IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-003343, UI-2024-003344
UI-2024-003346, UI-2024-003347

HU/61368/2023, HU/61264/2023
HU/61265/2023, HU/61369/2023

LH/00816/2024, LH/00949/2024
LH/00950/2024, LH/00952/2024

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 14th October 2024

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Entry Clearance Officer

Appellant

and

Patricia Omon Akhiwu
Henry Odiou Akhiwu
Mariah Eghoughou Akhiwu
Harry Akhere Akhiwu
(no anonymity order made)

Respondent

Representation:

For the Appellant: Mr Habtemariam, Immigration Advisory Service
For the Respondent: Ms Lecointe, Senior Home Office Presenting Officer

Heard at Field House on 1 October 2024

DECISION AND REASONS

1. The Respondents are all Nigerian nationals and are members of the same family. They are respectively a mother and her three children. They seek leave to enter the United Kingdom in order to settle here with their Sponsor, Mr Emmanuel Iredia Akhiwu. Mr Akhiwu is the husband of the First Respondent, and the father of the children. On the 3rd June 2024 the First-tier Tribunal (Judge

Jepson) allowed their linked appeals on human rights grounds. The Secretary of State (acting here on behalf of an Entry Clearance Officer), now has permission to appeal to this Tribunal.

Background and Matters in Issue

2. Mr Akhiwu is a British citizen. On the 22nd March 2023 his wife and children made applications for entry clearance to join him here in the UK. In support of those applications Mr Akhiwu provided evidence of their relationships, ie marriage and birth certificates, and documents relating to his employment in the UK. He asserted that he had two jobs, one for G4S, and one with a company called Elmerito. He relied on the joint income from these two jobs in order to show that his family met the financial requirements set out in Appendix FM of the Immigration Rules.

3. The applications were refused on the 31st August 2023. The Entry Clearance Officer (ECO) accepted that the relationships were as claimed. Entry clearance was however refused because of two issues arising from the financial documents. First, the ECO was not satisfied that the letter purporting to be from Elmerito, to confirm the Sponsor's employment there, was genuine. This was because verification checks had shown that HMRC had no record of tax having been paid for the Sponsor's employment there during the relevant period. The applications were therefore refused on suitability grounds. Further and in the alternative, even if the employment were genuine, the Sponsor had failed to supply payslips in respect of the Elmerito job, and the applications therefore fell to be refused with reference to the 'specified evidence' requirements set out in Appendix FM-SE.

4. When the matter came before the First-tier Tribunal the Sponsor gave oral evidence. In a detailed and balanced review of the materials before it the Tribunal concluded that it had not been proven that the applications fell to be refused on suitability grounds. If Elmerito had failed to pay tax for their employment of the Sponsor, that was no fault of the Respondents: Fatima v Secretary of State for the Home Department [2022] UKUT 155 applied. By her grounds of appeal dated 10th June 2024 the Secretary of State took issue with this conclusion, but she was refused permission to argue this ground by First-tier Tribunal Judge Curtis on the 17th June 2024 and no application has been made to renew the application for permission. The finding of the First-tier Tribunal that the applications were wrongly refused on suitability grounds is therefore undisturbed.

5. The First-tier Tribunal was satisfied that the Sponsor works for G4S, and that all the specific evidence relating to this employment has been supplied. His annual salary from this employment in the relevant period was £25,668. This fell short of the required minimum income of £27,200 that would enable his wife and children to meet the requirements of the rules. That was why he relied on the additional income from Elmerito. The Tribunal accepted that the Sponsor was employed there as claimed, but it was common ground that in the absence of payslips, this income could not meet the specified evidence rules and the Entry Clearance Officer was therefore entitled to refuse the applications with reference to the Immigration Rules. The decision reached the same conclusion in respect of evidence produced in respect of a third job, albeit for the different reason that these payslips had not been shown to the ECO on application.

6. The Tribunal went on to consider whether the decision was an unlawful interference with this Article 8 family life. It repeatedly directed itself that an appeal cannot be allowed on Article 8 grounds simply because there is only a 'near miss' under the Rules [at §61 and 66]. It directed itself to consider the public interest in refusing those who are unable to meet the requirements of the rules [§57, §62, §63] and to the established jurisprudence that Article 8 does not permit families to choose which country they live in [§58]:

> "There can have been no expectation of automatic entitlement to live in this country on embarking on a relationship or having children".

The decision further recognises that family life is currently subsisting on the basis of the family being split, via modern means of communication [§59] and that the Sponsor's absence from their day to day lives is not said to have placed them in any peril or destitution [§59]: the decision simply maintains the status quo as far as the children are concerned. The Tribunal notes that the relationship began when the Sponsor's immigration status in the UK was precarious and that there can have been no expectation of family life being pursued here [§66].

7. Against those factors militating in favour of dismissing the appeal, the Tribunal recognised the argument that it would be unreasonable to expect Mr Akhiwu to relocate to Nigeria, thereby giving up the employment that supports the family [§58], and importantly, the best interests of the children in being reunited with their father [§66]. Further the Tribunal recognised that the sole reason that this family have not qualified for entry under Appendix FM is for a matter outside their control, namely the failure of the Sponsor's employer to pass on to HMRC the tax it deducted from his wages, and to properly issue him with payslips.

8. Weighing all of these competing factors in the balance the Tribunal reaches the "finely-balanced" conclusion that the appeals should be allowed on the grounds that the continuing refusal to admit them would be disproportionate.

9. The ECO has permission to argue that this reasoning falls to be set aside for two reasons. The first concerns the requirement that the decision amount to an *interference* with family life:

> "it is submitted that the FTTJ has failed to give adequate reasons for allowing the appeal on Article 8 grounds when there are inadequate reasons for finding that the respondent's decision amount to an interference with family life. The sponsor has maintained family life despite living in the UK and never having lived with his family for any significant period of time, the respondent's decision in no way interferes with the way the appellant has chosen to conduct his family life. It is submitted that family life may continue through visits and modern means of communication, indeed the FTTJ acknowledges that this has been the case and that the sponsor's absence has resulted in no detriment to the appellants".

10. The second addresses the Tribunal's analysis of proportionality:

> "While the FTTJ claims otherwise at [66], it is submitted they have in effect allowed the appeal on the basis of a 'near miss' in accepting evidence that postdates the application [63] as part of

> the proportionality assessment. Furthermore, the FTTJ has failed to take the public interest in maintaining an effective immigration control or the protection of the public purse into adequate account as required by s.117B of the Nationality, Immigration and Asylum Act 2002".

11. Before me Ms Lecointe adopted and expanded on these written grounds. Mr Habtemariam defended the Tribunal's decision, submitting that the grounds upon which permission was granted were in reality no more than a disagreement with the outcome. He submitted that in fact the Tribunal had conducted a careful analysis, balancing factors for and against the Respondents' cases.

Discussion and Findings

12. I deal first with the matter of interference. This was an entry clearance appeal, and as the Tribunal rightly observed, the parties are not currently living together. The Secretary of State submits, on behalf of the Entry Clearance Officer, that there is therefore be no interference arising from the decision.

13. I can deal with this shortly. It is apparent from the pre-hearing review, and the First-tier Tribunal's summation of the ECO's case [at its §§23-29], that this argument was not advanced before it appeared in the grounds of appeal. Before the Tribunal the ECO appeared to accept that the decision would amount to enough of an interference to engage Article 8, since his entire case was predicated on submissions about proportionality. This is no doubt because the ECO understood himself bound by longstanding authority. As long ago as ECO Dhaka v Shamim Box [2002] UKIAT 002212 the Tribunal held, applying Strasbourg jurisprudence, that there is a positive obligation upon the signatory state to facilitate family reunification. The focus, in entry cases, is that obligation to 'show respect for' a family life. More recent authorities remind us that although the jurisdiction of the Human Rights Convention is primarily territorial, family life is unitary in nature. The consequence of that is that the interference with the family life of one – here Mr Akhiwu - is an interference with the rights of all those within the ambit of the family whose rights are engaged: see SSHD v Abbas [2017] EWCA Civ 1393, Al-Hassan (Article 8 – entry clearance – KF (Syria) [2024] UKUT 00234 (IAC). It is, further, perhaps evident from the existence of the appeal right that, as a matter of law, decisions to refuse entry clearance are capable of interfering with family life. I therefore find no merit in ground 1.

14. There are two limbs to ground 2. The first is that the First-tier Tribunal has in effect allowed these appeals because they are a 'near miss', the only failing being the absence of the payslips proving a job that is accepted to exist. The second is that the Tribunal fails to have regard to the public interest consideration at s117B(1) Nationality Immigration and Asylum Act 2002.

15. As the grounds acknowledge, it cannot be said that the Tribunal was not alive to the danger of a 'near miss' conclusion: it repeatedly directs itself to the settled legal position that Article 8 appeals cannot be allowed simply on the basis that the claimant nearly met the requirements of the rules. The case is nevertheless put before me that this is precisely what the Tribunal has done.

16. I must read the decision as a whole. The Tribunal repeatedly returns, it is true, to the fact that these appellants failed to meet the requirements of the rules

because the second of Mr Akhiwu's employers had failed to meet their obligations towards him and HMRC: but for their failure to pay Mr Akhiwu's tax (deducted as PAYE), and to issue him with payslips, the financial requirements of the rules would have been met and the family would be together today. The Tribunal was entitled, in the scope of a human rights appeal, to have regard to the evidence at the date of the hearing, and it was satisfied that as a matter of fact this was a family who would be financially self sufficient with no reliance upon the state. That is not however the only finding that the Tribunal makes. It also places "some value" on the relationship between Mr Akhiwu and his wife, and crucially, to the fact that it would be in the best interests of the children that they be with their father as well as their mother. This, it seems to me, is an entirely uncontroversial conclusion. The general proposition that it is the best interests of children to live with both parents (absent some particular risk of harm) has been a long standing driver of government policy. The Tribunal was obviously entitled to give that matter weight. In Zoumbas v SSHD [2023] UKSC 74 the Supreme Court held that although the best interests of a child can certainly be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant. It was in my view a consideration rationally capable of tipping the balance in the claimants' favour. I do not therefore accept that the 'near miss' under the rules was the only matter weighed in the balance.

17. As for the contention that the Tribunal has failed to have regard to the public interest in refusing leave to persons who cannot meet the requirements of the rules, this is simply unarguable. That is because the Tribunal emphasises this matter throughout its own reasoning. At §57:

> "Balanced against that factor is the inability of the Appellants to meet the Rules. That must also bear significant weight. There is a clear public interest in effective immigration control".

And at §61:

> "again I remind myself there is no 'near-miss' principle. One either meets the Rules or not".

And at §62:

> "Taken to its logical conclusion, any appellant could suggest they almost met the Rules and thus gain entry via Article 8. Immigration control remains a matter in which there will typically be a considerable public interest. Failure to satisfy the Rules in full is an important component of that".

And at §63:

> "Mr. Habtemarian depicts the appeal in these terms – that the Respondent is arguing because the sponsor (or rather Elmerito) did not pay taxes the family should not be reunited. It is not in my view quite so simple. Irrespective of that point, which I do not ignore, there remains the fact the Rules have not been satisfied. That the sponsor now has another job can play a part in any overall consideration of proportionality, but the fact remains the Rules were not met at the relevant time".

And at §66:

> "A legitimate public interest lies in immigration control, specifically the weight given where the Rules cannot be met".

18. I therefore find no merit in the grounds as argued and the appeal is dismissed.

Decisions

19. The appeal is dismissed: the decision of the First-tier Tribunal to allow the appeals is upheld.

20. I have not been asked to make an order for anonymity and on the facts, I see no reason to do so.

Upper Tribunal Judge Bruce
Immigration and Asylum Chamber
12th October 2024