Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/04938/2013

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination Promulgated**
on 25 March 2013	**On 2 April 2014**
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Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

JEFFAR NOOR KARUKU

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Ms J Ang, of Brown & Co, Solicitors
For the Respondent: Mr A Mullen, Senior Home Office Presenting Officer

No anonymity order requested or made

DETERMINATION AND REASONS

1) This is an appeal against a determination by Judge Debra Clapham, promulgated on 17 December 2013, dismissing the appellant's appeal against refusal of entry clearance to join his mother and brother in the UK. It was conceded that the appellant could not meet the requirements of the Immigration Rules. His case was argued only under Article 8 of the ECHR, outwith the Rules.

2) Before the Upper Tribunal Ms Ang relied firstly upon the "revised legal argument for the appellant" in the appellant's third inventory of productions in the First-tier Tribunal, Item AA, paragraphs 23-55 at pages 298 to 307. This sets out case law subsequent to the introduction of the "new Rules" in July 2012, and argues as follows. This case is one in which these Rules do not adequately reflect Strasbourg jurisprudence or previous UK case law on Article 8. Whether family life exists between

an adult child and a parent is a fact-sensitive issue. The appellant is single, has not established a family life of his own and is "wholly financially and emotionally dependant on his mother and brother for support", as evidenced by text messages. His mother and brother visit him in Kenya when they are able, but are restricted in their ability to do so for financial reasons. The appellant is aged 24. His mother believes that he suffers from undiagnosed mental illness as a consequence of traumatic experiences. He has no other surviving relatives in Kenya or in the UK. The present decision constitutes an interference with his enjoyment of family life with his mother and brother. In the proportionality assessment, the best interests of his younger brother are to be taken into account in accordance with the respondent's obligations under section 55 of the 2009 Act – that is to say, the best interests of the child are to be treated as a primary consideration. "Greater weight should be given to the significance of the relationship of the older brother to the younger in light of the separation of their family and the fact that they have never known their father." The respondent's decision is disproportionate for a number of reasons, "… taking into account the specific circumstances of the appellant and his family, but a failure to consider the best interests of the appellant's younger brother is among those reasons."

3) Ms Ang next relied upon the grounds of appeal to the Upper Tribunal. These set out the judge's finding that there were no strong elements of dependency, but rather the appellant did not appear to be in any kind of distress and was leading his own life in Kenya. As to the needs of his brother, the judge found that the relationship could continue from abroad by the usual means of communication, and that the family had visited the appellant in Kenya and might continue to do so. The grounds criticise this for failure to conduct each element of the *Razgar* tests, and because the case law test is not "strong elements of dependency" but "additional elements of dependence … or more than normal emotional ties". It is argued that application of the correct legal standards might have led to a materially different outcome.

4) The grant of permission to appeal to the Upper Tribunal was on the basis of arguable failure adequately to consider the *Razgar* guidance and the human rights of the appellant's younger brother.

5) Mr Mullen submitted thus. The judge dealt properly with the question of the best interests of the appellant's younger brother. To make good the appellant's case for that reason, something would have to be shown which would operate in his brother's best interests so as to take the case out of the ordinary. The main evidence about relations between the brothers was text messages, large parts of which were missing. It might understandably be the wish of the younger brother to have the older residing with him in the UK, but there was nothing which went significantly to show an effect on the best interests of the child. Some incomplete texts and evidence of ordinary affection did not go that far. An older brother at the age of 25 years might well in the ordinary course of events have left the family home in any case. There was no error of law, and the determination should stand.

6) Ms Ang in reply submitted that the Article 8 case had been based on the relationship not only between the brothers but between mother and son. The grounds and the grant of permission were sufficient to disclose error in both aspects. As well as the texts exchanged, there was evidence of the mother and brother visiting Kenya, and letters from the younger brother. The appellant was separated from his mother at age 13, and reunited at age 19. The case had been clearly made out of the existence of family life between an adult child and a parent, and between siblings. Strong levels of dependency were shown, even although that was not the test. The judge thought that relations could continue as they were, but that was not the relevant question. The issue was whether it was proportionate on a proper Article 8 analysis to refuse to facilitate the reunion of this family in the UK. The determination should be remade in favour of the appellant.

7) I reserved my determination.

8) *Gulshan* (Article 8 – new rules – correct approach) [2013] UKUT 640 (IAC) reviewed the case law to date and put the test in this way. 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.

9) The Rules establish a scheme under which family reunion is permitted. There was little, if anything, requiring this case to go beyond that scheme.

10) Whether family life exists between an adult and a parent, or between siblings, is a mixed question of fact and law, but primarily of fact, for a judge to resolve. The judge was entitled to find on the evidence in this case that family life for Article 8 purposes was not constituted.

11) The same circumstances were of course relevant to Article 8 in regard to private life, but it would take a very unusual case for such interests to require admission of an adult family member to the UK.

12) The judge was required to treat the best interests of the child, the younger brother, as a primary consideration; but there was nothing in this case, in practical rather than theoretical terms, bearing on those best interests. As the Presenting Officer observed, his ideal might be to have his brother with him in the UK, but there was no evidence to show that his best interests would be significantly affected one way or the other, particularly as he is nearing adulthood, with only a brief part of his childhood remaining.

13) The appellant insists that circumstances not recognised by the Immigration Rules require the Secretary of State, under reference to Article 8 and the best interests of the child, to permit his entry to the UK. Under the circumstances, that was a weak case. The conclusions reached by the First-tier Tribunal were properly open to it. Nothing turned on setting out the 5 steps of *Razgar*, on any nuance of how to approach Article 8 outside the Rules, or on the substance of the best interests of the child. The judge needed to say no more than she did.

14) The determination of the First-tier Tribunal shall stand.

31 March 2014
Judge of the Upper Tribunal