



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: UI-2022-001912
HU/04259/2021

THE IMMIGRATION ACTS

**Heard at Field House
on 5 December 2022**

**Decision & Reasons Promulgated
on 16 February 2023**

Before

**UPPER TRIBUNAL JUDGE NORTON-TAYLOR
DEPUTY UPPER TRIBUNAL JUDGE SYMES**

Between

**HABIBA SALIFU (AKA SALA ADAM)
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Ms T Srin dran, Counsel, instructed by JT Solicitors

For the respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant appeals against the decision of First-tier Tribunal Judge Dyer (“the judge”), promulgated on 15 February 2022 following a hearing on 31 January 2022. By that decision, the judge dismissed the appellant’s appeal against the respondent’s decision, dated 11 August 2021, refusing her human rights claim.
2. The appellant is a citizen of Ghana, born in 1962. She arrived in the United Kingdom as a visitor on 20 November 2000 and then overstayed. In October 2012, she unsuccessfully applied for leave to remain (we assume on the basis of Article 8 ECHR - “Article 8”). On 7 July 2020, she again applied for leave to remain, relying on her lengthy residence in the United Kingdom and Article 8. The refusal of that application led to the appeal before the judge.

The decision of the First-tier Tribunal

3. Before the judge, the appellant was represented by Counsel (not Ms Srin dran), whilst the respondent had declined to provide a Presenting Officer.
4. The appellant had allegedly used an alias, Sala Adam, over the course of time. The judge was satisfied that this had in fact been demonstrated: [22]-[23]. This established a link between the appellant and documentary evidence which had been provided in support of her appeal.
5. That documentary evidence included GP patient records, running to approximately 180 pages. It is recorded that Counsel emphasised the significance of the GP patient records, submitting that they demonstrated the claimed continuous residence in the United Kingdom from November 2000 until the date of hearing.
6. It is apparent that the judge went through the records with care: [26]. He discovered an entry, dated 9 March 2017, which stated that the patient (under the name Sala Adam - i.e. the appellant) was unable to attend an appointment the following day because she was “*out of the UK. Will be back end of March*”. A further entry, dated 5 May 2017, referred to a missed appointment in April of that year and recorded that: “*History: attending rv says neighbour just brought all letters sent to her house; says likely postman but in wrong letterbox and neighbour has been away. Missed USS*”. Evidently, the judge took the second reference to “neighbour” in the entry as meaning the appellant.
7. In light of that evidence, together with credibility concerns relating to friends and family members set out at [29], the judge did not accept that the appellant had resided continuously in the United Kingdom since her arrival in November 2000: [28], [30], [31]. At [30] the judge stated that he

was “not in a position” to make a finding as to whether the appellant did in fact leave the United Kingdom. In all the circumstances, that the appellant was unable to satisfy the requirements of paragraphs 276A and 276ADE(1) (iii) of the Immigration Rules.

8. The judge then went on to consider Article 8 on a wider basis. He addressed the mandatory considerations contained within section 117B of the Nationality, Immigration and Asylum Act 2002, as amended, in particular section 117B(4) relating to “little weight” being accorded to unlawful residence. The appellant’s inability to meet the relevant Immigration Rules weighed against her in the balancing exercise, but only to a limited extent. He had regard to relevant aspects of the appellant’s private life, including employment and familial and friendship ties. The judge took account of the presence of family members in Ghana and the fact that the appellant had resided in that country for almost 40 years before coming to the United Kingdom. Ultimately, the judge concluded that the appellant’s removal in consequence of the respondent’s decision would not be disproportionate. The appeal was accordingly dismissed.

The grounds of appeal and grant of permission

9. The appellant did not have legal assistance when seeking permission to appeal from the First-tier Tribunal. The grounds of appeal sought to explain the GP patient record entries referred to previously and asserted that she had no travel document on which to travel to and from Ghana at any stage. There was also reference to additional evidence attached with the notice of appeal which purported to further demonstrate the continuous residence in United Kingdom.
10. Permission to appeal was granted by First-tier Tribunal Judge Mills. He regarded the grounds as unarguable, but took it upon himself to raise an additional point, namely that the judge arguably acted unfairly by failing to raise the particular GP patient record entries with the appellant and/or Counsel at the hearing.
11. Post-permission, the respondent provided a rule 24 response, which contended that the judge’s decision was free from error. In essence, it submitted that the GP patient records had been provided by the appellant herself and the judge could not be criticised for going through that evidence and making findings thereon.

The hearing

12. Ms Srin dran accepted that the additional evidence provided by the appellant with the notice of appeal could not, in the circumstances of this case, be relevant to our consideration of whether the judge had erred in law. She submitted that there was a “contradiction” between the judge’s

reliance at [28] on the entry which indicated that the appellant had left United Kingdom, and the avoidance of making a clear finding on that issue at [30].

- 13.** Mr Tufan emphasised the point made in the rule 24 response. What the judge had said at [30] might not have been entirely clear, but was sufficient to support the conclusion that the appellant had not proved that she was continuously resident in the United Kingdom throughout. Mr Tufan raised an additional point, which neither the judge nor the parties had appreciated previously. Paragraph 276ADE(1) contains what might be described as a ‘time- fixing’ criterion: the subsequent substantive requirements of the provision must be shown to have existed as at the date of the relevant application, not the date of hearing. In this case, the appellant made her application on 7 July 2020, before she clocked up the 20 years from her arrival in this country (and assuming that she had never left).
- 14.** Ms Srin dran fairly accepted the strength of this new point.
- 15.** At the end of the hearing we reserved our decision.

Discussion and conclusions

- 16.** Before turning to our analysis of this case we remind ourselves of the need to show appropriate restraint before interfering with a decision of the First-tier Tribunal, having regard to numerous exhortations to this effect emanating from the Court of Appeal in recent years: see, for example, Low e [2021] EWCA Civ 62, at paragraphs 29-31, AA (Nigeria) [2020] EWCA Civ 1296; [2020] 4 WLR 145, at paragraph 41, and UT (Sri Lanka) [2019] EWCA Civ 1095, at paragraph 19.
- 17.** We would first observe that where a judge considering an application for permission to appeal deems it appropriate to raise a new ground of challenge not contained within the grounds, best practice is to either cite, or at least refer to the substance of, the decision in AZ (error of law: jurisdiction; PTA practice) Iran [2018] 245 (IAC). Where the new ground raised by the judge potentially favours the original appellant, there needs to be a “strong prospect of success”. In the present case, Judge Mills did not allude to the relatively high threshold required to grant permission on such a basis.
- 18.** It was not immediately apparent to us that there was a “strong prospect of success” of the procedural unfairness challenge being made out. Having said that, we formed a provisional view, as indicated to the parties at the outset of the hearing, that the judge might have been wrong not to have raised the particular GP patient record entries with the appellant and/or Counsel.

- 19.** On further consideration, we have concluded that the judge did not commit an error of law as regards procedural fairness. The applicant provided the GP patient records in support of her appeal. She and/or her legal representatives at the time knew, or should have known, the content of those records before they were submitted in evidence. If there were particular entries which might have raised a legitimate concern, these could and should have been addressed by the appellant herself. It is apparent that they were not. In our judgment, the judge cannot be criticised (at least as regards the committing of an error of law) because he took account of the evidence before him. Ideally, the judge might have raised the issue at the hearing (if in fact he had been cognisant of the specific evidence at that point in time), but it was not incumbent on him to do so as a matter of procedural fairness.
- 20.** We confirm that we have not taken account of the post-decision explanation offered by the appellant in the grounds of appeal. This could and should have been put forward at the hearing.
- 21.** In light of the above, the ground of appeal on which permission was specifically granted fails.
- 22.** We did see something of a tension in the judge's decision between his reliance on the GP patient record entry and the apparent failure to have made a clear finding of fact that the appellant had left United Kingdom at some point. One might have thought that the latter would have followed on from the former. However, for the following reasons we conclude that there is no error of law here.
- 23.** First, the point was not raised in the original grounds of appeal and has been no amendment to those.
- 24.** Second, it is tolerably clear that the judge was in effect finding that continuous residence had not been proved and that was the central issue in respect of the paragraph 276ADE(1) issue.
- 25.** Third, we take no account of the post-decision explanation put forward in the grounds of appeal.
- 26.** Fourth, the judge was fully entitled to conclude that the appellant's overall credibility was undermined by other aspects of her evidence relating to family and friends in United Kingdom: [29].
- 27.** Even if the judge had erred in one or other respect, success by reference to paragraphs 276A and 276ADE(1)(iii) (or indeed 276ADE(1)(vi)) of the Immigration Rules was precluded by the fact that the appellant made her application on 7 July 2020, *before* she had accrued the necessary 20 years' residence in the United Kingdom. Paragraph 276ADE(1) (which was in place at the time of the judge's decision was promulgated, but subsequently deleted) began by providing that:

“276ADE (1). The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that **at the date of application**

...

(iii) has lived continuously in the UK for at least 20 years (discounting any period of imprisonment);

...

(vi) subject to sub-paragraph (2), is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant’s integration into the country to which he would have to go if required to leave the UK...”

[Emphasis added]

- 28.** Therefore, the appellant simply could not have satisfied the provision. In turn, the judge could not have legitimately concluded that the appeal would have succeeded because the relevant Immigration Rule had been met and therefore removal from United Kingdom would have been disproportionate under Article 8: see TZ (Pakistan) [2018] Imm AR 1301.
- 29.** There has been no challenge to the judge’s proportionality assessment on the wider Article 8 basis. In any event, we conclude that the judge carried out an adequate balancing exercise and was entitled to find that the appellant’s overall circumstances did not outweigh the public interest. We note in particular that the judge proceeded on the basis that the appellant had resided in the United Kingdom for a significant period of time beginning in November 2000 and did not place significant weight on her inability to have met the Immigration Rules. In this way, he was in effect taking her case at its highest. We are satisfied that the judge took all relevant matters into account and left none out. The judge was entitled, indeed bound, to have regard to section 117B(4) of the 2002 Act and this counted against the appellant to a significant extent. On the evidence, he was also plainly entitled to conclude that the appellant had strong ties in Ghana and would not face very significant obstacles to re-integration.

Anonymity

- 30.** The First-tier Tribunal made no anonymity direction and there is no basis for us to do so.

Notice of Decision

31. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law and that decision shall stand.

32. The appellant's appeal to the Upper Tribunal is dismissed.

Signed: H Norton-Taylor

Date: 12 December 2022

Upper Tribunal Judge Norton-Taylor