**Upper Tribunal**
**(Immigration and Asylum Chamber)** **Appeal Number: HU/08134/2020**
**[UI-2021-000729]**

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On the 21 February 2022** | **On the 12 April 2022** |

**Before**

**UPPER TRIBUNAL JUDGE NORTON-TAYLOR**
**DEPUTY UPPER TRIBUNAL JUDGE JOLLIFFE**

**Between**

**ENTRY CLEARANCE OFFICER**

Appellant

**and**

**CHINYERE ANOSIKE**
**(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**
For the Appellant: Mr T Melvin, Senior Home Office Presenting Officer
For the Respondent: Mr L Youssefian, Counsel, instructed by House of Immigration Solicitors

## DECISION AND REASONS

### Introduction

**1.** For ease of reference, we shall refer to the parties as they were before the First-tier Tribunal. Thus, the Entry Clearance Officer is once more "the Respondent" and Ms Anosike is "the Appellant".

**2.** This is an appeal brought by the Respondent against the decision of First-tier Tribunal Judge Ripley ("the judge"), promulgated on 23 July 2021. By that decision, the judge allowed the Appellant's appeal against the Respondent's decision, dated 2 October 2020, refusing her human rights claim. That claim was made through an application for entry clearance as the spouse of a British citizen ("the sponsor").

**3.** The Appellant, a citizen of Nigeria, married the sponsor in 2019 and made her application for entry clearance in July of the following year. She was, and remains, a qualified nurse and the sponsor was employed by Mencap.

**4.** In refusing the application, the Respondent concluded that the financial requirements under Appendix FM to the Immigration Rules ("the Rules") were not met and that the refusal would not have unjustifiably harsh consequences for the couple.

## The decision of the First-tier Tribunal

**5.** The judge concluded that the Appellant was unable to meet the financial requirements of Appendix FM, with reference to Appendix FM-SE: [16]. Indeed, the Appellant had accepted this at the hearing.

**6.** The judge quite rightly went on to consider the Appellant's case outside the scope of the Rules. She placed "considerable weight" on the Appellant's inability to satisfy the Rules and the fact that relevant financial evidence had not been provided for the hearing. She found that the sponsor would be able to have secured additional hours and/or alternative employment in order to satisfy the relevant threshold. In light of this, a further separation of the couple would be temporary in nature and this would not have been unjustifiably harsh: [21].

**7.** That conclusion did not represent the end-point of the Article 8(2) exercise. The judge continued to undertake an assessment of all relevant factors. At [22], the judge referred to three considerations in the Appellant's favour: the fact that the sponsor's sister had provided evidence to show that she could provide relevant financial assistance; the Respondent's guidance relating to the Covid pandemic and consequent reductions in earnings for people in the sponsor's position; and the fact that the Appellant was a nurse, which was listed as a shortage occupation. Towards the end of [22] the judge said the following:

> "Despite my finding that there was a lack of evidence that this temporary separation would result in unjustifiably harsh consequences, I am not satisfied that it is proportionate when weighed against these three factors set out above. Further requiring the Appellant to re-apply for entry clearance will also result in delay whilst she awaits a new decision. I am not satisfied that the public interest requires the appellant and the sponsor to endure any further temporary separation… To require her to do so would comprise a disproportionate interference to her Article 8 rights."

**8.** The appeal was duly allowed.

## The grounds of appeal and grant of permission

**9.** The Respondent's grounds of appeal are twofold. First, there was said to be a contradiction in the judge's findings. She had found that a temporary separation would not be unjustifiably harsh, whilst later in the decision she had gone on to reach the opposite conclusion. It was said that the conclusions on the overall proportionality exercise were irrational on the grounds that there was no evidential basis to support the finding that the sponsor would have been able to secure additional hours and/or alternative employment.

**10.** Permission to appeal was granted by the First-tier Tribunal on 18 October 2021.

**11.** In advance of the hearing, the Appellant provided a helpful rule 24 response.

## The hearing

**12.** Mr Melvin relied on the grounds of appeal. He submitted that the findings at [21] and [22] could not be reconciled. In respect of the Appellant's as a nurse, the case of UE (Nigeria) [2010] EWCA Civ 975; [2011] Imm AR 1, stated that a benefit to the community would only exceptionally have an impact on proportionality (we note that this particular point had not been taken in the grounds of appeal).

**13.** Mr Youssefian relied on the rule 24 response. He submitted that when the judge's decision was properly analysed, there was no contradiction between [21] and [22]. In the former, the judge had essentially concluded that, absent any other factors, a further temporary separation would not be unjustifiably harsh. However, [22] took account of additional factors in the Appellant's favour. Thus, a wider exercise had been undertaken at that point. The three additional factors set out in [22] were capable of attracting weight, and weight was a matter for the judge. The judge had taken proper account of the fact that the Appellant could not meet the Rules. As to the second ground of appeal, the Presenting Officer had in fact relied on this aspect of the sponsor's evidence himself at the hearing. In any event, that evidence was expressly counted against the Appellant.

## Conclusions on error of law

**14.** At the end of the hearing, we announced our decision that there were no errors of law in the judge's decision. We now give our reasons for this conclusion.

**15.** First and foremost, we acknowledge the need for appropriate restraint before interfering with a decision of the First-tier Tribunal. Further, we remind ourselves that a judge's decision must be read sensibly and holistically.

**16.** As to the first ground, we agree with Mr Youssefian's analysis of [21] and [22]. It is clear to us that, having found that the Appellant could not satisfy the Rules, the judge went on to conduct a balance sheet approach, as commended by the Supreme Court in Hesham Ali [2016] UKSC 60; [2017] Imm AR 484.

**17.** In so doing, at [21], the judge was considering the factors weighing against the Appellant. In that context, and not having factored in any considerations favouring the Appellant, the judge concluded that a further period of separation would not be unjustifiably harsh. What followed at [22] was an overall conclusion on proportionality having then considered matters weighing in the Appellant's favour. It was only at this final stage that the judge concluded that a further separation would be disproportionate. That this was in fact the approach being adopted by the judge is, in part, demonstrated by the sentence beginning "Despite my finding that…" This aspect of the Respondent's challenge has not properly considered the judge's decision in a holistic manner.

**18.** Turning to the second ground of appeal, we again agree with Mr Youssefian. It is clear that the Presenting Officer himself relied on the potential for further hours of employment and/or alternative employment. In our view, this makes it difficult for the Respondent to now rely on this issue as undermining the sustainability of the judge's assessment. In any event, this aspect of the evidence was expressly held *against* the Appellant in the balancing exercise: [21]. Therefore, the irrationality argument falls away.

**19.** For the sake of completeness, we address other aspects of Mr Melvin's submissions, albeit they did not feature in the grounds of appeal. The judge plainly took proper account of the public interest in this case: she placed "considerable weight" on the Appellant's inability to satisfy the Rules. The judge was factually correct to state that nursing was on the shortage occupation list. The case of UE (Nigeria) does not preclude a factor such as this from being relevant and there is no indication that the judge deemed this to be a decisive element of the Appellant's case. The judge was also entitled to take account of the sponsor's sister's evidence and the Respondent's guidance on Covid-affected earnings (Mr Melvin said nothing about these two particular factors).

**20.** In summary, the judge did not err in her approach to Article 8, she took relevant matters into account, did not fail to have regard to any other

relevant matters, rationally attributed weight to particular factors, provided adequate reasons, and ultimately reached a conclusion which was open to her. There are no errors of law and thus no basis for us to interfere with her decision.

## Anonymity

**21.** The First-tier Tribunal made no anonymity direction and there is no proper basis for us to do so.

## Notice of Decision

**22. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law and that decision shall stand.**

**23. The appeal to the Upper Tribunal is accordingly dismissed.**

Signed: H Norton-Taylor Date: 24 February 2022

Upper Tribunal Judge Norton-Taylor