



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM CHAMBER**

Case No: UI-2023-005284

First-tier Tribunal No: HU/58411/2023

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**

On 2<sup>nd</sup> of October 2024

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE WILDING**

**Between**

**AK**  
**(ANONYMITY ORDER MADE)**

Appellant

**and**

**ENTRY CLEARANCE OFFICER**

Respondent

**Representation:**

For the Appellant: Mr A Ariyo, Solicitor

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

**Heard at Field House on 18 June 2024**

**Order Regarding Anonymity**

**Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.**

**No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.**

**DECISION AND REASONS**

1. The appellant is a Ghanaian national, he is now over 2 years old. He appeals against the decision of the ECO who refused his application to enter the UK as the dependent of his mother. His appeal was dismissed by First Tier Tribunal Judge Rose ('the Judge') on 6 October 2023. I found an error of law in that decision, this

is the remaking of the appeal. My error of law decision can be found appended to this decision.

### **Background**

2. The appellant applies to join his mother ('the sponsor') in the UK, she has limited leave to remain under the EU Settlement Scheme on the basis that she is dependent on her father, who is an Italian national.
3. The sponsor and her own mother ('grandmother') have taken responsibility for the appellant's care and upbringing. The appellant's father plays no role in his life. Around the time of the application for entry clearance, the sponsor left Ghana to come to the UK, she left the appellant with his grandmother before her EU Settlement Family Permit expired. Other than the sponsor and the appellant's grandmother there is no one else in Ghana who can care for the appellant. The sponsor's sister, who is 25, has also moved to the UK as a dependent on her father.
4. Whilst the appellant accepts that he cannot meet the provisions of the immigration rules, he submits that the decision is a disproportionate interference with his Article 8 rights.
5. The respondent did not accept that the appellant's mother has had day to day responsibility for him, or that she provides him with all the emotional, financial and other needs. The limited evidence provided with the application did not go to show that there was such day-to-day responsibility.
6. The respondent was further not satisfied that the financial requirements could be met because his sponsor earned £22,400 per year.
7. The respondent did not accepted that Article 8 was engaged, and in any event the public interest outweighed the appellant's Article 8 rights. The respondent did not consider there were any compelling circumstances which justified granting leave outside the rules.

### **The hearing**

8. I heard evidence from the appellant's grandfather. No other witness attended to give evidence. I refer to the relevant parts of the oral evidence in my reasons below.
9. I heard submissions from the two advocates.

### **Decision and reasons**

10. It was common ground between the parties that the appeal could only succeed outside the immigration rules.
11. The consideration I have to undertake is at the date of the hearing before me on 18 June 2023 whether:
  - a. Article 8(1) is engaged.
  - b. If it is, whether in all the circumstances the refusal decision is proportionate.

12. I find that taking the evidence in the round that the appellant enjoys a family life with his mother, he is only 2 years old, the sponsor is his mother. There is plainly a strong presumption that they enjoy family life together, and there is nothing within the evidence which suggests that this is not so.
13. The error which the Judge had fallen into was essentially one of fact surrounding the whereabouts of the appellant's grandmother at the date of the hearing. Before me I regret to say that the whereabouts of the adults in the appellant's life was singularly unclear, as was the evidence of financial support and the circumstances the appellant was living in in Ghana.
14. Before Judge Rose the appellant's mother was clearly the sponsor the appellant was relying on. He relies on his grandparents for any additional third party support he may require, but the clear case is that it is his mother whom is sponsoring his relocation to the UK, that she earns approximately £22,000 per year and that she wishes to bring her son to live with her, and the wider family in the UK.
15. His grandfather is in the UK, he gave evidence before me. It is said that his grandmother is also now back in the UK, although given the previous confusion before the FTT no updating evidence has been provided in the form of witness statement evidence. However Mr Tan did not dispute this in cross examination or submissions.
16. The current location of the appellant's mother is however more questionable. She did not attend the tribunal on the day of the hearing before me. No application was made to adjourn so that she could attend. I was told she was unwell however no documentary evidence of any sickness had been provided.
17. In his oral evidence the appellant's grandfather said that the appellant's mother had returned to the UK in November 2023 and lived with him and his family. On the day of the hearing she was in the UK, she was just unwell.
18. There was a real lack of evidence in the form of the appellant's mother being present in the UK. She had signed an updated statement, signed on 5 June 2024, however curiously the sponsor said she said she "currently" was staying at an address in Ghana, but was "resident" at the grandfather's address in North London. This was the same language used in her original witness statement signed on 29 July 2023 when she was, on her own account, residing in Ghana with the appellant.
19. There was no documentation for the sponsor of her being in the UK in 2024. Nor was there evidence of the sponsor receiving any money from her father when she was in Ghana prior to her alleged return in November 2023. There was, as of June 2024, a paucity of evidence as to the financial support given to the appellant in Ghana from the family in the UK. As Mr Tan pointed out in his submissions there was no documentary evidence to show financial support going to Ghana since March 2023. The grandfather said he transfers money using "Tap Tap" however no documentary evidence of this was provided to show financial support from March 2023 to date.
20. I find that on balance it is probable that the sponsor is in Ghana. I have been provided with no evidence that she is in the UK in May or June 2024. I note that

she did attend the hearing before the FTT and gave evidence, however given that she did not attend the remaking hearing, did not provide any documentary evidence as to why she did not attend, and made no application to adjourn so that she could give evidence.

21. In all the circumstances, and bearing in mind the burden is on the appellant, I do not accept that the sponsor is in the UK as claimed. This is not fatal to the appeal given the appellant's consistent evidence is that his mother and grandmother have travelled back and forth between the UK and Ghana to care for him, however it demonstrates two significant features in the case. Firstly that the sponsor has suitable flexibility in her work arrangements such as to travel back and forth so frequently, and secondly that that decision is one which they can maintain.
22. The appellant had provided various medical documentation for his grandmother in the form of GP records showing on going treatment in the UK in 2023 and 2024 which explains why she is not in a position to travel as frequently as she has previously. Whilst I accept the medical evidence I have no evidence, written or otherwise, from his grandmother as to her medical and physical health.
23. I further note the evidence contained in the sponsor's evidence that the family have arranged a nanny to care for the appellant in Ghana if there is no family out there. I have no details as to the arrangements for the nanny, how frequently they engage her services, whether she 'lives in' in the family home or what other arrangements are made. I am also not told how much she is paid, how many hours that is for or what services she provides.
24. In his oral evidence the grandfather said that the child was being cared for by a neighbour but that she was putting pressure on the family and the appellant was giving them a lot of problems. There was no other mention of a neighbour anywhere in the statements, and I place particular weight on the sponsor's statement in which she says there is a nanny, albeit a temporary arrangement, there is no reference to pressure being exerted from the nanny or any suggestion that the appellant is causing them difficulties.
25. I consider that the grandfather's evidence is an exaggeration as to the appellant's circumstances in Ghana which he developed in his oral evidence. There is no mention of neighbours in his statement, simply reference to the nanny that the sponsor mentions and no mention either in his statement of any problems with the care of the appellant.
26. I accept that the sponsor and grandfather consider that it is in his best interests to be with his mother, that is an unsurprising belief and one which in many respects is well founded. However there is absolutely nothing in the evidence before me which prevents his mother from being with him in Ghana. I have found that it probable that is where she currently is given her statement and the circumstances surrounding her non attendance at the hearing, however even if she were in the UK, the separation between her and the appellant is entirely one of choice. She has limited leave to remain in the UK, there is no route through the rules for the appellant, and that she has chosen to come to the UK notwithstanding the appellant being a baby is one entirely of her own. She has made arrangements for his care in Ghana, previously with her mother travelling back, more recently with a nanny.

27. I have also not been provided with any evidence, as was the case before the Judge below, as to the situation with the appellant's father. There is an assertion that he has nothing to do with the appellant, but there is a complete lack of explanation as to the relationship between the sponsor and the appellant's father, how he came to have no role in the appellant's life and any explanation as to what, if any, contact he has with the appellant. The sponsor says in her statement that he "*ceded his care, upkeep and responsibilities to me as he is unable to do so due to work and financial constraints*". This explanation however says nothing as to the contact or otherwise that the appellant's father has with the appellant. The grandfather said in his oral evidence that the issue was really that the father was not working and could not help. However there was nothing beyond this to explain what contact, if any, he has with the appellant.
28. There is a lack of any detail to the circumstances of the appellant's circumstances in Ghana, as noted above that includes the nanny's arrangements, the frequency of the sponsor's visits, including whether she was there at the time of the hearing before me, and the circumstances surrounding the appellant's father's involvement, or lack thereof, in the appellant's life.
29. However I do consider the respondent's decision to be proportionate. As I set out in the findings of fact above the backdrop to this application is manifestly unclear. The burden is on the appellant to outline the circumstances facing him in Ghana.
30. I place significant weight on the public interest to immigration control, there is no route within the immigration rules which the appellant can satisfy, this is a weighty consideration and one which enhances the public interest.
31. The appellant is cared for in Ghana from his mother, or I am told a nanny, there is no evidence of any medical or other conditions which makes the current situation to be impacting his well being or best interests.
32. Ultimately the appellant is in the situation he is because of decisions taken by his mother. The family have found a solution to continue his care in Ghana despite his mother wanting to take the opportunity to come to the UK as her father's dependent. That she did this notwithstanding the appellant and that there is not a way in which he can come with her is a consequence of the permitted categories of person who can come to the UK within the immigration rules. I note, albeit it is of no relevance to the decision here, that were the appellant's mother to have indefinite leave to remain then she would be able to sponsor the appellant through appendix FM.
33. In such a case it is possible in principle for such a decision to be disproportionate if the individual circumstances are such that there are unjustifiably harsh consequences for the applicant, however for the reasons identified there is insufficient clarity as to the appellant's circumstances and the evidence is that suitable arrangements have been made for his care. There are no unjustifiably harsh consequences in this case. The appellant's mother has made a decision to come to the UK, however that decision of the appellant's mother does not render the ECO's decision disproportionate. The appellant's family have made, and can continue to make, suitable arrangements for his care. The respondent's decision, taking into account the significant public interest, is proportionate in all the circumstances.

**Notice of Decision**

The appeal is dismissed.

**Judge T.S. Wilding**

Deputy Judge of the Upper Tribunal  
Immigration and Asylum Chamber

Date: 1<sup>st</sup> October 2024

**Appendix: Error of law decision**



**IN THE UPPER TRIBUNAL**  
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**THE IMMIGRATION ACTS**

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**Before**

**DEPUTY UPPER TRIBUNAL JUDGE WILDING**

**Between**

**AK**  
**(ANONYMITY ORDER MADE)**

Appellant

**and**

**ENTRY CLEARANCE OFFICER**

Respondent

**Representation:**

For the Appellant: Mr A Bello, Solicitor of Apex Solicitors

For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

**Heard at Field House on 22 January 2024**

**Order Regarding Anonymity**

**Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.**

**No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.**

**DECISION AND REASONS**

1. The appellant appeals against the decision of First-tier Tribunal Judge Rose ('the Judge'), who in a decision dated 6 October 2023 dismissed the appeal. The appellant appeals with permission against this decision.

## **Background**

2. The appellant is now 1 year and 10 months old. He applied for entry clearance under appendix EU of the immigration rules to join his mother in the UK. This was refused on the basis that the appellant's mother was not an EEA national as required, she had leave under appendix EU by being dependent upon her own father, an Italian national.
3. The appellant appealed and his appeal was heard by the Judge over CVP on 3 October 2023. In his decision the Judge found:

*13. The application form makes clear that the application is based upon the Appellant's relationship to his mother. She is, in effect, the sponsor of his application.*

*14. Question 2) is a pure issue of law. For the reasons set out in the Respondent's Reasons for Refusal Letter, I agree that the Appellant's application has been made under the wrong section of the Immigration Rules and that her mother does not have the required status with which to sponsor an application, she not meeting the necessary definition of someone having leave in that she is not an EEA national, as per paragraph GEN 1.3(d) of Appendix FM.*

4. There is no challenge to the above. The Judge then went on to consider the matter outside the immigration rules and found that the decision to refuse entry clearance was proportionate. In doing so he found as follows:

*15. The other questions therefore fall away and the Appellant's claim is to be considered under Article 8. Working through the Razgar principles, the first question is whether I am satisfied that there is an interference in the Appellant's family and private life. The Appellant is of an age whereby his private life is limited to his immediate family, i.e., those who care for him and, in particular, his mother with whom he has the closest bond. It is irrelevant that his mother is willing to go to Ghana and spend much of the time there caring for him. She has leave to enter and remain in the UK and it follows that any decision to prevent him from entering the UK with her, when she exercises that legal right, will amount to an interference in his right to a family life sufficient to engage Article 8. Nevertheless, I have found that the decision is entirely within the rules and I am satisfied that it is in pursuit of a legitimate aim, namely the proper control of migration. The question therefore is whether the decision is a proportionate one.*

*16. In assessing that question, I must not consider whether it is proportionate to, effectively, inhibit the Appellant's mother from entering the UK, notwithstanding that she is clearly able to spend much of her time in Ghana. She has a legal right to enter and remain in the UK and she is entitled to exercise that right. What I must consider is whether it is proportionate to prevent the Appellant from entering with her.*

*17. That assessment depends upon the level of interference in the Appellant's life caused by the Respondent's decision. The interference only arises when his mother exercises her legal right to enter the UK. During that time, the family are able to ensure that the Appellant is well cared for by a close family relative, namely his maternal grandmother. Thus far, there appears to have been little impact on the Appellant. During those periods that the Appellant's mother is in*



*the UK, he and she will be able to communicate remotely. It is well established that the test for allowing a case under Article 8 is a high one and the Appellant's circumstances simply do not reach that high bar. It follows that this appeal must fail.*

5. The appellant was dissatisfied and appealed. Permission was granted on one ground of appeal, namely that the appellant submits that the Judge made a material error of fact in paragraph 17 because at the date of the hearing his grandmother was not in Ghana, she was back in the UK. That was a material error of fact impacting the proportionality assessment.

6. The respondent responded to the appeal under rule 24, and submitted:

*5. Respectfully, the ground has omitted the remainder of the evidence that was put forward by Adjei Welford, the sponsor's father. His evidence was that when the sponsor had come to the UK, his wife (maternal grandmother of appellant) had gone to Ghana to look after the appellant. When the sponsor returned to Ghana, the grandmother then returned to the UK [10].*

*6. Therefore, it is submitted that it is not correct that the FTTJ had overlooked the evidence that the maternal grandmother was no longer in Ghana at [17]. The finding was in relation to the previous arrangement which could continue, where there 'appears to have been little impact on the appellant' [17]. This formed the basis of the proportionality assessment, where the FTTJ correctly considered whether it was proportionate to prevent the appellant from entering the UK with the sponsor notwithstanding her legal right to enter and remain [16] - [17].*

7. The appeal came before me, I heard submissions from both representatives. Mr Bello submitted that the error of fact is clearly material because having found that Article 8 was engaged at paragraph 15, the Judge was having to determine whether the refusal of entry clearance was proportionate or not. The Judge's only answer to this was that the appellant's grandmother had ensured the appellant was well cared for, and there has been little impact on the appellant.

8. Ms Everett submitted that whilst there were difficulties with the decision, and that there had been a mistake of fact this was not material for the reasons outlined in the rule 24 response.

### **Decision and reasons**

9. I have carefully considered the submissions by both advocates. I am persuaded that the Judge did materially err in law as advanced by Mr Bello. Despite Ms Everett's submissions to the contrary, I am unable to find that the error of fact was not material, I find so for the following reasons.

10. The Judge finds at paragraph 15 that there the decision refusing the appellant entry clearance is an interference with the appellant's Article 8 rights, he finds that the question for him is whether the decision is a proportionate one. The Judge then goes on to outline that he is not considering the proportionality of inhibiting the appellant's mother from entering the UK as she has a legal right to enter or remain and she is entitled to exercise that right.

11. Having set that out, which is not challenged by the respondent in the rule 24, the Judge goes on to conclude that the decision is nevertheless proportionate

because the interference only arises when his mother exercise her legal right to enter the UK. There has been little impact on the appellant in these circumstances because the family have got by with the grandmother going to Ghana.

12. Insofar as the Judge appears to have proceeded on the basis that the grandmother is in Ghana at the time of the hearing before him, this is an error of fact. She had in fact returned to the UK, as set out in paragraph 10. The Judge's proportionality assessment is infected by this error because he does not consider any alternative scenario. There is no consideration of other family members going, no consideration on the question of separation between the appellant and his mother were she to come to the UK, and no consideration as to the appellant's grandmother's ability to return to Ghana again.
13. In short, the proportionality 'assessment' undertaken by the Judge appears to read as a secondary decision on interference, but the Judge had already found that Article 8 was engaged, which necessarily involved assessing the interference.
14. As such I conclude that the error of fact has infected the proportionality balancing exercise such that the decision is set aside.

### **Directions**

15. The appellant is eager for this appeal to be resolved expeditiously given his very young age. It is for that reason that I have decided to retain the matter in the Upper Tribunal. I make the following directions:
  - a. The appellant is at liberty to file and serve any updated evidence he wishes to rely no later than 2 weeks before the final hearing.
  - b. Either party, if so advised, at liberty to file and serve a skeleton argument no later than 3 days before the final hearing.
  - c. The matter to be relisted at the Upper Tribunal before Deputy Upper Tribunal Judge Wilding on the first available date after 6 weeks of this decision being promulgated.
  - d. No interpreter is required.
  - e. Hearing listed for 2 hours.

### **Notice of Decision**

The decision of Judge Rose is set aside for falling into a material error of law.

The decision will be remade by the Upper Tribunal at a date to be fixed.

**Judge T.S. Wilding**

Deputy Judge of the Upper Tribunal  
Immigration and Asylum Chamber

Date: 22<sup>nd</sup> January 2024