



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2023-002510

First-tier Tribunal No:
HU/57668/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 13th of October 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE JARVIS

Between

ROSE OSAYI
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A. Kashiva, Counsel instructed by JF Law Solicitors
For the Respondent: Mr N. Wain, Senior Home Office Presenting Officer

Heard at Field House on 12 September 2023

DECISION AND REASONS

Introduction

1. The Appellant appeals the decision of Judge L Mensah (hereafter “the Judge”) promulgated on 6 June 2023; permission having been given by Judge LK Gibbs on 10 July 2023 with no limitation upon the Grounds.

The relevant background

2. This is ultimately an appeal under Article 8 ECHR on the basis of the Appellant’s family life with her Sponsor. At the First-tier Tribunal hearing, the

Appellant was represented but there was no attendance by a representative on behalf of the Respondent.

3. At para. 2 of the judgment, the Judge observed that the Respondent's refusal letter did not deal with the financial eligibility component of Appendix FM of the Rules. The Judge put this deficiency in the refusal to the Appellant's representative who did not ask for an adjournment and whom appears not to have provided much assistance to the Judge by simply deferring to her reading of the relevant guidance.
4. At paras. 6 - 8, the Judge made a number of findings about the Sponsor's financial position including his federal pension from Belgium but concluded that the financial evidence did not meet the specific requirements of Appendix FM read with the documentary evidential requirements in Appendix FM-SE.
5. The Judge also observed in the decision (but does not appear to have put this to the Appellant's representative) that the Respondent was also silent about whether or not the Appellant met the English language requirements of the eligibility criteria in Appendix FM, see para. 5.
6. At para. 8, the Judge concluded that the Appellant had not established that she meets the requirements of the financial or English eligibility components of Appendix FM.
7. The Judge also concluded that the overall evidence in respect of the Sponsor's circumstances in the UK, including the fact that he has previously had five strokes and an aneurysm, were insufficient to establish that there would be insurmountable obstacles to the parties continuing their family life in Nigeria (para. 12).
8. The Judge also concluded that there were no exceptional circumstances outside of the Rules including the application of s. 117B of the NIAA 2002 (para. 14). She also found that there were no very significant obstacles to the Appellant reconstituting her private life in Nigeria, applying 276ADE(1) (vi) of the Rules (para. 15).

The Appellant's Grounds

9. The Appellant asserts that by taking points which were not in the refusal letter, the Judge unlawfully *entered the arena* and therefore acted procedurally unfairly.
10. The Appellant has also criticised the Judge's findings in respect of insurmountable obstacles, exceptional circumstances and very significant obstacles.

Findings and reasons

11. In coming to my conclusions, I confirm I have not been influenced by Judge Gibbs' apparent finding that there had been procedural unfairness in the First-tier hearing in her second para. 2. I have proceeded solely on her conclusion that the Grounds were arguable.

Procedural fairness

12. I have had sight of the authorities which deal with the 'Surendran guidelines', as summarised in WN (Surendran; credibility; new evidence) Democratic Republic of Congo [2004] UKIAT 00213. I proceed on the basis that they are not rules as such and that everything will depend upon the facts of the case.
13. I firstly find that there was no procedural unfairness in the Judge raising the issue of the financial requirements in Appendix FM at the outset of the hearing with the Appellant's representative. Simply put, if the representative felt that the Appellant was disadvantaged by this preliminary issue he should have objected or asked for an adjournment if the full documentary financial evidence was not available. Instead he simply deferred to the Judge's reading of the evidence and the relevant requirements.
14. Secondly, in respect of the issue of the Appellant's English language ability, I find that this point was not expressly raised in the refusal and I accept it was also not put to the representative or Appellant by the Judge. The issue was also not raised in the Respondent's review.
15. Applying WN, I find that the issue of the English language requirement should have been put to the Appellant at the hearing. I also note that there is no indication that the Appellant needed the assistance of an interpreter at the hearing when giving oral evidence (para. 3) and the Judge found that she and the Sponsor communicate in English (para. 9).
16. In reality the Upper Tribunal has not been particularly assisted by the absence of any submission from the Appellant about her actual compliance with the English language requirement but nonetheless, applying SH (Afghanistan) v Secretary of State for the Home Department [2011] EWCA Civ 1284 at para. 15, I have concluded that the Judge's failure to put the point to the Appellant under these circumstances does amount to procedural unfairness. Whilst there were numerous other issues to be considered, I find that the Appellant's English language ability was still a relevant part of the insurmountable obstacles and exceptional circumstances tests. This is additionally emphasised by its inclusion as a mandatory statutory criteria in s. 117B(2) of the NIAA 2002.
17. I have therefore concluded that the procedural unfairness does infect the Judge's other core conclusions in respect of the *partner route* in Appendix FM and GEN.3.2.

Notice of Decision

18. On that basis I find that the Judge's decision should be set aside in its entirety.

DIRECTIONS

The parties indicated that the remaking of the appeal should be held in the Upper Tribunal but I have decided that, due to the complete fact-finding which is required and the presence of procedural unfairness, the matter should be remitted to the First- Tribunal to be heard by a Judge other than Judge L Mensah.

I P Jarvis

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

20 September 2023