Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: VA/18672/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 30 October 2014	**On 3 November 2014**

Before

Deputy Upper Tribunal Judge Pickup

Between

Secretary of State for the Home Department
[No anonymity direction made]

Appellant

and

Gladys Tapona

Claimant

Representation:

For the claimant: The sponsor Mrs Olivia N Ndoro (unrepresented)
For the respondent: Mr S Whitwell, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The claimant, Gladys Tapona, date of birth 23.11.46, is a citizen of Zimbabwe.

2. This is the appeal of the Secretary of State against the determination of First-tier Tribunal Judge Sangha promulgated on 13.8.14, allowing, on human rights grounds, the claimant's appeal against the decision of the respondent, dated 2.10.13, to refuse her application made on 26.9.13 for entry clearance as a visitor, pursuant to paragraph 41 of the Immigration Rules. The Judge heard the appeal on 18.6.14.

3. First-tier Tribunal Judge Hodgkinson granted permission to appeal on 23.9.14.

4. Thus the matter came before me on 30.10.14 as an appeal in the Upper Tribunal.

Error of Law

5. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Sangha should be set aside.

6. In granting permission to appeal, Judge Hodgkinson noted that the First-tier Tribunal Judge "appears to have concluded within his determination that the appellant satisfies the requirements of the relevant Immigration Rule, but does not explicitly say so, and has only allowed the appeal on Article 8 grounds outside the Rules." Judge Hodgkinson does not appear to have appreciated, though Judge Sangha did, that the claimant had only a limited right of appeal under section 84(1)(c) of the 2002 Act. There was no right of appeal on immigration grounds. That is why Judge Sangha went on to consider article 8 outside the Immigration Rules.

7. At the outset of the hearing and after hearing submissions on the point I granted leave to Mr Whitwell to amend his grounds to include procedural error of law.

8. I am satisfied that there was a procedural error in this appeal which alone is sufficient to require the determination to be set aside. The appeal was listed as a floating case at Birmingham on 18.6.14. Towards the end of the hearing day, this appeal had not been reached and Judge Sangha made the decision to adjourn the hearing to be relisted. The Presenting Officer returned to her office and noted the file to say that she was notified at 15:55 that the appeal had been adjourned without hearing. However, the sponsor pleaded that she was awaiting hospital treatment and that it would be difficult for her to come back on another date. Judge Sangha then heard the appeal and took evidence from the sponsor, but did so in the absence of a Home Office Presenting Officer. There was thus no opportunity for the Secretary of State to challenge the evidence or address the Tribunal.

9. Further, it appears from §5 of the determination that whilst the judge noted that as an out of country appeal, the evidence that could be considered was limited to the circumstances appertaining to the date of decision, 2.10.13, the judge proceeded at §13 and elsewhere in the determination to take into account evidence of the sponsor's circumstances up to the date of the hearing, as well as recent documentation and other evidence relating to the appellant's financial circumstances, and the sponsor's ability to maintain and accommodate the appellant as at the date of the appeal hearing. In doing so, I find that Judge Sangha took into account inadmissible evidence and thus the findings both in relation to accommodation, maintenance and proportionality under article 8 are flawed and cannot stand and must be set aside.

10. The remaining argument in the grounds of appeal is that the judge should not have gone on to consider article 8 outside the Immigration Rules without consideration of the Rules in relation to family and private life and without applying Gulshan [2013] UKUT 00640 (IAC) to the effect that the consideration outside the Rules should only be done if the judge has identified compelling circumstances insufficiently recognised in the Rules such that the decision is unjustifiably harsh.

11. There is little merit in this ground. It is arguable that in considering the human rights claim, the judge should perhaps have first considered Appendix FM in relation to family life, but pursuant to section 86 of the 2002 Act, the Tribunal was obliged in any event to consider the human rights claim raised in the grounds of appeal and to refuse to do so would have been a breach of article 6 ECHR. Inevitably, the judge was required to proceed to an article 8 assessment, whether or not there were compelling or exceptional circumstances.

12. However, I find that the article 8 assessment of the First-tier Tribunal was flawed in a number of respects, quite apart from the admission of inadmissible evidence and a failure to focus on the circumstances prevailing at the date of decision.

13. I heard evidence from the sponsor, only some of which is relevant to the circumstances prevailing at the date of decision. As no doubt did Judge Sangha, I found the sponsor, a credible and compelling witness. She was visibly distressed during her evidence and no one listening to her could have anything but the greatest empathy for her and in particular her desire to have her mother come and visit her at this difficult and precarious stage of her life.

14. I understand that the appellant has made two previous family visits to the UK, in 2004 and 2006/07, returing to Zimbabwe. I accept that the sponsor has property there and that she has and continues to provide financial support to her mother. She last visited her mother in 2011 and before that visited in 2009 and returned with her mother in 2007. The appellant's only other daughter passed away in 2004.

15. Summarising the rest of the evidence, the sponsor first began to experience serious health issues in February 2013, when she suffered a pulmonary embolism. Whilst undergoing treatment and investigation into that matter she suffered a second embolism and further investigation revealed a large fibroid mass in her abdomen. She began treatment to shrink the mass, but it has not worked and she now faces surgery for removal. I find that at the date of application, 26.9.13, the sponsor was in a serious condition and she was fearful that she would not survive. Nothing had changed by the date of decision, 2.10.13. There was no documentary evidence in support, but I fully accept that the sponsor was advised that given the two previous embolisms it would be a serious risk to fly to Zimbabwe, requiring being seated for 10 hours. It does not take expert evidence for me to accept that it is common knowledge that flying does create a risk of an embolism. I thus find that at the date of decision there was no likelihood of the sponsor being able to visit her mother in Zimbabwe, both because of the risks associated to her condition and because she was in the course of treatment for serious illness.

16. There is no doubt a strong bond between the appellant and her only surviving daughter in the UK, the sponsor. Undoubtedly, given the very serious medical health issues experienced the appellant wished to visit her daughter for moral and emotional support. I accept the sponsor's evidence when she poignantly said that she just wanted to be able to hold her mother's hand. Her evidence was very moving.

17. However, it is clear that the appellant does not meet any of the Immigration Rules relating to family life within Appendix FM. The sponsor accepts this. One might well consider that the sponsor's circumstances are sufficiently compelling to consider whether the appeal can be allowed outside the Immigration Rules under family life pursuant to article 8 ECHR.

18. Whilst in the abstract I accept that it is possible to have family life between a mother and daughter settled in different countries and thus apart over many years, in order to demonstrate that such family life as may exist between them as at 2.10.13 is sufficient to engage article 8 they would have to demonstrate something more than the normal emotional ties to be expected between an adult child and a surviving parent, following Kugathas v SSHD [2003] EWCA Civ 31. In that case the Court of Appeal said that such ties might exist if the appellant were dependent on the family member or vice versa. However, neither blood ties nor the concern and affection that ordinarily go with them are enough to constitute family life. "Most of us have close relations of whom we are extremely fond and whom we visit… from time to time; but none of us would say on those grounds that we share a family tie with them in any sense capable of coming within the meaning and purpose of article 8."

19. In essence, Kugathas confined article 8 family life to situations where a genuine situation of mutual dependency exists, otherwise the mere arrival of the appellant in the UK could be exploited to create a right to family life preventing removal. Such dependency is much more than the financial support which I accept the sponsor provides to the appellant. In this case the appellant and the sponsor have lived apart and engaged in separate lives for many years. Neither can it be said, despite the serious medical concerns that the appellant's presence is necessary for the benefit of the sponsor's health. It is open to the appellant to continue to provide the sort of support I heard about from the sponsor, including regular telephone calls and messages to check how the sponsor is.

20. In assessing whether there is family life sufficient to engage article 8, I have to separate out the current situation of the sponsor's ill health, including as at the date of decision. The fact of her ill-health, whilst engendering the greatest empathy for her situation, does not alter the nature and degree of the family ties between the appellant and the sponsor. In the circumstances, no matter how much I may be moved by what I accept are compassionate circumstances, I cannot find that there is such family life between the appellant and the sponsor as to engage article 8. I do not have a residual discretion to allow the appeal on compassionate grounds; that is a matter for the Secretary of State to consider.

21. In the circumstances, I find and Judge Sangha should have found that there was insufficient to demonstrate that article 8 is engaged on the facts of this case and thus the article 8 assessment proceeds no further.

22. Perhaps had the sponsor provided more and clearer evidence of her situation, including the restriction on flying, the decision of the Secretary of State may have been more favourable. However, that does not change my duty to determine the matter by applying the law to the facts of the case. I can only suggest that it remains open to the appellant to make a fresh application in which she can marshal all the current evidence. It does seem to me that the circumstances here are very compelling and call for consideration of an exercise of discretion outside the Rules. However, that is a matter entirely for the Secretary of State and this Tribunal has no power to intervene on the appellant's behalf. I can do no more than point out my findings as to the sponsor's circumstances.

Conclusion & Decision

23. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I re-make the decision in the appeal by dismissing it.

Signed: Date: 30 October 2014

Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The appeal has been dismissed and thus there can be no award.

Signed:  Date: 30 October 2014

Deputy Upper Tribunal Judge Pickup