Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/42855/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21st December 2015	**On 18th January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MISS CYNTHIA KONADU ANIM
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms E Savage, Home Office Presenting Officer
For the Respondent: Mr D Adams, instructed by AJ Solicitors

DECISION AND REASONS

1. The Appellant in this appeal is the Secretary of State. However, I shall retain the naming convention as in the First-tier Tribunal where the Appellant was Miss Anim.

2. Miss Anim is a citizen of Ghana, born on 19th November 1978. The Appellant first entered the United Kingdom on 13th September 2003, and was granted entry clearance as a student until 31st October 2007. She was subsequently granted leave to remain as a work permit holder from

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October 2007 until 5th October 2010. The Appellant was then granted leave to remain as a Tier 2 Skilled Worker from July 2011 until July 2014.

3. The Appellant applied to the Respondent on 2nd July 2014 for indefinite leave to remain on the basis of long residency. The Respondent refused that application for reasons set out in a letter dated 3rd October 2014. The Respondent also issued a decision of 3rd October 2014, served on 13th October 2014 refusing to vary the Appellant's leave to enter or remain and deciding to remove her from the UK.

4. The Respondent in the refusal letter noted that the Appellant claimed to have had leave to remain for a continuous period of ten years. However the Respondent noted that the Appellant remained in the UK without valid leave from 6th October 2010 until 5th July 2011, a period of 272 days. The Respondent was not willing to exercise discretion regarding the application and the application was refused under paragraph 276D with reference to 276B of HC395 of the Immigration Rules. The Respondent also considered the Appellant's private and family life and was not satisfied that the Appellant had lived in the UK continuously for twenty years. The Respondent also was of the view that the Appellant would have ties in Ghana, having lived there for the majority of her life. It was not accepted therefore that there would be very significant obstacles to her return to Ghana.

5. The Appellant appealed on the basis that although it is correct that she had overstayed the Respondent should have considered the circumstances that led her to doing so and discretion should have been exercised in her favour. The Appellant is a qualified pharmacist and has been working in the UK. She has also studied in the UK. It was the Appellant's contention therefore that she had established a right to private life in the UK and any interference was in breach of Article 8.

6. The appeal came before the First-tier Tribunal on 6th May 2015. In a Decision and Reasons promulgated on 20th May 2015, First-tier Tribunal Judge Wyman dismissed the appeal under the Immigration Rules but allowed the appeal under Article 8.

7. The Secretary of State appealed to the Upper Tribunal. In a decision granting permission dated 29th September 2015, it was stated that it was arguable that the First-tier Tribunal failed to direct itself to Section 117B of the 2002 Act and as a consequence failed to attach little weight to the Appellant's private life in the UK, all of which was built up whilst her leave was precarious.

Ground 2

8. It was Ms Savage's contention in Ground 2 that the judge failed to properly direct himself in relation to the consideration of Article 8. Although the Respondent noted that the judge may have been aware that the Appellant had only limited leave to remain in the UK throughout her period of stay, it was not clear that the judge had given little weight to the Appellant's

private life as was required under Section 117B(v) of the Nationality, Immigration and Asylum Act 2002.

9. Weight was attached by the judge to the fact that the Appellant had no criminal record and had not taken benefits. In attaching that weight Ms Savage submitted that the judge had failed to follow the Upper Tribunal in the case of **Nasim and Others (Article 8) Pakistan [2014] UKUT 25 (IAC) 17th January 2014**, in particular paragraph 26. **Nasim** confirms that a person's human rights are not enhanced by not committing criminal offences or not relying on public funds. The only significance of such matters is to preclude the Secretary of State from pointing to any public interest justifying removal over and above the basic importance of maintaining a firm and coherent system of immigration control. Ms Savage submitted that the judge had erred in attaching weight to the Appellant's lack of convictions.

10. Ms Savage also referred the Tribunal to the case of **Forman (ss.117A-C: considerations) [2015] UKUT 00412**, in particular that the public interest in firm immigration control is not diluted by the consideration that a person pursuing a claim under Article 8 ECHR has at no time been a financial burden on the state or is self-sufficient or is likely to remain so indefinitely. The significance of these factors is that where they are not present the public interest is fortified. **AM & Others (s.117B) Malawi [2015] UKUT 260** confirms that an Appellant can obtain no positive right to a grant of leave to remain from either Section 117B(2) or (3) whatever the degree of his fluency in English or the strength of his financial resources.

11. At [62] of the Decision and Reasons the judge referred to the Appellant's 'very good immigration history' without reference to Section 117B(v) which requires that little weight be attached to precarious immigration status. **Dube (ss.117A-117D) [2015] UKUT 00090** confirms that judges are required statutorily to take into account a number of considerations and are duty bound to have regard to these specified considerations.

12. It was Mr Adams' submissions that the judge had implicitly considered Section 117B. Mr Adams took me through the decision in some detail. Whilst I note that the Upper Tribunal in **Dube** confirmed that it is not an error of law to fail to specifically set out Sections 117A-117D considerations if the judge has applied the relevant test, i.e. that what matters is substance not form, I am satisfied that in substance the judge failed to have regard to the matters set out in Section 117B.

13. I am satisfied that the judge erred in attaching weight at [57] to the Appellant's lack of convictions and to the fact that she had not claimed any public funds and had paid her university fees. Even if I am wrong in this, crucially the judge whilst accepting the Appellant's reasons for her period of unlawful leave, which under Section 117B(iv)(a) should have little weight attached, failed to attach little weight to all of the Appellant's leave which must be considered as precarious: **AM & Others (s.117B) Malawi**

[2015] UKUT 260, applied. The fact that the judge at paragraph 62 referred to the Appellant's "very good previous immigration history" indicates that rather than attaching little weight to the Appellant's leave, the judge placed positive weight on her immigration history. I am satisfied that the judge failed to correctly direct himself in relation to the Appellant's precarious leave. I do not accept that it can be inferred that he gave little weight to the Appellant's private life, particularly as the judge refers to the Appellant's "very good previous immigration history". The judge also at paragraph 65 noted that the Home Office had granted further leave to the Appellant despite the fact that she had overstayed her leave. I am not satisfied that the judge properly directed himself.

14. Therefore I am satisfied that the First-tier Tribunal erred materially in the consideration of Article 8.

<u>Ground 1</u>:

15. As I identified an error in respect of Ground 2 that is sufficient to set aside the decision. In relation to Ground 1, the judge at [48] stated that there were arguably good grounds for granting leave to remain outside the Immigration Rules, due to the fact that the Appellant 'has lived legally in the United Kingdom for over ten years, that she has family here and is a qualified pharmacist'. The judge also directed himself at [47] that 'only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to on to consider whether there are compelling circumstances not sufficiently recognised under them'.

16. The Court of Appeal in **<u>SS (Congo) and Others</u> [2015] EWCA Civ 387** identified that the proper approach should always be to identify the substantive content of the relevant Immigration Rules. Although the judge was of the view that there were compelling circumstances not sufficiently recognised under the Immigration Rules, I am not satisfied that he would inevitably reached that conclusion had he considered the Respondent's conclusion that the Appellant did not meet the requirements of paragraph 276ADE of the Immigration Rules.

<u>Error of law</u>

17. I am satisfied therefore that the First-tier Tribunal made material errors of law and I set aside that decision in relation to Article 8. The judge's findings in relation to paragraphs 276B and 276D are not disputed and can stand. I gave my decision at the hearing.

<u>Remaking</u>

18. Both representatives indicated that there was sufficient material before the Tribunal to re-make the decision. Although Miss Anim was in court Mr Adams indicated that he did not require further evidence from her. I confirm that I had before me the bundle of documents including Miss Anim's statement dated 30th April 2015. Miss Anim also confirmed in court that nothing had changed substantively since that date.

19. In reaching my decision, it is accepted that the Appellant cannot qualify under the Immigration Rules. I have considered that the Respondent considered that the Appellant did not meet the requirements of paragraph 276ADE.

20. I have considered the substantive content of the relevant Immigration Rules. The Appellant did not meet the requirements of paragraph 276B as she did not have at least ten years' lawful residence. This was accepted by the Appellant. The Respondent in the refusal letter also addresses 276ADE.

21. In terms of 276ADE the Respondent considered that the Appellant was at the date of decision aged 34 years and 11 months and had entered the United Kingdom as a student on 13th September 2013. With that in mind the Respondent considered that the Appellant has not lived continuously in the United Kingdom for at least twenty years and could not therefore meet the requirements of paragraph 276ADE(iii).

22. The Respondent also considered that the Appellant is not under the age of 18 and therefore could not meet paragraph 276ADE(iv). In addition the Appellant was not under the age of 25 and had not spent at least half of her life residing continuously in the UK (paragraph 276ADE(v)).

23. In relation to paragraph 276ADE(vi) the Respondent noted that whilst the Appellant has not lived continuously in Ghana for eleven years and one month, it was considered that the Appellant resided there for the majority of her life and it was not accepted that there were very significant obstacles to her return to Ghana

24. The Respondent therefore concluded that the Appellant had not provided any evidence which might justify her allowing her to remain in the UK exceptionally and it was not considered that there were sufficiently compelling or compassionate circumstances to justify allowing her to remain outside the Immigration Rules.

25. In appealing against this decision the Appellant concentrated on the issue of her period when she had no leave in the UK. She stated that the Respondent's consideration was very subjective and that the circumstances of her overstaying should have been considered and discretion exercised. The Appellant also considered that the Respondent failed to take into account that she was living in the UK for a considerably long time and also qualified as a pharmacist.

26. It is clear that the Respondent considered all the circumstances including the circumstances which caused the Appellant to overstay in the UK. However the Respondent was not satisfied that the Appellant had produced any evidence which might demonstrate that she could satisfy the requirements of paragraph 276ADE in relation to private life (it had not been argued that the Appellant qualified under Appendix FM and I do not consider such in this appeal).

27. The Appellant in her witness statement dated 30th April 2015 discusses her study in the UK and difficulties in her employment. In particular she details difficulties with Boots, her pre-registration employer as a pharmacist. The Appellant then goes on to state how she found her employment with her current employer. The Appellant details that she was diagnosed with rheumatoid arthritis during the second year of her pharmacy degree and discusses how this affected her life and her requirement to attend appointments. However despite this she confirmed that she was able to persevere with her education.

28. The Appellant confirms that through hard work she has "settled down pretty well in this country". She refers to an established network of very strong ties and that she now considers this country as her home. The Appellant also refers to "a lot of family members in the UK". However the Appellant does not adequately address the Respondent's conclusion that there are no "very significant obstacles to the Appellant re-integrating in her home country of Ghana".

29. The Appellant is clearly very well-educated, having obtained post graduate qualifications in pharmacy. She also notes at D14 of her application that she has cultural ties to Ghana. I am not satisfied given that the Appellant has spent the majority of her life in Ghana that she has shown that there are very significant obstacles to her re-integration there.

30. I am satisfied that the Appellant has failed to demonstrate that she meets the requirements of paragraph 276ADE. For the reasons set out above, I am not satisfied that there is a reasonably arguable case under Article 8 which has not already been sufficiently dealt with under the Rules. **SS (Congo)** (above) applied.

31. Further and in the alternative, if I am wrong in relation to this, I have considered Article 8 outside of the Rules. In so doing I have considered the five stage test in **Razgar v SSHD [2004] UKHL 27**. Although the Appellant referred to family I am not satisfied that she has demonstrated that she has family life in the UK.

32. However it is not disputed that the Appellant has been in the UK for a number of years. I am therefore satisfied that she has established private life in the UK and that the Respondent's decision may interfere with that private life. Given the low threshold I am satisfied that that interference may reach the threshold of engaging Article 8. As the Appellant does not meet the requirements of the Immigration Rules I am satisfied that the refusal is in accordance with the law and for the legitimate aim of the maintenance of effective immigration control. I have therefore gone on to consider whether that interference is proportionate to that legitimate aim.

33. In considering the proportionality balance I have considered, as I must, Section 117B of the 2002 Act. Section 117A of the 2002 Act confirms that in considering the public interest question the court or Tribunal must in particular have regard in all cases to the considerations listed in Section 117B. Section 117A(iii) confirms that "the public interest question" means

a question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

34. I have reminded myself that Section 117B(i) confirms that the maintenance of effective immigration controls is in the public interest. It is also in the public interest that an individual seeking to remain in the UK can speak English. I am satisfied that the public interest is not infringed by the Appellant in this regard as it is clear from her qualifications and employment that she does speak English. In relation to Section 117B(iii) it is also in the public interest that persons seeking to remain are financially independent. Again it is not suggested that the public interest is infringed by the Appellant in this regard given her employment. I am not satisfied that it is.

35. I then consider Section 117B(iv) that little weight should be given to a private life that is established at a time when a person is in the UK unlawfully. It was not disputed that the Appellant was in the UK unlawfully for a relatively short period of time during her time in the UK.

36. Section 117B(v) requires me to attach little weight to a private life established by a person at a time when the person's immigration status is precarious. As noted above, **AM & Others (s.117B) Malawi [2015] UKUT 260** confirms that a person's immigration status is "precarious" if their continued presence in the UK will be dependent upon their obtaining a further grant of leave. I am satisfied that the Appellant's status has been precarious for all of her time in the UK (bar the time when it was unlawful). I therefore must attach little weight to her private life.

37. In considering the public interest I have also considered that the Appellant cannot succeed under the Immigration Rules and that she has not shown that there are very significant obstacles to her re-integrating into Ghana. As noted above she has substantial benefits in terms of her education and employment in the UK which will assist with that integration.

38. In the Appellant's favour I have considered all that is before me in relation to the strength of her private life and her difficulties in securing employment, notwithstanding that I must attach little weight to that private life.

39. I am satisfied that the Appellant's appeal under Article 8 cannot succeed.

Conclusion

40. The decision of the First-tier Tribunal erred in law and is set aside. I re-make that decision dismissing the Appellant's appeal.

Notice of Decision

The appeal is dismissed on human rights grounds (Article 8).

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Hutchinson

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed Date

Deputy Upper Tribunal Judge Hutchinson