Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/21919/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On April 11, 2018	**On April 16, 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

PROSPER [C]
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr Deller, Senior Home Office Presenting Officer
For the Respondent: Mr Chikowore, Sponsor

DECISION AND REASONS

1. I do not make an anonymity direction.

2. The respondent in these proceedings was the appellant before the First-tier Tribunal. From hereon I have referred to the parties as they were in the First-tier Tribunal so that, for example, reference to the respondent is a reference to the Secretary of State for the Home Department.

3. The appellant is a Zimbabwean national. The appellant applied for entry clearance as a visitor to enable him to come and see his uncle who lived in the United Kingdom. His application was refused by the respondent on July 29, 2016. His appeal came before Judge of the First-tier Tribunal Gillespie (hereinafter called "the Judge") on August 23, 2017 and in a decision promulgated on September 4, 2017 the Judge

found that the appellant had satisfied the Immigration Rules and therefore allowed the appeal under article 8 ECHR.

4. The respondent appealed that decision and permission to appeal was granted by Judge of the First-tier Tribunal Grant-Hutchinson on January 12, 2018 on the basis it was arguable the Judge had failed to address the issue of family life and dependency when allowing the appeal under article 8 ECHR.

5. The matter came before me on the above-date. I pointed out to the parties the recent decisions of Secretary of State for the Home Department v Abbas [2017] EWCA Civ 1393 and Secretary of State for the Home Department v Onuorah [2017] EWCA Civ 1757 in which the Court of Appeal unanimously held that short visits to the UK do not engage either family life or private life within the meaning of article 8 ECHR**.** Mr Deller also brought to my attention the case of Baihinga (r.22; human rights appeal: requirements) [2018] UKUT 90 (IAC).

6. At the outset of the hearing Mr Deller invited me to deal with a matter that had not been raised in the grounds of appeal but was a *Robinson* obvious issue.

7. This had been an application for a visit visa and the entry clearance officer had rejected the application. The appellant had appealed that decision and the matter was then referred to a Duty Judge on September 23, 2016. This Judge was asked to consider whether there was a valid appeal because an appeal against a refusal of an entry clearance application would only generate a right of appeal if human rights had been raised at the outset. The Judge considered the application form and directed that this issue should be argued before a Judge at a full hearing.

8. When the matter came before the Judge on August 23, 2017 the issue was not considered. It was therefore a Robinson obvious issue and in those circumstances I allowed Mr Deller to address me not only on the pleaded grounds but also the new ground.

SUBMISSIONS

9. Mr Deller submitted that the Tribunal did not have jurisdiction to hear this appeal because human rights had not been raised in the application. Whilst he acknowledged the application form made reference to the appellant visiting his uncle who suffered from mental health illness he argued that this did not say article 8 was to be argued. The appellant stated he wished to come here to see his uncle and to view the sights. Mr Deller pointed to the recent decision of Baihinga which allows a challenge to a right of appeal at any stage. He submitted that on the totality of the information supplied there was nothing which drew the caseworker's attention to a consideration outside of the Immigration Rules. Nowhere in the refusal letter was human rights mentioned. He submitted that the Tribunal should dismiss the appeal under Rule 22 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014.

10. Mr Deller's second submission concerned the Judge's finding that there was family life. The evidence produced to the Tribunal demonstrated that the appellant kept in touch with his uncle by way of social media but there had been no direct contact

between them since 2011. They were both adults and there was no evidence of any additional support from the appellant which would engage article 8. Even if article 8 had been engaged he submitted that the decision to refuse entry clearance maintained the status quo that had been in existence for over five years. He submitted that the Judge had erred by allowing the appeal primarily on the basis that he was satisfied the Immigration Rules had been met.

11. The sponsor responded to both submissions and submitted that at Q80 of the application form the appellant had raised article 8 and there was a valid appeal. If the Tribunal accepted that there was a valid appeal he submitted that the Judge had not made an error because the Judge had taken into account the fact the uncle could not travel due to his mental health condition and that there was a relationship between the appellant and his uncle. He also argued that the Tribunal was entitled to take into account the family life between the appellant and himself. He urged me not to reverse the decision.

FINDINGS

12. This was an entry clearance application and as I indicated in open court the application form does not specifically ask a person whether they are making a human rights application. Case law and guidance suggests that the entry clearance officer has to look at the substance of the form and decide whether this is a human right application even if those words are not used.

13. The file was highlighted at Arnhem house which is the clearing office for all applications. An issue over validity was marked on the file and when Duty Judge Jones looked at the file he took the view that there was an arguable article 8 claim based on the application form but it was something which should be argued at court. In other words, he did not make a finding there was a valid appeal but left that to the Tribunal to decide. Unfortunately, the issue was not raised at the hearing or considered by the Judge in his determination.

14. I have considered the application form. There was no covering letter with the application form and it therefore follows that unless the form highlights a human rights claim this appeal should be dismissed under Rule 22.

15. At Q74 the appellant stated that his parents were paying for his trip and that he would use his summer holiday to visit his sick uncle. At Q76 he stated that his intention was to visit his sick uncle and to "sightsee". At Q80 he stated that he wanted to visit his uncle and see him as part of therapy to his mental health sickness. He went on to add that his uncle wanted him to come and see him and that this would help him recover.

16. It is a fine line as to what amounts to a human rights claim. There is nothing specifically in the appellant's answers above that suggests this was a human rights application. The application was for a short visit and there was nothing in the application form that explained how the appellant and his uncle enjoyed family life or why a refusal would breach his human rights. It is this latter point that is significant in this case. There are many family visits which start with a similar

application form and whilst I accept there was subsequently evidence before the Tribunal to show contact between the appellant and his uncle I am drawn to the inevitable conclusion that the application form was simply an entry clearance application as against a human rights application. I therefore find the Judge materially erred by finding he had jurisdiction to hear this appeal. The Tribunal had no jurisdiction to hear the appeal.

17. I indicated to the parties that I would consider the substantive grounds of appeal for which permission had been given. The Court of Appeal has given clear guidance on how human rights appeals arising out of entry clearance applications should be handled. Following the decision of Secretary of State for the Home Department v Abbas [2017] EWCA Civ 1393 it seems there are virtually no circumstances where a private life claim will ever succeed. The appeal before the Judge did not involve private life.

18. It is clear from the findings of fact made that the Judge formed the view that the appellant's entry clearance application should have been allowed. The Judge said as much at the beginning of paragraph 10 of his decision. The Judge correctly noted that the only ground of appeal was if the appellant could demonstrate a breach of human rights as distinct from whether the appellant met the requirement of the Rules.

19. Unfortunately, the Judge does not consider or explain how article 8(1) is engaged. The appellant and his uncle had not seen each other since 2011 and whilst they maintained contact through social media and email that had been the extent of their contact. This may well have been in part due to the fact the uncle had mental health issues but the documents did not demonstrate any dependency beyond mere emotional support.

20. In his decision the Judge failed to engage with this issue and only considered the public interest factors and section 117B of the Nationality, Immigration and Asylum Act 2002. Those factors are only relevant when considering the proportionality of the decision. There are a number of steps that must be met before that proportionality assessment is undertaken.

21. The Judge identified the case as an exceptional case but as 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."

22. 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."

23. In other words, the Judge erred by failing to engage with whether there was an article 8(1) right and effectively considered the case simply on proportionality grounds. The Court of Appeal has made clear that family life does not depend on the purpose of the visit. The appellant failed to demonstrate family life existed for the purposes of article 8(1) and a visit of this nature would not allow the appellant to develop family life. In these circumstances the Judge erred in allowing the appeal.

24. It therefore follows that even if this had been a valid appeal I would have found there was a material error and based on the evidence that was presented to the Judge I am satisfied the only outcome would have been a dismissal of the appeal.

25. I should add the fact the Judge accepted the Rules were met may assist the appellant in any future application.

DECISION

26. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law. I set aside the decision.

27. I dismiss the appeal for want of jurisdiction under Rule 22 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 and direct that no further action be taken on this appeal.

Signed Date 22/03/2018

Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT
FEE AWARD

I do not make a fee award because I have dismissed the appeal.

Signed Date 22/03/2018

Deputy Upper Tribunal Judge Alis