Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: VA/18659/2013**

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons promulgated**
On 23 September 2014	**On 2 December 2014**

Before

Deputy Judge of the Upper Tribunal I. A. Lewis

Between

Entry Clearance Officer, Pretoria

Appellant

and

Gawudencia Muza
(No anonymity order made)

Respondent

Representation

For the Appellant: Mr. N. Bramble, Home Office Presenting Officer.
For the Respondent: Dr. M. Mavaza.

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Place promulgated on 26 June 2014 allowing Ms Muza's appeal against the decision of the Entry Clearance Officer ('ECO') dated 1 August 2013 to refuse to grant entry clearance a a family visitor.

2. Although before me the ECO is the appellant and Ms Muza the respondent, for the sake of consistency with the proceedings before the First-tier Tribunal I shall hereafter refer to Ms Muza as the Appellant and the ECO as the Respondent.

Background

3. The Appellant is a national of Zimbabwe born on 5 August 1951. By way of a visa application form completed on 18 July 2013 she applied for entry clearance to visit her son Mr Innocent Muza ('the sponsor') and daughter-in-law. The application was refused for reasons set out in a Notice of Immigration Decision dated 1 August 2013 with particular reference to paragraphs 41(i), (ii), (vi), and (vii) of the Immigration Rules. Essentially, the Respondent was not satisfied in respect of the extent of the information provided by the Appellant with regard to her personal and financial circumstances in Zimbabwe and in consequence doubted her intention to quit the UK following her proposed visit; further, the Respondent was not satisfied that it had been shown that the sponsor had adequate funds to support the Appellant's visit, or that adequate accommodation was available.

4. The Notice of Immigration Decision specified that the Appellant's right of appeal was limited to the grounds referred to in section 84(1)(c) of the Nationality, Immigration and Asylum Act 2002.

5. The Appellant appealed to the IAC. The Grounds of Appeal, amongst other things: alleged that the Respondent had failed to consider Article 8 of the ECHR; pleaded that by virtue of the sponsor being a refugee he was not able to visit the Appellant in Zimbabwe, and that "*the visit by the mother to the UK will have cemented the Article 8 requirements*"; and asserted that "*the appeal should be allowed on Rules and on Article 8 of the ECHR*".

6. A subsequent Review by an Entry Clearance Manager ('ECM') dated 17 April 2014 acknowledged that "*the grounds of appeal assert that the ECO's decision violated the appellant's Human Rights on the basis of there being interference to family life under Article 8*", but maintained the decision to refuse entry clearance, asserting that "*the decision was correct, proportionate and in accordance with the Immigration Rules*".

7. The First-tier Tribunal Judge, having heard evidence from the sponsor, allowed the Appellant's appeal under the Immigration Rules for reasons set out in her determination.

8. Judge Place found the sponsor to be a credible witness (paragraph 12); she found "*the Appellant has strong economic and social ties to Zimbabwe, and does intend a genuine visit and to leave the UK at the end of the visit*" (aragraph 13); and also concluded "*on the balance of probabilities [the sponsor and his wife] are able to maintain and accommodate the Appellant during her proposed trip... [and] are able to fund her return journey*" (paragraph 14). Having concluded "*that the Respondent's decision was not in accordance with the Immigration Rules*" (paragraph 15), and having allowed the appeal, the Judge did not consider 'human rights' grounds in the alternative.

9. The Respondent sought permission to appeal which was granted by First-tier Tribunal Judge Page on 11 August 2014.

Consideration: Error of Law

10. The First-tier Tribunal Judge considered the Appellant's appeal by reference to the Immigration Rules, allowed the appeal on the basis that the decision was not in accordance with the Rules, and substituted his own decision under the Rules. This was in a clear error of law in that it failed to recognise the limitation imposed upon the Appellant's right of appeal was such that the ground of appeal under section 84(1)(a) – "*that the decision is not in accordance with immigration rules*" – was not available to the Appellant.

11. This was plainly a material error: notwithstanding that it was outside the scope of the appeal, and thereby beyond the jurisdiction of the Tribunal, the Judge founded his decision on re-evaluating the Appellant's case under the Rules.

12. Dr Mavaza submitted that I should infer from the concluding words under the heading 'Decision' – "*I allow the appeal*" - that the Judge had also allowed the appeal on Article 8 grounds, and as such any error of jurisdiction in considering the appeal under the Rules was ultimately not material. There is no merit in that submission, and I reject it: the Judge did not descend to any analysis under Article 8, and confined his considerations to the Rules.

13. In such circumstances I find that the First-tier Tribunal Judge materially erred, and that the decision of the First-tier Tribunal must be set aside.

Remaking the Decision

14. Both representatives acknowledged that the appeal was suitable for consideration by the Upper Tribunal. The sponsor was present, and I heard evidence from him both in-chief and under cross-examination. I then heard submissions from the representatives. I have made a careful note of the evidence and submissions in my record of proceedings and have had regard to all such matters in deciding this appeal.

15. Although the Respondent's decision was based on the Appellant not meeting the requirements of the Immigration Rules, and although I am not embarked upon a consideration of an appeal where the ground pursuant to section 84(1)(a) is available to the Appellant, it is nonetheless the fact that the First-tier Tribunal Judge made findings of fact - not themselves expressly challenged and eminently sustainable - to the effect that the Appellant did meet the requirements of the Immigration Rules at the date of the Respondent's decision. Mr Bramble frankly acknowledged that if Article 8 was engaged to an extent that the first two **Razgar** questions should be answered affirmatively in the Appellant's favour, such findings gave rise to difficulties for the Respondent in respect of the remaining **Razgar** questions. Plainly if the decision to refuse the Appellant entry clearance ran contrary to the requirements of the Rules it could not be maintained that the decision was in accordance with the law; further, it could not readily be argued that any consequent interference with private/family life was necessary in circumstances where it was not justified under the Rules; yet further, the imperative of maintaining effective immigration control could not readily be relied upon as a justification for interference in circumstances where the Appellant met the requirements imposed by the Rules as a mechanism of such control.

16. Whilst it is very likely – though not inevitable – that the refusal of entry clearance in a family visitor case will involve an interference with the right to respect of either or both the applicant's and the UK-based sponsoring family member's private and/or family lives (the first **Razgar** question), in my judgement, and notwithstanding the relatively low threshold, it is far less likely that the gravity of any such interference will be such as to satisfy the second of the **Razgar** questions. Whether or not it does will be fact-sensitive

depending upon the circumstances of the particular case. Relevant matters may be the quality of the family life enjoyed between applicant and sponsor (perhaps involving consideration of the length of time they have spent apart and the extent and quality of any previous family life prior to geographical separation), and the extent to which family life is, or may be, adequately maintained by means other than the proposed visit to the UK (which may include correspondence, telephone calls, other forms of electronic communication, and face-to-face meets whether in the home country of the appellant or some third country).

17. A number of factors emerge from the evidence that, in my judgement, are particularly pertinent to the evaluation of family life, and its quality in this appeal. I note the following:

(i) The sponsor is the eldest of eight children of the Appellant. Since his father's death, as the eldest male he has become the "*de facto head of the family*" (determination of First-tier Tribunal at paragraph 5). He told me that this meant he was responsible for family decisions – for example, in the administration of his father's estate following his death – albeit at times this was difficult at 'arm's length' whilst residing in the UK. In particular, in this context, he stated that he had a continuing role in respect of his sister who was still at school in Zimbabwe. In my judgement this aspect of the case demonstrates a continuing involvement in the mutual family life between the Appellant and the sponsor, notwithstanding the geographical separation and the time period over which they have been so separated.

(ii) The sponsor is a recognised refugee. Necessarily it would not be reasonable to expect him to visit the Appellant in Zimbabwe.

(iii) The Appellant and the sponsor have not seen each other for approximately 7 years. The First-tier Tribunal Judge found "*it entirely plausible that the Appellant should wish to see her eldest son again after a separation of some years*" (paragraph 12). Indeed, in my judgement, in circumstances where there has been no actual breakdown in the relationship between mother and son, such a period of separation likely make the desire to visit and see each other the more acute. On the facts of this particular case I do not consider that the period of separation is indicative of a deterioration in the quality of family life such as to defeat the Appellant's claim by reference to either of the first two **Razgar** questions.

(iv) In this context and generally I note that the sponsor told me that there was something very particular, both for him and for his mother, in his mother being able to see where he lived and how he lived in the UK. I accept this. Whilst not essential, it seems to me a matter of some significance both out of a sense of sated curiosity and, more particularly, reassurance as to the well-being of offspring, for a parent to have direct knowledge of the way in which their adult child is living his or her life. I accept that this is a relevant element of family life.

(v) The underlying purpose of the visit was for the Appellant to attend the sponsor's graduation ceremony, as well as 'just' visiting him and his wife. Necessarily the graduation ceremony was not an occasion that the Appellant could enjoy through the making of arrangements to meet the sponsor in some third country.

18. Having regard to the matters set out above, I am satisfied that both the first and second **Razgar** questions are to be answered in favour of the Appellant. The effect of the refusal of entry clearance denied the Appellant the opportunity of attending her eldest son's graduation ceremony, and also of seeing something of the life he has created for himself in the UK as a refugee. In the context of the particular interrelationship of the Appellant and her son, those were significant and relevant aspects of family life, and were not matters of family life that could be enjoyed by the Appellant and sponsor meeting in some third country.

19. For the reasons already discussed above in respect of the third, fourth, and fifth **Razgar** questions, I find that the interference with the Appellant's – and also the sponsor's – family life was not in accordance with the law, was not necessary, and could not be justified as proportionate. Accordingly, the Respondent's decision was in breach of the Appellant's Article 8 rights by reference to any or all of the final three **Razgar** questions.

20. For the avoidance of any doubt I have had regard to the public interest considerations incorporated at sections 117A-117D of the Nationality, Immigration and Asylum Act 2002 (pursuant to amendments introduced by the Immigration Act 2014). In so far as the Appellant's appeal succeeds by reference to the third and fourth **Razgar** questions, the 'public interest question' does not, strictly speaking, arise. Insofar as, in the alternative, the matters at section 117C may be relevant to evaluation of the fifth **Razgar** question, there is nothing to suggest that the facts and circumstances of the Appellant and the sponsor give rise to any adverse considerations:

there is no English language issue, adequate funds for the purpose of the proposed visit were demonstrated to the satisfaction of the First-tier Tribunal, and there is no issue of private life being established at a time when immigration status was precarious.

Notice of Decision

21. The decision of the First-tier Tribunal Judge contained a material error of law and is set aside.

22. I re-make the decision. The appeal is allowed on human rights grounds.

Deputy Judge of the Upper Tribunal I. A. Lewis 1 December 2014