



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/13491/2019
HU/13492/2019

THE IMMIGRATION ACTS

Heard at the Birmingham Civil Justice Centre
On the 15th June 2021

Decision & Reasons Promulgated
On the 5th July 2021

Before

UPPER TRIBUNAL JUDGE MANDALIA

And

DEPUTY UPPER TRIBUNAL JUDGE SHEPHERD

Between

AMIE SANKAREH SAWO (1)
FATOUMATTA SAWO (2)
(ANONYMITY DIRECTION NOT MADE)

Appellants

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Sawo, Sponsor
For the Respondent: Mr C Bates, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are nationals of Gambia. The first appellant is the partner of Mr Mankamang Sawo (“the sponsor”). The second appellant is the daughter of the first appellant and sponsor. In April 2019, the appellants applied for entry clearance to join the sponsor in the UK. Their applications were refused by the respondent for reasons set out in two decisions dated 7th April 2019. The appellants’ appeals were dismissed by First-tier Tribunal Judge Sharma for reasons set out in a decision promulgated on 6th February 2020.

2. The appellants were granted permission to appeal to the Upper Tribunal by First-tier Tribunal Judge Swaney on 24th April 2020. The appeal was heard by Upper Tribunal Judge Bruce on 30th July 2020. It was conceded on behalf of the respondent that there had been procedural unfairness in the way in which the First-tier Tribunal Judge had proceeded. Upper Tribunal Judge Bruce noted that, although it was open to the First-tier Tribunal to satisfy itself that all of the requirements of the rules were met, it should not have reopened settled matters in the manner that it did. She set aside the decision of the First-tier Tribunal Judge and having done so, Upper Tribunal Judge Bruce adjourned the hearing for a resumed face-to-face hearing for the decision to be remade in the Upper Tribunal. At paragraph [10] of her decision, she noted that it did not appear to be in issue that the appellants failed to demonstrate that they met the requirements set out in Appendix FM of the immigration rules at the date of their applications. The first appellant had failed to establish that the eligibility financial requirements were met because the applications were not supported by all of the specified evidence required by Appendix FM-SE relating to Mr Sawo’s self-employment.

3. Upper Tribunal Judge Bruce noted that it remained open to the appellants to argue that the refusal to grant entry clearance was a disproportionate interference with their right to a family life with the sponsor. She noted that if the appellants could successfully demonstrate that they now met all of the requirements of the rules, it

would be for the respondent to explain why it would be in the public interest to maintain the refusal. At paragraph [12] of her decision she said:

“12. The matter in issue before me, in respect of the rules, is a narrow one. In accordance with routine practice, the Entry Clearance Officer has not included in his bundle all of the documents provided by the Appellants upon application. He has instead provided an explanatory statement from the Entry Clearance Manager, dated 25th September 2019, identifying what ‘specified evidence’ remained outstanding. I will therefore proceed on the basis that absent those documents, all of the ‘specified evidence’ was supplied. As I set out above, the missing documents are:

- i) The membership status of the accountant who had prepared Mr Sawo’s unaudited accounts (paragraph 9(iv) of appendix FM-SE);
- ii) Evidence that the company’s tax return had been filed with HMRC (9(b)(i); and
- iii) Corporate bank statements covering the same period as the company tax return (9(v))”

4. Upper Tribunal Judge Bruce noted, at paragraph [13] of her decision, that in accordance with paragraph 1(1) of Appendix FM-SE, all of this evidence must cover the period ending no earlier than 28 days before the application, the application in this case having been made on 7th April 2019.
5. It is against that background that the appeal was listed for a resumed hearing before us to remake the decision. As the appellants were unrepresented and the sponsor appeared before us in person, at the outset of the hearing we drew the sponsor’s attention to the decision of Upper Tribunal Judge Bruce. In particular, we referred the sponsor to the requirements of Appendix FM-SE that Upper Tribunal Judge Bruce had identified as being in issue, to identify whether the specified evidence was now available so as to establish that the requirements of the immigration rules were now met, albeit they were not met at the date of the applications for entry clearance.

Remaking the decision

6. The appellants have appealed the respondent’s decisions to refuse their applications for entry clearance, under s82 of the Nationality, Immigration and

Asylum Act 2002 on the ground that the decisions are unlawful under s6 of the Human Rights Act 1998. The appellants must satisfy us on the balance of probabilities that Article 8 ECHR is engaged. If it is, the burden shifts to the respondent to establish that the decision is proportionate.

7. The appellants' relationship with the sponsor is not in issue. We find the appellants enjoy a family life with each other and the sponsor and Article 8 is plainly engaged. We find that the decision to refuse the appellants leave to enter has consequences of such gravity as to engage the operation of Article 8. We accept that the interference is in accordance with the law, and that the interference is necessary to protect the legitimate aim of immigration control and the economic well-being of the country. The issue in this appeal is whether the decisions to refuse entry clearance are proportionate to the legitimate aim.

The requirements of the Immigration Rules

8. Although the appellants' ability to satisfy the immigration rules is not the question to be determined, it is capable of being a weighty factor when deciding whether the refusal is proportionate to the legitimate aim of enforcing immigration control. As set out by the Court of Appeal in TZ (Pakistan) [2018] EWCA Civ 1109, compliance with the immigration rules would usually mean that there is nothing on the respondent's side of the scales to show that the refusal of the claim could be justified. At paragraphs [32] to [34], the Senior President of Tribunals confirmed that where a person meets the rules, the human rights appeal must succeed because 'considerable weight' must be given to the respondent's policy as set out in the rules. Conversely, if the rules are not met, although not determinative, that is a factor which strengthens the weight to be attached to the public interest in maintaining immigration control.
9. At the outset of the hearing Mr Sawo provided us and Mr Bates with the Santander Business Bank Account statements for Sawo Ltd for the period 1st March 2018 to 30th April 2019.

10. On behalf of the respondent, Mr Bates accepted that the only required specified evidence that had not been provided by the appellants to the respondent, were the three pieces of specified evidence identified by the Entry Clearance Manager and by Upper Tribunal Judge Bruce in paragraph [12] of her decision, which we have set out at paragraph [3] above. Mr Bates confirmed that having reviewed the file, it is now apparent that at the hearing before the First-tier Tribunal, the sponsor had provided evidence that the Company Tax Return CT600 for the financial year ending 31st March 2019 had been filed with HMRC. The sponsor had provided evidence that the CT600 was received by HMRC at 22:47hrs on 31st December 2019.
11. The only evidence outstanding is the requirement set out in paragraph 9(b)(iv) of Appendix FM-SE. That is:

“(iv) If the company is not required to produce annual audited accounts, unaudited accounts for the last full financial year and an accountant's certificate of confirmation, from an accountant who is a member of a UK Recognized Supervisory Body (as defined in the Companies Act 2006) or who is a member of the Institute of Financial Accountants, The Association of Authorised Public Accountants, The Chartered Institute of Public Finance and Accountancy, The Chartered Institute of Management Accountants, the Association of International Accountants and The Association of Accounting Technicians.”
12. The relevant provision was worded differently when the appellants made their applications. It is now well established that the relevant date for consideration of an application under the immigration rules is the date of decision, not of application. The changes made to the relevant provision make no difference here because the ACCA is a UK Recognised Supervisory Body for the purposes of the Companies Act 2006 under the authority of the Professional Oversight Board.
13. When the appellants appealed the respondent's decisions of 9th July 2019, they provided further documents in support of the appeal. The appellants provided a copy of the Report of the Director and Unaudited Financial Statements for Sawo Limited for the period 1st April 2017 to 31st March 2018.

14. We note that the applications made by the appellants were made on 7th April 2019. The appellants were therefore required to provide unaudited accounts for the last full financial year, which in this case was for the period 1st April 2018 to 31st March 2019, together with an accountant's certificate of confirmation, from an accountant who is a member of a UK Recognized Supervisory Body. The respondent did not previously take issue with the period for which the unaudited accounts have been provided, and neither did Mr Bates suggest at the hearing before us that the unaudited accounts provided were not for the correct period. For the avoidance of doubt we proceed upon the premise that the appellants have provided the unaudited accounts for the last full financial year as required. There is evidence before us that the CT600 for the financial year ending 31st March 2019 was filed and we accept the evidence of the sponsor that the CT600 could not have been filed unless the accounts had been prepared. Mr Bates confirmed that the sponsor had previously provided confirmation that the CT600 had been received by HMRC on 31st December 2019.
15. The issue remains, as identified by Upper Tribunal Judge Bruce, whether the appellant has provided the required certificate of confirmation from an accountant who is a member of a UK Recognised Supervisory Body.
16. Mr Sawo was unable to provide us with a copy of any certificate of confirmation from an accountant as required. Insofar as he relies upon the Report of the Director and Unaudited Financial Statements for Sawo Limited for the period 1st April 2017 to 31st March 2018, we pointed out to Mr Sawo that the 'Accountants' Report' that is at page 6 of 12, is unsigned, and appears to have been prepared by 'Abbey Lincon UK Ltd'. Mr Sawo was unable to explain why the Accountant's Report is unsigned. His evidence was that that appears to have been an oversight on the part of the Accountants. He relies upon a copy of a certificate issued by the ACCA to Mr Rafiu Abiodun Adebambo confirming that Mr Adebambo was admitted as a member of the Association on 31st March 2013, that is at page 43 of the appellants' bundle. He

submits that this is evidence that the Accountant is a member of a UK Recognised Supervisory Body as required by paragraph 9(b)(iv) of Appendix FM-SE.

17. Having considered the evidence relied upon, we find, on balance, that the appellants have failed to provide the specified evidence required in paragraph 9(b)(iv) of the Immigration Rules. Even giving the appellants the benefit of the doubt and accepting the respondent was prepared to accept the Report of the Director and Unaudited Financial Statements for Sawo Limited for the period 1st April 2017 to 31st March 2018 as being the required unaudited accounts for the last full financial year, the Accountant's report is unsigned. Mr Sawo was unable to provide us with a signed copy and although it may well have been an innocent omission by the Accountant, the relevant provision of Appendix FM-SE requires a certificate of confirmation from an accountant who is a member of a UK recognised supervisory body. Although Mr Rafiu Abiodun Adebambo was admitted as a member of the ACCA on 31st March 2013, there is nothing in the evidence before us to establish that he was a member in 2018/19. More importantly however, there is nothing in the evidence before us that establishes that Mr Adebambo has any association with Abbey Lincon UK Ltd or was the particular Accountant responsible for completing the Accountant's Report.
18. It follows that we find that the appellants have failed to provide the specified evidence required to establish that the financial requirements are met.
19. In SS (Congo) -v- SSHD [2015] EWCA Civ 387, the Court of Appeal considered the proper approach to applications for leave to enter the UK outside the Immigration Rules on the basis of ECHR Article 8 following the Court of Appeal's decision in MM (Lebanon) -v- SSHD [2014] EWCA Civ 1985. In each of the six conjoined cases, the applicants had applied for leave to enter as the family member of a British national or recognised refugee living in the UK. Each had been refused leave because the sponsor's income did not meet the minimum requirements in the Immigration Rules Appendix FM and Appendix FM-SE. The Entry Clearance Officer rejected SS's application for leave to enter, on the grounds that her sponsor

husband's income was below the £18,600 required, and that documents submitted in support of her application did not meet the requirements set out in Appendix FM-SE. At paragraphs [50] to [53] of his judgment, Lord Justice Richards considered the evidential requirements set out in Appendix FM-SE which stipulate the form of evidence required to substantiate claims that the substantive financial requirements under Appendix FM, have been met. He stated:

“51. In our judgment, the approach to Article 8 in the light of the Rules in Appendix FM-SE should be the same as in respect of the substantive LTE and LTR Rules in Appendix FM. In other words, the same general position applies, that compelling circumstances would have to apply to justify a grant of LTE or LTR where the evidence Rules are not complied with.

52. This is for two principal reasons. First, the evidence rules have the same general objective as the substantive rules, namely to limit the risk that someone is admitted into the United Kingdom and then becomes a burden on public resources, and the Secretary of State has the same primary function in relation to them, to assess the risk and put in place measures which are judged suitable to contain it within acceptable bounds. Similar weight should be given to her assessment of what the public interest requires in both contexts.

53. Secondly, enforcement of the evidence rules ensures that everyone applying for LTE or LTR is treated equally and fairly in relation to the evidential requirements they must satisfy. As well as keeping the costs of administration within reasonable bounds, application of standard rules is an important means of minimising the risk of arbitrary differences in treatment of cases arising across the wide range of officials, tribunals and courts which administer the system of immigration controls. In this regard, the evidence Rules (like the substantive Rules) serve as a safeguard in relation to rights of applicants and family members under Article 14 to equal treatment within the scope of Article 8 : compare *AJ (Angola)* , above, at [40], and *Huang* , above, at [16] (“There will, in almost any case, be certain general considerations to bear in mind: the general administrative desirability of applying known rules if a system of immigration control is to be workable, predictable, consistent and fair as between one applicant and another; the damage to good administration and effective control if a system is perceived by applicants internationally to be unduly porous, unpredictable or perfunctory; ... the need to discourage fraud, deception and deliberate breaches of the law; and so on ...”). Good reason would need to be shown why a particular applicant was entitled to more preferential treatment with respect to evidence than other applicants would expect to receive under the Rules. Moreover, in relation to the proper administration of immigration controls, weight should also be given to the Secretary of State's assessment of the evidential requirements needed to ensure prompt and fair application of the substantive Rules: compare *Stec v United Kingdom* , cited at para. [15] above. Again, if an applicant says that they should be given more preferential treatment with respect to evidence than the Rules allow for, and more individualised consideration of their case, good reason should be put forward to justify that.”

20. The specified evidence required in support of an application is there to establish an audit trail to ensure that the income requirement is met. As Lord Justice Richards noted in SS (Congo), and the Supreme Court noted in MM (Lebanon), the evidence rules have the same general objective as the substantive rules, namely, to limit the risk that someone is admitted into the United Kingdom and then becomes a burden on public resources. There is no doubt that avoiding a financial burden on the state is relevant to the fair balance required by Article 8.

The best interests of the second appellant

21. In reaching our decision we have also had regard to the best interests of the second appellant. The s55 duty to have regard to the best interests of a child applies when considering the proportionally assessment, and we acknowledge that there is a need to safeguard and promote the welfare of the child.
22. We have had regard to the best interests of the second appellant as a primary consideration. She was born on 8th July 2015 and is a national of Gambia. She is currently cared for in Gambia by the first appellant. In his oral evidence before us, Mr Sawo stated that his mother continues to live in Gambia and that he has a number of uncles and aunts that also continue to live in Gambia. The second appellant's application for entry clearance was made upon the basis that she intended to join the first appellant and sponsor in the UK. In his oral evidence before us, Mr Sawo said that the appeal has taken some time to resolve and that he and the first appellant now have another daughter who was born on 7th June 2020. The passage of time has caused him to be concerned that his daughters may be subjected to FGM, a practice that he says is prevalent in Gambia. When cross-examined he told us that he fears his daughters will be subjected to FGM by members of the extended family or members of the community. Mr Sawo himself opposes the practice and he has made it clear to his family that he does not want his daughters to undergo FGM. Some of his extended family are supportive of his view and others oppose it. His mother (*i.e. the second appellant's paternal grandmother*) is well aware that Mr Sawo opposes FGM, and he believes she will try and respect

his wishes although she cannot guarantee that his two daughters will not be subject to the procedure because it is a strong cultural practice. Mr Sawo said that he had not raised any concerns about his daughters being subjected to FGM previously, because at the time of the previous hearings, he had only one daughter, the second appellant. He said there is no particular age at which FGM is performed and it can be undertaken at any age.

23. Although FGM may be prevalent in Gambia, we were not presented with any objective country background evidence on the point and are not satisfied that the second appellant is at risk of being subjected to the practice. It is clear that Mr Sawo opposes FGM and that his extended family are aware that he does not wish his daughters to be subjected to FGM. The first appellant and the second appellant's paternal grandmother are aware of the views of Mr Sawo and have clearly been able to protect the second appellant from being subjected to FGM to date. There is no evidence before us that the second appellant has any unmet needs.

24. We readily accept that the best interests of a child are usually best served by being with both or at least one of their parents. The second appellant has lived with her mother, the first appellant, throughout. The family dynamics changed when Mr Sawo came to the UK, but he has been able to continue at least some contact with his daughter. The second appellant has lived in Gambia all her life and we are satisfied that she will be familiar with the culture and traditions in Gambia. A move to the United Kingdom would enable her to reunite with her father, but unless the first appellant can also join them in the UK, it would simultaneously result in separation from her mother and now also a younger sibling. It would also mean a change in the place of residence where she has grown up. There is no evidence before us of any adverse impact upon the second appellant from her current separation from Mr Sawo. It is generally in the interests of children to have both stability and continuity of social and educational provision and the benefit of growing up in the cultural norms of the society to which they belong. The

assessment of what is in the best interests of a child is inherently fact sensitive and we must carry out the assessment on the evidence before us. In the end, it is in our judgement in the best interests of the second appellant to remain with her mother and younger sister in Gambia.

Whether refusal of entry clearance is nevertheless proportionate

25. We have carefully considered whether the decision to refuse the appellants entry clearance is nevertheless disproportionate. The ultimate issue is whether a fair balance has been struck between the individual and public interest. In our final analysis and in carrying out the balancing exercise, we note the appellants are unable to satisfy the requirements of the immigration rules for the reasons we have set out. We have also had regard to the public interest considerations set out in s117B of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). We acknowledge that the maintenance of immigration control is in the public interest. For reasons we have set out above we cannot be satisfied that the minimum income requirement is met.
26. We have had regard to the factors that weigh in favour of the applicants such as their wish to live together as a family in the UK, and the sponsor's lawful presence in the UK. We also acknowledge the sponsor's concerns regarding his daughters. Against that, there is no evidence before us regarding the ongoing impact of separation upon the family and there is no evidence before us that the appellants have any unmet needs. Having considered all the evidence before us in the round, and although we have accepted the refusal of entry clearance will interfere with the appellants' family life and the family life of their sponsor, in our judgement, the interference for the purposes of the maintenance of effective immigration control, is proportionate, and it follows, lawful.
27. It follows that we dismiss the appeal.

28. We simply add that we have some sympathy with the appellants' position. These applications failed because upon the evidence before us, the appellants failed to provide the specified evidence required to support their applications. Our decision will not prevent them from making fresh applications. The specified evidence is quite particular, and if fresh applications are made, we would urge the appellants to ensure that all the required specified evidence is provided to ensure the respondent can be satisfied the income requirements are met.

Notice of Decision

29. The appeals are dismissed
30. No anonymity direction is made.

Signed *V. Mandalia*

Date 15th June 2021

Upper Tribunal Judge Mandalia