Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/07083/2016

THE IMMIGRATION ACTS

Heard at HMCTS Employment Tribunals, Liverpool	**Determination Promulgated**
On 5 March 2018	**On 23 May 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE O'RYAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

GLADYS DUBE
(ANONYMITY ORDER NOT MADE

Respondent

Representation:

For the Appellant: Mr Bates, Senior Home Office Presenting Officer
For the Respondent: Ms Santamera, Counsel, instructed by RMB Solicitors

DECISION AND REASONS

1 This is an appeal brought by the Appellant Entry Clearance Officer against the decision of Judge of the First-tier Tribunal Shergill dated 29 June 2017, allowing the Applicant's appeal against the decision of the Appellant dated 23 February 2016 refusing the Applicant entry clearance

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to enter the UK. The Applicant is a national Zimbabwe, and had applied for entry clearance for a visit under paragraph 41 of the immigration rules. Her stated purpose for doing so was to come to the United Kingdom for the church wedding of her daughter, the Sponsor.

2 The Appellant refused entry clearance on the grounds that the Applicant had not shown that she had sufficient assets or ties to Zimbabwe, and it was not accepted that the Applicant intended to leave the United Kingdom after the visit.

3 The Applicant appealed to the First Tier Tribunal, and the Sponsor gave evidence before the Judge. The Judge allowed the appeal on human rights grounds, finding that the decision amounted to a disproportionate and therefore unlawful interference with the Applicant's rights under Article 8 ECHR.

4 The Appellant applied for permission to appeal to the Upper Tribunal on grounds, in summary, that family life under Article 8(1) had not been established as between the Applicant and the Sponsor. Reference was made to certain authorities, in particular Kugathas v SSHD [2003] EWCA Civ 31, referring to the necessity for the existence of more than the normal emotional ties between a parent and an adult child for family life to exist.

5 It was argued that those criteria were not met in the present case. The fact that the Sponsor had been prepared to have a registry office wedding in Zimbabwe in addition to her intended church wedding in the United Kingdom undermined the Judge's view that the proposed wedding in the United Kingdom was a once-in-a-lifetime event.

6 It was further argued that the Judge had erred in actually failing to make a finding as to whether there was family life between the Applicant and Sponsor. Further, the Judge had erred in failing to have regard to the case of Adjei (visit visas – Article 8) (Rev 1) [2015] UKUT 261 (IAC), para 13: "*A person who satisfies the Tribunal that he does meet the requirements of para 41 of HC 395 does not succeed on that account. He still has to demonstrate that refusal represents an unlawful infringement of rights protected by Article 8 of the ECHR.*"

7 Further, it was argued that the Judge's proportionality assessment was inadequate.

8 It is to be noted that within the grounds of appeal, the Appellant accepts at paras 8 and 10 that the Judge had found that the Applicant had met the requirements of paragraph 41 of the immigration rules.

9 Permission to appeal was granted by Judge of the First-tier Tribunal Scott Baker on 13 December 2017, on the basis that the grounds of appeal were arguable.

10 Before me, Mr Bates relied upon the grounds of appeal. He confirmed that the Appellant's position, as reflected in the grounds of appeal, was that the Judge had accepted that the requirements of the immigration rules were met. Indeed, I observe that the Judge considered in detail the Applicant's evidence, supported by the oral evidence of the Sponsor, that the Applicant had significant ties to Zimbabwe, paragraphs 26 to 32. There is no challenge to those findings.

11 Mr Bates repeated the submission that the Judge had erred in law in making no finding as to the existence of family life. In the alternative, to the extent that Judge did so find, Mr Bates argued that he was not entitled in law to do so, on the evidence before him. Mr Bates referred to the recent judgements in Entry Clearance Officer, Sierra Leone v Kopoi [2017] EWCA Civ 1511, and SSHD v Onuorah [2017] EWCA Civ 1757 as to the nature of ties which must exist to support a finding of family life.

12 In response, Ms Santamera defended the decision of the Judge. The Judge had made a positive finding that family life was engaged, at paragraphs 18 and 20 of the decision. Ms Santamera referred to the Judge's reference paragraph 22 to Abbasi and another (visits - bereavement - Article 8) [2015] UKUT 463 (IAC), in which the Tribunal had held that Article 8 could be engaged in unusual circumstances; in that case, it was held that the wish of adult grandchildren to enter the UK for a finite period for the purposes of mourning with family members the recent death of a close relative, and visiting the grave of the deceased was capable of constituting a disproportionate interference with the rights of those persons under Article 8 ECHR. By analogy, the Applicant argued that her Article 8 family life rights were engaged in order to visit her daughter in the United Kingdom for the specific purposes of attending the daughter's marriage. The Judge had clearly directed himself in law in relation to Adjei at paragraph 11.

Discussion

13 The Judge fully acknowledged that the issue in the appeal was whether the case involved human rights issues that were justiciable before the First-tier Tribunal [12]. It is also clear that the Judge was of the view that at least in the normal course of their lives, the Applicant and Sponsor did not have a family life together – see [14].

14 However, the Judge noted the particular purpose for which the application for entry clearance had been made; to visit her daughter at the time of her church wedding in the UK. The Judge held as follows regarding that purpose:

> '16 ... I am satisfied the purpose for which the visitor is proposed has a unique quality to it in terms of it being a once-in-a-lifetime

> event marking a key passage in the sponsor's life. It is axiomatic that it would also mark a key milestone in the appellant's life. ...
>
> 17 My assessment of all this evidence indicates that the particular event of the sponsor getting married is a key milestone event in her life and naturally she wants her parents to attend. I also accept that she wishes to get married in the United Kingdom which is where she has been living for the last 16 years; and were her friends and other family members are based.
>
> 18 I am satisfied in those circumstances for the purposes of this milestone event that there are more than the normal emotional ties that one would expect between parent and adult children. The enjoyment of the family life is not something in those circumstances that can be enjoyed long-distance for that particular milestone event or apart from each other.'

15 The Judge noted that a registry wedding had in fact already taken place in Zimbabwe, as entry clearance had been refused to the Applicant. However the Judge was of the view that the Sponsor's wish to marry in a church wedding in the United Kingdom was understandable [18].

16 The Judge concluded on this issue:

> "19 Having concluded that for the purposes of the wedding there is more than the normal emotional ties one would expect to see between adults, it has a quality which on the face of it is interfered with by the respondent's decision not to grant entry clearance; and as such can be considered by me.
>
> 20 I am satisfied that the interference is of sufficient gravity to engage article 8 because being a once-in-a-lifetime event, cannot be repeated. I am satisfied that in milestone event such as a wedding is a key aspect of the bonds and ties which holds families together across different religions and cultures around the world. Once the event has passed it cannot be repeated and the inability of key family members to partake in that has the potential to interfere with the exercise of family life rights in a sufficiently grave manner. That is despite the context in which mother and daughter have lived apart for the last 16 years. I draw support from this proposition of a unique facet of family life from Abbasi [2015] UKUT 00463 (see para 11). I am therefore satisfied that the first and second Razgar principle is met."

17 The crux of the Appellant entry clearance officer's case is that the Judge was simply not entitled to find that family life existed as between the Applicant and Sponsor.

18 I note that within the case of Kopoi, the Court of Appeal held at [20] that the evidence before the First tier and Upper Tribunal had been insufficient to establish that family life existed between that applicant and her cousin and cousin's family in the UK, observing that that applicant was not even a member of her sponsor's immediate family, did not have any element of dependency on the sponsor, nor was she the beneficiary of any established pattern of support by the sponsor or the sponsor's family members. The Court distinguished the circumstances of that applicant from the facts in the case of Boyle v UK (1994) 19 EHRR 179, where significantly stronger family life ties existed. I note that in the present case, the Applicant and Sponsor *are* immediate members to one another (mother and daughter) and there is prior pattern of visiting one another; see paras [6] and [14].

19 Further, in Onuorah, where an applicant for entry clearance sought to visit her brother settled in the UK, few details are given as to the extent of the ties between the applicant and the sponsor, but the Court made its decision on the apparent basis that the facts were similar to those in Kopoi, which the Court refered to as authority for the proposition that family life did not embrace a situation 'such as the present' (para [30]).

20 However, the proposed visits in Kopoi and Onuorah were for the desired purpose of maintaining family life, between persons who did not have the necessary elements of dependency to meet the Kugathas criteria.

21 However, Mr Bates has not succeeded in persuading me that the Judge's approach, to treat the particular purpose of the proposed visit, as being one which engaged family life as defined under Article 8(1) ECHR, disclosed an error of law. I believe it uncontroversial to suggest that a relationship between a parent and their adult child might over time, and due to changes of circumstances, move in and out of the boundaries of family life as defined by Article 8 ECHR. They may move nearer to, or further away from one another; they may become more, or less dependent on one another, depending on their respective circumstances, including their health and their care needs, such that there may be periods where they have more than the normal emotional ties to one another than would be expected between parent and adult child, and at other times, not. The boundaries of family life between adults, as recognised in Kugathas, are not permanently fixed one way or another.

22 I do not find any error in in Judge finding on the one hand, at [14-15] that in general, the Applicant and Sponsor would not have the required dependency on one another such that they may be deemed to have a family life with one another, but finding, on the other hand, that for the purposes of the 'milestone event' of the Sponsor marrying in church in the UK, there *were* more than the normal emotional ties that one would expect between a parent and adult children [18-20].

23 In Abbasi, a panel chaired by the former President, the Tribunal held that the refusal of a visa to foreign nationals seeking to enter the United Kingdom for a finite period for the purpose of mourning with family members the recent death of a close relative and visiting the grave of the deceased is capable of constituting a disproportionate interference with the rights of the persons concerned under Article 8 ECHR (see headnote). Further, having referred at [3]-[9] to a series of authorities from the European Court of Human Rights, which McCloskey J considered illustrated that matters relating to death, burial and mourning had been held to fall within the ambit of Article 8, the Tribunal held at [11]:

> "As the decided cases of the ECtHR make clear, the FtT's decision that the Appellants' appeals did not fall within the ambit of Article 8 ECHR is unsustainable. The Judge's error was driven by an impermissibly narrow approach to the scope of Article 8 protection and a concentration on the Appellants' family life in Pakistan, to the exclusion of both their family ties in the United Kingdom and the central purpose of their proposed visit. The essence of the error was a failure to recognise that the particular aspect of private and family life invoked by the Appellants was capable of being encompassed by Article 8 ECHR. The protection, or benefit, which they were asserting had the potential of being protected by Article 8 ECHR."

24 That decision was considered by the Court of Appeal in Onuorah. Singh LJ held:

> "44. As Mr Biggs points out, the Upper Tribunal (Immigration and Asylum Chamber) considered and applied the decision in Sabanchiyeva in Abbasi v Entry Clearance Officer of Karachi [2015] UKUT 463 (IAC): see para. [9] (McCloskey J, the then President of that Chamber). As McCloskey J pointed out in para. [9], the European Court of Human Rights in Sabanchiyeva found that there had been a violation of Article 8 "without making any distinction between the private life and family life dimensions." That is indeed a feature of some of the case law to which this Court has been referred.
>
> 45. No doubt there are some cases in which it is immaterial precisely which of those two concepts is invoked, because it is clear that there has been an interference with at least one of the rights set out in Article 8(1). However, in my view, in the present context it is important to be clear about which gateway into Article 8 a person is able to go through before one reaches later questions such as whether there has been an interference with that right by a public authority or a lack of respect pursuant to a positive obligation which can sometimes be imposed on the state in order to give effect to the rights in Article 8.

> 46. Mr Biggs also relies on the decision of the UT in Abbasi itself in support of his submission in the present case. I note that the decision of this Court in Kugathas was not referred to in that case. In my view, this is unsurprising, since the factual matrix of the case was very different from the present one. It concerned "matters relating to death, burial, mourning and associated rites": see para. [6] of the judgment. It is for this reason that the UT referred, at para. [7], to the decision of the European Court of Human Rights in Sargsyan v Azerbaijan (2011) ECHR 2337. That is a decision to which I will return under the rubric of the right to respect for private life. Although I have no reason to doubt the correctness of the decision of the UT in Abbasi on its facts, I consider that it has no bearing on the present context, which is governed by the principle in Kugathas."

25 Gloster LJ and Sales LJ, agreeing with Singh LJ, specifically stated that they preferred to reserve their opinion as to the correctness or otherwise of the decision of the UT in Abbasi. (paras [63]-[64].

26 There being no error in McCloskey J's decision in Abbasi, therefore, in its own context, could it be used as authority to support the Judge's conclusion in the present case?

27 I find that it can. In Kopoi and Onuorah, there was no purpose for the proposed visits by the Applicants with the 'unique quality' present in the instant appeal; that being for the Applicant to attend the 'key milestone' event in the Applicant's and Sponsor's life which the Sponsor's intended church wedding in the UK represented. The Appellant's argument that the purpose was not as unique as the Judge suggested, because a registry office wedding had already taken place in Zimbabwe, does not disclose any error of approach by the Judge in my view, and represents a mere disagreement with the Judge's finding as to the significance of the proposed visits; it was an understandable, and reasonable desire shared by the Applicant and Sponsor that the Applicant attend the church wedding in the UK, where all the Sponsor's other family and friends resided. The desire to marry in church, in a religious ceremony, may often have greater importance to the parties to a marriage, and to family members, than a civil marriage alone.

28 I find that there was no error of law in the Judge's finding that the Article 8 family life of the Applicant and Sponsor was engaged in the appeal.

29 The suggestion that there was no actual finding that Article 8(1) was engaged is not made out; it is clear from the first two lines of paragraphs [18] and [19] respectively that he did so find.

30 Further, where the Appellant accepts within the grounds of appeal, and in the oral submission of Mr Bates, that the Judge held that the

requirements of the immigration rules were satisfied (and there being no challenge before this Tribunal that such a finding was not open to the Judge), I find that there is no merit in the Appellant's remaining challenge that the proportionally balancing exercise was inadequate. Adequate reasons were given at [35]-[40] for that conclusion. Further, where the rules are met, it is difficult to see what public interest considerations there would be in continuing to refuse the Applicant admission to the UK for the stated purpose of a visit. Mr Bates does not argue, for example, that the Applicant has 'acted in a way that undermines the system of immigration control' (a relevant consideration identified in Mostafa (Article 8 in entry clearance) [2015] UKUT 112 (IAC) .

31 I find no material error of law in the decision.

32 I have noted that the findings of fact made by the Judge in this appeal were that the rules were satisfied. The Appellant Entry Clearance Officer accepts that, and has not quibbled with it. The suggestion in Adjei at [11] that the findings made by the Judge in that case were to be given little weight by any ECO was an observation made on the particular facts of that case; where the applicant's grounds of appeal to the First tier Tribunal did not allege that the rules were met, and there was no Presenting Officer appearing for the ECO at the First tier; the Judge's findings of fact had been made on the case of one party only, the ECO having had no notice of the challenge being pursued. Insofar as the headnote in Adjei appears to suggest that any and all findings made by a Judge as to the positive satisfaction of para 41 of the rules will carry little weight, this fails to accurately reflect the decision of the Upper Tribunal actually given within the body of the decision at [10] -[11]. The Court of Appeal has observed that a headnote may not always accurately reflect the reasoning actually contained within the body of the decision; PO (Nigeria) v Secretary of State for the Home Department [2011] EWCA Civ 132 paras [37] and [56].

33 I see no reason why the Judge's findings that the Applicant met the requirements of the immigration rules, unchallenged in these proceedings, ought not be accepted by the Entry Clearance Officer considering this decision.

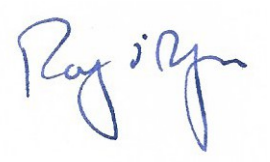
Decision

34 The making of the decision did not involved the making or an error of law.

35 I do not set aside the Judge's decision.

36 The Appellant Entry Clearance Officer's appeal is dismissed.

Signed: Date:
21.5.18



Deputy Upper Tribunal Judge O’Ryan