



IAC-FH-CK-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Numbers: HU/17810/2018
HU/19922/2018
HU/19923/2018

THE IMMIGRATION ACTS

**Heard at Manchester
On 10 August 2020**

**Decision & Reasons Promulgated
On 18 August 2020**

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

SB

DC

RS

(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr M Mukulu, Counsel, instructed by Amity Chambers

For the Respondent: Mr A McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS (P)

This has been a remote hearing which had been consented to by the parties. The form of remote hearing was video by Skype (v). A face-to-face hearing was not held because it

was not practicable, and all the issues could be determined in a remote hearing. The order made is as described at the end of these reasons.

1. The first appellant, a citizen of Jamaica with a date of birth of 23 September 1985, is the partner of a British citizen, JM. The second and third appellants are her two children from a previous relationship and who were minors at the date of application made in April of 2018. Those children are now 18 and 7 years of age. However, as the judge recorded at paragraphs 2 and 49 of the decision, since the application was made another child was born in October 2018 and is the child of the appellant and the sponsor.
2. The appellants have appealed with permission to the Upper Tribunal against a decision of the First-tier Tribunal promulgated on 20 November 2019 dismissing on all grounds their linked appeals against a decision of the Entry Clearance Officer of 23 July 2018, a decision upheld and maintained by the Entry Clearance Manager in the review decision of 16 January 2019, to refuse their applications for entry clearance to join the sponsor in the UK on the basis of family life.
3. Some of the issues that were in contention in the refusal decision have been resolved by the First-tier Tribunal Judge, such as the nature of the relationship. Whilst finding the relationship between the sponsor and the appellant to be genuine and subsisting, their marriage valid, and that they had established family life together sufficient to engage Article 8 ECHR, the First-tier Tribunal was not satisfied for the reasons set out in the decision that the first appellant had sole responsibility for the two child appellants. The judge also found that the first appellant could not meet the requirements of Appendix FM. Outside the Rules, the judge found the decision proportionate and that there were no compelling circumstances which would otherwise have rendered the decision unjustifiably harsh.
4. The grounds assert that the judge made adverse findings without giving the sponsor the opportunity to respond to the points made; these related to wage slips. It is also argued that the judge failed to give weight to relevant evidence; failed to consider whether the grandmother had day-to-day responsibility for the children and placed undue weight on the designation of the maternal grandmother as 'legal guardian'.
5. Permission on all grounds was granted by First-tier Tribunal Judge O'Brien on 7 May 2020. The judge considered it arguable that, having found that the sponsor met the financial requirements of Appendix FM, the judge then fell into error by concluding that the sponsor did not meet the requirements of the Rules or, alternatively, that the residual public interest was capable of outweighing the family's Article 8 rights. In granting permission the judge stated, "*it is arguable therefore that it was not open to the judge to dismiss the appellants' appeal*".
6. Judge O'Brien also considered it arguable, in the alternative, that if the judge had failed to ask the sponsor why he only produced copy documents rather than originals the judge acted in a materially unfair manner. Judge O'Brien considered that although the appellant might have some difficulties challenging the 'sole

responsibility' part of the decision, if the first appellant were to succeed in her appeal that would have been a material factor affecting the best interests of the children and the proportionality of excluding them from the UK.

7. Before reaching my decision, I have carefully considered the grounds, the grant of permission and the oral submissions that have been made to me today.
8. It seems to me that the grant of permission was made on a misreading of the decision. Contrary to the understanding of the judge granting permission, the First-tier Tribunal did not accept that the financial requirements of Appendix FM were met. The judge carefully considered the income evidence, noting what the threshold was, and seemed to be willing to accept that the sponsor had sufficient income to meet the threshold of £24,800. However, at paragraph 77, the judge noted that the specified evidence requirements of Appendix FM-SE had not been met; the sponsor failed to provide original payslips covering the full six month period prior to the date of application, and failed to provide sequential bank statements demonstrating that the earnings had been paid into the bank. It follows from that, as the judge found, that the first appellant could never have succeeded under the Rules on the application as made. I gather that prior to the making of the decision, there was some correspondence from the Home Office in which the sponsor may have been asked to provide some further information, but by the time of the decision there was not sufficient information to meet the mandatory requirements of the Rules. If the first appellant could not succeed under the Rules, then neither could either of the two child appellants, as the judge noted at paragraph 82 of the decision.
9. It follows that there was no error in respect of the findings under the Rules.
10. I also find there was no error in the judge's observation at paragraph 55 of the decision that the sponsor failed to provide with the application payslips covering the full six-month period. At the hearing, some further photocopies of payslips were handed in without explanation for late production. However, as I have explained, that evidence should have been provided with the application. The Rules provide a route for entry which should have been followed and in my view the first appellant is not entitled to sidestep or short-circuit the mandatory evidential requirements simply because she made a mistake or omitted to provide all the documentary evidence required. If it is now contended that the sponsor can meet all the FM-SE requirements and the financial threshold under Appendix FM then it is open to the appellants to make a fresh application taking care to provide the correct documentation. I cannot see that it is disproportionate to require them to do that and, as Mr McVeety has pointed out in his submissions, if they can prove they meet the Rules the first appellant will be on a shorter five year route to settlement than she would be if allowed in outside the Rules on Article 8, so it would be to her advantage despite the extra cost of making a fresh application. However, whether she does or does not make a fresh application, I cannot see that it is disproportionate to require an appellant who claims to be able to meet the Rules to actually make a proper application showing that she has met all the specified evidence requirements.

11. It follows that I am not satisfied that the judge was required to invite comment from the sponsor as to why the specified evidence requirements had not been met. It was for the first appellant to ensure that the application as made met all the requirements of the Rules. In any event, the observation the judge made at paragraph 55 about photocopies was not material to the outcome of the case because even if original further documents had been handed in at the appeal hearing, the first appellant would still have failed to meet the requirements of the Rules which have to met on application. The appeal could not be allowed on the Rules, because this is a human rights appeal, but if she had been able to provide all the evidence in the correct format, that would have been highly material to any Article 8 proportionality consideration. In summary, the appellant failed to provide the required evidence and even at the appeal hearing the evidence remained inadequate. In the circumstances, no material error is disclosed by that ground, or the judge's comment about photocopies, or because this was not put to the appellant. It was for the appellant to ensure that the application was properly made with the correct documentary evidence.
12. The judge did not accept that the first appellant had sole responsibility for the two child appellants from the previous relationship, giving cogent reasons for that finding, starting at paragraph 61 and going through to paragraph 74. I find that the grounds arguing to the contrary are no more than a disagreement with the decision and an attempt to reargue the appeal.
13. The grounds argue that the judge made a misdirection in law by elevating the grandmother's role, having been described by the first appellant as a legal guardian, when a proper examination of the facts were to reveal that whilst the grandmother may have had day-to-day control, the first appellant retained the critical decision-making for the children. It was the first appellant and the sponsor who described the grandmother as legal guardian. Mr Mukulu made submissions to the effect that a legal guardian is term of art and a reference by a lay person to someone being a legal guardian should not be held against them. However, whatever the true legal status of the grandmother, that was how the sponsor and the first appellant viewed the grandmother when they were asked about that, as the legal guardian. That, together with absence of evidence from the grandmother, and indeed of any involvement of the first appellant from the school, led the judge to the conclusion that the grandmother retained joint control with the first appellant and, therefore, that the first appellant did not have sole responsibility. Once again, this is a matter that could have been dealt with by some satisfactory evidence, but the evidence was effectively inadequate and insufficient for the judge to reach the conclusion that the appellant sought.
14. Contrary to the grounds it is not the case that the judge ignored the potential role of the grandmother as having day-to-day control whilst the first appellant retained the critical decision-making. That scenario was specifically considered at paragraph 72 of the decision, where the judge noted the absence of the supporting evidence. At paragraph 74, the judge accepted specifically that it is possible to have a day-to-day carer who may or may not assume full parental responsibility. However, after

reviewing all the evidence, the judge concluded that the first appellant did not have or, more accurately, had failed to demonstrate that she had sole responsibility but that it was shared with the grandmother. I am satisfied that cogent reasons open to the judge were given for that finding.

15. Outside the Rules the judge took into account the best interests of the children but found no compelling reasons requiring entry clearance to be granted on the basis that the decision of the respondent would otherwise have had unjustifiably harsh consequences. The appellants are accommodated and maintained either wholly or partly by the sponsor in Jamaica, they have the benefit there of other wider family members including the grandmother and it is difficult to see how there could have been any compelling circumstances in this case to justify granting entry clearance when the appellant had failed to comply with the Rules. Even taking into account the best interests and the desirability of children to be raised together, the judge did not err in finding the respondent's decision entirely proportionate.
16. The first appellant maintains that she can meet the specific requirements of the Rules and that she will be able to provide the necessary documentary evidence. As said above, she is not entitled to simply short-circuit the requirements of the Rules and say, well I omitted to supply the correct documentation but please let me in anyway. As already suggested, it is still open to the appellant to make a fresh application taking care to pay attention to the Rules.
17. In the circumstances and for the reasons set out I find no material error of law in the decision of the First-tier Tribunal requiring it to be set aside.

Decision

The decision of the First-tier Tribunal did not involve the making of an error of law.

The appeal of each appellant to the Upper Tribunal is dismissed.

The decision of the First-tier Tribunal stands and the linked appeals remain dismissed on all grounds.

I make no order for costs.

Signed *DMW Pickup*

Upper Tribunal Judge Pickup

Dated 10 August 2020

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed *DMW Pickup*

Upper Tribunal Judge Pickup

Dated 10 August 2020