Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/39821/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 30 July 2015	**On 5 August 2015**

Before

Deputy Upper Tribunal Judge MANUELL

Between

Mrs MYRTLE COTHILL
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J Doerfel, Counsel (instructed by International Care Network)
For the Respondent: Mr S Whitwell, Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction

1. The Appellant appealed to the Upper Tribunal with permission granted by First-tier Tribunal Heynes on 22 May 2015 against the decision and reasons of First-tier Tribunal Judge Burnett who had dismissed the Appellant's appeal against the refusal on 25 September 2014 of her application for further leave to remain on human rights grounds (Article 8 ECHR). The decision and reasons was promulgated on 11 March 2015.

2. The Appellant is a national of South Africa, born on 11 November 1923 and so is now 91 years of age. The Appellant had entered the United Kingdom as a visitor in February 2014 with leave to enter valid until 14 July 2014. On 11 July 2014, i.e., just as that nominal leave to enter was due to expire, the Appellant sought the variation of leave which is the subject of this onwards appeal. The application was refused by reference to paragraph 276ADE of the Immigration Rules. The Appellant had always lived in South Africa and had not lost her ties. Medical treatment was available in South Africa, the Appellant was able to care for herself and there were no exceptional circumstances. The judge found that the Appellant had brought about any situation of loss of accommodation, that she retained ties with South Africa and could not meet paragraph 276ADE. The Appellant could return to South Africa and could make an entry clearance application under Appendix FM if her circumstances changed. Any interference with the respect due to her private and family life pursuant to Article 8 ECHR was proportionate.

3. Permission to appeal was granted by First-tier Tribunal Judge Heynes because he considered that it was arguable that the judge had applied the wrong tests in relation to integration and the requirement to return to make an entry clearance application, had failed to apply the provisions of section 117B of the Nationality, Immigration and Asylum Act 2002 and had failed to assess Article 8 ECHR considerations fully or at all in relation to the sponsor and her husband. It was further arguable that inadequate reasons were given in relation to the Article 8 ECHR assessment.

4. Standard directions were made by the tribunal, indicating that the appeal would be re-decided immediately if a material error of law were found. A rule 24 notice in the form of a letter dated 25 June 2015 had been filed on the Respondent's behalf opposing the onwards appeal.

Submissions

5. Mr Doerfel for the Appellant relied on the grounds of appeal. The judge had applied the wrong test to paragraph 276ADE(vi) of the Immigration Rules. It was not "inability" but "very significant obstacles to integration". The Appellant had no home and no relatives left in South Africa. The Appellant's circumstances had not been properly or fully considered. The judge had failed to apply

Chikwamba [2008] UKHL 40 in the same context. This was a family case and the purpose of a return for entry clearance needed to be assessed but was not. Nor had the judge applied section 117B of the Nationality, Immigration and Asylum Act 2002. This had been shown by Forman (ss117A-C considerations) [2015] UKUT 412 (IAC) and AM (s117B) Malawi [2015] UKUT 260 (IAC) to be a statutory duty, not simply a formality. While both Upper Tribunal decisions had been promulgated after Judge Burnett's decision, the law had been clarified and his approach was erroneous.

6. Counsel submitted that the judge had further erred by classifying access to NHS treatment as "public funds". There had been no access by the Appellant to United Kingdom public funds. Home Office Guidance "Public Funds" (version 12, valid from 21 February 2014) stated at page 8: "National Health Service (NHS) treatment and Local Educational Authority (LEA) schooling are not considered to be public funds". The judge's error was significant given the fact that the judge had reached his Article 8 ECHR conclusions "with some hesitation".

7. Counsel concluded by submitting that the judge had failed to follow and apply Huang [2007] UKHL 11. The facts of Huang were far less compelling than those of the present case. The judge's evaluation was defective by failing to weigh the health and vulnerability of the Appellant. Nor had the judge taken account of the sponsor and her husband's Article 8 ECHR rights, contrary to Beoku-Betts v Secretary of State for the Home Department [2008] UKHL 39. The decision and reasons should be set aside and the appeal reheard by another judge.

8. Mr Whitwell for the Respondent relied on the rule 24 notice. He submitted that there was no error of law and the determination should stand. The submissions made on the Appellant's behalf ignored the underlying deception of the Appellant and her sponsor's conduct: the Appellant had admitted that she had no intention of returning to South Africa when she entered the United Kingdom as a visitor. That was a powerful public interest consideration which the judge had rightly factored into his Article 8 ECHR assessment. Any error of approach to section 117B of the Nationality, Immigration and Asylum Act 2002 was not material. The relevance of Huang lay not in any factual comparison, but in the broad principles expressed. The judge had been correct to find that there was no exceptionality. The onwards appeal should be dismissed.

9. The tribunal indicated at the conclusion of submissions that it reserved its determination, which now follows.

No material error of law finding

10. The tribunal agrees with Mr Whitwell that the facts of this appeal need to be placed into their proper context. As Judge Burnett recorded at [18] and [19] of his decision and reasons, on her own admission the Appellant entered the United Kingdom as a visitor with the intention of remaining in the United Kingdom. It is implicit in his findings that the Appellant and her sponsor conspired in the Appellant's entry as a visitor by deception, *inter alia* by disposing of the Appellant's property in South Africa before she came to the United Kingdom. There was no challenge to those findings. The inescapable inference is that the Appellant and her sponsor sought to circumvent United Kingdom immigration law, because it suited their purposes to do so. Had the Appellant been eligible for settlement as a dependant relative, she could and should have applied for entry clearance on that basis. Judge Burnett addressed Appendix FM at [47] of his determination and found that the Appellant did not meet the high threshold requirements. Again there was no challenge to that finding. Judge Burnett chose not to spell out the Appellant's and her sponsor's deception and dishonesty, no doubt because he considered that his findings spoke for themselves, but the tribunal considers it right to make that more explicit in the face of the attack on the judge's decision.

11. The implication from the application for permission to appeal, and from the submissions made on the Appellant's behalf was that the judge had not considered the case with the sympathy and respect due to a person of advanced years. That was not so: see, e.g. [49] and [55] of his decision and reasons. His findings in relation to family life were in the tribunal's view very generous indeed. The Appellant entered the United Kingdom for the declared purpose of a visit, from which no variation of leave to adult dependency is permitted within the Immigration Rules. It would have been open to the judge to have found that the refusal decision in fact caused no interference with the family life of adult persons, as it had been lived for many years in a condition of separation with contact maintained by telephone and correspondence, if not occasional visits. The tribunal considers that the Appellant's case was more accurately described as a private life claim, as no emotional dependency was found.

12. The relevant part of the text of paragraph 276ADE(vi) of the Immigration Rules is that "but there would be very significant obstacles to the applicant's re-integration into the country to which he would have to go if required to leave the UK." Paragraph 276ADE is directed towards persons who claim to have established a private life in the United Kingdom by virtue of length of residence. The Appellant had been in the United Kingdom for barely a year, having gained entry by deception. It was argued that Judge Burnett had used the wrong test at [45] of his decision and reasons by stating "unable to return", but the tribunal considers that the submission to such effect was a misreading. The judge found that the Appellant

retained various important ties in South Africa above and beyond her nationality, including friends, her church and the medical staff she had used there. Other ties she had cut voluntarily but so recently that they could be reinstated in some form or other. It was obvious that there was no "reintegration" issue at all as the Appellant had lived in South Africa for the whole of her long life and had been absent for a tiny fraction of that period.

13. Chikwamba [2008] UKHL 40 must now be read with the assistance provided by Upper Tribunal Judge Gill in Chen [2015] UKUT 00189 (IAC). Chikwamba lays down no rule that it is always disproportionate to expect an individual to return to his home country to make an entry clearance application to rejoin family members in the United Kingdom where the requirements of Appendix FM would otherwise be satisfied. In any event, as already noted, Judge Burnett found that the applicable requirements of Appendix FM, adult dependant relatives, were *not* satisfied.

14. The tribunal considers that there was nothing at all in Mr Doerfel's section 117B point. He accepted that the only parts of that section which could be considered to assist the Appellant were section 117B(2), ability to speak English, and section 117B(3), financial independence. While the Appellant's English was not in issue, her financial independence was by no means proved: see [22] of the decision and reasons. Moreover, section 117B(1) refers to the maintenance of effective immigration control, which the Appellant and sponsor have breached seriously by their deception over the Appellant's visit visa, section 117B(4) refers to the requirement to give little weight to a person's private life established when that person was in the United Kingdom unlawfully (i.e., having gained entry by deception) and section 117B(5) refers to the requirement to give little weight to a person's private life established when that person's immigration status was precarious. The Appellant fails those tests, so obviously that it hardly need have been spelt out. Thus if Judge Burnett's statement that he had had "regard" to section 177B were considered insufficient in the light of Forman (ss117A-C considerations) [2015] UKUT 412 (IAC) and AM (s117B) Malawi [2015] UKUT 260 (IAC), any error of law was immaterial.

15. "Public funds" are defined in the Immigration Rules at paragraph 6, and do not include recourse to the NHS. However, recourse to the NHS is addressed in the Suitability-entry clearance requirements in Appendix FM: see, e.g., S-EC.2.3., as perhaps the judge had in mind. It should at the same time be noted that there is no reference to recourse to the NHS in the adult dependant requirements of Appendix FM, for the obvious reason that such applications can only be made from abroad: see EC-DR.1.1.

16. At [61] Judge Burnett found that the Appellant had "had recourse to public funds and access to the NHS to which she is not entitled".

The finding of access to the NHS was secure as it was based on the Appellant's own admission: see [21] of the decision and reasons. There was, however, no evidence before the judge which showed that the Appellant had received any public funds as defined in paragraph 6 of the Immigration Rules. Any conflation by the judge of unlawful access to NHS services as amounting to receipt of public funds was ultimately a correct expression of principle: the Appellant was receiving costly public services to which she had no entitlement. (There was no evidence before the judge that the Appellant as a South African citizen had any reciprocal rights above and beyond emergency health care.) Thus there was no material error of law.

17. The attempt to draw comparisons between the facts of Huang [2007] UKHL 11 and those of the present appeal was in the tribunal's view a misconceived and barren exercise, as will invariably be the situation when Article 8 ECHR is in issue because each appeal is fact sensitive. In the first place, the legal landscape has changed since 9 July 2012 when the Immigration Rules were extensively re-written. Article 8 ECHR is no longer a legal vacuum. That is not, of course, to suggest that the general principles of Huang have ceased to be relevant. In the tribunal's view, Judge Burnett applied those principles correctly. No error has been shown in his findings of fact. His approach to the Appellant's family life was generous, perhaps excessively so, as the tribunal has explained above. The judge correctly identified proportionality as the live issue on those findings. He addressed the position of the sponsor and her husband: see, e.g., [56] of the decision and reasons, and thus applied Beoku-Betts. He gave clear and sustainable reasons for finding that the proportionality balance was against the Appellant and in favour of the legitimate objectives of Article 8.2 ECHR.

18. The tribunal accordingly holds that there was no material error of law in the decision and reasons and there is no basis for interfering with the experienced judge's decision.

DECISION

The making of the previous decision did not involve the making of an error on a point of law and stands unchanged

Signed **Dated**

Deputy Upper Tribunal Judge Manuell