Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/43948/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 10 July 2014	**On 11 July 2014**

Before

Deputy Upper Tribunal Judge Pickup

Between

Secretary of State for the Home Department
[No anonymity direction made]

Appellant

and

Charles Kwake Antwi

Claimant

Representation:

For the claimant: Mr M Sowerby
For the appellant: Mr J Wilding, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The claimant, Charles Kwake Antwi, date of birth 20.6.60, is a citizen of Ghana.

2. This is the appeal of the Secretary of State against the determination of First-tier Tribunal Judge Adio, who allowed the claimant's appeal against the decision of the respondent to refuse him entry clearance to the United Kingdom as ZZ. The Judge heard the appeal on 26.3.14.

3. First-tier Tribunal Judge Murray granted permission to appeal on 20.5.14.

4. Thus the matter came before me on 10.7.14 as an appeal in the Upper Tribunal.

Error of Law

5. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Adio should be set aside.

6. Judge Adio found the claimant's evidence and factual account not credible, particularly in relation to his claim that he would be made king or killed on refusal. Thus the non-medical claim under article 3 was rejected. The medical claim under article 3 was found not to reach the high threshold necessary. The judge found that there is treatment available in Ghana and the medical evidence demonstrates that whilst his cancer condition is serious and the prognosis poor, there is no indication that his life expectancy is dropping.

7. There has been no cross-appeal against the First-tier Tribunal's findings and decision in relation to article 3 and they must therefore stand.

8. Judge Adio set out the claimant's appalling immigration history between §2 and §5 of the determination and it is clear from §38 that this was taken into account in the article 8 assessment. However, Judge Adio went on to find, based exclusively on the claimant's health and medical condition, that his removal would breach the claimant's private life rights under article 8 ECHR.

9. The grounds of application for permission to appeal complain that the judge did not apply the Immigration Rules and in particular paragraph 276ADE, or follow the guidance of Gulshan [2013] UKUT 00640 (IAC) in identifying any compelling circumstances for considering the claim outside the Immigration Rules and did not show that there would be any unjustifiably harsh outcome if the appeal failed. The grounds also state that the claimant's appalling immigration history had not been properly considered and the only factor in his favour was his health and health care services in Ghana. It is submitted that article 8 cannot be met.

10. In granting permission to appeal, Judge Murray stated, "It is clear from the determination that the judge was aware of the claimant's appalling immigration history and was aware of the case of N (2005) UKHL and that the claimant has not paid for the medical treatment he has received in the UK. He considers the claim under Article 8 ECHR at paragraph 35 onwards giving no reason as to why he finds there is a good arguable case for him to do so. He has not followed the relevant country guidance case law. There is an arguable error of law in the judge's determination."

11. When Judge Adio commenced from §35 of the determination to consider the claimant's article 8 claim, which comprises private life only, no reference was made to the Immigration Rules and paragraph 276ADE, which sets out the Secretary of State's response to article 8 private life claims.

12. The refusal decision had addressed private life under 276ADE, noting that the claimant had not lived in the UK continuously for over 20 years, as required under 276ADE(iii) and considered that he retained linguistic, social and cultural ties to his home country where his wife and seven children remain. He arrived in the UK as an adult and has spent the majority of his life in Ghana. There was no compelling evidence that he would have difficulty in returning to Ghana and adapting to life in that country. The claimant's presence in the UK is not conducive to the public good; he availed himself of NHS treatment to which he was not entitled and for which he has not paid.

13. Judge Adio completely ignored and failed to deal with the claimant's private life claim under paragraph 276ADE. It may have been arguable that the claimant's medical condition, state of health and treatment regime were compelling circumstances not sufficiently recognised in the Immigration Rules. However, there was no such consideration. For this reason alone the decision of the First-tier Tribunal was in error and cannot stand.

14. It is clear that in proceeding to consider the claimant's article 8 rights outside the Immigration Rules the First-tier Tribunal judge also failed to apply the principles enunciated in MF Nigeria [2013] EWCA Civ 1192 in the Court of Appeal and Gulshan in the Upper Tribunal, to the effect that the Immigration Rules are to be regarded as a complete code and that an article 8 assessment should only be carried out where there are compelling circumstances not recognised by the Rules and which would, exceptionally, render the decision of the Secretary of State unjustifiably harsh, referred to in the grounds as exceptional circumstances as defined in Nagre [2013] EWHC 720 Admin.

15. In Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 00640 (IAC) the Upper Tribunal set out, inter alia, that on the current state of the authorities:

> (b) after applying the requirements of the Rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them: R (on the application of) Nagre v Secretary of State for the Home Department [2013] EWHC 720 (Admin);
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> (c) the term "insurmountable obstacles" in provisions such as Section EX.1 are not obstacles which are impossible to surmount: MF (Article 8 – new rules) Nigeria [2012] UKUT 00393 (IAC); Izuazu (Article 8 – new rules) [2013] UKUT 00045 (IAC); they concern the practical possibilities of relocation. In the absence of such insurmountable obstacles, it is necessary to show other non-standard and particular features demonstrating that removal will be unjustifiably harsh: Nagre.

16. The Tribunal explained that the Secretary of State addressed the Article 8 family aspects of the respondent's position through the Rules, in particular EX1, and the private life aspects through paragraph 276ADE. The judge should have done likewise, also paying attention to the Guidance. Only if there were arguably good grounds for granting leave to remain outside the rules was it necessary for him for

Article 8 purposes to go on to consider whether there were compelling circumstances not sufficiently recognised under the Rules.

17. More recently, in Shahzad (Art 8: legitimate aim) [2014] UKUT 00085 (IAC), the Upper Tribunal held:

> (i)Failure on the part of the Secretary of State to identify in her decision any legitimate aim under Article 8(2) of the ECHR does not prevent a court or tribunal from seeking to do so on the basis of the materials before it.
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> (ii) "Maintenance of effective immigration control" whilst not as such a legitimate aim under Article 8(2) of the ECHR can normally be assumed to be either an aspect of "prevention of disorder or crime" or an aspect of "economic well-being of the country" or both.
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> (iii) "[P]revention of disorder or crime" is normally a legitimate aim both in expulsion cases where there has been criminal conduct on the part of the claimant and in expulsion cases where there have only been breaches of immigration law.
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> (iv) MF (Nigeria) [2013] EWCA Civ 1192 held that the new immigration rules regarding deportation of a foreign criminal are a complete code. This was because of the express requirement in them at paragraph 398 to have regard to exceptional circumstances and other factors.
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> (v) It follows from this that any other rule which has a similar provision will also constitute a complete code;
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> (vi) Where an area of the rules does not have such an express mechanism, the approach in R (Nagre) v Secretary of State for the Home Department [2013] EWHC 720 (Admin) ([29]-[31] in particular) and Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC) should be followed: i.e. after applying the requirements of the rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them.

18. There is an express mechanism within paragraph 276ADE to consider exceptional circumstances where the applicant does not meet the long residence requirement for leave to remain on the basis of private life. The consideration of ties to the home country, including family, social and cultural, is in effect a proportionality or reasonableness assessment. In those circumstances and with that express mechanism, which is to be regarded as a complete code, there may have been no justification for the First-tier Tribunal Judge to go on to consider private life under article 8 outside the Rules.

19. Even if paragraph 276ADE was not a complete code for assessment of the claimant's private life, following Shahzad private life outside the Rules under article 8 ECHR, should not be unless there are arguably good grounds for doing so for considering that there are compelling circumstances which would justify, exceptionally, allowing

the application under article 8 on the basis that the decision produced a result that was unjustifiably harsh.

20. On the facts of this case and in particular the claimant's medical condition, state of health and treatment regime, I find there are arguably good grounds for going on to consider whether there are compelling circumstances to justify consideration of article 8 private life outside the Immigration Rules. 276ADE recognises private life considerations in relation to family, social and cultural ties to the home country. It does not cater for serious health conditions or circumstances where a patient is undergoing a course of treatment, even if the patient is not entitled to that treatment. Obviously, those are factors of great concern to the claimant. However, for reasons set out below, I am not satisfied that those factors were sufficiently compelling to justify, exceptionally, granting leave to remain on the basis of private life under article 8 ECHR outside the Rules.

21. I find that undue weight was placed on the claimant's health issues in the article 8 assessment and that highly relevant factors were ignored, in particular that the claimant was unable to meet any of the Immigration Rules for leave to remain, including paragraph 276ADE, and the fact that he was not entitled to and had not paid for the NHS treatment he had obtained in the UK.

22. Having found that the claimant did not meet the threshold for article 3, the judge allowed the appeal under article 8 ECHR, but did so relying exclusively on the same medical evidence, despite that evidence not reaching the article 3 threshold. In essence, the judge was relying on the same article 3 claim evidence but applying a lower threshold under article 8. For the reasons stated herein that was an error of law.

23. In MM (Zimbabwe) v SSHD [2012] EWCA Civ 279 the Court of Appeal suggested that it makes no sense to refuse to recognise a medical care obligation in relation to article 3, but to acknowledge it in relation to article 8. At §23 of the decision Lord Justice Moses stated that the only cases he could 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. The example was given, "Supposing…the claimant had established firm family ties in this country, then the availability of continuing medical treatment here coupled with his dependence on the family here for support, together establish 'private life' under article 8." In MM family support in the UK was a key factor in keeping well a person suffering from schizophrenia. That is not the situation of this claimant.

24. However, MM was further considered by the Upper Tribunal in Akhalu (health claim: ECHR Article 8) [2013] UKUT 00400 (IAC), which held:

> (1) MM (Zimbabwe) v Secretary of State for the Home Department [2012] EWCA Civ 279 does not establish that a claimant is disqualified from accessing the protection of article 8 where an aspect of her claim is a difficulty or inability to access health care in her country of nationality unless, possibly, her private or family life has a bearing upon

> her prognosis. The correct approach is not to leave out of account what is, by any view, a material consideration of central importance to the individual concerned but to recognise that the countervailing public interest in removal will outweigh the consequences for the health of the claimant because of a disparity of health care facilities in all but a very few rare cases.
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> (2) The consequences of removal for the health of a claimant who would not be able to access equivalent health care in their country of nationality as was available in this country are plainly relevant to the question of proportionality. But, when weighed against the public interest in ensuring that the limited resources of this country's health service are used to the best effect for the benefit of those for whom they are intended, those consequences do not weigh heavily in the claimant's favour but speak cogently in support of the public interests in removal.

25. Thus medical care issues can be relevant to an article 8 ECHR private life assessment, if that stage is reached. However, it must be recognised in such an assessment that the countervailing public interest in removal, which with the claimant's appalling immigration history is particularly significant, will outweigh the consequences for the health of the claimant because of a disparity of health care facilities in all but a few rare cases.

26. In submissions, Mr Wilding also referred me to GS & EO (Article 3 – health issues) India [2012] UKUT 00397 (IAC). The claimants in that case had chronic irreversible advanced kidney disease, the cost of which they could not meet in their home countries of India and Ghana. The panel found that GS would die without dialysis treatment within 1-2 weeks. He could access that treatment in India, but could not afford to do so. His condition did not reach the article 3 threshold and his appeal was dismissed. Similarly, it was accepted that EO would die within 2-3 weeks and could not afford treatment in Ghana. His condition was not exceptional and did not reach the article 3 threshold. Both appeals were dismissed.

27. At §85(8) the Upper Tribunal confirmed, obiter, that in principle article 8 can be relied on in respect of health issues, on the basis of an interference with private life as an aspect of that individual's physical and moral integrity. Unlike article 3, however, article 8 is not absolute and the legitimate aim of the economic well-being of the country would be relevant in determining whether a breach of article 8 could be established given any financial implications that continued treatment in the UK would entail. In GS & EO, the Upper Tribunal panel explained that in practical terms in a case where the claimant has no right to remain it will be a "very rare case" indeed where such a claim could succeed.

28. Mr Sowerby did not argue that the judge had failed to properly consider all the relevant evidence. I find that there was nothing within the evidence summarised within the determination in relation to the claimant's medical condition, health and treatment regime that on the facts of this case could reasonably be considered to outweigh the public interest in removal.

29. The article 8 assessment of the First-tier Tribunal does not appear to take any account of the public interest in the removal of the claimant. At §37 the judge found that if removed it would affect his quality of life, that he would not be able to get the exact treatment he is getting at the moment, and that stabilising his condition is very important to him to be able to enjoy a qualitative life. Whilst those may be relevant factors, they are insufficient in a private life article 8 ECHR consideration to outweigh the very significant public interest in this claimant's removal.

30. In the circumstances, and for the reasons stated, I find that there was an error of law in the making of the decision of the First-tier Tribunal such that it should be set aside and remade.

31. In submissions as to the remaking of the decision, Mr Sowerby referred me to some further medical evidence, comprising 5 medical letters, three of which are appointment letters, which I have taken into consideration.

32. Mr Sowerby explained that the claimant had commenced a new course of chemotherapy in January 2014 and completed the last session some two weeks earlier. As confirmed by the outpatient letter he had a body scan on 20.6.14 and is awaiting the results. Mr Sowerby sought an adjournment to await the outcome. I refused that application. It is clear that the claimant's condition is serious, although Mr Sowerby was unable to say if it was terminal. However, I note that the letter from Dr Bhatnagar dated 1.7.14 made the assumption that the chemotherapy is palliative treatment but noted that he had responded to the chemotherapy. The doctor thought that the claimant would not survive long if returned to Ghana as there are no medical facilities in his country. That appears inconsistent with the other evidence put before the First-tier Tribunal. The same doctor's evidence was that the prognosis was poor but that his quality of life was not so bad. In the letter of 25.4.14 Dr Plowman stated that the claimant was clinically much improved by the chemotherapy. The First-tier Tribunal Judge found that there was similar chemotherapy treatment available to the claimant in Ghana and there was no evidence that life expectancy was dropping. The claimant is always going to have future and further treatment and reports. There remains no evidence to suggest that the claimant's condition has worsened and Mr Sowerby did not make any article 3 submissions. In the circumstances, there seemed little if any purpose in postponing the decision further.

33. Taking account of the case law set out above, and for the reasons stated, I find that the claimant's circumstances when considered in the round, as a whole, are not so compelling and insufficiently recognised in the Immigration Rules as to require or justify consideration under article 8 outside the Rules. Neither do I find that the decision is unjustifiably harsh. I have to bear in mind that the claimant still does not meet the article 3 threshold, as conceded by Mr Sowerby. His health condition is certainly serious and he may not be able to afford treatment in Ghana resulting in serious consequences for him, but I am satisfied that equivalent treatment remains available, as was the First-tier Tribunal.

34. However, even if the stage of an article 8 private life proportionality balancing exercise is reached following the Razgar five steps, the Tribunal has to take account of not only the public interest in removal but the cost to the public by the claimant's access of treatment to which he is not entitled. As cited in Akhula, the UK cannot afford to be the world's hospital.

35. It is right, if this stage is reached, which I do not accept it is, to have regard to every aspect of the claimant's private life in the UK and the consequences for removal, as highlighted in the evidence and the determination of the First-tier Tribunal. However, I have to bear in mind in striking the balance of proportionality that a comparison of levels of medical treatment is not something that will itself have any real impact on the outcome of the exercise, even if it is an important aspect of the claimant's case.

36. I also have to take into account that he has not been able to demonstrate that he meets any of the Immigration Rules for leave to remain; that he came to the UK unlawfully and has no right to remain; that paragraph 276ADE is the Secretary of State's response and consideration of private life claims under article 8; and the claimants immigration history. All previous claims including Judicial Review have been found to be without merit. In balancing on the one hand the claimant's rights to respect for his private life and on the other the legitimate aim of protecting the economic well-being of the UK by applying immigration control and the very significant public interest in removing the claimant, the balance comes down clearly in favour of removal and a finding that the decision is not disproportionate. This is not one of what could only be a very small number of rare cases where that public interest is outweighed by the claimant's medical/health factors.

Conclusions:

37. For the reasons set out above, I find that the making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside, remade and dismissed, for the reasons given.

I set aside the decision.

I re-make the decision in the appeal by dismissing it on all grounds.

Signed: Date: 10 July 2014

Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The appeal has been dismissed.

Signed:  Date: 10 July 2014

Deputy Upper Tribunal Judge Pickup