



**IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER**

Case No: UI-2024-001954

First-tier Tribunal Nos:
HU/59651/2023
LH/02219/2024

THE IMMIGRATION ACTS

**Decision & Reasons Issued:
On the 22 October 2024**

Before

UPPER TRIBUNAL JUDGE MAHMOOD

Between

**AM
(ANONYMITY ORDER MADE)**

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Sponsor (as a litigant in person)

For the Respondent: Ms R Arif, Senior Home Office Presenting Officer

Heard at Birmingham Civil Justice Centre on 15 October 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. This is my oral decision which I delivered at the hearing today.

Introduction and Procedural History

2. The Appellant appeals with permission against the decision of First-tier Tribunal Judge Aziz (“the Judge”), dated 5 April 2024, whereby he had refused the Appellant’s application for leave to remain as a child of Mr Abdulrazaq Awofeso. Mr Awofeso is the sponsor. At that time, Mr Awofeso had limited leave to remain in the United Kingdom.
3. As can be seen from the Judge’s decision, he had considered the documents, and he had invited Mr Awofeso to go through his arguments slowly and in some detail because Mr Awofeso had failed to provide a written statement. The Judge set out his findings of fact over several paragraphs at 11 to 17. This included eight subparagraphs to paragraph 11 referring to the background. The Judge noted that the Appellant had arrived in the United Kingdom on 1 January 2023 and when some three weeks later, she had submitted her human rights claim, which was then the subject of the appeal before the Judge.
4. Permission to appeal against Judge Aziz’s decision was granted by First-tier Tribunal Judge Gumsley by way of a decision dated 1 April 2024. Judge Gumsley said it was not an arguable error of law for the First-tier Tribunal Judge to fail to take into account something which was not before him. Judge Gumsley did grant permission to appeal though in respect of section 55 of the Borders, Citizenship and Immigration Act 2009 relating to the safeguarding and promotion of the welfare of the child. Judge Gumsley said that it was arguable that there may be a material error of law in respect of this part of Judge Aziz’s decision because it was not clear if the Judge had had regard to section 55.

The Hearing Before Me

5. I have heard from the Sponsor today and I have taken care to give him an opportunity to say all that he wanted. He had also provided a note in which he said as follows (I have not included the Appellant’s full name):

“I disagree with the tribunal decision because I stated my case and pleaded it be decided on humanitarian grounds that my daughter A** be allowed to remain in the UK. I've proven beyond reasonable doubts that my daughter no longer has a life in South Africa. Magistrate indicated that he didn't see a letter of consent from her mother which was submitted initially, however I shall be attaching it again for your perusal and reference. Her mother is on a contract job where she earns barely enough to survive. She's been retrenched since 2019. There's no one else to look after A** (sic).”
6. Mr Awofeso explained to me in a calm and reasonable way that his daughter was born in 2011. He said she is still a child. He told me that

when his daughter was about 2 or 3 months old, he had to leave her in one African country whilst he went to his own African country. It was then not until 1 January 2023 when he was here in the UK with limited leave to remain that he saw his daughter again, whereby she had come to visit the United Kingdom for a short period of time with the benefit of a visitor visa. The Appellant has remained in the United Kingdom since her arrival.

7. Mr Awofeso also said that he had missed out on the early part of his daughter's life and that the mother cannot look after his daughter's needs financially. The whole matter 'was compounding fear and anxiety', and his daughter was the only source of joy at the moment. He said at that time when the appeal was dismissed previously, he did not have Indefinite Leave to Remain, but he said he now has Indefinite Leave to Remain. He said that the mother has also written a recent letter and indeed the mother had recently visited. I assume Mr Awofeso was referring to a visit by the mother to here in the United Kingdom.
8. After hearing from Ms Arif, Mr Awofeso was invited to respond. He said that 'the reunion was not imminent' and that the reunion did bring back good feelings for him but that the Appellant decided to stay until the mum and the daughter moved in, it was not pre-planned. The mother was 'incapacitated financially' and as a father the only option left to him was to take up that responsibility. He had joy of being a father. Medically he cannot have a child with the woman he is married to now. He said the position in respect of his Indefinite Leave to Remain has changed now and he invited me to decide that he and his daughter can continue to live as a family. He said he now also had a DNA test result, that it was not pre-planned, that he was on a Global Talent Visa as an artist, and life was very uncomfortable for the daughter with nine to a room outside of this country. Mr Awofeso said he has much better amenities here.

Conclusion and Analysis

9. It is important that I set out what can or cannot happen at an appeal. An appeal is not an opportunity to reargue the case that took place at the First-tier Tribunal. An Upper Tribunal Judge cannot interfere with the decision of the First-tier Tribunal just because he or she disagrees with it and just because he or she might have decided the case differently.
10. The Upper Tribunal Judge at the Error of Law stage cannot take into account evidence which was not before the First-tier Tribunal, unless there are very exceptional reasons such as *E and R v Secretary of State for the Home Department* [2004] QB 1044 principles in respect of fresh evidence.
11. Therefore, what I cannot do is to take into account the new information that Mr Awofeso has provided to me today to decide if there is an error of law in the Judge's decision. For example, I cannot take into account, the update in relation to his Indefinite Leave to Remain, the new DNA evidence, the new letters from the mother or even or the recent visits by the mother to the United Kingdom.

12. It is important I set out for Awofeso and for the Appellant that the Court of Appeal in the case of *Volpi v Volpi* [2022] EWCA Civ 464 makes very clear that I must have due regard to the expertise of the First-tier Tribunal.
13. I therefore note that this experienced Judge set out the law in very clear terms at paragraph 10 of his decision. The Judge then correctly referred to the need for consideration of whether there would be unjustifiably harsh consequences as to whether the refusal would be proportionate or not when applying the law to the facts.
14. In my judgment, although the Judge does not specifically refer to section 55 of the Borders, Citizenship and Immigration Act 2009, it is clear from the wording and from the nature of the case that that is something that the Judge clearly had regard to.
15. In particular, the Judge noted that it was just a matter of three weeks or so after the Appellant's arrival in the country that the application to remain was made relying on the Immigration Rules and Article 8.
16. In any event, even if section 55 was required to be referred to specifically, in my judgment any error was not material because ultimately, in this case, the public interest in removal outweighed the findings. The Judge noted at paragraph 17 of his decision and said specifically,

"The public interest in removal outweighs the findings I have made in the appellant's favour. When adopting the balance sheet approach, even if I were to take into account all of the factors relied upon by the appellant, even in those circumstances, I still would not be persuaded that these considerations outweigh the public interest considerations in maintaining immigration control. For these reasons, the appellant's appeal cannot succeed."
17. Therefore, taken at its highest and even when taking everything into account in favour of the Appellant, the appeal still could not succeed. That decision was against a backdrop where the Judge did not in fact accept all of what was being said to him. For example, the Judge specifically referred at paragraph 12 to two aspects of the Sponsor's account which he did not accept. He did not accept the 'moving around' and the background in respect of the claim of there being no pre-planning to get the Appellant to the United Kingdom to make her application for leave to remain.
18. Standing back, making an application three weeks after arrival on a visit visa is not indicative, in my judgment, of the Judge having room for manoeuvre in terms of the consequences which might apply for the Appellant. The Judge also noted the concerns in relation to the Appellant having apparently not seen her father (I do not make any findings as to whether the evidence is satisfactory as to paternity). In my judgment where someone has not seen a person since they were 2 or 3 months of age and then simply meets them over 12 years later, there are many

concerns which call out for assessment in respect of child protection and safeguarding. On any basis, the Judge was entitled to observe such concerns too.

19. In the circumstances, considering the test which the Appellant has to meet to show a material error of law as explained by the Court of Appeal in *R (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982; [2005] INLR 733, I conclude that there is no material error of law in the decision of the First-tier Tribunal. In the circumstances the decision of the First-tier Tribunal, which had dismissed the Appellant's appeal, stands.

Notice of Decision

20. There is no error of law in the decision of the First-tier Tribunal.
21. The First-tier Tribunal's decision dismissing the appeal stands.

Abid Mahmood

Judge of the Upper Tribunal
Immigration and Asylum Chamber

15 October 2024