Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/01920/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 15 August and 28 September 2018	**On 17 October 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

ENTRY CLEARANCE OFFICER

Appellant

and

TAFADZWA [C]
(ANONYMITY DIRECTION NOT MADE)

Respondent/Claimant

Representation:
For the Appellant: Mr D Clarke (15.08.18) and Mr S.Walker (28.09.18), Senior Home Office Presenting Officers
For the Respondent: [H.C.], Co-sponsor

DECISION AND REASONS

1. The Specialist Appeals Team appeals on behalf of an Entry Clearance Officer from the decision of the First-tier Tribunal (Judge Mailer sitting at Hatton Cross on 19 January 2018) allowing on human rights grounds the claimant's appeal against the refusal of entry clearance as a family visitor. The First-tier Tribunal did not make an

anonymity direction, and I do not consider that anonymity is required for these proceedings in the Upper Tribunal.

The Reasons for the Grant of Permission to Appeal

2. On 21 May 2018, First-tier Tribunal Judge Kelly granted permission to appeal for the following reasons: "*For the reasons stated in the grounds, it was arguably perverse for the Tribunal to hold that refusal of the adult appellant's application for entry clearance for the purpose of making a short visit to her father in the United Kingdom engaged the potential operation of Article 8 of the 1950 European Convention on Human Rights and Fundamental Freedoms, or that it was disproportionate to the legitimate aim of maintaining the economic wellbeing of the country through the consistent application of immigration controls.*"

Relevant Background

3. The claimant is a national of Zimbabwe, whose date of birth is [b] 1993. Her father, [F.C.], was born in Zimbabwe on [~] 1971. He entered the UK on 24 March 2012 in order to claim asylum, as was accepted by the Presenting Officer at the outset of the hearing in the First-tier Tribunal. He was granted asylum as a political refugee on 12 December 2012.

4. On 19 December 2016 the Entry Clearance Officer gave his reasons for refusing the claimant's application to visit her father, who was suffering from a severe mental illness. He was not satisfied that she was genuinely seeking entry clearance for the purpose claimed and for the period stated by her. With regard to her Article 8 claim, he stated that there was nothing to prevent her father from meeting her in a third country.

5. Although the claimant did not have formal legal representation, her grounds of appeal to the First-tier Tribunal evinced considerable legal knowledge, including familiarity with many of the relevant decisions in this field of the Law, including **Singh [2015] EWCA Civ 630** and **Kaur (Visit visas: Article 8) [2015] UKUT 00487**. She pleaded that the decision interfered disproportionately with her family and private life, as well as the private and family lives of her Uncle Hansen and her father. Her relationships with her father and uncle were "*more than emotional ties*" considering that her uncle was her father's Carer, and her father loved her passionately, as described in **Kugathas**. She had submitted abundant evidence to show that she depended financially on her father and uncle. Her visit was going to help her uncle, who was over-stretched, tired and always busy from working full-time and also caring for her father. Her visit was going to give her uncle a break. Her father felt lonely and isolated in the UK, and so her visit was also going to provide relief and therapy for him. Her father's mental illness made her case exceptional.

The Hearing Before, and the Decision of, the First-tier Tribunal

6. At the hearing before Judge Mailer, the Entry Clearance Officer was represented by a Home Office Presenting Officer. The Judge received oral evidence from the

claimant's father and uncle, and he also considered a large volume of documentary evidence, much of it directed to establishing the nature, extent and severity of the father's ill health.

7. In his subsequent decision, the Judge set out the claimant's case, including a summary of the evidence given by the father and uncle, in paragraphs [8]-[45]. At paragraphs [49]-[65], the Judge gave his reasons for finding that questions 1 and 2 of the **Razgar** test should be answered in favour of the claimant. He found the evidence of the father and uncle to be credible. He found that the father was substantially disabled and was in receipt of disability allowances. He was in regular and constant communication with the claimant, his only daughter, and she also regularly spoke to him. The claimant had a strong connection with her father, and her visit to the UK was in order to strengthen his mental well-being: he could see her face-to-face and tell her stories that happened around the place he lived. He felt lonely, and her short visit would boost his morale. She had a strong bond with both her father and her uncle. Her father was unable to visit her, owing to the medication that he took.

8. At paragraph [54], the Judge posed the question as to whether there was family life for the purposes of the appeal. After referring to number of authorities, the Judge held, at paragraph [61], that there must be more than the normal emotional ties between adult relatives for family life to exist for the purposes of Article 8. The Judge continued:

> 62. I am satisfied that the evidence produced of the relationship between the appellant and father is one between adult relatives which does disclose a substantial component of dependency. The appellant's father was strongly emotionally dependent on his daughter whilst in an institution in Zimbabwe. He subsequently left Zimbabwe and obtained refugee status in the UK. He has substantial mental health problems, for which he receives treatment. This makes it very difficult, if not impossible for him to travel as the medication he takes causes him to be dizzy and unwell.
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> 63. I am also satisfied that there has been consistent and substantial communication between the appellant and her father since he left, and this continues to this day. She has been supported by him financially in Zimbabwe. He has paid for her accountancy tuition fees as well as supporting her in her day-to-day living costs.
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> 64. I find that there is mutual dependency and support that has existed and will continue to exist between them.
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> 65. I accordingly find that Article 8 is engaged on the basis of family life in this case.

9. The Judge then went on to consider the other **Razgar** questions, and he found that the requirements of the relevant Immigration Rules were met. He was satisfied that she intended to visit her father only for a short period, and that if the claimant was in the unlikely event to refuse to return to Zimbabwe, her uncle would undertake measures to ensure that she complied with the conditions of her stay in the UK. He was also satisfied, from the evidence produced, that the claimant had the means to pay for her return air fare. Although it was suggested that she could meet her father

outside the UK, he found that his current condition, exacerbated by his medication, prevented that. He became dizzy when travelling. "*Further, it is important for the appellant to observe for herself the way that her father lives on a day-to-day basis in the UK, including his treatment.*"

The Error of Law Hearing in the Upper Tribunal

10. At the hearing before me to determine whether an error law was made out, Mr Clarke developed Ground 1 of the appeal, but abandoned Ground 2.

11. Ground 1 was that the Judge had erred in finding family life in the light of the case law - in particular **Kugathas -v- SSHD [2003] EWCA Civ 31** and **ECO (Sierra Leone) -v- Kopoi [2017] EWCA Civ 1511**, which the Judge had cited at paragraph [56] of his decision. In particular, reliance was placed on the following passage in **Kugathas** at paragraph [20]: "*… Neither blood ties nor the concern and affection that ordinarily go with them, are, by themselves put together in my judgment, enough to constitute family life. Most of us have close relations of whom we are extremely fond and whom we visit, or who visit us from time to time; but none of us would say on those grounds alone that we share a family life with them in any sense capable of coming within the meaning and purpose of Article 8.*"

12. As the claimant had not seen her father since 2011, the Judge erred in finding that there was a substantial component of dependency. On the contrary, there was no family life for the purposes of Article 8 between the claimant and her father.

13. Mr Clarke developed Ground 1 by reference to **PT (Sri Lanka) -v- Entry Clearance Officer, Chennai [2016] EWCA Civ 612** and **Rai -v- Entry Clearance Officer, New Delhi [2017] EWCA Civ 320**.

14. The facts of Rai were that the appellant was born in Nepal on 1 January 1986, and his father entered the UK with ILR on 26 June 2010. His mother followed his father to the UK with ILR on 17 February 2012. On 2 October 2012 the appellant, then 26 years old, applied for entry clearance to settle in the UK as his father's dependant.

15. Giving the leading judgment of the Court, Lindblom LJ held at [39] that the real issue under Article 8(1) was, "*whether, as a matter of fact, the appellant had demonstrated that he had a family life with his parents, which had existed at the time of their departure to settle in the UK and had endured beyond it, notwithstanding their having left Nepal when they did.*" At paragraph [42], Lindblom LJ reiterated that the critical question was whether family life between the appellant and his parents had subsisted at the time when they left Nepal to settle in the UK, "*and was still subsisting at the time of the Upper Tribunal's decision.*"

16. Mr Clarke submitted that, by parity of reasoning, the critical question here was whether the family life which had undoubtedly subsisted between the claimant and her father prior to his departure to the UK was still subsisting at the time of the First-tier Tribunal's decision.

17. He submitted that the Judge had not engaged with the fact that there was an obvious gap in the evidence of dependency for the period between 2012 and 2014/2015. The father's evidence was that he had been supporting his daughter for the past three years: see paragraph [23] of the decision. So, on the face of it, there was no financial dependency between 2012 and 2014/15.

18. On the issue of emotional dependency, he submitted that the postcards from 2016, and the three pages of emails (which were undated and which featured routine exchanges) did not support the proposition that at the relevant time there were more than normal emotional ties between the claimant and her father. There was thus a paucity of evidence of ongoing dependency.

19. In response, the claimant's uncle elaborated on his brother's history by way of an explanation for the apparent gap in the evidence of continuous financial dependency. His brother had entered the UK on a visit visa which he had sponsored. His brother had obtained entry clearance as a family visitor after a successful appeal to the First-tier Tribunal which he had supported. His brother had claimed asylum on arrival as a result of the persecution he had received as a teacher in the run up to an election. He had had been detained under the Mental Health Act four times since arriving here in 2012, and he had been in hospital for "*most of the time*." As a result, he, and not his brother, had mainly been supporting the claimant financially – as his brother could not make remittances from hospital. His brother was currently detained under the Mental Health Act, and he was attending the hearing today with a Carer assigned by the hospital.

20. Mr Chikowere produced a schedule issue to him by Western Union, setting out their record of the remittances which he had personally made to the claimant. He acknowledged that there was a two year gap between a single payment made by him to her in 2012 and the next payment made by him to her in 2014. However, he had also sent money through people who were travelling to Zimbabwe. Also, he had sent money to their sister, Margaret, with whom the claimant was living in the family home in Zimbabwe until April 2014, when Margaret died.

21. After hearing from Mr Clarke and the claimant's uncle, I ruled that an error of law was made out under Ground 1, as developed by Mr Clarke in oral argument. I gave my reasons for so finding in short form, and my extended reasons are set out below.

22. Mr Clarke invited me to proceed to re-make the decision on the evidence that was before the First-tier Tribunal. However, he subsequently agreed that this was an appropriate case for the remaking to be adjourned so as to enable the claimant's uncle to present more comprehensive evidence of the remittances which he said that he and his brother had made to the claimant and/or their sister Margaret from 2012 onwards.

The Reasons for Finding an Error of Law

23. The significance, for present purposes, of the cluster of Court of Appeal decisions in 2017 on visit visa cases is that the requirement for the **Kugathas** dependency criteria to be met is no less rigorous in a visit visa appeal than it is in an appeal against the refusal of entry clearance for the purposes of settlement. I refer to the decisions of the Court of Appeal in **Kopoi [2017] EWCA Civ 1511**, **Abis [2017] EWCA Civ 1393** and **Onuorah [2017] EWCA Civ 1757**.

24. In **Onuorah**, the Court of Appeal held that **Kugathas** remains good law, and that it applies to visit visa cases just as much as it applies in settlement cases. Giving the leading judgment of the Court, Singh LJ at paragraph [35] said that there were two reasons for not distinguishing the guidance given by the Court of Appeal in **Kugathas** in a visit visa case:

> First, as a matter of principle, the question whether there is "family life" for the purpose of Article 8 is a logically prior question and cannot depend on the purpose for which an application for entry clearance is made. Secondly, the shortness of the proposed visit is, if anything, an indication that a refusal of leave to enter did not involve any want of respect for the Respondent's family life for the purpose of Article 8: see *Kopoi* at para. 30 (Sales LJ) which I have quoted above.

25. In **Kopoi**, Sales LJ said at paragraph [30] as follows:

> A three week visit would not involve a significant contribution to family life in the sense in which that term is used in Article 8. Of course, it would often be nice for family members to meet up and visit in this way. But a short visit of this kind would not establish a relationship between any of the individuals concerned of support going beyond normal emotional ties, even if there were a positive obligation under Article 8 (which there is not) to allow a person to enter the UK to try to develop a "family life" which does not currently exist.

26. The corollary of this is that what might be termed 'the Rai question' is just as pertinent in a visit visa appeal as it is in an appeal against the refusal of entry clearance for the purposes of settlement.

27. The Judge did not give adequate reasons, having regard to the Rai question, for finding in paragraph [64] that there was mutual dependency and support that had existed and which continued to exist between parent and daughter.

28. He gave adequate reasons for finding that there was mutual dependency and support when they were living together under the same roof in Zimbabwe, and also when the father was admitted to a psychiatric hospital in Harare in 2011. However, he did not engage with the potential ramifications of the father becoming a dependant of his brother in the UK, while the claimant remained in the family home in Zimbabwe; or with the paucity of evidence relating to the status of the relationship between father and daughter from the time of his departure to the UK in March 2012 and the point at which he said he had started to support her financially, which was for the last three years prior to the date of the hearing.

29. The upshot is that the Judge did not give adequate reasons for finding that the family life which parent and daughter shared in Zimbabwe had been continuously subsisting since March 2012 - through a continuation of a relationship of mutual dependency and support - in circumstances where they had been living separate lives in different countries, and they had not seen each other.

The Hearing to Remake the Decision

30. For the purposes of the remaking of the decision, the claimant's uncle filed a large number of exhibits, which were in part directed at the gap in the evidence of financial dependency for the period between 2012 and 2014/2015 identified by Mr Clarke.

31. On the topic of the claimant's father's state of health, Rose Scott of the Lambeth Home Treatment Team at South London and Maudsley NHS Trust confirmed in a letter dated 10 September 2018 that he had been experiencing significant mental health difficulties requiring in-patient admission. At present, he was working with the Lambeth Home Treatment Team. Ms Scott went on to give a breakdown of all his in-patient admissions between his first one on 17 January 2013 and his last admission on 23 July 2018, which ran until 20 August 2018.

32. It was apparent from her breakdown that that the first six in-patient admissions were all clustered in 2013, whereas the last five admissions were all clustered in 2018, with the first in 2018 being from 15 March 2018 to 29 March 2018.

33. The claimant's uncle also directed my attention to another enclosure (E17) which showed that in August 2016 he had consulted the NHS by email because his brother was becoming obsessed with his daughter and he kept on asking him when he was going to see her. Sometimes, he would ask him more than five times a day. He asked whether there were any services, such as therapy or something, that would help to calm down his anxieties about his daughter in Zimbabwe. He did not want him to relapse as he had been sectioned four times in one year (2013) and he did not want this to happen again.

34. The claimant's father was also in attendance, and both he and the claimant's uncle were briefly questioned by Mr Walker. They also answered questions for clarification purposes from me.

35. Mr Walker produced a Home Office minute dated 13 December 2012 which explained why the claimant's father had been granted asylum, despite there being a number of credibility concerns regarding his claim. Part of his claim, as set out in his asylum interview, was that he had been hospitalised in Harare Psychiatric Hospital for two months at some stage after 5 December 2011, which was when he said he had been beaten with sticks by five men wearing Zanu-PF t-shirts.

36. The claimant's father confirmed what his brother had said earlier to me, which was that he was only in the psychiatric hospital for two weeks. At the time of his admission to the hospital, he was living on his own with the claimant. He had made

arrangements later for his sister Margaret to move into the family home with his daughter. This was when he was leaving for the UK.

37. The claimant's uncle drew my attention to E3, which was an affidavit sworn by the claimant's father in Harare on 28 February 2012. In this affidavit, he said he was residing at Cotswold Secondary School. He authorised his daughter, who resided at Glen-Lorah B in Harare, to obtain the following items, namely a sofa, fridge, television, five goats and three cows, and to sell them to obtain cash for "*daily living*".

38. The claimant's uncle explained that, after Margaret died in 2014, the claimant was not left on her own. This was because he had arranged for tenants to move into the family home in Harare. They were not relatives, but they provided the claimant with companionship.

39. In his closing submissions on behalf of the respondent, Mr Walker submitted that the appeal should be dismissed for the reasons given in the refusal letter. He submitted that the Entry Clearance Officer had expressed justifiable concern about whether the claimant had a sufficient incentive to return to Zimbabwe, particularly as the stress of her going back might aggravate her father's symptoms of mental ill-health.

40. In reply, the claimant's uncle said that the claimant had consistently maintained that there were more than normal emotional ties between herself and her father, so her case was distinguishable on the facts from the cases of **Kopoi** and **Onuorah**. He also relied on the decision of Deputy Upper Tribunal Judge O'Ryan in appeal number HU/07083/2016 promulgated on 23 May 2018. In that case, the Judge found that **Abbasi [2015] UKUT 00463** supported the conclusion of the First-tier Tribunal Judge that the denial of entry to a Zimbabwean mother to attend the wedding of her daughter in the UK was an interference of sufficient gravity to engage Article 8 because the wedding was a once-in-a-lifetime event, and it could not be repeated.

Discussion and Findings on Remaking

41. I did not formally preserve Judge Mailer's findings that the claimant met the requirements of the Rules, including the requirement that she should be a genuine visitor, who intended to return to Zimbabwe after a short visit of two weeks' duration. However, Judge Mailer gave adequate reasons for finding that all the relevant requirements of the Rules were met, and permission to appeal was not sought on the basis that the Judge had erred in finding that the claimant was a genuine visitor.

42. I accept that one issue under the Rules was raised by way of appeal to the Upper Tribunal, which was the sustainability of the Judge's finding on funding. The sponsor was reliant on benefits, and the cost of the trip was estimated to be around £650. Accordingly, it was argued, Judge Mailer erred in finding that the claimant would not be a burden on the taxpayer, as the taxpayer would be indirectly funding her visit through the sponsor's disability benefits.

43. The claimant's father can spend his disability benefits as he wishes. He is in the fortunate position of being looked after by his brother, who cares for him and provides him with board and lodging. So he has disposable income to cover the costs of the claimant's trip.

44. The core issue in this appeal is whether Questions 1 and 2 of the **Razgar** test should be answered in the claimant's favour. It is clear from the authorities that it cannot be answered in her favour on the ground that the refusal interferes with her private life or with her father's private life: see inter alia **Abbas [2017] EWCA Civ 1393**. There has to be a significant interference with family life.

45. In E1 there is a schedule of the remittances which the claimant's father has made to the claimant since his arrival in the UK. The schedule shows regular remittances of generally modest sums to the claimant from 2 January 2013 through to 20 June 2018. There is also one transfer in 2012 of just over £20 which was made on 14 June 2012.

46. E2 contains a schedule issued by Western Union in respect of payments made by the claimant's uncle to the claimant. The first payment was made on 17 May 2012 of just over £13, and the next payment was made on 12 April 2014 amounting to just over £75. The payments continue through to 10 January 2018. Insofar as it is material, there are fewer payments from the uncle, but some of the payments are much larger than those from the father. For example, the claimant's uncle transferred to the claimant the sum of £330 on 14 March 2017.

47. I find that the claimant has shown that she has been continuously financially supported as a student in Zimbabwe since the time of her father's departure to the UK, and that her father has been a material contributor to that funding as well as her uncle.

48. The fact that the claimant's father has been regularly remitting money to the claimant from February 2013 onwards tends to substantiate the claim that he has been in regular contact with her since arriving in the UK, albeit that tangible evidence of communication by telephone, Whatsapp, Facebook, email or postcards is scant, and it does not begin before 2016.

49. The disclosed exchanges between father and daughter show that they are very fond of each other, but they do not show that either of them is emotionally dependent upon the other.

50. Having assessed the evidence in the round, I am unable to answer the Rai question in the claimant's favour. It is arguable that the nature of her father's condition is such that his desire to see her is particularly intense. But what is missing is the required element of continuing emotional dependency. Realistically, I do not consider that it can be said that he has been emotionally dependent on his daughter since March 2012, or that she has been continuously emotionally dependent on him. There is also no evidence that either of them has recently become emotionally dependent on the other, following a period of non-dependency. The **Kugathas** criteria are thus not met. Another way of putting it is that, after all this time spent living apart on separate

continents, it cannot be said that father and daughter enjoy a family life which engages Article 8 ECHR.

51. The discussion in **Onuorah** illuminates a possible alternative basis on which family life could be said to be engaged. At [46] Singh LJ said he had no reason to doubt the correctness of **Abbasi** "*on its facts*", but said it had no bearing on the present context, which was governed by the principle in **Kugathas**.

52. Since Singh LJ went on to hold that he was bound by the decision of the Court of Appeal in **Abbas** that Article 8 in its private life aspect was not engaged in a visit visa case, logically the decision in **Abbasi** can only have been correct on its facts if it engaged Article 8 in its family life aspect. Nonetheless, as Singh LJ indicated, **Abbasi** was not a case in which the **Kugathas** criteria were satisfied. Instead, as he held at [45], it concerned "*matters relating to death, burial, mourning and associated rites*".

53. As I am reminded by the co-sponsor's production of my decision in **Onuorah** which was overturned by the Court of Appeal**,** I addressed **Abbasi** in some depth to support my finding that on the current state of the law the claimant did not require to have an "*established*" family life with the sponsor and his family in the UK. This is the logical consequence of **Abbasi**, in which the claimants did not have an established family life with anyone in the UK, but simply wished to visit their grandfather's grave and to mourn his passing with other relatives. But the clear decision of the Court of Appeal in **Onuorah** was that I was wrong to hold, by parity of reasoning, that the claimant could succeed in her appeal without having an established family life with the brother she was seeking to visit. Thus, it is not open to me to hold that Article 8 in its family life aspect is engaged in this appeal because of the compassionate circumstances surrounding the proposed visit.

54. Accordingly, while the claimant has shown that the refusal was wrong in substance – and she can rely on this fact in any future application for a visit visa which she may choose to make – she has not shown that the decision was unlawful under section 6 of the Human Rights Act 1998.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside and the following decision is substituted:

This appeal on human rights (Article 8 EHCR) grounds is dismissed.

I make no anonymity direction.

Signed Date 29 September 2018

Judge Monson
Deputy Upper Tribunal Judge