



**Upper Tribunal  
(Immigration and Asylum Chamber)  
Number: VA/06617/2014**

**Appeal**

**THE IMMIGRATION ACTS**

**Heard at North Shields**

**Decision & Reasons**

**Promulgated**

**On 28 January 2016**

**On 4 February 2016**

**Prepared 28 January 2016**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE JM HOLMES**

**Between**

**A. N.**

**(ANONYMITY DIRECTION MADE)**

Appellant

**And**

**ENTRY CLEARANCE OFFICER PRETORIA**

Respondent

**Representation:**

For the Appellant: Sponsor

For the Respondent: Mr Diwnycz, Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. The Appellant, a citizen of Uganda, born on 29 August 2007, applied for leave to enter the United Kingdom for four weeks as a family visitor to her brother, sister, and aunt.
2. The Respondent first refused entry clearance to the Appellant by decision made on 23 April 2014 [E4], and the Appellant's renewed application was refused on 24 September 2014 by reference to paragraph 41 (vi) and (vii) of the Immigration Rules. The Notice of Decision informed the Appellant that her right of appeal was limited to the grounds identified in s84(1)(c) of the 2002 Act. She appealed that decision, although she requested that the appeal be

- determined upon the papers before the Tribunal without a hearing. The Respondent raised no objection to that.
3. The grounds of appeal made no reference to unlawful discrimination, but they can and should be read as asserting that the decision was unlawful under s6 of the Human Rights Act 1998. The ECM reviewed the decision to refuse entry clearance on that basis on 2 February 2015, but chose to uphold it.
4. The appeal was heard on the papers, and allowed in a decision promulgated on 1 July 2015 by First Tier Tribunal Judge K Lester.
5. By a decision of First Tier Tribunal Judge Nicholson dated 29 September 2015 the First Tier Tribunal granted the Respondent permission to appeal on the basis it was arguable there had been a failure by the Judge to dispose of the appeal pursuant to the restricted grounds permitted by s88A of the 2002 Act (as amended), because the Judge had failed to ask the primary question of whether Article 8 was engaged by the decision at all; Adeji (visit visas) Article 8 [2015] UKUT 261, and, had failed to identify that this was at best a “private life” entry clearance appeal which could not therefore succeed; SS (Malaysia) [2004] UKAIT 91, and to the extent that the Judge had considered the appeal as a “family life” appeal had failed to apply the appropriate test.
6. The Appellant has filed no Rule 24 Notice. Thus the matter comes before me.

#### Error of law?

7. I remind myself that s85A of the 2002 Act applied to the evidence admissible upon the appeal, and of the guidance upon the proper approach to Article 8 cases involving applications for leave to enter that is to be found in Mostafa (Article 8 in entry clearance) [2015] UKUT 112, and SS (Congo) [2015] EWCA Civ 387.
8. As the Upper Tribunal set out in Mostafa [9] and Kaur (visit appeals; Article 8) [2015] UKUT 487, the Judge was obliged to assess the evidence to decide whether the Appellant met the substance of the Immigration Rules at the date of decision, as she claimed she did, or whether she did not, as the Respondent had claimed. Although that question did not arise directly as a result of the limited ground of appeal available, it was the context in which the decision upon the Article 8 appeal was to be made. Thus the Judge did not fall into the error identified in Virk & Others [2013] EWCA Civ 652, or Mostafa [11], because she did not purport to allow the appeal under the Immigration Rules.
9. As set out in Kaur, even if an appellant can establish that they met the requirements of paragraph 41, it does not mean that their Article 8 appeal is strengthened to the point that it must be allowed. Article 8 must first be shown to be

engaged. As was said in Mostafa the appellant must show that the denial of the visit has a material impact on their Article 8 rights, before there is any consideration of the balance between the competing interests of the individual, and the state's interest in the maintenance of effective immigration controls. In SS (Congo) [2015] EWCA Civ 387 it was said that unless an appellant can show that she has individual interests at stake that are covered by Article 8, and that are of "a particularly pressing nature" so as to give rise to a "strong claim that compelling circumstances may exist to justify the grant of LTE outside the rules" she is exceedingly unlikely to succeed in an Article 8 appeal.

10. Although the Judge did direct herself that the "facts as found constitute an interference with the Appellant's right to respect for her family life"[14] it is very far from clear what findings of fact she is referring to. None of the facts recited in the course of the decision that "this is a genuine family visit", and the finding that the Appellant met the requirements of paragraph 41, would justify such a conclusion. There appears therefore to be, at best, some confusion in the Judge's mind over whether a genuine intention to visit members of the extended family constitutes part of "family life" for the purposes of Article 8, when plainly rather more than that is required.
11. In my judgement what was required, but did not occur, was an analysis of the evidence to identify whether the ties with the individuals relied upon had the necessary quality required, or whether this was in truth a "private life" appeal, and the elements of that which were relied upon; Marckx v Belgium [1980] 2EHRR 330 and Singh v ECO New Delhi [2004] EWCA Civ 1075, and Abbasi (visits - bereavement - Article 8) [2015] UKUT 463
12. It follows that I must set aside the decision and remake it. I do so on the papers filed for the original appeal, as the parties had requested the First Tier Tribunal to do, and as the sponsor confirmed before me he was content that I should do.

#### Decision remade

13. I am not satisfied on the balance of probabilities that the immigration decision under appeal did engage the Article 8 rights of the Appellant, because I am not satisfied that the documentary evidence she offered to the Judge established that she had a "family life" at the date of decision with the individuals she would be prevented from visiting as a result of that decision. The evidence does not establish that the relationship she has with those relatives goes beyond the normal emotional ties between adult relatives of the type identified in the evidence. Whilst her desire to visit them was understandable and genuine, as the Judge accepted,

and thus could constitute a part of her “private life” for Article 8 purposes, this was not a “discrete facet” situation of the type rehearsed in Abbasi. Thus Article 8 was not engaged by the decision under appeal, and the Article 8 appeal must therefore be dismissed.

## DECISION

The Decision of the First Tier Tribunal which was promulgated on 1 July 2015 did involve the making of an error of law in the decision to allow the appeal on human rights grounds that requires that decision to be set aside and remade.

The appeal is dismissed.

### Direction regarding anonymity – Rule 14 Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until the Tribunal directs otherwise the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to proceedings being brought for contempt of court.

Deputy Upper Tribunal Judge JM Holmes  
Dated: 28 January 2016