



IAC-AH-CO-V1

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

Appeal Number: VA/04617/2014

THE IMMIGRATION ACTS

**Heard at Birmingham (ET)
On 16 October 2015
Prepared 20 October 2015**

**Decision & Reasons Promulgated
On 4 December 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

ECO- Nairobi

Appellant

and

**HUSEIN BADRU MAWEJJE
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr N Smart, Senior Presenting Officer

For the Respondent: Miss S Ssemwogerere, Sponsor

DECISION AND REASONS

1. In this decision the Appellant is referred to as the ECO and the Respondent is referred to as the Claimant.
2. The Claimant, a national of Uganda, date of birth 27 March 1962, appealed against the ECO's decision dated 21 July 2014 to refuse entry clearance as a family visitor with reference to paragraphs 41 and 42 of the Immigration Rules HC 395 as amended. The Claimant had limited rights to appeal as derived from Section 84(1)(c) of the Nationality, Immigration and Asylum Act 2002. The appeal came before First-tier Tribunal Judge O'Malley (the judge) who on 17 February 2015 allowed an appeal under the Immigration

Rules with reference to somewhat confusingly Article 8 ECHR. The purpose of the visit had been to support the Appellant's niece and her three children after the death of her husband, their father, and to say prayers at a service during Ramadan.

3. I do not know what, if any, the evidence was as to any family life that had previously been held and there was nothing before the judge concerning any former private life rights being exercised as between the Claimant and his niece or to what extent there had been length of hiatus in any such relationship.
4. Whilst the judge found that the Claimant was a genuine visitor and was coming for the purposes of supporting [his] niece, the judge found that he would be returning at the conclusion of his stay.
5. Permission to appeal that decision was given by First-tier Tribunal Judge De Haney on 23 April 2015.
6. From the information before the judge, the Sponsor had come to the United Kingdom it seems in 1991. She had married here in 1993 and her husband had died on 1 March 2014. The visa application was made on 8 July 2014 and the decision was, as I have indicated, on 21 July 2014. The delay between his death and the application was explained by the turmoil and upset caused by the Sponsor's husband's death and the making of consequential arrangements.
7. In considering whether or not the judge made an error of law it was plain that there needed to be a consideration of whether there have been Article 8 rights previously exercised between the Claimant and Sponsor, any hiatus in the exercise of those rights, why that has happened and how long the gap has been. Plainly in cases of bereavement it will be relevant what was the family relationship between the deceased and the would-be visitor.
8. The judge had no information about any previous relationship or whether Article 8 was engaged in terms of the purposes of mourning the deceased. Those are fact-sensitive matters as illustrated in such a case as Kochieva v Sweden [2012] ECHR 549. I find that there was not the proper or adequate fact basis for concluding the nature of the relationship between the Sponsor and the Claimant or the Sponsor's deceased husband and the Claimant justified entry to the UK to exercise such rights and thus I conclude that the judge made an error of law in failing to deal with those matters.
9. Accordingly I find that the original Tribunal's decision was in error of law and cannot stand.
10. In remaking the matter as I have been invited to do on submissions made I took into account the cases of Abbasi [2005] UKUT 463 which relates to matters concerning the death of a relative and Mostafa [2015] UKUT 112, Adjei [2015] UKUT 261 and Kaur [2015] UKUT 00487.

11. Kaur identified that there was no material difference between Mostafa and Adjei in considering the ambit of Article 8 in the visit visa context. There is a material difference between two regimes under the Immigration Rules and Article 8 ECHR: The fact that a person meets the requirements of paragraph 41 of the Rules does not necessarily establish they can succeed under Article 8 or vice versa. Thus the refusal of a visit visa with limited appeal rights the burden is upon the applicant to show that the denial of a visit has a material impact on their Article 8(1) rights. Clearly before the Judge it was dealt with on the papers and there was therefore no opportunity for the judge to test the reliability of the claim.
12. The judge decided that the Claimant did meet the requirements of paragraph 41 of the Immigration Rules and allowed the appeal under the immigration rules when there was no right did so.
13. The judge made no findings upon what had been any family life rights exercised between the Sponsor and Claimant, or the deceased or how close the relationship had been or when and what had been the character of their relationship since the Sponsor had been in the UK or with the niece's husband which, in the circumstances of the case, appears to be unlikely for the husband was not a relative e.g. a cousin. As a matter of approach the judge concluded that because the Claimant was a genuine visitor who intended to leave it was disproportionate to refuse entry clearance. The judge's decision at paragraphs 17-20, 22-25 conflates the issues and whilst the purpose of the visit was legitimate that does not of itself show the ECO's decision was disproportionate to the aim of enforcing immigration control. Similarly it needed to be considered what private/family rights were being sought to maintain or re-establish.
14. It seems to me particularly regrettable that relevant matters which could have been put forward but were not. It is no criticism of the Sponsor that she did not appreciate nor have the necessary expertise to address the evidential needs to establish Article 8 ECHR rights were engaged. Ultimately her stance was to leave the matter to me to sort out.
15. In the circumstances I do not find there was the necessary family/private life relationship or seeking to re-establish any such connections arising from or because of the Sponsor's and children's bereavement. On the evidence, I find that Article 8(1) ECHR rights were not engaged and the appeal on human rights grounds fails.

ANONYMITY ORDER

No anonymity order is necessary.

NOTICE OF DECISION

The appeal by the ECO is allowed. The original Tribunal decision cannot stand. The following decision is substituted.

The appeal by the Claimant is dismissed.

Signed

Dated 2 December 2015

Deputy Upper Tribunal Judge Davey

TO THE RESPONDENT
FEE AWARD

I have dismissed the Claimant's appeal and therefore there can be no fee award.

Signed

Date 2 December 2015

Deputy Upper Tribunal Judge Davey

P.S. I regret the delay in promulgation due to the typing being delayed and the case file being miss-located.