



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/03493/2016

THE IMMIGRATION ACTS

Heard at Field House  
On July 16, 2018

Decision & Reasons Promulgated  
On July 25, 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

THE ENTRY CLEARANCE OFFICER

Appellant

and

ABIODUN [A]  
(ANONYMITY DIRECTION NOT MADE)

Respondent

**Representation:**

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

For the Respondent: Mr Ojukotola, Legal Representative

DECISION AND REASONS

1. No anonymity direction is made.
2. The appellant is a citizen of the United States of America. He attempted to enter the United Kingdom on January 19, 2016 in order to visit his sister and children. The respondent refused his application on January 20, 2016 on the basis he was not satisfied the appellant was a genuine visitor because he had been previously removed from the United Kingdom after being here illegally for fourteen years.

3. The appellant lodged grounds of appeal under Section 82(1) of the Nationality, Immigration and Asylum Act 2002 on January 25, 2016. His appeal came before Judge of the First-tier Tribunal Beg (hereinafter called "the Judge") on January 30, 2018 and in a decision promulgated on February 8, 2018 she allowed his appeal on human rights grounds.
4. The respondent appealed this decision on February 13, 2018. The respondent argued the Judge had erred by failing to make a finding as to whether there was a genuine parental relationship between the appellant and his children in the United Kingdom. Article 8 did not extend a right (a) to allow the appellant to develop family or private life that had not previously existed (see Entry clearance officer, Sierra Leone v Kopoi [2017] EWCA Civ 1511); (b) to enable the appellant to see his sister who was an adult unless family life within the meaning of article 8 could be established and (c) the proportionality assessment was inadequate.
5. Permission to appeal was granted by Judge of the First-tier Tribunal Birrell on May 30, 2018 found it arguable the Judge had erred by failing to give adequate consideration to the nature of the appellant's relationship with his children given that there was no evidence of any contact with them previously and the only contact had been financial support for a much shorter period than the appellant claimed. It was also arguable the proportionality assessment was inadequate as there had been no weight attached to his period as an overstayer.
6. At the commencement of the hearing I confirmed there had been no Rule 24 response filed.

### **SUBMISSIONS**

7. Mr Bramble initially relied on the grounds of appeal and submitted that Judge Birrell had summed up the situation perfectly.
8. Mr Ojukotola, who had represented the appellant in the First-tier Tribunal, reminded the Tribunal that the appellant had been here lawfully only for a short period but that between 2004 and 2007 he had resided with his former partner and they had four children who were now aged 12, 11 (twins) and 10. He had only seen the younger child for a short period of time due to the fact that he had been removed on December 17, 2007. Mr Ojukotola submitted that between 2008 and 2016 he had maintained contact with his children and there was evidence he had been sending funds to their mother from 2012. He had provided a witness statement, which the Judge took into account, in which he stated that he had maintained contact and there were letters from each child confirming their wish to see their father. He accepted there was no evidence of cards being exchanged between them or records of messaging or calls but submitted the fact he had been supporting them demonstrated he was involved in their lives. Mr Ojukotola agreed that when considering the appeal under article 8 ECHR the Judge did not consider the public interest and more detailed reasoning could have been given. However, he submitted the decision should stand.

## FINDINGS

9. The background to this appeal is that the appellant had come to The United Kingdom in or around 1989 and had remained here unlawfully until he was administratively removed on December 17, 2007. His immigration history suggests there were no applications between 2007 and 2015 for him to visit the United Kingdom and when he was removed he returned to Nigeria, his home country.
10. According to the evidence the appellant went to live in America in January 2011 and he became an American citizen in December 2015. He is now settled there with children and when considering the evidence the Judge concluded that it was likely he would return to America after his visit because he was employed, owned property and had a partner and children to return to.
11. The Judge made it clear that she was satisfied that he met the requirements of Part 4 of Appendix V HC 395 and in paragraph 14 of her decision she concluded her decision stating that she found that the appellant met the requirements of section 4 of Appendix V HC 395.
12. In her decision the Judge set out in some detail the immigration history and the circumstances upon which the appellant and his former partner have four children. At paragraph 11 she stated that the appellant claimed to be “well-established and settled in the United States.”
13. The Judge then proceeded to look at the other evidence and noted the appellant’s employment, as a nurse at Dallas County hospital, and the papers showed that financial payments had been made since 2012 to his former partner.
14. In paragraph 13 of the decision the Judge accepted that the appellant’s purpose in visiting was genuine and she found no credible evidence to suggest he would not return after a two-week visit. She was satisfied that he had the necessary funds and that whilst he had overstayed previously his circumstances had “moved on” and he was settled in the United States.
15. At paragraph 14 of the decision the Judge reminded herself about the best interests of the child and section 55 of the Borders, Citizenship and Immigration Act 2009 and concluded it was in their best interests to have contact with their father. The Judge noted that the children were becoming teenagers and expressed the wish in separate letters to see their father and he confirmed in his statement that he wished to continue to play an active role in their lives.
16. The Judge, whilst mentioning article 8 briefly in the first three lines of paragraph 40, effectively allowed this appeal because she was satisfied he met the Immigration Rules. Unfortunately, this is not the basis on which to allow a visit visa appeal and it is necessary for the appellant to demonstrate there was family life.
17. In Pritam Kaur (Visit appeals; Article 8) [2015] UKUT 487 (IAC) the Court stated:

“In visit appeals the Article 8 decision on an appeal cannot be made in a vacuum. Whilst judges only have jurisdiction to decide whether the decision is unlawful under s.6 of the Human Rights Act 1998 (or shows unlawful discrimination) (see Mostafa (Article 8 in entry clearance) [2015] UKUT 00112 (IAC) and Adjei (visit visas – Article 8) [2015] UKUT 0261 (IAC)), the starting-point for deciding that must be the state of the evidence about the appellant’s ability to meet the requirements of paragraph 41 of the immigration rules.

The restriction in visitor cases of grounds of appeal to human rights does not mean that judges are relieved of their ordinary duties of fact-finding or that they must approach these in a qualitatively different way. Where relevant to the Article 8 assessment, disputes as to the facts must be resolved by taking into account the evidence on both sides: see Adjei at [10] bearing in mind that the burden of proof rests on the appellant.

Unless an appellant can show that there are individual interests at stake covered by Article 8 “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 [Leave to Enter] outside the rules”: (see SS (Congo) [2015] EWCA Civ 387 at [40] and [56]) he or she is exceedingly unlikely to succeed. That proposition must also hold good in visitor appeals.”

18. In considering whether there has been an error in law I start from the position, outlined in Kaur, that the starting point is the appellant’s ability to meet the requirements of the Immigration Rules. In the current appeal before me the Judge concluded that the Rules were met.
19. It has been argued that the Tribunal in Mostafa did not rule out human rights appeals in entry clearance applications for people other than married couples and Mr Ojukotola submitted the fact the appellant claimed he had maintained contact with his children and sent money to their mother was sufficient to engage article 8 ECHR.
20. Permission to appeal was given on the basis that the Judge had arguably failed to give adequate consideration to the appellant’s relationship with his children given that there was no evidence of any contact apart from the payment to the mother.
21. The Judge appears to have fallen into the trap that because she felt the Rules were met the appeal should be allowed under article 8 ECHR. However, there is very little in paragraph 14 of the decision which suggests any proper examination of article 8 had been undertaken. The Judge failed to examine the extent of contact between the appellant and his children. The fact he is the children’s father does not mean there is family life and in order to engage article 8 ECHR the appellant had to set out a family life claim.
22. The appellant was refused entry in January 2016 but provided no evidence of contact prior to that date and the evidence of contact after that date amounted to a couple of letters from the children and himself. If he claimed to have been maintaining contact by telephone and social media then such evidence should have been submitted to enable the Judge to consider the level of his relationship with his children.

23. It therefore follows that I am not satisfied the Judge properly considered the article 8 issue. Finding article 8 existed because the visitor rules were met is an error in itself. Failing to have regard to the previous immigration history when considering proportionality is also an error.
24. I therefore set aside the decision.
25. I indicated to the representatives that I proposed to remake the decision based on all the evidence before me.
26. Mr Ojukotola did request an adjournment to obtain further evidence but I pointed out to him that this appeal had been in the system for the last 30 months and the appellant had had ample time to provide evidence of his contact and had failed to do so. Nothing was therefore to be gained by adjourning the case for further information especially as the court's directions made clear the hearing was likely to be concluded at today's hearing.
27. I acknowledge the appellant is the father of four minor children who each live in the United Kingdom. It appears three of those children are now British citizens and one is likely to be a British citizen after ten years residence has been reached. The mere fact money has been sent since 2012 does not prove family life and the appellant bears the burden of proof to demonstrate there was family life.
28. I note in his statement he claims there has been ongoing support but he should have provided evidence of this. The appellant was aware of the issues appertaining to today's appeal but he chose not to address the concern that had been raised. The only evidence of contact are letters which post-date January 2017 and they do not, with respect, take the matter much further. They are effectively single letters expressing a wish that their father be allowed to visit.
29. The Court of Appeal in Secretary of State for the Home Department v Onuorah [2017] EWCA Civ 1757 made clear at paragraph 35,
 

"... the question whether there is "family life" for the purpose of Article 8 is a logically prior question and cannot depend on the purpose for which an application for entry clearance is made. Secondly, the shortness of the proposed visit is, if anything, an indication that the refusal of leave to enter did not involve any want of respect for the Respondent's family life for the purpose of Article 8."
30. The Court of Appeal in Entry Clearance Officer and Kopoi [2017] EWCA 1511 made clear at paragraph 30,
 

"... the shortness of the proposed visit in the present case is a yet further indication that the refusal of leave to enter did not involve any want of respect for anyone's family life for the purposes of Article 8. A three-week visit would not involve a significant contribution to "family life" in the sense in which that term is used in Article 8. Of course, it would often be nice for family members to meet up and visit in this way. But a short visit of this kind will not establish a relationship between any of the individuals concerned of support going beyond normal emotional ties, even if there were a positive obligation under Article 8 (which there is not) to allow

a person to enter the UK to try to develop a "family life" which does not currently exist."

31. In this appeal the appellant was only planning to visit two weeks. He had claimed he had maintained his family life by electronic means for a number of years. However, I am not satisfied the appellant has a relationship as claimed and the fact he may satisfy the requirements of the Immigration Rules does not mean there is family life.
32. Even if article 8(1) had been demonstrated the appellant still had to demonstrate compelling evidence. In TZ (Pakistan) and PG (India) v The Secretary of State for the Home Department [2018] EWCA Civ 1109 the Court of Appeal confirmed the Secretary of State is entitled to apply a test within the Rules and a test of exceptional circumstances as described outside the Rules. This had not been demonstrated in this appeal based on my findings.
33. I do not therefore accept article 8 is engaged and therefore the appellant cannot succeed on human rights grounds. I do not need to consider his immigration history because I have found article 8 has not been engaged.

#### **DECISION**

34. There was an error in law for the reasons set out above and I set aside the decision.
35. I have remade the decision and I dismiss the appeal on human rights grounds.

Signed

Date 16/07/2018



Deputy Upper Tribunal Judge Alis

#### **TO THE RESPONDENT** **FEE AWARD**

I make no fee award as I have dismissed the appeal.

Signed

Date 16/07/2018



Deputy Upper Tribunal Judge Alis