IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006677

First-tier Tribunal Nos: HU/53580/2021
IA/09158/2021

Extempore decision

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 28 August 2024

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH
UPPER TRIBUNAL JUDGE LOUGHRAN

Between

OWAMI ENHLE SIMA
(NO ANONYMITY DIRECTION IN FORCE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mr J Rene, Counsel instructed by Dorcas Funmi & Co Solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

Heard at Field House on 6 August 2024

DECISION AND REASONS

1. By a decision dated 15 May 2022, following a remote hearing on 6 April 2022, First-tier Tribunal Judge Phull ("the judge") dismissed an appeal brought by the appellant, a citizen of South Africa born on 30 April 2003, against a decision of the Entry Clearance Officer dated 29 June 2021 to refuse his human rights claim made in the form of an application for entry clearance under paragraph 297 of the Immigration Rules. The appeal was brought under Section 82(1) of the Nationality, Immigration and Asylum Act 2002.

2. The appellant now appeals against the decision of the judge with permission to appeal granted by First-tier Tribunal Judge Frantzis on 7 July 2022. We observe at this point that there has been a considerable delay between the grant of permission to appeal and the listing of this matter in the Upper Tribunal. It is not clear to us what the cause of that delay was, but we apologise for it and, as shall become clear in due course, it will not be held against the appellant.

Factual background

3. The appellant's mother, Thulisile Sima, is a British citizen of South African descent residing in the United Kingdom. We refer to her as "the sponsor". Her son, the appellant, was born in and remains in South Africa. On 11 March 2021, three weeks before his 18th birthday, he applied for entry clearance under paragraph 297 of the Rules. The application was made on the basis that his mother had sole responsibility for his upbringing.

4. The application was refused by the Entry Clearance Officer by her decision dated 29 June 2021.

5. First, the Entry Clearance Officer was not satisfied that the appellant was related to the sponsor as claimed. That issue was conceded before the First-tier Tribunal and we say no more about it. Secondly, the decision concluded that the sponsor did not have sole responsibility for her son. That issue was resolved by the judge in favour of the appellant. The judge made detailed findings, having concluded that the sponsor was a credible witness, finding that the sponsor does have sole responsibility for the appellant. There has been no challenge to those findings of fact and we need say no more about them.

6. The refusal decision concluded that the sponsor was not able to meet the maintenance requirements required by paragraph 297 of the Rules, in particular sub-paragraph (iv). The Entry Clearance Officer concluded that the income that would be available to maintain the appellant once the housing costs of the sponsor had been taken into account was below the threshold of the amount that would be available to a British family living off income support in similar circumstances. That being so, the Entry Clearance Officer concluded that the maintenance requirements were not met. There were no exceptional circumstances such that it would be unjustifiably harsh for the application to be refused and the application was indeed refused.

7. The appellant appealed. The case was heard by the judge sitting at Birmingham. The Secretary of State was not represented at the hearing. The operative reasons for which the judge dismissed the appeal in her reserved decision were based on the maintenance requirements. The judge set out in considerable detail at paras 25 to 33 why she considered that the maintenance requirements had not been met. The judge returned to that theme in her analysis of Article 8 outside the rules, anchoring the main reason for dismissing the appeal on that basis to the absence of evidence concerning the claimed increase in her income, such that the maintenance requirements would be met (para. 43).

8. We pause here to observe that it had been the appellant's case before the First-tier Tribunal that the sponsor's income had been reduced in the months leading up to the application on account of the Covid pandemic, and the restrictions then in force. However, in the period leading up to the hearing, after the application had been submitted, the sponsor had resumed work in another role. She had by that stage, she claimed, begun to earn enough money such that the maintenance requirements were met. A crucial part of the evidence going to that issue was a recent pay slip for the sponsor's employment which was dated 31 March 2022, i.e. just over a week before the hearing. Since the hearing was a remote hearing, it was not possible for very recent documentary evidence of that sort simply to have been handed to the judge, as would usually have been the case. Central to

the appellant's appeal to this tribunal is that her then solicitor, Mr Ekene Ogbonna, obtained the judge's permission to send the document to the court clerk during the hearing.

9. The grounds of appeal contend, as supported by a witness statement by Mr Ogbonna dated 5 August 2024, the solicitor with the conduct of the proceedings before the judge, that what took place at the hearing in relation to that issue was as follows. Mr Ogbonna's statement says that he obtained permission from the judge to forward the pay slip for March 2022 directly to the judge, care of the court clerk who was on the remote link along with all other participants in the hearing. That email was sent during the hearing and, according to the account given in the witness statement, the court clerk informed him that she had received it over the remote link. The March 2022 payslip, and the events which led to it being sent to the court, were not referred to by the judge in her decision.

10. Against that background, there are two grounds of challenge in these proceedings.

11. First, there was a procedural irregularity on the part of the judge's failure to take into account the pay slip. It had been sent to the court clerk but either was not forwarded to the judge for her consideration, or was forwarded and not referred to. Mr Rene relies on the statement of Mr Ogbonna to establish the factual basis for this claimed procedural irregularity.

12. Secondly, it was an error for the judge to conduct the Article 8 proportionality assessment on the basis of an incomplete evidential landscape. The primary basis upon which the judge concluded that the appellant was unable to meet the requirements of the Rules, and that there was no requirement pursuant to Article 8 outside the Rules for the appeal to be allowed, was on account of the sponsor's ability to maintain the appellant. Mr Rene submits that the operative reasoning relied upon by the judge for dismissing the appeal was in fact based on an erroneous foundation. The absent evidence to which the judge had ascribed determinative significance was, in fact, before the Tribunal.

13. Responding on behalf of the Secretary of State, Mr Melvin in a skeleton argument dated 1 August 2024 (for which we are most grateful) took issue with the description of the events at the hearing as set out in the grounds of appeal. He submitted that there was no evidence that the judge had requested or permitted an additional document to be sent to the tribunal by email. Such a document should have been uploaded to the court's electronic case management portal. There had not been an application for directions for a recording of the hearing to be made available to the parties, nor had other steps been taken to establish what took place at the hearing before the First-tier Tribunal, such as through a transcript. Mr Ogbonna's account had only just been provided. The Secretary of State was unable to respond to the account provided by Mr Ogbonna or set out in the grounds of appeal because she was not represented at the hearing before the First-tier Tribunal. However, insofar as Mr Ogbonna's statement purported to give an account of what took place, Mr Melvin did not accept it. Mr Melvin accepted, however, that, in principle, if there had been evidence before the Tribunal which had not been taken into account then that failure may have amounted to an error of law. However, based on the material that was before the judge as set out in her decision, Mr Melvin submitted that the judge reached a decision that was open to her for the reasons she gave.

Discussion: procedural irregularity giving rise to a material error

14. In our judgment, it is appropriate to admit the evidence of Mr Ogbonna under Rule 15(2A) of the Upper Tribunal Rules of Procedure. There is no better account before the Tribunal of what took place. The Secretary of State primarily has the opportunity to respond to grounds of appeal which contend that certain events took place at a hearing in the form of a notice under rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008. The grounds of appeal themselves annexed a copy of the email forwarding the sponsor's March 2022 payslip to the email address of an HMCTS official. That email was a sufficient basis for Judge Frantzis to grant permission to appeal, and to put the Secretary of State on notice of the issues that would need to be addressed in order to resist this appeal. However, there was no rule 24 notice. The first objection to the account in the grounds of appeal featured in Mr Melvin's skeleton argument dated 1 August 2024. It was in response to the Secretary of State's position as then formulated that Mr Ogbonna drafted his statement dated 5 August 2024 and, we understand, that arrangements were made for Mr Rene to present the case to this tribunal, since Mr Ogbonna had assumed the role of a witness in the case.

15. The rule 24 notice was the forum within which any factual dispute should have been raised (although we are grateful to Mr Melvin for the care with which he has approached this matter undoubtedly of having only been the case very recently).

16. We conclude that the approach that is most appropriate is for us to admit this statement and to take its contents at face value. The statement was provided by the solicitor with conduct of the proceedings. There is no reason to doubt what Mr Ogbonna says in that document. We therefore accept it. We also observe that it would be very surprising if Mr Ogbonna had been able to send the pay slip to the email address given for the clerk in circumstances in which those details had not been provided. Accordingly, we admit the statement and we ascribe significance to its contents.

17. That being so, we find that the first ground of appeal is made out. There was material which had been provided to the Tribunal which was not taken into account. We are not persuaded by Mr Melvin's submissions that because this pay slip had not been uploaded to the MyHMCTS platform and that the proper procedure had not been followed that the judge should not have taken it into account. In our judgment emailing a statement directly to the clerk at the request of the judge is the digital equivalent of handing up a document in physical form in the courtroom itself. Although it may have been better for all concerned had Mr Ogbonna uploaded the pay slip directly to the MyHMCTS platform in addition to sending it by email. The process that was followed was, we find, followed with the permission of the judge. There was either therefore a procedural irregularity if that document was not forwarded to the judge as she had directed, or alternatively if it was forwarded to the judge there was a failure to take into account a relevant consideration, because the judge either failed to have any regard to it, or any proper regard, or alternatively the judge failed to give sufficient reasons for why she dismissed its contents. It is in relation to the contents of that document that we now turn.

18. The March 2022 payslip itself is significant. It demonstrates that the gross pay for the year to the end of March 2022 was at a level which exceeded the amount which was necessary to establish the maintenance requirements. The net pay of the March 2022 pay slip, that is to say when gross pay has tax and national insurance contributions deducted, was, according to calculations provided by the appellant's solicitors, £18,936.26. That gives a weekly income of £364.06. To that is added £196 of tax credit, giving a subtotal of a weekly income of £560. From that is deducted £253 of rent leaving a total of £307.06 per week. That sum is significant because, as the judge set out at para. 33 of her decision, the calculations performed on the basis of the figures that were before the judge left only a balance of £23.73. The threshold which the appellant needed to meet in order to demonstrate that the maintenance requirements were met was in the circumstances of these proceedings £254.85. Accordingly, there was material before the judge which demonstrated that the sponsor's income exceeded that which was necessary in order to meet the maintenance requirements.

19. For the reasons we have already given it was an error of law for the judge to fail to take that income into account. The March 2022 payslip detailed the sponsor's earnings over the course of the previous tax year. Those earnings demonstrate that the sponsor's net pay in March 2022 was not an isolated occurrence, but rather demonstrated a level of income which was, for the reasons we have given, sufficient to meet the maintenance requirements of the Rules. It was an error of law for the judge to fail to take into account the contents of the pay slip. Her conclusions at para. 33 concerning the sponsor's inability to meet the maintenance requirements involved the making of an error of law.

20. That error was material for the following reasons. The Article 8 assessment which the judge proceeded to conduct at paras 35 to 43 onwards took as the core reasoning the appellant's inability to meet the income and maintenance thresholds required by paragraph 297.

21. At the hearing, we discussed with the parties whether it was material that the appellant had reached the age of majority by the time the hearing before the judge took place. Mr Melvin very fairly accepted that the Secretary of State's position was that, in principle, where an appellant who has turned 18 is able to demonstrate at a hearing before the First-tier Tribunal that the maintenance requirements of the Rules are met in relation to an application that was submitted while the applicant was still a child, then it is open to a judge to allow the appeal on the basis that the Immigration Rules were met. We agree. That appears to have been the approach of the judge, whose reasons for dismissing the appeal were based on the absence of the very evidence that was submitted in the March 2022 payslip.

22. It is necessary in our view to take a realistic view of the chronology of proceedings before the Tribunal. Where an application is submitted in time but the challenge is not heard before the First-tier Tribunal until the applicant has attained the age of majority, it is appropriate to take a holistic view of the overall evidential landscape in the case in order to determine whether or not there would be a breach of Article 8 if the application were to be refused. We therefore set the decision aside with all findings of fact preserved, save for those at para. 33.

Remaking the decision: section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007

23. We now turn to re-make the decision under Section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007. In light of the findings of fact that we have preserved, we consider that this is a decision which may be re-made in this Tribunal.

The law

24. This is an appeal brought on the ground that the refusal of entry clearance to the appellant would be unlawful under section 6 of the Human Rights Act 1998, on the basis that it would breach the United Kingdom's obligations under Article 8 of the European Convention on Human Rights ("the ECHR") (right to respect for private and family life). It is for the appellant to establish that Article 8 is engaged, and for the respondent to establish that any interference with it is justified.

25. As Baroness Hale explained in *R (oao Bibi) v Secretary of State for the Home Department* [2015] UKSC 68 at [25] to [29], and in *R (oao MM (Lebanon)) v Secretary of State for the Home Department* [2017] UKSC 10 at [38] and [40] to [44], the European Court of Human Rights has for long distinguished between the negative and positive obligations imposed by Article 8 of the ECHR. Contracting parties to the ECHR are subject to negative obligations not to interfere with the private and family lives of settled migrants, other than as may be justified under the derogation contained in Article 8(2). By contrast, in cases concerning the admission of migrants with no such rights, the essential question is whether the host state is subject to a positive obligation to facilitate their entry. In positive obligation cases, the question is whether the host country has an obligation towards the migrant, rather than whether it can justify the interference under Article 8(2). But the principles concerning negative and positive obligations are similar. As the Strasbourg Court held in *Gül v Switzerland* (1996) 22 EHRR 93:

> "In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the state enjoys a certain margin of appreciation…" (paragraph 106)

26. Part 5A of the 2002 Act contains a number of public interest considerations to which the tribunal must have regard when considering the proportionality of the refusal of entry clearance. In addition, it is settled law that the best interests of the child are a primary consideration when assessing proportionality under Article 8(2) of the ECHR.

A fair balance: appeal allowed

27. In our judgment for the same reasons that the error on the part of the judge was material, it follows that the appeal should be re-made by being allowed. Given the focus of the judge's reasons for dismissing the appeal, had she had the missing document that was, in fact, sent to the tribunal, she would have inevitably allowed the appeal. That is not determinative for present purposes, but it is a significant feature of the Article 8 landscape. The judge found that the appellant met the requirements of the Immigration Rules, but for the maintenance requirement. The "missing evidence" pertaining to that issue was, in fact, before the judge, or at least should have been.

28. We note and we have taken into account the fact that the appellant is now a young man of 21 years of age. The factual matrix is now very different from that of a 17-year-old child as he was when the application was submitted.

29. In relation to that two points arise.

30. First, as Mr Melvin accepted, it is possible, in principle, to take into account material pertaining to the subsequent ability of an individual to meet the financial requirements of the Immigration Rules in a context such as this, even where those Rules were not met at the time of the application.

31. Secondly, the delay in these proceedings has not been the fault of this appellant. For reasons that are not clear to us it has taken a considerable period for this matter to be listed for an error of law hearing in the Upper Tribunal The grant of permission to appeal was made over two years ago. It is not this appellant's fault or his mother's that it has taken until now for the matter to be heard in this Tribunal. Had the matter been heard in a timely manner, the age difference between that when the appellant made the application to the Entry Clearance Officer and his present age would be much less stark. That is not a matter that should be held against the appellant, and we therefore do not do so. It is also relevant to take into account the fact that the reason the sponsor's income had dropped to a lower level prior to the application being made was, in findings which have not been challenged, attributable to the Covid pandemic. That in our judgment is an exceptional feature of these proceedings which would now render the refusal of entry clearance unjustifiably harsh in circumstances where it is now common ground that the sponsor met the requirements at the date of the hearing before the First-tier Tribunal. We also note that there were a number of very sensitive reasons why the sponsor left South Africa and moved to the United Kingdom in 2005. It is not necessary to detail those issues in this decision, other than to say they add to the appellant's side of the evaluative assessment we must perform.

32. We conclude that, had the judge been aware of the March 2022 payslip, or adequately taken that into account, she would have allowed the appeal. It is difficult to see how it would be consistent with article 8 (2) for us to dismiss the appeal in the circumstances. It would not be a proportionate interference with the article 8 (1) rights of the sponsor to dismiss this appeal in circumstances when, taking the previous judge's analysis to its logical conclusion, the appeal should have been allowed. It would, in our judgment, be wholly disproportionate to maintain the appellant's ongoing exclusion from the United Kingdom against that factual background. We conclude that this decision is consistent with the maintenance of effective immigration controls, and the public interest inherent to that concept, since it is based on the balance as set by the Secretary of State in framing the rules, by reference to updating evidence, taking into account the broader evidential landscape as set out above.

33. For those reasons we allow this appeal.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and is set aside.

We remake the decision, acting under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007, allowing the appeal.

Stephen H Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

Transcript approved on 9 August 2024