Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/46595/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 16th June 2014	**27th August 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE R C CAMPBELL

Between

A I
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Richard Singer (Counsel)
For the Respondent: Ms J Isherwood (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. The appellant's appeal against a decision to remove her from the United Kingdom was allowed by First-tier Tribunal Judge Ross ("the judge") in a determination promulgated on 22nd March 2014. The respondent applied

for permission to appeal and permission was granted on 1st May 2014. It is convenient to refer to the Secretary of State as "respondent" and to the respondent to the application as the "appellant," as they were before the First-tier Tribunal.

2. The appellant entered the United Kingdom in May 2007 as a working holidaymaker but was made exempt from immigration control in December the following year, after she joined the armed forces. She was medically discharged from the army in May 2011. Following refusal of an application for leave to remain outside the rules, the appellant brought an appeal which was dismissed in August 2012. There then followed a further application for leave to remain on human rights grounds, in February 2013. This application was refused by the Secretary of State in July that year and, on 22nd October 2013, a decision was made to remove her as an overstayer, giving rise to the present appeal.

3. The appellant is HIV positive. The judge took into account what he described as two important pieces of evidence which were not available in the first appeal. The first was a letter from the National AIDS Trust, dated 27th February 2014 and the second was a letter from a consultant physician, referring to the appellant's recruitment to a clinical research trial, requiring regular follow-up for a period of three years. The judge took into account both items in his Article 8 assessment. The first raised an issue of fairness in the decision to medically discharge the appellant from the army and the second showed that particular medical care was required during the clinical trial. The judge found that although the medicines the appellant was currently prescribed might be available in Ghana, the particular level of care she received would not be and that her removal would bring to an end her participation in the important clinical trial (known as "Poppy"). Although the appellant could not succeed on Article 3 grounds, the judge found that Article 8 was engaged and that her removal at the present time would be disproportionate. He took into account what he found to be private life ties built up since 2007, the appellant's service in the army and her participation in the clinical trial. He took into account the guidance given in recent decisions including Nasim [2014] UKUT 0025 and Gulshan [2013] UKUT 00640.

The Application for Permission to Appeal

4. In the respondent's application for permission to appeal, it was contended that the judge erred by failing to have due regard to the general public interest in firm immigration control. A number of authorities were referred to in the grounds, including Akhalu [2013] UKUT 400, FK and OK [2013] EWCA Civ 238 and Shahzad [2014] UKUT 85.

5. The judge erred in failing to take into account the "macro elements" weighing in the public interest and failing to identify factors weighing against the appellant.

6. Permission to appeal was granted on 1st May 2014.

Submissions on Error of Law

7. Ms Isherwood adopted the written grounds. The appellant was HIV positive but there was nothing to suggest that she acquired the condition while in the army. She arrived here as a working holidaymaker and then enlisted. She apparently intended to serve for 22 years but was discharged on medical grounds. The judge did not properly take into account the public interest in her removal. She would be a drain on resources. Treatment for her condition was available in Ghana. The judge appeared to acknowledge this in paragraph 14 of the determination but he did not specify how the appellant's circumstances outweighed the public interest in her removal. Guidance was given in GS and EO [2012] UKUT 397, as well as in Akhalu.

8. A proper proportionality assessment required all the circumstances relied upon by both parties to be taken into account but the determination failed to show where the public interest had been factored in. The appellant was in the army for only two and half years and although emphasis on service might be appropriate, in this case it had been for only a short period. Participation in the clinical trial might fall in the appellant's favour but the judge was obliged to show how the Secretary of State's case for removal was outweighed.

9. Mr Singer said that there was a clear line of authority, including R (Iran), RE (Zimbabwe) and Miftari that showed that the Upper Tribunal should be slow to overturn a case where there was no clear legal error. The judge's decision in the present appeal was not vitiated by error. He had before him the Secretary of State's case, set out in the notice of decision and he heard submissions from two representatives. There was no error shown by a failure to refer expressly to, for example, Akhalu.

10. It was not part of the appellant's case that there was no treatment available in Ghana. This was clear from paragraph 16 of her witness statement. What she would be lacking was the level of particular care given to her during the clinical trial.

11. Even if the judge omitted an explicit reference to the legitimate aim in pursuance of which the Secretary of State made her decision, this did not amount to an error. The judge was very experienced and he had before him two experienced advocates. He directed himself properly in relation to Gulshan and it could not sensibly be suggested that he did not have the public interest in mind as a salient factor. It was clear from Miftari that it was not incumbent on the judge to set out every feature of the evidence and every single factor. What was required was a decision containing sufficient reasons. In the present case, the judge set out the factors showing that removal was unjustifiable at present. The appellant's case was not simply put on health grounds. In some respects, it was stronger

than the case brought by the appellant in Akhalu, taking into account the appellant's service in the army and her participation in the medical trial. The judge considered fairness in the way that the appellant was treated by the army and this was a material factor. Of course, the appellant in Akhalu won in both the First-tier and the Upper Tribunals. She came here with leave and was diagnosed while that leave was extant. She had built up a substantial private life. These factors weighed in the appellant's favour in the present case. Paragraph 16 of the witness statement showed that she had continued to make a contribution to community life. So far as GS and EO was concerned, this largely concerned Article 3 but the obiter factors relating to Article 8 set out in the judgment showed that the lawfulness of a person's presence here was material, at the time a diagnosis was made.

12. The appellant was not subject to immigration control while in the army. Her service and her participation in the clinical trial should not be dismissed as insubstantial matters. This was not simply a case where she would be a drain on NHS resources. Although the United Kingdom could not be the hospital of the world, she was diagnosed at a time when she had leave, she had served in the armed forces and she was taking part in the clinical trial. These factors were relevant and the judge did not err in taking them into account and giving them weight. The decision he made was open to him.

Decision on Error of Law

13. The determination has been written by a very experienced judge and it is clear that he had the salient features of both cases in mind. He properly took into account the earlier determination as a starting point and made his own assessment, in the light of material evidence which had come into being since. In the Article 8 assessment, he gave due weight to the medical evidence, the appellant's service in the armed forces (albeit for a relatively short period of time), her participation in the clinical trial and the private life ties established by her here since 2007.

14. The thrust of the Secretary of State's challenge is that he did not weigh in the balance the public interest in the appellant's removal as an overstayer. I accept, however, Mr Singer's submission that the judge properly directed himself on the law and, in expressly referring to guidance given in, for example, Gulshan, he also had in mind the legitimate aim being pursued by the Secretary of State. Indeed, in also taking into account guidance given in Nasim, the judge had in mind current authority reflecting the substantial weight to be given to the public interest. The determination shows that he carefully weighed factors on the other side of the balance showing, in the unusual circumstances of this case, that the public interest was outweighed. The judge did not err in setting out these matters in detail.

15. There was no material misdirection on the law and I conclude that the judge did not misunderstand either party's case. Although the balance might have been struck differently by another judge, I find that the conclusion reached in the present appeal was one which was open to him, in the light of the evidence. The determination contains no material error of law and the decision shall stand.

DECISION

The decision of the First-tier Tribunal shall stand.

ANONYMITY

The judge made an anonymity direction and I direct that it shall continue until varied or set aside by the Upper Tribunal or a court.

Signed Date

Deputy Upper Tribunal Judge R C Campbell