IAC-AH-DN-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/04385/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17 October and 5 December 2014	**On 17 December 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MISS HELLEN KAHENDO
(ANONYMITY DIRECTION NOT MADE)

Respondent/Claimant

Representation:

For the Appellant:	Mr P Duffy (17 October) and Mr N. Bramble (5 December), Specialist Appeals Team
For the Respondent/Claimant:	Miss Kyakwita, Legal Representative, Immigration Practitioner Service

DECISION AND REASONS

1. The Secretary of State appeals to the Upper Tribunal from the decision of the First-tier Tribunal dismissing the claimant's appeal against the decision of the Secretary of State to refuse to recognise her as a refugee, but allowing on Article 8 grounds her appeal against the Secretary of State's concomitant decision to remove her under

Section 10 of the Immigration and Asylum Act 1999. The First-tier Tribunal did not make an anonymity order, and I do not consider that such an order is warranted for these proceedings in the Upper Tribunal.

2. The claimant is a national of Uganda, whose date of birth is 13 January 1982. She entered the United Kingdom on 8 August 2008 with a visit visa that was valid from 31 July 2008 until 31 January 2009. She did not leave the UK before this visa expired, and she made no application to extend her leave to remain or otherwise regularise her stay in the UK until she claimed asylum on 10 November 2011. Her asylum claim was refused on 10 June 2014, and a decision to remove her as a person subject to administrative removal was served on 17 June 2014.

The Hearing Before, and the Decision of, the First-tier Tribunal

3. The claimant's appeal came before Judge Geraint Jones QC sitting at Hatton Cross in the First-tier Tribunal on 4 August 2014. Miss Kyakwita appeared on behalf of the claimant. The judge received oral evidence from the claimant and also from the claimant's partner, Mr Edwin Asafu-Adjaye. He said he had met the claimant in October 2012 and he described how their relationship had blossomed thereafter with them starting to live together in April 2013. He was a British citizen, and he would not want to go and live with the claimant in Uganda. He also would not take his daughter by the claimant to reside in that country.

4. The judge went on to dismiss the appeal against the refusal of asylum, but to allow the claimant's appeal on Article 8 grounds. He found that the claimant had maximised her position by having a child by a British citizen father, so that the child was also a British citizen. Although the claimant would be gaining her desired outcome because she had given birth to a child fathered by a British citizen, the burden of authority was presently in favour of allowing such immigration tactics to prevail in favour of those who deployed them. He referred to **ZH Tanzania [2011] UKSC 4**. That line of authority, which gave precedence to the interests of children, prevailed in this appeal by driving him to conclude that it would be disproportionate to require the claimant to depart the United Kingdom.

The Application for Permission to Appeal

5. The Secretary of State applied for permission to appeal, submitting that the First-tier Tribunal Judge had misdirected himself by failing to apply the correct approach to Article 8 as set out in **Gulshan (Article 8 – new Rules – correct approach) UKUT 640**. Head note B stated as follows:

> "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 circumstance is not sufficiently recognised under them; **R (on the application**

of) Nagre v Secretary of State for the Home Department [2013] EWHC 720 (Admin).

6. The judge had not applied the Immigration Rules at all to any of the findings made in respect of the Article 8 claim. The judge had not followed the correct approach in deciding if the claimant met or did not meet the Immigration Rules; and if the latter, whether the claimant's circumstances were compelling enough that they were not sufficiently recognised under them.

The Grant of Permission to Appeal

7. On 28 August 2014 First-tier Tribunal Judge Parkes granted permission to appeal for the following reasons:

> "The judge appears to have considered Article 8 without reference to the relevant Immigration Rules or the financial ability of the child's father to support the [claimant]. The grounds are clearly arguable and permission to appeal is granted."

The Error Law Hearing on 17 October 2014

8. After receiving submissions from both parties, I ruled that an error of law was made out. My reasons for so finding are set out below.

Reasons for Finding an Error of Law

9. The difficulty faced by the judge below was that Miss Kyakwita had not sought to make out a case under Appendix FM, and only relied on an Article 8 claim outside the Rules. Nonetheless, the judge needed to follow the approach set out in **Gulshan**. Failure to do so means that his decision on the Article 8 claim is vitiated by a material error of law such that it has to be set aside and remade. By not following the two stage approach set out in **Gulshan**, the judge has engaged in a free wheeling Article 8 assessment which has not been permissible since the introduction in July 2012 of the new Rules relating to family and private life claims.

10. While the judge may ultimately be proved right in his conclusion on Article 8, he has not given adequate reasons for reaching that conclusion. One of the functions of a determination is to inform the losing party why he/she has lost, and the failure to follow **Gulshan** means that this function has not been discharged so far as the Secretary of State is concerned.

The Resumed Hearing on 5 December 2014

11. At the resumed hearing, Miss Kyakwita relied on a supplementary bundle of documents in addition to the bundle of documents that had been placed before the First-tier Tribunal. In her skeleton argument, she submitted the basic facts were not

in dispute. The appellant's child and partner were both British citizens. They all lived together as a family. The appellant had started living with her partner in April 2013. He worked full-time as a bus driver, and his P60 for the tax year ended April 2014 showed that he earned more than £42,000 per annum. The claimant came within the scope of EX.1. She was in a genuine and subsisting relationship with a child, who was under the age of 18, was in the UK, and was a British citizen. The child had been born on 12 October 2013, and she was still being breastfed. The claimant's partner worked full-time as a bus driver, and all his shifts were at night. While he was at work, the claimant looked after the baby. It would not be reasonable to expect the child to leave the UK with her mother. Equally it would be reasonable to expect the mother to leave the UK without the child. The father was not able to look after a child just over the age of 1 who still needed breastfeeding, and who certainly needed her mother. There were insurmountable obstacles to family life with the partner continuing outside the UK. Her partner was born here, and he had lived in the UK all his life. He had never been to Uganda.

12. In reply, Mr Bramble submitted that not all the requirements of Appendix FM-SE were met. An employer's letter had not been provided. He accepted that it would not be reasonable to separate the child from her mother, and he did not dispute that it would be unreasonable to expect the child to leave the UK. But the claimant could not bring herself within EX.1 as she was not eligible for consideration under EX.1.

The Remaking of the Decision

13. The claimant is not yet eligible for leave to remain under the partner route in Appendix FM as Mr Asafu-Adjaye does not yet meet the definition of a partner given in GEN.1.2. He is not a person who has been living together with the applicant in a relationship akin to marriage for at least two years.

14. Although it is accepted by Mr Bramble that the claimant meets the exemption criteria contained in EX.1(a), he rightly submits that the claimant is disqualified from relying on these exemption criteria because of the relationship requirements contained in E-LTRP.2.3. She does not have sole responsibility for her British citizen child, and the child does not normally live with her, rather than with both her parents, one of whom is a British citizen.

15. However, it is not disputed by Mr Bramble that the claimant has a viable claim outside the Rules, applying **Gulshan**. I refer to the five point **Razgar** test. Questions 1 and 2 in the **Razgar** test clearly fall to be answered in the claimant's favour, as the removal of the claimant will split up a family. Questions 3 and 4 of the **Razgar** test should be answered in favour of the SSHD, and so the crucial issue is that of proportionality.

16. The claimant has a poor immigration history. She entered the United Kingdom on a visit visa on 8 August 2008, and overstayed after the expiry of her visa on 31 January 2009. She did not seek to regularise her status until she claimed asylum on 10

November 2011. The asylum claim was rejected by the Secretary of State on 10 June 2014, and Judge Geraint Jones QC found that her core account was false, including her claim to have been an active lesbian in Uganda. However in her favour is the fact that she speaks English and that, with the support of Mr Asafu-Adjaye, she is financially independent. The main and decisive consideration in her favour under Section 117B of the 2002 Act is that she has a genuine and subsisting parental relationship with a British citizen child, and it would not be reasonable to expect that child to leave the United Kingdom with her, as is accepted by Mr Bramble on behalf of the Secretary of State. Accordingly, I find that the proposed removal of the claimant is disproportionate, and that her Article 8 claim succeeds outside the Rules.

Decision

The decision of the First-tier Tribunal contained an error of law in the disposal of the claimant's Article 8 claim, and accordingly the decision on Article 8 is set aside and the following decision is substituted: the claimant's appeal against removal is allowed under Article 8 ECHR.

Signed Date **16 December 2014**

Deputy Upper Tribunal Judge Monson