Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/30080/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 5 June 2014	**On 30 June 2014**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

AGNES CHAIDON FILIMON
AKA
AGNES CHAIDON PHILLIPS
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Saeed of Aman Solicitor Advocates (Luton)
For the Respondent: Ms A Everett, a Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant appeals with permission, in her maiden name, against the decision of the Secretary of State to refuse her indefinite leave to remain

on Article 8 grounds. Her appeal was dismissed by First-tier Tribunal Judge Boyes in a determination dated 19 March 2014.

Factual matrix

2. The following facts and matters are established in the First-tier Tribunal determination. The appellant is a citizen of Malawi, born there in 1968, but moved with her parents to Zimbabwe in 1969, when she was one year old. The appellant has no family members now in Malawi. She has a residence permit entitling her to live in Zimbabwe. The appellant's mother died in 1977. After her mother's death, the appellant's father moved back to his home village and remarried. The appellant's sister remained in Zimbabwe. There may be other siblings: that is unclear. She has three children, a son in South Africa and two daughters who live in Botswana. The appellant is still in contact with all her family members.

3. The appellant came to the United Kingdom on a visit visa in 2004, to see friends. She overstayed. She never had any lawful status after the expiry of her visitors' visa, but she met Mr Phillips and they became engaged in 2006 but at that time they needed a Certificate of Approval before they could marry. They commenced living together in his council flat. Mr Phillips had a serious congenital disability which meant that he was never likely to live to be old, and in fact it seems that he survived rather longer than expected. He was not able to work and was supported on benefits, particularly disability benefits. The appellant did not work: looking after Mr Phillips was a full-time occupation and she had no lawful status entitling her to do so. There were before the First-tier Tribunal four fairly short letters from friends of her late husband, Jason Phillips, indicating that the parties had a happy marriage and that the appellant helped him with his illness and his dietary requirements and acted as his carer until his death.

4. The couple applied on 13 October 2009 under the discredited Certificate of Approval to marry scheme. It is accepted now that the scheme was a breach of Article 12 ECHR. However, any such breach ended when approval was granted on 19 August 2010: the couple married at Alton Registry Office on 8 October 2010.

5. On 25 October 2010, the appellant applied for leave to remain as a spouse but the respondent refused her application on 6 January 2011, with no right of appeal. Before her husband's death on 25 November 2010. The applicant then submitted an application for leave to remain outside the Immigration Rules on compassionate grounds. On 22 December 2010, her application was refused, again with no right of appeal, on the basis that while the appellant might have established a private and family life in the United Kingdom, in particular with her late husband, she had done so while her status was precarious and had made no effort to regularise her immigration status until 25 November 2010, by which time she had been in the United Kingdom unlawfully for just under six years. The Secretary of State considered that to require the appellant to return to her country of origin, Malawi, would be a limited interference with her private and family

life and that skills obtained in the United Kingdom could be used to support herself there. Removal would be proportionate.

6. The appellant launched proceedings for a judicial review of that decision and it was during those proceedings that her husband died. On 19 May 2011, following a consent agreement, the Secretary of State granted the appellant a period of leave to remain on compassionate grounds. Her letter to the appellant's solicitors stated that:

> "You state that your client should be granted leave to remain or indefinite leave on the basis of compassionate grounds. However, your client does not qualify for indefinite leave to remain in the United Kingdom under the Immigration Rules. Your client's circumstances have been reconsidered and the Secretary of State has used his discretion and granted your client six months leave to remain in the United Kingdom outside the Immigration Rules on the basis of compassionate grounds.
>
> The Secretary of State sympathises with your client's circumstances, however, I must remind your client that after the expiry of this leave she has no basis of stay in the United Kingdom. She is required to leave the United Kingdom immediately, it is noted that she still has family life in Malawi as her children reside there."

7. After her husband's death, the appellant's financial and personal situation was dire. She was unable to pay the rent or council tax on her late husband's flat without his benefits income and was facing eviction. She was unable to afford to pay the undertakers for the cremation service, to enable her to collect and bury her husband's ashes. The appellant returned to Zimbabwe in September 2011 and went to stay with her sister, well within the period of compassionate leave granted to her.

8. On 24 July 2012, the appellant re-entered the United Kingdom, sponsored by her former mother-in-law. It seems that she had satisfied an Entry Clearance Officer in Zimbabwe that she wished to come to the United Kingdom only to pay for the cremation, collect, and bury her husband's ashes and that she would return at the end of six months. Unfortunately, and for the second time in the story of this appeal, the appellant did not do as she had said. Her six-month visitors' visa expired on 24 January 2013. The appellant was accommodated by an unspecified friend, not her mother-in-law. She has no dependants, here or anywhere else. In May 2013, her sister in Zimbabwe died.

9. The appellant applied for leave to remain in the United Kingdom as her deceased husband's partner, in order to be close to her late husband's grave. Her husband had planned to send her to Theology College and she stated that she wished to fulfil that plan. In the alternative, she argued under Article 8 ECHR that her removal to Zimbabwe or Malawi would be disproportionate and in particular that, by reason of the respondent's unlawful requirement for the appellant and her husband to apply for a Certificate of Approval to Marry, there was in her case an historic wrong of the type considered in G*hising & Ors (Ghurkhas/BOCs : historic wrong;*

weight) (Nepal) [2013] UKUT 567 (IAC). It is the appellant's case that if the respondent had granted the Certificate of Approval earlier, the couple would have married in 2006 and by the time of her husband's death, she would have been entitled to indefinite leave to remain on that basis.

First-tier Tribunal determination

10. The First-tier Tribunal held that since the appellant never had leave to remain as a spouse, she could not bring herself within the deceased spouse or partner provisions of the Immigration Rules. In addition, she was not in the position of having no ties to Zimbabwe, her country of former habitual residence. The Tribunal dismissed the appeal under the Rules and on human rights grounds, but allowed it to the limited extent that the respondent's decision to remove the appellant as an overstayer under s.10 of the Immigration and Asylum Act 1999 was unlawful: when she made her application, her visit visa had not yet expired and there was as yet no lawful decision to remove the appellant.

11. The consideration of Article 8 ECHR begins at paragraph [31] of the determination. The First-tier Tribunal Judge considered that Article 8(1) was not engaged at all, for the reasons set out at paragraph [35] of the determination:

> "35. It is clear from the case of **Ghising**, that even if there is an historic wrong that first the Appellant needs to show that Article 8(1) is engaged. In this case there is very limited evidence before me to demonstrate the nature or extent of the Appellant's private life in the UK. She stated in oral evidence that she is living with a friend, although no further details have been provided in relation to this. She is not residing with her deceased husband's mother or any members of his family. There is no evidence before me of any community or church ties, and the Appellant stated that she is not presently studying. Whilst I accept that the Appellant has no doubt made friends and acquaintances in the time that she has resided in the UK, the burden of proof is upon her to demonstrate, on the balance of probabilities, that she has a private life in the UK capable of being interfered with. She has not discharged that burden and therefore Article 8(1) is not engaged. As the Appellant has not demonstrated that the Respondent's decision will interfere with her Article 8 rights I need not go on to consider the remaining questions as laid out in **Razgar**."

Appellant's case

12. In his skeleton argument for the appellant, Mr Saeed sought to persuade me that the Article 8 decision ought to be approached on the basis that the appellant would have married her husband in 2006, received two lots of discretionary leave to remain, and been able to apply for indefinite leave to remain in the United Kingdom in 2012. Of course by that time her late husband would have been dead for about eighteen months, and in addition there is no evidence before me as to the financial or other circumstances which would have applied in 2006, 2009 or in 2012, save

that by then, after her husband's death, the appellant had returned to Zimbabwe because the leave granted to her on a discretionary basis by the respondent did not allow her either to work or claim benefits and she was in severe financial difficulties and facing eviction from her husband's premises which had never been in her name. Mr Saeed seeks to persuade me that the failure to allow the parties to marry between 2006 and 2010 is a historic injustice of the type discussed in *Ghising and others (Ghurkhas/BOCs: historic wrong; weight)* [2013] UKUT 567 (IAC) and he relies on the judicial head note which is as follows:-

> "(1) In finding that the weight to be accorded to the historic wrong in Ghurkha ex-servicemen cases was not to be regarded as less than that to be accorded the historic wrong suffered by British Overseas citizens, the Court of Appeal in *Gurung and others* [2013] EWCA Civ 8 did not hold that, in either Gurkha or BOC cases, the effect of the historic wrong is to reverse or otherwise alter the burden of proof that applies in Article 8 proportionality assessments.
>
> (2) When an Appellant has shown that there is family/private life and the decision made by the Respondent amounts to an interference with it, the burden lies with the Respondent to show that a decision to remove is proportionate (although Appellants will, in practice, bear the responsibility of adducing evidence that lies within their remit and about which the Respondent may be unaware). ...
>
> (4) Accordingly, where it is found that Article 8 is engaged and, but for the historic wrong, the Appellant would have been settled in the UK long ago, this will ordinarily determine the outcome of the Article 8 proportionality assessment in an Appellant's favour, where the matters relied on by the Secretary of State/ entry clearance officer consist solely of the public interest in maintaining a firm immigration policy.
>
> (5) It can therefore be seen that Appellants in Gurkha (and BOC) cases will not necessarily succeed, even though (i) their family life engages Article 8(1); and (ii) the evidence shows they would have come to the United Kingdom with their father, but for the injustice that prevented the latter from settling here earlier. If the Respondent can point to matters over and above the public interest in maintaining a firm immigration policy, which argue in favour of removal or the refusal of leave to enter, these matters must be given appropriate weight in the balance in the Respondent's favour. Thus, a bad immigration history and/or criminal behaviour may still be sufficient to outweigh the powerful factors bearing on the Appellant's side of the balance."

13. To the extent that the *Ghising* analysis is relevant in these proceedings, I note that this appellant does have a bad immigration history in that she had no leave to remain after her initial six months' visitor's leave which expired in December 2004. It is further relevant that she accepted the six months' compassionate leave offered to her after the death of her husband, withdrew her judicial review challenge to the decision to refuse her indefinite leave to remain on the basis of the marriage, and left the United Kingdom in September 2011 within the period granted by the

Secretary of State for her to settle her and her husband's affairs in the United Kingdom. I also note that the appellant when returning to the United Kingdom satisfied an Entry Clearance Officer that she proposed to do so only for the purpose of burying her husband's ashes and was not intending to settle. At some point she changed her view about that, but it is not a satisfactory immigration history on any view.

14. Mr Saeed also relied on the analysis of the breadth of Article 8 in the European Court of Human Rights judgment, *Niemietz v Germany* 1371/88 of 16 December 1992, in which the court said:-

> "29. The Court does not consider it possible or necessary to attempt an exhaustive definition of the notion of 'private life'. However, it would be too restrictive to limit the notion to an 'inner circle' in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings."

The rest of the decision concerns whether that definition extends to professionals exercising their professional responsibilities and is not strictly relevant in these proceedings. The passage I have quoted appears to me to be well-established, both internationally and in domestic law. It is certainly possible for private life in the form of friendships to be sufficient to found an Article 8 claim.

15. Mr Saeed also relied on *Kadir Ascioglu* [2012] EWCA Civ 1183, a case on the Turkish Ankara Agreement, but on closer examination that case has very little to offer on the facts of this case and I note that at paragraph 97 thereof Lord Justice Rix, giving the decision of the court, reminds himself that each case must be turn on its own facts and be determined in its own context.

Discussion

16. I remind myself that the decision under appeal is that of 2 July 2013, refusing the appellant's application for leave to remain based on her arrival in the United Kingdom on 24 July 2012 on a six-month visit visa. I have already indicated that the 'historic injustice' argument cannot succeed: any breach of Article 12 ECHR was remedied when the parties were allowed to marry and the applicant left the United Kingdom in 2011, returning in 2012.

17. On this occasion she has been in the United Kingdom only for a short time, as her husband's widow, initially for the purpose of burying his ashes. The appellant has not challenged the dismissal of her appeal under the Immigration Rules and there is no challenge to the decision under s.10 that the removal decision was not in accordance with law. I am therefore seised only of the human rights element of the appeal. While there is no family life, since the appellant's husband has died, I consider that the

First-tier Tribunal erred in law in finding that Article 8(1) was not engaged at all by such limited private life as the appellant has developed in the United Kingdom. I therefore set aside the Article 8 element of the determination and now proceed to remake it.

18. The question of the appellant's private and family life with her deceased husband, or the course which she would like to study, but is not currently studying, do not relate at all to her *present* private life: one is her previous private and family life and the other is her desired future private life. The evidence of the appellant's present private life in the United Kingdom now that her husband is dead is sparse. Her mother-in-law was prepared to invite her for the interment, but not to accommodate her. She is accommodated by an unspecified friend and she produced four letters of support from persons, one of whom attended the First-tier Tribunal hearing but was not cross-examined, all of whom recorded how well she had treated her husband and how happily married they were. Whilst I accept that the appellant does have some private life still in the United Kingdom, it is not such that interference with it would be disproportionate. The private life claim cannot succeed and I dismiss it.

19. No anonymity direction has been sought and I do not consider that there is any necessity to make such a direction.

Decision

I dismiss the appeal under the Immigration Rules and on human rights grounds.

I maintain the decision of the First-tier Tribunal to dismiss the appeal under the Immigration Rules and to allow the appeal against the removal directions to the extent that the respondent's decision to remove the appellant is not in accordance with the law.

Signed Date: 26 June 2014

Upper Tribunal Judge Gleeson