Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/32312/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 19 August 2014	**On 27 August 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE PEART

Between

FAITH UMULISA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Harris of Counsel
For the Respondent: Ms Holmes, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Rwanda, born on 2 September 1986. She made an application to vary her leave on 30 May 2012. On 16 July 2013 the respondent

refused her application pursuant to paragraph 319V of the Immigration Rules and to remove her pursuant to s47 of the Immigration, Asylum and Nationality Act 2006.

2. The appellant's appeal against the respondent's refusal was allowed by Judge Howard (the judge) in a determination promulgated on 24 February 2014. At an error of law hearing, I found that the appellant's failure to meet the requirements of the Immigration Rules was relevant to the judge's Article 8 analysis in terms of **Gulshan [2013] UKUT 640**, **Shahzad [2014] UKUT 00085 (IAC)** and **Nagre [2013] EWHC 720 (Admin)**. That was because the new Rules set out what needed to be balanced in the public interest which rendered the judge's assessment incomplete. I found as claimed in the Secretary of State's grounds that the judge gave inadequate reasons for finding that the appellant's circumstances were sufficiently compelling to show that there were arguably good grounds for consideration outside the Rules. Further, I found the judge's Article 8 assessment inadequate at [30]. All he said was that the appellant had not apparently been a burden on the state, she had assisted her sister and that the only way family life could be maintained would be by the siblings moving to Rwanda.

3. I set aside the decision and the case was listed for hearing with the purpose of re-making the decision on 19 June 2014, when the appellant was represented by Mr A Khan of Counsel and Mr Tarlow, Senior Home Office Presenting Officer. The parties were advised to prepare for the hearing on the basis that none of the findings of the First-tier Tribunal should stand. Following examination-in-chief, cross-examination and submissions by Mr Tarlow, Mr Khan raised for the first time that the appellant was relying upon paragraph 317 of HC 395. I adjourned the hearing at that stage and made directions that Mr Khan file and serve his skeleton argument addressing generally the issues for me to consider in re-making the determination and specifically how or in what circumstances paragraph 317 of the Immigration Rules was relevant to the appellant's appeal. Mr Khan filed his skeleton argument on 7 July 2014 although it appears that it was not served upon the respondent. Neither Ms Holmes nor Mr Harris had seen Mr Khan's skeleton argument such that I briefly adjourned to give them the opportunity of considering the same. When the hearing resumed Mr Harris confirmed he was not relying upon paragraph 317. As neither Ms Holmes or Mr Harris had been present at the previous hearing, I read them my note of the evidence. I invited Mr Harris to consider whether he wanted the appellant to give additional evidence, which he told me he did not consider necessary. He was content to rely upon the appellant's oral evidence before me on 19 June 2014 and her bundle of documents.

4. The documentary evidence consisted of the respondent's and appellant's bundles. In the bundle prepared by the respondent there appeared copies of the notice of decision, a letter giving reasons, and the notice of appeal. The appellant's solicitors prepared a bundle in readiness for the hearing before the First-tier Tribunal (also relied upon before the Upper Tribunal) and included statements of the appellant, her half sister Rita Stevenson and Tom Close.

The Appellant's Case

5. The appellant's case emerged from her application, witness statements and submissions put to me by Mr Harris. The appellant said Rita Stevenson was her full sister, however, Mr Harris conceded they are in fact half sisters. The appellant said her parents and other members of their family were killed in the Rwandan War of 1994 and her grandmother, Josephine Mukantagara, Rita Stevenson and the appellant were the only members of the family to survive. Rita Stevenson was brought up by their aunt in Burundi. She was given humanitarian protection in the United Kingdom in 2005.

6. The appellant said that after her parents were killed, she lived with her grandmother. They were living on the street, begging for money for food and water. After a while her grandmother started to sell milk and earned money so that they could survive. Her grandmother's business supported her through Primary School and High School between 1997 and 2007. When the appellant finished High School she joined her grandmother in the business and they worked together. Nevertheless, the appellant said that they lived in fear at all times such that her grandmother planned to send her to the United Kingdom to study. Her grandmother sold land in order to generate money for her trip. She said that whereas all land owned by the Tutsi minority had been previously confiscated, when President Kagame came to power, her grandmother managed to reclaim her land which she subsequently sold. The appellant said she left Rwanda on 10 February 2010 and went to live with Rita Stevenson in the United Kingdom. The appellant said she has no friends or family now in Rwanda. She lives with Rita Stevenson, a single parent. She has two children, Alpha aged 10 or thereabouts who I was told has behavioural and anger problems and Ellah, 8 months old or thereabouts who suffers from Downs Syndrome. As Rita Stevenson owns a recruitment consultancy business, the appellant cares for Alpha. The appellant said that her grandmother Josephine Mukantagara went to live in Canada in December 2011 when she was already in the United Kingdom.

7. The respondent refused the appellant's application giving reasons in her letter of 16 July 2013. It was not accepted the appellant satisfied the Immigration Rules which was conceded both by Mr Khan and Mr Harris. Nor was it accepted by the respondent that the appellant's removal would breach her rights in respect of family or private life under Article 8 of the ECHR.

Evidence

8. The appellant adopted her statements, confirmed their truth and asked me to accept them in evidence. She told me that she takes Alpha to and from school and helps him with his homework. She said he has behavioural and anger problems. That was because Rita Stevenson has little time for Alpha because her time is taken up with Ellah who suffers from Downs Syndrome.

9. In cross-examination, the appellant said that her grandmother had land and a business in Rwanda. She sold some land in order to provide the £16,000 it cost to

send the appellant to the United Kingdom. Asked whether it was her intention to study here when she entered on a student visa, the appellant replied in the negative. She just wanted to come here. She claimed Rita Stevenson was her full sister but did not challenge the DNA evidence that they are half sisters.

10. Rita Stevenson adopted her statement, confirmed its truth and asked me to accept it in evidence. She said that the appellant helped her with childcare, in particular with Alpha as her own time is used up in her business and caring after Ellah who as well as suffering from Downs Syndrome, has a heart defect. She said that Social Services support would only be available for Ellah from age 3 onwards. Ms Stevenson's evidence was that the appellant's intention as she understood it, was to come to stay with her but also to study here.

Submissions

11. Mr Tarlow made submissions on 19 June. He relied upon the reasons for refusal. He questioned the appellant's motives in coming to the United Kingdom. She had conceded her intention was to come here to live with her sister. The student visa had been used as a vehicle for that purpose. She was not a genuine student. The appellant left her own country as an adult. She had access to significant sums of money there. It might well be that she wanted to live with her sister in the United Kingdom and was helping with childcare here, but there was nothing between the women other than the normal emotional ties. If Rita Stevenson needed assistance with childcare, then alternative arrangements could be made and state facilities were available. Ms Holmes made no submissions on 19 August but adopted those made by Mr Tarlow.

12. Mr Khan made no submissions on behalf of the appellant on 19 June. Mr Harris did not provide a skeleton argument. Mr Harris asked me to take into account the two particular aspects of the appellant's case which made her removal disproportionate. They were the appellant's vulnerability in terms of her life experiences in Rwanda such that the emotional support she receives from Rita Stevenson should be considered in terms of that vulnerability. Further, the family circumstances in terms of Ellah and Alpha. Rita Stevenson and her children benefit from the appellant's presence here.

Findings and Conclusions

13. In this appeal the burden lies with the appellant to prove the facts and matters she relies upon. Her case was advanced on the basis that she has established a family and private life in the United Kingdom since her arrival here in 2010 and that her removal in consequence of the respondent's decision would breach her rights under Article 8 of the Human Rights Convention. The standard of proof is that of a balance of probabilities. (See the determination in **EH (Iraq) [2005] UKIAT 00065**)

14. Article 8 of ECHR states:

    (i) Everyone has the right to respect for his private and family life, his home and his correspondence.

    (ii) There should be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interest of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

15. The Court of Appeal has stated in a number of cases that the threshold for establishing an interference with private or family life is not high. **AG (Eritrea) [2007] EWCA Civ 801**.

16. In applying Article 8, **Beoku-Betts [2008] UKHL 39** provides that it is not just the applicant's family (or private) life that needs to be taken into consideration but that of her family members too.

17. **LD (Article 8 – best interests of child) Zimbabwe [2010] UKUT 278 (IAC)** provided that the best interests of children have to be a primary consideration, meaning that they have to be considered first. Broadly speaking, the best interests of the child mean the wellbeing of the child. **ZH (Tanzania) [2011] UKSC 4.**

18. In **VW [2009] EWCA Civ 5** the Court of Appeal held that in assessing proportionality and whether an appellant's family should return to his country of origin with him, the test is not whether there are insurmountable obstacles to prevent their going but whether it is reasonable to expect them to go. If there are insurmountable obstacles, they will succeed but if there are not, they will not necessarily fail.

19. At [128] of **R (MM and Others) [2014] EWCA Civ 985** Aikens LJ considered the relationship of Article 8 with the Immigration Rules and Strasbourg case law:

> "…… **Nagre** does not add anything to the debate, save for the statement that if a particular person is outside the Rule then he has to demonstrate, as a preliminary to a consideration outside the Rule, that he has an arguable case that there may be good grounds for granting leave to remain outside the Rules. I cannot see much utility in imposing this further, intermediary, test. If the applicant cannot satisfy the Rule, then there either is or there is not a further Article 8 claim ……"

20. And at [134]:

> "…… if the relevant group of IRs is not such a "complete code" then the proportionality test will be more at large, albeit guided by **Huang** tests and UK and Strasbourg case law."

21. **Razgar** remains relevant. See also **Omotunde (Best Interests – Zambrano applied – Razgar) Nigeria [2011] UKUT 00247 (IAC)** with regard to the appellant's family life with the children. In **Razgar [2004] UKHL 27** Lord Bingham gave guidance at [17] as to the correct approach when dealing with Article 8 as follows:

> "In considering whether a challenge to the Secretary of State's decision to remove a person must clearly fail, the reviewing court must consider:
>
> (i) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or family life?
>
> (ii) If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?
>
> (iii) If so, is such interference in accordance with the law?
>
> (iv) If so, is such interference necessary in a democratic society in the interest of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, or the protection of health or morals, or for the protection of the rights and freedoms of others?
>
> (v) If so, is such interference proportionate to the legitimate public end sought to be achieved?"

22. In reaching my decision I have had regard to s19 of the Immigration Act 2014 and to the considerations relevant to the appellant set out in s117. The appellant speaks English. She is not financially independent.

23. I consider the appellant's particular circumstances. I consider whether family life exists in terms of **Kugathas [2003] EWCA Civ 31** and **Salad [2002] UKIAT 06698**. I accept that in so far as the appellant currently lives with Rita Stevenson and helps with child care, family life exists. As I have indicated above at [15] the threshold for establishing an interference is not high.

24. I consider s55 and the best interests of the children. The appellant takes Alpha to and from school, helps him with his homework and addresses his behavioural and anger problems when they arise. I accept that Alpha and his mother enjoy the appellant's involvement in their lives. The appellant shares the childcare burden with her half sister and enables her to run her business. The documents refer to Rita Stevenson suffering from hip pain but that was not raised before me, nor was there any evidence to explain why it is that the hip problem necessitates assistance from the appellant and the extent of the assistance.

25. There was no credible evidence before me that Alpha is suffering from such behavioural or anger problems that necessitate the appellant's input or that such care as she provides could not be supplied by another nanny or child-minder.

26. I do not accept that there is any credible evidence whether medical or otherwise in terms of **LD**, **ZH**, or the various other cases regarding the best interests of children and s55, to suggest that the welfare and best interests of Ellah and Alpha would be to live with and be cared for by the appellant as well as their mother. Ellah is too young to need anyone but Mum; in any event, her father has contact and can provide assistance. I find the care the care the appellant provides for Alpha can be readily obtained from another child-minder or nanny; there is nothing to suggest otherwise.

27. I do not accept that there is any credible evidence of dependency over and above the normal ties between the appellant and Rita Stevenson. Mr Harris would have me accept that the appellant's background and experiences in Rwanda have made her more vulnerable, such that there is a degree of dependency upon Rita Stevenson over and above close emotional bonds, however, there was no credible evidence before me in that regard.

28. The appellant has been in the United Kingdom for 4 years. She is living with her half sister at the moment and helping with childcare, but she has not lived with her continually since she came here. During 2013, the appellant was caring for the children of Tom Close in Suffolk. I have taken his statement into account.

29. The appellant is a young woman in good health who has lived the majority of her life in her own country. She would have me accept that she lived a traumatised life there as a result of the civil war, however, on her own evidence, she and her grandmother established a business of some success and their assets were such that her grandmother was able to provide £16,000, a considerable sum, to send the appellant to the United Kingdom. The appellant's evidence before me was that her grandmother had provided the £16,000 through the sale of land, however in her application in 2012, the appellant was inconsistent and said that she herself owned land which she sold.

30. On the appellant's own evidence she did not come to the United Kingdom as a genuine student (see [9] above) although Rita Stevenson's evidence was inconsistent in that regard(see [10] above).

31. There was no credible evidence before me that the appellant's grandmother went to Canada from Rwanda in 2011 or if she did so, the terms on which she entered and it is claimed, remains in that country. I have not found the appellant to be a credible witness regarding her circumstances. See [9],[29] and [30] above. I do not necessarily accept that the appellant has no family or friends in Rwanda to whom she could turn to for support on return but even if I am wrong in that regard, I do not accept that it is unreasonable to expect the appellant to return to her own country to make her own way there. She made her way in her own country, rising with nothing from the streets and establishing a successful business; she can do so again on return. There is no absolute right to enjoy family and private life in the United Kingdom. Contact can continue with Rita Stevenson and her children in whatever way is thought best.

32. The respondent would interfere lawfully with the appellant's family and private life in the interests of the maintenance of immigration control. The interference engages Article 8. The issue must be the proportionality of the decision. Looking at the situation in the round, I find it proportionate given this particular appellant's circumstances to expect her to return to Rwanda. I make that finding respecting the balance between the public interest in maintaining immigration control and the appellant's family and private life rights. I find in terms of **Razgar** that the appellant's circumstances are not such on these particular facts to demand an outcome in her favour. For these reasons, the appeal is dismissed under Article 8 on my finding that the decision is lawful and necessary in the pursuit of the legitimate aim of immigration control and is a proportionate interference with the appellant's desire to pursue her family and private life rights in the United Kingdom.

33. I re-make the decision by dismissing the appeal.

Decision

34. Appeal dismissed under Article 8.

Anonymity direction not made.

Signed Date 26 August 2014

Deputy Upper Tribunal Judge Peart

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

Signed Date: 26 August 2014

Deputy Upper Tribunal Judge Peart