Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/11296/2019 ('V')**

THE IMMIGRATION ACTS

Heard at Field House
And via Skype for Business
On 25th March 2021

Decision & Reasons Promulgated
On 8th April 2021

Before

UPPER TRIBUNAL JUDGE KEITH

Between

MILLICENT DELOWENA MILLER
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Ms D Revill, Counsel, instructed by Peer & Co Solicitors
For the respondent: Mr S Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. Both representatives and I attended the hearing via Skype, while the hearing was also open to attend at Field House. The parties did not object to attending via Skype and I was satisfied that the representatives were able to participate in the hearing.

2. This is an appeal by the appellant against the decision of First-tier Tribunal Judge Brewer (the 'FtT'), promulgated on 6th November 2019, by which he dismissed the appellant's appeal against the respondent's refusal on 27th June 2019 of her

application for leave to remain on the basis of right to respect for her private life. She claimed to have entered the UK on 17th December 1998, remained unlawfully but continuously, and applied on 28th November 2018 for leave to remain, on the basis that it was less than 28 days until she had lived continuously in the UK for 20 years. She also referred to family members in the UK; working and not claiming benefits; and the very significant obstacles to integration in her country of origin, Jamaica.

3. The core points taken against the appellant by the respondent were that the appellant did not have a partner, parent or dependent children in the UK; the respondent did not accept her claim to have lived continuously in the UK for 20 years; the respondent did not accept that there were very significant obstacles to her integration in to Jamaica, where she had lived the first 30 years of her life; and any private life was established when she had no legitimate expectation of remaining in the UK. The appellant's family members in the UK were all adults who were not dependent on the appellant.

4. The central thrust of the appellant's appeal to the First-tier Tribunal was that the respondent had failed to consider adequately her continuous presence in the UK.

The FtT's decision

5. The FtT found on the evidence before him that the appellant had lived continuously in the UK for more than 20 years of the date of hearing (§§ 15 and 17). The difficulty as the FtT saw it, was that at the date of her application, the appellant fell short of satisfying paragraph 276ADE(1)(iii) of the Immigration Rules, having arrived on 17th December 1998 and having applied on 28th November 2018 (§16). As a consequence, the respondent's decision to refuse the application was correct, under the Rules. Considering the appellant's appeal outside the Rules, at §24, the FtT noted and took into account section 117B of the Nationality, Immigration and Asylum Act 2002 and the little weight to be attached to private life (albeit not no weight). At §34, the FtT recorded the appellant's submission that because the appellant now met the Rules, the FtT did not have to have regard to sections 117A and B of the 2002 Act, whereas the FtT concluded that as the appellant did not meet the Rules of the time of the application, little weight should be given to her private life. At §35, the FtT referred to the appellant deliberately overstaying in the UK unlawfully, having entered the UK on a 2-day visit visa; working illegally; and accessing NHS services free at the point of delivery. Weighing that against her private life and taking into account Part 5A of the 2002 Act, the FtT found that the respondent's decision was proportionate and dismissed the appellant's appeal.

The grounds of appeal and grant of permission

6. The appellant lodged grounds of appeal, supplemented later by a witness statement from Ms Revill, Counsel before the FtT, as to what submissions she had made to the FtT, the gist of which was that the FtT had misunderstood some of her submissions, which had been inaccurately recorded in the FtT's decision.

7. The appellant accepted that she did not meet the requirements of the Immigration Rules at the date of her application but would have done so had she applied 19 days'

later. The first ground was that the FtT had failed to place sufficient weight on the respondent's policy of granting leave to remain even where somebody had remained unlawfully in the UK. The analysis of the proportionality was limited to §35 which had made no reference to the respondent's policy and had instead assumed that because the Rules were not met, long residence had no part to play in the proportionality assessment.

8. The second error was in the FtT's application of section 117B(5) of the 2002 Act, which referred to little weight applying to private life. The FtT had ignored the Supreme Court decision in Rhuppiah v SSHD [2018] UKSC 58 which confirmed that these provisions were normative guidance and may be overridden in an exceptional case, by particularly strong features of the private life in question. In this case, the fact that the appellant had spent over 20 years in the UK by the time the hearing was such a particularly strong feature, which the FtT had ignored.

9. In her witness statement, Ms Revill added that the submissions to the FtT had been that if the appellant had not completed 20 years continuous residence at the date of the hearing, she would not argue that there were exceptional circumstances. However, had the appellant completed 20 years' continuous residence this would amount to exceptional circumstances. She had not submitted that sections 117A and B did not apply, but was seeking to explain to the FtT, how the long residence and private life provisions of the Immigration Rules interacted with sections 117A and B of the 2002 Act - the two were separate.

10. First-tier Tribunal Judge Holmes granted permission on 1st May 2020. The grant of permission was not limited in its scope.

The hearing before me

11. The representatives agreed in identifying the two issues before me. In doing so Mr Whitwell began by indicating that he accepted Ms Revill's submission that the FtT had misunderstood her submissions in relation to the applicability of the Immigration Rules and section 117 of the 2002 Act and there was no need for Ms Revill to give evidence, whose word Mr Whitwell accepted. I was grateful to the professionalism of both representatives in resolving the point of what submissions had been made to the FtT, without the necessity of having to hear evidence.

12. The appellant had accepted before the FtT that she did not meet the requirements of the Immigration Rules because at the date of the application she did not have the requisite twenty years presence in the UK. That necessarily meant that she sought to rely upon an appeal outside the Immigration Rules and it was not the case that Ms Revill had said there were not exceptional circumstances. Had she done so that would have effectively been a concession that the appeal had no merit, when the core of this appeal related to the assertion that whilst not in compliance with the Immigration Rules, the length of the period of presence, coupled with the fact that at the date of the hearing the appellant would, if she now reapplied, be granted leave to remain, was that very exceptional circumstance which would justify applying greater weight than little weight to her private life under section 117B(5) of the 2002 Act.

The appellant's written submissions

13. Ms Revill relied upon her two skeleton arguments: the first dated 17th November 2019; and the second dated 11th August 2020.

14. In essence there were two grounds. The first was the FtT's failure to apply requisite weight to the period of time spent by the appellant in the UK. Applying the authority of TZ (Pakistan) v SSHD [2018] EWCA Civ 1109, had the appellant applied nineteen days later, her application would have been granted and as she continued to live in the UK at the date of the Hearing (now over 20 years), that should be positively determinative of her article 8 claim. That was the case, notwithstanding that the appellant had lived here unlawfully and had worked without permission, as the Rules acknowledged and provided for the grant of leave to remain for those living in the UK in such circumstances.

15. The FtT had failed to attach any substantive weight to that when considering the proportionality of the appellant's removal. The FtT was obliged to place considerable weight – see Rhuppiah. That case illustrated the fact that it was the length of residence, not the date of the application that was important to the respondent under the twenty-year rule.

16. The second ground was that the FtT had impermissibly regarded himself as being bound to apply section 117B(5) of the 2002 Act, namely the 'little weight' provision and had failed to consider the guidance in Rhuppiah which regarded that provision as 'normative guidance' which could be overridden in exceptional circumstances.

17. In the second set of written submissions and partly in response to the respondent's submissions, on the one hand, the appellant accepted that there was no 'near miss' principle, following Patel & others v SSHD [2013] UKSC 72. On the other hand, the length of residence, albeit unlawful, was relevant to the public interest in the maintenance of immigration control and that was clearly so, bearing in mind that proportionality related to the refusal of leave to remain and consequential removal, and not the alternative scenario of the appellant having to reapply and pay an additional fee.

18. The appellant did not suggest that the FtT was unaware of the fact that the appellant had completed twenty years' residence at the date of the hearing, rather that the FtT had failed to attach appropriate weight to it because of the FtT's misunderstanding that Ms Revill was not seeking to argue 'exceptional circumstances'. (If she were not arguing exceptional circumstances outside the Immigration Rules, that would be tantamount to a concession that the appeal should fail). By analogy to the authority of OA & others (human rights; 'new matter'; s. 120) Nigeria [2019] UKUT 00065 (IAC) and paragraph 276B of the Rules, there was no material distinction between that case relating to lawful residence and the appellant's circumstances. What was common was the requirement of a certain period of residence, met at the date of the hearing and there were no reasons why, on that basis, the appellant's appeal should not have been allowed on human rights grounds. Indeed, the Court of Appeal had observed in ZH (Bangladesh) v SSHD [2009] EWCA Civ 8 that it would defeat the purpose of the predecessor to Rule (276ADE(1)(iii)), which allowed people to regularise their

status, based on the length of unlawful residence, if that unlawful residence itself was held against them. There was no other reason why the application would be refused.

19. The FtT's reasoning that the appellant could simply reapply was not part of the original refusal decision. The respondent had failed to engage with the appellant's argument that in Rhuppiah, the appellant had lived in the UK continuously for 20 years, and her appeal was allowed (albeit on a different basis).

20. The FtT's analysis was also flawed, noting the Upper Tribunal's reported decision in Birch (precarious and mistake; new matters) [2020] UKUT 0086 (IAC). In particular at §24 it had stated:

> *"Whatever might have been the substantive merits of the appellant's case before the expiry of twenty years since her arrival in the United Kingdom, the position now is that she meets the substantive requirements of the Rules entitling her to a grant of leave. For that reason, and that reason only, we consider that in her case it would not be proportionate to remove her from the United Kingdom."*

21. Returning to the second ground, the FtT's self-direction at §24 was only partially correct. Whilst he was right to say that 'little weight' does not mean 'no weight,' the FtT noted that he '*should give little weight to private life*', where §49 of Rhuppiah made clear that in an appropriate case, significantly greater weight might be attached. In this case it was clear that the FtT had failed to consider he had some limited flexibility afforded to him by section 117A(2)(a), see §58 of Rhuppiah.

The respondent's written submissions

22. The respondent reiterated that there was no 'near miss' principle, see: Patel. The appellant had accepted that she did not meet the requirements of Rule 276ADE(iii) due to the temporal requirement being tied to the date of the application. Accordingly, any assessment of proportionality needed to be conducted, taking into account the public interest in the maintenance of effective immigration control. The FtT had been entitled to give 'little' weight pursuant to section 117B(5) of the 2002 Act. The FtT had not omitted a material consideration and was well aware of the accrual of twenty years residence in the UK, as recorded at §34.

23. Whilst the appellant relied upon the authority of OA & others, that case was distinguishable. OA was concerned with continuous lawful residence under paragraph 276B, whereas the FtT in this case was unarguably entitled to take into account the factors of overstaying; illegal working and using NHS services without payment, which were capable of consideration in the proportionality assessment.

24. In relation to the second ground, giving 'little weight' to private life was not contrary to the authority of Rhuppiah. Reading the FtT's decision as a whole, it was clear why the FtT had applied the 'little weight' provision and it was not incumbent on the FtT to provide reasons for not making a contrary finding. In the circumstances, there was no error of law.

The appellant's oral submissions

25. Ms Revill accepted that the FtT was entitled to take into account section 117B but should have considered the weight placed on the appellant achieving over twenty years' residence at the date of the hearing. When I asked her, Ms Revill went as far as to say that absent of any suitability issue, living in the UK continuously for at least twenty years at the date of the hearing, was determinative of the appellant's appeal by reference to human rights. The FtT's analysis at §§34 and 35 of his decision had failed to take this into account. By analogy to the authority of OA, the respondent could not point to the maintenance of effective immigration control as having weight in the proportionality assessment, as reflected in paragraph 276ADE(1)(iii) of the Rules, when, if she were to reapply now, the appellant would be granted leave to remain. The historic unlawfulness of the appellant's residence in the UK could not be a material factor in the proportionality assessment. Whilst it was said that the Birch case could be distinguished (Ms Birch had been the victim of deception and had attempted to regularise her status), Ms Birch's circumstances were arguably weaker because she had applied for leave to remain for a number of different reasons over the years and her appeal was subsequently allowed solely (noting §24 of that decision) because the length of time she had lived in the UK would make refusal of leave to remain disproportionate. In relation to the second ground, the 'little weight' provisions could apply in principle but the FtT had failed to consider flexibility and his discretion to apply greater weight in exceptional circumstances.

The respondent's oral submissions

26. Mr Whitwell submitted that the FtT's decision could not fairly be framed solely as a dismissal of the appeal on the basis that the appellant was nineteen days' short of twenty years. The rationale for the FtT's dismissal of the appeal was at §§34 and 35 and distilled down to an analysis of the public interest features in the proportionality assessment. Mr Whitwell accepted that if I were to conclude that an acquisition of twenty years' continuous residence, at the date of the FtT's hearing, was determinative of the proportionality assessment, then the FtT's decision was clearly wrong, but it was not so determinative. Paragraph 276ADE(1)(iii) of the Rules imposed a temporal requirement which tied into the date of the application, as opposed to the hearing, in contrast to paragraph 276B, and the tie back to the date of the application would otherwise be meaningless. The FtT had considered that the appellant had met the requirements of the length of residence at the hearing, but, crucially, was entitled nevertheless to take into account three countervailing factors: the appellant's almost immediate and deliberate overstaying, after being granted a two-day visit visa; her working illegally; and accessing NHS services free, to which she was not entitled. All were permissible factors to take into account in the proportionality assessment.

27. I should treat the cases of OA and Birch as fact sensitive. In the case of Birch, she initially had leave to enter and had been genuinely deceived. Judge Blundell had said in Rhuppiah that he was required to apply section 117B of the 2002 Act, but the FtT in this case recognised that the 'little weight' provision was not a fixed quality.

The Court in §49 of Rhuppiah had spoken about the small degree of flexibility and that was exactly what, when taken in context, the FtT had applied.

The appellant's oral response

28. In brief response, Ms Revill added that the key point here was that if the appellant applied now, she would be granted leave to remain. It was correct to say that the FtT had not refused the application merely because the appellant was 19 days short of the 20 years at the date of the application, but what the FtT had not done was to engage with the flexibility of the 'little weight' provision, at §§34 and 35.

Discussion and conclusions

29. I conclude that the FtT did not err in law. First, I am satisfied that the FtT correctly reminded himself at §§34 and 35 that his assessment of proportionality required '*balancing the rights protected by Article 8 against the public interest*' (§34) and that the approach was now set out in sections 117A to D of the 2002 Act. Whilst I accept that the FtT misunderstood Ms Revill to have submitted that the appellant now met the Rules and so the FtT did not need to consider those sections, that was not material, as the FtT did then go on to consider those sections.

30. Dealing with the grounds in reverse order, I accept the force of Mr Whitwell's submission that when read in context, the FtT's reasoning at §§34 to 35 was a full and appropriate proportionality assessment, balancing the public interest in the maintenance of effective immigration control versus the appellant's article 8 rights. The FtT noted (and was entitled to note) the period of time spent by the appellant in the UK and while applying the 'little weight' provision' of section 117B(5), unarguably then went beyond this to consider the wider proportionality assessment, and so recognised the flexibility of how section 117B(5) ought to be applied. That was the reason why, having referred to that provision at the end of §34, the FtT then immediately went on to consider not just the fact of the appellant's overstaying, but her deliberate intention in doing so; her working illegally; and having accessed free NHS services. The FtT weighed these factors against the appellant's private life (§35). In summary, the FtT did not simply reason that by virtue of falling short of the required period of presence, little weight was given to the appellant's private life, and therefore her appeal failed; there was a fuller analysis, in which the FtT considered the length of presence in the UK and the three countervailing factors.

31. Dealing finally with the first ground, I do not accept Ms Revill's submission that absent any suitability issues, that a fact that somebody has lived in the UK for at least 20 years by the time of a hearing is determinative of a human rights appeal, by analogy to the long residence provisions under OA or an application of TZ (Pakistan). I reject this for the following reasons. First, paragraph 276B does not import a similar requirement of length of continuous residence at the date of the application itself and indeed the respondent permits early applications, as reflected in its policy on Long Residence. This contrasts with paragraph 276ADE(1)(iii), which ties back specifically to the date of the application. I accept Mr Whitwell's submission that to treat as determinative the period of presence at the hearing, by analogy to OA would otherwise render the link to the date of the application

meaningless. Second, it ignores the function of section 117B(5), which, as Rhuppiah makes clear, is to provide 'normative guidance,' but which nevertheless permits cases with particularly strong features to succeed (§49). Were Ms Revill's submission to succeed, the reverse would apply, with the fact of continuous presence imposing the very straight-jacket that the Supreme Court had counselled against. Instead, what the FtT was entitled to do (and sections 117A and B permit) is to weigh up all of the factors in the round in the proportionality assessment, including when someone has lived in the UK for at least 20 years. Such an assessment may include consideration, as in the appellant's case, of access to NHS services free at the point of delivery, when there was no entitlement. There may be a number of other factors, including financial independence, in section 117B which remain relevant. In the circumstances of this case, the FtT was unarguably entitled to take into account the countervailing circumstances, in refusing the appellant's appeal.

32. As an aside (and not relevant to the issue of whether there was an error of law), it remains unclear why the appellant's legal advisors regarded it as appropriate to make the application on the appellant's behalf, before the appellant had lived in the UK for at least 20 years, such a short period before the appellant reached that anniversary and did not instead wait three weeks. It may be that those subsequently reviewing the legal advice conclude that the advisors' actions were professionally negligent, with the result that it is not appropriate for the appellant (as opposed to her advisor's insurers) to bear the costs of a renewed application, but I am conscious that I am not privy to the legally privileged advice given to the appellant and that it is a matter for her to take up with them and any relevant professional regulatory body.

Conclusion

33. I conclude that there are no material errors of law in the FtT's decision. Therefore, the appellant's challenge fails, and the FtT's decision shall stand.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law.

The decision of the First-tier Tribunal stands.

No anonymity direction is made.

Signed *J Keith*

Upper Tribunal Judge Keith Date: 29th March 2021