Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/50262/2013

THE IMMIGRATION ACTS

Heard at: Field House	**Decision and Reasons Promulgated**
On: 15th April 2015	**On: 30th June 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE BRUCE

Between

Secretary of State for the Home Department

Appellant

and

Sher Afzal
(no anonymity direction made)

Respondent

Representation:
For the Appellant: Ms Holmes, Senior Home Office Presenting Officer
For the Respondent: Mr Z Nasim, Counsel instructed by Maher & Co Solicitors

DETERMINATION AND REASONS

1. The Respondent is a national of Pakistan date of birth 13th November 1982.

2. The history of this matter is not straightforward; it is necessary to set it out in some detail. The Respondent came to the UK with leave to enter as a Religious Worker in October 2006, leave that was subsequently extended. On the 17th September 2008 a further application for leave in the same capacity was refused because he was approaching the 24 month maximum period of stay under that rule. The Respondent initially appealed that decision but

subsequently withdrew. On the 27th October 2008 he applied for leave to remain as a Minister of Religion. That application was refused, his appeal dismissed and by May 2009 the Respondent was an overstayer with all appeal rights exhausted.

3. On the 13th November 2010 the Respondent made an application for leave to remain 'outside of the Rules'. This was refused, with no right of appeal, on the 24th November 2010. On the 19th February 2011 he made an application for leave to remain as a Tier 2 (Minister of Religion) Migrant. His "points based system" sponsor was Reading Islamic Centre. That application was refused on the 4th April 2011. The Respondent's representatives submitted a pre-action protocol letter to the Home Office inviting reconsideration on the grounds that the Respondent met all of the requirements of the Rules, and in the alternative that his removal would be an unlawful interference with his Article 8 rights. When the Secretary of State declined to change her mind, the Respondent issued judicial review proceedings.

4. When the matter came before Wyn Williams J the point upon which permission had been granted was a narrow one. Had the Secretary of State unlawfully failed to exercise her discretion and grant the Respondent leave to remain outside of the Rules, taking into account all relevant evidence including the views of numerous worshippers at the Reading Islamic Centre and the parents of children receiving religious instruction by the Respondent. This latter feature of the case was framed in the context of s55 of the Borders, Citizenship and Immigration Act 2009, ie the best interests of the Respondent's pupils; the wider argument was based on the authority of EU (Nigeria) v SSHD [2010] EWCA Civ 975 to the effect that detriment to the community can be a relevant factor when considering proportionality.

5. Wyn Williams J dismissed the claim on the 31st May 2012. He held that the Secretary of State had had regard to the wider interests of the Muslim community in Reading when she reached her decision, and in respect of the s55 argument he said this:

> "… it could not sensibly be inferred from the very limited information which was provided to the Defendant in this case that the Claimant's skills were not easily replaceable within a comparatively short time by an alternative Imam".

6. Attempts to challenge the decision of Wyn Williams J failed in the Court of Appeal.

7. The Secretary of State served a s10 removal notice on the 11th November 2013, with a right of appeal. It was that decision which led to the appeal coming before the First-tier Tribunal (Judge Cresswell).

8. On appeal the Respondent conceded that he could not meet the requirements of paragraph 276ADE of the Rules and relied solely on human rights

arguments: Article 8 'outside of the Rules', and Article 9. The argument advanced, and accepted, was that the Respondent was such an asset to the Muslim community of Reading that his removal would be to their detriment. The Tribunal directed itself to the authorities of UE Nigeria and Bakhtaur Singh [1996] 1 WLR 910 before considering the evidence. The Respondent had received written support from numerous members of the community in Reading, including an MP, councillors, Reading Islamic Centre, the Thames Valley Police Community and Diversity Officer and the parents and children at the madrassa: "it was an unusually high level of support for someone facing removal". Nine of these supporters attended the hearing to give evidence. Having heard that evidence the Home Office representative accepted that the Respondent was a highly regarded man "who had made a real difference to his community". The Tribunal noted in particular the evidence that the Respondent was active in promoting integration, tolerance and respect, and that Councillor Hussain of Reading Council had recognised his role in "ensuring that Reading's Islamic community remains largely free of radical influence".

9. All of that led the Tribunal to conclude that the Respondent's removal would be an interference with his Article 9 rights, in particular his right to manifest his religious belief by being a spiritual guide and youth leader to Muslims in Reading; the Secretary of State had failed to show that interference to be proportionate. Even taking into account the fact that for the vast majority of the time he had been there he had no lawful status, the bond between the Reading Islamic Centre and the Respondent was so deep that his removal would have an adverse impact "on the "right of exercise by a religious organisation (itself or its members collectively) of the Convention right to freedom of thought, conscience or religion". The appeal was allowed on Article 9 grounds.

10. In respect of Article 8 the Tribunal properly reminded itself that the Respondent had failed to meet the requirements of the Rules and referred itself to Gulshan [2013] UKUT 640. Proceeding to the final Razgar [2004] UKHL 27 stage the determination finds as follows:

> "I find that this is an Appellant who came to the UK without any hope of staying unless he could meet the requirements of the Rules, who has obtained benefits from his stay whilst building his private life, but who has built that private life in the knowledge that there was a real likelihood he would not be able to remain. He has deliberately overstayed. He would be returning to a country whose culture he was familiar with and with a new language qualification and greater experience and skills. Any friendships and associations formed in the UK can be continued, albeit in a different manner and at a different level, using modern means of communication. I do not find that the refusal of leave to remain prejudices the private life of the Appellant in a manner sufficiently serious to amount to a breach of the fundamental right protected by Article 8"

The appeal was dismissed on Article 8 grounds.

11. The Secretary of State sought permission to appeal the Article 9 decision. It is submitted that the Judge "entirely misdirected himself" as to the applicable law. In summary the Secretary of State accepts that the right to hold a religious belief is absolute, but that the right to manifest one's religious belief can be qualified[1]. It is submitted that on the facts of the case the Secretary of State had shown the Respondent's removal proportionate, since he could carry on being a tolerant religious leader in Pakistan. Permission was initially refused by First-tier Tribunal Judge Davies, but was granted upon renewed application by Upper Tribunal Judge Reeds.

12. The matter was set down for hearing before Deputy Upper Tribunal Judge Drabu who heard, and refused, the Respondent's oral application for permission to cross appeal the Article 8 decision. That application was renewed, and refused by Upper Tribunal Judge Grubb on the 25th September 2014.

13. So it was that when the matter came before me the only live issue was whether Judge Cresswell had erred in law in his approach to Article 9.

Error of Law

14. Before me Mr Nasim and Ms Holmes were more in agreement than the convoluted history set out above might have suggested.

15. Both agreed that the First-tier Tribunal had erred in law in its approach to Article 9 insofar as it would appear that the removal decision in respect of the Respondent was found to be unlawful because of, or largely because of, the interference with the Article 9(1) rights of Muslims in Reading, none of whom were parties to the appeal. The Tribunal had concluded that the Secretary of State could not show the interference to be necessary in pursuit of any of the legitimate aims set out in Article 9(1) but this rather missed the point. It was open to the Tribunal to allow the appeal on purely Article 9 grounds but only if it found removal would result in a "flagrant" interference with the Article 9 rights of the Respondent himself: Ullah and Do [2004] UKHL 26. There is no finding to that effect in the determination, which focuses on the positive relationship that the Respondent enjoys with his supporters. Nowhere has the Tribunal turned its mind to how the Respondent might continue to manifest his religious belief in Pakistan, nor how his pupils might fare under another teacher, as considered by Wyn Williams J when he rejected this same argument as long ago as 2011.

16. Mr Nasim and Ms Holmes were also however in agreement that the facts found by the First-tier Tribunal were reasonable and open to it on the evidence, and that all of these factual findings were relevant to consideration

[1] See for instance Eweida v United Kingdom [2013] 57 EHRR 8 at paragraph 80

of Article 9 considered in conjunction with Article 8. The reasoning at paragraph 26 of the determination (cited above) is perfectly sustainable, but reading the determination as a whole it is difficult to see how the reasoning in respect of 'community detriment' – and indeed Article 9 - could have been properly excluded in the Article 8 proportionality balancing exercise. In this way, Ms Holmes conceded that the Respondent's Article 8 arguments get in through "the back door".

17. Having set out these agreed matters the parties invited me to re-make the decision on the evidence before me.

The Re-Made Decision

18. Article 9 reads:

> **'Article 9 – Freedom of thought, conscience and religion**
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> 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.'

19. There is limited authority on the reliance upon Article 9 in removal cases. As I note above the lead case is Ullah and Do, wherein the House of Lords held that in order to resist removal on purely Article 9 grounds the interference with the right in the receiving country would need to be "a flagrant violation of the very essence of the right" [*per* Lord Steyn at paragraph 50] or a "flagrant, gross or fundamental breach" of that article [per Lord Carswell at 70].

20. As the facts as found by the First-tier Tribunal, and indeed the evidence, shows, it could not be said that the Respondent's removal to Pakistan would be a flagrant interference with his right to be a Muslim, and a tolerant exponent of that faith. Nor can it be said, on the evidence that his departure from Reading would result in a "gross or fundamental" breach of the Article 9(1) rights of others. As Wyn Williams J observed, the evidence falls short of establishing that the Reading Islamic Centre would not be able to replace the Respondent with an alternative Imam within a relatively short period of time. It is no doubt the case that his pupils will suffer a temporary setback in their learning if he is replaced, they may like him and miss him, but this does not represent a significant interference with their right to manifest their religion or

worship collectively. These are matters relevant – although not determinative - to the consideration of proportionality under Article 9: see paragraph 83 Eweida. However without any long term significant detriment to the Respondent's Article 9 rights upon return to Pakistan, his case under that head must fail.

21. To what extent might the decision under Article 8 be different if the rights of the Muslims at the Reading Islamic Centre have been weighed in the balance along with the matters very properly taken into account by the First-tier Tribunal? I agree with Mr Nasim – and I did not understand Ms Holmes to challenge this submission – that the detriment to the community discussed in Bakhtaur Singh and EU (Nigeria) was a matter that should, according to those authorities, have featured in the proportionality balancing exercise.

22. I have considered the facts as found by the First-tier Tribunal. The Respondent clearly has been an asset to the Muslim community in Reading and that a great many people think a good deal of him is evident from the large bundle of witness statements, petitions and letters in support which has been provided. Significant weight can be attached to that fact. It remains the case however that for all but 2½ of the 8½ years that the Respondent has spent in the UK, he has been here unlawfully. Section 117B(4) of Nationality, Immigration and Asylum Act 2002 (as amended by the Immigration Act) mandates that decision-makers must therefore place "little weight" on his private life in those circumstances. This is an applicant who has known that he has no further basis to remain in the UK since 2010. Mr Nasim urged me to find that he had become an overstayer because of a "technicality" arising from the changeover between the old Rules and the Points Based System. Although he declined to frame this as a 'near miss' argument, this is, in effect, what it was. The Respondent did not then, or now, meet the requirements of the Rules. Had he returned to Pakistan in 2010 and made an application under the Points Based System this would no doubt have been successful. That he chose not to do this is a matter for him, and all of his relationships, the foundation of his private life in Reading, must be viewed through that prism. Having taken all of those circumstances into account I find that the Secretary of State has shown the decision to remove the Respondent to be proportionate and lawful.

Decisions

23. The determination of the First-tier Tribunal contains an error of law and it is set aside.

24. I remake the decision by dismissing the appeal.

25. I make no direction for anonymity.

Deputy Upper Tribunal Judge Bruce
23rd June 2015