Upper Tribunal
(Immigration and Asylum Chamber)

Birch (Precariousness and mistake; new matters) [2020] UKUT 00086 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Decisions & Reasons sent out on**
On 29 January 2020	.....

Before

MR JUSTICE LANE, PRESIDENT

MR C. M. G. OCKELTON, VICE PRESIDENT

Between

KAREN RICKEL BIRCH

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Mr D Selwood, instructed by Wilson Solicitors.

For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer.

1. The observations about a person's misapprehension, found in paragraph [53] of Agyarko are, despite their context in a discussion of precariousness, capable of being applicable also to a person who has no leave.

2. The prohibition on considering new matters in s 85 of the 2002 Act does not apply to proceedings in the Upper Tribunal.

DETERMINATION AND REASONS

1.
The appellant, a national of Jamaica now aged 43, appeals against the decision of Judge Carroll in the First-tier Tribunal dismissing her appeal against the decision of the respondent on 18 April 2018 refusing her application for leave to remain on human rights grounds. She has permission to appeal, granted by this Tribunal following the quashing by the High Court of an earlier refusal.

2.

The appellant entered the United Kingdom in May 1999 with a visitor's visa and was granted leave to enter for one month. She subsequently applied for, and was granted, leave to remain as a student; following a renewal, that leave expired on 30 September 2001. She has remained in the United Kingdom without leave since then.

3.
In 2007 or 2008 she was introduced to somebody posing as an Immigration Officer and was persuaded to pay £3,000 to regularise her position and obtain a grant of leave. She gave the person her passport, which was returned with a stamp appearing to grant her indefinite leave to remain, and a letter confirming the grant. She maintains, and, it is important to note, the respondent accepts, that she was genuinely deceived and that she thought that she did have indefinite leave to remain.

4.
In 2015 the appellant applied for a driving licence. She had to send her passport to the DVLA, who sent it to the respondent. It appears to have been mislaid. Her representatives sent a copy of the ILR letter, which was confirmed as counterfeit. After an interview she was served with notice that she was liable to removal. She then applied for leave to remain on human rights grounds. Her application was refused and certified as clearly unfounded. A judicial review challenge to that assessment was withdrawn by consent on the respondent's undertaking to reconsider, taking further material into account. The reconsideration led to the refusal now under appeal.

5.
The grounds of the appellant's human rights claim are based on her relationship with her own family members and with a man with whom she has had a long-term relationship, together with her continuous presence in the United Kingdom for many years.

6.
The appellant lives with her half-sister, who has children and grandchildren. The appellant claims that she is very close to her nephews, and her half-sister says that she has been a huge support in raising the children and grandchildren. But there was no evidence from any of the nephews, and Judge Carroll concluded that there was no basis for a finding that there was anything more than the normal affection between family members. The appellant's living arrangements fell nevertheless to be considered as part of her family life. The appellant has family members in Jamaica, including her parents (who are separated) and her children: she is in contact with all of them. She has numerous other family members in Jamaica, including a brother, a half-brother and three half-sisters, and nephews and nieces.

7.
Since 2007 the appellant has had a relationship with a man, who is married with children and does not propose to leave his wife for her. They see each other during the week and sometimes at weekends. He provides financial support for her, and her children in Jamaica. He gave evidence in support of the appellant's appeal but, as the Judge noted, that evidence left it far from clear whether he would continue any support if the appellant returned to Jamaica. He would certainly have no intention of following her there. The Judge concluded that although the relationship was limited, it had elements going to the appellant's family life and her private life.

8.
The appellant has, it appears, been in the United Kingdom continuously since her first arrival. There is no evidence of her having left, or that she would have been able to return on the documents available

to her after her leave expired in 2001. The respondent's letter of refusal appears to accept her continuous presence.

9.
The respondent had refused the application on the basis that the appellant did not meet the requirements of the Immigration Rules in any category, and that her circumstances were not such as to give her a right to remain despite not meeting the requirements of the Rules. The Judge considered the grounds of appeal, which were to the effect that the appellant's removal would be a disproportionate interference with her Convention rights, cited s 117B of the Nationality, Immigration and Asylum Act 2002, noted that the appellant has relatives in Jamaica, where employment might well be available to a person with the appellant's experience and training, and concluded that the decision was not disproportionate.

10.
The grounds of appeal to this Tribunal asserted that the Judge had failed to follow what the grounds described as a "structured approach" to applying the Rules and the possibility of success outside them, had failed to apply guidance from the Supreme Court decision in Agyarko v SSHD [2017] UKSC 11 at [53], had failed to consider all the factors relevant under s 117B, and had failed to strike a fair balance between the individual rights affected and the public interest. We had the benefit of a full rule 24 response from the respondent and oral submissions from Mr Selwood and Mr Melvin.

11.
We think nothing of the grounds apart from that based on Agyarko . In particular, it appears to us that the Judge's decision has sufficient structure for its purpose: it considers the potential case under the Rules properly within the context of an appeal on human rights grounds only, and reaches a conclusion amply open to the judge on its own terms (that is to say, disregarding for the moment the Agyarko point). There is nothing in s 117B that the judge should have considered and did not: in particular, the points raised in relation to subsections (2) and (3) could not assist her case: see Rhuppiah v SSHD [2018] UKSC 58 at [57], firmly summarised in SC (Bangladesh) v SSHD [2019] EWCA Civ 3069 at [32]:

"[I]n Rhuppiah the Supreme Court endorsed the approach in AM (Malawi) and it is now established that section 117B(2) and (3) do not require the Tribunal to take into account fluency in English and financial independence as factors in [an] Article 8 appellant's favour."

12.
We turn then to Agyarko . This is a decision of the Supreme Court considering issues in relation to applications for leave based on article 8 as applied in Appendix FM to the Immigration Rules, and the reasons for recognising article 8 rights outside the Rules. It makes no reference to s 117B, probably because each of the appellants before the Court was challenging a decision made in 2013, before the enactment of s 117B, which was introduced by the Immigration Act 2014. But the decision is still relevant because of its treatment of the notion of "precariousness".

13.
Sections 117A-B read, so far as relevant for present purposes, as follows:

"117A

(1)

This Part [i.e. ss 117A-D] applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—

(a)
breaches a person's right to respect for private and family life under Article 8, and

(b)
as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2)
In considering the public interest question, the court or tribunal must (in particular) have regard—

(a)
in all cases, to the considerations listed in section 117B, and

(b)
in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

(3)
In subsection (2), “the public interest question” means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

117B

…

(4) Little weight should be given to—

(a) a private life, or

(b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United

Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a

time when the person's immigration status is precarious.”

14.
In Agyarko the Supreme Court had the task of working out the implications of precariousness with little assistance other than that to be derived from the decision of the ECtHR in Jeunesse v The Netherlands [2014] ECHR 1036. In that case the Court, in working through the principles in the light of its previous decisions, said this at [108]:

“Another important consideration is whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host State would from the outset be precarious. It is the Court’s well-established case-law that, where this is the case, it is likely only to be in exceptional circumstances that the removal of the non-national family member will constitute a violation of Article 8.”

15.
Lord Reed’s judgment (with which the other members of the Court agreed) set out various possibilities and at [53] said this:

“[T]he reference in the [Home Office] instruction to "full knowledge that their stay here is unlawful or precarious" is also consistent with the case law of the European Court, which refers to the persons concerned being aware that the persistence of family life in the host state would be precarious from the outset (as in Jeunesse , para 108). One can, for example, envisage circumstances in which people might be under a reasonable misapprehension as to their ability to maintain a family life in the UK, and in which a less stringent approach might therefore be appropriate.”

16.
As we have seen, s 117B(5) introduces precariousness as a statutory concept applicable in cases where a person has leave (so contrasted with cases where the person has no leave, governed by s 117(4)): the meaning of precariousness in this context is settled by Rhuppiah . But the introduction of the statutory notion in the case of a person who has leave does not of itself remove the applicability of any non-statutory notion, given the same name, in the case of those who do not have leave. The sentiment in paragraph 108 of Jeunesse does not appear to be limited to those who have some sort of permission to be in the country in question; and the notion of mistake embraced in paragraph [53] of Agyarko is precisely a mistake about whether there is permission or not. In our judgment it would be quite wrong to confine that notion to cases where a person in fact has some leave and refuse to apply it to a person who in fact has no leave.

17.
Between 2007 or 2008 and 2015 the appellant thought she had indefinite leave to remain. That was the period when the appellant was beginning and developing her relationship with her partner, and forms a considerable part of the time that she was establishing herself in the United Kingdom. In considering the “public interest question” the Judge ought to have taken into account whether a “less stringent approach might be appropriate”. Judge Carroll took no notice of the Agyarko approach despite its having been cited on the appellant’s behalf: paragraph 23 of the Judge’s decision notes the period of time, the mistake, and the respondent’s acceptance of it, but in the end states simply that “It remains the case that the appellant had no valid leave to remain from 2001”.

18.
That was an error of law. The Judge should have treated the period during which the appellant thought she had leave differently from the periods in which she knew she had no leave. Given the extent of the former, and the relationships and the conduct of her private life during it, it is impossible to say that the result in general, and in the application of s 117B, would or should have been the same if this factor had been taken into account. The Judge’s decision must be set aside.

19.
We proceed, therefore, to re-make the decision on the appeal. There is no further evidence as such, but there has been a development of some importance. At the date of the hearing before us on 29 January 2020, the appellant had been in the United Kingdom, albeit for the most part without leave, for a period in excess of twenty years continuously. There being no known matters to the contrary, she would apparently be entitled on application to a grant of leave under paragraph 276ADE of the Immigration Rules.

20.
Before the hearing the appellant’s representatives had attempted, without success, to persuade the respondent that leave should now be granted for that reason. At the hearing Mr Melvin’s position was that the appellant’s current position as a person who had spent twenty years in the United Kingdom

was a “new matter”, which we were not entitled to consider unless he gave us permission to do so. He relied on s 85(4)-(6) of the 2002 Act:

“(4) On an appeal under section 82(1) against a decision the Tribunal may consider any matter which it thinks relevant to the substance of the decision, including a matter arising after the date of the decision.

(5)
But the Tribunal must not consider a new matter unless the Secretary of State has

given the Tribunal consent to do so.

(6)
A matter is a “new matter” if—

(a)
it constitutes a ground of appeal of a kind listed in section 84, and

(b)
the Secretary of State has not previously considered the matter in the context of—

(i)
the decision mentioned in section 82(1), or

(ii)
a statement made by the appellant under section 120.”

21.
Mr Melvin’s argument would, we think, have some purchase if this question had arisen before the First-tier Tribunal, or if we were to remit the appeal to the First-tier Tribunal for the decision to be re-made. While the matter remains in this Tribunal, however, the prohibition on the consideration of “a new matter” does not apply.

22.
The reason for that is that in s 81 of the 2002 Act the phrase “the Tribunal” is defined for the purpose of the ensuing Part (including s 85) as meaning the First-tier Tribunal. The phrase specifically does not apply to the Upper Tribunal. No other legislation to which our attention has been drawn suggests that the Upper Tribunal is to be considered as falling within that definition, even when determining an appeal begun under s 82 (which continues in the Upper Tribunal as an “appeal under s 82”, rather than under the appeals provisions of the Tribunals, Courts and Enforcement Act 2007: see LB (Jamaica) v SSHD [2011] EWCA Civ). The provisions of s 84(4) are not needed to enable the Upper Tribunal, a superior court of record, to take relevant matters into account, so it cannot be said that without acceding to the restriction in subsection (5) this Tribunal could not take anything into account at all.

23.
Furthermore, it is clear that in general procedure before the Upper Tribunal is not identical to that before the First-tier Tribunal: there are two different sets of Procedure Rules; and the Upper Tribunal alone has the powers given by s 25 of the 2007 Act. Although s 12(4)(a) of the 2007 Act provides that on an appeal the Upper Tribunal may make any decision that the First-tier Tribunal could make, there is no suggestion that the route to a decision, or the reasons for the decision, are confined to those that

would be open to the First-tier Tribunal; and paragraph (b) of that subsection specifically provides that the Upper Tribunal may make “such findings of fact as it considers appropriate”.

24.
We therefore reject the argument that we cannot take the new matter into consideration. The passage of time is clearly relevant to the determination of this appeal as it now stands before us. Whatever might have been the substantive merits of the appellant’s case before the expiry of twenty years since her arrival in the United Kingdom, the position now is that she meets the substantive requirements of the Rules entitling her to a grant of leave. For that reason, and that reason only, we consider that in her case it would not be proportionate to remove her from the United Kingdom.

25.
We therefore allow the appellant’s appeal.

C. M. G. OCKELTON

VICE PRESIDENT OF THE UPPER TRIBUNAL

IMMIGRATION AND ASYLUM CHAMBER

Date: 11 February 2020