Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: VA/02204/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 30th March 2015	**On 10th April 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MS SYLVIA DACRES
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER – KINGSTON

Respondent

Representation:

For the Appellant: Mr M Muirhead (LR)
For the Respondent: Ms L Kenny (HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Widdup, promulgated on 14th November 2014, following a hearing at Hatton Cross on 3rd November 2014. In the determination, the judge allowed the appeal of Sylvia

Dacres. The Respondent Entry Clearance Officer, subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a female citizen of Jamaica who was born on 4th July 1942. She appeals against the decision of the Respondent Entry Clearance Officer dated 26th March 2014, refusing her application for an entry clearance to visit her sponsoring daughter and her husband, both of whom are present and settled in the UK.

The Judge's Findings

3. The judge heard evidence from the sponsoring daughter, Mrs Dixon Wynter, that the Appellant was her mother. The Appellant, when she was a child, lost her speech, but this aside, she has no other health problems. She took work as a domestic worker in Jamaica. She married. She then separated from her husband, Mrs Dixon Wynter sends money to Jamaica. However, the Appellant also has five other children in Jamaica "who all help her and seventeen grandchildren two of whom live in the UK. They are 21 and 7 years old". (Paragraph 10).

4. It is a feature of this appeal that, "the Appellant has been to the UK twice, in 2004 for a wedding and in 2007 for a funeral" and always she has returned back to Jamaica (paragraph 11).

5. The judge at the outset made it clear that, in circumstances where the Appellant was unrepresented by a legal representative, that, "although there is no express reference to Article 8, I find that the appeal does give rise to Article 8 issues" (paragraph 7). But the judge also added that, "I will also consider whether, notwithstanding the concerns of the Entry Clearance Officer, the Appellant met the requirements of paragraph 41 of the Immigration Rules," because "the burden of proof is on the Appellant to show that she met the requirements of the Rules at the date of the decision and that her appeal should succeed on human rights grounds" (paragraph 8).

6. The judge then observed that the Entry Clearance Officer had expressed concerns with respect to the Appellant's financial circumstances. She held that this omission "was addressed and the appeal bundle contains" an account (paragraph 15). The judge also observed that, as far as the Appellant was concerned, "she has the good fortune to have a large and supportive family in Jamaica and is also in receipt of payments made by her daughter in the UK" although her financial circumstances in Jamaica "are not good and she is dependent on her family" (paragraph 16).

7. It was in these circumstances that the judge went on to then make specific findings in relation to the application for a visit visa itself. The judge observed that consideration had to be given to whether the Appellant intends to settle unlawfully in this country, whether she has a good immigration history, whether she has

substantial ties to Jamaica, and whether the credibility of the Sponsor is in her favour (paragraph 18). Against this background, the judge held that, "the Appellant has visited the UK before without difficulty and would, ... , have been looking forward to this visit". He observed that the chances of her seeing her relatives in the UK could only be exercised "infrequently" given the nature of the position that the Appellant was in. (Paragraph 22). Therefore, the judge concluded that, "I find that Article 8 can be engaged when a family visit is refused and I find it is engaged in this case in which the Appellant's family would appear to be of great importance to her". Given these findings, the judge then turned to the burden of proof and observed that, "it is for the Respondent to show that the decision is proportionate, in other words that it is an appropriate response to the concerns identified by her" (paragraph 24). Regard was given by the judge to the fact that he was "considering whether a genuine, short ..... family visit to a daughter who is working and who can accommodate the Appellant has any adverse impact on the public interest" (paragraph 24), and especially when the requirements of paragraph 41 "are met and in particular that the Appellant intends returning to Jamaica" (paragraph 24). The judge held that the decision by the Respondent Entry Clearance Officer, in circumstances where Article 8 was engaged, was not a proportionate one. The appeal was allowed.

Grounds of Application

8. The grounds of application state that the judge erred by not assessing whether Article 8 was engaged through any form of dependency and the proportionality exercise was inadequate. On 7th January 2015, permission to appeal was granted.

Submissions

9. At the hearing before me on 30th March 2015, Ms Kenny, appearing on behalf of the Respondent Entry Clearance Officer, placed reliance upon the case of **MS (Article 8 – Family Life – Dependency – Proportionality) Uganda [2004] UKIAT 00064**, and emphasised the requirement for "dependency". In that case the Tribunal made it clear that, "it is accepted law that in circumstances where family life is put forward as existing between an adult child and his parents … there need to be further elements of dependence involving more than emotional family ties …". The judge in this case had not been able to show what the extra element of dependency was over and above emotional family ties. Therefore, he had erred in law.

10. For his part, Mr Muirhead submitted that the Appellant had lost the power of speech when she was a child and this was noted by the judge at paragraph 16 of the determination. He drew my attention to his skeleton argument. He submitted that the case of **MS (Uganda)**, as relied upon by the Respondent, was disingenuous. These cases all deal with applicants who do not meet the Immigration Rules, who are overstayers who have breached the Immigration Rules, and were then seeking leave to remain in the UK beyond that which is allowed by the Rules.

11. The right approach, submitted Mr Muirhead, was that set down by the House of Lords as long ago as the case of **Beoku-Betts [2008] UKHL 39**, which makes it clear

that the family life has to be of the entire family as taken as a social unit, and not simply the family life of the single individual who is applying to remain in the UK. This is also how the case of **Huang [2007] UKHL 11** approached the matter at paragraph 18 of the determination when the point was made that, "human beings are social animals. They depend on others. Their family, or extended family, is the group on which many people must heavily depend, socially, emotionally and often financially …".

12. In reply, Ms Kenny submitted that it was not proper to refer to the Immigration Rules because this was an Article 8 appeal and therefore the position in Article 8 jurisprudence alone must be considered.

No Error of Law

13. I am satisfied that the making of the decision by the judge did not involve the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision. My reasons are as follows.

14. Insofar as any suggestion of an "element of dependency" is good, as submitted by Ms Kenny, it is clear that the judge did have evidence before him, which she accepted, of the Appellant being in a position where "her financial circumstances in Jamaica are not good and she is dependent on her family" . The judge also observed that the Appellant "is also in receipt of payments made by her daughter in the UK" (paragraph 16). This plainly demonstrates a dependency that goes beyond mere emotional ties. Furthermore, the judge recognised that there was a "close relationship with her daughter in Jamaica" between the Sponsor and the Appellant, and in the light of the birth of the 7 year daughter to the Appellant, these ties needed to be maintained (paragraph 20).

15. However, the matter does not rest with the requirement, if this indeed be a requirement, of "further elements of dependency". The case of **MS (Uganda)** is indeed, as Mr Muirhead makes clear, a case arising from a situation where the Rules have not been met, where a person has remained outside the Rules, where there is a degree of unlawful stay, and where there is an attempt to seek to remain in this country through other means. The position with respect to visit appeals is quite the opposite.

16. This is clear from the fact that, not only do the cases of **Beoku-Betts** and **Huang** address the situation differently, but that the recent case of **Mostafa (Article 8 in entry clearance) [2015] UKUT 00112**, now makes it clear that, rather than an "element of dependency" what is necessary to show is whether a visitor applicant can meet the standard requirements of the Immigration Rules, because although this is not the question to be determined by the Tribunal, it is "capable of being a weighty thou not determinative factor when deciding whether such refusal is proportionate".

17. In this case, this is precisely the situation that the judge finds the Appellant in. The Appellant has visited before. She came in 2004 for a wedding and she came in 2007 for a funeral and she always returned (paragraph 11). There are strong ties in her

family which is commendable for its love and affection for each other and for the support that they give each other, and the judge is absolutely clear in concluding that the existence of the Appellant's ties in Jamaica are such, that she will return back to the country, as she has always done in the past, after making a short visit to see her family "whom she will only see infrequently". It was for the Respondent Entry Clearance Officer to show that the decision was proportionate (see paragraphs 23 and 24) and this the Respondent failed to do. There is no basis for this Tribunal interfering in this determination.

Notice of Decision

18. There is no material error of law in the original judge's decision. The determination shall stand.

19. No anonymity order is made.

Signed Dated

Deputy Upper Tribunal Judge Juss 4th April 2015