Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/01935/2020

THE IMMIGRATION ACTS

Heard at Field House via Microsoft Teams	**Decision & Reasons Promulgated**
On 4 June 2021	**On 09 July 2021**

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

JUDE MAKPA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms J Isherwood, Senior Home Office Presenting Officer
For the Respondent: Mr S Nwaekwu of Moorehouse Solicitors

DECISION AND REASONS

1. The Secretary of State appeals with permission to the Upper Tribunal against the decision of the Judge of the First-tier Tribunal who allowed the appeal of Mr Makpa against the Secretary of State's decision of 24 September 2019 refusing his application

for entry clearance as the spouse of his wife, who is present and settled in the United Kingdom, having been naturalised, with the couple's four children, who are also British citizens.

2. I shall refer hereafter to the Secretary of State as the respondent, as she was before the judge, and to Mr Makpa as the appellant, as he was before the judge.

3. The basis of the respondent's decision was that the appellant failed to meet the financial eligibility requirements of Appendix FM of the Immigration Rules. In particular there was no evidence provided that his sponsor and wife had a gross income of £18,600. The self-employment documentation submitted did not meet the requirements of the Rules in respect of cash savings as there was a failure to provide evidence of savings held for at least six months of at least £62,500 in the form specified by paragraph 11 of Appendix FM-SE. In addition the respondent was not satisfied that there were exceptional circumstances which would render refusal a breach of the appellant's rights under Article 8 of the European Convention on Human Rights.

4. As noted by the judge at paragraph 6 of the decision, the appellant's position was that there was no documentation relating to the sponsor as she did not do sufficient work due to childcare commitments. The documentation relating to savings did not meet the requirements of the Rules, but the refusal would breach Article 8 as it would result in unjustifiably harsh consequence for the appellant and his family. Consequently, it was argued, the judge was required to take a more flexible approach to the financial information provided pursuant to paragraph 21A of Appendix FM-SE, which allowed the judge to assess whether the minimum income requirement could be met through any other credible and reliable source of income, financial support or funds available to the couple.

5. The judge concluded that there were exceptional circumstances so that the refusal to allow the application breached the appellant and his family's Article 8 rights because the refusal resulted and continued to result in unduly harsh consequences for the appellant, the children and the sponsor. The judge said that she heard extensive and compelling evidence during the hearing on the impact of the continued separation in particular on the children, which is significant. The children had spent their whole life in the United Kingdom and had been to Nigeria on a few occasions for short visits but had never lived there. The judge said that she was satisfied, given the children's life in the United Kingdom, on which she heard evidence regarding friends and schooling, that requiring them to relocate permanently to Nigeria, where they had never lived, would not promote their welfare or be in their best interests and would be disproportionate. She considered this fact against the public interest in maintaining immigration control when considering proportionality.

6. The judge considered the evidence at the date of decision and found that the savings combined with the money available to the appellant and the sponsor and the business account alone accounted for roughly £64,000. (It would appear that this is a

combination of bank statements showing a balance to the equivalent of £39,000 in a savings account and the equivalent of some £24,000 showing self-employment income in a business account.) The judge said that this did not take into account the income shown in the accounts. The money in the business account did fluctuate but at the date of application the bank statements showed that for a period of time sufficient funds are available when combined with the savings to get over the savings threshold. The judge said she was entitled to take into account any other credible and reliable source of income available at the date of application to the appellant and the sponsor. There was income from self-employment clearly available at the date of the application. She found that the documents were credible and reliable.

7. She concluded at the date of the application the appellant met the requirements of the Rules. Paragraph 21A of Appendix FM-SE read with GEN.3.2. If the appellant were not granted entry his British citizen children and wife would not relocate to Nigeria. The family would be permanently separated. There would be an unjustifiably harsh consequence that would have a continuing devastating impact on the appellant's children in particular. The appellant had satisfied her that he had a successful business in Nigeria and that he would likely continue with this or a similar business in the United Kingdom. The judge concluded that the refusal to grant entry was an interference with the appellant's family life in the United Kingdom and that of his partner and children that was disproportionate, having regard to the public interest in immigration control and in the alternative that there were exceptional circumstances rendering refusal of leave a breach of the family's Article 8 rights. The consequences of a refusal of leave would cause very substantial difficulties and unduly harsh consequences when balanced against the strength of public interest in immigration control.

8. The appeal having been allowed, the respondent sought and was granted permission to appeal on the basis that the judge was only entitled to take other sources of income into account where there were truly exceptional circumstances, and no such exceptional circumstances had been identified. It was argued that the decision was proportionate. In her submissions Ms Isherwood adopted and developed the points made in the grounds. It was accepted that the appellant did not meet the financial requirements via the required evidence. It had not been explained why the appellant wanted to rely on the other evidence of self-employment and the judge had not shown why the requirements of the Rules could not be met as self-employment was allowed. In the refusal letter it was accepted that there was £25,000 of income but the judge referred to more and ignored the accepted point in the refusal letter. There was little evidence provided. It was unclear how the judge had arrived at the figure of £64,000 equivalent, at paragraph 20 of the decision. Article 8 did not exist to enable a person to chose where they wanted to spend their family life. It had to be compelling and that was not the case here. The evidence with regard to the children did not make out the necessary exceptional circumstances. The fact that the sponsor would not go back to Nigeria, having been naturalised, was a matter of choice just as had been made some years earlier. The decision lacked reasoning.

9. In his submissions Mr Nwaekwu argued that the judge had provided a reasoned decision especially at paragraph 19 and paragraph 20 and made adequate findings about exceptional circumstances which had been found to exist and this was on the basis of hearing the oral evidence of the appellant and the sponsor. The judge had reached findings on GEN.3.2 and the fact that paragraph 21A requirements were met. It was found at paragraph 20 that the appellant met the requirements of the Rules at the date of the application. The respondent did not properly consider paragraph 21A and hence the judge had done so and found that the requirements were met. The challenge sought to relitigate or reargue the case. The findings on proportionality were adequate as the decision was to be read as a whole. The judge had heard sufficient oral evidence about the children and the circumstances when they were separated from their father at a time when they needed him in their lives. Exceptional circumstances had been found to exist and it was a reasoned decision and there was no error of law.

10. Ms Isherwood had no points to make by way of reply.

Discussion

11. The application was refused on the basis that the appellant could not meet the financial requirements under EC-ECP.3.1 to 3.4 as there was no evidence that his wife and the sponsor had income of £18,600 a year, and the self-employment documentation did not meet the Rules in respect of cash savings that there had been a failure to provide evidence of savings held for at least six months of at least £62,500.

12. The judge at paragraph 10 of her decision noted that it was accepted by the appellant that he had not submitted documents that satisfied the main requirements of the Rules. She allowed the appeal however on the basis that under paragraph 21A of Appendix FM-SE it was possible to take into account any other credible and reliable source of income or funds for the applicant or their partner, which is available to them at the date of application or which will become available to them during the period of limited leave applied for and in circumstances where at GEN.3.2 there would be unjustifiably harsh consequences.

13. The difficulty as I see it with the judge's decision, is that when she was considering the evidence, she said no more, at paragraph 19, with regard to the children that they are British citizens and have spent their whole life in the United Kingdom, had been to Nigeria on a few occasions for short visits and that given their life in the United Kingdom on which she said she heard evidence regarding friends and schooling, that requiring them to relocate permanently to Nigeria, where they had never lived. would not promote their welfare or be in their best interests and would be disproportionate.

14. That however in my view falls short of enabling a proper finding to be made that the consequences would be unjustifiably harsh. In effect the judge described no more

than the ongoing circumstances of the family separation, and referred to no evidence which showed that there would be a continuing devastating impact on the children in particular, to which she referred at paragraph 22 of her decision. In my view the challenge to the decision goes well beyond simple disagreement and points to a failure adequately to consider, still less set out in any detail what the evidence was, that could be said to amount to unjustifiably harsh consequences which is the test required in the Immigration Rules.

15. Since the judge also in essence based her decision on Article 8 outside the Rules on those same circumstances, I consider that her decision is equally flawed in that regard. Accordingly the appeal will require to be reheard and in my view will require a rehearing to the extent that it can only properly be done by the matter being remitted for a full rehearing in the First-tier Tribunal at Newport by a judge other than Judge Heaven.

No anonymity direction is made.

Signed Date 30 June 2021

Upper Tribunal Judge Allen