IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-005529

First-tier Tribunal Nos:
HU/52403/2023
LH/04462/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 19 June 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

MR BRIGHT NANA PREMPEH
(NO ANONYMITY ORDER MADE)

Appellant

v

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr F. Farhat, Solicitor, instructed by Gulbenkian Andonian Solicitors
For the Respondent: Mr E. Terrell Senior Home Office Presenting Officer

Heard at Field House on 10 May 2024

DECISION AND REASONS

1. The Appellant is a national of Ghana born on 21 January 1997. His appeal previously came before the Upper Tribunal on 31 January 2024 following the grant of permission to the SSHD against a decision of First tier Tribunal Judge Ficklin who allowed his appeal on the basis of article 8 of ECHR, but with reference to an argument put forward on the Appellant's behalf that he should have been entitled to permanent residence on the basis of the CJEU case C-423/12 Reyes v Migrationsverket [2014] QB 1140 in relation to the fact that he was a family member of an EEA national and that as a consequence that there had been historic injustice in the case.

2. In a decision promulgated on 15 March 2024, I found a material error of law in the decision and reasons of the First tier Tribunal Judge; set that decision aside and adjourned the appeal for a resumed hearing before the Upper Tribunal, with the finding that the Appellant has family life with his mother, which was unchallenged, being preserved. I further directed that the Respondent should use his best endeavours to provide documents in respect of the Appellant's immigration history and case notes as to the Appellant's position under EU law. A copy of that decision is appended.

Hearing

3. At the hearing the Appellant gave evidence, relying on his witness statement at page 285 of the bundle, from 2021, a witness statement dated 1 June 2023 at AB 184 and a new statement dated 9 May 2024. In short, he stated that he gave up work on 4 January 2018 in order to go to University but was unable to do so as his residence card was only valid until November 2018 and consequently he was dependent upon his stepfather from January 2018 until his stepfather moved out of the family home in April 2019. The *decree nisi* took place on 28 June 2019 and the *decree absolute* on 9 August 2019. He said his mother had flare ups of arthritis quite often and he has to be there to help her ease the pain as she was unable to move her fingers. He said that they had been to the council who have made modifications to their home but would be unable to provide care for more than a few hours a day and currently were not providing any care. The Appellant stated that his mother is not physically capable or confident about going out on her own.

4. The Appellant was cross-examined by Mr Terrell when he stated that he was working part time in construction, mostly in London for 2-3 days a week. He said he was the only person looking after his mother as his sister was in Kent and she barely had friends. The Appellant said he would make her breakfast before he left home in the mornings on the days he was working. He said that he and his mother had not discussed the possibility of him returning to Ghana. The Appellant said that he did not know any of their relatives in Ghana and he did not know whether his mother was in contact with them as he had not asked her about that. He said that the last flare up was this week but he had not been there. The Appellant stated that his mother takes a lot of medicines including Gabapentine; that her GP was in Thornton Heath and she would also attend Croydon University hospital.

5. In response to questions from the Upper Tribunal, the Appellant stated that if he is going out he has something set up on her phone so that his mother could call him and he leaves food prepared for her. He said that she could sometimes manage to take medication on her own when she had a flare up. The Appellant stated that they no longer attended Church due to his mother's pain and difficulty in getting to Church and sitting for several hours.

6. The Appellant's mother, Florence Forson, then gave evidence when she adopted her statement and confirmed the medications she was taking. She denied that there had been improvements to her health. Ms Forson stated that her last flare up had been more than a month ago. She also

stated that her son did not work and had not worked for several years. She then stated that sometimes he would say he is going to work but he was not continuously working. Ms Forson said that her son would try to do everything for her before he goes out and that whilst her daughter comes it is the Appellant who does everything eg shopping and her care.

7. Ms Forson said that she had three sisters in Ghana but she had not been in contact with them for 5-6 years. Mr Terrell pointed out that in her witness statement at AB 182 at [65] she said she had no living relatives in Gahan but this was not true. Ms Forson said that they were not close and denied lying in her witness statement. She confirmed that she had had a diagnosis of fibromyalgia and was awaiting an appointment with a specialist. Ms Forson was asked how it would impact on her if her son had to go back to Ghana at which point she stated that it would impact on her a lot as she cannot be without him and she broke down, stating that she had kidney failure. Given the witness' distress and that she had raised a matter that had not previously been covered in her witness statement I gave Ms Forson time to recover and Mr Farhat time to take instructions.

8. Upon their return to the courtroom Ms Forson stated that she takes 8 tablets a day for various matters including management of her blood pressure and every Wednesday she takes 10 tablets for management of her arthritis and had been doing so since 2019. She stated that she had seen a specialist on 13 January 2024 following a blood test and the specialist told her she had some kidney failure as the tablets were impacting on her kidneys, as a consequence of which they have reduced her tablets and referred her again to another specialist. She did previously disclose this as she did not want her son to know as she did not want to worry him.

9. In his submissions, Mr Terrell stated that in respect of any historic injustice argument relating to the fact the Appellant had not been granted permanent residence, this would only be relevant to section 117B NIAA 2002 and the statutory public interest considerations. He submitted that the decision making by the SSHD had been lawful and whilst it may be that there could have been a different result in 2020 if better evidence had been submitted, no application had been made under EUSS so even if he had had permanent residence that would have ended on 31 December 2020 and he would have been unlawfully present since that time. Consequently, Mr Terrell submitted that the public interest in the Appellant's removal was not reduced.

10. In relation to the consideration of article 8 outside the Rules, Mr Terrell submitted that the evidence about family in Ghana was inconsistent and the evidence of the Appellant and his mother was not reliable in light of the vagueness of the evidence in some places and a number of lies had been told eg details about the Appellant's mother's medical condition, the number of flare ups and their frequency and the inconsistency as to the Appellant's work goes to the extent to which he is at present looking after his mother. He submitted that there is an obvious motive to exaggerate the circumstances and that the inconsistencies were fairly significant and would need to be taken into account when assessing credibility.

11. Mr Terrell submitted that there was no updating medical evidence and the most recent was from January 2023. He also pointed out that there was a lack of expert evidence on the Appellant's mother's future prognosis and the extent of the Appellant's caring responsibilities and that, even if one accepts that he assists his mother albeit with some exaggeration, it was noteworthy that the Appellant has not given thought to what alternative care arrangements would be made if he had to leave the country. Mr Terrell submitted that the local authorities would step in to meet her current care needs.

12. Mr Terrell submitted that account should be taken of the fact that the Appellant came to the UK age 16 and lawfully albeit not on a pathway to settlement and that he has overstayed the visa he did have. He submitted with regard to section 117B NIAA 2002 that there is nothing that diminishes the public interest in this case and that this outweighs the relative strength of the Appellant's private and family life and that the appeal should be dismissed.

13. In his submissions, Mr Farhat submitted that article 8(1) was engaged and the finding of family life had been preserved. He submitted that the medical evidence was quite extensive over a period of 10 years and that Ms Forson had a progressive degenerative disease which was getting worse and had been taking its toll on her. Mr Farhat drew attention to the fact that there was an occupational health assessment which had led to her taking early retirement. In terms of the Appellant's role in her life, he is present and clearly helps his mother and contributes to her quality of life and provides emotional support and in his absence there would be a diminution in her quality of life.

14. Mr Farhat submitted that the family life proportionality test was still based on the House of Lords judgments in *Huang* [2007] UKHL 11 and *Beoku Betts* [2008] UKHL 39. He submitted that it is not so much a question of whether the Appellant could go to Ghana but could family life continue elsewhere and one could not arrive at a sensible conclusion that family life could continue in Ghana, given the Appellant's mother's medical conditions.

15. With regard to the historic EEA issue, Mr Farhat submitted that it was not so much that better evidence should have been submitted but rather that the law should have been applied correctly and the Appellant should not have been subjected to the criteria relating to the dependency except for the 4 day period between the expiry of his residence permit and his 21st birthday, given that he arrived in the UK on 25 January 2013 on an EEA family permit. The HMRC record makes clear that the Appellant was employed by TK Maxx from 2 August 2015 to 4 January 2018 and was not employed thereafter. His 21st birthday was on 21 January 2018 and the five year residence period ended on 25 January 2018, 4 days later during which time the Appellant was, by necessity, dependent upon his stepfather. Therefore, he would have acquired permanent residence by operation of law and the fact this was not recognised is a wrong turn in the case.

16. Mr Farhat submitted that the distinguishing feature is that EU law operated differently and rights were not contingent on the grant of permission but were acquired automatically by operation of law and the right of residence such that if accepted and established it plays a pivotal role in the proportionality assessment. Those that do not have a right to remain in the UK are subject to default public interest and removal is in the public interest. We say it is severely diminished as he acquired PR through operation of law and should not be in court today and could have been a British Citizen some years ago and so the balancing exercise should be decided in the Appellant's favour. With regard to the issue of precarious immigration status pursuant to section 117B NIAA 2002, Mr Farhat submitted that permanent residence is almost akin to leave under the Immigration Acts and Rules and should be treated as such. He submitted that the appeal should be allowed.

Decision and reasons

17. A central underlying aspect of the appeal was the issue of whether or not the Appellant should have been granted permanent residence in recognition of his five year period of residence plus 4 days dependency upon his stepfather. This was the subject of an appeal before First tier Tribunal Judge Callow on 7 January 2020, where he found at [11] that the Appellant (and his sister) did not live with his stepfather and so were not financially dependent upon him. Whilst *Devaseelan* [2002] UKAIT 00702 applies I find that it was not at that time appreciated that it was only necessary for the Appellant to show dependency upon his stepfather for 4 days, between 21 January 2018 and 25 January 2018. In light of the evidence now available from HMRC as to the Appellant's work history I find that he was not working at that point in time, having stopped work on 4 January 2018. I further accept the unchallenged evidence that the Appellant's stepfather was still living in the family home until April 2019. Therefore, I find on the balance of probabilities that the Appellant was dependent upon his stepfather and was, therefore, entitled to permanent residence.

18. However, that is not the end of the matter, given the UK's withdrawal from the European Union on 31 December 2020 and, as a consequence of not being deemed eligible for permanent residence the Appellant did not make an application under the EUSS for regularisation of his stay in the United Kingdom.

19. Contrary to Mr Terrell's submission, I do find that the fact that the Appellant should have been entitled to permanent residence is relevant to an article 8 proportionality assessment, albeit in reality the Appellant has had precarious leave since 31.12.20, which is also a material factor when assessing his private life pursuant to section 117B(5) NIAA 2002. However, the Appellant's case is primarily based on his established family life with his mother, which was accepted on the basis of the particular circumstances, primarily his mother's illnesses and the care the Appellant provides her, which is both practical and emotional. I have had regard to the judgments in *Razgar* [2004] UKHL 27 as well as to those in *Huang* and *Beoku Betts (op cit)*.

20. Whilst the evidence of the Appellant and his mother was not entirely consistent as to whether he is working and if so how often; his mother's flare ups, which I find were exaggerated by the Appellant and the presence or absence of relatives in Ghana, the oral evidence as to Ms Forson's health conditions was consistent with the medical evidence. I find that removal of the Appellant to Ghana would constitute an interference with his established family life with his mother.

21. Ultimately I find that it would be disproportionate for family life to take place in Ghana, due to Ms Forson's serious illnesses, including rheumatoid arthritis, as a consequence of which she was forced to take early retirement; fibromyalgia and recently, the beginnings of kidney failure caused by the medication she is obliged to take for her arthritis. I find Ms Forson cannot reasonably be expected to relocate to Ghana and it would be disproportionate and unjustifiably harsh to expect her to do so.

22. Equally, I find it would be disproportionate and unjustifiably harsh for Ms Forson to remain in the UK without the Appellant. Whilst no doubt some local authority support could be obtained for her and the Appellant's sister lives in Kent with her own family, I find this would not be an adequate substitute for the care provided by the Appellant to his mother for a number of years and certainly for the last 5 years since his stepfather left the family home in April 2019 and the increased costs of local authority support would not be in the public interest.

Notice of Decision

23. The appeal is allowed on human rights grounds (article 8).

Rebecca Chapman

Deputy Upper Tribunal Judge Chapman

10 June 2024