Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/41253/2013

THE IMMIGRATION ACTS

Heard at Field House

On 21st July 2014

Determination Promulgated
On 24th July 2014

Before

UPPER TRIBUNAL JUDGE REEDS

Between

CATHERINE ASIHENE

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Jafar, Counsel instructed on behalf of Mayfair Solicitors
For the Respondent: Mr S Walker, Senior Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a national of Ghana born on 25th December 1979. She appeals with permission against the decision of the First-tier Tribunal (Judge Andonian) who in a determination promulgated on 23rd March 2014 dismissed her appeal against the decision of the Respondent to refuse her

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application as a dependent partner of a points-based system migrant under paragraph 319E of the Immigration Rules.

2. The history can be briefly stated as follows. The Appellant entered the United Kingdom as a visitor on 29th June 2004 with valid leave until 8th December. It is said that she later had entry clearance as a working holidaymaker which was valid until 23rd November 2007. On 21st June 2008 she entered the United Kingdom as a dependent of Mr Louis Nana-Owusu who had leave to remain in the UK as a work permit migrant. The immigration history of the Appellant sets out that her leave to remain was extended as a dependant inline with that of her partner's leave to remain in the UK and her last grant of leave was under Tier 2 (dependent) partner which was valid until 23rd April 2012.

3. In an application made originally in July but then resubmitted on 2nd August 2012 she applied for indefinite leave to remain on form SET(O) as a partner of a points-based system migrant. That application was refused firstly under paragraph 319E and secondly under Appendix FM and paragraph 276ADE of the Immigration Rules. It is plain from the refusal letter that the reasons given for refusing the application was that the Appellant was required to demonstrate that she was in a relationship with Mr Nana-Owusu and that the relationship was subsisting. The reasons for refusal letter which accompanied the notice of immigration decision set out the reasons why. Consideration was also given to her application on Article 8 grounds applying Appendix FM of the Immigration Rules and EX1 and also paragraph 276ADE with reference to her private life. Consideration was also given within the reasons for refusal letter to the child of the parties who had been born in the United Kingdom although was not a British citizen.

4. The Appellant appealed that decision on the grounds that the decision was flawed, that the Secretary of State had not considered the supporting evidence correctly and had failed to consider Article 8 of the ECHR in reference to her circumstances.

5. The hearing came before the First-tier Tribunal (Judge Andonian) on 5th March 2014 at Inner London Crown Court. It is plain from reading the determination that there was no appearance by the Appellant or on her behalf. As set out in paragraph 1 of the determination, a letter from those instructed by the Appellant dated 5th March 2014 set out that the Appellant was not "feeling very well for the past few days and was unable to attend court". Thus the judge determined the appeal on the papers.

6. The judge dismissed the appeal under the Immigration Rules and also under Article 8 of the ECHR. The reasons given in the determination relate to the Appellant not providing evidence to substantiate her claim that the relationship was subsisting and secondly, by reference to Article 8 and in particular Appendix FM, as she was unable to provide evidence that she was in a genuine and subsisting relationship with her partner settled in the UK, and she could not meet the requirements of the Immigration Rules

and in respect of EX1 of Appendix FM, there were no insurmountable obstacles for family life continuing outside the UK. Insofar as paragraph 276ADE was considered, the judge noted that she was 33 years of age and had resided in the UK for five years and three months at the date of the application and that it was not considered that she had lived continuously in the UK for twenty years and therefore was likely to have ties with Ghana. In relation to the child of the parties, consideration was given to Section 55 of the 2009 Act but that in the circumstances of the case the judge found that the need to maintain the integrity of the Immigration Rules outweighed the effect on the Appellant and her child that may result from her and the child having to re-establish family life outside the UK.

7. Permission to appeal that decision was granted by the First-tier Tribunal Judge White on 4th June 2014. The reasons given were as follows:-

> "Having had regard to the grounds of permission to appeal and the determination, I am satisfied that in reaching his decision the judge arguably made an error of law for the following reasons:-
>
> (a) At paragraph 5 and 7 of the determination the judge makes reference to paragraph 319E of the Immigration Rules (a principal Rule under which the Appellant's application was refused by the Respondent).
>
> (b) However, the judge makes no findings as to whether the Appellant meets paragraph 319E, paragraphs 5 – 7 of the determination appear and simply to be a recital/paraphrase of parts of the Respondent's reasons for refusal letter.
>
> Accordingly I am satisfied that the grounds and determination disclose an arguable error of law."

8. Thus the appeal came before the Upper Tribunal, Mr Jafar attended on behalf of the Appellant and, Mr Walker, Senior Presenting Officer on behalf of the Respondent. Mr Jafar relied upon the written grounds for which permission was granted. He submitted that the judge did not set out adequate reasoning as to why the Appellant could not meet the relevant Immigration Rule namely 319E. As the grant of permission sets out, what the judge effectively did was to recite or paraphrase the Respondent's reasons given in the reasons for refusal letter without making any reference to findings made from the evidence as a whole. Mr Jafar took the Tribunal through the determination pointing out the paragraphs in which the information was simply recited rather than giving reasons. At paragraph 7 of the determination Mr Jafar submitted that the conclusion in that paragraph that she was "unable to provide evidence that this relationship is subsisting" was insufficient and did not consider the evidence that had been provided on behalf of the Appellant. In this regard he referred me to the Appellant's bundle sent from her solicitors including photographs of the parties, birth certificate, copies of bank statements, payslips. The child of the relationship had been born in 2007 and the birth certificate demonstrated that both father and mother were in a relationship at the date of the birth and there were no reasons given as to why the judge

found they were still not in a subsisting relationship. He submitted that the evidence that had been provided by the Appellant should have been considered and none of that had been properly looked at. In particular at paragraph 14 Mr Jafar submitted that that was insufficient to discharge the duty to consider that evidence. In particular he said to the Tribunal that the sentence "There is nothing novel in them that I have not already considered in the evidence in the round that could give rise to a successful appeal," suggested that the judge had considered the evidence post fact rather than looking at the evidence as a whole. Similarly there were problems considering Article 8 as the principal finding was that she was not in a genuine and subsisting relationship with her partner.

9. Mr Walker, on behalf of the Secretary of State referred to the Rule 24 response dated 16th June 2014 which was very brief and only made reference to paragraph 6 and 7. He confirmed that the only finding in the determination was that set out at paragraph 14 where the judge did make reference having considered the witness statement but that was the evidence that was placed before the judge.

10. At the conclusion of the submissions I gave a brief judgment which I indicated to the parties that I had reached the conclusion after considering the papers and also hearing the submissions of the parties that the determination did disclose an error of law and in those circumstances the determination should be set aside.

11. The reasons for reaching that decision can be briefly stated. It is plain from the issues in the case and in particular those set out in the reasons for refusal letter that the principal issue related to whether or not the Appellant and her partner were in a genuine and subsisting relationship. The past history demonstrated by the Appellant's immigration status and the last grants of leave demonstrated that she had leave to remain which had been extended on a number of occasions based on her relationship as a dependent of her partner. The evidence also demonstrated that there was a child of the relationship born in 2007. The refusal letter made reference, as did the judge to a letter sent to the Appellant on 19th July 2013 asking for documentary evidence to show that her and her partner were residing together. It was as a result of this that the further application was made on 2nd August 2012. The refusal letter also later set out that she had responded to the Secretary of State that she had not lived with her partner because they wanted to be married before they moved to live together but that there was no evidence to substantiate those circumstances and that the evidence provided of greeting cards was not considered to be sufficient evidence.

12. Whilst the judge made reference to the refusal letter and in effect set out verbatim what was in that refusal letter, the judge did not assess the evidence that had been provided by the Appellant concerning the issue of whether or not the relationship was subsisting. The Appellant had produced a further evidence including a witness statement setting out her history and that of the partner and also evidence concerning the

subsistence of the relationship. In addition there was other evidence including Barclays bank statements in her name showing the address that she was living at and also there were other documents including payslips for her partner which also gave the same address. Thus there was evidence before the Tribunal, and also in accordance with the witness statement that gave rise to evidence capable of supporting her account.

13. That evidence is not referred to within the determination either in reaching a conclusion on paragraph 319E of the Immigration Rules or in relation to Article 8 and this was the principal issue in relation to both matters. Whilst at paragraph 14 the judge sets out that he has considered the papers and the skeleton argument but went on to state "I regret for the reasons stated in the determination these do not take matters any further insofar as this appeal is concerned. There is nothing novel in them that I have not already considered in the evidence in the round that can give rise to a successful appeal", there are no reasons given from that documentation to reach the conclusion that the evidence that has been provided was either not acceptable, unreliable or did not seek to show that the documents purported to show.

14. In short, I consider the submission made by Mr Jafar has weight in that it was necessary to engage with those documents and to give reasons, if those documents were not to be given weight, why that should be so. The absence of the Appellant was unfortunate and this did not assist the judge. Whilst the Appellant did not attend the hearing, the documents presented were still before the Tribunal.

15. For those reasons, I have reached the conclusion that the determination should be set aside and that there should be a fresh hearing before the First-tier Tribunal. The advocates have invited the Tribunal to determine the appeal with a fresh oral hearing by way of remittal to the First-tier Tribunal. Mr Jafar indicated that both the Appellant and her partner Mr Nana-Owusu would be giving evidence before the Tribunal relating to the genuineness and subsistence of the relationship. Due to the nature of the error of law, the Tribunal will be required to hear the oral evidence of the Appellant and the findings of fact to be made on all the factual issues and matters of credibility. In that context, I am satisfied that that is the appropriate course for there to be an assessment of all the evidence. Whilst it is not the ordinary practice of the Tribunal to remit cases to the First-tier Tribunal, there are reasons why in this case such a course should be adopted, having given particular regard to the overriding objective of the efficient disposal of appeals and that there are issues of fact that are central to the appeal that require determination.

16. Therefore the decision of the First-tier Tribunal is set aside; none of the findings shall stand and the case is to be remitted to the First-tier Tribunal at Hatton Cross for a hearing in accordance with Section 12(2)(b) of the Tribunals, Courts and Enforcement Act and paragraph 7.2 of the Practice Statements of 10th February 2010 as amended.

Signed   Date 22/7/2014

Upper Tribunal Judge Reeds