Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/52192/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26th September 2017	**On 29th September 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

CHRISTINE MADU
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Richardson, Counsel
For the Respondent: Mr P Nath, Senior Presenting Officer

DECISION AND REASONS

1. This is the appeal of the Secretary of State against the decision of First-tier Tribunal Judge David Taylor promulgated on 25th January 2017, allowing the appeal of the Appellant on the basis of her private life in respect of Article 8 of the European Convention on Human Rights following a refusal

by the Secretary of State on 24th January 2014. The appeal is of some considerable vintage and has been back and forth between the First-tier Tribunal and Upper Tribunal on three separate occasions, this being the last of those circuits. I do not propose to set out the history of the appeal beyond that, it not being relevant to my decision.

2. The Secretary of State was granted permission to appeal by First-tier Tribunal Judge Pooler. The grant of permission may be summarised in the following terms:

> "There is, however, enough in the substance of the application to identify other alleged errors of law. It is arguable that the judge erred in his assessment of the public interest factors under s117B of the Nationality, Immigration and Asylum Act 2002 and failed to take account of matters relevant to proportionality on which the Respondent relies. It is also arguable that he relied on a 'near miss' and that he erred in identifying compelling factors which could give rise to the need to consider Article 8 outside the Immigration Rules. It is unfortunate that the headings used in the application for permission did not accurately identify the alleged errors of law on which the grounds in fact rely. Bearing in mind their substance, permission is granted on all grounds."

3. I was provided with a Rule 24 reply drafted by Mr Richardson which myself and the Secretary of State's representative had the opportunity to consider prior to the commencement of the hearing.

Error of Law

4. At the close of submissions I indicated that I did not find that there was an error of law in the determination such that it should be set aside, but that my reasons for so finding would follow. My reasons for that finding are as follows.

5. Taking the Grounds of Appeal in turn, given that the grant of permission by the First-tier Tribunal did not limit the grant of permission to specific grounds, albeit criticising the remaining grounds drafted in the same breath, in relation to the first issue of the consideration of the Appellant's continued residence in the United Kingdom for at least twenty years by the First-tier Tribunal Judge, I remind myself that paragraph 276ADE(1)(ii) states that an applicant should have made a valid application. It is not in dispute that the Appellant did not apply for leave to remain on the basis of her private life as she had not completed twenty years at the time of her application and indeed had only completed twenty years' residence shortly before the promulgation of the determination of the First-tier Tribunal. Albeit the First-tier Tribunal Judge considered the Appellant's twenty years' residence and the Secretary of State complained that this was something beyond his consideration and was used as a near-miss to justify granting the appeal under Article 8, I do not see any force in this argument as the First-tier Tribunal would have been entitled in theory to consider the

twenty years' continuous residence that the Appellant had demonstrated according to the Tribunal's findings by reference to paragraph 276AO of the Immigration Rules which specifies that for the purposes of paragraph 276ADE(1), the requirement to make a valid application will *not* apply when an Article 8 claim is raised in an appeal subject to the consent of the Secretary of State where applicable, according to paragraph 276AO(3) specifically. It does not appear, and I have not been told, that the Secretary of State took issue with the judge's consideration of the Appellant's twenty years' continuous residence as he indicated he would do at the close of the hearing which would have come to pass by the time the decision would have been promulgated. As such any later complaint that he did so, where any complaint could have been raised at the time this was mentioned to both parties by the First-tier Tribunal is belated and unarguable. In any event, the judge did not substantively consider paragraph 276ADE(1)(iii) in relation to the Appellant having lived continuously in the UK for at least twenty years.

6. It is further noteworthy that the Secretary of State complained that such a matter would have been not likely to succeed because the Appellant had not demonstrated she met the suitability requirements. This statement was plainly unfounded given that the Secretary of State had not taken issue with her suitability in the refusal letter which gave rise to the appeal. This was noted by the First-tier Tribunal at paragraph 7 of the determination in any event (which the Secretary of State has failed to note in drafting her Grounds of Appeal). Thus, in my view the judge did not misdirect himself in stating that the only reason the Appellant did not succeed under the Rules was because she had not acquired twenty years' residence at the time of her application. Indeed this was a correct observation to make. I further observe in light of my above analysis that if the Appellant were to make such an application today it would also be likely to succeed. Such hypothetical observations were noted by the Supreme Court in the decision of *R, (on the application of Agyarko and Ikuga) v Secretary of State for the Home Department* [2017] UKSC 11 by Lord Reed at paragraph 51 of the judgment where it was stated that if an applicant is in the UK unlawfully or is entitled to remain in the UK only temporarily, the significance of that consideration depends on what the outcome of immigration control might otherwise be and if an applicant were residing in the UK unlawfully but was otherwise certain to be granted leave to enter (or remain in this instance) then there might be no public interest in her removal.

7. As such in my view the ability of the Appellant to meet the Immigration Rules in theory, and perhaps in practice also, is relevant to the consideration of, and weight to be given to the public interest. To that end the criticism of the First-tier Tribunal Judge's decision by reference to an allegation that he used a "near-miss" scenario to justify consideration of Article 8 is wholly without merit. This is because the Immigration Rules normally give clarity to the weight and purpose to be given to the public interest in any assessment that had been established by the judgment of Lord Carnwath in the Supreme Court decision of *Patel* at paragraphs 55 to

57 (see *Patel & Others v Secretary of State for the Home Department* [2013] UKSC 72). Thus in this instance the First-tier Tribunal Judge was quite right, not only for the reasons I have already given but also for this reason, in gauging the weight to be given to the public interest by looking at the relevant provisions of the Immigration Rules against the Appellant's scenario as he saw it.

8. In any event I also note that the First-tier Tribunal considered the public interest in maintaining immigration control, at paragraphs 26 and 30 amongst other passages, and also noted the public interest in maintaining immigration control at paragraph 30 of the judgment. I note in particular that the judge used the language of the 2002 Act by describing the Appellant's presence in the UK as precarious rather than unlawful thus paying regard to the statute as he was bound to do.

9. The further complaint that the judge failed to note the Appellant's use of the NHS is similarly, I find, misconceived in relation to paragraph 12 of the determination and her hospital treatment and orthopaedic advice from a Harley Street consultant, as this scenario suggests she received private treatment. But in any event, any recourse to such treatment would not be sufficient to rob her of the weight to be given to her private life such that it would tip the balance against her in my view, particularly given that the Secretary of State did not seek to raise any suitability issues in her refusal letter.

10. In summary, I do not find that the First-tier Tribunal materially erred in its consideration of the appeal.

Notice of Decision

11. The decision of the First-tier Tribunal is hereby affirmed.

12. The appeal to the Upper Tribunal is dismissed.

13. No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Saini