



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: IA/10502/2014

**THE IMMIGRATION ACTS**

**Heard at Manchester  
On 7<sup>th</sup> January 2015**

**Decision & Reasons  
Promulgated  
On 20<sup>th</sup> January 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE LEVER**

**Between**

**MS E M  
(ANONYMITY DIRECTION MADE)**

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

Respondent

**Representation:**

For the Appellant: Mr Hussain

For the Respondent: Mr McVeety

**DECISION AND REASONS**

**Introduction**

1. The Appellant born on 5<sup>th</sup> June 1960 is a citizen of Zimbabwe. The Appellant who was present was represented by Mr Hussain. The Respondent was represented by Mr McVeety, a Presenting Officer.

### **Substantive Issues under Appeal**

2. The Appellant had applied for a residence card as a family member of an EEA national exercising treaty rights in the UK. That application had been refused by the Respondent on 7<sup>th</sup> February 2014. The Appellant had appealed the Respondent's decision and in the Grounds of Appeal had raised Article 8 of the ECHR additional to matters under the 2005 Regulations.
3. The appeal was heard by First-tier Tribunal Judge Lloyd-Smith sitting at Manchester on 8<sup>th</sup> July 2014. She dismissed the appeal under the EEA Regulations but allowed the appeal under Article 8 of the ECHR.
4. The Respondent made application for permission to appeal on the basis that the judge had not followed the case law of **Gulshan** or **Nagre**. Further it was said that there was no dependency between the Appellant and adult children beyond the normal ties as stated in the case of **Kugathas**. Permission to appeal was granted by First-tier Tribunal Judge Pullig on 9<sup>th</sup> September 2014. Essentially permission was granted on the basis that there was an arguable error of law in the judge allowing the appeal under Article 8 as there was no removal decision but simply a refusal to issue a residence card. Directions were issued for the Upper Tribunal firstly to consider whether or not an error of law had been made and directions in that respect bring the matter before me.

### **Submissions on behalf of the Respondent**

5. Mr McVeety accepted that Article 8 of the ECHR was a live issue and the judge was entitled to deal with that matter. He made no further submissions in respect of **Kugathas** or other points raised within the Grounds of Appeal.
6. Having considered the decision of the First-tier Tribunal Judge I indicated to Mr Hussain I did not need to hear submissions from him and indicated that there was no error of law made but I would provide my decision with reasons. I now provide that decision.

### **Decision and Reasons**

7. The judge had noted at paragraph 5 of the determination at the outset of the hearing both parties had conceded that given the fact that the Appellant's son was not married to an EEA national there was no basis upon which the appeal could succeed under the 2006 Regulations. The judge had therefore properly dismissed the appeal under the 2006 Regulations.

8. She had also noted that Article 8 had been raised in the Grounds of Appeal and the matter before the judge proceeded on that basis alone. The judge was entitled to deal with Article 8 that matter having been raised in the Grounds of Appeal and in accordance with the ruling in **JM Liberia**. Had the judge not dealt with Article 8 at that stage it would simply have meant the case would not have been concluded and potentially the matter coming back before the Home Office and possibly within the appeal system thereby wasting both time and public money.
9. The judge had provided a clear and detailed analysis of the evidence and there was much within that evidence that was not contested. The judge had also found for proper reasons given that she essentially found credible that the evidence provided by the Appellant supported by documentary evidence. This was a case where the Appellant's husband had been granted refugee status in the UK following his experiences at the hands of ZANU-PF in Zimbabwe. The judge had found that the Appellant herself would have been of adverse interest to the authorities in Zimbabwe from those who had persecuted her husband since his disappearance. The judge had also noted that the Appellant had tried to regularise her stay and had it not been for her separation from her husband as a result of domestic violence she would have been entitled to settle in this country as the spouse of a refugee. The judge also noted that she was not afforded the protection as a victim of domestic violence as she was not here on a spouse visa but as the spouse of a refugee. She had also taken account of the Appellant's various and serious medical conditions and had noted the medical evidence showing the improvement that had taken place since she had moved in with her son. Contrary to the assertions made in the Grounds of Appeal the judge had considered the family situation outlined in the case of **Kugathas** but found for proper reasons given that the Appellant had a family life that goes above and beyond the normal adult son relationship. She also found that because of the basis as to why her children were settled in this country it would not be an option for them to return to Zimbabwe to assist with the care of their mother. She also concluded that it would not be safe for the Appellant to return and be deprived of family support and care for her precarious health condition.
10. The judge had carefully considered the question of proportionality under Article 8 of the ECHR and even if it could be said that **Gulshan** remains good law she had set out clear reasons why the Appellant's circumstances were both exceptional and compelling and why she was therefore entitled to exercise the residual judicial discretion in considering the Appellant's case under Article 8 on the basis of proportionality. She gave clear reasons for finding that a removal would be disproportionate, those reasons encapsulated within paragraph 15 of the decision. She was not only entitled to reach the conclusions that she did as being reasonable conclusions but it is somewhat difficult to see how, when properly assessed, a different conclusion could have been reached.

**Notice of Decision**

11. There was no error of law made by the judge and I uphold the decision of the First-tier Tribunal.

**Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

Unless and until a tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date **19<sup>th</sup> January 2015**

Deputy Upper Tribunal Judge Lever