Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/42766/2013

THE IMMIGRATION ACTS

Heard at Birmingham, Sheldon Court	**Determination Promulgated**
On 11th July 2014	**On 22nd July 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MS CHRISTINE MUZAKI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms H Masih (Counsel)
For the Respondent: Mr D Mills (HOPO)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge P J Holmes, promulgated on 22nd April 2014, following a hearing at Stoke-on-Trent on 17th March 2014. In the determination, the judge allowed the

appeal of Christine Muzaki. The Respondent Secretary of State applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a citizen of Uganda who was born on 13th October 1972. She appealed against the decision of the Respondent Secretary of State refusing her leave to remain indefinitely outside the Immigration Rules, following her application on 28th September 2012.

The Appellant's Claim

3. The Appellant's claim is that the Appellant has been in this country for more than eleven years and has made a contribution to society in the UK, having suffered domestic violence from her husband, a Ugandan citizen, who has left her, and that she has been dependent on friends for support, but has strong and supportive community relations now, such that she succeeds on the basis of Article 8 ECHR rights.

The Judge's Findings

4. The judge gave consideration to the fact that the Appellant had not taken legal advice at the time of applying and that much of that which was in her favour had simply not been properly put in her application. The judge summarised the facts (at paragraph 13) and heard the evidence of the Reverend Harper, from the Church of England, who spoke very well of the Appellant (paragraph 14).

5. He then found the Appellant to be a truthful witness, who had not exaggerated her claim, and who had suffered domestic violence, and had been a victim of neglect, but had redeeming features which went in her favour (paragraph 15). The judge held that the Appellant could not satisfy the requirements of the Immigration Rules in Appendix FM. However, she could satisfy freestanding Article 8 jurisprudence requirements and the judge proceeded to allow the appeal on this basis (paragraph 18).

The Grounds of Application

6. The grounds of application state that the judge failed to apply "case-specific guidance" in relation to the way in which Article 8 was to be used, and had misunderstood the import of **MF (Nigeria) [2013] EWCA Civ 1192**.

7. Permission to appeal was granted on 22nd May 2014 with the Tribunal observing that the judge had committed a clear error of law (in paragraph 18) when he said "there is no test of exceptionality applicable under Article 8". Moreover, the judge had failed to identify any compelling circumstance which enabled him to leave the domain of the Immigration Rules and consider the case of the Appellant under Article 8 ECHR jurisprudence.

Submissions

8. At the hearing before me on 11th July 2014, Mr Mills, appearing on behalf of the Respondent Secretary of State, explained that the judge had clearly misunderstood the applicable law. He had said that the case of **Izuazu [2013] UKUT 00045** had now been given specific approval by the Court of Appeal in paragraph 49 of **MF (Nigeria)**. He had said that this judgment was to be preferred over that in **Gulshan [2013] UKUT 00640**, but this was plainly wrong. The judge had wrongly chosen not to follow **Gulshan** . However, Mr Mills submitted that the findings of fact by the judge were entirely open to him and these were not being challenged in this appeal.

9. For her part, Ms Masih referred to her Rule 24 response. This also served as her skeleton argument. In addition, there was her "Amended Skeleton Argument" as well which I was directed to. She submitted that the judge did refer to the authorities but he was not wrong in saying that there was no legal exceptionality test. He was correct in following **Nagre** and his findings of fact clearly demonstrated that there were "compelling" circumstances which led him to leave the domain of the Immigration Rules and consider the position of the Appellant under Article 8 ECHR.

10. In reply, Mr Mills submitted that **Gulshan** is the gateway to Article 8. **MF (Nigeria)** accepted that the Rules are a complete code. The point of the gateway is that there has to be something "compelling" before one can enter the gateway and reconsider the position under Article 8. The judge did not consider the gateway but he also did not then proceed to explain why, his having considered the position under Article 8 ECHR grounds, the Appellant deserved to succeed. At paragraph 21 the judge had not properly balanced the Appellant's family life with the public interest.

No Error of Law

11. I am satisfied that the making of the decision by the Judge does not involve the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside this decision and remake the decision.

12. In what is a careful and comprehensive determination, the judge properly has regard to all the relevant case law. Before he does this he recognises that the Appellant cannot succeed under Appendix FM. He considers the position under paragraph 276ADE and he makes it clear that this "does not give room for reporting the complete proportionality exercise... It does not permit consideration of the qualify of the Appellant's private life in the UK" (a point made by Ms Masih in her skeleton argument).

13. It then refers to Sales J in **Nagre [2013] EWHC 720**, where recognition is given to the possibility of an individual succeeding whose roots are put down in the UK over his remaining ties in the country of his nationality.

14. When the case law is considered (at paragraph 18) the judge is not wrong in saying that "There is no test of exceptionality applicable under Article 8". There is none. Article 8 jurisprudence does not speak about "exceptionality". The judge gives citations for the references to the judgments given in the respective cases. He was perfectly aware that

> "Only if there were arguably good grounds for granting leave to remain outside the Rules was it necessary for the judge for Article 8 purposes to go on to consider whether there were compelling circumstances not sufficiently recognised under the Rules" (paragraph 18).

15. It was only after the judge had appraised himself of the proper legal situation in this manner that he went on to say that, "I would find there are indeed arguably good grounds for the reasons I have given in the preceding paragraph" (paragraph 18). It was only in this context that he then said that there were no "legal tests" of "compelling circumstances". No judgment of the Court of Appeal has suggested that there are.

16. **MF (Nigeria) [2013]** is the case that he referred to but he also refers to the later case of **Shahzad [2014] UKUT 00085**, and what he then gives is a reasoned determination on the basis of this case law.

17. Finally, the judge gives a very fulsome explanation at paragraphs 20 to 21 in relation to proportionality of the decision by the Secretary of State. There is nothing here at all that suggests that the judge fell into error.

18. It has to be borne in mind that under established legal authority what the Appellant has to show in a case such as this is that the decision of the judge below is "perverse" and that this is a "very high hurdle" (see **R [Iran] (2005) EWCA Civ 982**).

Decision

19. There is no material error of law in the judge's decision. The determination shall stand.

20. No anonymity order is made.

Signed Date

Deputy Upper Tribunal Judge Juss 21st July 2014