Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/43324/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On Tuesday 20 October 2015	**On Thursday 22 October 2015**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

MR KWAME OTCHERE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Waithe, Counsel
For the Respondent: Mrs Williock-Briscoe, Senior Home Office Presenting Officer

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
No anonymity order was made by the First-tier Tribunal. I find that no particular issues arise on the facts of this case that give rise to the need for a direction. For this reason no anonymity direction is made.

DECISION AND REASONS

Background

1. The Appellant is a citizen of Ghana. He appeals against the Respondent's decision dated 14 October 2014 refusing him a derivative right of residence under regulation 15A(4A) of the Immigration

(European Economic Area) Regulations 2006 ("the EEA Regulations") on the basis that he is the primary carer of his mother, Miss Wuwaa who is a British citizen.

2. The Appellant's appeal was dismissed by First-Tier Tribunal Judge Mays under the EEA Regulations and on Article 8 grounds in a decision promulgated on 19 June 2015 ("the Decision"). The Appellant sought permission to appeal the Decision on the basis that the Judge has materially erred in his consideration of both the application under the EEA Regulations and in his assessment of proportionality in relation to the Article 8 claim.

3. Permission to appeal was granted by First-Tier Tribunal Judge Cox on 17 September 2015 on the basis that the ground concerning Article 8 was arguable, the ground concerning the EEA Regulations less so but giving permission to argue both grounds. The matter comes before the Tribunal to determine whether the First-Tier Tribunal Decision involved the making of an error of law.

Submissions

4. Dealing first with the appeal under the EEA Regulations, Mr Waithe submitted that the Appellant is the only surviving child of Miss Wuwaa and the evidence is that he is her primary carer. He came to the UK lawfully (as a visitor) and overstayed only because his mother became unwell. The Judge's finding that Miss Wuwaa could look to the local authority for support if the Appellant were removed has no evidential basis as they have not supported her to date save for providing some adjustments to facilitate her movement. There is no evidence to support the finding that Miss Wuwaa's friends from church could support her. Mr Waithe submitted that the local authority would be unable to care for Miss Wuwaa in light of the "austerity cuts" and submitted that the fact that the Appellant is providing the care that the local authority might otherwise be obliged to supply is a factor counting in the Appellant's favour in relation to the proportionality of his removal as he would be saving money for the UK State.

5. In relation to the Article 8 claim, Mr Waithe referred to section 2 Human Rights Act 1998 as authority for the proposition that the Tribunal should have regard to Strasbourg case law and then to cases such as Marcxx v Belgium. It was not entirely clear to me the proposition which he sought to derive from the cases since, as I pointed out to him, the Judge accepted that the Appellant's relationship with his mother and her emotional dependency on him was sufficient to found a family life which required respect. There remained an issue whether the UK is required to permit the Appellant and Miss Wuwaa to enjoy that family life in the UK and whether interference would be proportionate.

6. Mr Waithe submitted that there were exceptional circumstances in this case which the Judge should have considered outside the Immigration Rules. I pointed out to him that at [45] to [60] of the Decision, the

Judge had conducted that very exercise. The Judge considered the case outside the Rules but decided that removal was not disproportionate. Mr Waithe submitted that in circumstances where the Judge accepted there exists family life between the Appellant and his mother, very weighty reasons are required to displace that and to justify removal. I pointed out that section 117B Nationality, Immigration and Asylum Act 2002 is relevant as is the fact that the Appellant is here unlawfully following the expiry of leave as a visitor and has at all times had precarious status. Mr Waithe continued to insist that the Judge did not properly factor in the assistance which the Appellant provides for his mother nor the impact on her of his removal. He submitted that "little weight" for the purposes of section 117B does not mean "no weight".

7. Mrs Williock-Briscoe reminded me that this is in fact an appeal in relation to an application under the EEA Regulations and, following the decision in Amirteymour and others (EEA appeals; human rights) [2015] UKUT 00466 (IAC), the Judge should not have considered Article 8 at all. There is no removal decision in this case (although the Appellant is an overstayer). There has been no section 120 notice served. Mrs Williock-Briscoe submitted that, on the basis that the Judge considered Article 8, this amounts to an error of law since he had no jurisdiction to do so but is not a material one since the outcome in relation to the appeal under the EEA Regulations is unaffected. She submitted that, if the Judge did have jurisdiction to consider Article 8 contrary to her primary submission, the Judge has carried out a comprehensive assessment, finds there to be both family and private life which requires to be weighed in the balance, considers the weight to be applied against the public interest in removal and applies section 117B appropriately. There is no error of law in the Decision in this regard.

8. In relation to the appeal under the EEA Regulations, Mrs Williock-Briscoe submitted that the Judge has properly directed himself in accordance with the evidence before him. He accepts that the Appellant is Miss Wuwaa's son and primary carer. The issue is the extent of care which the Appellant provides and whether the care could be provided by some other person. In other words, the Judge was required to consider whether Miss Wuwaa would be unable to continue to reside in the UK if the Appellant were removed. For the reasons set out at [42] to [43] the Judge does not accept that this would be the position and for that reason holds that the Appellant is not entitled to a derivative right of residence under the EEA Regulations ([44]).

9. Whilst Amirteymour is authority for the proposition which the Respondent seeks to derive from it, I note no point was taken before the First-Tier Tribunal Judge as to his jurisdiction to consider Article 8 (although Amirteymour has only recently been promulgated). In any event, I consider it appropriate to deal also with the ground relating to Article 8 since permission to appeal was granted mainly on this basis and in case the appeal goes further and the view is taken that the Judge did have jurisdiction to consider it.

Decision and reasons

10. I deal first with the Decision under the EEA Regulations. As noted above, the Judge accepts that the Appellant is Miss Wuwaa's son [33] and that Miss Wuwaa is a British citizen [32]. In spite of finding the Appellant an unimpressive and not credible witness [36], the Judge accepts in light of all the evidence that the Appellant is Miss Wuwaa's primary carer [40]. As the Judge rightly notes, therefore, the issue is whether there would be anyone else to provide that care if the Appellant were removed. At [42] the Judge notes Miss Wuwaa's evidence that "there was not anything her son did for her which someone else could not do" (which evidence is recorded at [20]). Miss Wuwaa's evidence therefore was that she would prefer her son to assist her because he "made her feel happy and at home" [42].

11. The Judge notes that a local authority assessment has been carried out but Miss Wuwaa has objected to having carers because she prefers her son to carry out her personal care [42]. There was therefore ample evidence for the Judge's finding that the local authority would provide that care; indeed would be statutorily obliged to do so [43]. The fact that the local authority does not presently do so arises from the fact that the Appellant is in the UK and Miss Wuwaa would prefer that he provide care but there is no evidence that they would not do so if he were not here.

12. The finding that Miss Wuwaa may be able to obtain care from her friends from the church is put on a tentative basis only [42] but is limited to them facilitating her attendance at church or other events on the basis I presume that they would themselves be attending and as friends might reasonably be expected to assist Miss Wuwaa to attend. As such it is a finding which was open to the Judge.

13. The Judge accepts that the Appellant also provides Miss Wuwaa with emotional support but does not accept that without that support she would be unable to remain in the UK. Her evidence was not in any event to that effect. She accepted that there was nothing which he does for her that others could not do. She did not say in evidence that she would leave the UK with him were he to be removed.

14. There is no error of law therefore in the Judge's finding that the Appellant could not satisfy the EEA Regulations for a derivative right of residence as the primary carer of his mother.

15. I have noted at [9] above that the Judge may have erred in considering Article 8 at all. For the reasons there stated, if he did err in doing so then such error cannot be material. It could not impact on the lawfulness of the Decision under the EEA Regulations which I have found contains no error of law. However, also for the reasons stated at [9], I go on to consider the Judge's consideration of Article 8.

16. The Judge accepts at [47] that the Appellant and Miss Wuwaa enjoy family life together which is deserving of respect. He accepts that the Appellant will have formed a private life also in the UK although he has been here only since 2011 and there was no evidence before the Judge as to that. The Judge rightly notes at [50] that the issue in this case is whether interference with that family and private life would be proportionate.

17. Paragraphs [51] to [55] set out the extent and nature of the family and private life having due regard to the care which the Appellant is providing both physically and emotionally, the cost of the local authority providing alternative care if the Appellant were removed (although noting that the Appellant is seeking assistance as Miss Wuwaa's carer and might become dependent on public funds) and the impact on their family and private life in the event of the Appellant's removal. The Judge has regard to the extent of the family and private life bearing in mind that Miss Wuwaa left the Appellant behind in Ghana when he was aged four years and the Appellant has lived for twenty-five of his thirty-one years in Ghana apart from the occasional visit to his mother [54]. The Judge expressly considers the impact on Miss Wuwaa's care and support if the Appellant is removed at [60].

18. The Judge at [56] to [59] considers the public interest including with regard to section 117B. As the Judge notes, the Appellant has been in the UK unlawfully since his leave as a visitor expired. Mr Waithe sought to persuade me that this should not be held against the Appellant because of the reason for the overstaying namely that the Appellant was obliged to stay due to his mother's ill health. That submission might attract some sympathy were it not for the fact that the Appellant's leave expired on 9 December 2011, before his mother collapsed (although she says she was sick before that); also because he took no steps to regularise his status until June 2013 after he had been arrested as an overstayer and long after his leave had expired. The Judge was therefore entitled to take account of his unlawful and precarious status when weighing his (and Miss Wuwaa's) family life and private life in the balance.

19. The Judge's assessment of proportionality discloses no error of law (save as noted above whether the Judge had jurisdiction to consider this issue at all which is immaterial to the outcome of the Decision).

20. For the above reasons, I am satisfied that the First-Tier Tribunal Decision did not involve the making of an error of law.

DECISION

The First-tier Tribunal decision did not involve the making of an error on a point of law.

I do not set aside the decision

Signed  Date 22 October 2015

Upper Tribunal Judge Smith