Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/04182/2013

THE IMMIGRATION ACTS

Heard at Manchester	**Determination Promulgated**
On 11 June 2014	**On 12 June 2014**

Before

Deputy Upper Tribunal Judge Pickup
Between

Eya Loko Kuli
[No anonymity direction made]

Appellant

and

The Entry Clearance Officer Nairobi

Respondent

Representation:

For the appellant: Ms C Johnrose, instructed by South Manchester Law Centre
For the respondent: Ms C Johnstone, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, Eya Loko Kuli, date of birth 14.11.96, is a citizen of Ethiopia.

2. This is her appeal against the determination of First-tier Tribunal Judge Manuel, who dismissed her appeal against the decision of the respondent to refuse entry clearance to the United Kingdom for family reunion pursuant to paragraph 352D of the Immigration Rules. The Judge heard the appeal on 29.1.14.

3. First-tier Tribunal Judge Macdonald granted permission to appeal on 2.5.14.

4. Thus the matter came before me on 11.6.14 as an appeal in the Upper Tribunal.

Error of Law

5. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Manuel should be set aside.

6. In essence, the grounds of application for permission to appeal to the Upper Tribunal contend that the First-tier Tribunal Judge failed to give weight to material evidence. In particular it is asserted that the judge did not engage with evidence of the appellant's parents, sibling, appellant and grandmother, as well as the evidence of the appellant's brother. There is also a challenge under article 8 assessment of proportionality of the interference with family life. It is claimed that the judge failed to consider that the appellant's parents and siblings have been refugees in a refugee camp in Kenya since they fled Ethiopia and were only recently resettled in the UK. To that extent it is said that the judge did not properly consider the unavailability of being reunited with the appellant before then, as well as other material factors weighing in favour of the appellant, such that the proportionality assessment was flawed.

7. In granting permission to appeal, Judge Macdonald noted that the judge found in favour of the appellant in relation to paragraph 352D(iii) "and it is arguable, for reasons given on the grounds, that the judge did not give adequate reasons for dismissing the appeal under paragraph 352D(iv). Permission is granted on both grounds."

8. For the reasons set out herein, I find no material error of law in the determination of the First-tier Tribunal such that it requires the decision to be set aside and remade.

9. There is no challenge that the appellant is the child of the sponsor, nor that she is under the age of 18. It is also accepted that Mr Kuli has been granted refugee status in the UK before the application was made.

10. 352D(iii) requires that the appellant is not leading an independent life, is unmarried and has not formed an independent family unit.

11. 352D(iv) is a separate requirement that the appellant was part of the family unit of the person granted asylum at the time that the person granted asylum left the country of his habitual residence in order to seek asylum. That is the crucial issue in this appeal.

12. In the refusal decision of 21.12.12, the secretary of State did not accept that the appellant met either of those requirements.

13. The Secretary of State has not sought to challenge the decision of Judge Manuel that the appellant meets 352D(iii).

14. The argument is that in finding at §20 and §21 of the determination that the appellant meets the requirements of 352D(iii) the judge was expressly or by implication also finding that the appellant remained part of the family unit of the sponsor.

15. The judge referred to NM ("leading an independent life") Zimbabwe [2007] UKAIT 00051, a copy of which is in the appellant's bundle and I have considered it. It held that in order to establish that an application is not leading an independent life, he must not have formed through choice a separate (and therefore independent) social unit from his parents' family unit whether alone or with others. At §13 of that decision the Upper Tribunal panel considered the meaning of Independent life, pointing out that the Rule did not require the child to be independent of everyone, just independent of the parents, at which point the underlying purpose of the Rule was no longer engaged. The panel agreed that it was a matter of assessing the nature of the choices made by the child and whether by choice the child has separated from his parents' family to form his own social unit, whether alone, by marrying or as part of his own independent social unit. It is not the same as saying he is no longer dependant on the parents or no longer part of the family. The family ties remain even if the family unit headed by the parents has now split up.

16. At §15 the panel stated that where the child lives is no more than a factor (albeit a potentially significant one) to be taken into account. The panel could readily foresee situations where the child may live away from that home whilst still remaining part of the parents' social unit, for example whilst temporarily away studying at college. At §21 on the facts of that case, the panel accepted that although the child had lived away from the family unit for several months, her evidence that it was only temporary until they obtained a larger home to accommodate all the family.

17. Judge Manuel carefully considered this authority in the light of her findings of fact and found that it could not be said that the appellant was leading an independent life because she herself did not make a choice at the age of 6 to live with her step-grandmother; that decision was made by her parents when her grandmother wanted to adopt her.

18. It does not follow, however, that the judge was also finding that the appellant was not part of a social unit separate to that of her parents; the rule does not refer to a social unit. It is quite possible to foresee circumstances where a child has not chosen to live independently of the parents but that has been imposed upon her, without her choice, and thus not an independent choice, yet she was no longer part of the family unit of the sponsor at the time he left his home country. It is clear from §21 of the determination that Judge Manuel's decision in respect of 352D(iii) was based on the absence of choice.

19. I therefore reject Ms Johnrose's primary submission that the finding in favour of the appellant in relation to 352D(iii) is necessarily inconsistent with the finding against the appellant in respect of 352D(iv). Such an argument makes no sense when it is clear that 352D(iii) is an entirely separate consideration to 352D(iv). It cannot be that a finding in relation to 352D(iii) determines the outcome in relation to 352D(iv).

20. In considering paragraph 352D(iv) and whether the appellant was part of the family unit when her father left to seek asylum, Judge Manuel set out between §22 and §27 her reasons for finding that she was not pare of his family unit.

21. Ms Johnrose also submitted that Judge Manuel either ignored relevant evidence or failed to place proper weight on aspects of the evidence in support of the appellant. However, I find that on a careful reading of the determination it is clear that Judge Manuel made a careful assessment of the evidence before reaching findings of fact, which I find were open to her on the evidence before her.

22. I accept that the fact that the appellant lived apart from the parents is one factor to consider, even though a significant one, and not necessarily determinative of the issue. There may be reasons why a child lives away from the family home for periods of time. Equally, the fact that a child may still be considered part of the family and have contact with family members does not necessarily mean that the child remains part of the family unit. A child reaching maturity and setting up their own home away from the family home is still part of the family and may retain close personal ties although no longer part of the family unit of the father.

23. However, in this case there was evidently a very deliberate decision to send the appellant to live with her step-grandmother on an indefinite basis. Reasons were cited in different parts of the evidence that the mother could not cope and more significantly that the grandmother wanted to adopt the child, and that both parents have stated that they were willing for that to happen and never sought to change that arrangement, because the child was settled. Thus the grandmother raised the appellant for the past 11 years or so.

24. Judge Manuel took account of all the evidence, but it is clear that some parts of the evidence she did not accept. The judge also took into account the lack of contact between the appellant and the father over a number of years. They went to Kenya for 8 years and did nothing to have the appellant join them there, although they were apparently living in a refugee camp.

25. Considering the evidence and the determination as a whole I find that the conclusion reached that the appellant had failed to demonstrate that she was part of the family unit of the father at the time he left to seek asylum is one which the judge was entitled to reach and for which cogent reasons have been given. It should be remembered that this test of part of the family unit at the time the father left his country to seek asylum is not the same as saying that she is not still a family member who may qualify under paragraph 297, as she had been found not to be leading an independent life. However, that is a matter for the appellant and her family members to consider. I simply point out that the tests and requirements are different that those under 352D and for good reason the financial requirements of 297 are not applicable in 352D, when what is intended is a reunion of the family unit that existed at the time the asylum seeker left his home country in order to seek asylum.

26. In the circumstances, I find no error of law in Judge Manuel's conclusion that on the facts of this case she was not part of the family unit at that time.

27. In relation to article 8, private and family life it was accepted that the appellant could not meet the requirements under Appendix FM.

28. Under the current law, the appellant would have to show arguably compelling circumstances insufficiently recognised under the Immigration Rules in order to justify, exceptionally, granting entry clearance outside the Rules on the basis that the decision produces an unjustifiably harsh outcome.

29. Briefly, recent authority is to the effect that the Immigration Rules are a complete code and there is no need to look outside the Rules unless there are arguably good grounds for consideration that there are compelling circumstances not adequately recognised in the Rules, which render the decision of the Secretary of State unjustifiably harsh. I set out below a summary of some of the recent case law.

30. In MF (Nigeria) v SSHD [2013] EWCA Civ 1192, the Court of Appeal held that in relation to deportation cases the 'new' Immigration Rules are a complete code but involve the application of a proportionality test. Whether that is done within the new rules or outside the new rules as part of the article 8 general law was described as a sterile question, as either way the result should be the same. MF (Nigeria) was followed in Kabia (MF: para 398 - "exceptional circumstances") 2013 UKUT 00569 (IAC).

31. In Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 00640 (IAC) has set out, inter alia, that on the current state of the authorities:

    (a) the maintenance requirements of E-LTRP.3.1-3.2 stand, although Blake J in R (on the application of MM) v Secretary of State for the Home Department [2013] EWHC 1900 (Admin) said that they could constitute an unjustified and disproportionate interference with the ability of spouses to live together; he suggested that an appropriate figure may be around £13,400, and highlighted the position of young people and low wage earners caught by the higher figure in the rules;

    (b) after applying the requirements of the Rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them: R (on the application of) Nagre v Secretary of State for the Home Department [2013] EWHC 720 (Admin);

    (c) the term "insurmountable obstacles" in provisions such as Section EX.1 are not obstacles which are impossible to surmount: MF (Article 8 – new rules) Nigeria [2012] UKUT 00393 (IAC); Izuazu (Article 8 – new rules) [2013] UKUT 00045 (IAC); they concern the practical possibilities of relocation. In the absence of such insurmountable obstacles, it is necessary to show other non-standard and particular features demonstrating that removal will be unjustifiably harsh: Nagre.

32. It is illustrative that in Gulshan the Upper Tribunal considered that it was not unduly harsh for a husband who originated from Pakistan but was now a British national, to return to Pakistan with his wife who was seeking leave to remain as his spouse. The panel acknowledged that the couple would suffer some hardship, as he had been in the UK since 2002, he had worked here and was receiving a pension, and housing benefit and other state benefits, some of which could not be transferred to Pakistan.

33. More recently, in Shahzad (Art 8: legitimate aim) [2014] UKUT 00085 (IAC), the Upper Tribunal held:

    (i) Failure on the part of the Secretary of State to identify in her decision any legitimate aim under Article 8(2) of the ECHR does not prevent a court or tribunal from seeking to do so on the basis of the materials before it.

    (ii) "Maintenance of effective immigration control" whilst not as such a legitimate aim under Article 8(2) of the ECHR can normally be assumed to be either an aspect of "prevention of disorder or crime" or an aspect of "economic well-being of the country" or both.

    (iii) "[P]revention of disorder or crime" is normally a legitimate aim both in expulsion cases where there has been criminal conduct on the part of the claimant and in expulsion cases where there have only been breaches of immigration law.

    (iv) MF (Nigeria) [2013] EWCA Civ 1192 held that the new immigration rules regarding deportation of a foreign criminal are a complete code. This was because of the express requirement in them at paragraph 398 to have regard to exceptional circumstances and other factors.

    (v) It follows from this that any other rule which has a similar provision will also constitute a complete code;

    (vi) Where an area of the rules does not have such an express mechanism, the approach in R (Nagre) v Secretary of State for the Home Department [2013] EWHC 720 (Admin) ([29]-[31] in particular) and Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC) should be followed: i.e. after applying the requirements of the rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them.

34. It is clear that the determination does not address any of these issues and does not in any way justify the exceptional consideration of private and family life under article 8 ECHR outside the Immigration Rules by reference to compelling circumstances. However, no ground of appeal has been raised in respect of that. If the decision had to be set aside and remade, the appellant would struggle to demonstrate that her circumstances are so compelling. The decision does not change the status quo created by the parents when they agreed to let the grandmother adopt the appellant at the age of 6. That there has been no formal adoption is neither here nor there. On the

findings of Judge Manuel the grandmother has raised the appellant and she is settled with her.

35. The article 8 exercise conducted outside the Immigration Rules by Judge Manuel was by reference to the Razgar steps, from §28 of the determination onwards. The judge properly went through those steps and in doing so, accepted that family life existed between the appellant and her parents and siblings and that the refusal decision amounts to an interference with private and family life.

36. As is usually the case, the crucial issue was that of proportionality. The absence of the appellant from the family unit since she was 6 years of age; that she was raised from that age by her grandmother until the appellant is now 17 years of age and will be 18 in November 2014 are matters properly taken into account. I also note that the judge took account of evidence of some contact since 2012, together with financial support.

37. In my view, in the light of the factors for and against the appellant set out in the determination, not just after §28 (the numbering went awry after the Razgar steps were set out), I am satisfied that the judge's conclusion at §39 that the decision was proportionate is one to which she was entitled to come in the light of her findings of fact and earlier conclusions in relation to the Immigration Rules. It was a decision within the margin of appreciation open to a judge, even though a different judge may have reached a different conclusion. I am satisfied that as far as the article 8 decision is concerned the grounds of appeal amount to no more than a disagreement with the conclusions reached.

38. I should also add, that the appellant was unable to bring herself within the Immigration Rules is also a significant factor that would have to be brought into account, together with the fact that, without prejudging the matter, there may be another route for entry as a dependant child under other provisions of the Immigration Rules, dependant on evidence to satisfy maintenance and accommodation requirements.

39. In the circumstances, I find no error of law in the determination of Judge Manuel in respect of either the decision under the Immigration Rules or that in respect of private and family life outside the Immigration Rules under article 8 ECHR.

Conclusion & Decision:

40. For the reasons set out above, I find that the making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision should be set aside.

I do not set aside the decision.

The decision of the First-tier Tribunal stands and the appeal remains dismissed.

Signed: Date: 11 June 2014

Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The decision of the First-tier Tribunal stands and the appeal remains dismissed.

Signed: Date: 11 June 2014

Deputy Upper Tribunal Judge Pickup