



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

Appeal Number: VA/01117/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 11 December 2017**

**Decision & Reasons
Promulgated
On 18 January 2018**

Before

UPPER TRIBUNAL JUDGE PITT

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MRS VIRGINIA WANJIRU KIBICHO
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr Bramble, Senior Home Office Presenting Officer

For the Respondent: Mr S Canter, Counsel

DECISION AND REASONS

1. This is an appeal against the decision dated 21 March 2017 of First-tier Tribunal Judge Blake which allowed the visit visa appeal of Mrs Kibicho.
2. For the purposes of this decision, I refer to Mrs Kibicho as the appellant and the Secretary of State as the respondent, reflecting their positions before the First-tier Tribunal.

3. The background to this matter is that the appellant is a citizen of Kenya, born on 1 January 1951. Her daughter came to the UK some time ago, married and has children here. The appellant has visited her daughter and her family on numerous occasions and her daughter and her husband have also visited the appellant in Kenya six times over an eight year period, including leaving their children with their grandmother whilst they holidayed elsewhere in Africa.
4. After being granted a number of visit visas the appellant applied for entry clearance as a dependent adult relative but this application was refused by the Entry Clearance Officer on 1 August 2014.
5. The appellant then made a further application for entry clearance as a visitor which was refused in the decision under challenge dated 21 January 2015. The Entry Clearance Officer considered that the appellant's recent refusal in the adult dependent relative category, her separation from her husband and her limited circumstances in Kenya suggested that it was her true intention to settle in the UK and that she was therefore not genuinely intending to visit the UK for a short period or leave at the end of that visit.
6. The appellant could only appeal against the decision of the Entry Clearance Officer on human rights grounds. In the findings at [36] - [52] the First-tier Tribunal Judge set out clear findings that the evidence of the appellant, her daughter and her son-in-law was highly credible. At [52] the judge "accepted in full the Appellant's circumstances as outlined in the evidence given by the Sponsor and also the Appellant's other daughter". The reasons for this were that the appellant had explained in her visit visa application that she did not wish to settle in the UK but her circumstances had changed because she had another adult daughter now living with her in Kenya who could care for her and that her health had also improved. All of the witnesses whether in writing or orally were clear that she was only intending to come to the UK temporarily as a visitor and then return to Kenya.
7. Having considered the evidence in support of the appellant's claim and found it credible, at [56] - [60] the judge concluded that the appellant, albeit the appeal could not be allowed on this basis, met the requirements of the Immigration Rules at the date of the decision. Following the case of **Mostafa (Article 8 in entry clearance) [2015] UKUT 00112 (IAC)** and **Adjei (Visit visas - Article 8) [2015] UKUT 0261 (IAC)** the judge factored in the fact of the Immigration Rules having been met to the Article 8 consideration.
8. In order to do so an assessment has to be made of whether family life for the purposes of Article 8 was engaged. At [55] the judge found that:

"... family life did exist between the Appellant, her daughter and her grandchildren. I was satisfied that the Refusal of the ECO was such as to engage Article 8 ECHR. I therefore consider whether or not the decision taken was proportionate to the legitimate aim of enforcing immigration control."

9. The respondent's first challenge was that the judge did not give reasons for finding as to why family life could exist between the appellant and her adult daughter. The correct test from **Kugathas** and other Article 8 case law had not been considered or the evidence here assessed in light of the principles of that case. There were no findings of additional dependency beyond normal emotional ties between the appellant and her daughter.
10. At the hearing before me Mr Canter conceded that the judge's findings on the issue of the relationship between the appellant and her daughter did not contain the requisite assessment of the evidence against the test from **Kugathas** and did not appear to seek to argue that such a claim could be made out on the material before the First-tier Tribunal. However, he maintained on behalf of the appellant that there was no challenge in the grounds to the relationship of the appellant with her grandchildren. He maintained that the evidence before the First-tier Tribunal was of a particularly close relationship between the appellant and her grandchildren. She had visited the UK for an extended period shortly after the birth of her first grandchild, had seen the children very often thereafter because of the number of visits either she had made to the UK or her daughter and the family had made to Kenya. The closeness of the appellant with her grandchildren was particularly noticeable where her daughter and son-in-law left their children with her whilst they took an independent holiday. There was also evidence before the First-tier Tribunal of the frequent contact between the appellant and her grandchildren by way of skype, telephone and so on.
11. Mr Bramble did not seek to argue that the grounds contained a challenge to the appellant's family life with her grandchildren and he therefore proceeded to argue the respondent's second ground. This was that the decision did not explain why the refusal of a visa which only allows the parties to be together temporarily is a disproportionate interference with Article 8 rights.
12. It is my conclusion that this ground is made out. The First-tier Tribunal judge materially misstated the full ratio of the case of **Mostafa**. At [60] the judge refers to the appellant meeting the Immigration Rules as follows:

"In accordance with the decision of **Mostafa** I found that the ability to satisfy the Rules did illuminate the proportionality decision to refuse entry clearance."
13. That is a correct summary of the part of the ratio from **Mostafa**. The judge is not correct in stating at [65]:

"I noted it was recorded that if a person's circumstances did satisfy the Immigration Rules and they had not acted in a way that undermined the system of immigration control, a refusal of entry clearance was liable to infringe Article 8."
14. That approach to the proportionality decision fails to take into account that the degree of interference was reduced where a 6 month visit visa was

being refused. The evidence here was also that the grandchildren could continue to visit the appellant in Kenya, which to some extent continues their direct contact even if it is less than when the appellant is also visiting the UK. The First-tier Tribunal Judge here did not consider those material factors.

15. For these reasons, I found that a material error of law had arose and set aside the proportionality section of the decision to be remade.
16. I can remake the appeal relatively simple as it is my conclusion that the interference here cannot be shown to be disproportionate where it arises only from the appellant's inability to visit the UK for a temporary period and it remains open to the family to visit her in Kenya. The family life is not reduced to a level that can be regarded as disproportionate where visits can continue, albeit contact is reduced by the appellant not being able to visit the UK for the particular period of 6 months for which she applied.
17. It is worth mentioning that the First-tier Tribunal Judge's findings that, contrary to the decision of the Entry Clearance Officer, were that the Immigration Rules were met as this appellant had not shown an intention to settle or remain beyond the period of her temporary visit visa. Those findings were not challenged by the Secretary of State for the Entry Clearance Officer here. There are therefore clear judicial findings, not opposed by the respondent here, which the Entry Clearance Officer will no doubt take into account if the appellant makes a further visit visa application under the Immigration Rules.

Notice of Decision

The decision of the First-tier Tribunal discloses and error on a point of law to the extent set out above and is set aside.

The appeal is remade as refused on Article 8 ECHR grounds.

Signed: 
Upper Tribunal Judge Pitt

Date: 16 January 2018