Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/01327/2013

THE IMMIGRATION ACTS

Heard at Newport	**Determination Sent**
On 4 July 2013	**On 24 July 2013**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

VK
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr K Hibbs, Home Office Presenting Officer
For the Respondent: Ms R Harrington instructed by Avon and Bristol Law Centre

DETERMINATION AND REASONS

1. This appeal is subject to an anonymity order made by the First-tier Tribunal pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI 2005/230). Neither party invited me to rescind the order and I continue it pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

2. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal (Judge Hart TD) allowing the appellant's appeal against the Secretary of State's decision made on 1 February 2013 to remove VK by way of directions to Namibia under s.10 of the Immigration and Asylum Act 1999.

3. For convenience, I will hereinafter refer to the parties as they appeared before the First-tier Tribunal.

The First-tier Tribunal

4. In dismissing the appellant's claim on asylum and humanitarian protection grounds, the Judge accepted that the appellant was gay. However, on the basis of the background evidence, the Judge did not accept that there was a real likelihood that the appellant would be persecuted or suffer serious harm rather than discrimination on return to Namibia. The Judge also dismissed the appellant's appeal under the "private life" provisions in para 276ADE of the Immigration Rules (HC 395 as amended) on the basis that the appellant had failed to establish that he had "no ties" with Namibia and therefore the Judge found that the appellant would not meet the requirement in para 276ADE(iv). However having reached his finding in relation to para 276ADE the Judge went on to consider whether the appellant's removal would breach Article 8 at paras 102-115 of his determination. The Judge concluded that the appellant's removal would interfere with his private life in the UK and given that interference and the "difficult circumstances" that the appellant would face in Namibia, the Judge found that his removal would not be proportionate.

Permission to Appeal

5. On 16 April 2013, the First-tier Tribunal (Judge Cruthers) granted the Secretary of State permission to appeal against the Judge's decision in favour of the appellant under Article 8. Those grounds are as follows:

> "1) The Immigration Judge has allowed the appeal on Article 8 grounds, having dismissed the appeal on Asylum, Article 3 and paragraph 276ADE of the Immigration Rules. It is submitted that the Immigration Judge's reasons for allowing the appeal on Article 8 grounds was taken together with his negative findings are inadequate. The Immigration Judge finds at paragraph 104 of the determination that the appellant has established a family life. It is not clear who the appellant has established a family life here with as he is not currently in a relationship although he has friends in the community. The Immigration Judge's findings that the appellant has established family life is wrong in law.
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> 2) The Immigration Judge finds that the appellant has established a private life, however it is submitted that this private life was established at a time when the appellant's immigration status was precarious, further his private life is of the sort that can be continued through modern means of communication, the appellant has been working in the UK illegally and has undergone training, he has gained from such illegality however can take these skills back to Namibia to assist him in finding a job there. The Judge finds that the appellant will find rejection from his community in Namibia as he has here, therefore it is submitted that his removal would not be disproportionate as he can find the same support mechanisms within the Anglican Church as he has in the UK. There is no evidence that the appellant cannot continue to receive medical assistance for his depression in Namibia. The appellant spent his formative years in Namibia and came to the UK as an adult, the Immigration Judge found that he has not severed all ties with Namibia even if the ties with his family might be strained due to his sexuality. The Immigration Judge has not given adequate reasons for finding that the appellant's removal would be disproportionate…."

The Rule 24 Issue

6. The appellant (as respondent) to this appeal did not serve a notice under rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) and did not seek permission to appeal challenging the Judge's decision to dismiss the appeal on asylum and humanitarian protection grounds and under para 276ADE of the Rules.

7. At the hearing before me, Ms Harrington, who represented the appellant sought to introduce a notice under rule 24 in which it was argued that the Judge had erred in law in dismissing the appeal under para 276ADE. Ms Harrington accepted that the notice was out of time and was unable to offer, on instructions, any explanation as to why a rule 24 notice had not previously been served. Ms Harrington applied to rely on the notice out of time to challenge the Judge's adverse finding in relation to para 276ADE.

8. I drew to the representatives' attention the recent decision of the Upper Tribunal in EG and NG (UT Rule 17: Withdrawal; Rule 24: Scope) Ethiopia [2013] UKUT 00143 (IAC) as relevant to the issue of what matters may be raised in a rule 24 notice. Having given both representatives an opportunity to consider EG and NG, both Ms Harrington and Mr Hibbs made submissions in relation to the case.

9. Ms Harrington submitted that EG and NG did not prevent the appellant challenging in a rule 24 notice the alternative finding of the Judge made against the appellant under para 276ADE. She accepted that if the appellant had sought to challenge the adverse asylum decision then, on the basis of EG and NG, that challenge could not be brought through the mechanism of a rule 24 notice. The appellant could only do that by seeking, for himself, permission to appeal to the Upper Tribunal. She submitted that the appellant's challenge to the para 276ADE decision was not a different matter from that raised by the Secretary of State in challenging the decision in the appellant's favour under Article 8. Although the application was about six weeks out of time, Ms Harrington submitted that I should extend time.

10. Mr Hibbs did not resist Ms Harrington's application as being out of time. Instead, he submitted that on the basis of EG and NG at [45]-[47], this was in effect a cross appeal by the appellant on a different matter not raised by the Secretary of State's appeal to the Upper Tribunal. The challenge could only be brought by the appellant seeking permission to appeal to the Upper Tribunal.

11. I begin with the relevant provision in the Upper Tribunal Procedural Rules which is rule 24(3). It states what a notice under rule 24 served by a respondent in the Upper Tribunal must contain. Rule 24(2)(e) provides that the response must state:

> "The grounds on which the respondent relies, including (in the case of an appeal against the decision of another Tribunal), any grounds on which the respondent was unsuccessful in the proceedings which are the subject of the appeal, but intends to rely on in the appeal;…"

12. On the face of it, that provision would appear to allow the respondent (here the appellant before the First-tier Tribunal) to set out "grounds" upon which she was

unsuccessful in the First-tier Tribunal proceedings. Such a ground could, conceivably, be a claim under the Immigration Rules, namely para 276ADE upon which he was unsuccessful. The position is not, however, that straightforward.

13. In EG and NG, the appellants before the First-tier Tribunal had succeeded under Article 3 of the ECHR. However, their appeals had been dismissed on asylum and humanitarian protection grounds. The Secretary of State appealed the decision under Art 3. One of the issues which the Upper Tribunal had to decide was whether, in a rule 24 notice, those appellants (now respondents in the Upper Tribunal to the Secretary of State's appeal against the Article 3 decision) could in a rule 24 notice challenge the First-tier Tribunal's decision to dismiss their appeals on asylum and humanitarian protection grounds. The Upper Tribunal held that they could not do so. Such challenges could only be brought by the unsuccessful claimants (on those grounds) themselves appealing against the First-tier Tribunal's decision.

14. The Upper Tribunal rejected the submission that rule 24 permitted a respondent to raise any points that failed to impress the First-tier Tribunal including a point which could itself have been the subject of an appeal. At [46], the Upper Tribunal said this:

> "46. Rule 24 does not create a right of appeal to a party who has not asked for permission to appeal. Rule 24 is not in any way to do with seeking permission to appeal and is not an alternative to seeking permission where permission is needed. It is to do with giving notice about how the respondent intends to respond to the appeal that the appellant has permission to pursue. If a respondent wants to argue that the First-tier Tribunal should have reached a materially different conclusion then the respondent needs permission to appeal."

15. At [47], the Upper Tribunal went on to state:

> "47. This is probably more significant in international protection cases than entry clearance cases because an appeal can be allowed on different grounds. An appellant may have shown, for example, alternatively, that he is a refugee, or entitled to humanitarian protection or that removal is contrary to his rights under article 8 of the European Convention on Human Rights. The beneficial consequences of success would be different in each case. For example, a person found to be entitled to humanitarian protection may want to argue that he should have been recognised as a refugee whilst the Secretary of State may want to argue that the appeal should only have been allowed with reference to article 8. In such cases both parties would want a result materially different from the one decided by the Tribunal and both should seek permission to appeal.

16. In my judgement, that last illustration equally captures the circumstances of this appeal.

17. The situation in this appeal is to be distinguished from the situation contemplated in para 46 of EG and NG. There, the Upper Tribunal identified a situation where a respondent may properly raise in a rule 24 notice an issue upon which he was unsuccessful in the First-tier Tribunal. The example concerns an entry clearance

application by a husband who successfully persuades a First-tier Tribunal Judge that the accommodation requirements are met but is unsuccessful in respect of the maintenance requirements of the spousal entry rule. On appeal to the Upper Tribunal by the husband against the decision to dismiss his appeal under the Rules because he did not meet the maintenance requirements, the Upper Tribunal recognised that the Entry Clearance Officer could, in a rule 24 notice, seek to argue that the Judge's finding in the appellant's favour on the accommodation requirement was flawed. The Upper Tribunal said this:

> "46. Suppose a man seeks entry clearance as a husband and suppose that the Entry Clearance Officer finds that he has not shown that he can be either accommodated or maintained in accordance with the rules. A First-tier Tribunal Judge may decide, arguably wrongly, that the husband can satisfy the accommodation requirements but not the maintenance requirements. In that event the judge would dismiss the appeal. The Entry Clearance Officer would have no interest in appealing. He is content with the decision to dismiss the appeal. The husband however may want to challenge the decision. He might want to argue that the decision that he did not satisfy the maintenance requirements was wrong in law and he may be given permission to appeal. In that event the Entry Clearance Officer may well want to argue not only that the decision that the husband did not meet the maintenance requirements was right but that the decision that he did meet the accommodation requirements was wrong. In short, without wanting to appeal the decision, the Entry Clearance Officer may want to rely on a ground that failed before the First-tier Tribunal. Rule 24 permits the Entry Clearance Officer to give notice of his intention to raise such a point in a reply."

18. By contrast, what is sought by the appellant here is a "materially different conclusion" to that reached by the First-tier Tribunal. The appellant wishes to succeed under the Immigration Rules which, if made good, brings with it its own scheme of leave that would be initially granted and route to indefinite leave (see paras 276BE and 276DE). I will deal below with the submissions made concerning the scope of any claim under Article 8 where an individual cannot succeed under the new so-called Article 8 Rules. It suffices to say here that there is not a complete overlap between the Rules and Article 8 both in principle and in the instant case.

19. For these reasons, I refuse Ms Harrington's application to rely in a rule 24 notice, even if time is extended, upon a challenge to the Judge's decision to dismiss the appellant's appeal under para 276ADE.

Article 8

20. I now turn to the Secretary of State's challenge to the Judge's decision to allow the appeal under Article 8.

21. Mr Hibbs essentially made two submissions. First, he relied upon the decision of the Inner House of the Court of Session in MS v SSHD [2013] SCIH 52 at [26]. He submitted that the Judge, having decided the appellant's appeal against him under para 276ADE, there was nothing left to decide under Article 8 as the "private life" rule in para 276ADE covered all relevant matters. Secondly, Mr Hibbs submitted

that, in any event, the Judge failed to give adequate reasons for finding that the appellant's removal would be disproportionate. He submitted that the Judge had concentrated unduly upon the effect of the appellant's return to Namibia rather than any interference with his private life in the UK. He submitted that the Judge had, in effect, in para 114 resolved the issue in the appellant's favour improperly on the basis that he was "deserving of sympathy and recognition of his problems". Mr Hibbs candidly accepted that the reference in the grounds to the Judge appearing to make inconsistent findings in paras 103 and 104 that the appellant had both "no family life" and also had "family life" in the UK had no substance. That concession was, in my view, wholly justified. It is clear that the Judge found that the appellant had no family life in the UK in para 103 and his reference to him having established "family life" in para 104 is clearly a typographic error with the reference being obviously to "private life" in the UK as the remainder of that paragraph makes plain.

22. Ms Harrington submitted that the Judge's reasons at paras 102-114 were adequate. She submitted that para 276ADE did not preclude consideration of Article 8 outside the Rules. She submitted that para 276ADE was focussed on life in the UK with the single exception of determining whether the appellant could establish that he had "no ties" with his home country. Ms Harrington submitted that the Judge had looked at the appellant's circumstances in the UK at paras 104-105 and had been entitled to look at the circumstances in which the appellant would live on return to Namibia. She submitted that the Judge had taken everything into account and his end point that the appellant's removal was disproportionate was one properly open to him.

23. I deal first with Mr Hibbs' submission that there was, in effect, no issue for the Judge to decide under Article 8 given his adverse finding under para 276ADE.

24. In MS v SSHD at [26], the Inner House of the Court of Session cited with approval [30] of the judgement of Sales J in R (Nagre) v SSHD [2013] EWHC 720 (Admin);

> "26. In *R (Nagre) v Home Secretary, supra*, Sales J indicated his general agreement with that statement of the law, but added (at paragraph 30)
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> > "The only slight modification I would make, for the purposes of clarity, is to say that if, after the process of applying the new rules and finding that the claim for leave to remain under them fails, the relevant official or tribunal judge considers it clear that consideration under the rules has fully addressed any family life or private life issues arising under Article 8, it would be sufficient simply to say that; they would not have to go on, in addition, to consider the case separately from the Rules. If there is no arguable case that there may be good grounds for granting leave to remain outside the rules by reference to Article 8, there would be no point in introducing full separate consideration of Article 8 again after having reached a decision on application of the rules".
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> We agree with that qualification. It seems to us that the new rules are likely to deal adequately with the great majority of cases where the article 8 right to private or family life is put in issue. In that event, there is no need to go on

> to consider article 8 separately, using the type of analysis set out in *R (Razgar) v Home Secretary, supra.*

25. In [27], the Court of Session noted that:

> "In some cases, however, the new rules may not adequately cover an applicant's Article 8 right to private or family life".

26. The reliance upon Nagre and MS by the Secretary of State is to criticise the Judge for following the two stage process set out in the Upper Tribunal's jurisprudence in MF (Article 8 – New Rules) Nigeria [2012] UKUT 00393 (IAC); Ogundimu (Article 8 – New Rules) Nigeria [2013] UKUT 0060 (IAC) and Izuazu (Article 8 – New Rules) [2013] UKUT 0045 (IAC). The two stage approach is that first a Judge should consider whether an individual can succeed under the relevant immigration rule (here para 276ADE). If the individual can succeed there is no reason to carry on and consider whether he can also succeed under Article 8. But, secondly, if the individual cannot succeed under the relevant new rule then the First-tier Tribunal should consider whether the appellant can succeed under Article 8 applying the relevant Strasbourg jurisprudence and that of the senior courts in the UK as to its proper application.

27. In Nagre and MS, the courts recognised a caveat to that where it would be unnecessary, even if an individual was unsuccessful under the Rules, to consider private and family life issues under Article 8. More recently, in Green (Article 8 – New Rules) [2013] UKUT 00254 (IAC), the Upper Tribunal, in a deportation appeal, recognised that the relevant Immigration Rule (there para 398) did not deal with the particular issue raised in that appeal, namely that the offences in question had been committed when the individual was a juvenile which was a matter considered to be of specific relevance in assessing proportionality by the Strasbourg Court in Maslov v Austria [2008] ECHR 546. The Upper Tribunal concluded that Art 8 should also be considered and the caveat in Nagre did not apply.

28. In this appeal, the appellant relied essentially on two different, and discrete, matters as demonstrating a level of interference with his private life which resulted in his removal being disproportionate. Those were: first, the impact on his life in the UK in particular his acceptance within the Anglican Church and his sexual orientation and secondly, the impact upon him of returning to Namibia where he has been ostracised by his family and his sexual orientation would not be tolerated. I accept Ms Harrington's submission that, in this appeal, the latter factor is not the focus of para 276ADE. As regards an individual's circumstances in her home country, para 276ADE(vi) focuses exclusively upon whether that individual has "no ties (including social, cultural or family)" with the country to which they have been returned. There is no obvious place there for a consideration of the impact upon the appellant of living in Namibia as an openly gay man. Those circumstances were, in my judgement, patently relevant to the Judge's assessment of whether the appellant's removal would be proportionate despite the Judge's finding (which is not challenged) that any impact upon the appellant would not reach the level of severity to amount to persecution or serious ill treatment falling within Article 3 of the

ECHR. In the settled case law of the Strasbourg Court in Boultif v Switzerland (2001) 33 EHRR 1179; Üner v The Netherlands [2007] Imm AR 303 and Maslov v Austria [2009] INLR 47 the Court has recognised that all the circumstances of the individual in the country of origin are to be taken into account in any assessment of proportionality.

29. Consequently, I reject Mr Hibb's submission that the Judge was, in effect, not required to consider Article 8 outside the new rules in the case of this appellant.

30. Turning now to the Judge's reasoning in relation to Article 8, I do not accept Mr Hibbs' submission that the Judge's reasons were inadequate. Mr Hibbs did not submit that the Judge's conclusion was not open to him, namely that it was irrational or perverse. Though ground 2, which I set out above, criticises the Judge for reaching his finding despite the fact that the appellant's immigration status was precarious, his private life could be continued through modern means of communication, that he was working in the UK illegally and that he could seek the support of the Anglican Church as he had in the UK, the ground rests itself upon the error being the Judge's failure to give "adequate reasons" for his finding on proportionality.

31. It is important to see the Judge's reasons given at paras 104-114 in the light of his consideration of the evidence and findings in relation to para 276ADE which is at paras 98-104. In my judgement, the Judges' reference to the appellant's "deserving sympathy and recognition of his problems" was not a yardstick by which he determined whether the appellant's removal was proportionate. That remark was made in the context of a sentence in which the Judge noted that he had found that any harm to the appellant on return did not reach a level of severity to amount to persecution or serious ill treatment contrary to Article 3. In paras 98-99 and 101 and 109 and 113, the Judge accepted that there was a level of discrimination and intolerance in Namibia against inter alia, gay men. He also noted that the appellant's family had disowned him because of his sexual orientation. He noted that the appellant would be unlikely to access the

> "white gay scene in Namibia, although he had been welcomed into the Anglican Church in this country, the Christian Church in Namibia may have difficulties of its own in affording recognition to the LGBT community".

32. Although, in relation to para 276ADE, the Judge found that it could not be said that the appellant had lost "all ties" in Namibia, the Judge nevertheless went on in para 101 to note:

> "[h]e has some ties but would find it difficult to renew them if he returned."

33. In reaching the finding that the appellant's removal would be disproportionate, the Judge clearly had in mind that the appellant had been in the UK for 9 years but that he had overstayed since November 2007 (see paras 104 and 106). In taking into account the strength of the appellant's private life in the UK (see para 104) and the impact upon him of returning to Namibia where family had disowned him, there

would be difficulties in renewing any ties that he had not lost and he would return to a "hostile environment", in my judgement, it cannot be said that the Judge failed to take all relevant matters into account. The balancing exercise inherent in proportionality was one for the Judge to carry out subject to his not reaching a finding which was irrational or perverse. As I have already indicated, both the grounds and Mr Hibbs firmly put the Secretary of State's challenge to the Judge's decision on a "reasoned basis". In my judgement, the Judge gave adequate reasons for striking the proportionality balance in the appellant's favour.

Decision

34. The Judge did not err in law in allowing the appellant's appeal under Art 8.

35. The Secretary of State's appeal to the Upper Tribunal is, accordingly, dismissed.

Signed

A Grubb
Judge of the Upper Tribunal

Date: