Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/10551/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
Heard on 28 February 2019	**On 14 March 2019**
Prepared on 11 March 2019	

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MR HENRY HAGAN
(Anonymity order not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mrs S Widdison, Counsel
For the Respondent: Mr T Melvin, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Ghana born on 17 November 1956. He appeals against a decision of Judge of the First-tier Tribunal Easterman sitting at Hatton Cross on 19 November 2018 in which the Judge dismissed an appeal by the Appellant against a decision of the

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Respondent dated 20th of April 2018. That decision was to refuse the Appellant's application for leave to remain under the requirements of the Immigration Rules (Appendix FM and paragraph 276 ADE), and Articles 3 (prohibition of torture) and 8 (right to respect for private and family life) of the Human Rights Convention.

2. The Appellant entered the United Kingdom on 28 March 2003 unlawfully. He has had no leave to remain since arriving. On 7 March 2011 he applied outside the Rules on compassionate grounds, but his application was rejected by the Respondent. A further application on 19 April 2011 was refused by the Respondent with no right of appeal. A third application on 6 July 2012 under Article 8 was refused with no right of appeal on 26 July 2013. On 23 August 2012 the Appellant was served with form IAS 151 A as an immigration offender. On 23 July 2014 the Appellant applied for leave to remain on family/private life grounds which was again refused with no right of appeal on 23 September 2014. A human rights Article 8 application was refused on 14 February 2017. On 13 November 2017 the Appellant made the present application the refusal of which led to these proceedings.

The Appellant's Case

3. The Appellant's case was set out by the Judge at [16] to [37] of the determination. Briefly, the Appellant stated that in line with tradition and because he was the oldest male child he was summoned by family members to marry a second wife and produce male offspring, the Appellant already had two daughters by his first wife. His refusal to marry another woman resulted in him being banished from the family and declared an outcast. One of his uncles threatened to stone the Appellant to death if the Appellant did not comply with the instruction to marry as a result of which the Appellant had to leave Ghana. The Appellant's daughters remained with his wife's parents.

4. After arriving in the United Kingdom, the Appellant made a number of applications which I have summarised above. The Appellant complained that he had been poorly advised by his legal representatives, who had not explained to him he could have applied for asylum although he had not made a formal complaint to the previous representatives because he had insufficient funds to do so. He had been in the United Kingdom for 14 years by the time of the hearing before Judge Easterman and he no longer felt any cultural connection with Ghana. He had separated from his wife in 2017 and currently lived with his cousin and his cousin's family who provided him with support. The Appellant had worked in Ghana as a mechanic but was doubtful that he would find work upon return at his age. He could not live in another area of Ghana as he believed that the news of his return would spread and he would be punished for refusing to honour the chief's demand. He had not worked whilst in the United Kingdom but if he got permission to stay he would like to work either as a

mechanic or an electrician. There were very significant obstacles to him resettling in Ghana.

The Decision at First Instance

5. At [47] the Judge stated that if the Appellant's claim was accepted the Appellant would be at real risk of serious harm and if the Appellant had given this account to previous representatives they could not have failed to realise that the best course for the Appellant would be to apply for asylum. The Judge noted the lack of a formal complaint made against any of the Appellant's previous representatives notwithstanding that a complaints procedure existed. The Ghanaian government's ability to protect individuals affected by tribal issues was tempered by their ability to enforce the law more generally. Whilst there might be a discrepancy between what the government would like to be able to do and what it actually could do, there was a system of law enforcement in Ghana even if some of it was through the tribal chiefs in their home areas.

6. There were no physical punishments for refusing a traditional position as the Appellant had done and this did not support the Appellant's claim that he was likely to be stoned. Stoning would undoubtedly be a criminal offence in Ghana and the police would offer the Appellant protection if they were aware of the matter. There was a sufficiency of protection available. If the Appellant's account were true he would have brought it to the attention of the United Kingdom authorities a long time ago. Even if the account were true, the Appellant could live away from his family and therefore away from danger. The Appellant did not know what would happen if he did not succeed to be a chief himself and had no male heir.

7. At [56] the Judge wrote: "turning to insurmountable obstacles to the Appellant returning, which really means very significant hardship, I see no special hardship for the Appellant to return to his home country of 45 years and his daughters, other than the sort of hardships one would expect for someone to leave the country, where they have been for 14 years." No evidence of any substance to show the Appellant was culturally integrated in the United Kingdom had been put forward. The Appellant had spent more than 45 years in Ghana and to say he had lost all culture ties was simply unbelievable. He spoke regularly to his daughters in Ghana. At [58] the Judge stated: "nor do I accept that he would have any significant obstacles to returning to his home country". The Appellant could find work in Ghana notwithstanding his age. There were no insurmountable obstacles to the Appellant reintegrating into Ghana. Any interference with the Appellant's private life in this country was proportionate. He dismissed the appeal.

The Onward Appeal

8. The Appellant appealed against this decision making four main points. The first was that the Judge was said to have applied the wrong standard of

proof applying a higher standard of proof to the Article 3 claim namely the balance of probabilities. The Judge had referred to it being virtually impossible to believe that the Appellant had been given inadequate poor and/or negligent advice, but this was not something rare. It was something that members of the judiciary had commented upon negatively. Even the Judge had noted some confusion as to whether there was or was not a Convention reason for an asylum claim. It was entirely possible that an inexperienced or inadequately trained immigration representative might also share this confusion and so not advise the Appellant on making a protection claim because they may have believed that there was no such valid claim.

9. The 2nd ground argued that the Judge had failed to consider objective evidence appropriately. It was not open to the Judge to say there was sufficiency of protection. The Respondent's own background information highlighted serious problems with the police: brutality, corruption, negligence and impunity. Sufficiency of protection was variable. The Judge's finding appeared to indicate that he had applied an incorrect standard of proof. Contrary to the conclusion of the Judge the United States Department of State human rights report 2017 had stated that deaths and injuries had occurred as a result of chieftaincy disputes. This also impacted on the Appellant's private life claim since it indicated very significant obstacles which would impact on the Appellant's ability to establish a private life in Ghana.

10. The 3rd ground argued that the Judge had applied an incorrect test under the Immigration Rules. The correct test was whether there were very significant obstacles to integration not whether there were insurmountable obstacles to continue family life. Throughout the determination the test of insurmountable obstacles and very significant obstacles were interchangeably used as if they were the same test. The tests were distinct as the Respondent's own guidance made clear. The key issue was whether or not the Appellant would be able to continue the private life he had developed in the United Kingdom not whether he would be able to continue his family life with his daughters. The Appellant's length of time in the United Kingdom coupled with the specific circumstances he would find himself in upon return would be very significant obstacles to relocation.

11. The 4th ground argued that the Judge had failed to consider case law particularly **Parveen [2018] EWCA Civ 932** which held that the multiplied effect of hardship, difficulty or hurdles could suffice as very significant obstacles. The Appellant's account of his chieftaincy dispute was credible and consistent with the objective country evidence and satisfied the definition of very significant obstacles. **Herrera [2018] EWCA Civ 412** was a case where a 65-year-old Appellant who had overstayed from 2002 made an application on private life grounds. The Appellant in that case was in a more favourable position than this Appellant yet had succeeded. No clear reasons were given why these

authorities were not applicable which breached the requirement set out in **MK Pakistan [2013] UKUT 641** to give reasons.

12. The application for permission to appeal came on the papers before Judge of the First-tier Tribunal Andrew on 18 January 2019. In granting permission to appeal she stated that having read paragraph 8 of the decision she was satisfied that the Judge may have muddled the standard of proof. The decision did not show the Judge had considered the country information before him before coming to his conclusions. The Judge may have muddled the tests applicable to Article 8 and it was arguable that the Judge had failed to consider relevant case law. The Respondent replied to the grant of permission pursuant to rule 24 arguing that there was no material error of law in the Judge's determination as the Judge had correctly applied the law and reached conclusions open to him on the evidence.

The Hearing Before Me

13. In consequence of the grant of permission to appeal the matter came before me to determine in the first place whether there was a material error of law in the decision such that it felt to be set aside. If there was not the decision at first instance would stand. If there was I would make directions for the rehearing of the appeal.

14. Counsel for the Appellant relied on the grant of permission arguing that the Judge had confused the specific test set out under paragraph 276 ADE of the Immigration Rules which was whether there were significant obstacles faced by the Appellant upon return to Ghana. The Judge had referred to insurmountable obstacles rather than the correct test. This was not a protection claim it was an Article 8 private life application. I queried this with counsel as it appeared that what had been argued at first instance was that this was an Article 3 claim. Counsel replied that the Judge should have considered each part of the claim separately because the claim was presented in addition to or alternatively that Article 3 applied. The Judge had not considered **Herrera.** At [27] the Judge was wrong when he said that the Appellant's father was still alive, both the Appellant's parents were deceased.

15. In reply the Presenting Officer indicated he relied on the rule 24 response. The Judge had rejected the protection claim which was 15 years old because it was not credible. The argument that the Judge had applied an incorrect standard of proof was misconceived. There were no findings made by the Judge which were pointed to by the Appellant that could show the Judge's findings would have been materially different if another test was applied. The facts spoke for themselves in this case. It was not clear where the Judge was supposed to have applied an incorrect standard of proof for Articles 3 or 8. Given the delay by the Appellant in claiming international protection there appeared to be no challenge to

the Judge's conclusion that a qualified immigration practitioner would have made an earlier claim on the Appellant's behalf.

16. The Judge had analysed the country background information from [49] onwards quoting the Australian country advice. Relocation was an option. There was no evidence from the family that the tribal chief of the village had any further interest in the Appellant. There was no reason why the Appellant could not relocate to Accra or live with other family members. It was difficult to see what the relevance of the case law relied upon by the Appellant was in this case.

17. In conclusion counsel argued that the reason why the Appellant had not pursued a complaint against previous advisers was because, having paid a substantial amount of money in legal fees, finances were a significant factor in the decision not to make a complaint. It was not uncommon for representatives to give bad advice. That was why **Parveen** was relied on.

Findings

18. Paragraph 276 ADE (1) of the Immigration Rules sets out the requirements to be met by an applicant for leave to remain on the grounds of their private life in the United Kingdom. The relevant ground for the purposes of this appeal is sub paragraph (vi) which provides that where an applicant has lived continuously in the United Kingdom for less than 20 years there would be very significant obstacles to the applicant's integration into the country to which they would have to go if required to leave the United Kingdom.

19. A significant part of the challenge to the determination in this case is that the Judge applied the wrong test under the Immigration Rules. The Judge made reference at various points to "insurmountable obstacles to the Appellant returning", see [56] which he defined as very significant hardship. At [60] he referred again to insurmountable obstacles but crucially at [58] the Judge stated in terms that he did not accept that the Appellant would have any significant obstacles to returning to Ghana. This in fact is a lower test than that prescribed by the rules which refers to very significant obstacles not merely significant obstacles. If that was an error, it was an error in the Appellant's favour and not one which could found a material error of law such that the determination fell to be set aside.

20. The ground argued in this case comes down to a submission that because the Judge had used other terminology in other parts of the determination the fact that he then did use the correct test should be disregarded. I do not accept that argument. It is quite clear that the Judge was aware that the test was whether there were significant obstacles to the Appellant's return to Ghana. Some of the confusion may have stemmed from the Respondent's argument when counsel for the Respondent submitted that

there were no insurmountable obstacles to the Appellant returning to Ghana. That confusion was compounded by counsel's submission (who appeared for the Appellant and who appeared before me) quoted at [37] that the Appellant met the requirements either of Article 3 or paragraph 276 ADE (vi) "on the basis of insurmountable obstacles". Given the unhelpful submissions made by both advocates to the Judge, he did surprisingly well in nevertheless finding the correct test to be applied and applied it.

21. The 2nd ground seeks to argue that the Judge applied an incorrect standard of proof. The standard of proof for Article 3 is the same as the standard of proof for asylum and humanitarian protection claims that is that there is a reasonable chance or likelihood that the Appellant will be at risk upon return. The standard of proof for Article 8 is the usual civil standard of balance of probabilities. The determination in this case was criticised by Judge Andrew who granted permission to appeal as arguably muddling the standard of proof at [8] of the determination. In that paragraph, the Judge specifically stated that he applied the lower standard of proof which he correctly defined. That standard of proof applied to the Article 3 part of the claim and the Judge was making it clear that that was what he meant. I do not perceive the muddle which Judge Andrew apparently perceived when granting permission.

22. At [9] the Judge went on to consider the separate claim made by the Appellant in this case under Article 8 that his private life would be interfered with if he was refused further leave. The Judge correctly directed himself that the first consideration was whether the Appellant could meet the rules and only in a very few cases would a claim based on the personal circumstances of an Appellant succeed outside the rules. The Judge directed himself on the step-by-step approach under **Razgar** and noted the impact of section 117B of the Nationality Immigration and Asylum Act 2002. The argument is that the Judge had not applied the balance of probability test when considering Article 8 and the Immigration Rules.

23. The Judge's reference to the Appellant's claim to have lost cultural links to Ghana as being "simply unbelievable" does not in my view suggest that the Judge was applying too high a standard of proof for the Appellant. Rather, if anything, the Judge was indicating that the test for the Appellant to meet to show he had lost cultural links was a relatively low one but he could not even meet that. If the Appellant could not meet a low standard of proof, he certainly could not show on the balance of probabilities that it was more likely than not that he had lost cultural links to Ghana. Whilst I appreciate that the Judge could, in as little as one sentence, have stated that he was applying the usual civil standard to the Article 8 claim, I cannot see that the Appellant suffered as a result of the test which the Judge did apply.

24. The 3rd argument made by the Appellant is that the Judge did not properly consider the country background information and had come to a too optimistic view about the risk to persons who did not comply with the dictates of the tribal chief. The Judge had before him the country advice on Ghana issued by the Australian government's Refugee Review Tribunal and he accepted that as authoritative and applied it. That information indicated that there was no physical punishment for refusing a traditional position although there might be social ostracism. That of itself it has to be said would not lead to a breach of Article 3.

25. The Appellant counters in the grounds with an extract from the United States Department of State Report 2017. In the event of a conflict, it was a matter for the Judge to decide which evidence he preferred and he evidently preferred the report from the Australian authorities rather than from the American authorities. Chiefs do appear to have some authority in Ghana devolved from the government to keep some sort of order. The Judge was aware at [50] that there was background evidence to suggest that there had been clashes in the capital Accra where people had internally relocated relating to chieftaincy disputes which was what the US State Department report was referring to. The important point for the Judge was that there was a system of law enforcement in Ghana some of which was carried out through the tribal chiefs but much it appeared outside the tribal chiefs and undertaken by the central government. I do not see that the Judge had misunderstood the background information or misapplied it.

26. The issue was whether there was a sufficiency of protection for the Appellant in the event that his claim was true. The Judge did not accept that the claim was true but nevertheless looked at the matter on an "even if" basis. The grounds take issue with the Judge's conclusion as to the adequacy of protection, but it is important to note that the test under the well-known authority of **Horvath** is not whether there is an absolute system of protection but whether there is an adequate one. It may well be that the Ghanaian police have some difficulties whether with corruption or otherwise but that is far from saying that there is no functioning police force in Ghana and no ability to protect. There is no country guidance to indicate that that is the case and no reason why the Judge should have come to any such conclusion. The Judge's conclusion as to sufficiency of protection was sound. I do not accept Judge Andrew's comments in this regard either.

27. The final point made by the Appellant is that the Judge failed to consider relevant case law. Partly this is a reference to **Parveen** in which criticism was made of poor representation. The point the Judge was making was that he could not accept that the Appellant might have been so unlucky each time he went to different representatives that no one was able to advise him to make an asylum claim on the basis of his claimed chieftaincy problem. That there are practitioners in the field of immigration law who fall below the standards one can reasonably expect

is not in dispute. However, the Judge evidently felt it was stretching coincidence too far to suggest that the various representatives the Appellant had approached over the years (while he made several unsuccessful applications for leave) would not at some point have advised him to make a claim for asylum if he had told them about his problems with the chieftaincy. The Appellant was not advised to claim asylum because he had not mentioned that he had problems with the chieftaincy because, in turn, that was an invention he had made at the last moment to try to ensure he could remain in the United Kingdom.

28. There was a substantial delay in this case, the Appellant had never had leave to be here but had made a series of applications. This indicated some knowledge of the workings of the immigration system of this country and an ability to instruct lawyers on his behalf. It was straining credulity to believe that at no point had the Appellant been told he could make an asylum claim. The Appellant's explanation for not making a formal complaint about poor representation was also, in the Judge's view, a very thin one. The Appellant claimed that he had no money to make a complaint. Nevertheless, he must have had funds to pay for his present (and previous) representation. It is difficult to see why no complaint was made if the Appellant really was the victim of incompetent advice. In short, the case law cited by the Appellant was of no relevance to this case at all.

29. The case cited of **Herrera** did not assist the Appellant, the Judge was aware that the case had been quoted to him, see [36] but since its relevance in this case was very limited there was no particular reason why the Judge should have analysed it. Both gentlemen were in their 60s and both made applications on private life grounds, neither having leave to remain. In the case of **Herrera**, the First-tier Tribunal Judge had found there were very significant obstacles to the Appellant reintegrating into Argentina. That was on the basis of the facts as found by the Judge including a finding of a lack of continuing ties to Argentina. In the instant case before me Judge Easterman found there were no significant obstacles to the Appellant's reintegration into Ghana on the basis of the facts that he found, including the Appellant's continuing ties to Ghana.

30. It is important to note what the Court of Appeal said in **Herrera**: "It is trite law that in performing an assessment of that kind different Judges may reasonably reach different conclusions. Appellate Tribunals must always guard against the temptation to characterise as errors of law what are in truth no more than disagreements about the weight to be given to different factors, particularly if the first Tribunal had the advantage of hearing oral evidence." **Herrera** is not authority for the proposition that gentlemen in their 60s who have lived in the United Kingdom for several years without leave are entitled to leave to remain without more. They must show that there are very significant obstacles to reintegration. In the case of **Herrera,** the Appellant was able to show that, in the instant case before me the Appellant was not able to show that.

31. The authority cited in the grounds of **Kamara** is of limited importance in the instant case. There was scant evidence before the judge of the appellant's integration into the United Kingdom. The Judge was not impressed by how many years the appellant had spent in the United Kingdom living unlawfully, see [58]. The Judge indicated that he was aware of the effect of section 117B of the 2002 act and would therefore have been aware that given that the appellant's status here was unlawful, little or no weight could be ascribed to it in the proportionality exercise under Article 8. At [57] the Judge specifically stated that no evidence of any substance to show cultural integration was put forward.

32. The test in **Kamara** is not relevant if no evidence of substance is put before a Judge to show integration. The grounds of onward appeal in this case amount to no more than a disagreement with the decision. I do not accept the point made by Judge Andrew that Judge Easterman had arguably failed to consider relevant case law. That case law was not relevant and therefore there was no arguable error in failing to analyse it in the body of the determination. Overall, I do not find there is any material error of law in this determination and I dismiss the Appellant's onward appeal. The Appellant had no leave to remain, he had evidently not lost cultural ties with Ghana speaking regularly to his daughters there. He had made a very late claim for asylum after making a series of Article 8 claims. His claim had no merit and it was open to the Judge in those circumstances to dismiss the appeal.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold the decision to dismiss the Appellant's appeal

Appellant's appeal dismissed

I make no anonymity order as there is no public policy reason for so doing.

Signed this 11 March 2019

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Judge Woodcraft
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed this 11 March 2019

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Judge Woodcraft
Deputy Upper Tribunal Judge