



**UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
IA/23195/2013**

APPEAL NUMBER:

THE IMMIGRATION ACTS

Heard at: Field House

**Determination
Promulgated**

On: 2 July 2014

On: 16 July 2014

Prepared: 14 July 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

**MS NANA AMA AFRAKOMA DANSO
NO ANONYMITY DIRECTION MADE**

Respondent

Representation

For the Appellant: In person

**For the Respondent: Mr E Tufan, Senior Home Office Presenting
Officer**

DETERMINATION AND REASONS

1. I shall refer to the appellant as the Secretary of State for the Home Department and to the respondent as the claimant. She is a national of Ghana, born on 15th December 1970. She entered the UK illegally in 2003. On 16th November 2010 she sought leave to remain as the unmarried partner of a British citizen. This was refused on 20th December 2010.

2. On 17th January 2011, she sought leave to remain under Article 8 of the Human Rights Convention, which was refused on 11th February 2011.
3. On 10th January 2012 the appellant then applied for a Derivative Residence Card as the primary carer of a British citizen resident in the UK.
4. Her application was considered pursuant to Regulation 15A(4A) and (7) of the Immigration (EEA) Regulations 2006 ("the 2006 Regulations"). She failed to demonstrate that she met the relevant requirements under the regulation.
5. In the reasons for refusal, the secretary of state notified her that if she wished to rely on family or private life established in the UK under Article 8 of the Human Rights Convention, the Immigration Rules included such provisions. She was informed that if she wished the secretary of state to consider such application she must make a separate charged application using the appropriate specified application form as set out fully at page 3 of the reasons for refusal.
6. No decision was made to remove her from the UK.
7. The claimant in the additional grounds of appeal before the First-tier Tribunal stated that "she has rights under Article 8" of the Human Rights Convention regarding her two daughters. She has however made no application pursuant to Article 8 of the Human Rights Convention following the refusal of her application for leave to remain under the 2006 Regulations.
8. First-tier Tribunal Judge Andonian dismissed the appellant's appeal under the 2006 Regulations, but went on to allow it on human rights grounds. The appellant was represented by Immigration Advisory Centre at the hearing.
9. He stated at paragraph 9 that "the conventional free standing Article 8 rules apply in this case as confirmed by the Court of Appeal case of **Edgehill**, and this is because the application was made prior to the coming into effect of the new rules."
10. After considering the evidence in the case, he found that the appeal should be allowed under Article 8.
11. The secretary of state respondent sought permission to appeal against that decision. Ground 1 asserted that it was not wrong in law to require a separate application for "separate grounds to be considered." The Judge had stated that a separate application did not need to be made which the

claimant would have to pay a fee for. The contention by the secretary of state was, the Judge stated “wrong in law.”

12. Further, the secretary submitted that the authority of **Edgehill v SSHD [2014] EWCA Civ 402**, referred to was inapplicable. That judgement was limited in scope to private life cases only. The present case was an application under the 2006 Regulations and not an Article 8 application. The secretary was under no obligation to consider the claimant’s human rights (or anyone else’s) as no human rights application had in fact been made and the alternative remedy of a statutory appeal was available.
13. It is further contended that as the first point at which the human rights grounds arose was 11th June 2013, when the appeal grounds were lodged, the new rules are in fact applicable.
14. The decision was in any event flawed as the Judge had failed to “follow the process laid down in **Nagre**”.
15. On 22nd May 2014, First-tier Tribunal Judge J M Holmes granted the secretary of state permission to appeal. He noted that there was no dispute relating to the derivative right of residence claimed. Further, the notice of decision contained no s.120 notice, but informed the claimant that if she wished to advance any argument as to why she should be granted leave to remain based upon the existence of any private or family life, she would need to make an application on the appropriate form. The Judge’s apparent view that there was a s.120 notice or that she was not obliged to make such an application was arguably wrong.
16. The evidence relied on by the claimant in support of the Article 8 appeal appeared to have been served either at the hearing or only shortly before that. The claimant secretary of state’s representative’s objection to the approach was apparently overruled.
17. It was also not in dispute that the claimant did not raise Article 8 grounds until the introduction of Appendix FM and paragraph 276ADE into the Immigration Rules. Accordingly, if the Judge had been entitled to consider the Article 8 appeal, it had to have been in the context of the immigration rules as they were at the date of the hearing. There was no proper basis upon which the claimant could claim the benefit of the earlier version of the immigration rules.
18. Further, the Judge’s finding at paragraph 15 of the determination that the decision under appeal was “not in accordance with the law” was not explained, in the light of the fact that he had dismissed the appeal under the 2006 Regulations.

19. At the hearing before me on 3rd July 2014, the claimant was not represented by any solicitor. However, her partner, who is the father of her children, attended the hearing and supported her. During the course of the proceedings, I ascertained that he was aware of the nature of the proceedings. I explained to him what the issues were. He informed me that he had in fact read the papers the night before. I had provided him a bundle of documents including the determination as well as the respondent's grounds of appeal and the permission decision.
20. I ascertained from the claimant that she did not want to have the services of a solicitor and that the hearing could continue.
21. I summarised the claimant secretary of state's grounds seeking permission and made sure that she understood them.
22. Mr Tufan relied on the permission grounds to which I have referred. He also referred to paragraph 400 of the Immigration Rules. That provides that where a person claims that their removal under paragraphs 8 to 10 of Schedule 2 to the Immigration Act 1971, s.10 of the Immigration And Asylum Act 1999 or s.47 of the Immigration, Asylum and Nationality Act 2006 would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, the secretary of state may require an application under paragraph 276ADE or Appendix FM of the rules.
23. It is further provided that where an application is not required, in assessing that claim, the secretary of state or an immigration officer will, subject to paragraph 353, consider that claim against the requirements to be met under paragraph 276ADE or Appendix FM and, if appropriate, the removal decision will be cancelled.
24. Mr Tufan finally submitted that there has at yet been no removal decision, and there had simply been a notification to the claimant that if she wished to make such an application pursuant to Article 8, such an application could be made.
25. The claimant and her partner made no submissions.

Assessment

26. I find that there have been no removal directions made, or even contemplated, against the claimant.
27. It is accepted that she did not qualify for a derivative right of residence pursuant to the 2006 Regulations.
28. Nor was a s.120 notice contained in the notice of decision. There was simply information given to the claimant that if she wished to advance

any argument to be allowed to be granted leave to remain on the basis of private or family life, she would need to make such an application on an appropriate form. This was not done.

29. There had not been a claim based on human rights which accompanied the application for the residence card. The claimant had only raised Article 8 grounds in the grounds of appeal after the introduction of Appendix FM and paragraph 276ADE into the immigration rules. Accordingly, even assuming that the Judge was entitled to consider the Article 8 appeal, this had to be considered in the context of the immigration rules prevailing as at the date of hearing.
30. For these reasons, the decision of the First-tier Tribunal Judge involved the making of an error of law. In the circumstances, I set aside the determination and re-make it. No submissions were made and no further evidence was produced or relied on.
31. I find for the reasons given that the claimant's appeal under Article 8 cannot succeed. The claimant does not satisfy the article 8 requirements under the 'new rules'. Nor, after applying the requirements of the Rules have any compelling circumstances not sufficiently recognised under them been advanced for granting leave to remain outside them.

Decision

Having set aside the First-tier Tribunal's determination, I re-make the decision as follows: The appeal against the Secretary of State's refusal to issue the Claimant a residence card is dismissed

Signed

Date 14/7/2014

C R Mailer
Deputy Upper Tribunal Judge