



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Numbers: IA/51892/2013
IA/51895/2013

THE IMMIGRATION ACTS

Heard at Field House

**On 21 August 2014
Prepared on 21 August 2014**

**Determination
Promulgated
On 29 August 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

**MS DOROTHY NALUBEGA (FIRST APPELLANT)
(NO ANONYMITY ORDER MADE)
MISS S K (SECOND APPELLANT)
(ANONYMITY ORDER MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Ms J. Victor-Mazeli of Counsel
For the Respondent: Mr E. Tufan, Home Office Presenting Officer

DETERMINATION AND REASONS

The Appellants

1. The Appellants are both citizens of Uganda and are mother and daughter respectively. The first Appellant who I shall refer to as "the Appellant" was born on 1 November 1984. The second Appellant who I shall refer to as "S" was born on 21 July 2012. S is dependent upon the Appellant's appeal.

They appeal against decisions of Judge of the First-tier Tribunal Walters sitting at Richmond on 15 May 2014 dismissing their appeals against decisions of the Respondent dated 21 November 2013. Those decisions were to refuse the Appellant's application for leave to remain outside the Immigration Rules and to remove both Appellants by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006.

2. The Appellant and S first entered the United Kingdom on 30 May 2013 on visitors' visas valid until 22 October 2013. They had residence permits in Italy to reside with Mr Ronald Kiyemba who is the Appellant's husband and the father of S. The Appellant and Mr Kiyemba had married in Verona, Italy on 5 February 2011. The Appellant's leave to reside in Italy has been extended until February 2015. The relationship between the Appellant and Mr Kiyemba was strained. He was violent towards her and his mother also threatened the Appellant. He made it clear that he did not want her to live with him anymore. Shortly before the Appellant's leave to enter the United Kingdom as a visitor was due to expire she applied for leave to remain on 9 October 2013 on the basis of her private and family life and on the basis of fear of return to Italy.

The Explanation for Refusal

3. The Respondent considered the application under Article 8 with reference to the Immigration Rules in force from 9 July 2012, in particular Appendix FM. The refusal letter made two main points. The first was that the Appellant's child S was neither a British citizen nor had lived in the United Kingdom for at least seven years preceding the date of application thus the Appellant could not succeed under the parent route paragraph E-LTRPT.2.2. The Appellant had been in the United Kingdom as a visitor and switching to the parent route was prohibited by paragraph E-LTRPT.3.1. She could not come within the criteria of paragraph EX.1.
4. The second point was that the Respondent did not consider that the Appellant's application raised or contained any exceptional circumstances which (consistent with the right to respect for private and family life contained in Article 8) might warrant a grant of leave to remain in the United Kingdom outside the Immigration Rules. The Appellant had argued that she was a victim of domestic violence by her husband in Italy and thus feared return there. A request for international protection constituted an asylum application under the terms of paragraph 327(b) of the Immigration Rules. The Appellant's claim should have been made in person via an appointment at the Asylum Screening Unit. It was not open for the Appellant to make such a claim in her application under the Immigration Rules. The claim that she had made was refused because she did not meet the Rules and it did not raise or contain any exceptional circumstances.
5. The Respondent also made a decision that the Appellant could not succeed under the private life requirements of paragraph 276ADE of the Rules as she had not lived continuously in the United Kingdom for at least

twenty years, she was over the age of 25 and therefore could not meet subparagraphs (iv) and (v). She had spent 29 years and four months of her life in Uganda/Italy and it was not accepted that during the period of time that she had been in the United Kingdom she had lost ties to her home country. S's application was refused in line with the Appellant's.

The Proceedings at First Instance

6. The Appellant appealed against those decisions arguing that she could not go back to Uganda as she would be homeless and on the streets. She would not be accepted in her home village unless she and her daughter were subjected to female genital mutilation (FGM). Whilst in the United Kingdom the Appellant had developed a close family relationship with her mother, brother, cousins and other family members which went beyond normal emotional ties. She was a victim of domestic violence which had left her traumatised. Her husband would have no hesitation in harming her if she were to return to Italy. Her private and family life would be severely disrupted if she were forced to return to Uganda.
7. The matter came before the Judge who heard oral evidence from the Appellant and from her mother and father. It was accepted that the Appellant could not meet the private and family life requirements under the Immigration Rules. The Appellant's case was put outside the Immigration Rules, the Respondent's arguments under the Immigration Rules thereby being accepted.
8. The Judge agreed with the Respondent that the fear of domestic violence on return to Italy amounted to an Article 3 claim which could only be decided if an asylum application was lodged. The Respondent had not served a One-Stop Notice and the Judge indicated at paragraph 17 of the determination that he was not prepared to consider the issue of the alleged domestic violence. The Judge was not prepared to consider the claim to fear FGM upon return to Uganda either for the same reason that the Appellant had failed to make this in an asylum claim to the Respondent. The Judge did note that the Respondent appeared not to have considered Section 55 of the Borders and Citizenship Act but proceeded to consider it himself at paragraph 19. S's best interests were to remain with the Appellant wherever the Appellant may be. At paragraph 20 the Judge concluded:

"I therefore did not find that there are any arguably good grounds based on relevant evidence for granting leave to remain outside the Rules."

He dismissed the appeal.

The Onward Appeal

9. The Appellant appealed against those decisions arguing in grounds submitted by Counsel who had appeared at first instance and who

appeared before me that the Judge had failed to add in his determination that submissions had been made regarding Article 8 outside the Immigration Rules. The Judge had failed to consider them. In particular the Judge had failed to consider whether there were compelling circumstances not sufficiently recognised under the Rules. The fear of domestic violence and fear of FGM were factors which should have been considered in deciding whether there were compelling circumstances not sufficiently recognised under the Rules. There was no attempt to apply the structured approach required by the case of **Razgar [2004] UKHL 27**. The Tribunal should have determined whether the interference with the Appellant's private and/or family life was proportionate. The Judge was wrong to accept the Respondent's argument that an Article 3 claim could not be decided unless there was an asylum claim made. The Judge was also wrong to state that the Appellant had failed to make a human rights claim to the Respondent and had misdirected himself.

10. The application for permission to appeal came on the papers before First-tier Tribunal Judge Cruthers on the papers on 24 June 2014. In granting permission to appeal he wrote:

"It is arguable that the Judge should not have declined to decide the Appellant's case as regards them claiming to face a real risk of serious harm in (a) Italy and (b) Uganda (see **Patel [2013] UKSC 72** and **Chichvarkin [2010] EWHC 1858**)."

11. Having said that he then went on to say:

The Appellants should not take this grant of permission as any indication that the appeals will ultimately be successful. I suspect that the Appellants' case for being granted leave to remain in the United Kingdom will turn out to be weak in the last analysis. But it is at least arguable that the Appellants are entitled to a fuller consideration of their case than that which appears from the five page determination under consideration."

12. The Respondent's response to the grant of permission came by letter dated 11 July 2014. The Respondent continued to oppose the Appellant's appeal and whilst accepting that Judge Walters' determination was short stated it was unfair to criticise him where under the circumstances he took all relevant information into consideration and properly weighed the evidence. He made findings that were open to him on that evidence. He properly directed himself to the law and considered whether there were good arguable grounds for granting leave to remain outside the Rules and found there were no such grounds. The argument that the Judge was wrong by not considering the claim of risk of serious harm in Italy and Uganda was erroneous. The Judge properly directed himself to the Respondent's policy that claims were required to be made in person at an ASU and it was open to him to accept the Respondent's policy position on this and find that despite the refusal letter no such asylum or human rights claim had been made by the Appellant. The Respondent's policy of

requiring such claims to be made in person was a procedure designed to ensure a reasonable process was followed and that the identity of the individual claiming protection was checked.

13. Directions were sent out to the parties by Principal Resident Judge Southern directing them to prepare for the forthcoming "error of law" hearing on the basis that if the Upper Tribunal decided to set aside the determination of the First-tier Tribunal any further evidence including supplementary oral evidence that the Upper Tribunal might need to consider if it decided to remake the decision could be so considered at that hearing.

The Hearing before Me

14. Counsel for the Appellant relied on the grounds which she had drafted. The Judge had not directed himself properly by failing to consider whether there were good grounds for the Appellant to be granted leave outside the Rules. The Tribunal had failed to make findings whether removal would interfere with Article 8 and **Razgar** had not been applied. If the Appellant were returned to Italy she would be unable to live away from her husband. He did not want her and so she should not come back.
15. For the Respondent it was pointed out that the Appellant had now made a claim for asylum on the basis of her fears upon return to Uganda and had had a screening interview on 2 July in which she had said that she had leave to remain in Italy until February 2015.
16. In conclusion Counsel argued that the determination was not sufficiently detailed to give the Judge's reasons why he was not considering the evidence of risk of FGM. The Judge had made a one sentence conclusion and that was not sufficiently detailed.

Findings

17. It is not in dispute in this case that the Appellant cannot bring herself within the Immigration Rules. She argues that she should be entitled to remain outside the Rules because she has an established private and family life in this country and there are compelling circumstances such that her application should be allowed outside the Rules. Those compelling circumstances do not relate to the Appellant's residence in this country, they relate to her fear that if she were to return to Italy she would be subject to violence from her husband or if returned to Uganda she and her daughter might be at risk from FGM.
18. The Judge had refused to deal with either of those two claims and as a result found that there were no compelling circumstances such that the claim should succeed outside the Rules. As the Respondent acknowledged in the Rule 24 response the determination was indeed brief. The Judge did not cite the case of **Gulshan [2013] UKUT 00640** but it is clear from the wording he used at paragraph 20 that he was aware of the ratio of that

case because he specifically said that he did not find that there were any arguably good grounds based on relevant evidence for leave to be granted outside the Rules. That was a concise description of the position. For the Appellant to succeed outside the Rules she had to show that there were arguably good grounds for Article 8 to be prayed in aid. The Judge was indicating in effect under the ratio of **Gulshan** that there were not. That in turn was based on the fact that he was not prepared to consider either the issue raised about return to Italy or the issue raised about return to Uganda.

19. If the Judge was correct not to consider either of those two factors then his determination cannot be criticised. Indeed in the light of the recent Upper Tribunal authority of **Budhathoki [2014] UKUT 00341**:

“It is generally unnecessary and unhelpful for First-tier Tribunal judgments to rehearse every detail or issue raised in a case. This leads to judgments becoming overly long and confused and is not a proportionate approach to deciding cases. It is however necessary for Judges to identify and resolve key conflicts in the evidence and explain in clear and brief terms their reasons so that the parties can understand why they have won or lost”.

20. Applying that ratio to the present case, it was clear why the Appellant had lost her case at first instance because the Judge did not find that there were arguably good grounds for granting leave to remain outside the Rules since he had disregarded the claims in relation to Italy and Uganda.
21. The question is: was he right to do so? In granting permission to appeal Judge Cruthers felt that it was arguable that the Judge should not have declined to decide the Appellant’s case on either of those two countries and cited two authorities **Patel** and **Chichvarkin**. It is difficult however to see the relevance of the case of **Patel** to this appeal. **Patel** was concerned with the situation where the Respondent has served a Section 120 Notice with the result that an Appellant could rely on Section 85(2) of the Nationality, Immigration and Asylum Act 2002 to raise a new ground in the response to the Section 120 Notice. Here as Judge Walters pointed out there was no Section 120 Notice. In **Chichvarkin** the position was factually different to the case before me.
22. In **Chichvarkin** the Appellant had sought to add a Ground of Appeal that removal to Russia would breach the Human Rights Convention in circumstances where the initial application to the Respondent had been as a Tier 1 Highly Skilled Migrant. The Respondent sought to withdraw the initial decision so that she could consider all matters in the round in particular give more consideration to the late claim that return to Russia would breach Article 3. The High Court indicated it was perfectly proper for the Respondent to withdraw her decision in those circumstances but went on to make a number of comments which are very far from supporting the Appellant’s argument in the instant case before me.

23. The court approved at paragraph 37 of their judgment a submission made by the Respondent that:

“This primary role of the Respondent also enables certain decisions to be made more effectively and efficiently. For example fingerprinting at the asylum interview conducted by the UK Border Agency allows the UK authorities to determine whether an application for asylum and the applicant may be transferred to another Member State with which the applicant was linked (under Council Regulation EC No 343/2003 of February 2003 “Dublin II”). As a primary decision-maker the Respondent may also certify an asylum and/or human rights claim as clearly unfounded (Section 94(1A) of the Act) so that the Claimant does not have the suspensive right of appeal against a relevant consequential adverse immigration decision whilst remaining in the UK We believe also that in many cases the Appellate process is itself likely to benefit from a first instance decision by the Respondent. Primary findings of credibility under Section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 may assist the Tribunal in its own deliberations and a two-stage procedure may enable the issues on the appeal to be more precisely focused in each instance promoting the overriding objective ... A favourable decision by the Respondent of course obviates the need for an appeal altogether”.

24. This case underpins the Respondent’s policy that asylum applications should be made in the correct form and indeed the Appellant has now done that. It was quite correct for the Judge to say that he should not consider the Appellant’s claim that she and her daughter would be at risk upon return to Uganda on refugee grounds as that was an application which should be made more properly to the Respondent first. The asylum claim is likely to be on the basis that the Appellant and S are members of a particular social group namely uncircumcised Ugandan females who would be at risk of persecution and/or ill-treatment. It was not appropriate for the Judge to consider the merits or otherwise of that application and thus it did not constitute compelling circumstances such that the Appellant’s application should be allowed outside the Rules.
25. In relation to the other issue he did not consider it is difficult to see how the Appellant’s claim to be at risk upon return to Italy had any evidential basis. Although the Judge did not consider the claim for the same reason that he did not consider the claim regarding fear of return to Uganda, the claim itself upon closer inspection appears to have no merit. Italy is a large populous country with a sophisticated legal system and laws designed to protect spouses from abusive relationships. It has an effective functioning police force. The Appellant’s own evidence is that her husband far from seeking her out if she were to be returned to Italy wants to have nothing to do with her. The only risk potentially to the Appellant would be if she were to put herself in that position by forcing herself upon her husband. That cannot amount to a claim for international protection. The Appellant has leave to reside in Italy and could therefore be returned

there under the Dublin Convention but that is a matter which the Respondent must consider when considering the Appellant's application recently made for asylum.

26. Whilst I do not find there was any error in the Judge's failure to consider the claim of risk if returned to Italy, upon examination there is no substance to that claim in any event. Thus even if the Judge was wrong not to consider it, the result would still have been the same that it could not have been prayed in aid by the Appellant as a compelling factor such that her appeal should be allowed outside the Rules.
27. As both of the Appellant's claims to remain outside the Rules fall away, it follows that the Judge was quite right to say at paragraph 20 there were no arguably good grounds based on relevant evidence, that is to say the evidence which he had considered, to allow the appeal outside the Rules. There was thus no error of law in the Judge's decision albeit that it was somewhat brief. The Judge did not spell out the Razgar step by step approach but since he found there was no good reason to allow the appeal outside the Rules that omission was not a material error. The grant of permission appears to have been based on a misunderstanding of the relevant case law. I dismiss the Appellant's appeal and the appeal of S also stands to be dismissed as it is dependent upon that of the Appellant.

Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold the decision to dismiss the Appellant's appeal.

Appellant's appeal dismissed.

I make no anonymity order in relation to the Appellant as there is no public policy reason for so doing but I do make an anonymity order in relation to S.

As I have dismissed the appeals I do not disturb Judge Walters' decision at paragraph 25 to make no fee award.

Signed this 28th day of August 2014

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Deputy Upper Tribunal Judge Woodcraft