Upper Tribunal
(Immigration and Asylum Chamber)

Kaur (visit appeals; Article 8) [2015] UKUT 00487 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 28 July 2015	.....

Before

UPPER TRIBUNAL JUDGE STOREY

DEPUTY UPPER TRIBUNAL JUDGE BAGRAL

Between

ENTRY CLEARANCE OFFICER - NEW DELHI

Appellant

and

MRS PRITAM KAUR

(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation :

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

For the Respondent: Mr J Dhanji of Counsel instructed by ATM Law

1. 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.

2. 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.

3. 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.

DECISION AND REASONS

1. On 2 April 2014 the appellant (hereafter “Entry Clearance Officer” or “ECO”) refused the application by the respondent (hereafter the claimant) for entry clearance to visit the UK for six weeks. The claimant is a citizen of India and at the date of decision was an 83 year old army widow. She lives in District Karpulthala. She said she wished to come to the UK to visit her third son and sponsor, Mr G S Turna, her daughter-in-law and her grandchildren aged 19 and 13 respectively. She had been the subject of a previous refusal of entry clearance in July 2013. In a letter from her solicitors dated 3 March 2014 making a new application, it was accepted she had not previously provided evidence of her retirement and income from bank interest. The letter produced documents in support of her claim that her main source of income was from sale of crops. Evidence was also attached to show she received a state pension of Rs1,000 a month. It said she had two sons in India with whom she shared close ties.

2. In the refusal letter the ECO observed that although the claimant had stated she had two sons in India she had provided no evidence, or even any indication of whether they resided with her or lived separately and she had provided no evidence of their financial or economic circumstances or employment. The ECO noted that the passport issued to one of these sons, Mr M Singh, showed his address as in Goa. The ECO concluded that:

“[i]n the absence of better, personal circumstances in India , I am not satisfied that you plan to leave the UK at the end of your visit or that you are genuinely seeking entry as a general visitor for a period not exceeding 6 months (paragraph s 41(i) & (ii) of HC 395 (as amended)) .”

3. The claimant was informed that her right of appeal was limited in this case to the grounds of appeal referred to in s.84(1)(c) of the Nationality, Immigration and Asylum Act 2002 (hereafter “the 2002 Act”). She appealed. Her grounds stated that the decision was not in accordance with the law or the immigration rules and was unlawful under s.6 of the Human Rights Act 1988 (HRA 1998). An Entry Clearance Manager Review dated 22 October 2014 noted that no new documents had been submitted, that no reasons had been given for the assertion that the decision was not in accordance with the law, the immigration rules or unlawful under the HRA 1998.

4. The appeal came before First-tier Tribunal (FtT) Judge Farmer on 22 January 2015. In a determination sent on 29 January 2015 he allowed the appeal on Article 8 grounds. The judge noted that the claimant had produced a bundle of documents which included a detailed written response to the Notice of Refusal. The judge stated that he heard evidence from the claimant’s son/sponsor and the granddaughter. The judge went on to find:

(i) that the claimant enjoys a family and private life with her sponsor son and grandchildren. In this regard he noted that the oldest grandchild was 19 and the second grandchild was 13 and both had lived with the claimant until two and a half years ago (July 2012).

(ii) that the decision constituted an interference with the claimant’s family and private life and as such engaged Article 8. In this regard the judge highlighted that both children had lived with the claimant

for the majority of their lives and “her granddaughter gave compelling evidence of the fact that the [claimant] effectively brought them up. They have not seen her since they left India.”

(iii) that the decision disproportionately interfered with the claimant’s right to a private and family life with her son and grandchildren. The judge’s reasons for this finding were embodied in paragraphs 11 – 13 as follows:

“ 11. I was invited to consider the reasons given for the refusal when considering the public interest. I find that the basis for the refusal was weak. The reasons given were that the appellant had not provided details of her family’s circumstances in India . She had provided her own circumstances and that of her family she hoped to visit in the UK . The respondent concluded that they were not satisfied that the appellant would leave at the end of her visit, without basing this conclusion on any facts found. I accept that the appeal does not lie against the merits of the decision but against the breach of Article 8 rights, however I put it into the balance when considering the public interest behind refusing permission to visit the UK .

12. The respondent relied on the fact that there is nothing to prevent the family in the UK visiting the appellant in India . This was responded to in two ways. Firstly there is the economic reality of the cost of transporting 4 people to India as opposed to one person visiting here. Secondly, and more importantly there is the logistic and practical difficulty in arranging a visit. I accepted the evidence that the family here do not manage a family holiday together, even in the UK . They find it difficult to find a period of time when everyone is available. The appellant’s son works for himself and when he is not working he does not earn anything. It is therefore costly for him to take time off work. Secondly his wife is in a full time job which only allows her 4 weeks off a year and only in blocks of a maximum of 2 weeks. Finally the children are both in education and are more attainable an objective for the appellant to travel to the UK to spend time with her family than vice versa.

13. I find that there is no good reason for finding that there is a public interest in not permitting the appellant to enter the UK for a 6 week holiday and that the decision disproportionally interferes with the Appellant’s right to a private and a family life with her son and grandchildren.”

5. In amplifying the ECO’s grounds, Mr Bramble said he relied on the principles set out in Mostafa (Article 8 in entry clearance) [2015] UKUT 00112 (IAC) and Adjei (visit visas – Article 8) [2015] UKUT 0261 (IAC). He said the judge was wrong to find there was family life within the meaning of Article 8 because (i) her sponsor son was an adult; (ii) she had not seen him for two and a half years; (iii) it was his family’s choice that they moved away from their family life setting in India with the claimant; (iv) there was no evidence to suggest that since the grandchildren moved to the UK the claimant exercised any control over their upbringing or financially supported them.

6. Mr Bramble drew our attention to what had been said by the Tribunal in Mostafa at [24] that:

“It will only be in very unusual circumstances that a person other than a close relative will be able to show that the refusal of entry clearance comes within the scope of Article 8(1). In practical terms this is likely to be limited to cases where the relationship is that of husband and wife or other close life partners or a parent and minor child …”

7. As regards the judge’s findings of interference and lack of proportionality, Mr Bramble submitted that the judge had given wholly inadequate reasons for considering that the public interest was reduced or outweighed. Factors such as the costs of a visit or the greater logistical convenience of the

claimant coming to the UK rather than the sponsor and his family going to India, were not compelling circumstances.

8. Mr Dhanji submitted that even though the judge did not refer to any case law dealing with Article 8 in visit visa cases under the limited grounds of appeal imposed by s.88A of the 2002 Act, his decision was clearly faithful to Mostafa in that he considered that the claimant intended only a 6 weeks visit, which was evidence capable of being weighty. The judge had also applied the very approach enjoined by Adjei, namely (1) first to ask whether Article 8 is engaged at all; and (2) second, if it is, then [paragraph 1 of head note to Adjei] "the Tribunal may need to look at the extent to which the claimant is said to have failed to meet the requirements of the rules because that may inform the proportionality balancing exercise that must follow." In this case it was reasonably open to the judge to find that the claimant's grandchildren had been brought up by her and that Article 8(1) was therefore engaged. Even if one of the two grandchildren was now an adult, the other remained a minor. Looking at the two generations of the family with which the claimant still had close ties, he was entitled to find there was existent and meaningful family life.

9. As regards the judge's treatment of the issues of interference and proportionality, Mr Dhanji accepted that the judge gave cursory attention to the matter of the claimant's ability to meet the immigration rules for visitors (paragraph 41) and had not set out any reasons in [11], but he had nevertheless conducted a balanced proportionality assessment and was entitled to consider that the public interest in refusing a visit in this case was weak.

10. In response Mr Bramble pointed out that the evidence submitted for this hearing cast serious doubt on the judge's finding that the claimant had brought up the two grandchildren, it being said by the claimant in her witness statement of 22 January 2015 that she resides in her own property where she lives with her first son, that she visits her second son in Goa and has a daughter nearby with whom she shares close ties and that since her third son had left for the UK in the 1990s she had "hardly resided with him " and it was never the case that the two grandchildren had lived in India without their mother.

11. In reply to a question from the bench, both parties agreed that if we were minded to set aside the judge's decision, we could re-make it without further ado.

DISCUSSION

T he decision under the visitor rules as evidence relevant to the Article 8 assessment

12. As explained in Mostafa, by virtue of an amendment to s.88A of the 2002 Act brought into effect on 25 June 2013 by s.52 of the Crime and Courts Act 2013, there is no right of appeal in visit cases even in a family visitor case except on grounds alleging that the decision shows unlawful discrimination or is unlawful under s.6 of the HRA 1998. In consequence, in an appeal brought on human rights grounds, judges have no jurisdiction to allow or dismiss it on the basis that it is not is or is not in accordance with the rules or is or is not otherwise in accordance with the law. (What we say below about the visitor rules is strictly only applicable to those for "general visitors" although it may also have some relevance to the specific visitor categories.)

13. However, in visit appeals the Article 8 decision on an appeal cannot be made in a vacuum. Almost invariably the subject-matter of the decision under appeal is confined to a refusal under the rules (notwithstanding paragraph 2 of the rules, it is rare for an ECO to go on to consider whether the refusal decision is contrary to an applicant's human rights [1]). The judge cannot ignore the decision

in front of him. That decision is that visit entry clearance is refused because the applicant does not meet one or more of the requirements set out at paragraph 41 for leave to enter as a "general visitor". [2] It is worth rehearsing in summary that those requirements relate to genuineness of intention to visit for a limited period as stated by him (41(i)); intention to leave at the end of that period (41(ii)); absence of intention to take employment (41(iii)) or to produce goods or provide services (41(iv)); absence of intention to study (41(v)); ability to maintain and accommodate himself and any dependants without recourse to public funds; ability to meet the costs of the return or onward journey (41(vii)); and other conditions requiring absence of intention to marry, receive private medical treatment etc. Whilst such requirements are clearly not Article 8 considerations there is at least one obvious overlap in subject-matter when the applicant seeks to visit family members, namely that the genuineness of the intentions behind the visit (a requirement set out in paragraph 41(i)) may be highly material to the issue of whether there is family life within the meaning of Article 8(1) and/ or the issue of whether there are strong family life reasons for the visit that are to be weighed in the balance under Article 8(2). In this context an inability to maintain and accommodate without recourse to public funds or employment may also be material to any Article 8 proportionality exercise.

14. Whilst therefore judges only have jurisdiction to decide whether the decision is unlawful under s.6 of the HRA 1998 (or shows unlawful discrimination), the starting-point for deciding that must be the state of the evidence about the applicant's ability to meet the requirements of paragraph 41.

15. It is also important to bear in mind in Article 8 visit appeals that the restriction 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. Sometimes there may be no dispute as to the facts. Quite often, however, such appeals will feature refusal decisions in which the ECO does not accept one or more aspects of the appellant's account whereas the appellant is claiming that their account should in fact be accepted. Obviously the requirement in ECO appeals to decide them on the basis of evidence in existence at the date of the ECO's decision limits the scope for an appellant to challenge such findings (see AS (Somalia) & Anor v Secretary of State for the Home Department [2009] UKHL 32), but it remains that appeals against visit refusals are capable of succeeding on the strength of appellants being able to satisfy the judge by production of further documentary evidence and/or evidence from the sponsor and other relevant witnesses that their account of circumstances appertaining at the date of decision is to be believed. But where there is a dispute about the facts that is relevant to the Article 8 assessment, the judge must seek to resolve it by taking into account the evidence on both sides, bearing in mind that the burden of proof rests on the appellant.

The visitor rules as evidence relating to the public interest

16. The question arises as to whether the visitor rules are also relevant in an additional way, as evidence of the public interest in the maintenance of effective immigration control. It seems to us that this question is one that judges must ask as part of their duty to apply a two-stage approach to Article 8 considerations. As is clear from cases such as MM & Ors [2014] EWCA Civ 985, the two-stage approach is not confined to in-country appeals; it applies to entry clearance appeals also.

17. As regards the immigration rules in general, it is uncontroversial that, at least since 9 July 2012, they can be taken to reflect the view of the Secretary of State as to the proper balance to be struck in respect of Article 8 considerations. Equally, however, it is widely recognised that outside the context of foreign criminal cases (where the rules are a complete code), the rules do not always fully mirror all relevant Article 8 considerations and as a result there may be gaps between the rules and what Article 8 requires see e.g. MM & Ors, SS (Congo) [2015] EWCA Civ 387 and Singh and Another

[2015] EWCA Civ 74. In SS (Congo) the Court of Appeal has further clarified that an important distinction has to be made between Leave to Enter (LTE) and Leave to Remain (LTR) cases, Richards LJ concluding at [40] that:

"In the light of these authorities, we consider that the state has a wider margin of appreciation in determining the conditions to be satisfied before LTE is granted, by contrast with the position in relation to decisions regarding LTR for persons with a (non-precarious) family life already established in the United Kingdom. The Secretary of State has already, in effect, made some use of this wider margin of appreciation by excluding section EX.1 as a basis for grant of LTE, although it is available as a basis for grant of LTR. The LTE rules therefore maintain, in general terms, a reasonable relationship with the requirements of Article 8 in the ordinary run of cases. However, it remains possible to imagine cases where the individual interests at stake are of a particularly pressing nature so that a good claim for LTE can be established outside the rules. In our view, the appropriate general formulation for this category is that such cases will arise where an applicant for LTE can show that compelling circumstances exist (which are not sufficiently recognised under the new rules) to require the grant of such leave. "

18. Given that the court in SS (Congo) was principally concerned with LTE rules governing family reunification under Appendix FM, it remains to be asked, how do these general considerations play out in the context of the visitor rules?

19. There would appear to be competing considerations. On the one hand, it can be said that the visitor rules do not specifically accommodate such considerations because very similar rules have been in force since the 1971 Immigration Act, well before the HRA 1998 gave them legal form; and in 2012, when the Home Secretary announced new rules, she did not expressly identify the visitor rules as codifying her view of Article 8. Further, it cannot be assumed that her rules are necessarily compliant in all respects with Article 8. It is not unknown for the higher courts to find certain provisions of the rules (or at least their operation) contrary to the Human Rights Act: see e.g. Quila and Another [2011] UKSC 45; see also MM & Ors at [134].

20. On the other hand, previous versions of the visitor rules had never been the subject of successful challenges before either the (old) European Commission of Human Rights or the ECtHR; even though in 2012 the Secretary of State did not specifically identify the visitor rules as Article 8 compliant, she did state that the rules in general were compatible with Article 8: see for example a document placed on the Home Office website entitled "Statement of Intent: Family Migration", June 2012 at paragraph 7. Similar unqualified language is used in the recent "Immigration Directorate Instructions on Family Migration: Appendix FM, Section 1.0a", 3 August 2015. In response to the Supreme Court judgment in Quila, the Secretary of State amended the relevant rules. There is now also the Home Office Guidance for Entry Clearance Officers, entitled "Considering human rights claims in visit applications", Version 1.0, April 24, 2015, which states at pp.12-13 that:

"The Immigration Rules set out the requirements that must be met by visitors. Those requirements are established in order to ensure that decisions made to grant visit visas are in the public interest, for example, that the person must be a genuine visitor, can be maintained and accommodated without accessing public funds; does not intend to breach the conditions of their leave and there are no suitability grounds for refusal. Where those requirements are not met, it is not in generally the public interest for the individual to enter the UK."

21. Further, at a general level it is a right of states to impose immigration controls; in LTE cases Article 8 does not confer an automatic right of entry (see SS (Congo) [39(i)]) and "[i]n deciding

whether to grant LTE to a family member outside the United Kingdom, the state authorities may have regard to a range of factors, including the pressure which admission of an applicant may place upon public resources, the desirability of promoting social integration and harmony and so forth" (SS (Congo) [39(iii)]).

22. In light of the above, the visitor rules must in common sense be seen as part of parcel of that system of controls and as reflecting the public interest in regulation of entry and exit, by preventing unrestricted access for overseas visitors (including those seeking to visit family members in the UK) and requiring them whilst in the UK to avoid being a burden on public funds and health and education services and to refrain from engagement with the labour market. In this regard the visitor rules could indeed be said to represent one of the clearest examples of the right of states to impose immigration controls in the interest of their own communities. Given that other parts of the rules do make Article 8-compliant provision for family reunification, it might also be said that the visit rules reflect the parallel consideration that applicants cannot expect to circumvent those by means of the visitor rules which stipulate that visitors, whether coming for the purpose of seeing family or for tourism, can only do so for a very limited period and subject to certain conditions such as no recourse to public funds.

23. Having analysed these two competing sets of considerations, we find the latter are to be preferred. The visitor rules may not be a perfect reflection of the Secretary of State's view of what Article 8 requires, but, utilising the analysis of Richards LJ in SS (Congo) [2015] EWCA Civ 387**,** we do not discern any significant gap between the visitor rules and "what Article 8 requires". Indeed, on the analysis in SS (Congo) there is less basis for considering in the visitor context that Article 8 requires more than the LTR rules provide because (a) what is in issue in relation to an application for leave to enter is more in the nature of an appeal to the state's positive obligations under Article 8 (SS (Congo) at [39 (ii)]; see also Shamin Box [2002] UKIAT 02212); (and b) as a result the requirements upon the state under Article 8 are less stringent in the LTE context than in the LTR context: see SS (Congo) at [38]. Within the context of the LTE rules, there is the additional fact that the visitor rules are not in any event about reuniting families, only about allowing visitors a short visit in the UK, which can be for the purposes of visiting family members but on the strict understanding that applicants know that outside the context of that visit, the family concerned will reside in different countries.

24. It is also important to bear in mind that there are two dimensions to the way in which the immigration rules serve the public interest: not just on the general level, by setting out a regulatory framework of immigration control and thereby establishing "a reasonable relationship with the requirements of Article 8 in the ordinary run of cases" (SS (Congo) at [40]); but also on the particular level, by establishing in any individual case why a grant of entry clearance is not in the public interest. Accordingly we are entitled to consider that when a visit is refused because of failure to meet the requirements of paragraph 41, that ordinarily shows that it is not considered in the public interest for a visit to be granted in those circumstances.

25. Against this background, the need (emphasised in Adjei) to look at the extent to which the applicant is said to have failed to meet the requirements of the rules is important for an additional reason. For if an applicant has failed to meet the rules, that is apt to demonstrate that the refusal is in the public interest at a general and particular level.

26. Another aspect to the issue of the interrelationship between the rules and Article 8 concerns the issue of whether a "near-miss" under the rules strengthens an argument based on Article 8. Again SS (Congo) is in point. At [54]-[56] Richards LJ observed:

“54. At the hearing, there was debate about the proper approach to be adopted in ‘near miss’ cases, for example if the sponsor of an applicant for LTE could provide evidence of an annual income a little less than the £18,600 required or could provide evidence which might be regarded as similar to (but not the same as) that required under Appendix FM-SE. Mr Payne, for the Secretary of State, made submissions to the effect that ‘a miss is as good as a mile’ and that the fact that one is dealing with a ‘near miss’ case should be irrelevant to the Article 8 balancing exercise required. The general position of the respondents, on the other hand, was that great weight should be attached to the fact that there was a ‘near miss’ by an applicant in relation to the requirements of the rules.

55. In our judgment, the true position lies between these submissions. Contrary to the argument of the respondents, that fact that an applicant may be able to say that their case is a ‘near miss’ in relation to satisfying the requirements of the rules will by no means show that compelling circumstances exist requiring the grant of LTE outside the rules. A good deal more than this would need to be shown to make out such a case. The respondents’ argument fails to recognise the value to be attached to having a clear statement of the standards applicable to everyone and fails to give proper weight to the judgment of the Secretary of State, as expressed in the rules, regarding what is needed to meet the public interest which is in issue. The ‘near miss’ argument of the respondents cannot be sustained in the light of these considerations and the authority of Miah v Secretary of State for the Home Department [2012] EWCA Civ 261, especially at [21]-[26].

56. However, it cannot be said that the fact that a case involves a ‘near miss’ in relation to the requirements set out in the rules is wholly irrelevant to the balancing exercise required under Article 8. If an applicant can show that there are individual interests at stake covered by Article 8 which give rise to a strong claim that compelling circumstances may exist to justify the grant of LTE outside the rules, the fact that their case is also a 'near miss' case may be a relevant consideration which tips the balance under Article 8 in their favour. In such a case, the applicant will be able to say that the detrimental impact on the public interest in issue if LTE is granted in their favour will be somewhat less than in a case where the gap between the applicant's position and the requirements of the rules is great, and the risk that they may end up having recourse to public funds and resources is therefore greater.”

27. This background fortifies us in our view that a judge limited by s.88A to deciding whether the refusal of entry clearance to an appellant is compatible with Article 8 cannot – and must not – avoid taking the factual situation as regards the ability of the appellant to meet paragraph 41 as a starting point. In deciding whether Article 8(1) is engaged, for example, the judge must be satisfied that there is a factual content to the claimed private and family life. If the evidence relating to the ability to meet the requirements of paragraph 41 discloses to the judge that the visitor has no real family ties or that the visitor does not genuinely intend a visit, that may have a direct material bearing on the decision as to whether Article 8(1) is engaged. Similarly, evidence regarding the applicant’s ability to meet the requirements of the rules may sound on whether the decision constitutes interference and also on whether, if there is interference, it is proportionate. Overall, 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 outside the rules” (see SS (Congo) at [40] and [56]), he is exceedingly unlikely to succeed. That proposition must also hold good in visitor appeals.

Mostafa and Adjei: weight to be attached to findings regarding compliance with the rules

28. Although the judge did not refer to any case law on Article 8 in visit appeals, both representatives cited Mostafa and Adjei and their submissions touched on what the different panels in these two cases have said about the weight to be attached to any findings made as regards compliance with paragraph 41. We have to ask ourselves whether the two decisions are entirely consistent with one another insofar as the Tribunal in Mostafa states in its head note that the claimant's ability to satisfy the Immigration Rules is "capable of being a weighty, though not determinative factor when deciding whether such refusal is proportionate"; whereas the Tribunal in Adjei states that any findings concerning compliance with paragraph 41 "will carry little weight, especially if based upon arguments advanced only by the appellant".

29. Having considered the two cases in the light of our foregoing analysis, we find there is no conflict between them. Both panels were properly concerned to establish the limited ambit of an Article 8 appeal in the visit visa context, tribunal judges having no jurisdiction to allow or dismiss an appeal on the basis of it not being in accordance with the rules (or the law). Both were also concerned to establish that the rules on visitors and Article 8 constitute two separate legal regimes. Even if a person meets the requirements of paragraph 41, that does not necessarily establish they win under Article 8; e.g. Article 8(1) may not even be engaged. That is why in Mostafa it was emphasised that applicants need to establish that denial of a visit has a material impact on their Article 8(1) rights. Both were also fully aware that the proportionality assessment conducted under Article 8 has to weigh the interests of the individual against the interests of the state in the maintenance of effective immigration control.

30. Seen in this context there is no inconsistency in what each panel said about evidential considerations. For the Tribunal in Mostafa such evidence was capable of being weighty. The statement by the Tribunal in Adjei (cited above) must be read in context: in that appeal the judge had simply bypassed the ECO's reasons for refusing entry clearance and as a result "based his findings of fact upon the case of one party only" ([10]); and it was "[i]n those circumstances" that "the findings of fact carry very little weight."

31. In any event, even if we are wrong in our analysis of the reasoning in these two cases, we consider it beyond doubt that (i) evidence relating to the ability of an appellant to meet the requirements of paragraph 41 must be relevant to the assessment of whether there is a violation of Article 8; (ii) this means that it is essential for a tribunal judge deciding the Article 8 question to make any findings on the basis of all the evidence in the case. If an appellant is contending that the ECO was wrong about matters of evidence, relating to intention, finances etc., then the Tribunal Judge must decide whether that is in fact so. He cannot simply rely on the ECO's findings, but neither can he (as happened in Adjei) simply rely on what an appellant avows.

The claimant's case

32. It will be readily be apparent in light of the foregoing discussion that the judge deviated in at least two key respects from a correct approach.

33. First, the judge wholly or largely ignored the findings of the ECO as regards the claimant's overall family circumstances and its relevance to ascertainment of her true intentions. The ECO's reasons for refusal make very plain that the officer was not satisfied the claimant had strong family ties in India because there was a lack of evidence regarding the whereabouts of the two sons in India. In [41], as conceded by Mr Dhanji, the judge simply noted descriptively that the ECO was concerned about lack of details of her family's circumstances in India. The judge gave no evaluation and no reasons for disagreeing with those concerns apart from saying that "the basis for the refusal was weak", and the

curious comment that “the respondent … decided [that] they were not satisfied that [the claimant] would leave at the end of her visit, without basing this conclusion on any facts found”. The glaring flaw in this comment is that the burden of proof lay on the claimant to show only a genuine visit was intended and that, by dint of her failure to evidence that she had close family ties in India, the ECO was plainly entitled to conclude that the claimant had not established that only a visit was intended. For the decision-maker at least, that was a fact found. The later assumption of the judge at [13] that the claimant would enter the UK for a six week holiday was wholly unreasoned.

34. The other departure from a correct approach concerned the judge’s conduct of the Article 8 balancing exercise. Despite beginning and ending [11] with sentences referring to the public interest, the judge did not weigh anything on the public interest side of the scales at all – neither the public interest at the general level nor at the particular level. Further, to the extent that what the judge said at [11] and [12] might be construed as meaning to convey that the public interest could tolerate the claimant “[entering] the UK for a 6 week holiday” [13], this evaluation first of all did not factor in the public interest at a general level and second it was based not on any compelling family circumstances, but only on matters of economic and logistical convenience (“the economic reality of the cost of transporting 4 people to India as opposed to one person visiting here”; “the logistical and practical difficulty of arranging a visit” (family business; children’s school)). It must also be borne in mind that even on the claimant’s own evidence hers was not a case of a person with no family life at all in her country of origin. Even if on her account as put to the ECO her most important family ties were with her sponsor son and family in the UK, it remained that she had ties of some description with two sons in India and their families.

35. For the above reasons we conclude that the FtT Judge materially erred in law and his decision is to be set aside.

Re-making of decision

36. We are satisfied we are in a position to re-make the decision on the basis of the evidence before us and the parties’ respective submissions. The further evidence includes a witness statement dated January 2015 from the claimant. Although this post-dates the date of decision we consider that in certain respects it pertains to the situation as at the date of decision. We take into account that the claimant is an elderly widow, although she has been assisted in her entry clearance application by solicitors.

37. As regards the claimant’s ability to meet the requirements of the visitor rules, we do not consider she discharged the burden of proof on her to establish that at the date of decision she intended only a family visit. The evidence does establish that at the date of decision she was financially self-sufficient, but it does not establish that she was committed to continuing to live in her home in India. We consider it significant that in contrast to the great importance she attached to her ties with her sponsor son and his children, she made no similar reference to the importance of her ties with her sons and their families, in India. In her recent statement it is again said that her ties with the latter are close, but even here she gives very scant details regarding them, even though she says she and her first son live in the same house. In conjunction with the fact that the latest witness statement still lacks vital details about her sons’ circumstances in India, we conclude that her family life ties in India have not been shown to be sufficiently strong for her to have any incentive to return there if she went to the UK. She had not shown only a genuine visit was intended.

38. Turning to the actual – and only – grounds of appeal with which we are concerned, we are satisfied that the claimant has established that the ties she has with the sponsor son and his family constitutes

protected family life within Article 8(1). We note that even though identifying visitor appeals involving close relatives such as a married couple as the paradigm Article 8(1) scenario, the Tribunal in Mostafa did not rule out other cases. It is well-established that the notion of family life is not confined to parents and children and can include the ties between near relatives, including grandchildren, "since such relatives play a considerable part in family life" (Marckx v Belgium (1980) 2 EHRR 330 at [45]); see also Singh v ECO New Delhi [2004] EWCA Civ 1075 at [21]). Nor can it be excluded that in such contexts, e.g. family bereavement, significant elements of private as well as family life may be engaged.

39. We bear in mind that ties between a parent and adult children or between a grandparent and children will not as a rule constitute family life for Article 8(1) purposes unless there is dependency over and above normal emotional ties: see Kugathas [2003] EWCA Civ 31 and Singh and Another [2015] EWCA Civ 74. In light of these authorities we are prepared to accept that even though not financially dependent on her sponsor son, the claimant enjoyed ties with him and has family that went beyond the normal emotional ties between an elderly mother/grandmother and her sponsor son/ grandchildren and fall within the scope of Article 8(1). Although we have set aside the decision of the First-tier Tribunal Judge, we consider that in relation to the issue of whether Article 8(1) was engaged he was entitled to attach particular weight to the evidence that the claimant had played a central role in bringing up the two grandchildren (the judge heard evidence about this from one of them). There may have been a two and a half year gap, but it was known she had tried unsuccessfully before to get a visa.

40. Whilst in entry clearance cases it is not to be assumed that there will always be an interference with family life (see e.g. SM and Others (Somalia) [2015] EWCA Civ 233; see also more generally VW (Uganda) (2009) EWCA Civ 5), we are prepared to accept that the decision in this case did interfere in the claimant's right to respect for family life (or, as the Strasbourg Court prefers to describe it in entry clearance cases, did amount to a lack of respect for family life).

41. Regrettably we are wholly unpersuaded, however, that the decision lacked proportionality. Like the ECO, we consider the claimant had not shown she met the requirements of paragraph 41 to show that she intended only a genuine visit. The First-tier Tribunal Judge would appear to have concluded otherwise but gave no or no adequate reasons for adopting that view. In re-making the decision we must now, of course, have regard, inter alia, to the claimant's letter of January 2015. This letter certainly assists us in providing some further details of her family circumstances in India, but it does not persuade us that her family ties in India were as meaningful to her as those with her third son and his children whom she had brought up. (In this regard we would observe that we do not accept Mr Bramble's contention that this further letter casts doubt on whether she had in fact brought up these children, as the reference she makes to having "hardly resided with him" was a reference to the sponsor, who had gone to the UK leaving his children behind; it was not a reference to these two grandchildren.)

42. Given this background, there was a weighty public interest in not permitting the claimant to enter the UK by way of a visit for family purposes. Furthermore, in order to succeed in a claim outside the visitor rules, a claimant must show a particularly pressing need so as to give rise to compelling circumstances justifying a departure from the rules. This is an instance of the operation of the two stage approach: see e.g. SS (Congo). The circumstances identified by Mr Dhanji as arising in the claimant's case, in particular the difficulties in the way of the sponsor son and his family visiting the claimant in India, do not in our judgment amount to compelling circumstances. Indeed, given her age it would if anything appear physically easier for the sponsor son and his family to undertake the

necessary journey than the claimant to travel the other way. Bearing in mind that the claimant has some family ties in India, we do not consider it disproportionate for her connection with her sponsor son and his family in the UK to be maintained by them visiting, even if that cannot be done concurrently. Because the claimant could not show only a genuine visit was intended, she must fail under Article 8(2) no matter how strong her family ties with her sponsor son and his family.

43. Accordingly we conclude that:

The FtT Judge materially erred in law and his decision is set aside.

The decision we re-make is to dismiss the claimant's appeal.

No anonymity direction is made.

Signed Date : 25 August 2015

Upper Tribunal Judge Storey

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[1] This is unlikely to change, despite the introduction on April 24, 2015 of a Home Office guidance note entitled "Considering human rights claims in vi sit applications", Version 1.0 , first of all because this document states that "[t]he starting-point for considering a visit application is that a visit does not generally engage human rights" and secondly because it states that even where a human rights claim is made or accepted as impliedly made, it will only be processed as such if it has prospects of success. Notwithstanding paragraph 2 of the rule s, this document also considers that if entry clearance is granted on the basis of the human rights claim, it will be done "outside the rule s".

[2] See now the new provisions regarding visitors in Appendix V to the Immigration Rules HC 395 (as amended).