Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/01053/2013

THE IMMIGRATION ACTS

Heard at Field House	**Date sent**
On 2 July 2013	**On 4 July 2013**

Before

UPPER TRIBUNAL JUDGE MOULDEN

Between

MISS EUNICE ANKRAH

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr V Makrol a solicitor acting pro bono
For the Respondent: Mr P Nath a Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Ghana who was born on 20 December 1967. Both she and the respondent have been given permission to appeal the determination of First-Tier Tribunal Judge J Simpson. She had appealed against the respondent's decision of 9 January 2013 to refuse her leave to remain in the UK following the refusal of asylum. The judge allowed her appeal on Article 8 human rights grounds but decided that she was not entitled to the benefit of the respondent's "legacy" scheme.

2. At an earlier hearing before me the representatives were confused as to who had been granted permission to appeal. It turned out that the respondent had been granted permission to appeal but the appellant's in time application for permission to appeal had not been decided. I granted permission to appeal to the appellant. In this determination I will refer to the original claimant as the appellant and the Secretary of State as the respondent.

3. The appellant entered the UK in June 1995 and claimed asylum. Her application was refused in March 1996 and her appeal against this decision was dismissed in January 1998. Removal directions were given but the appellant was not removed. The next contact between the appellant and the respondent was in September 2009. Through solicitors she made a claim for leave to remain in the UK under the legacy scheme. I will need to return to the history of this claim in more detail.

4. The appellant appealed against the respondent's decision of 9 January 2013 and the judge heard her appeal on 7 March 2013. Both parties were represented, the appellant by Mr Makrol. The appellant gave evidence as did her partner and three friends. It was conceded that the appellant was not pursuing her asylum claim.

5. The judge decided that the appellant was not entitled to leave under the long residence provisions of the Immigration Rules, a conclusion which is not now disputed. In relation to the Article 8 grounds, he found that the appellant had established a private and family life in this country. The family life was largely with her partner with whom he concluded the appellant had established a genuine and subsisting relationship which started in 2007. Her partner was a British citizen who worked and supported her. The judge found the appellant, her partner and the three friends who gave evidence to be credible witnesses. The judge considered the Razgar tests, finding that all but the last of the questions were answered in the affirmative and that the decision turned on proportionality. He weighed in the balance the factors which favoured the appellant against "the need to maintain effective immigration control" and "the public interest is always a high hurdle for any appellant to overcome". He found that if the appellant returned to Ghana she was likely to succeed in an application for entry clearance to settle with her partner/husband in the UK. They had for sometime intended to marry but were unable to do so because the respondent held the appellant's passport which she needed to produce if the marriage was to be arranged.

6. The judge addressed the appellant's grounds under the legacy provisions in paragraph 7 (d) of the determination before reaching the final conclusion in paragraph 11 that she was not entitled to the benefit of these.

7. The respondent's grounds of appeal argue that the judge erred in law by failing to give any or adequate reasons for his findings which

led to the Article 8 conclusion. They allege that the appellant had failed to produce evidence demonstrating her subsisting relationship with a British citizen or that they had lived together for the period they claimed. There was a lack of documentary evidence in support such as joint bills or tenancy agreements. The appellant had not tried to obtain her passport from the respondent in order to marry. There is reference to "conflicting evidence". It is also argued that any private or family life rights would have been established during a period when the appellant's precarious immigration status was known. The appellant had ties to Ghana including children there. She had shown a disregard for the immigration law. The judge is said to have pre-empted the outcome of an entry clearance application from abroad without evidence to support his conclusion.

8. Mr Nath confirmed that, whilst the respondent was represented at the hearing before the judge, the grounds of appeal which accompanied the application for permission to appeal to the Upper Tribunal would have been prepared by somebody who had the determination but not all the papers before the judge at the hearing. This may explain why important elements of the grounds are no doubt unintentionally misleading or misconceived. For example the appellant's representatives submitted five substantial bundles (A to E) which include a great deal of corroborative evidence. This includes copies of the appellant's partner's latest and previous passports showing that he has been a British citizen since at least October 2002. There are utility bills in the appellant's name for the address where she is living with her partner. There are other utility bills in his name for the same address. Whilst I accept that there are no utility bills in their joint names the existence of bills in each of their names for the same address assists them. There is a tenancy agreement in his name for the same address. There are payslips for the appellant's partner giving the same address. There is a letter from her church stating that the appellant lives at this address. Witnesses gave evidence and provided statements or letters saying that the appellant and her partner lived together at this address. The allegation that "no attempt has been made to request permission and documents from the respondent to marry" takes no account of the letter from the appellant to the respondent dated 21 March 2012 at page 40 of bundle A with which she sent her passport to the respondent who had asked for it. She asked for it to be returned. I asked Mr Nath to point me to any "conflicting evidence" but he was not able to do so.

9. The judge found the appellant, her partner, and the witnesses to be credible. The respondent's grounds do not question this conclusion. It is arguable that on this basis alone the judge was entitled to reach his findings of fact. However, I find that there was corroborative documentary evidence before the judge which supported his findings. I find that the judge was entitled to reach his findings of fact and that in this regard there is no error of law.

10. I find that the judge did have in mind and take into account the fact that the appellant has had no right to be in this country for most of her time here. This appears from his findings relating to her immigration history in paragraph 8 and what he said about maintenance of immigration control and the public interest.

11. Having reached the conclusion that the appellant was in a genuine and settled relationship with her partner it was appropriate for the judge to consider whether she should be required to return to Ghana in order to make an entry clearance application from there. I find that on the totality of the evidence before him it was open to the judge to come to the conclusion not that an application was bound to succeed but that it was "likely to be successful".

12. The judge could have set out his reasoning in relation to the Article 8 grounds at greater length and in more detail. However, having examined these in the light of the evidence before him, oral and documentary, I find that he reached conclusions open to him on that evidence and that there is no error of law.

13. The judge dealt with the appellant's grounds under the legacy scheme in paragraph 8 (d) of the determination in which he said; "Mr Makrol argues that the legacy provisions applied to the appellant. This was first raised in the letter of September 2009 asserting her claim had not been concluded as there remained an extent human rights claim. Mr Makrol produced a number of documents regarding the legacy scheme and based his argument on a category referred to in one of his bundles [24] of "asylum applications which had been refused but there is no indication that the appellant has left the UK". In answer to my question he contended that any asylum seeker who had been refused and whose rights of appeal were exhausted, irrespective of how long ago that occurred, and who had since gone to ground to avoid removal, had an expectation that leave would be granted once the legacy system came into being. I reject that submission." Nothing more is said about this aspect of the appellant’s claim until the final conclusion in paragraph 11 rejecting it.

14. I find that the judge erred in law in his consideration of the legacy scheme grounds. Whilst this may have been Mr Makrol's answer to one question from the judge the judge failed to address the appellant’s lengthy and detailed skeleton argument and the substantial bundle of documents in support. They have not had proper consideration.

15. In the refusal letter dated 9 January 2013 the respondent referred to the legacy scheme and said; "You have stated that you have applied for a consideration under Legacy (sic), however legacy is not an application and can not be applied for. Furthermore this is a Pardeepan case and therefore carries a right of appeal."

16. On 22 September 2009 the appellant's then solicitors wrote to the respondent outlining her situation and asking that her case should be "treated/considered under the Legacy case directive". Mr Nath questioned whether there was any evidence that this letter had been received by the respondent. I find that it was. There is a recorded delivery tracking number on the letter and a written confirmation from Royal Mail that a letter with this tracking number was delivered on 25 September 2009. The date is significant because, after 14 October 2009 any new submissions or applications had to be made in person and, it appears, in Liverpool.

17. The appellant or her solicitors wrote chase up letters to the respondent in 2010. In early 2011 she went to her MP, Mr David Lamy, who wrote to the respondent. The respondent replied on 9 February 2011 and said "As Miss Ankrah has now contacted us to request that she be granted leave under the "Legacy" scheme, her file has been forwarded to the appropriate casework unit for consideration of this request. I can assure you that she will be notified of the final decision as soon as possible, but at this time I cannot give a firm indication as to when this will be."

18. The respondent wrote a further letter in response to an e-mail from Mr David Lamy of 12 July 2011 which appears to have been sent on 5 October 2011. This said that there had been an earlier letter of 11 May stating that the case would be referred to the Case Assurance and Audit Unit to be concluded and that "this unit has been established to deal with these cases". It also said; "We have reviewed Miss Ankrah's case and the review considered the original decision made on her case on whether she had any outstanding applications or representations for leave to remain in the UK. Following the review, it was deemed that the original decision made on Miss Ankrah's case should remain extant. As it stands she has no basis of stay in the UK and should make arrangements to leave the country as soon as possible."

19. The appellant wrote to the respondent on 28 October 2011 and 31 January 2012 disputing this conclusion and with additional representations. The respondent replied in a letter of 17 February 2012 stating that the appellant's case "has now been allocated from CRD to CAAU. CAAU will resolve cases by either removing individuals from the United Kingdom or granting them leave to remain in accordance with existing law and policy." It goes on to refer to the appellant's solicitors letter of 31 January 2012 and her claim under "Legacy" but adds that the respondent has no record of outstanding further submissions.

20. The appellant or her solicitors submitted further letters to the respondent on 1 March 2012, 11 June 2012 and 26 September 2012 to the effect that representations had been made but had not been considered. On 5 October 2012 the respondent replied stating; "Given the content of your letter it is accepted that further

investigation is merited. We will aim to review your client's case and provide a response within six months."

21. The next step by the respondent was the refusal letter of 9 January 2013 which reached the conclusion I have already set out.

22. The question of whether the appellant succeeds under the legacy provisions as well as on Article 8 human rights grounds is not academic. I am informed that if the appeal is allowed on Article 8 human rights grounds the appellant will be granted 30 months leave. I am also informed that if she had succeeded under the legacy provisions in force at the time of her application she would have been entitled to indefinite leave.

23. I find that the appellant made an in time application under the legacy provisions which should have been but has not been properly considered by the respondent.

24. In relation to the judge's decision to allow the appeal on Article 8 human rights grounds I find that he did not err in law and I uphold his decision.

25. In relation to the judge's decision to dismiss the appeal in relation to the legacy provisions I find that the judge erred in law and I set aside his decision. I substitute my decision that, in relation to the application under the legacy provisions, the respondent's decision was not in accordance with the law and I allow her appealed to this extent. The appellant application must be properly considered by the respondent and a fresh decision reached.

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Signed Date 3 July 2013

Upper Tribunal Judge Moulden