Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/11129/2013

THE IMMIGRATION ACTS

Heard at: Manchester	**Decision Promulgated**
On: 19th December 2014	**On 17th March 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE BRUCE

Between

Secretary of State for the Home Department

Appellant

and

Priscilla Bediako
(no anonymity order made)

Respondent

For the Appellant: **Mr Harrison, Senior Home Office Presenting Officer**
For the Respondent: **Mr Binafeiga, Binas Solicitors**

DECISION AND REASONS

1. The Respondent is a national of Ghana date of birth 17th September 1973. On the 23rd January 2014 the First-tier Tribunal (Judge Davies) allowed her appeal against a decision to refuse to vary her leave to enter and to remove her from the United Kingdom pursuant to s47 of the Immigration, Asylum and Nationality Act 2006. The Secretary of State now has permission to appeal against that decision[1].

[1] Granted by First-tier Tribunal Judge Pirotta on the 12th February 2014

Background and Matters in Issue

2. The Respondent claims to have been in the UK since 1998. In April 2002 she made an application for leave outside the rules as the spouse of a person present and settled here. That application was not dealt with until the 3rd August 2006 when the Secretary of State granted three years discretionary leave. Prior to that leave expiring she made an application to vary that leave so as to extend it. That application was rejected on the basis that she had used the wrong form; the Secretary of State subsequently conceded that she had in fact used the right form and in January 2010 further discretionary leave was granted until the 7th January 2013. On the 9th January 2013 the Respondent made an application for indefinite leave to remain on the basis that she had accrued six years of discretionary leave.

3. The Secretary of State refused this application by way of letter dated the 21st November 2013. She treated the application of the 9th January 2013 as having been in time. The letter stated:

> "A person may be eligible for a grant of indefinite leave to remain when they have completed a continual period of six years discretionary leave in the UK and *where the circumstances that led to the grants of discretionary leave are subsisting* or *at the very least where the applicant's circumstances at the time of application for settlement would have led to a grant of discretionary leave*". (Emphasis added)

4. The letter went on to note that each of the previous grants of leave had been on the basis that the Respondent was in a subsisting relationship with a settled person. At the time of this application, that relationship had broken down. It could not therefore be said that the circumstances which led to the previous grants were subsisting and the application was refused.

5. On appeal to the First-tier Tribunal Judge Davies heard oral evidence from the Respondent and found her to be a credible witness. He accepted that she had been here since 1998 as she claimed. He goes on to briefly address the questions set out in Razgar pertaining to Article 8. He finds the Article engaged and takes into account the fact that she has been living in the UK for a long time with valid leave. He then sets out the legitimate aims set out in Article 8(2) which might justify an interference with Article 8(1) rights. He finds "there is not one scrap of evidence put forward by the [then] Respondent" to indicate that the decision is necessary in pursuit of any of those aims. He concludes "in my view the evidence indicates overwhelmingly that the [then] Respondent's decision is not proportionate and therefore he cannot discharge the burden of proof upon him". The appeal is allowed.

6. The Secretary of State submits that the First-tier Tribunal made the following errors of law:

i) There are no reasons given as to why the Tribunal found the Respondent to be credible or accepted her claim that she came to the UK in 1998;
ii) The Tribunal failed to give "adequate reasons" in his Razgar consideration;
iii) The decision is unsustainable.

Error of Law

7. It is not an error for a Judge to believe a witness. It would appear from the refusal letter that this lady's credibility was never put in issue. The Record of Proceedings is brief and there is no indication that the Secretary of State challenged credibility on the day. It cannot therefore be said to be an error for Judge Davies to have found her to be a credible and his finding that she has been in this country since 1998 is upheld.

8. Simply describing a decision as "unsustainable" is not actually a ground of appeal.

9. The decision is however, not adequately reasoned in respect of Article 8. The proportionality balancing exercise is limited to the observation that the Secretary of State has produced no evidence to establish that decision is necessary in pursuit of one of the legitimate aims set out in Article 8(2). This lady did not qualify for leave to remain under the Rules and as such it can be assumed that the decision to refuse further leave was taken in pursuit of the legitimate aim of protecting the economy. The determination identifies no particular reasons why the consequences for the Respondent would be unjustifiably harsh or otherwise disproportionate. The decision is set aside.

The Re-Made Decision

The Facts

10. As set out above Ms Bediako has been living in the UK since 1998. It is her evidence that she entered the country illegally, with the assistance of an agent. She worked illegally, first as a cleaner, then as a carer. In 1989 she met a Mr Christian Ibokwe, a person present and settled in the UK. They were married in 2001 and in 2002 she made an application 'outside of the Rules' to be permitted to remain here: as far as she is aware the basis of the application was that her relationship was protected by Article 8. That was her first contact with the Home Office. So for the first four years that she was in the UK she had no leave to be here, was working illegally and had no valid claim under the Immigration Rules.

11. The Home Office did not deal with Ms Bediako's application for another four years. During the time that she was waiting for her application to be processed she found work as a care assistant in Beach Nursing Home in Manchester. She

continued to live with Mr Ibokwe. So for that four years she had no status but was known to the Home Office and was, as she was entitled to do, waiting for the outcome of her application.

12. Her application was successful. On the 3rd August 2006 she was granted three years Discretionary Leave. She carried on working as a carer, paying tax and living with Mr Ibokwe. As I mention above there was some confusion in 2009 when she tried to extend that leave: it is now acknowledged that the Appellant was not at fault, that she submitted the right form in time. The upshot was that on the 7th January 2010 she was granted a further three years DL.

13. That leave expired on the 7th January 2013 and two days later the present application was made. By this time her relationship with Mr Ibokwe had broken down. The Home Office dealt with the matter with relative efficiency and she had her answer by the 21st November 2013. It would appear that the Home Office applied a grace period and treated the application as being in-time. To summarise, Ms Bediako has to date spent:

    - Four years living and working in the UK illegally
    - Four years waiting for the Home Office to deal with her initial application
    - Six years and five months with DL
    - Two years waiting for the outcome of this appeal

    That is a total of 16 years. Apart from the initial period when she was working as a cleaner in London, Ms Bediako has been working as a carer the whole time. It is agreed that she has never claimed public funds. I accept, as does Mr Harrison, that during that time Ms Bediako has established a substantial private life. She has many close friends and two in particular are "like family" to her. Ms Bediako told me that she has maintained a relationship with Mr Ibokwe, although they are not 'together' any more. He is suffering from serious depression and she is looking after him. She is currently working in Manchester in a unit with 99 beds that specialises in caring for patients with dementia. She says she enjoys her work and is close to her patients: I accept that the difficult nature of that disease requires a particular bond between patient and carer.

14. Ms Bediako's parents are dead. She had two brothers but they have both died. She has a step-sister who is living in Ghana. She also has two children of her own, two boys that she left behind aged two and seven. Like many other women she took the very difficult decision to hand the care of her children over to a relative in order that she could come to Europe to work to support them. In all the years that she has been in the UK she has been sending money home to her sons. She has funded their educations, and it has paid off: the elder took science in further education and now has a job working for 'Volvic' water in Ghana. Ms Bediako is clearly very proud of that, but the cost for her has been her relationship with her boys. They look to her step-sister as their mother.

They have only seen Ms Bediako twice in the past sixteen years, once in 2006 and once in 2009 when she made trips to Ghana.

The Rules

15. Mr Binafeiga did not advance his case under Appendix FM, since it is acknowledged that although Ms Bediako remains close to Mr Ibokwe, they are no longer in a subsisting marriage.

16. His central submission was that Ms Bediako qualifies for leave under paragraph 276ADE of the Immigration Rules, which at the date of decision read:

> 276ADE (1). The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:
>
> (i) does not fall for refusal under any of the grounds in Section S-LTR 1.2 to S-LTR 2.3. and S-LTR.3.1. in Appendix FM; and
>
> (ii) has made a valid application for leave to remain on the grounds of private life in the UK; and
>
> (iii) has lived continuously in the UK for at least 20 years (discounting any period of imprisonment); or
>
> (iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK; or
>
> (v) is aged 18 years or above and under 25 years and has spent at least half of his life living continuously in the UK (discounting any period of imprisonment); or
>
> (vi) subject to sub-paragraph (2), is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK

17. It is accepted that Ms Bediako cannot qualify under (iii) since she has not reached the 20 year mark. Her age disqualifies her from (iv) and (v). The only potential for success lies in (iv). That provision has, since the date of the refusal, been amended to read:

> (vi) subject to sub-paragraph (2), is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK

It is the Respondent's view that the new wording better reflects the intention of the drafters of the original. "No ties" is therefore to be read in light of the new test of "very significant obstacles to integration".

18. In Ogundimu (Article 8 – new rules) (Nigeria) v SSHD (approved in YM (Uganda) v Secretary of State for the Home Department [2014] EWCA Civ 1292) and Bossadi (paragraph 276ADE; suitability; ties) [2015] UKUT 00042 (IAC) it was held that this requires a rounded, holistic evaluation of the applicant's circumstances.

19. Ms Bediako is currently aged 41. She was 25 when she left Ghana. She had therefore an understanding of that country as an adult. She speaks the language and understands the culture. Whilst I accept that her relationship with her two sons and step-sister has over the long years become distant, they are familial links that could be strengthened should she return to Ghana today: Balogun v UK app. no. 60266/09 [2012] ECHR 614. It cannot be said that she has "no ties" to Ghana. Nor can it be said that she faces substantial obstacles to re-integration there, since on her own evidence she has two adult sons whom she has supported all their lives. One is working and I presume would not refuse to assist his mother should she come back to live with the family again. She cannot meet the requirements of paragraph 276ADE(1)(vi).

Article 8

20. Ms Bediako cannot meet the requirements of the Rules. She has not accrued sufficiently long residence to meet the '20 year rule' and as I set out above, her circumstances in Ghana are not such that it can be said that her ties to that country have diminished to the point of non-existence. It might be said – although not by Mr Harrison - that this would be the end of the matter. I am not satisfied that this is so. The exclusive focus of paragraph 276ADE(1)(vi) is the situation an applicant will face when she returns "home": this overlooks the strength or otherwise of the individual's life in the UK. It would be a nonsense to suggest that a person who has lived in the UK for over 16 years has no private life to speak of. She plainly has a substantial private life and interference with it would have serious consequences for her. I am not therefore satisfied that this provision is not a 'complete code' for the purpose of assessing Article 8 and I will go on to consider the matter 'outside of the Rules'.

21. It is accepted that Ms Bediako does have a private life, and that the decision to remove her would amount to an interference with it. As Mr Harrison acknowledged in his submissions: we can go straight to proportionality. I agree, save to note that the decision to remove persons with no leave to remain is rationally connected to the legitimate aim of protection of the economy and that the Secretary of State has the power in law to make the decision that she has.

22. In assessing proportionality I am bound to have regard to the public interest factors set out in paragraph 117B of the Nationality, Immigration and Asylum Act 2002 (as amended by the Immigration Act 2014):

117B Article 8: public interest considerations applicable in all cases

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—

(a) are less of a burden on taxpayers, and
(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—

(a) are not a burden on taxpayers, and
(b) are better able to integrate into society.

(4) Little weight should be given to—

(a) a private life, or
(b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and
(b) it would not be reasonable to expect the child to leave the United Kingdom.

23. I have had regard to the fact that the maintenance of effective immigration controls is in the public interest. The provisions in the Rules are where the Secretary of State believes the balance is to be struck between the rights of the individual and the rights of the state. I have reminded myself that it is only where a case raises compelling circumstances not sufficiently recognized by the Rules that a breach of Article 8 should be found: Singh and Khaled [2015] EWCA Civ 74. I have weighed in the balance the fact that Ms Bediako entered the country illegally and made no attempt to regularize her position for approximately four years. These factors weigh in the Secretary of State's favour.

24. I have had regard to the fact that it is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English are less of a burden on taxpayers, and are better able to integrate into society. There is no dispute that Ms Bediako speaks fluent English, or that this weighs in her favour.

25. There is no evidence at all that the Appellant has ever claimed benefits, or that she has been a drain on the resources of public funds. She has worked for care homes for approximately 15 years and confirmed in response to Mr Harrison's questions that she has always paid tax and national insurance. I accept and find as fact that she is financially self-sufficient and this weighs in her favour.

26. Sub-clause (4) mandates that I must attach little weight to a private life that was established in the UK when the Appellant was in the UK unlawfully. In applying this provision I draw a distinction between the periods of time that the Appellant has spent with, and without, valid leave. I therefore attach little weight to the first four years of residence without leave. Sub-clause (5) mandates that I must attach little weight to a private life established when the person's status in the UK is "precarious". That means anything short of ILR. That impacts upon the 12+ years that follow.

27. I have weighed all of those matters in the balance. I have also had regard to the following additional factors.

28. The Secretary of State made no attempt to remove Ms Bediako in 2002 when she revealed herself as being an illegal entrant. The Home Office instead spent four years deciding on her application. That was an unreasonable delay by any standards, and the grant of DL which followed no doubt recognised that she could hardly be blamed for getting on with her life, building her marriage and strengthening her private life, during that period: see EB (Kosovo) v SSHD [2008] UKHL 41. Ms Bediako then had DL for just short of six and half years. Her leave during that period was "precarious", but as Mr Harrison conceded, had been granted on the basis that to remove her at that time would have been to breach her Article 8 rights.

29. I have given substantial weight to the fact that Ms Bediako has worked as a carer for approximately 15 years. Her current work with dementia patients is remunerated at £6.31 per hour: surely the most emotionally challenging, physically demanding and socially necessary jobs to be paid at the minimum wage. It is hard, unforgiving work. Unlike other areas of nursing care, these patients are never going to get better. The care workers who undertake this role are performing a vital service for our society, and Mr Harrison agreed with my suggestion that the care system would collapse were it not for their commitment. Ms Bediako spoke movingly of her relationships with her patients, which I accept to be warm and no doubt of great value to these most vulnerable of people.

30. Ms Bediako has no family to speak of in the UK but she does have close friends, and she remains very close to Mr Ibokwe. She told me that he is suffering from severe depression and cannot really leave his house. She checks up on him, brings him food and makes sure he has someone to talk to. Again, she is providing a service that someone else would have to do if she were not here. Sixteen years is a long time to spend anywhere. She came to this country in order to work and pay for her sons' educations and has therefore sacrificed her

own family life in order to provide them with financial security. Her youngest son has not yet finished tertiary education and she would like the opportunity to continue to fund him until he has. I accept that it would be a severe blow to Ms Bediako to be removed from her friends, work and life in the UK.

31. The statute requires that I attach "little weight" to the private life that Ms Bediako has established and I have done so. I remind myself however that it is for the Secretary of State to show that this decision is, in all the circumstances, proportionate. In doing so the Secretary of State must show this lady's removal to be necessary for the protection of the economy. I have set the decision of Judge Davies aside for lack of reasons, but could not agree more with his assessment that the facts "indicate overwhelmingly that the [Secretary of State's] decision is not proportionate". The Secretary of State has taken no action to remove Ms Bediako for the sixteen years that she has spent in the UK. During the first eight she had no leave at all, and was thereafter granted leave to remain , albeit on the "precarious" basis of DL. During virtually that entire time she has worked in a vital role, serving society as well as contributing to the economy. I find it wholly likely that she will continue to do so. In those circumstances the Secretary of State cannot reasonably claim that her removal today is necessary or proportionate.

Decisions

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

33. I re-make the decision in the appeal as follows:

"The appeal is dismissed under the Immigration Rules.

The appeal is allowed on human rights grounds."

34. I make no direction as to anonymity. No such direction was requested and I see no reason to make one.

Deputy Upper Tribunal Judge Bruce
7th March 2015

Fees

No fee was paid in this appeal.