Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/00442/2020 (V)**

THE IMMIGRATION ACTS

Heard at : Field House	**Decision & Reasons Promulgated**
On : 26 August 2021	**On: 3 September 2021**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

LATJOR JAMES MAYUL

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No representation
For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This has been a remote hearing to which there has been no objection from the parties. The form of remote hearing was Microsoft Teams. A face-to-face

hearing was not held because it was not practicable, and all issues could be determined in a remote hearing.

2. The appellant is a citizen of South Sudan, born on 2 September 1972. He appeals, with permission, against the decision of the First-tier Tribunal dismissing his human rights appeal.

3. The appellant applied, on 5 November 2019, for entry clearance to the UK under Appendix FM of the immigration rules on the basis of his family life with his partner, Nyibol Dim Deng, with whom he wished to settle in the UK. The appellant had previously been issued with a family visit visa from 19 July 2012, but had been refused entry clearance as a spouse on 24 October 2017.

4. The respondent refused the application on 4 December 2019 under the financial and English language eligibility requirements of the immigration rules. With regard to the former, the respondent noted that the appellant had insufficient funds as cash savings in the six months prior to his application to meet the financial requirements under paragraph E-ECP.3.1 of Appendix FM of the immigration rules. With regard to the latter the respondent noted that the appellant's IELTS certificate had expired as it was only valid for two years before his application and therefore the appellant could not meet the requirements of paragraph E-ECP.4.1 of Appendix FM. It was considered further that there were no exceptional circumstances which would render refusal a breach of Article 8.

5. The appellant appealed against the refusal decision and his appeal was heard by First-tier Tribunal Judge Wilson on 4 March 2021. The appellant's sponsor and his sponsor's brother and sister gave oral evidence at the hearing before the judge. It was accepted by the appellant that he could not meet the financial requirements of the immigration rules on the basis of his cash savings, but he relied upon overseas income – namely dividends and access to retained profits and assets - from his companies, primarily South Flight Services Limited, an aviation company. It was further accepted by the appellant that overseas income would not normally count towards the requirements of E-ECP.3.1, but reliance was placed upon paragraphs GEN.3.1 and GEN.3.3 and it was submitted that since there were exceptional circumstances sufficient to engage GEN.3.1, the appellant could rely on that income as amounting to "sources of income, financial support or funds" under paragraph 21(A)(2) of Appendix FM-SE. Those exceptional circumstances included the fact that the appellant's children were British citizens and that the older child was autistic. The appellant submitted that the financial requirements were therefore met under paragraph GEN.3.1. The appellant also submitted, in relation to the English language requirements, that the immigration rules did not provide a two-year limit on the validity of a test certificate.

6. The judge accepted that the witnesses were all credible. He also found that it was in the best interests of the children for the appellant to enter and remain in the UK and for them to be brought up by both parents, but he found that

that was not sufficient to tip the balance when the requirements of the immigration rules were otherwise not met. The judge accepted that the appellant was the owner operator of an aviation company in which he and the sponsor held shares and that they drew an income from the company but he did not accept that the income was sufficiently reliable for the purposes of paragraph 21A(2)(c). Accordingly the judge did not accept that the financial requirements of the immigration rules were met, pursuant to GEN.3.1 or otherwise. Although the judge accepted that the evidence produced by the appellant was sufficient to satisfy the English language requirements of the immigration rules he did not accept that the requirements of GEN.3.2 were met as he did not consider that the respondent's decision resulted in "unjustifiably harsh consequences" for the appellant, the sponsor and their children. As for Article 8 outside the rules, Judge Wilson concluded that the public interest in refusing the appellant's application outweighed the family's Article 8 rights and that the decision was therefore proportionate and lawful. He accordingly dismissed the appeal.

7. The appellant applied for permission to appeal to the Upper Tribunal on the basis that Judge Wilson had erred by according more weight to the financial issues than to the best interest of the children. Reliance was placed upon the decision in SD (British citizen children - entry clearance) Sri Lanka [2020] UKUT 43 and it was asserted that the judge had erred by distinguishing the appellant's circumstances from that case. It was also asserted that the judge's conclusions about the appellant's overseas income was contrary to the clear wording of paragraph 21A(2) of Appendix FM-SE.

8. Permission was granted by the First-tier Tribunal on 4 May 2021 on the following basis:

> "It is arguable that having found that it was in the best interests of the children that the appellant be granted leave to enter, it is not entirely clear what the reasons were for tipping the proportionality balance against the appellant."

9. The respondent opposed the appeal in her Rule 24 response and the matter then came before me.

10. The hearing was held remotely and the appellant's legal representatives joined in order to explain that they had not received a notice of hearing, that they had been unaware of the hearing and that they had therefore not instructed counsel to represent the appellant. The Tribunal's records showed, however, that the notice of hearing had been properly served by email on 20 July 2021. I enquired of Mr Walker if he had a position to take on the appeal such that I could consider proceeding in the absence of counsel for the appellant as opposed to adjourning the hearing. Mr Walker advised me that, whilst he was aware of the rule 24 response, he considered the grant of permission to be made out and that the judge had erred in law for the reasons set out in the grant of permission. He also indicated that, on the basis of the evidence available, the appeal could be allowed and he would not have any objection to me allowing the appeal in the appellant's absence and without

adjourning the hearing. There was naturally no objection to that course on behalf of the appellant and I therefore considered it appropriate to proceed to determine the appeal in the absence of instructed counsel in light of Mr Walker's helpful concession.

11. It seems to me that, given the positive findings made by the judge in relation to the appellant's and sponsor's circumstances, the evidence of the appellant's income from his aviation company, the inability of the sponsor and children to relocate to South Sudan to join the appellant and the best interests of the children, no proper reasons were given by the judge as to why the proportionality balance was tipped against the appellant. Indeed, I have to agree with the grounds at [13] that the judge's findings within the immigration rules, in relation to GEN.3.1 of Appendix FM involved an unduly restrictive interpretation of the word "reliable" in relation to the source of income or funds available to the appellant for the purposes of paragraph 21A(2) of Appendix FM-SE, and that no proper reasons were therefore given as to why the requirements of the immigration rules were not met on that basis. For those reasons the judge's conclusions and decision has to be set aside.

12. For the same reasons it seems to me that, on the basis of the evidence available, the appellant has demonstrated an ability to meet the requirements of the immigration rules under GEN.3.1 and that the requirements of GEN.3.2 have also been shown to be met in the alternative. As such, there is no public interest in refusing him entry clearance to join his spouse and children in the UK. Given Mr Walker's helpful concession I see no need to make any more detailed findings. Accordingly I allow the appellant's appeal on Article 8 human rights grounds.

DECISION

13. The original Tribunal was found to have made an error of law and the decision was set aside. I re-make the decision by allowing the appellant's appeal.

Signed: S Kebede
Upper Tribunal Judge Kebede Dated: 26 August 2021