Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/32363/2013

THE IMMIGRATION ACTS

Heard at : Field House	**Decision Promulgated**
On : 1 May 2014	**On : 8 May 2014**

Before

THE HONOURABLE MRS JUSTICE ANDREWS DBE
UPPER TRIBUNAL JUDGE KEBEDE

Between

FRANCESCA DUNCAN WILLIAMS

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr F Shibli, instructed by Raja & Co Solicitors
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Ghana, born on 23 January 1960. Her appeal came before us following a hearing on 10 March 2014 at which errors of law were found in the decision of the First-tier Tribunal allowing her appeal, on

Article 8 grounds, against the respondent's decision to remove her from the United Kingdom.

2. The further background to the appeal is as set out in the error of law decision which is reproduced as follows:

> "1. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing Ms Williams' appeal against a decision to remove her from the United Kingdom following the refusal of her application for indefinite leave to remain outside the immigration rules. For the purposes of this decision, I shall refer to the Secretary of State as the respondent and Ms Williams as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.
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> 2. The appellant is a citizen of Ghana, born on 23 January 1960. She entered the United Kingdom on 7 November 2008 with leave to enter as a visitor valid until 7 May 2009. On 29 April 2009 she submitted an application for leave to remain as a Minister of Religion which was refused on 9 June 2009. She made two further applications for leave to remain as a Tier 2 Minister of Religion, on 30 July 2009 and 30 October 2009, both of which were refused, on 2 September 2009 and 2 December 2009 respectively. On 27 September 2012 she submitted an application for leave to remain under Article 8 of the ECHR but that was refused on 6 June 2013. On 7 August 2012 an application was made for indefinite leave to remain outside the immigration rules but that was refused on 5 July 2013. A decision was then made on 12 July 2013 to remove the appellant from the United Kingdom.
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> 3. The respondent refused the appellant's application under paragraph 322(1) of HC 395. It was considered that there was no evidence to suggest that her removal would be in breach of Articles 2 and 3 of the ECHR. With regard to Article 8, the respondent noted that there was no evidence to support the appellant's claim to be in a relationship with a British national and in any event considered that she had failed to demonstrate that there were insurmountable obstacles to family life continuing outside the United Kingdom. There was no evidence to support her claim as to her child being resident in the United Kingdom. Accordingly the respondent concluded that the appellant could not meet the requirements of Appendix FM of the rules and furthermore considered that she was unable to meet the private life requirements of paragraph 276ADE.
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> 4. The appeal's appeal against that decision was heard in the First-tier Tribunal on 2 January 2014, by First-tier Tribunal Judge Pacey, who heard oral evidence from the appellant and two other witnesses. It was conceded that the appellant could not meet the requirements of the immigration rules and the appeal proceeded on the basis of Article 8 only. The judge accepted that the appellant had established a private life in the United Kingdom and, on the basis of the evidence of her valuable ministry work and her strong private life, concluded that it would be disproportionate to require her to leave the United Kingdom. She allowed the appeal on human rights grounds.
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> 5. The respondent sought permission to appeal that decision to the Upper Tribunal on the grounds that the judge had failed to follow the approach in Nagre, R (on the application of) v Secretary of State for the Home Department [2013] EWHC 720 and Gulshan (Article 8 – new Rules – correct approach) Pakistan

[2013] UKUT 640; that she had failed to identify any exceptional circumstances which would result in an unjustifiably harsh outcome to the appellant; that she had failed to take into account the public interest against applicants relying on Article 8 to get around the immigration rules; that the judge had failed to consider that there were other preachers in the United Kingdom who could take over the appellant's duties; and that the judge had overestimated the weight to be attached to the appellant's religious activities.

6. Permission to appeal was granted on 31 January 2014.

7. The appeal came before me on 10 March 2014 and I heard submissions on the error of law.

8. Mr Saunders relied upon the grounds of appeal and submitted that the judge had ignored the principles in Gulshan and had materially erred in her decision such that it should be set aside and re-made by dismissing the appeal.

9. Mr Shibli raised a preliminary matter, namely that the Secretary of State's appeal was one day out of time and that the appeal should not have been admitted into the Upper Tribunal given the absence of any explanation for the delay. Mr Shibli accepted that a rule 24 response to the grounds of appeal had never been filed and that the appellant had not previously raised any issue as to the timeliness of the appeal. I considered that, although the Secretary of State had given no explanation for the delay in submitting the application for permission to appeal, I was not now prepared to set aside the decision to extend time and to grant permission, given the nature of the delay and the absence of any prior objection by the appellant to the extension of time.

10. With regard to the substance of the grounds, Mr Shibli submitted that the judge was not required to consider the immigration rules because it had been conceded that the rules could not be met. The judge's findings at paragraphs 34 and 36 showed that she considered there to be unjustifiably harsh consequences if the appellant was removed. She took a balanced view and was entitled to reach the conclusion that she did.

11. In my view the judge made material errors of law in her decision such that the decision has to be set aside and re-made.

12. Having accepted the concession that the appellant was unable to meet the requirements of the family and private life provisions of the immigration rules the judge then moved on to conduct an Article 8 proportionality assessment without any consideration of the approach set out in the cases of Nagre, MF (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 1192 and Gulshan [2013] UKUT 640 and without any apparent appreciation of the emphasis in recent case-law of the significant weight to be given to the public interest in cases where the requirements of the rules could not be met. The correct approach has most recently been set out by the Upper Tribunal in Shahzad (Art 8: legitimate aim) Pakistan [2014] UKUT 85 at paragraph 31:

> "Where an area of the rules does not have such an express mechanism, the approach in *R (Nagre) v Secretary of State for the Home Department* [2013] EWHC 720 (Admin) ([29]-[31] in particular and *Gulshan (Article 8 - new Rules - correct approach)* [2013] UKUT 640 (IAC) should be followed: i.e. after applying the requirements of the rules, only if there may be arguably

> good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them."

13. Whilst Shahzad was decided after the appeal was heard, it endorsed the principles in earlier cases which were available at the time and which the judge failed to consider or apply. No consideration was given to the existence of arguably good grounds for granting leave so as to justify going on to consider Article 8 in a wider context and neither was any consideration given to whether compelling circumstances existed that were not sufficiently recognised under the rules. Although the judge set out factors in the appellant's favour at paragraph 34, she gave no, or no adequate reasons, for concluding that they were compelling.

14. In all of these circumstances I find that the judge's decision has to be set aside for reason of error of law and re-made.

15. In view of Mr Shibli's submission that the judge's determination failed to give a sufficiently detailed account of the evidence and the various factors that persuaded her to find in the appellant's favour and that it was necessary for further evidence to be adduced and for findings to be made in that respect, I was prepared to accept that the decision ought not simply to be re-made on the evidence before me. I agreed that the appeal would be adjourned and listed for a resumed hearing at which further evidence could be adduced. However I considered that it was appropriate for that to take place in the Upper Tribunal. Indeed Mr Shibli did not suggest otherwise.

16. Accordingly the appeal will be listed for a resumed hearing"

Appeal hearing and submissions

3. The appeal came before us for a resumed hearing on 1 May 2014. We heard oral evidence from the appellant and three further witnesses, Pastor Appoh, Bishop Paul Hackman and Babatunde Tony Alli.

4. The evidence of the witnesses, in particular that of the appellant, is lengthy and we see no purpose in setting it out in detail. However, in summary, the appellant confirmed that she was currently undertaking a doctorate in theology at Ramah Bible College. Her studies at the college commenced in 2008 and were due to end in 2015. She gave a detailed account of her ministerial work, including preaching, teaching bible, training pastors, youth and leadership work, counselling, work with the "put down your weapons" programme and the homeless stress-free programme and soup kitchen which she recently set up herself. When asked why she had not made an application within the rules with a sponsor she said that she had started an application with the Christian Action Faith Ministries as her sponsor but it did not go through and her solicitor never showed her the refusal letter. In response to our enquiry, she said that she did not have any evidence from the Christian Action Faith Ministries to confirm that they had acted as her sponsor. They were used as a sponsor in only the first application and she did not know why there was no sponsor in the other applications. She did not know how the solicitors went about the applications.

5. When asked why she could not be replaced here if she had to return to Ghana, the appellant said that she was needed because of her years of experience and the trust that she had built up, in particular in the knife and gun crime project. People called her Mama Francisca and related to her as a mother and her absence would therefore cause a big gap. When referred to the details given by her former solicitors in the application they made on her behalf on 2 August 2012, the appellant said that it was wrongly claimed that she would be executed if she went back to Ghana as that was not the case and she did not approve the letter. Furthermore, whilst she remained in a relationship with a British citizen, Ibrahim Bangura, he was not currently in the United Kingdom and her son was no longer in the United Kingdom. Mr Shibli confirmed that the appeal was not being pursued on family life grounds. The appellant said that she had four children, two of whom lived in the US and two in Ghana. She spoke to them from time to time. She had no other close family in Ghana. The church that she had originally started with her ex-husband in Ghana had branched throughout the world but she no longer had any connection to that church in Ghana since her divorce.

6. The witnesses all confirmed the evidence given in their statements and Mr Appoh and Bishop Hackman gave further oral evidence about the appellant's work in Ghana and the United Kingdom. Mr Appoh talked in particular about the gun and knife crime programme, a new initiative inaugurated in February 2014 following several years of preparatory work. Bishop Hackman explained that he was in charge of Trans Atlantic Pacific Alliance of Churches, of which the Christian Action Faith Ministries was a part. He was not responsible for sponsoring the appellant previously and, when asked why he had not assisted her to meet the requirements of the immigration rules by sponsoring her, his response was that she was already in the country. He said that his organisation was prepared to sponsor her but it was only now that he understood that she had been in the United Kingdom without leave.

7. We then heard submissions.

8. Ms Isherwood submitted that the appellant had failed to show compelling reasons why she should be permitted to remain in the United Kingdom without meeting the requirements of the immigration rules. There was no adequate explanation as to why, if so many people wanted her to stay in the country, none had been prepared to sponsor her. It was not credible that Bishop Hackman had been unaware of her immigration status and only now realised that he could sponsor her. The appellant's work could continue without her being in the United Kingdom, as she had trained others to take on her various roles.

9. Mr Shibli asked us to accept that the appellant's immigration history had been due to problems with and inadequate advice from her previous solicitors. As a result of that she had lacked the knowledge about sponsorship. Requiring her to return to Ghana and seek entry clearance would mean separation from

her invaluable work. She had thirty years of experience and people trusted her. Her absence would leave many people without support.

Consideration and findings

10. The appellant pursues her case on the basis of her private life under Article 8 of the ECHR. It is accepted that she cannot meet the requirements of the immigration rules, with respect both to Tier 2 under the points-based system and to the family and private life rules under Appendix FM and paragraph 276ADE. She claims that her circumstances are compelling, such that she should be permitted to remain in the United Kingdom outside the rules on wider Article 8 principles.

11. It is common ground that the relevant principles are to be found in the case of Gulshan (Article 8 – new Rules – correct approach) Pakistan [2013] UKUT 640, as endorsed in Shahzad (Art 8: legitimate aim) Pakistan [2014] UKUT 85 and as set out at paragraph 12 of the error of law decision. As we indicated to Mr Shibli, we have difficulty in seeing, in line with these principles, how the appellant even gets as far as addressing "compelling circumstances", since she has first to demonstrate that there are arguably good grounds for granting leave outside the rules.

12. There are, in the appellant's case, clear and distinct immigration rules under which she could have sought, and could still seek, leave to enter and remain in the United Kingdom. It is her evidence that she has been studying at the Ramah Bible College since 2008 and that her studies have been funded by her ex-husband, yet no explanation has been given as to why she has never sought to apply under the student provisions of the rules and currently as a Tier 4 (General) Student Migrant under the points-based system.

13. More significant, however, is her failure to provide any explanation as to why she has not been able to produce a Certificate of Sponsorship from a recognised sponsor in order to meet the requirements of the rules as a Tier 2 Minister of Religion Migrant. It is clear, from the various refusal decisions with which we have been provided, that the appellant made several applications for leave to remain as a Tier 2 Migrant, dating back to June 2009. Her first application was rejected as invalid on 9 June 2009; a second was refused on 1 September 2009, a third on 2 December 2009 and a fourth on 29 March 2010. Whilst the applications failed partly on the basis of an absence of prior relevant leave, the common denominator in all the applications was a failure to produce a Certificate of Sponsorship. No further application was made until the application of 2 August 2012 leading to the decision under appeal. That application, however, was made outside the rules.

14. The appellant seeks to blame previous incompetent solicitors for a failure to make a proper application under the rules and claims that she was, at one stage, advised by her solicitor that she had actually been granted leave. Whilst we are prepared to accept that she may have been unfortunate in her choice of previous solicitors and has, in the past, been inadequately advised, we cannot

accept that that provides a reasonable or credible explanation for what is now a prolonged stay in the United Kingdom without any form of permission or leave to be here. She is clearly an intelligent woman with many professional resources available to her. She would have known from the various refusal decisions that a Certificate of Sponsorship was required. Indeed, by her own evidence she was aware, at the time of her initial application, that a sponsorship was required, as she claimed before us that the Christian Action Faith Ministries acted as her sponsor, although she stated that the application, once started, "never went through". There is, however, no evidence before us that a Certificate of Sponsorship was ever obtained and submitted from such a sponsor or that the Ministries did indeed sponsor her and neither is there any explanation why, if the Ministries had been willing to sponsor her previously, they were not willing to continue to sponsor her.

15. Neither is there any explanation why the appellant has not obtained sponsorship from any other source in the years that she has been working as a minister in the United Kingdom. The claim presented is that she is an invaluable asset to the community and that her services in various churches and programmes have made her indispensible. It is claimed that her skills acquired over the past thirty years, dating back to the time when she first started visiting the United Kingdom in 1978, and the level of trust established over that period, are irreplaceable. It is claimed that her absence would cause immense difficulties, even for the short period of time in which she could return to Ghana to make an entry clearance application. We find it inconceivable, in such circumstances, for there to be an absence of willing candidates for sponsorship and can find no explanation for such.

16. Like Ms Isherwood, we have considerable difficulty in accepting Bishop Hackman's claim that he was unaware of the appellant's unlawful status in the United Kingdom and that had his ministry been aware of the need for sponsorship he would have been willing to offer it. According to his evidence he has known her since 1992, he ordained her as a pastor in November 2004 and he has met with her regularly since she re-entered the United Kingdom and started serving as a Christian minister of Christian Action Faith Ministries in November 2008. There is simply no adequate explanation as to why his organisation, or any of the many other ministries or organisations with which she has worked, would not have been willing to offer her sponsorship in order to make an application under the immigration rules.

17. In all of these circumstances we find that the appellant has failed to provide any, or any adequate explanation for her failure to produce the required evidence to meet the requirements of the immigration rules. The basis for her current application outside the immigration rules is one that it is properly provided for under the rules. It has always been open to her to make an entry clearance application under the rules and that still remains open to her. We do not accept that her situation is such that she cannot reasonably be expected to leave the United Kingdom for the short period in which such an application can now be made. It is plain from her own evidence and that of the witnesses supporting her that there are many other people, whom she has

herself trained, who are able and qualified to carry on her work during her absence and there is no reason to believe that her absence would leave a void that could not be filled by those lawfully resident in the United Kingdom. Accordingly we conclude that there are no arguable grounds justifying a grant of leave outside the rules.

18. We find, in any event, and for the reasons already given, that there are no compelling circumstances in the appellant's case which are not sufficiently recognised under the rules. Since her most recent entry to the United Kingdom the appellant has been living here for five and a half years, which is significantly less than the period of residence allowed for under the rules. Although she entered lawfully she has not had any leave to remain since the expiry of her visit visa. She has made various applications for leave to remain, but as we have stated above, has failed adequately to explain the absence of required supporting evidence of sponsorship. We accept that she has nevertheless established a substantial private life here during that time and has undertaken valuable services to the communities, ministries and organisations with which she works, not only during her current period of residence but also during the periods of previous visits over a number of years.

19. However, as we have already said, the appellant has herself trained other people who are able to carry on her work in her absence. There is no reason why she could not return to her work and her studies here after obtaining the required entry clearance, but in any event she would be able to continue to contribute to her various projects from Ghana and by way of future visits to the United Kingdom. She would also be able to provide the same valuable services to the ministries in Ghana with whom she retains close ties. Other than her work and her studies there are no ties of significance in the United Kingdom. There has been mention of a British partner in the United Kingdom but there is scant evidence of that and in any event she does not rely on the relationship in her Article 8 claim. Her son is no longer in the United Kingdom and he and another of her children remain in Ghana. The claim in the application made on her behalf, leading to the decision under appeal, as to a risk of persecution in Ghana is one that the appellant does not herself endorse. Accordingly there is no reason why she cannot return to that country.

20. For all of these reasons we find that the appellant cannot succeed in her Article 8 claim and that her appeal falls to be dismissed.

DECISION

21. The making of the decision of the First-tier Tribunal involved an error on a point of law. The decision of the First-tier Tribunal has been set aside. We re-make the decision by dismissing the appeal on all grounds.

Signed

Date

Upper Tribunal Judge Kebede