Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/17096/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25 February 2019	**On 28 February 2019**

Before

Deputy Upper Tribunal Judge Pickup

Between

Jennifer Ayanty Pagel
[No anonymity direction made]

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the appellant: Mr M Jaufurally, instructed by Callistes Solicitors
For the respondent: Mr L Tarlow, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the appellant's appeal against the decision of First-tier Tribunal Judge Clarke promulgated 7.12.18, dismissing her appeal against the decision of the Secretary of State, dated 24.11.17, to refuse her application made on 13.6.17 for entry clearance on the basis of family life with her sponsoring partner settled in the UK, Mr Jonathan Francis Pagel, following their marriage in Jamaica on 8.4.17.

2. The application was refused on suitability grounds, the appellant having pervious overstayed in the UK by a very considerable period. Further, the appellant failed to

provide with the application all documents required under the specified evidence requirements of Appendix FM-SE.

3. Reliance was also made in the refusal decision on failure to pay for NHS treatment but in the Entry Clearance Manager Review, this point was conceded by the respondent and was not relevant to the appeal, as Judge Clarke accepted.

4. First-tier Tribunal Judge Osborne granted permission to appeal on 25.1.19, finding it arguable that the decision failed to address the best interests of the relevant child and also failed to give consideration to GEN 3.2 of Appendix FM. Permission was granted on all grounds raised in the application for permission to appeal.

Error of Law

5. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the decision of Judge Clarke should be set aside.

6. It is common ground that the decision of the First-tier Tribunal does not specifically address the best interests of the appellant's child by a previous relationship pursuant to Section 55 of the Borders, Citizenship and Immigration Act 2009. Mr Tarlow agreed that he could not identify where that consideration had been made but submitted that in the circumstances of the decision as a whole neither that issue nor consideration of GEN 3.2 could have made any material difference to the outcome of the appeal.

Appendix FM-SE Specified Evidence

7. It was Mr Jaufurally's submission that the sponsor's business was not one within the definition of paragraph 9(a) of Appendix FM-SE, an argument advanced in the grounds. Judge Clarke dealt with this issue at [22] and [23] of the decision, considering paragraph 9, finding that the appellant's business was of a type defined in 9(a) and thus that he should have submitted with the application dividend vouchers, as required in 9(d), but failed to do so.

8. Mr Jaufurally's argument on this issue has no merit. He submitted that as the sponsor held all the shares in the business and there were no remaining shares held by fewer than five others, the business did not come within the definition of 9(a). This was patently wrong, as the requirement, inter alia, is for the person to be a director of the company and for shares to be held (directly or indirectly) by that person, their partner or one or more of the listed family members, and that "any remaining shares" are held by fewer than five persons. The use of the word "any" does not require the business to have shares held by others, it means that if there are any shares held by others from than those in list of family members there must be no more than five of these others. It is nonsense to suggest that the definition requires shares to be held by others.

Discretion under Appendix FM-SE

9. In the alternative, Mr Jaufurally submitted that if dividend vouchers were in fact required, the Secretary of State should have applied its general discretion under paragraph D of Appendix FM-SE to either disapply the requirement or to request the missing documents from the appellant and that the Secretary of State having failed to do so, the Judge should have exercised the discretion. However, these provisions explain that missing documents will not be requested where the application is being refused for other reasons so that the missing documents would have made no material difference. As the refusal decision explained, the application was also refused on suitability grounds, the appellant having overstayed between 2011 and 2017, when she returned to Jamaica. In the circumstances, there is no merit in this ground of appeal.

10. In the alternative, it was submitted in more general terms that as the judge was satisfied at [21] of the decision that the sponsor's income exceeded the threshold of £18,600. However, the requirement is for the requirements to be met at the date of the application, including the specified evidence. There is no reason why the appellant should be enabled to short-circuit the requirements of the Rules. The whole facts and circumstances were considered in the judge's outside the Rules consideration and cogent reasons provided for finding the refusal decision proportionate. There is no merit in this ground of appeal.

11. The strongest point which the grounds raise in the appellant's favour is the omission of reference to the best interests of a relevant child pursuant to Section 55 of the Borders, Citizenship and Immigration Act 2009 and consideration of GEN 3.2 of Appendix FM.

12. The application at paragraph 97 mentioned that the appellant was anxious to join the sponsor and her minor step-daughter in the UK "as we have established effective family life together."The child in question is the sponsor's daughter from a previous relationship. I was told that the child's mother now lives in the USA and that the sponsor is the primary carer of this child. This is also mentioned at [21] of the sponsor's witness statement of 4.11.18, where it is explained that the daughter moved in to live with the appellant and the sponsor in 2016 and had allegedly established a special bond with the appellant whilst she was in the UK until her return to Jamaica in 2017. The period of cohabitation was therefore something less than two years.

13. However, it is far from clear that reliance on the appellant's relationship with the sponsor's daughter was ever raised as an issue in the First-tier Tribunal appeal hearing. Mr Jaufurally was unable to confirm that it was and could only point to those brief references in the application form and the sponsor's witness statement set out above. It follows that there was no evidence before the tribunal as to the circumstances or strength of this relationship of a relatively short duration. At [38] of the decision the judge commented that there was no qualifying child to consider. As an aside, if a minor child is relevant, then the minimum income threshold may well be more than £18,600.

14. From the above, I am satisfied that this issue of a relationship between the appellant and a step-child was not raised with the tribunal. It is also obvious that had the best interests of the child been addressed, the tribunal would surely have found that they were to remain with her father, whether that was in the UK or Jamaica. The judge found that there were no insurmountable obstacles to continuing family life in Jamaica or that would render the refusal of entry clearance unjustifiably harsh. Nothing in the evidence was presented to suggest that it would be unreasonable to expect the child to accompany the sponsor to Jamaica if he decided to continue family life there with the appellant. The judge can hardly be criticised when this issue was never raised as a live issue in the appeal hearing and only raise, rather in desperation, in the grounds of application for permission to appeal to the Upper Tribunal.

15. Further, it is obvious that the relationship with the sponsor was entered into in entirely precarious circumstances and pursuant to R (on the applications of Agyarko and Ikuga) v Secretary of State for the Home Department [2017] UKSC 11 there would have to be very compelling circumstances, to, exceptionally, justify granting entry clearance outside the Rules. The judge explained that the decision merely maintained the status quo and the sponsor could continue to financially support the appellant whilst she made a fresh application for entry clearance. GEN 3.2 adds nothing more to Agyarko in the circumstances.

16. On the facts of this case, I find that specific consideration to the best interests of the appellant's step daughter could have added little to those matters raised in the First-tier Tribunal appeal. I am not satisfied that it would or could have made any material difference to the outcome of the appeal. In the circumstances, the appeal to the Upper Tribunal cannot succeed.

Decision

17. The making of the decision of the First-tier Tribunal did not involve the making of an error on a material point of law such that the decision should be set aside.

18. I make it clear that even if there was an error of law requiring the decision to be set aside and remade in order to consider the impact of the best interests of the child pursuant to s55, on the facts and circumstances I would have remade the decision by dismissing it even after taking into account Section 55 of the Borders, Citizenship and Immigration Act 2009 and GEN 3.2, for the reasons set out above.

I do not set aside the decision.

The decision of the First-tier Tribunal stands and the appeal remains dismissed.

Signed *DMW Pickup*

Deputy Upper Tribunal Judge Pickup

Dated

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 13(1) of the Tribunal Procedure Rules 2014.

Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award pursuant to section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007.

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The appeal has been dismissed so there can be no fee award.

Signed *DMW Pickup*
Deputy Upper Tribunal Judge Pickup
Dated