Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/27845/2012

THE IMMIGRATION ACTS

Heard at Field House **Determination Sent**
On 4 September 2013 **On 9 September 2013**

Before

UPPER TRIBUNAL JUDGE MOULDEN

Between

MS Y M B
(Anonymity Direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Harris of counsel instructed by Sunrise solicitors
For the Respondent: Mr S Walker a Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Guyana who was born on 4 December 1978. She has been given permission to appeal the determination of First-Tier Tribunal Judge M R Oliver ("the FTTJ") who dismissed her appeal against the respondent's decision of 16 November 2012 to refuse her further leave to remain in the UK as the victim of domestic violence under the provisions of paragraph 289A of the Immigration Rules.

© CROWN COPYRIGHT 2013

2. This appeal came before me on 9 July 2013. Following that hearing I issued a Decision and Directions which is set out in the Appendix to this determination. Having concluded that the FTTJ erred in law I set aside his decision in relation to the grounds under the Immigration Rules and human rights which would have to be remade at a later date with none of his findings preserved. I upheld his decision to allow the appeal against the section 47 decision. I gave directions.

3. This appeal now comes back before me to remake the decision. I have a new bundle of documents submitted with the appellant's representative's letter of 28 August 2013 and a composite bundle of the documents previously before the Tribunal. During the course of the hearing the appellant produced better copies of the photographs showing some of her injuries and the original of the document showing that she had had a scan at a NHS hospital.

4. Mr Walker accepted that there was only one outstanding point to be determined in the appeal; whether the appellant's relationship had broken down because of domestic violence. He accepted that the appellant met the other requirements of the Immigration Rules.

5. I heard oral evidence from the appellant, her sister and a neighbour. All of them adopted previous and current witness statements, were examined in chief and cross-examined. I asked some questions for the purpose of clarification. Their evidence is set out in my record of proceedings.

6. Mr Walker made submissions. He accepted that in relation to the evidence of the appellant and her sister Devaseelan principles applied and that my starting point should be the findings of Immigration Judge Callow who heard the appellant's appeal in January 2010, found them to be credible witnesses, allowed the appellant's appeal and concluded that the appellant had at that time been living with her partner in a relationship akin to marriage for a period of two years or more. In relation to the evidence given before me he accepted that there was corroborative evidence of the appellant's claims to have suffered domestic violence. There were photographs showing scars and teeth which had been knocked out. Whilst the hospital note showing that she had undergone an ultrasound scan was not conclusive as to the cause it did provide some corroboration. Crucially, Mr Walker accepted that all the witnesses who had given evidence before me were credible. In the circumstances he did not wish to make any further submissions. I told Mr Harris that there was no need for him to make submissions and I reserved my determination.

7. I find the appellant and her two witnesses to be credible. I would have done so even if Mr Walker had not accepted this. I find that the appellant arrived in the UK on 24 December 2005 with a marriage visa in order to marry a British citizen. Her period of leave expired on 21 June 2006. On 21 March 2006 she applied for leave to remain under the Armed Forces non-exempt category. This application was granted for a period expiring on 11 October 2006. On 3 October 2006 she applied for leave to remain outside the Immigration Rules. This was refused on 8 October 2006. A further application on 19

October 2006 made outside the Immigration Rules was refused on 13 November 2006. On 23 November 2006 she applied for leave to remain under the Armed Forces non-exempt category. This was granted and she was given further leave expiring on 4 March 2008. On 1 March 2008 she applied for further leave to remain in the same category and this was granted for a period expiring on 30 January 2009. On 29 January 2009 she applied for further leave as an unmarried partner. This was refused on 15 October 2009. She appealed and her appeal was allowed by Immigration Judge Callow following a hearing on 4 January 2010. She was then granted further leave to remain for a period expiring on 15 October 2012. Before that leave expired she made the application which has led to the current appeal.

8. I find that the appellant's partner was and may still be a serving soldier in the British Army. Until their final separation in August 2012 they had been together since high school in Guyana. When she came to the UK they planned to marry. They did not do so because she wanted a big family wedding which neither of them could afford on his income, because she was not allowed to work and because of his postings overseas. They did not live together all the time, because of his military service commitments. She lived with her sister in the UK and she lived with him when they could either at her sister's house or in barracks.

9. There were minor incidents but the appellant suffered no serious violence from her partner before 2010. Starting in 2010 she suffered many incidents of violence and abuse at the hands of her partner, some of them serious. She cannot remember all of them or when they occurred but they included being punched, slapped and pushed against a wall. He was verbally abusive. Many of the incidents of violence were at her sister's home when her sister was not present.

10. The appellant was able to remember the following incidents. In mid-2010 she was with her partner in his barracks. He was ironing his uniform. He abused her and she tried to leave. He grabbed her and pulled her back and pushed the hot iron towards her face. She put up her arm to protect her face and the iron caused the burn on her lower forearm. The scar in this area appears in one of the photographs.

11. In about September or October of 2010 her partner punched the appellant in the stomach. This caused severe pain which lasted for several hours. She went to a local hospital where she was admitted her for a period of between 36 and 48 hours. Subsequently she had the documented ultrasound scan. She has now discovered that she has fibroids which may require treatment. The appellant does not know and it is not clear whether she had fibroids before she was punched by her partner or whether these were exacerbated by what he did.

12. In December 2010 at her sister's house the appellant's partner shouted at her, abused her, and grabbed her by the hair. This incident was viewed by the neighbour who gave evidence.

13. In January 2011 the appellant and her partner were returning from a party where they had been arguing and he had abused her. He stopped the car and told her to get out which she did. He punched her in the face knocking out two upper front teeth and causing bruising and bleeding. The appellant was knocked unconscious. When she came round he had placed her in the car and was looking for her teeth which he was unable to find. The appellant hid from her sister in her room for two days and subsequently went to the dentist who has provided her with a two tooth denture. The photographs show the appellant with and without the denture. Following this incident the appellant's sister said that her partner could no longer come to her house.

14. On a date which she cannot now recall with any certainty, although she thinks it may have been in 2011, she was returning from a party with her partner. He abused her. She asked him to stop so that she could get out. After she had got out he slapped her around the face and pushed her against a barbed wire fence causing a cut, bleeding and now a scar on her upper right arm which appears in one of the photographs. This appears to be between 2 and 3 inches in length. The appellant cleaned and bandaged this herself. She did not obtain medical treatment.

15. For a long time the appellant put up with the domestic violence because she was still in love with her partner, believed that he would change his ways and did not report what had happened to the police or the authorities because she did not want to harm his career. She was embarrassed and did her best to hide what was going on from family and friends.

16. It is for the appellant to establish the facts on which she seeks to rely and that she meets the requirements of the Immigration Rules. The burden of proof is on her and the standard is that of the balance of probabilities. To that standard I find that she has established that her relationship with her partner was caused to permanently break down as a result of his domestic violence. The relationship came to an end in or about August 2012 at which time she had the required extension of stay. It is conceded that the appellant meets the other requirements of paragraph 289A of the Immigration Rules. I find that she meets all the requirements of the Rules.

17. Having set aside the decision of the FTIJ I substitute my decision allowing the appellant's appeal under the Immigration Rules. The decision to allow the appeal against the section 47 decision is not flawed and stands.

18. Direction regarding anonymity

19. I was asked to make an anonymity direction because of the embarrassing personal nature of what happened to the appellant and to protect her partner a serving soldier against possible consequences of my findings in circumstances where he has not had an opportunity to state his position. I agreed to make such a direction.

20. Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or

any member of her family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

APPENDIX

1. The appellant is a citizen of Guyana who was born on 4 December 1978. She has been given permission to appeal the determination of First-Tier Tribunal Judge M R Oliver who dismissed her appeal against the respondent's decision of 16 November 2012 to refuse her further leave to remain in the UK as the victim of domestic violence under the provisions of paragraph 289A of the Immigration Rules.

2. The appellant arrived in the UK on 24 December 2005 with leave as the spouse of a British citizen. Her period of leave expired on 21 June 2006. On 21 March 2006 she applied for leave to remain as the spouse of a person serving in the Armed Forces. This application was granted for a period expiring on 11 October 2006. On 3 October 2006 she applied for leave to remain outside the Immigration Rules. This was refused five days later. A further application on 19 October 2006 was refused on 13 November 2006. On 23 November 2006 she applied for leave to remain as the spouse of a member of the Armed Forces. This was granted and she was given further leave expiring on 4 March 2008. On 1 March 2008 she applied for further leave to remain and this was granted for a period expiring on 30 January 2009. On 29 January 2009 she applied for further leave as an unmarried partner. This was refused on 15 October 2009. She appealed, her appeal was allowed and she was granted further leave to remain for a period expiring on 15 October 2012. I have taken this summary from what the judge sets out in paragraphs 1 to 3 of the determination but I have doubts as to whether some of the grants of leave could have been as a spouse and were in fact as a partner.

3. The appellant claimed that her partner was a serving soldier and that over a long period he had subjected her to serious domestic violence including a number of violent assaults. She claimed that they had been together since high school and for a long time she put up with the domestic violence because she was still in love with him, believed that he would change his ways and did not report what had happened to the police or the authorities because she did not want to harm his career. They did not live together all the time, because of his military service commitments. She lived with her sister in the UK and she lived with her partner when they could either at her sister's house or in barracks. The appellant said that the relationship had come to an end and they had been living apart since August 2012.

4. The respondent rejected the appellant's claim concluding that she had not provided sufficient evidence to show that the relationship had permanently broken down as a result of domestic violence. Her application was refused under the provisions of the Immigration Rules and on Article 8 human rights grounds.

5. The appellant appealed and the judge heard the appeal on 26 April 2013. At that stage the appellant was not represented. The respondent was represented. The judge heard oral evidence from the appellant, her sister and a friend. The judge concluded that the violence that the appellant claimed to have experienced at the hands of her partner was "very minor". The evidence strongly suggested that it was her partner who became disaffected and broke off the relationship rather than it breaking down because of domestic violence. The appellant had not established that they were unmarried partners. There was little documentary evidence to support her claims and the judge appears to found the appellant not credible. She had not applied during the period of her provisional leave. Her appeal also failed on human rights grounds.

6. The judge allowed the appeal against the decision to remove the appellant from the UK by way of directions under s 47 of the Immigration, Asylum and Nationality Act 2006. He dismissed the appeal under the Immigration Rules and on human rights grounds.

7. One matter can be disposed of immediately. In line with the authorities culminating in Adamally and Jaferi (section 47 removal decisions: Tribunal Procedures) [2012] UKUT 00414 (IAC) it is common ground that the judge was correct to conclude that the s 47 decision was not in accordance with the law and that the appeal should be allowed to that extent.

8. The appellant prepared her own grounds to accompany her application for permission to appeal and permission to appeal to the Upper Tribunal was granted by a judge in the First-Tier Tribunal. Since the grant of permission the appellant has instructed solicitors who briefed Mr Harris.

9. The appellant's solicitors have submitted a bundle with a letter dated the day before the hearing. Insofar as this contains material which was not before the judge this does not fall to be considered unless and until the decision is set aside.

10. I heard oral submissions from both representatives. On behalf of the respondent Mrs Tanner conceded that the judge made a number of errors of law and that his decision should be set aside and remade. Specifically, he failed to make findings in respect of the evidence of all the witnesses. Whilst appreciating that there had been a previous appeal and that there would have been findings of fact by an Immigration Judge he did not consider whether, following Devaseelan principles, these findings would have impinged on and provided the starting point for his findings, in particular as to whether there was a subsisting partnership. In the light of the evidence she found it impossible to defend the judge's description of the violence the appellant claimed to have suffered as "very minor".

11. I find that the judge erred in law in a number of respects. Firstly, the judge had a witness statement from a Mr W dated 19 February 2013 which, if accepted, would have provided detailed corroborative evidence of an incident of domestic violence.

Whilst he did not give oral evidence the judge did not address his statement. Secondly, whilst the judge appears to have found the appellant not credible in at least a number of respects there are no clear findings of fact in respect of the evidence of the appellant's sister or Ms L. Findings in respect of their evidence and credibility were essential because they had given not only important background evidence but, if believed, corroborative evidence of specific incidents of domestic violence. The lack of clear findings is difficult to understand because the judge summarised their evidence in paragraphs 11 to 13 (the appellant's sister) and 14 (Ms L) and, in paragraph 16, said that he preferred the evidence of the sister to that of the appellant. Thirdly, at the beginning of paragraph 16 the judge said "Without in any way trivialising the violence which she claims her ex-partner inflicted on her". At the end of the paragraph he found that "the violence she claims to have experienced at the hands of her ex-partner has been very minor". I find that the judge did what he warned himself against. He trivialised the violence. Taking only the incidents which the appellant could remember and particularise I find that what she claimed to have suffered cannot possibly be described as "very minor". Fourthly, in paragraph 13, the judge refers to the appellant's sister as saying that the appellant "lies about a lot of things" without any further explanation or qualification. Reference to his record of proceedings indicates that the appellant's sister was referring to the appellant lying about what her partner was doing to her by way of "making excuses for him to keep relations going". Fifthly, the statement in paragraph 18 that the application for leave on the basis of domestic violence would not satisfy the requirements that the application had to be made during the provisional leave is incorrect. As the judge records in paragraphs 1 and 2 of the determination the application was made on 10 October 2012 and her period of leave did not expire until 15 October 2012. Sixthly, the judge's conclusion in paragraph 18 that the appellant had not established that she was in an unmarried partnership is not clearly explained and flies in the face of the fact that, on more than one occasion, the respondent must have accepted that such a relationship existed and that the Immigration Judge who heard her appeal in 2010 is likely to have made findings about this. I now have a copy of the determination of Immigration Judge Callow promulgated on 28 January 2010 in which he accepted that the appellant and her partner were living together in a relationship akin to marriage which has subsisted for more than two years. Whilst this was not before the First-Tier Tribunal Judge there were clear indications that the existence of such a partnership is likely to have been accepted by both the respondent and the judge in a previous appeal. If the judge was going to come to a different conclusion it should have been clearly explained.

12. I heard submissions as to whether the decision should be remade in the First-Tier Tribunal or the Upper Tribunal. Mrs Tanner did not express a view. Mr Harris asked for a continuation hearing in the Upper Tribunal and I accept that this is the course to be followed. The appellant wishes to give oral evidence and call four other witnesses. There was insufficient time to hear them and submissions on the day of the hearing before me.

13. I find that the errors of law are such that the decision must be set aside and remade in relation to the grounds under the Immigration Rules and human rights. None of the judge's findings are preserved. The decision to allow the appeal against the section 47 decision is not flawed and stands.

Signed:.. Date: 4 September 2013
Upper Tribunal Judge Moulden