Upper Tribunal
(Immigration and Asylum Chamber)

Adubiri-Gyimah and others (Post-study work – Listed institution) Ghana [2011] UKUT 00123 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 1 February 2011	.....

Before

THE HON. MR JUSTICE LLOYD JONES

UPPER TRIBUNAL JUDGE BATISTE

Between

ROSEMARY ADUBIRI-GYIMAH

DICKSON AMOAH

TRACEY SERWA-AKOTO AMOAH

GRACE AMOAH

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellants: Mr A Ollennu , instructed by Messrs Shores Anchor

For the Respondent: Mr J Gulvin, Presenting Officer

The requirement imposed by the Immigration Rules, Appendix A, Table 9, paragraph 2(a) on an applicant as a Tier 1 (Post-Study Work) Migrant relates to the status of the relevant institution at the time of study.

DETERMINATION AND REASONS

1.
The appellants are all citizens of Ghana. The first appellant is the main appellant; the second appellant is her husband; and the third and fourth appellants are their children, both of whom are minors. They have obtained permission to appeal against the determination of Immigration Judge Coleman who dismissed their appeals against the decisions of the respondent on 17 May 2010 to

refuse the first appellant leave to remain as a Tier 1 (Post-Study Work) Migrant, and to refuse the other appellants leave to remain as her dependents.

2.
The material facts are not in dispute. The first appellant originally came to the UK on 8 December 2001 with leave to enter until 31 January 2003. Her husband also came to the UK as a student in January 2001 and he has successfully obtained a diploma in management, banking and financial services and an MBA in finance at Leicester University. Their two children were born here. The first appellant's leave as a student was extended on three occasions to enable her to study at the Inter-Continental College for an honours degree in health and social care at the Open University. The last extension was on 7 November 2008 when she was granted further leave to remain as a student until 30 April 2010. On 31 December 2009 she was awarded her B. Sc. degree from the Open University, the certificate for which she received on 10 February 2010. On 15 April 2010, within the period of her extant leave, she made the application which is the subject of these appeals. She wants to stay in the UK for two years to obtain work experience in international health and social care systems for which the UK is renowned before returning with her family to Ghana.

3.
The Respondent refused her application on various grounds, all of which the judge determined in the first appellant's favour save for one. There is a requirement in paragraph 2 of Table 9 of Appendix A to the Immigration Rules, which imposes the following requirement in applications such as this.

"(a) The applicant has studied for his award at a UK institution that is UK recognised or is a listed body, or which holds a sponsor licence under Tier 4 of the points-based system."

4.
In respect of this requirement and article 8, the judge concluded as follows.

"24.... I accept that both the cases of Pankina [2010] EWCA Civ 719 and CDS (Brazil) [2010] UKUT 00035 (IAC) do indicate that there would be cases relating to education and the points-based system where article 8 could be engaged.

25. Having said that however I do not find that this is one of those cases. Both the appellant and her husband have made it clear in their statements and evidence before me that they do not consider themselves to be permanently settled in United Kingdom and were seeking extension of their stay simply to get work experience to further their prospects on return to Ghana. It has therefore always been in the contemplation of the parties that their stay in the United Kingdom was a temporary not permanent one. Given that, they inherently accept that it is reasonable for them to return to Ghana and to re-establish their private life there. They both have good educational qualifications obtained in this country. Their claim is that their career prospects would be harmed by lack of work experience in this country is not backed up by any evidence whatsoever. They appear to have skills that are needed worldwide. Although the children had been here for some years it is not suggested that it was not in the contemplation of all the parties that the children would also return with them to Ghana. They are in education but the younger one has only just started nursery level and the older one is still only at primary school. It is not been suggested they could not adapt to Ghana where they are nationals.

26. Although I do accept that this decision is very inconvenient for the parties I do not find that the inconvenience is so serious such as to engage article 8. I therefore find that the appellants had failed to prove that any interference with their private life by reason of this decision would be

disproportionate to the lawful and legitimate aim of the Secretary of State in maintaining immigration control…”

27. Although I have dismissed the appeal under article 8 as I have stated above I have a great sympathy for the appellants and I find that they are just caught in a dilemma due to the change in the structure of the rules dealing with study and post-study work. In light of the fact that the only reason the appellant has not succeeded under the rules is that her college, which was accepted by the respondent as a suitable place to study while she was there, failed to succeed in obtaining a tier 4 registration after the appellant obtained her qualification, so as to satisfy the rule in place at the date of application, I urge the Secretary of State to consider exercising discretion in this matter and allowing the appellant to remain for post-study work in the light of my other findings of fact."

5.
The appellants appealed under the rules and in respect of article 8. The chief presenting officer replied on 7 December 2010 to the grounds of appeal, stating that:

“The respondent does not oppose the appellants' appeal and invites the tribunal to determine the appeal with a fresh oral (continuance) hearing to consider whether the appellants succeed under Tier 1 (Post-Study Work) or article 8."

6.
Permission to appeal was then granted on the following material terms.

“2. The only ground upon which the immigration judge dismissed the appeal under the Immigration Rules was that the college at which the first appellant had studied for a degree that was awarded by the open University was not, at the date of her application, a UK recognised or a listed body, or one which holds a sponsor licence under Tier 4 of the points-based system..

3. It is arguable that the judge erred, as argued in the grounds, in so finding given that at the time the first appellant was studying at that institution it was registered and further the Open University is recognised.

4. It is also arguable that given the immigration judge's findings as to the genuineness of the appellant, the length of time the family has been in the UK and the fact that the two children have been born in the UK, her conclusions on article 8 are perverse, especially given the judge's recommendation to the Secretary of State that she should let the appellants stay outside the rules…."

7.
Directions were then made to the effect that paragraphs 13 to 15 inclusive of the determination (which contained the findings of fact by the judge) should stand, whilst the judge's conclusions with regard to the rules and article 8 should be set aside.

8.
It was on this basis that the appeals came before us for hearing. Mr Gulvin indicated at the outset of the proceedings that he was content that paragraph 16 of the determination (which contained judge’s findings in favour of the appellants on the other issues under the rules raised by the respondent in the reasons for refusal) should stand in addition to the findings of fact. Moreover, he accepted that there was nothing contentious in the written statements by the first and second appellants and accordingly he did not wish to cross-examine either of them. We proceeded on that basis.

9.

Mr Ollennu submitted that the college must have been listed at the time of the last grant of leave by the respondent or leave would not have been granted. It appeared that the college had applied for a sponsor licence under the newly introduced points based system for Tier 4 (General) Students. However it had been refused such a licence at some point after the appellant had completed her course. This was what the judge had stated as a fact in paragraph 27. Thus the appellant satisfied the requirements of the rules as the college was listed at the time she studied there. Alternatively as her degree in health care required, as an important component, some post degree work experience, she had a legitimate expectation that she would be allowed a limited period to acquire these skills. In the further alternative, even if the appellant failed under the Rules and in terms of legitimate expectation, she should succeed under article 8.

10.
Mr Gulvin submitted that the requirement under table 9 was clear. The college was not recognised at the time of the appellant's application. This was the relevant time as was indicated by the use of the words in table 9 " is a listed body ". Thus the application could not succeed under the rules. He conceded that the college was listed at the time the appellant was last given leave to remain. He invited us to dismiss the appeal on all grounds. We asked him if he could provide any further information about the transitional period for applying for a sponsor licence, the actual application of the college for a licence, and when the college was no longer deemed to be listed. However he said he was unable to assist us further.

11.
We also asked Mr Gulvin whether given (as it appeared from the tracking version of the Immigration Rules) that the categories of listed and recognised bodies were deleted on 6 April 2010, then the reference to them in table 9 should be interpreted thereafter as historic and relating back to the period of study, notwithstanding the use of the word "is". Mr Gulvin said that he did not know without taking instructions and could not immediately obtain instructions. In those circumstances and in view of the time, we rose and reserved our decision on the basis that we invited written submissions on this point and in relation to article 8. Any such submissions were to be sent to the tribunal within 14 days and they would then be taken into account.

12.
In the event both representatives provided further written submissions. Mr Gulvin indicated he was instructed to maintain the refusal under the rules and to rely upon the plain meaning of the words in paragraph 2 of table 9 as he had argued at the hearing. With regard to article 8 he accepted that the appellants had a private life that would be adversely affected by the respondent's decision so as to potentially engage the operation of article 8. However he maintained that the decision was proportionate in that the private life of the family as a whole whilst deserving of respect was outweighed by the need to maintain effective immigration control. He relied upon paragraph 17 of CDS (Brazil) as follows.

"17. It is apparent from these principles that article 8 does not provide a general discretion in the immigration judge to dispense with the requirements of the Immigration Rules merely because the way that they impact in an individual case may appear to be unduly harsh. The present context is not respect for family life that can in certain circumstances require admission to or extension of stay within the United Kingdom of those who do not comply with the general Immigration Rules. It is difficult to imagine how the private life of someone with no prior nexus to the United Kingdom would require admission outside the rules for the purpose of study. There is no human right to come to the UK for education or other purposes of truly voluntary migration."

13.
Mr Ollennu re-asserted in his written submissions the arguments which he had raised at the hearing. He provided some additional information on dates and maintained it would be unjust not to allow the appeal under the Immigration Rules. Moreover, and in the alternative, it could be argued that even though the appellant had obtained tuition from her college, her course was with the Open University which was a UK recognised body. With regard to article 8, he submitted that one of the children born in the UK is coming up to her eighth birthday and has only known the UK and is presently at school here. The main point however is that further work experience would assist the family in establishing a better quality of family life in Ghana and it would be disproportionate not to allow them some further time to obtain this work experience.

14.
Having considered these submissions we conclude that the outcome of these appeals depends upon whether the first appellant can satisfy the requirements of table 9 on their true interpretation. We say this because, with regard to article 8, we have come, on our own assessment of all the material factors in the balancing exercise relating to proportionality, to similar conclusions to those described by the judge in paragraphs 25 and 26 of his determination. It has always been and continues to be the position of the appellants that they wish to return to Ghana and do not seek to remain indefinitely in the United Kingdom. It is implicit in this that they accept that their return to Ghana in the not too distant future would not involve disproportionate interference with their family lives together. We find it follows also that, unless they can bring themselves within the Immigration Rules, it will not be a disproportionate interference with their private lives for the Secretary of State to refuse their applications given the weight to be attached to her policy of maintaining a fair and consistent immigration system. Similar considerations apply to defeat the point about legitimate expectation. There is no legitimate expectation that having been given leave to study in the UK the first appellant will be given further leave to remain to gain post-study work experience other than as provided for under the Immigration Rules. Moreover we note and accept that there is no corroborative evidence of the assertions of the first and second appellants that good post-study work experience of the type sought by the appellants required cannot be obtained in Ghana.

15.
Thus, as we have said, the crucial issue is whether the appellants can satisfy the relevant requirements of the Immigration Rules on their proper interpretation. There is no dispute as to which version of the rules applies. It is well established that in cases such as this it is the rules in force at the time of the appellants' applications on 15 April 2010. The issue is the interpretation of paragraph 2(a) of table 9 of Appendix A.

16.
We consider there is inherent ambiguity in the wording of that paragraph. This arises out of the tension created by the different tenses of the two verbs which are used in the one sentence, ie "the applicant has studied for his award at a UK institution that is …. a listed body." It is common ground between the parties that the appellant's college does not hold a sponsor licence and was never UK recognised (as it was defined in the rules). It is also implicit in the terms of any application for post-study work that the applicant must have finished any material studies. Thus, the words "has studied" in the past tense correctly reflect this. The ambiguity arises from the use of the present tense in reference to whether the institution at which the applicant studied "is" a listed body. In Mr Ollennu's submission it means it is a listed body at the time of the undertaking of those studies. In Mr Gulvin's submission it means it is a listed body at the time of the application.

17.
The paragraph concerns the 20 points to be claimed for the “institution of study”. There are separate points and provisions relating to the actual qualifications achieved. Given the ambiguity, we have tested each of these two interpretations to ascertain how they would work out in practice. Mr Ollennu’s interpretation would mean that an applicant qualifies for the points only if the institution at which he studied was a listed body at the time of those studies. In other words, “ is ” relates back and is linked to the timeframe of “ has studied ”. This fits well with what we understand the underlying policy to be, in that the respondent is concerned to ensure that the place where the studies were undertaken was a genuine educational institution. The wording of the paragraph could have been expressed more clearly, but this interpretation appears to chime with both policy and common sense.

18.
However if one separates the two verbs and treats each as a freestanding condition, as Mr Gulvin’s interpretation demands, there are some rather bizarre consequences. For example a person may have studied at an unlisted and wholly inadequate institution but if, after the studies were completed, the institution was improved and became listed, then the student would be entitled to the points even though he actually studied at an inadequate institution. Equally bizarre is the converse scenario where a person studies and qualifies at a properly listed institution but is denied the points retrospectively if for example the college subsequently closes down prior to the student’s application for leave being made. That does not reflect what we understand the underlying policy to be; nor does it make commonsense; nor is it fair.

19.
Thus, for these reasons, we conclude that the correct interpretation of paragraph 2(a) of the Immigration Rules is that in order to qualify for the 20 points for the institution of study, the student must have studied at a UK institution that was at the time of study either UK recognised or was a listed body, or which held a sponsor licence under Tier 4 of the points based system.

20.
Our conclusion is reinforced by our understanding of the chronology of the introduction of the points-based system, as revealed by the tracking version of the Immigration Rules. The different tiers were introduced at different times. Tier 1 was introduced on 30 June 2008. Table 9 was introduced as part of this as it related to Tier 1. The provisions for Tier 4 (General) Students were introduced by HC 314 on 31 March 2009 and table 9 was adopted into them. As part of this process, sponsor licences replaced the previous categories of listed and recognised bodies. There was a period of time allowed for institutions to apply for these new sponsor licences. Then, on 6 April 2010, the definitions of listed and recognised bodies were deleted from the Rules. In this context, the intentions of paragraph 2(a) become clearer. From 6 April 2010, institutions required sponsor licences. The references in the rules (as they were at the time of the appellant’s application) to listed and recognised bodies was intended to cover transitional cases where students had studied with leave last granted under the previous regime, but were applying for further leave under the points-based system. The very fact that listed and UK recognised bodies can still qualify for the institution of study points without having a sponsor licence suggests that a historic perspective was intended. This reinforces our conclusion that the proper interpretation of paragraph 2(a) is that the institution had to be recognised or listed at the time of the period of study by the student rather than at the time of the application.

21.
We have then examined how our conclusion impacts on the appellants by merging the material facts as established, with the above chronology.

7 November 2008 – the appellant was granted further leave to study at the college. The points based system was then in place for Tier 1 applicants but not for Tier 4 students. Mr Gulvin has conceded that the college must have been listed at that time.

31 March 2009 – the provisions relating to Tier 4 students were introduced into the rules. The appellants, having extant leave until 30 April 2010, were not affected

September 2009 – the appellant last studied at the college prior to taking her exams. Her offer letter from the college dated 18 August 2008 states however that the completion date for the course is December 2009.

October 2009 – the appellant sat her last exam paper for the Open University degree.

31 December 2009 – the appellant was awarded her degree. She did not then have the certificate and so could not yet apply to the respondent for further leave. So far as the appellant was aware, the college was still listed at the end of 2009 and had applied for a sponsor licence, which was under consideration. This is confirmed by the judge in paragraph 27 of the determination.

10 February 2010 – the appellant received her degree certificate. She only then had the necessary documentation to submit her application to the respondent for post-study work.

January to April 2010 – at some unknown point in this period, the first appellant's college was refused its sponsor licence under Tier 4 and closed down.

6 April 2010 – the definitions of listed and recognised bodies were removed from the Immigration Rules.

15 April 2010 – the appellant submitted her application in time and when it was refused made enquiries about the college and discovered what had happened.

22.
What we derive from this chronology is that the appellants have done correctly everything that was in their power and have been refused leave in circumstances of which they were unaware and over which they had no control. This illustrates the illogicality of Mr Gulvin's suggested interpretation of the ambiguous paragraph 2(a). We conclude that the judge erred in law in accepting that interpretation.

23.
We are able now however to cure that error by reaching our own conclusions. The judge sustainably found in the appellants' favour on all disputed issues under the rules, save for whether they qualified under paragraph 2(a). For the reasons described above we have concluded that the first appellant did study for her award at a UK institution which at the time of her studies was listed and thus meets the requirements of the rule. Thus the appellants' appeals must all be allowed.

Decision

The appeals of the four appellants are allowed.

Signed

Upper Tribunal Judge Batiste