Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/32856/2013

THE IMMIGRATION ACTS

Heard at: Field House	**Determination Promulgated**
On: 23rd July 2014	**On 06th Aug 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE BRUCE

Between

ZK
(anonymity direction made)

Appellant

And

Secretary of State for the Home Department

Respondent

For the Appellant: **Ms Lloyd, Counsel instructed by MNS Solicitor**
For the Respondent: **Mrs Kenny, Senior Home Office Presenting Officer**

DETERMINATION AND REASONS

1. The Appellant is a national of Tanzania. She has permission to appeal against the decision of the First-tier Tribunal (Judge Abebrese) to dismiss her appeal against the Respondent's decision to refuse to vary her leave to remain in the United Kingdom on human rights grounds and to remove her pursuant to s47 of the Immigration, Asylum and Nationality Act 2006.

Background and Matters in Issue

2. The Appellant came to the UK in 2006 as a Tier 4 (General) Student Migrant. She was here with that leave when she was diagnosed as being HIV+. It was this diagnosis, and its consequences for her, which led the Appellant to make an application for leave 'outside of the rules' in April 2013. She asked that the Respondent grant her discretionary leave on the basis that her removal to Tanzania would be a disproportionate interference with her Article 8 rights and/or a breach of Article 3 ECHR.

3. The Respondent refused the application in a letter dated the 10th July 2013. The Appellant did not qualify for leave to remain under the Rules. The facts of her case did not disclose a risk of an Article 3 breach because there would be treatment for her condition in Tanzania. The Respondent agreed that as a matter of law such a case could succeed in the alternative under Article 8, but found that the facts presented by the Appellant were not "so exceptional" as to warrant a grant of leave on that basis.

4. The First-tier Tribunal found that there would be some treatment for the Appellant's condition in Tanzania and dismissed the appeal under Article 3. Noting that the Appellant had "for the most part" lived lawfully in the UK the Tribunal then proceeded to address Article 8, considering the Rules in tandem with Razgar[1]. Judge Abebrese accepted that the Appellant has a private life in the UK, and apparently that her removal would be an interference with it. The proportionality balancing exercise is recorded as follows:

> "20. I do not find on the basis of the evidence and the law that there would be severe and grave consequences of the appellant returning to Tanzania for the following reasons. The appellant does have cultural links in that country where she has spent the majority of her life and she has ties in that country which will enable her to adapt bearing in mind that she has spent a substantial part of her life there.
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> 21. I do find that the decision is in accordance with the law in that the appellant cannot satisfy the provisions of Appendix FM and in particular paragraph 276ADE as stated above. It is also the case that the appellant stay expired (*sic*) and hence her need to make an application/appeal to the Tribunal. The decision of the respondents is in the view of the Tribunal one which is necessary in a democratic society in pursuance of a legitimate aim which is the control of immigration. On the evidence the appellant has been in the United Kingdom lawfully but she is no longer able to satisfy the provisions of the Rules.
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> 22. I do find that the decision is proportionate as the appellant cannot rely on Article 3 and case law in relation to her medical condition as laid down in my determination. I also do make a finding that she does have cultural links in Tanzania and even though she claims that her family have ostracised her because of her medical condition the Tribunal takes the view that she will nevertheless be

[1] R v SSHD (ex p Razgar) [2004] UKHL 27

able to adapt to a country where she has spent the majority of her adult and early years".

5. The grounds of appeal are that the First-tier Tribunal erred in failing to conduct an adequate assessment of Article 8. It is further said that the Tribunal made a material error of fact in the characterisation of the Appellant's residence in this country as "for the most part" lawful, whereas in fact she has always been here with leave.

6. The Respondent had not submitted a Rule 24. Mr Tarlow initially indicated that he would submit that the reasoning in the determination was sound, but having heard from Ms Lloyd declined to make any submissions.

My Findings on Error of Law

7. At a hearing on the 12th May 2014 I made a decision that the determination of the First-tier Tribunal did contain errors such that it should be set aside in its entirety. I did so for the following reasons:

i) Conflating the test under Article 3 with the test under Article 8. Whilst there is no challenge to the approach taken to Article 3, in addressing proportionality the Tribunal has failed to take all material considerations into account and has appeared to conclude that the failure under Article 3 and the Rules is determinative of Article 8. This is an error in approach. The Tribunal was obliged to look at the Appellant's circumstances in the round, both here and in Tanzania. This included the extent of her friendships and support networks in the UK, and the respective lack thereof in Tanzania. These cumulative factors were capable, when taken with the Appellant's illness, of rendering the decision disproportionate: MM (Zimbabwe) v Secretary of State for the Home Department [2012] EWCA Civ 279. The determination does not demonstrate that all of these factors were weighed in the balance.

ii) Error of fact in respect of lawful residence/failing to give adequate weight to that fact. The Appellant has always had leave to enter or remain in the UK and this was a relevant factor: see for instance JA(Ivory Coast) and ES (Tanzania) v SSHD [2009] EWCA Civ 1353. It is not clear from the determination that the First-tier Tribunal apprehended that the Appellant has always had lawful residence, nor that this was a factor in her favour.

iii) Failing to make findings on material facts. The Appellant's consistent – and unchallenged – evidence had been that her family in Tanzania had ostracised her when she informed them of her HIV+ status, and that she would not therefore receive any emotional or physical support from them on return. The reference to this matter at paragraph 22 of the

determination does not amount to a finding. This was a relevant factor under both Article 8 and Article 3: see for instance AE (Ivory Coast) v SSHD [2008] EWCA Civ 1509.

8. The Appellant was not at the hearing on the 12th May. The Tribunal received a letter from her solicitors informing me that she had recently had a hysterectomy and that she was suffering from post-operative complications which meant that she was unable to attend. The record of proceedings before the First-tier Tribunal consisted of a note saying "decision reserved", which is unfortunate since oral evidence was given. I agreed that in these circumstances it would be appropriate to adjourn the matter to enable further evidence to be called.

9. The hearing was re-convened on the 23rd July 2014 when I heard oral evidence from the Appellant and further submissions from both parties. I reserved my decision, which I now give.

The Re-Made Decision

10. Ms Lloyd did not rely on Article 3 ECHR. It was submitted that the Appellant qualifies for leave to remain under paragraph 276ADE of the Rules. If for any reason I found that she does not, I was asked to apply Razgar [2004] UKHL 27 and consider Article 8 outside of the Rules.

11. I found the Appellant to be a compelling, and entirely credible witness. I make my findings on the basis of her evidence, as well as the other, documentary evidence that is before me. I have taken all of the evidence into account including that which is not expressly mentioned here.

Paragraph 276ADE

12. Paragraph 276ADE of the Rules relates to private life in the UK. The provision that is relied upon is highlighted:

> 276ADE (1). The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:
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> (i) does not fall for refusal under any of the grounds in Section S-LTR 1.2 to S-LTR 2.3. and S-LTR.3.1. in Appendix FM; and
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> (ii) has made a valid application for leave to remain on the grounds of private life in the UK; and
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> (iii) has lived continuously in the UK for at least 20 years (discounting any period of imprisonment); or
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> (iv) is under the age of 18 years and has lived continuously in the UK for at least 7

> years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK; or
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> (v) is aged 18 years or above and under 25 years and has spent at least half of his life living continuously in the UK (discounting any period of imprisonment); or
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> **(vi) subject to sub-paragraph (2), is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK**

13. No issue arises as to the Appellant's 'suitability' to be granted leave to remain in the UK. She has made a valid application. It is accepted that she is over 18 and has lived continuously in the UK for less than 20 years. The question is whether she has "no ties (including social, cultural or family)" to Tanzania. The burden of proof lies on the Appellant and the standard of proof is a balance of probabilities.

14. In Ogundimu (Article 8 – new rules) Nigeria [2013] UKUT 00060 (IAC) the Tribunal considered the meaning of "ties" in the context of the identically worded paragraph 399A:

> 123. The natural and ordinary meaning of the word 'ties' imports, we think, a concept involving something more than merely remote and abstract links to the country of proposed deportation or removal. It involves there being a continued connection to life in that country; something that ties a claimant to his or her country of origin. If this were not the case then it would appear that a person's nationality of the country of proposed deportation could of itself lead to a failure to meet the requirements of the rule. This would render the application of the rule, given the context within which it operates, entirely meaningless.
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> 124. We recognise that the text under the rules is an exacting one. Consideration of whether a person has 'no ties' to such country must involve a rounded assessment of all the relevant circumstances and is not to be limited to 'social, cultural and family' circumstances. Nevertheless, we are satisfied that the appellant has no ties with Nigeria. He is a stranger to the country, the people, and the way of life. His father may have ties but they are not ties of the appellant or any ties that could result in support to the appellant in the event of his return there. Unsurprisingly, given the length of the appellant's residence here, all of his ties are with the United Kingdom. Consequently the appellant has so little connection with Nigeria so as to mean that the consequences for him in establishing private life there at the age of 28, after 22 years residence in the United Kingdom, would be 'unjustifiably harsh'.
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> 125. Whilst each case turns on its own facts, circumstances relevant to the assessment of whether a person has ties to the country to which they would have to go if they were required to leave the United Kingdom must include, but are not limited to: the length of time a person has spent in the country to which he would have to go if he were required to leave the United Kingdom, the age that the person left that country, the exposure that person has had to the cultural norms of that country, whether that person speaks the language of the country, the extent of the family and friends that person has in the country to which he is being deported or removed and the quality of the relationships that person has with those friends and family members.

15. In respect of the Appellant's ties to Tanzania she is clearly a national of that country, she speaks the language and has lived there for most of her life. I am however satisfied that on the particular facts of this case an intervening factor – her diagnosis with HIV – has affected her life with such violent force that her ties to the country of her birth have effectively been severed. Those particular facts are as follows.

16. The Appellant is from a relatively prosperous family in Dar es Salaam. They are practising Muslims and after her father died in 1996 the Appellant's 'guardianship' appears to have passed to her two elder brothers. The Appellant described her family as religious and conservative. She wears the headscarf and was for instance expected to remain living at home whilst she remained unmarried. Her brothers were however very supportive. One in particular was very close to her and successfully argued against her being married to an "old man" from the village whom some members of her family wanted her to marry. They both actively supported her in her choice to work as a teacher whilst living at home and in her quest for further education. When she suggested that she come to the UK in order to study they offered to pay for it: the plan was that she would study in the UK and then return to Tanzania to work in the family business. Her brothers paid for everything.

17. Whilst the Appellant was pursuing her studies in the UK she was diagnosed as having a large fibroid that required an operation. Although she had leave to remain at the time and would therefore have been able to have this operation on the NHS the Appellant elected to return to Tanzania to have it done there. She would then be able to recuperate at home. Her brother paid for her flight, and for the operation. She was given a blood test before the operation, which is routine. It came back OK, the operation proceeded and was successful. After she recovered the Appellant returned to her studies in the UK.

18. In January 2010 she became unwell. She had a pain in her chest that would not go away and her GP referred her for investigation after repeated courses of anti-biotics did not work. She was diagnosed as having tuberculosis. At the time she was living in Essex and travelling in to London each day on the tube in order to attend college. Obviously her doctors were concerned about this and took further blood tests to determine the strain of TB that she might have. On the 12th January 2010 the results of those tests revealed that the Appellant was HIV+ and she was started on anti-retroviral therapy.

19. The Appellant was in a state of shock. She has never used intravenous drugs, and has only ever had one sexual relationship, with a man she had met in the UK. She has contacted him since her diagnosis and told him to get tested. He told her that he was negative. She does not know if that is true or not. The only other possible source of infection was from a blood transfusion she received whilst having her operation in Tanzania.

20. At the time she found out about her diagnosis the Appellant was living with another woman from Tanzania to whom she was very close. She was such a good friend that the Appellant regarded her "as a sister". The Appellant confided in this woman, who supported her. The Appellant's friend was returning to Tanzania in December 2010. The Appellant told her that under no circumstances should she tell anyone about her diagnosis. She knew that her brothers would be shocked and possibly angry. She knew that she would have to tell them eventually but wanted to do it on her own terms, and face to face. She did not want them to find out whilst she was in the UK. Unfortunately the Appellant's friend did not listen to her. Possibly thinking that it was in the Appellant's best interest she went to see her brothers whilst she was in Dar es Salaam and told them.

21. The Appellant's brothers were furious. In the Appellant's oral evidence she cried profusely as she recalled the conversation she had with her second brother shortly after her friend's visit. He was yelling at her, asking whether this was what he had paid all this money for her to go to the UK for – "was it for her to find this disease, for her to find HIV?" . He hung up on the Appellant. Later on she tried to call her mother who was in the village. Her mother was obviously very upset. In the weeks that followed there were a number of agonising phone calls for the Appellant. It was made clear to her in no uncertain terms that she had brought shame on the family and that she was not to return home. When she left home she was a virgin and had been expected to stay that way. Her brothers wanted to marry her to someone they knew after she completed her studies. That was now out of the question. The Appellant's mother told her that her sons had instructed her not to have anything to do with her but she would stand by her because she was her daughter. The Appellant's brothers cut off her funding. When the time came to pay her next instalment of college fees she did not have the money and she had to stop studying.

22. In 2012 the Appellant's mother had a stroke. After one week the Appellant received a call from a distant cousin to tell her that her mother had died. The Appellant, as was required by custom, called her elder brother to say that she was sorry for her mother's loss. He was distraught. He told her that it was her fault. He said that their mother had been placed under an intolerable strain by the shame that she had brought upon the family and that the stroke had been caused by her worrying all the time about the situation. He told the Appellant that she had caused her mother's stroke and then her mother's death. He told her that she should never expect to be able to come back into the family.

23. The Appellant's contact with Tanzania is now limited to occasional telephone calls with her mother's cousin's daughter, a lady named Afrida. She is married and lives with her family. Although Afrida has not abided by the injunction not to have anything to do with the Appellant, she would not be able to help her if

the Appellant were to return to Tanzania. The Appellant's brothers would not permit it, and as a result it is unlikely her husband would have the Appellant in the house. Afrida has tried to intervene on the Appellant's behalf by telling her brothers that lots of people live with this condition now. They told her that if she wants to help the Appellant she will no longer be part of their family.

24. This is not then, simply an adult with no family. This is a woman from a traditional and religious family for whom life in Tanzania has always meant living in her father's house, under his control and then under her brothers', abiding by social mores and doing what is expected of her. Although, perhaps unusually, she was permitted a degree of latitude in that she was educated and allowed to work, and even when she was younger reject a marriage partner of her father's preference, the bottom line for this Appellant is that she was expected to come back to Tanzania, get married and work in the family business. Her religious, cultural and social life was all within the sphere of her family. Her diagnosis has destroyed all of that. It has entirely severed her relationship with her brothers, who have ensured that other family members participate in the complete ostracisation of the Appellant. Her only contact is her distant cousin who has been told not to have anything else to do with her and has little option but to comply. The Appellant's emotional, physical and financial support network has gone. Not only has it gone, but it has turned against her. It was apparent from the Appellant's emotional evidence how devastated she is by the loss of her family and their decision to violently reject her. It appeared to me that she was almost more distressed about that than she is about her diagnosis, which she appears to accept with fortitude and a mature understanding of how reasonable her prognosis could be, with the appropriate medication.

25. I accept then that the Appellant has lost all family ties to Tanzania. It would be a very rare case indeed where an adult who has lived most of her life in her country of origin could be said to have lost her "social and cultural" ties there, but I am satisfied that on the particular facts before me, this is such a case. That is because for this unmarried Muslim woman her cultural and social life was inextricably bound up with her natal family. If she were to be returned to Tanzania today she would have a passport, and the ability to speak Swahili. However she would have no meaningful opportunity to enjoy a family or private life. She would have to live on her own and rely on her own ability to find housing and the work to pay for it – in this regard she expresses real fears about being tested for HIV by prospective employers, a practice on the increase across East Africa. Whilst I am satisfied that she would be able to find work of some description she would be dependent upon her own ability to stay well in order to keep herself in employment. It would be an extremely lonely, and I accept, distressing existence. I find that such ties that the Appellant could be said to currently have to Tanzania are remote and abstract. The life she once enjoyed there is now completely at an end. Accordingly I allow the appeal with reference to paragraph 276ADE of the Rules.

26. It perhaps follows from what I have said that I consider there to be a compelling case under Article 8. Given my findings on the Rules I can be brief in setting out this alternative reason for allowing this appeal. I have considered Article 8 on the basis that the Appellant cannot succeed under the Rules and following the guidance given in Razgar.

27. I accept that the Appellant has a substantial private life in the UK. She has lived, studied and worked in the UK for eight years. She has a number of good friendships and receives support here that is unfettered by cultural taboo or social prejudice[2]. That private life could not be transported with her, and as I have found above, I am satisfied that the Appellant would face very significant obstacles in re-establishing her private and family life should she be returned to Tanzania. I am satisfied that the decision would be an interference with her private life such Article 8 is engaged.

28. The Respondent has the power in law to take the decision and there is no dispute that the decision to refuse leave to persons who no longer qualify for it is a measure rationally connected to the legitimate Article 8(2) aim of protecting the economy. The question is whether the decision is in all the circumstances proportionate.

29. My starting point is that where an applicant does not succeed under the Rules, it is likely to only be in a very small number of cases that he or she would succeed under Article 8. That is because the Rules now to a very large extent reflect the UK's obligations under the ECHR. A very great weight is to be attached to the public interest in removing people who have no lawful basis to remain here.

30. As the Respondent accepts, a 'health' case that does not reach the very high threshold required by Article 3 may nevertheless succeed under Article 8, although the number that do are likely to be "very rare indeed": GS and EO (Article 3 – health cases) [2012] UKUT 397, KH (Afghanistan) v SSHD[2009] EWCA Civ 1354. The jurisprudence identifies a number of factors that might be relevant to the question of whether the decision to remove is proportionate. The first is whether the applicant has had lawful leave to remain in the UK, or has come here as a "health tourist". This cannot be said to the case here. The Appellant has always had valid leave and in fact voluntarily returned to Tanzania in order to have an operation there in 2008. The UK assumed responsibility for her treatment at a time that she had lawful leave and her private life was already established. It can therefore be said that the Appellant did not come here to use resources to which she was not entitled[3].

[2] The Appellant's bundle contains several letters of support from friends and co-workers in the UK.

[3] As a student and then a worker, the Appellant was entitled to NHS treatment free of charge: see Regulation 4(1)(iii) and (zi) of the NHS (Charges to overseas visitors) Regulations 1989 (1989/306)

31. I can also consider whether, as a matter of financial practicality, medical treatment would be received in the state of return. The Appellant accepts that anti-retrovirals are available in Tanzania; the Respondent accepts that they are not free. The Appellant's ability to access such treatment would therefore be dependent on her own ability to gain employment and earn enough money to pay for her medication; if she falls ill and is unable to work her supply of drugs may be interrupted. If her ARVs are disrupted she runs a substantial risk of her condition worsening and her becoming very ill. I have attached some weight to this factor. I have however balanced against it the fact that the Appellant's ARVs are currently paid for by the public purse and that this is a significant countervailing factor.

32. An important consideration is whether the Appellant has social and familial support in the country of return and to what extent she would be able to enjoy a family and private life there. As I have found above, the prospects of the Appellant, in her particular circumstances, enjoying anything like a 'normal' private or family life in Tanzania would be bleak. I find that she would face humiliation and ostracisation by her family and those former friends and acquaintances known by her family and under the influence of her brothers. I accept her compelling evidence that she has no-one to whom she could turn in Tanzania today. I find that this strikes at the heart of the Appellant's ability to live as a 'social animal' and have attached significant weight to it.

33. I find that these factors, the dislocation of the Appellant from her current network of close friends and clinicians, the stress upon her of living with the uncertainty of being able to pay for her medication in the future, the complete ostracisation from the society that she previously knew in Tanzania, and the understandable pain that this causes her, cumulatively amounts to compelling humanitarian case for leave to be granted.

34. I have further attached some weight to the contribution that the Appellant herself is making to the UK, not just in the payment of taxes but in the important (and consistently under-valued) work she does as a carer. She has worked since she arrived in the UK. When she first came it was only a few hours for extra cash – she did not need to work significant hours because her brothers were supporting her. After they cut off her funding she has worked all the hours that she is permitted to do. She is a support worker for people with physical and learning disabilities. There are three particular people that she has been looking after for a long time – something over three years. These patients are categorised as having "challenging behaviour" and so are deemed to need a consistent carer who has received specialist training. She has taken a break from this at the moment because she has recently had to have a hysterectomy and so cannot lift her patients but when she is off "light duties" (that is currently helping to look after 22 elderly people) she will go back to her usual caring work. This involves cleaning her patients, feeding them and managing their needs. As well as these three regular clients who are particularly reliant upon

her, the Appellant has other patients with learning disabilities whom she takes shopping and spends time with.

35. Having considered all of these factors in the round I am satisfied that the Respondent cannot show this decision to be proportionate, notwithstanding the very great weight that I must attach to the public interest in removing people who do not qualify for leave to remain under the Rules. I therefore allow the appeal with reference to Article 8 in the alternative.

Decisions

36. The decision of the First-tier Tribunal contains errors of law and it is set aside.

37. I remake the decision as follows:

"The appeal is allowed under the Immigration Rules. The appeal is allowed on human rights grounds".

38. The First-tier Tribunal made an order for anonymity pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. Because of the Appellant's health issues I continue that order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

Deputy Upper Tribunal Judge Bruce
26th July 2014