Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/06696/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9 October 2018	**On 30 October 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MISS GRACE ADU-POKU
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr T Melvin, Senior Home Office Presenting Officer
For the Respondent: Mr S Bellara, Counsel instructed by Legend Solicitors

DECISION AND REASONS

Background

1. The appellant is the Secretary of State and the respondent is Miss Adu-Poku, a Ghanaian citizen born on 10 March 1986, aged 32. For the purposes of this decision and reasons however I refer to the parties as they were before the First-tier Tribunal where Ms Adu-Poku was the appellant.

2. Ms Adu-Poku appealed to the First-tier Tribunal against the decision of the respondent, dated 26 February 2016, to refuse the appellant's human rights application. In a decision promulgated on 11 June 2018, Judge of the First-tier Tribunal Freer allowed the appellant's appeal.

3. The respondent appeals with permission on the following grounds:

Ground 1 – Although the judge directed himself at [44] that although the appellant may have been able to claim British citizenship at an earlier point, this argument was not made before him and arguably required further investigation and was not relied upon, it was argued that the judge went on to rely on this factor as a ground for allowing the appeal and it was submitted this was an inconsistent finding.

Ground 2 – It was submitted that the judge found that the appellant would have succeeded in her application of British nationality but there was no evidence referred to in the judge's consideration and it was submitted that the judge gave weight to immaterial considerations in his assessment.

Ground 3 – It was submitted the judge's findings run counter to **MM (Zimbabwe) [2017] EWCA Civ 797** at paragraphs 38, 39, 41, 42 and 44 and given that Article 3 was conceded it was submitted that the reasons given for why the appellant succeeded under Article 8 on the same set of facts, were inadequate.

Ground 4 – It was submitted that, including at [77], the judge attempted to dilute the public interest by stating that the limited weight provisions do not apply to the period of residence when the appellant was a child; there was no basis for this finding and the judge had failed to take into account material matters in assessing proportionality. The judge further did not address the issue of the appellant having carers or a home help. There was no evidence to suggest why, if the appellant became self-employed, she could not seek a carer.

Error of Law Discussion

Grounds 1 and 2

4. Mr Melvin was unable to identify where in the First-tier Tribunal decision the judge had gone on to rely on the issue of whether or not the appellant might have succeeded in a British nationality application. Although Mr Melvin submitted that it appeared to be a weighty consideration in the proportionality exercise conducted by the judge he accepted that he was unable to identify any further references which suggested that the judge relied on the appellant's ability or otherwise to apply for British citizenship.

5. Although it was his submission that where the judge, at [77(i)] when considering that there was not particularly strong weight for the maintenance of effective immigration control by the respondent, noted that the appellant would surely have gained leave to remain under the ten or fourteen year Rule this implied that the judge was giving weight to the

fact that he felt that the appellant might have succeeded under the British nationality application, that is not the case. There was nothing in the findings of the First-tier Tribunal to support such a speculative submission.

6. It is a misrepresentation of the judge's findings to suggest that he gave any weight to the issue of British nationality. There was no error in the judge identifying on his review of the facts, at [44], that the appellant might have been able to claim but he properly directed himself but "this argument was not made to me and arguably required considerable investigation. I do not rely upon it".

7. Similarly, although Mr Melvin attempted to rescue the respondent's grounds by attempting to reframe grounds 1 and 2 into an attack on the judge's findings in respect of the previous ten year and fourteen Rule applications, there is no merit in this argument. Although ground 1 asserted that the judge erred by relying on the near-miss principle again that is a mischaracterisation of the judge's findings. The judge, at [77(i)], made reference to the possibility that the appellant might have gained leave to remain in terms of the public law doctrine of legitimate expectation but was very clear in reminding himself that this was not an alternative near-miss argument.

8. The argument of legitimate expectation was only considered in terms of the judge's findings that in this case there was not particularly strong weight for the maintenance of effective immigration controls in part due to the fact that the appellant might have gained leave to remain. The fact that an applicant may be able to say that their case is a 'near miss' in relation to satisfying the requirements of the Immigration Rules is not sufficient for 'compelling' circumstances requiring a grant of leave outside of those Rules. However, if compelling circumstances already exist, the fact that the case is also a 'near miss' may be a relevant consideration which tips the balance under Article 8 in their favour (see paragraph 56 **SS (Congo) [2015] EWCA Civ 387**). There was no error in the judge's reasoned approach and no material error made out in grounds one and two.

Ground 3

9. Mr Melvin submitted that the judge's findings run counter to **MM (Zimbabwe)** and further relied on the Court of Appeal decision in **SL (St Lucia) [2018] EWCA Civ 1894** which reiterated that **MM (Zimbabwe)** and **GS (India) v Secretary of State for the Home Department [2015] EWCA Civ 40** was unaltered by **Paposhvili v Belgium [2017] Mar 867**.

10. Mr Melvin submitted that there is adequate treatment for the appellant's medical condition (lupus) in Ghana. Although the judge accepted that he was not a medical expert, Mr Melvin submitted that he then went on to make detailed findings in relation to the appellant's medical conditions. Mr Melvin submitted that it can only be exceptional circumstances that an

Article 8 case can succeed where an Article 3 case would not and it was noted that the Article 3 case had been conceded by the appellant.

11. As highlighted in **MM (Zimbabwe) [2017]** and in **GS (India)**, the Court of Appeal in **MM (Zimbabwe) [2012] EWCA Civ 279** had this to say in relation to Article 8 medical cases:

> "The only cases I can foresee where the absence of adequate medical treatment in the country to which a person is to be deported will be relevant to Article 8, is where it is an additional factor to be weighed in the balance with other factors which by themselves engage Article 8. Suppose, in this case, the appellant had established firm family ties in this country, then the availability of continuing medical treatment here, coupled with his dependants and the family here for support, together established 'private life' under Article 8. That conclusion would not involve a comparison between medical facilities here and those in Zimbabwe. Such a finding would not offend the principle expressed above that the United Kingdom was under no Convention obligation to provide medical treatment here when it is not available in the country to which the appellant is to be deported."

12. I am not satisfied that this is not a case that can be characterised as one where the judge found that the case succeeded on Article 8 medical grounds alone. Rather this was an additional factor which weighed in the balance. The judge at [69] concluded that the appellant satisfied paragraph 276ADE(1)(vi) on private life. Paragraph 276ADE provides including as follows:

> "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:
>
> ...
>
> (vi) subject to sub-paragraph (ii), is aged 18 years or above, has lived continuously in the UK for less than twenty 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.
>
> ....."

13. The judge's primary finding was that the appellant had demonstrated that very significant obstacles to her integration in Ghana. In reaching that finding the judge took into consideration the appellant's relationship with her family, including her father, in the context of considering what the obstacles were to the appellant integrating back into life in Ghana. The

judge accepted that the appellant had no-one in Ghana and there has been no challenge to that finding.

14. In reaching the findings he did, the judge quite properly considered how the appellant's life-long cancer diagnosis of lupus (and the judge made findings which were not disputed that the specialist evidence shows that eh appellant has been diagnosed with not one but two varieties of lupus) would affect her ability to integrate in Ghana. In reaching that finding the judge took into consideration the issue of affordability. The judge also took into consideration the impact of the appellant's life-long condition on her ability to work on return to Ghana including that the evidence indicated that sometimes there will be extreme exhaustion, depression and flu-like symptoms rendering a patient unable to work and that there could be cognitive problems.

15. The judge at [60] found as follows:

> "The respondent may not rationally rely on the appellant's dance skills, because they cannot be used when lupus flare ups, so it is impossible for her to have a career in dance or as a dance teacher. The same may equally be said of her intellectual skills, due to foreseeable periods of lethargy, brain fog and depression."

16. Again there was no challenge to those findings before me. Similarly, the judge made findings, that were available to him and were not properly challengeable before me, at [61] that the appellant would not be likely to hold an employed position for long in Ghana, nor would she be able to set up her own business or sustain it. The judge went on to make adequate findings in relation to the difficulty for the appellant in residing in Ghana due to the likelihood of sun-induced rashes and extreme sensitivity to UV light, relevant to the diagnosis of lupus. These were factors that the judge considered would amount to undue harshness and again, there was no challenge to those findings. The judge accepted that the appellant could speak English and Twi and that her family could send her money although the judge noted that this ability would be "far from infinite" ([64]). However the judge was satisfied that that was not enough to enable the appellant integrate in Ghana.

17. It is significant that, contrary to the grounds of appeal which attempt to frame the judge's findings as an "Article 8 medical case", the judge at [65] confirms that "the core point I make is that employment prospects are very poor, for health reasons, taken in a cumulative manner, despite the obvious education and talent on record".

18. The judge reached reasoned, evidence-based findings which were available to him, that the appellant would face destitution and severe ill-health. These findings were based on the combined factors of her health, the lack of family support in Ghana where such as is available in the UK and the lack of adequate employment opportunities, exacerbated by her

lifelong health condition, together with the exacerbation of her condition in a tropical climate such as Ghana.

19. Although Mr Melvin criticised the judge for making findings on the appellant's condition, despite confirming that he was not a medical expert, such a criticism is unfounded. The judge quite properly directed himself and indicated at [67] that he had made findings on the basis of independent materials in the appeal and that he had taken judicial knowledge of commonly known facts about cancer and lupus. None of the respondent's four grounds of appeal amount to a challenge to those findings.

20. The findings that the appellant succeeds under 276ADE(1)(vi) must also be seen in the context of the judge's wider findings under Article 8 that the appellant enjoys family life with her extended family including her father ([73(v)]) and that these extend to more than normal emotional ties in line with **Kugathas [2003] EWCA Civ 31,** taking into consideration the appellant's medical vulnerability together with her closeness to her family. The judge clearly had that in mind in his findings under the Immigration Rules that it was relevant the appellant would not have family support in Ghana (at [53]). Again, although Mr Melvin in his wide-ranging submissions attempted to take issue with the family life finding this was not in the grounds of appeal before me and in any event the judge's finding was more than adequately reasoned.

21. No material error of law is disclosed in ground 3.

Ground 4

22. Mr Melvin submitted that the judge failed to give appropriate weight to the fact that the appellant had been fourteen years in the UK as an adult without leave and that the judge had given inappropriate weight to the fact that she had made a number of applications and that the judge had overstated the positive factors in the appellant's favour at [73]. Mr Melvin submitted that it was bordering on irrational for the judge to reach the findings he had in respect of Section 117B in minimising as it did the appellant's significant period of fourteen years without leave as an adult whilst focusing, in Mr Melvin's submissions, on "near-miss" ten or fourteen year Rule applications.

23. Mr Bellara referred me to the judge's detailed consideration of the evidence at [41] to [69] of the decision and reasons and similarly that the judge was very careful not to attach weight to the near-miss argument or to the citizenship issue. The judge found that the appellant succeeded under paragraph 276ADE(1)(vi) and then went on to consider Article 8 outside of the Rules, carefully reminding himself that the appeal could not be allowed under the Immigration Rules but that the fact that the appellant does meet the Rules is a strong factor in her favour in the balancing exercise (**Hesham Ali [2016] UKSC 60**).

24. He further submitted that consideration of Article 8 can involve considering medical evidence without offending the principles in **MM (Zimbabwe)** and he submitted that this appellant's appeal would never an Article 3 case (at [35] the judge noted that the Article 3 claim had been withdrawn). Mr Bellara submitted that this was not just a medical treatment case but also one where the appellant required the support of her family and the judge had taken into consideration that the appellant's father had stated in evidence that he could not assist her in Ghana and the judge had taken all of this into account.

25. The specific challenge under ground 4 was limited to submission in the written grounds that the judge had attempted to dilute the public interest by stating that the little weight provisions do not apply for the period of residence when the appellant was a child. However Mr Melvin did not dispute that a child cannot be blamed for the fact that she was under the control of her parents and that there was no deterrent effect in relation to minors as stated at [77(ii)] of the judge's findings.

26. The judge was entitled to take into consideration that the appellant met the requirements of the Immigration Rules paragraph 276ADE(1)(vi) and that this is a factor in the appellant's favour in the balancing exercise. The judge also properly directed himself that in order to succeed under Article 8 outside of the Immigration Rules the appellant needed to demonstrate that the consequences of the decision would cause very substantial difficulties or exceptional circumstances or unjustifiable harshness (**Agyarko v SSHD [2017] UKSC 11**). The judge gave more than adequate reasons as to why that threshold was reached in terms of the overall factors applicable. The judge set out the provisions under Section 117B and it was clear that he had this in mind. Whilst his reasoning at [77] to [79] might have been structured differently there was no material error in the judge, for the reasons he gave, finding that the public interest in this case was outweighed by the factors in the appellant's favour. The "little weight" provisions involve consideration of a spectrum. The judge was entitled to find as he did that the substantial weight to be given to the appellant's private life outweighed the public interest.

27. No error of law is disclosed in ground 4.

Notice of Decision

The decision of the First-tier Tribunal does not disclose an error of law and shall stand. The Secretary of State's appeal is dismissed.

No anonymity direction was sought or is made.

Signed Date: 22 October 2018

Deputy Upper Tribunal Judge Hutchinson

TO THE RESPONDENT
FEE AWARD

I maintain the fee award of the First tier Tribunal.

Signed Date: 22 October 2018

Deputy Upper Tribunal Judge Hutchinson