Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2024-004863
First-tier Tribunal Number: HU/52884/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued

On 23rd of January 2025

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

JANNET KAMARA
(Anonymity order not made)

Appellant

and

ENTRY CLEARANCE OFFICER - SHEFFIELD

Respondent

Representation:

For the Appellant: Mr P Richardson, Counsel
For the Respondent: Ms J Isherwood, Home Office Presenting Officer

DECISION AND REASONS

Heard at Field House on 13 January 2025

The Appellant

1. The appellant is a citizen of Sierra Leone, born on 17 November 1996. She appeals against a decision of Judge of the First-tier Tribunal Farrall dated 10 August 2024 which dismissed the appellant's appeal against a decision of the respondent dated 8 February 2023. That decision in turn refused the appellant's application dated 14 August 2022 for leave to enter. The appellant wishes to join her husband, Mr Sheriff Dumbuya who is a British citizen ("the sponsor") in the United Kingdom. The couple

have a child, A born 27 April 2021, who is also a British citizen and who presently resides in Sierra Leone with his mother, the appellant.

The Appellant's Case

2. The appellant's case is that she has a family life with her husband and child and the effect of the refusal to grant leave is to disproportionately interfere with that family life. The appellant's application was refused inter alia because the sponsor could not show that he met the financial requirements of appendix . The appellant argues that that was because of ill health at the time on the sponsor's part but that he would be able to work now. Although the sponsor could travel to Sierra Leone to bring A back to the United Kingdom he would not be able to look after A on his own and would require the assistance of the appellant. The effect of the respondent's decision is to cause unjustifiable hardship to each of the family members. A will not be able to have the level of education he could have in the country of his nationality (the United Kingdom).

3. The respondent refused the application because she was not satisfied that the appellant and sponsor met the financial requirements of a partner under paragraph E-ECP.3.1. of Appendix FM of the Immigration Rules. Further the respondent was not satisfied that the appellant could satisfy the English language requirements of the rules. The decision did not breach article 8, in the respondent's view, because the parties could maintain the status quo and their existing relationships.

The Decision at First Instance

4. The judge found that the Sponsor had adequate accommodation to house the Appellant and A however the sponsor could not satisfy the income requirements in the rules. There were several discrepancies in the evidence as identified by the Respondent in her review. There was no independent evidence to support the Sponsor's account of his current employment and earnings with Amazon. In relation to Article 8, the refusal decision adversely interfered with the appellant's right to enjoy an improved family life with the sponsor and A because the Appellant is unable to join the Sponsor in the UK. The Appellant and A have never lived in the UK and are able to enjoy a family life with the Sponsor when he visits (although he has not done so since A was born) and by other means of communication.

5. The refusal decision was proportionate to the need to maintain effective immigration control and other public interest factors. There were no exceptional circumstances that arose in this appeal that were of sufficient weight to outweigh the significant weight of the Immigration Rules not having been met and/or the public interest in maintaining effective immigration control. The judge dismissed the appeal.

The Onward Appeal

6. The appellant appealed against this decision on what were described as four grounds although counsel who appeared before me acknowledged that there was considerable overlap between some of the grounds. Counsel submitted that the judge did not properly assess the exceptional circumstances in the case. She had not considered the context of the sponsor's health condition, which directly impacted his employment history and earnings. She had failed to give due weight to the Sponsor's recent employment or the evidence provided regarding his current income, which was now sufficient to meet the financial requirements under Appendix FM. A's best interests had not been taken properly into account.

7. Permission to appeal was granted by the First-tier Tribunal on the basis that it was arguable that the judge had not made adequate findings on the best interests of A who is currently stuck in Sierra Leone with his mother. There had been a a failure to have regard to the Sponsor's recent ill health. Permission was refused in respect of ground three that the judge had improperly focused on the sponsor's finances at the date of application. That was the correct date to look at potential resources and this approach was supported by the case of **Begum [2021] UKUT 00115.**

The Hearing Before Me

8. In consequence of the grant of permission the matter came before me to determine in the first place where there was a material error of law in the decision of the First-tier Tribunal such that it fell to be set aside. If there was then I would make directions on the rehearing of the appeal. If there was not the decision at first instance would stand.

9. For the appellant counsel relied on his skeleton argument. This stated that the judge ought to have followed (but did not) a structured assessment of Article 8. Even where the financial requirements in the partner route were not met, there remained an ability to succeed under the Rules if paragraph GEN 3.2 of Appendix FM was met. Would there be unjustifiably harsh consequences for an applicant, their partner and/or a relevant child? The judge failed to consider this paragraph. The judge's brief Article 8 reasoning was at [18-20] of the determination. It was inadequate and there was a failure to apply a balance sheet approach.

10. The brief reference to section 55 of the British Citizenship and Immigration Act 2009 was insufficient. The judge failed to assess where the best interests of A lay, the strength of those best interests and the impact on A of being brought up by only one parent in a third world country, rather than by both parents in the country of the child's nationality. In finding that the appellant's husband did not earn enough to meet the financial requirement, the judge failed to have regard to the impact of the sponsor's health on his ability to do so.

11. In oral submissions counsel noted that this was a partial grant of permission to appeal. The judge should have looked at GEN 3.2 and the justifiably harsh consequences for the appellant, the sponsor and their son. The sponsor had been working for many years with some gaps due to the fact that he had had two heart attacks and a stroke. The only basis for the refusal was on the financial requirements not being met. The of article 8 assessment in the determination was extremely brief to the point that it excluded factors which were highly material. For example, the sponsor's evidence was that he had been unable to work because of his health problems. The witness statement of the appellant set out the sponsor's work history and his medical condition. He would be able to work in the future and context was everything. Because the sponsor's health problems were not looked at they were not factored into the Article 8 assessment.

12. The result of the decision was that a British child would be compelled to live outside the United Kingdom with their mother but not their father. The judge had no regard to the authority of **EV Philippines [2014] EWCA Civ 874** in particular paragraph 35 thereof. The judge was required to determine that issue if as here it was to be determined in the appellant's favour. [18] to [20] were not adequately reasoned. There was no balance sheet analysis. The judge failed to list factors and balance them for and against the appellant. At [19] the judge had said that the family could maintain contact by other means of communication but this was not a satisfactory way of promoting article 8 rights. The sponsor had never seen his son. The judge may have recognised that there were scales to be balanced but that was not the same as loading those scales to balance. The judge had said there were no exceptional circumstances without looking at what the circumstances were.

13. In reply the presenting officer said that when the application was made for the naturalisation of A, the sponsor had said he was living with A whereas now it was being said he had never seen A. The sponsor had said that the reference to living with A was a mistake. There was no material error of law in this determination. The appellants argument ignored the case of **SD (British citizen children - entry clearance) Sri Lanka [2020] UKUT 43**. Headnote 4 of that decision states:

    4. In assessing whether refusal to grant a parent entry clearance to join a partner has unjustifiably harsh consequences, the fact that such a parent has a child living with him or her who has British citizenship is a relevant factor. However, the weight to be accorded to such a factor will depend heavily on the particular circumstances and is not necessarily a powerful factor.

14. Thus the weight to be accorded to the fact of a British citizen child depends on all the circumstances, it was not necessarily a powerful factor. Although the appellant relied on GEN 3.2 she did not express

anywhere what the unjustifiably harsh circumstances were in this case that the appellant or anyone else would face. Although it was argued that A was entitled to be educated in the United Kingdom there was nothing about A's circumstances explaining why those circumstances were unjustifiably harsh. An appellant had to say what the unjustifiable harshness was. The burden of proof lay on the appellant and sponsor. The judge did not ignore the sponsor's health. The evidence was in a letter from the hospital and the GP records. They did not show unjustifiable harshness. At [7] the judge set out the legal framework.

15. At [58] the first point was the best interests of the child. The judge had found a number of factors in favour of the appellant. That the sponsor has never seen the child was his choice. He had married the appellant in Sierra Leone. The judge was entitled to say that despite the evidence provided there were no exceptional circumstances in this case.

16. In response counsel argued that the respondent was attempting to rewrite the determination for the judge. We know from the case of **SD** that nationality in itself is of no great importance but conversely it can be of considerable importance if there was relevant evidence before the judge. The sponsor worried about the appellant's safety and A's safety. Things could turn ugly. Every day in Sierra Leone harmed A's chances. The status quo was contrary to A's best interests.

Discussion and Findings

17. In this case the appellant failed to meet the entry requirements because her sponsor, her husband, was unable to show sufficient earnings at the date of application. Permission to appeal as to the date to meet the financial requirements was refused and the point was not pursued before me.

18. At the hearing at first instance, for the appellant to succeed under Article 8 outside the rules she had to show that there would be unjustifiably harsh consequences for the three members of the family occasioned by the refusal. That meant that there had to be evidence put before the judge to show what plausibly could be said to be the risk of unjustifiably harsh consequences.

19. The only circumstance which seems to have been put to the judge (and indeed in submissions to me) was that A would not receive the same level of education in Sierra Leone that he would receive in the United Kingdom. In **EV Philippines** it was noted that that the children in that case would not be without education in the Philippines and the judge was correct to find that although the education would not be as good as in the UK and that secondary education was not free was not determinative. That case concerns the specific situation in another country than Sierra Leone but the principle is applicable in the instant case.

20. Whether the judge should have found that receiving an education in Sierra Leone is unjustifiably harsh for A would depend on a detailed comparison of the type of education A will receive in Sierra Leone as opposed to what A could reasonably be expected to receive in the United Kingdom. It is not at all clear as the respondent submitted to me that there was any such evidence put to the judge to show unjustifiably harsh circumstances in A continuing to be educated in Sierra Leone. The burden of proof lay on the appellant to show this and the judge cannot be criticised for failing to deal with evidence that was not put before her.

21. It is argued for the appellant that the judge did not take into account the context of the sponsor's health problems which led to the gaps in the sponsor's work history which in turn led to the sponsor being unable to meet the financial requirements. To a certain extent there is a contradiction in the appellants case. On the one hand the appellant in her witness statement points to the health difficulties the sponsor has suffered which were of a serious nature including two heart attacks and a stroke. Yet at the same time it is an important part of the appellant's case to say that the sponsor will be able to work in the future notwithstanding those health concerns.

22. Even if the sponsor's health position is now settled and he can work that does not alter the fact that the appellant could not meet the requirements of the rules at the date of application. If however the sponsor is financially eligible now the appellant's remedy is to make a fresh application but not use Article 8 simply to get round the impact of the Rules.

23. The determination was criticised for being too brief and because the judge, it is said, did not carry out the recommended balancing exercise by weighing up factors for and against the appellant. Whilst the determination is concise that is not in itself a valid ground for criticism. The judge was aware of the need for a balancing exercise to be carried out, see [20]. At [18] she set out the principal factor in favour of the appellant namely that the decision adversely affected the ability of the appellant to live an improved family life. At [19] she set out a factor on the respondent's side of the balance sheet, that family life could continue as at present. There is no specific mention of the unjustifiable hardship points at [20] because as the judge points out in that paragraph such evidence was not presented to her to support that argument.

24. It is difficult to see how the preservation of the status quo (the effect of the decision in this case) results in unjustifiably harsh circumstances such that the appellant can succeed outside the rules. As the respondent pointed out it is the sponsor's choice not to have travelled to Sierra Leone to see his son or indeed spend time with the appellant and A as a family. The sponsor's lack of intervening devotion as far as his son is concerned is not a factor that strengthens the appellant's case but rather the opposite.

25. The criticisms made of the judge’s determination in this case amount to no more than a mere disagreement with the result. It is difficult to see how the sponsor’s problems in his work history caused by ill health is an unjustifiably harsh consequence. Inevitably to determine that issue one has to look into the future to see what may happen but as was pointed out such evidence was simply not there before the judge. The appellant's remedy is to make a fresh application to show this time why she is within the rules but that is a matter for her. I do not consider that there are any material errors of law in the determination of the First-tier and I dismiss the onward appeal against that determination.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold the decision to dismiss the Appellant’s appeal.

Appellant’s appeal dismissed

Signed this 17th day of January 2025

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Judge Woodcraft
Deputy Upper Tribunal Judge