



IAC-AH-SAR-V1

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

Appeal Number: VA/06466/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 10 February 2016**

**Decision & Reasons Promulgated
On 8 March 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE RAMSHAW

Between

ENTRY CLEARANCE OFFICER - PRETORIA

and

**FLORENCE DUBE
(ANONYMITY DIRECTION NOT MADE)**

Appellant

Respondent

Representation:

For the Appellant: Mr L Tarlow, a Home Office Presenting Officer

For the Respondent: Mr S Siwela, a legal representative

DECISION AND REASONS

Introduction

1. This is an appeal by the Entry Clearance Officer against a decision of First-tier Tribunal Judge Wyman, promulgated on 21 August 2015, in which she allowed Ms Dube's (the claimant) appeal against the decision of the Entry Clearance Officer of 1 October 2014 refusing her application for entry clearance as a visitor to the UK.

Background

2. The claimant is a citizen of Zimbabwe; her stated date of birth is 4 September 1952. On 22 September 2014 the appellant applied for entry clearance as a visitor to visit family in the UK. That application was refused by the Entry Clearance Officer because he was not satisfied that the claimant could meet the Immigration Rules. In particular, that the claimant intended to leave the UK at the end of the visit or that she was genuinely seeking entry as a visitor. The Entry Clearance Officer considered that the claimant had provided little in the way of documentary evidence of her personal and financial circumstances in Zimbabwe.

The Appeal to the First-tier Tribunal

3. The claimant appealed against the Entry Clearance Officer's decision to the First-tier Tribunal. As set out by the First-tier Tribunal judge, in June 2013 the full right of appeal against refusal of a visit visa sponsored by a family in the United Kingdom was abolished. An appeal can only be pursued on human rights or race discrimination grounds. The judge found that there was private and family life between the claimant and her children, although the judge noted that the children are adults and not dependent on the claimant. She concluded that the decision has consequences of such gravity as potentially to engage the operation of Article 8. The judge allowed the appeal under Article 8 of the European Convention on Human Rights ("ECHR").

The Appeal to the Upper Tribunal

4. The Entry Clearance Officer sought permission to appeal against the First-tier Tribunal's decision to the Upper Tribunal. On 22 December 2015 First-tier Tribunal Judge Frankish granted the Entry Clearance Officer permission to appeal. The grant of permission sets out that paragraph 35 of the First-tier Tribunal decision indicates an arguable application of the old approach rather than the foregoing considerations beyond a brief reference to Razgar [2004] UKHL 27.

Summary of Submissions

5. The grounds of appeal assert that the appeal is restricted to residual grounds contained in Section 84(1)(b) and (c) of the 2002 Nationality, Immigration and Asylum Act. On 25 June 2013 Section 52 of the Crime and Courts Act was commenced. This restricted the appeal rights of visitors coming to visit family members in the UK. The restrictions apply to any applications made on or after 25 June 2013. The instant application was made on 23 September 2014. The grounds assert that the judge made a material misdirection of law. It is asserted that established case law has established that family life within the meaning of Article 8 will not normally exist between adult siblings, parents and adult children. If family life does not exist, then generally Article 8 will not be engaged. The Entry Clearance Officer relies on paragraph 8 of MS (Article 8 – family life –

dependency – proportionality) Uganda [2004] UKIAT 00064. Reliance is also placed on paragraph 25 of Kugathas v SSHD [2003] EWCA Civ 31 and on ZB (Pakistan) v SSHD [2009] EWCA Civ 834 and Ghising and Others [2013] UKUT 00567 (IAC). It is asserted that an application to come to the UK as a visitor is a temporary visit of limited duration and the requirements that need to be met to qualify under the Rules are necessary for legitimate aims and are proportionate. It is also asserted that the proportionality assessment undertaken by the judge is inadequate. It does not explain why the refusal of a visa which only allows the parties to be together temporarily is a disproportionate interference with Article 8 rights. It is asserted that the claimant has not demonstrated that the interference with her right to a family and/or private life resulting from the refusal of the entry clearance has given rise to such grave consequences as to engage Article 8.

6. Mr Tarlow relied on the grounds of appeal. He submitted that the judge at paragraph 32 of the decision essentially said that the appellant clearly has a private and family life, however it is evident that the judge has not considered whether or not the appellant has a family life with her children or grandchildren and the finding is contrary to the case law. He relied on the case of Kugathas. He submitted that the judge did not undertake an adequate assessment of proportionality and that the reasons were entirely inadequate for the judge's findings on proportionality. He asserted that this was a short period family visit visa that had been refused by the Entry Clearance Officer on the basis that he was not convinced that the appellant was only coming to the UK for the purpose of a family visit. He referred to paragraph 37 of the judge's decision and submitted that there were no reasons given by the judge for the conclusions reached. The judge has not indicated why the family ties are so strong that the proportionality exercise requires that it falls in the appellant's favour. Mr Tarlow accepted that there is a private life but that the judge has not adequately dealt with this matter under either limb of Article 8 of the ECHR.

7. Mr Siwela submitted that the judge has done all that needed to be done and has made the correct decision and has undertaken a correct assessment. He submitted that the Home Office appeal does not take into account private life. In this case it is not just the appellant's children but her grandchildren. He submitted that on the evidence when possible the family will go to visit each other, they are in touch with each other via media, however their opportunities to visit their grandmother are limited as they can only go during school holidays when it is more expensive. He submitted that the new grandchild is very young. He asserted that it is important at this stage of the children's lives to establish a private life with their grandmother. A relationship at this age has a substantial effect on children. He submitted that the grandmother has not seen the latest grandchild. The judge found that one of the daughters was unable to travel as a result of her health problems. He relied on a case X v Iceland in which he asserted that it makes clear that Article 8 includes both

private and family life and that private life includes the right to establish and develop relationships with other human beings. He submitted that it is the private life of the sponsors and that those most affected are the grandchildren, they have a right to establish family life and that the less that the grandchildren see their grandparent they would be unable to establish that relationship. He submitted that the judge looked at the evidence of the witnesses and came to the conclusion that there was private life. He submitted that the judge was entitled to look at the factors that the appellant would return as the judge can look at the strength of a visa application insofar as it is relevant for assessing proportionality. He submitted that the judge weighed those factors up in the process and came to the decision that the private and family life outweighed the public interest.

8. In reply Mr Tarlow submitted that the case simply was that the appellant was not in the UK, she wishes to come here but has been refused by the Entry Clearance Officer. The judge has failed to give inadequate reasons as to why Article 8 considerations should fall in the appellant's favour.

Legislative Provisions

9. Section 117A of the Nationality and Immigration Act 2002 sets out the scope of the new Part 5A headed "Article 8 of the ECHR; Public Interest Considerations" as follows:

117A Application of this Part

(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—

(a) breaches a person's right to respect for private and family life under Article 8, and

(b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or tribunal must (in particular) have regard—

(a) in all cases, to the considerations listed in section 117B, and

(b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

(3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

10. The considerations listed in s.117B are applicable to all cases and are:

117B Article 8: public interest considerations applicable in all cases

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the

economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—
(a) are less of a burden on taxpayers, and
(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—
(a) are not a burden on taxpayers, and
(b) are better able to integrate into society.

(4) Little weight should be given to—
(a) a private life, or
(b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—
(a) the person has a genuine and subsisting parental relationship with a qualifying child, and
(b) it would not be reasonable to expect the child to leave the United Kingdom.

Discussion

11. The correct approach to consideration of a 'visit appeal' where the only grounds available are on the basis of Human Rights does not result in the claimant's ability to meet the Immigration Rules as irrelevant. As held in Kaur (visit appeals; Article 8) [2015] UKUT 00487 (IAC) ('Kaur')

"27. This background fortifies us in our view that a judge limited by s.88A to deciding whether the refusal of entry clearance to an appellant is compatible with Article 8 cannot - and must not - avoid taking the factual situation as regards the ability of the appellant to meet paragraph 41 as a starting point. In deciding whether Article 8(1) is engaged, for example, the judge must be satisfied that there is a factual content to the claimed private and family life. If the evidence relating to the ability to meet the requirements of paragraph 41 discloses to the judge that the visitor has no real family ties or that the visitor does not genuinely intend a visit, that may have a direct material bearing on the decision as to whether Article 8(1) is engaged. Similarly, evidence regarding the applicant's ability to meet the requirements of the rules may sound on whether the decision constitutes interference and also on whether, if there is interference, it is proportionate. Overall, unless an appellant can show that there are individual interests at stake covered by Article 8 "of a particularly pressing nature" so as to give rise to a "strong claim that compelling circumstances may exist to justify

the grant of LTE outside the rules" (see SS (Congo) at [40] and [56]), he is exceedingly unlikely to succeed. That proposition must also hold good in visitor appeals."

12. The claimant's ability to satisfy the Immigration Rules is not the question to be determined by the Tribunal but is capable of being a weighty factor. The judge has considered the claimant's ability to meet the Immigration Rules. Although there is no explicit finding it can be inferred that the judge considered that the claimant met the requirements of the Immigration Rules.

13. The judge correctly adopted a, albeit brief, structured approach to the Article 8 exercise following the five stage test identified in Razgar [2004] UKHL 27. The judge's findings and conclusions are very brief and I set them out in full below:

"32. However, the appellant has children in the United Kingdom and grandchildren. There is clearly private and family life between the appellant and her children, although I note that they are adult children who are not dependent on the appellant. The decision therefore has consequences of such gravity as potentially to engage the operation of Article 8. The decision is in accordance with the law and is necessary in the interests of maintaining an effective immigration control. The key question here is whether the interference is proportionate to the legitimate public end sought to be achieved.

33. The appellant has not previously come to the United Kingdom. She does not have a poor immigration history. She has proved that she can adhere to immigration control when visiting other countries.

34. The appellant has two sons living in the United Kingdom and four grandchildren. She has only met three of her grandchildren.

35. The appellant has strong links with Zimbabwe. She has worked as a teacher for over 30 years, and has recently retired from her post. She owns a farm and has both cattle and chickens.

36. I note that one of her daughters-in-law is unwell, and medical evidence has been provided to explain that she is unfit to travel. Her eldest grandson lives with Ms Tacadao.

37. Taking all these points into consideration I find that the appeal should be allowed under Article 8".

14. The Entry Clearance Officer's grounds of appeal centre around family life within the meaning of Article 8. A number of cases are cited in support of the proposition that there is no presumption of family life between an adult and his parent unless something more exists than normal emotional ties. In Kaur the Upper Tribunal set out:

"39. We bear in mind that ties between a parent and adult children or between a grandparent and children will not as a rule constitute family life for Article 8(1) purposes unless there is dependency over and above normal

emotional ties: see Kugathas [2003] EWCA Civ 31 and Singh and Another [2015] EWCA Civ 74.”

15. The Tribunal, in this case, has not identified any factors over and above the normal emotional ties that exist between the claimant, her sons and her grandchildren. The judge therefore erred in finding that there was family life between the claimant and her children and grandchildren.
16. The Entry Clearance Officer does not assert that private life does not exist between the claimant and her children and grandchildren in the UK. The core element of private life is the ability to establish relationships with other human beings. The refusal of entry clearance is an interference with the private lives of the claimant and her children and grandchildren. The first of the steps was correctly applied by the judge in accordance with the test in Razgar.
17. The judge has not, however, undertaken an appropriate or adequate proportionality exercise. The judge has not weighed the factors set out in statutory form in the balancing exercise as she was required to do under Section 117A and 117B of the Nationality and Immigration Act 2002.
18. The decision of the First-tier Tribunal therefore contains a material error of law. I set aside that decision pursuant to Section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007. I re-make the decision.
19. There was no challenge to the judge’s conclusions that the refusal of entry was an interference in the private lives of the claimant and her children, that the interference was in accordance with the law and was necessary. The two issues are whether or not that interference will have consequences of such gravity to engage Article 8 and the adequacy of the proportionality exercise. The starting point, as the Entry Clearance Officer sets out, is that the claimant was intending to visit for a short period. Any interference in the private lives of the claimant, her children and grandchildren is likely to be modest. The private life that exists between the claimant and her children and grandchildren in the UK is effectively being maintained at present. She last saw them in 2012. It is not the case that the private life cannot be continued by any other means other than by the claimant visiting the UK. I consider that on the facts of this case the interference is unlikely to be of such gravity as to engage Article 8.
20. However, even if Article 8 were engaged, in undertaking the proportionality exercise I consider that the scales fall in favour of the maintenance of effective immigration control. Section 117B requires this court to place weight on the fact that the maintenance of effective immigration controls is in the public interest. As regards the other provisions of section 117B, there was no issue with regard to the sponsor providing the claimant with maintenance and accommodation during her visit. The public interest expressed in section 117B(3) does not therefore arise. None of the other section 117B considerations arise. In favour of the

claimant is that the judge appears to have considered that she met the Immigration Rules therefore this weighs in her favour when considering whether the legitimate aim of enforcing immigration control is proportionate. However this is a case of interference in private life. In Mostafa (Article 8 in entry clearance) [2015] UKUT 00112 (IAC) at paragraph 24 it was considered that:

“24. ...We are, however, prepared to say that it will only be in very unusual circumstances that a person other than a close relative will be able to show that the refusal of entry clearance comes within the scope of Article 8(1). In practical terms this is likely to be limited to cases where the relationship is that of husband and wife or other close life partners or a parent and minor child and even then it will not necessarily be extended to cases where, for example, the proposed visit is based on a whim or will not add significantly to the time that the people involved spend together.”

21. Weighing against the claimant is that the visit is for a short period, is not a relationship of husband and wife or a parent and a minor child and will not add significantly to the time that ‘the people involved spend together’. There cannot be said to be family life between the claimant and her adult children and grandchildren. In entry clearance cases there must be some compelling circumstances that would require entry clearance to be permitted under Article 8 of the ECHR on the basis of a private life between the claimant and her children and grandchildren in the United Kingdom. No compelling factors have been identified.

Notice of Decision

22. The decision of the First-tier Tribunal involved the making of a material error of law. I set aside that decision. The Entry Clearance Officer’s appeal is allowed. The decision of the Entry Clearance Officer stands.
23. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

Signed P M Ramshaw

Date 28 February 2016

Deputy Upper Tribunal Judge Ramshaw