IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No.: UI-2023-001854

First-tier Tribunal Nos: HU/56873/2022
LH/00526/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 17 August 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

MAS (SIERRA LEONE)
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Amadu Kanu, Legal Representative, League for Human Rights
For the Respondent: Ms Julie Isherwood, Senior Home Office Presenting Officer

Heard at Field House on 24 July 2023

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. The appellant appeals from the decision of Judge R. Sullivan promulgated on 14 April 2023 ("the Decision"). By the Decision, Judge Sullivan dismissed the appellant's appeal against the decision of the respondent to refuse to grant him leave to remain either as the spouse of a person present and settled here, or as the parent of a child who is a British national.

Relevant Background

2. The appellant is a national of Sierra Leone, whose date of birth is 9 October 1981. The appellant is married to Ms H, who is dual national, being both a citizen of Sierra Leone and a British citizen, having first entered the United Kingdom in 2002 at the age of 16 with her uncle, and having become naturalised in due course. Ms H met the appellant on a return visit to Sierra Leone in 2008, and they got married in 2014. Thereafter, married life was carried on largely at a distance, with the appellant making visits to the UK, and Ms H making return visits to Sierra Leone.

3. On 7 June 2016, Ms H gave birth at a hospital in Dartford to a child, "S". Ms H was the informant for the purposes of S's birth certificate, in which S was given his mother's surname. S's father was not identified on the birth certificate, and it is accepted that the appellant is not the child's father. Apparently, S was conceived during a period when the appellant and Ms H were separated.

4. The appellant was issued with a multi-visit visa that was valid from 28 October 2020 until 28 October 2022. On 23 May 2022 the appellant entered the UK on this visa. On 5 August 2022 the appellant applied for leave to remain under Appendix FM.

5. In a refusal dated 21 September 2022, the respondent gave her reasons for refusing the application. The appellant had entered the UK as a visitor, and therefore did not satisfy the immigration status requirements. He also did not satisfy the financial requirements. He stated in his application form that he was relying on his partner's employment income to meet the financial requirement of £18,600 per annum. However, he had failed to provide payslips for six months before the date of application, namely from February to July 2022.

6. He had provided some evidence to suggest that he owned a business in Sierra Leone. However, he had failed to provide the evidence specified in Appendix FM-SE for his business's most recent financial year. Therefore, the income from this business could not be considered towards the requirement.

7. He had provided some evidence of cash savings in his name in a UBA Bank account ending 025. However, this evidence did not demonstrate cash

savings held for six months before the date of application, and therefore it could not be considered towards the financial requirement.

8. Consideration had been given as to whether the appellant was exempt from meeting certain eligibility requirements because paragraph EX.1 applied. It was accepted that he had a genuine and subsisting relationship with his British partner. He stated that it would difficult or impossible for him to integrate and establish a private life in Sierra Leone because the country was currently in crisis with hyper-inflation and corruption. He said that this environment made it difficult for him to run his business and therefore it had taken a financial toll, causing difficulties for normal family life. He stated that he and his partner could not live together outside the UK because his partner had spent the majority of her life here and she was a British citizen with a British child. He also stated that his partner had friends and family in the UK and worked here, and that relocating overseas would disrupt the British child's education and social life. He further stated that his partner would be considered an outsider in Sierra Leone, as she no longer spoke Krio and she had a strong English accent.

9. Although his partner might not wish to uproot and relocate half way across the world, and it might be difficult for her do so, a significant degree of hardship or inconvenience did not amount to an insurmountable obstacle. Article 8 did not require the UK to accept the choice of couples as to which country they would prefer to reside in. He and his partner being separated from extended family members would not usually amount to an insurmountable obstacle. He failed to evidence that the relationships which he and his partner had in the UK went beyond normal emotional ties. He would be able to provide his partner and step-child with the necessary emotional support to reintegrate into life in Sierra Leone should they decided to return overseas with him. His partner could use the experience she had gained from working in the UK to seek alternative employment opportunities overseas. There were education facilities in Sierra Leone for his step-child should he decide to relocate with him. It was reasonable to suggest that they could return as a family unit and that he could help his partner and step-child to adjust to the change of culture and languages.

10. It was also open to his partner and step-child to remain in the UK while he returned overseas to make a successful application for the correct entry clearance. He had not provided any evidence to suggest that his partner and step-child were solely reliant on him. As he had entered the UK as a visitor on 23 May 2022, it was reasonable to suggest that his partner and step-child had resided in the UK without his support until then. They could continue their relationship via visits and electronic means in the meantime. Therefore, the requirements of EX.1(b) did not apply in his case.

11. EX.1(a) also did not apply in his case, because he had regularly visited the UK in the past, and as such could return overseas to make a successful

application for the correct entry clearance. His partner and step-child were not obligated to leave the UK.

The Appellant's case on appeal to the First-Tier Tribunal

12. The appellant's case on appeal was set out in a skeleton argument dated 2 December 2022 from Sonia Ferguson of Counsel, that was uploaded to the CCD file shortly thereafter.

13. Ms Ferguson accepted that the financial requirements were not met in relation to the specified evidence for the six months prior to the application. This, combined with the appellant's immigration status meant that the application could not succeed within the Rules unless EX.1(a) or B applied.

14. Accordingly, the first issue which she identified was whether EX.1(a) or B applied, such that the application might succeed within the Rules. Alternatively, having regard to applicable case law and to s117B (6), could the application succeed outside the Rules?

15. On the issue of proportionality, she submitted that because the appellant's wife had switched from full-time employment where she was earning over £26,000 per annum to part time employment coupled with full-time study for a Paediatric Nursing degree, her earnings were dropped. There was also some evidence of self-employed income earned by the appellant. He was going to seek to obtain further evidence for the hearing. It was their contention that they would not be a burden on public funds, and that the MIR should be considered to be met. If it was accepted that the appellant and his wife met the MIR, then the only remaining issue was the immigration status of the appellant, who was not permitted to switch routes from visitor to spouse.

16. The appellant's appeal came before Judge R Sullivan sitting at Hatton Cross on 13 April 2023. There was no representation on behalf of the respondent, but the appellant was represented by Mr Gazzain of Counsel.

17. In the Decision at [9], the Judge said that Mr Gazzain had narrowed the issues to be decided in the appeal. On behalf of the appellant, he had conceded that the appellant did not meet the financial requirements of the Rules, either at the date of application or now.

18. At [10], the Judge recorded that he had heard oral evidence from the appellant and the sponsor, and oral submissions from the appellant's representative.

19. The Judge summarised the appellant's case at [12] which he said had been amplified by Mr Gazzain's oral submissions and the skeleton argument. In

short, the appellant wished to remain in the UK with the sponsor and her son. He met the sponsor in 2008 and they married on 8 March 2014. They continued their relationship by visits, with the appellant having business interests in Sierra Leone, but they found it increasingly difficult, and in May 2022 the appellant came to the UK with the intention of staying. It was not reasonable to expect the sponsor to leave the UK because she had lived here since 2002 and had recently started a university course. It was not reasonable to expect the sponsor's son to leave the UK as he attended school and had regular contact with his father who lived in London.

20. The Judge's findings of fact began at [13]. He found that the appellant did not qualify for leave to remain under the Rules for two reasons. The first was that the applicant must not be in the UK as a visitor; and the second was that, as the appellant conceded, he did not satisfy the financial requirements.

21. The Judge went on to consider proportionality, and s117B of the 2002 Act. At [19], the Judge said that he was not satisfied that the appellant had a genuine and subsisting parental relationship with the sponsor's son, due to a combination of factors which he went on to discuss. The Judge reached the following conclusion at [21]:

> "I have reflected on all the evidence and keep in mind the need to have regard to the child's best interests. I conclude that in this case the public interest in maintaining the refusal outweighs the individual interests of the appellant, the sponsor and her son. Put another way, the consequences of the refusal are not unjustifiably harsh."

The Grounds of Appeal

22. Ground 1 was that the Judge had failed to consider the grounds under EX.1 of Appendix FM. Whilst the appellant might not be the child's biological father, it was clear from the evidence that the appellant had been more regularly involved in the child's life.

The Reasons for the the Grant of Permission to Appeal

23. First-tier Tribunal Judge Curtis granted permission to appeal for the following reasons:

> 2. Ground 1 argues that the Judge failed to consider paragraph EX.1 of the Rules. It was clear from the RFRL that the decision-maker considered whether paras EX.1 applied. The skeleton argument raises this as an issue (albeit in the context of the sponsor's son leaving the UK) and the point was considered in the respondent's review, covering both scenarios in EX.1(a) and (b).
>
> 3. The Judge, at [13], found that the appellant did not qualify for leave to remain under the Rules because he could not meet the immigration status requirement or the financial requirement. However, it is possible that para EX.1 applied to effectively exempt the appellant from having to meet those two requirements. Since it had clearly been raised as an issue, it

was incumbent on the Judge to consider para EX.1 but there is no express reference to, or an assessment of, that important paragraph.

4. Given the finding that the appellant did not have a parental relationship with the sponsor's child for the purposes of s117B (6) of the Nationality, Immigration and Asylum Act 2002, it would inevitably have followed that EX.1(a) could not have applied. However, it was possible that EX.1(b) applied in the sense that there were insurmountable obstacles to the family life between the appellant and the sponsor continuing outside the UK. This was an issue between the parties which the Judge was required to resolve. He arguably fell into error by not doing so. Ground 1 is arguable.

24. The Judge went on to give reasons as to why Ground 2 was not arguable.

The Rule 24 Response

25. In a response dated 7 June 2023, a member of the Specialist Appeals Team said that para [4] of the reasons was "*well made out*", and that Judge Sullivan had failed to consider whether EX.1(a) and (b) applied. The respondent did not oppose the appellant's application for permission to appeal, and invited the Tribunal to determine the appeal with a fresh oral (continuance) hearing to consider whether the appellant's claims are made out.

The Hearing in the Upper Tribunal

26. The hearing before me fell into two parts. The first part of the hearing was taken up with a discussion on the ambit of the concession made in the Rule 24 response. After ruling that an error of law was made out with regard to the Judge's failure to consider whether paragraph EX.1(b) applied – see below - I invited the representatives to make submissions as to how the hearing should proceed in terms of remaking. Ms Isherwood said that she would wish to cross-examine the appellant and the sponsor if they were tendered as witnesses. Mr Kahn confirmed that he wished to call both of them to give evidence on the EX.1(b) issue.

27. The appellant gave evidence first, while his partner and her child remained outside. Ms H then gave her evidence. Each of them adopted as their evidence in chief the same witness statements that they had adopted before the First-tier Tribunal. Both of them were asked supplementary questions by Mr Kahn, and both of them were extensively cross-examined by Ms Isherwood. Each of them also answered questions for clarification purposes from me.

28. After the oral evidence had finished, I heard closing submissions and I reserved my decision on how the decision should be remade.

Reasons for Finding an Error of Law

29. The Judge fell into error because he did not give express consideration as to whether EX.1 applied. This error was not material so far as EX.1(a) is

concerned, because the Judge went on in his proportionality assessment to give express consideration as to whether s117B (6) applied. Since he found that it did not apply - for the reasons which he gave in para [19] - it necessarily follows that EX.1(a) also does not apply.

30. As to EX.1(b), I note that in the Decision at [12], the Judge summarised the appellant's case as to why the sponsor could not relocate to Sierra Leone as being merely that it was not reasonable to expect her to leave the UK because she had lived here since 2002 and had recently started a university course.

31. The threshold for EX.1(b) is much higher than a reasonableness test. There must be insurmountable obstacles as defined in EX.2 to family life between husband and wife being carried on outside the UK.

32. However, as there was no formal abandonment of the case that EX.1(b) applied - or at least not one which is recorded by the Judge - it was incumbent on the Judge to give reasons as to why EX.1(b) did not apply on the particular facts of the case, on the evidence provided.

The Evidence adduced for the purposes of Remaking

33. The bundle served for the hearing in the Upper Tribunal by Mr Kanu was identical to the bundle of evidence that was relied on before Judge Sullivan, the only difference being that Mr Kanu substituted an updated skeleton argument for that which was put before the First-tier Tribunal.

34. On the topic of why Ms H could not relocate to Sierra Leone, the appellant said in his witness statement that she was currently in full-time education and reading for a degree in Child Nursing, and was employed part-time. Given her commitments in the UK, she could not possibly relocate to Sierra Leone. He also said that his wife suffered from back pain and sciatica. She found it a great struggle to get through her days at times. If she was forced to return to Sierra Leone, she would lose all the treatment that she was receiving in the UK. The treatments were not the same in Sierra Leone.

35. In answer to supplementary questions from Mr Kanu, the appellant said that the reason why he had not moved to the UK after marrying Ms H in 2014 was because he was running a successful family business at home in Sierra Leone. There was no one else to run it if he settled in the UK. So, he and his wife had an agreement. He would come to the UK at least once a year, and she would also visit Sierra Leone once a year. But it ended up with him coming to the UK more than her going to Sierra Leone.

36. In cross-examination, the appellant denied that when he last entered as a visitor, he intended to stay. He said that initially he intended to go back within 60 days, which was how long his airline ticket had been booked for. But his wife had a medical condition. It was difficult for her to look after the child when she was enrolled on a university course. He felt he had to stay to help look after the child, as she could not do a part-time job as well

as looking after the child. He was asked why he had not gone back to Sierra Leone to obtain the correct entry clearance before his wife had commenced her studies. He indicated that it was because of his wife's medical condition. She had not been able to work. She had not even been able to do a part-time job. Sometimes she struggled to stand up. She had been able to study, but even that was difficult. Most of the time, she studied from home. He could not recall when she had stopped work.

37. Ms Isherwood put to the appellant that he had decided to stay on because his business in Sierra Leone was failing. He denied this. He said that the business was still going on and it was providing an income which enabled him to provide for himself and his family here. His wife had last gone back to Sierra Leone in 2019. She had taken her son with her. They had stayed for six weeks. This was at their family home in Freetown. He was asked about S's birth father. He said that he just appeared and disappeared. He could not recall when S had last had contact with him. His wife had family in Sierra Leone, comprising aunties, uncles and cousins. They lived in Freetown, which was also where his and his wife's home was located. The appellant reiterated that his wife was not working at the moment. She was studying and she was looking for a job, if she could work.

38. Ms H's witness statement dated 28 November 2022 was silent on the question of the viability of the family relocating to Sierra Leone. In answer to supplementary questions from Mr Kanu, she said that they had a business back home, and they were also building a house there, which her husband needed to supervise. It was a joint business. She was a partner in the business, but her husband was running it. The business had been set up in 2012.

39. She had never lived with the father of her son. He took no responsibility. He was not paying the child maintenance that he should be paying. The reason why her husband had not gone back to Sierra Leone before the expiry of his visit visa was because she had a problem with sciatica. Sometimes she had not been able to take her son to school due to her sciatica.

40. In cross-examination, Ms H said that she was doing part-time work as well as being a student. She had always worked part-time since starting her university course in September 2022.

41. In answer to questions for clarification purposes from me, Ms H said that she had worked full-time since 2021 for about a year as a Healthcare Assistant on a salary of about £24,000 per annum. Prior to that, she had been working for the same organisation on a zero hours contract. The reason that she had given up full-time employment was because she had decided that she needed to get a degree in Nursing. When her husband was in Sierra Leone, she had relied on neighbours and childminders for childcare, as she was doing 12-hour shifts.

42. She confirmed that she had last gone back to Sierra Leone with her son in 2019. They had stayed at their family home in Freetown. She was asked why they could not go back to Freetown as a family unit. She answered that uprooting the child was not in his best interests. He also suffered from asthma and eczema, so hot weather was not good for him. She agreed that he had gone to Sierra Leone on holiday, but that was different.

43. In re-examination, Ms H said that the quality of education was not as good in Sierra Leone as it was here. Her son had all his friends here, and it was going to affect his welfare if they went to live in Freetown. Also, he could not speak any of the local languages.

Discussion and Findings on Remaking

44. The necessary starting point in this discussion is a recognition that the appellant was not granted permission to appeal against the findings of fact made by Judge Sullivan on s117B (6) or on other matters relevant to the proportionality assessment. So, although I approach the oral evidence which I received from the appellant and the sponsor with an open mind, I do so on the basis that the findings of fact made by Judge Sullivan on s117B (6), and hence on EX.1(a), and also on other matters relating to proportionality, are preserved findings.

45. Inevitably, given the way the case was put before the First-tier Tribunal, the appellant and the sponsor continue to insist that the appellant has a genuine and subsisting parental relationship with S and I bear in mind that circumstances can change.

46. But I am not persuaded that I should depart from Judge Sullivan's assessment on the basis of the additional oral evidence that I have received. As was highlighted by Ms Isherwood in her closing submissions, the adverse credibility finding which Judge Sullivan made in respect of the evidence of the couple has been reinforced by some of their oral evidence.

47. In the Decision at [17], the Judge found that the couple had been guilty of exaggeration. Whereas each of the claimed in their respective witness statements that the appellant was the only father that S had known since he was born, the Judge received oral evidence of weekly contact between the biological father and son.

48. In his oral evidence before me, the appellant reverted to the position he had taken in his witness statement. His oral evidence about contact between S and his biological father was to the effect that there was so little contact that he could not remember when the last contact was.

49. His reliability as a witness of truth is further undermined by him clearly representing that his wife had had to stop part-time work because of her sciatica. He must have known this was untrue, as Ms H confirmed in her oral evidence that she was working part-time and there had never been a

point at which she had not worked part-time, apart from the period when she had worked full-time in the period running up to September 2022.

50. The evidence placed before the First-tier Tribunal included a report from Ms H's GP surgery dated 23 November 2022. In the report, the doctor stated that she was a patient at the surgery, and that she had a long-standing history of back pain and sciatica for which she had received treatment.

51. Accordingly, the medical evidence does not support the claims made by the appellant and the sponsor in their oral evidence that the reason why he made an in-country application for leave to remain, rather than going back to Sierra Leone to seek the correct entry clearance, was because of an unforeseen deterioration in his wife's medical condition which meant that he had to stay here to look after S as a matter of urgency. The message of the GP report is that the sponsor has a long history of back pain and sciatica. It is not suggested that it is of recent onset, or that recently it has got worse so as to incapacitate her.

52. The couple's claim is also inconsistent with the case that was put before the First-tier Tribunal, which is that the appellant came to the UK with the intention of staying because of problems with his business in Sierra Leone.

53. There has also been a significant (and unexplained) shift in position as to why the family cannot settle as a unit in Sierra Leone. The original reason given for the appellant not being able to back - and hence for his wife and step-son not being able to follow him - was the deteriorating situation in Sierra Leone. But as well as resiling from the case that was put forward in the First-tier Tribunal (which was that he came to the UK in May 2022 with the intention of staying) the appellant now maintains that there is no problem with the family business, which continues to produce an income sufficient to support the family in the UK.

54. The burden rests with the appellant to show that there are insurmountable obstacles as defined by EX.2 in continuing family life in Sierra Leone. I find that the appellant has not discharged this burden for the reasons set out below.

55. The sponsor was born and brought up in Sierra Leone until the age of 16. The sponsor met the appellant on a return visit to Sierra Leone in 2008, and her closest relatives continue to live in Freetown, which is also where she has a family home which she shares with the appellant. She is a partner in the family business run by the appellant in Sierra Leone. When she married the appellant in 2014, she knew (or is to be taken as knowing) that there was no guarantee that she would be able to carry on married life with the appellant in the UK, unless he met all the relevant requirements for entry clearance as a spouse, including the immigration status requirement and the financial requirement. In light of this background, I do not consider that there would be very significant difficulties faced by

her in continuing family life together outside the UK which cannot be overcome or which would entail very serious hardship for her.

56. I take into account that S is a British citizen, who has contact with his birth father who resides in the UK. But this does not constitute an insurmountable obstacle to S accompanying his mother to Sierra Leone, on the hypothetical scenario of his mother choosing to relocate there rather than remaining in the UK to support an application for entry clearance by the appellant. For instance, there is no Order of the Family Court preventing S being taken out of the jurisdiction by his mother. She has primary responsibility for S's care and upbringing, and it is overwhelmingly in his best interests for him to remain with his mother, wherever she chooses to be. She made it very clear in her oral evidence that she would choose to remain here with her son, but on the purely theoretical scenario that she chose to relocate to Sierra Leone with her son in order to carry on family life with the appellant there, this would not cause her son very serious hardship.

57. The sponsor's long-standing history of back pain and sciatica has not prevented her from holding down a full-time job or, more recently, from undertaking a Nursing degree as well as continuing to work part-time for the same organisation that she used to work for on a full-time basis. There is no reason to suppose that the sponsor would be unable to find gainful employment in the same sector on return to Freetown. As for S, he would be supported by his mother and the appellant in adjusting to a new life and a new school in Freetown. There is no medical evidence of S suffering from asthma or eczema, but even if he does, no evidence has been brought forward to show that these conditions could not be adequately treated and managed in Sierra Leone, and the same applies to the sponsor's back pain and sciatica. For S, the advantages of accompanying his mother to Sierra Leone would far outweigh the disadvantages. Contact with his birth father could be maintained by return visits to the UK and also through social media.

58. If either EX.1(a) or EX.1(b) was shown to apply, then the appellant would be relieved of the requirement to return to Sierra Leone to apply for the correct entry clearance. As neither of these is shown to apply, the appellant can only succeed in his appeal if the interference with private and family life consequential upon the refusal decision is disproportionate. For the reasons given by Judge Sullivan, which remain undisturbed, the refusal of leave to remain strikes a fair balance between, on the one hand, the rights and interests of the appellant, the sponsor and the sponsor's son, and, on the other hand, the wider interests of society. The refusal decision does not have unjustifiably harsh consequences for any of them, and it is proportionate to the legitimate aim of firm and effective immigration controls.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside and it is remade as follows: the appellant's appeal on human rights grounds is dismissed.

Anonymity

Although the First-tier Tribunal did not make an anonymity direction, as the sponsor's young child has been the main focus of the appeal to the Upper Tribunal, I have decided to make an anonymity direction for the child's protection.

Andrew Monson
Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
4 August 2023