Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/07495/2012

THE IMMIGRATION ACTS

Heard at Field House **Determination Sent**
On 14th April 2014

Before

UPPER TRIBUNAL JUDGE RENTON

Between

A W
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr F Singarajah Counsel instructed by Palis Solicitors
For the Respondent: Mr T Wilding

DETERMINATION AND REASONS

Introduction

1. The Appellant is a female citizen of Somalia (although she arrived in the UK from Kenya) born on 1st April 1990. She entered the UK illegally some time in 2005, and subsequently applied for asylum. That application was refused, but the Appellant was granted discretionary leave to remain until 31st March 2008 as an unaccompanied minor asylum seeker. On 12th March 2008 the Appellant applied for leave to remain as a refugee. That

application was refused for the reasons given in the Respondent's letter of 1st August 2012. The Appellant appealed that decision, and ultimately her appeal was heard by Judge of the First-tier Tribunal Glossop sitting at Taylor House on 19th November 2013. He decided to dismiss the appeal on asylum, humanitarian protection, and human rights grounds. The Appellant sought leave to appeal that decision, and on 2nd January 2014 such permission was granted.

2. The appeal first came before me on 14th February 2014 when I found an error of law in respect of the decision of the First-tier Tribunal but only in respect of that part of the decision relating to the Appellant's Article 8 rights and the lawfulness of the Respondent's decision as regards the exercise of her own policy. The appeal was then adjourned until today for those parts of the First-tier Tribunal's decision to be re-made.

Evidence

3. The background to this appeal, given by the Appellant in support of her asylum claim, is that she was born in Somalia on 1st April 1990 to a Somali Muslim father and a Kenyan Christian mother. Her father was killed in 1992, and her mother in 1993 after which the Appellant and her elder brother lived on the streets of first Mogadishu and then Nairobi. The Appellant's brother was killed in 2003, and during her time in Nairobi, the Appellant was regularly raped and otherwise sexually abused as a Somali street child. She came to the UK in January 2005 when she was only 15 years of age using a false passport which stated her age to be 24. The Appellant worked as a carer but after she was hospitalised with TB she was apprehended by UKBA who in March 2006 placed her with foster carers.

4. More recently, the Appellant has made statements dated 3rd September 2012, 14th January 2013, and 11th November 2013. She also gave oral evidence at the hearing in the First-tier Tribunal. To summarise that evidence, the Appellant said that she had no family or friends in Kenya. Since her arrival in the UK, she has been educated and achieved passes at GCSE and A level. Further, the Appellant achieved a BA(Hons) degree in business law and international business at London Metropolitan University. At various times the Appellant has worked as a student ambassador, a tutor, in hospitality, in a care home, and in administration. She has applied to the University of Oxford graduate programme to attempt a masters degree. She has integrated well into British society and has many friends. She considered the UK to be her home. The Appellant was a member of the Kingdom Faith Community and Church situated in Bond Street, London. She led prayer groups every week, and was active in mentoring new members of the church, and in a children's club. She was undergoing leadership training.

5. At the hearing before me, the Appellant gave further oral evidence in which she confirmed that the contents of her previous statements were true. When cross-examined, she said that she spoke various languages

including Kikuyu and Swahili. She was still involved with the church in Bond Street the members of which were not restricted to the Kenyan community. Indeed, the Appellant was not much engaged with that community. The Appellant added that she could not reintegrate into Kenyan life. Her friends in the UK were her family, and she would not feel secure in returning to Kenya. She had only attended school irregularly in Kenya and she had no sense of identity there. She had been bullied and ostracised as a Somali at school She had last been in contact with anybody in Kenya a few months ago when she had spoken to a friend who was now resident in Dubai.

Submissions

6. At the hearing I heard submissions from both representatives. Mr Wilding addressed me first when to begin with he argued that the decision of the Respondent was in accordance with the law. The decision of the Respondent had been made in accordance with chapter 53 of the Enforcement Instructions and Guidance. According to that chapter, there were three circumstances which were to be considered exceptional and ought to be taken into account on a mandatory or discretionary basis. The first two such circumstances as set out on page 2 of the Guidance did not apply as further submissions on behalf of the Appellant had been made and considered. As regards the third such circumstance, the Respondent had considered the provisions of paragraph 353 of HC 395 as recorded at paragraphs 32 and 211 of the Refusal Letter dated 1st August 2012. The Respondent had acted in accordance with the decision in **Khanum and Others (Paragraph 353B) [2013] UKUT 003111 (IAC)** and **Ukus (Discretion: when reviewable) [2012] UKUT 00307 (IAC)**. Further, the Respondent's decision was in accordance with the law because in the Appellant's circumstances, there was no requirement for the Respondent to consider her Discretionary Leave Policy. This was because the Appellant did not qualify for discretionary leave from the time when she became 18 years of age in 2008 and therefore no part of the Policy, and particularly that part set out at paragraph 4 thereof, applied to the Appellant when the Respondent made her decision.

7. As regards Article 8, Mr Wilding first pointed out that the Appellant did not come within the provisions of the Immigration Rules. That being the case, the decision in **Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 00640 (IAC)** made it unnecessary to consider the proportionality of the Respondent's decision. This was because there were arguably no good grounds for granting leave to remain outside the Immigration Rules as in this case there were no compelling circumstances not sufficiently recognised under those Rules. The Appellant retained linguistic and cultural ties with Kenya, and it was safe for her to return there. The Appellant's circumstances were now completely different from those when she had previously lived in Kenya. There had been some delay by the Respondent in dealing with the Appellant's case, but this had not been to the detriment of the Appellant as the delay had served only to strengthen the Appellant's private life in the UK. In any event, the

Respondent's decision was proportionate as the public interest in the maintenance of immigration control attracted the greatest weight.

8. In response, Mr Singarajah first argued that the decision of the Respondent was not in accordance with the law. This was because the Respondent had failed to comply with her own Discretionary Leave Policy in not granting to the Appellant subsequent periods of discretionary leave in accordance with paragraph 4 thereof. The Policy required the Respondent to keep under active review the Appellant's circumstances as she had been granted discretionary leave prior to 9th July 2012 and had applied for it to be renewed. The Appellant should have been granted indefinite leave to remain in accordance with paragraph 4.2 of the Policy. The Respondent had delayed for four years in dealing with the Appellant's application for leave to remain and during that period her discretionary leave had continued in accordance with Section 3C of the Immigration Act 1971.

9. Further, Mr Singarajah argued that the Respondent's decision was not in accordance with the law as she had failed to take into account the factors mentioned in paragraph 353B of HC 395 in accordance with paragraph 53.1 of the Enforcement Instructions and Guidance which was unlawful. The delay in dealing with the Appellant's application was significant.

10. As regards Article 8, Mr Singarajah then argued that the Appellant came within the provisions of paragraph 276ADE of HC 395. The Appellant now had no ties with Kenya. As explained in **Ogundimu (Article 8 – new Rules) Nigeria [2013] UKUT 00060 (IAC)**, linguistic ties alone were not sufficient. The Appellant had spent her formative years in the UK. The Appellant had no family in Kenya.

11. Otherwise, and outside of the Immigration Rules, Mr Singarajah submitted that the Appellant's return to Kenya would amount to a disproportionate breach of her Article 8 rights. It would be unjustifiably harsh to expect the Appellant to return to a country where she had been significantly abused in the past. The Appellant wished to continue her education in the UK. The Appellant's immigration history carried little weight as she had entered the UK illegally but only as a child.

Findings and Reasons

12. The Appellant's case is that she should be granted leave to remain as her return to Kenya would amount to a breach of her Article 8 rights, or alternatively that the Respondent should reconsider whether the Appellant should be granted leave to remain on that basis. The correct approach therefore is for me first to consider any breach of the Appellant's Article 8 rights under the Immigration Rules. It is accepted that the Appellant has no family life in the UK, and therefore the Appellant relies upon paragraph 276ADE(vi) of HC 395 which states as follows:

(vi) is aged 18 years or above, has lived continuously in the UK for less than twenty years (discounting any period of imprisonment) but has no ties (including social, cultural or family) with the country to which she would have to go if required to leave the UK.

13. The issue therefore is whether the Appellant has any ties with Kenya. I will decide that issue in accordance with the guidance given in **Ogundimu**, the relevant part of which reads as follows:

> 4. The natural and ordinary meaning of the word "ties" in paragraph 399A of the Immigration Rules imports a concept involving something more than merely remote or abstract links to the country of proposed deportation or removal. It involves there being a connection to life in that country. Consideration of whether a person has "no ties" to such a country must involve a rounded assessment of all of the relevant circumstances and is not limited to "social, cultural and family" circumstances.

I find that the Appellant now has no relevant ties with Kenya. She is not a citizen of that country. She lived in Kenya from the age of 3 until she was 15. The Appellant is now 24 years of age and therefore lived longer in Kenya than she has in the UK, but she has spent all of her formative years, during which she has made considerable progress, in the UK. As Mr Singarajah explained, the Appellant's experiences in Kenya were wholly negative, and it is no surprise to learn that she never wants to set foot in that country again. According to her evidence, the Appellant received an irregular and rudimentary education in Kenya, but what I find to be more significant is that during her time there she was regularly and significantly sexually abused. She was taken advantage of because she was a Somali street child. The Appellant has no family nor home in Kenya. She said that she had been in contact with one person who lived there, but that friend is now resident in Dubai. The Appellant is not in contact with the Kenyan community in the UK. She considers the UK to be her home where she wants to make her future. It is true that the Appellant speaks the languages of Kenya, but in my judgment that factor alone does not amount to a tie as defined in **Ogundimu**. While she lived in Kenya, the Appellant was treated as an outcast. I therefore find that the Appellant meets the requirements of paragraph 276ADE(vi) of HC 395 and on that basis I allow this appeal. That being the case, there is no need for me to consider the other issues raised in the appeal.

Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside that decision in as much as it relates to the Appellant's Article 8 rights.

I re-make the decision in the appeal by allowing it on human rights grounds.

Anonymity

The First-tier Tribunal made an order pursuant to Rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. I continue that order pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed Date

Upper Tribunal Judge Renton