Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/12946/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On January 2, 2018	**On January 4, 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS GIFTY AGYEMAN
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr Murphy, Counsel, instructed by Clapham Law LLP
For the Respondent: Mr Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I do not make an anonymity direction.

2. The respondent in these proceedings was the appellant before the First-tier Tribunal. From hereon I have referred to the parties as they were in the First-tier Tribunal so that, for example, reference to the respondent is a reference to the Secretary of State for the Home Department.

3. The appellant is a Ghanaian national. The appellant entered the United Kingdom as a visitor on December 6, 1998 and remained here unlawfully when her six months leave expired. On March 3, 2011 and April 5, 2013

the appellant applied to remain outside of the Immigration Rules but was refused with no right of appeal. A judicial review challenge was subsequently dismissed and after being served with a section 120 notice on September 17, 2015 the appellant applied for leave to remain under articles 3 and 8 ECHR. The respondent refused this application on November 24, 2015 and gave directions for her removal pursuant to paragraphs 8 to 10 of Schedule 2 to the Immigration Act 1971.

4. The appellant lodged grounds of appeal on December 4, 2015 under Section 82(1) of the Nationality, Immigration and Asylum Act 2002. Her appeal came before Judge of the First-tier Tribunal Atreya (hereinafter called "the Judge") on March 1, 2017 and in a decision promulgated on March 30, 2017 the Judge allowed her appeal.

5. The respondent appealed the decision on April 5, 2017. Permission to appeal was granted by Judge of the First-tier Tribunal Robertson on October 5, 2017. In giving permission Judge of the First-tier Tribunal Robertson found the Judge may have erred by not applying the provisions of Section 117B of the 2002 Act. In giving permission, she stated there was "little arguable merit" in grounds A and B but did not preclude the respondent from arguing the same. She also stated that based on the findings made the outcome may be no different.

6. The matter came before me on the above date and the parties were represented as set out above.

SUBMISSIONS

7. Mr Melvin submitted the findings made under the Rules were made without any real evidence to support the findings. The Judge found the appellant's partner would be unable to travel but failed to take into account the fact he had travelled to Ghana on four occasions in the last six years and the Judge failed to give weight to the following facts:

   (a) The appellant and her partner came from Ghana and spoke the language.

   (b) Apart from medical records there was no medical evidence to support the Judge's findings.

   (c) The appellant's husband was financially able to support them.

   (d) She had failed to regularise her status.

8. Mr Murphy opposed the application and submitted the Judge had considered Section 117B factors and the findings made took into account both positive and negative aspects of the case. The decision was well-reasoned and the Judge considered the appeal under both the Rules and outside the Rules. The findings made under the Rules were open to the Judge who then allowed the appeal on article 8 grounds. Alternatively, the Judge found that if the Rules were not met then it was disproportionate to require her to leave the United Kingdom despite her poor immigration

history. He submitted the respondent's submissions amounted to a mere disagreement.

FINDINGS ON THE ERROR IN LAW

9. At [3] of the Judge's decision it is recorded that "both representatives confirmed that article 8 within the Rules should be considered Appendix FM and Paragraph 276ADE(vi) as well as article 8 ECHR outside of the Rules." In giving permission to appeal Judge of the First-tier Tribunal Robertson made reference to the appeal being allowed under the provisions of both Section EX.1(b) of Appendix FM and paragraph 276ADE HC 395 as well as article 8 ECHR but pointed out that the only ground of appeal available was under article 8 ECHR.

10. This appeal was covered by the Immigration Act 2014 (Commencement No.4 Transitional and Saving Provisions and Amendment) Order 2014 No 371. This Act introduced the new provisions to all decisions made on or after 6 April 2015 other than

    i. Decisions on Tier 4 applications ….
    ii. Decisions on Tier 1, 2 or 5 applications ….
    iii. Decisions to refuse leave to enter, to refuse entry clearance, to refuse a certificate of entitlement and to refuse to vary leave to enter or remain (where the result of that decision is that the person has no leave) on applications where the application was made before 6 April 2015 unless the decision is also a refusal of an asylum/protection or human rights claim in which case the new provisions apply.

11. Having considered the transitional provisions and the application I agree with Judge of the First-tier Tribunal Robertson that the only appealable decision was on human rights grounds because the application was not submitted until submitted September 17, 2015.

12. The Judge's finding at [82] is incorrect but that still leaves question of whether the Judge erred at [83] of the decision.

13. Whilst the Judge had no power to allow the appeal under Section EX.1(b) of Appendix FM or paragraph 276ADE HC 395 he was required to consider the appeal under those headings before considering the appeal outside of the Rules. The reason being that the Rules state the respondent's approach to such applications and if the appellant could succeed under the Rules then it follows it is likely to be disproportionate to refuse the appeal under article 8 ECHR.

14. Accordingly, for the respondent to succeed with her grounds of appeal she has to demonstrate the decision under article 8 ECHR was materially flawed.

15. Mr Melvin submitted the positive findings in the appellant's favour made at [52] to [54], [60] to [65] and [67] to [68] were made without regard to any supporting evidence.

16. The Judge had before him the appellant's partner's medical records for the period leading up to February 27, 2017 and these referred to ongoing bronchitis problems up to June 2015 and a diagnosis of Type 2 diabetes and an annual asthma check up. His records showed he took daily medication (vitamin D) for bone deficiency and medication for breathing issues including asthma. He also had prescriptions for eye drops, antihistamine, reduce gout and risk of heart disease and diabetes. The notes recorded that he suffered with his right hip, in particular.

17. Mr Melvin challenged the Judge's finding at [52]. Having considered the records I find nothing in the finding at [52] that contradicts or exaggerates what is contained in the records. The Judge heard oral evidence from both the appellant and her partner that the appellant was the main carer for her partner and that whilst he had two sons they had their own lives and families and were unable to provide the level of care given by the appellant.

18. Having considered the background the Judge quite properly looked at the appeal through the prism of both Appendix FM and paragraph 276ADE HC 395. The Judge noted the respondent's position at [57] and went on to consider the claim in light of the Supreme Court decision of Agyarko v SSHD [2017] UKSC 11. At [59] the Judge reminded himself that the appellant had been here unlawfully since her visa expired and that her relationship with her partner was formed when she was here unlawfully and when her immigration status was precarious. Mr Melvin suggests this paragraph was a "throwaway" paragraph but I disagree. The Judge specifically made this at this juncture and later on he reminded himself of it at [79] when considering the appeal on article 8 grounds.

19. When considering the appeal under section EX.1 the Judge gave detailed reasons at [62] and [63] as to why he felt the appellant's partner would face "very significant difficulties". His reasons are based not only on the medical records but also on what he saw for himself in court and he at [64] and [65] the Judge gave his reason for finding Section EX.1 would be engaged.

20. The Judge further considered the appeal under paragraph 276ADE HC 395 and reached a similar conclusion. The point made by Mr Murphy was being able to go on holiday did not equate to being able to transfer your life permanently to another country.

21. Whilst I accept the test is a high test the circumstances must be considered under article 8 ECHR where of course the test is lower. The issue under article 8 ultimatley is was one of proportionality and all the factors outlined above are pertinent to the Judge's assessment under article 8 ECHR. The Judge reminded himself of the approach in Razgar [2004] UKHL 00027 and from [76] onwards he considered the evidence.

22. Whilst the Judge did not mention section 117B of the 2002 Act at this juncture it is clear from reading the whole decision that the Judge was aware of the law as he made reference at [43] to her ability to speak

English, at [54] to the fact she is financially supported without recourse to public funds and at [79] to the fact she did not meet the Rules and had been here unlawfully. The Judge balanced all these issues against the positive findings he made and concluded it would be disproportionate to remove her.

23. I find the finding under article 8 ECHR was one that was open to the Judge. The fact another Judge may not have reached the same decision does not amount to an error in law. Decisions under article 8 are discretionary and I find nothing in the decision, save allowing the appeal under the Rules, which amounts to an error in law.

DECISION

24. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law at [82]. I set aside that part of the decision as there was no power to allow the appeal under the Rules.

25. However, I uphold the decision at [83] and therefore dismiss the respondent's main grounds of appeal.

Signed Date 02/01/2018

Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT
FEE AWARD

No fee award was made in the First-tier Tribunal.

Signed Date 02/01/2018

Deputy Upper Tribunal Judge Alis