



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

Case No: UI-2023-005603

**First-tier Tribunal No:
HU/55516/2023
LH/02893/2023**

THE IMMIGRATION ACTS

**Decision & Reasons Issued:
On 14th June 2024**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

**A A
(ANONYMITY ORDER MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms M. Cleghorn , Counsel instructed on behalf of the appellant

For the Respondent: Mr M. Diwnycz , Senior Presenting Officer

Heard at (IAC) on 22 May 2024

DECISION AND DIRECTIONS

1. The appellant appeals, with permission, against the determination of the First-tier Tribunal promulgated on 23 October 2023. By its decision, the Tribunal dismissed the appellant's appeal against the decision of the entry clearance officer dated 23rd of March 2023. The appellant, who is a minor, made an application for entry clearance on 9 December 2022 so that he could join his sponsor and family relative who has leave to remain as a refugee.

2. The FtTJ did make an anonymity order and no grounds were submitted during the hearing for such an order to be discharged. Anonymity is granted because the facts of the appeal involve the circumstances of the child.
3. 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.
4. The background to the appeal is set out in the decision of the FtTJ and the skeleton argument provided by Ms Cleghorn, who appeared before the FtT and also before the Upper Tribunal.
5. The applicant is a citizen of Sudan, who made an application for entry clearance to enter the United Kingdom so that he could join his family relative, namely his half-brother, who was granted leave to remain as a refugee on 27 January 2020. Part of the factual matrix is that the appellant had made an application with his de facto mother (referred to in the papers as his stepmother E) who is married to the sponsor, and it was by way of a joint and linked application. There did not appear to be any dispute about the sponsor's wife. They attended the Visa application Centre together for those applications.
6. The circumstances of the appellant was that he was living with and was cared for by E. He had no surviving parents and his stepmother was 75 years of age and as a result of medical difficulties was unable to care for him. As a result of cultural reasons the other remaining half siblings were not able to care for the appellant. At the time of the hearing serious armed conflict had broken out in Sudan.
7. The application was refused by the entry clearance officer under paragraph 319X of the Immigration Rules on the basis that it was not accepted that the appellant and the sponsor were related or that the sponsor could meet the maintenance and accommodation requirements. It was further not accepted that there were any exceptional circumstances.
8. In his decision the FtTJ made the relevant findings. He was satisfied that the appellant and sponsor were related as claimed (that they shared the same father), he accepted that the sponsor's mother would not be able to care for the appellant given her age and infirmity. He also made a finding that the appellant also lived with the sponsor's wife E who was his effective carer. Ms Cleghorn describes that relationship as his "de facto mother". The FtTJ considered the circumstances in Sudan as set out in the June 2023 CPIN on security situation in Sudan. The judge found that that the appellant remained relatively unscathed by the fighting at that stage and that the sponsor's wife E was "very much a protective factor" (see paragraph 11). Paragraph 12 set out his assessment of the maintenance and accommodation requirements alongside paragraph 319XAA and whether there were exceptional circumstances which may justify the grant of leave. He concluded that the appellant had a parent in the form of E who was present and concluded there were no exceptional circumstances nor a breach of article 8.
9. The appellant sought permission to appeal. The sponsor's wife was granted entry clearance and was admitted to the United Kingdom in February 2024. In material provided in support of a Rule 15(2A) application, the circumstances of the appellant were described as living in Sudan unaccompanied.

10. Permission to appeal was granted by the Upper Tribunal on 8 April 2024. The grant of permission took into account the evidence of the circumstances of the sponsor's wife (the carer of E), and it was noted that whilst that was not a basis to impugn the decision of the FtTJ, it was arguable that the approach in *E v SSHD* [2004] EWCA Civ 49 at paragraph 91 meant that it was appropriate to grant permission to appeal.
11. It was further noted that whether that factual development is capable of amounting to an established and relevant fact and whether the possibility of the appellant making fresh application relying on the positive findings made by the FtTJ mitigated any unfairness that might otherwise result from the factual developments not being taken into consideration. Directions were given for the appellant solicitors to provide a skeleton argument updating the grounds of appeal in light of the developments and that the Secretary of State should file and serve a rule 24 notice.
12. In accordance with those directions Ms Cleghorn filed and served her skeleton argument on 2 May 2024.
13. The Secretary of State responded in a rule 24 response dated 17 May 2024. In that response it was set out that the Secretary of State had reviewed the additional bundle and had taken particular consideration of the appellant's skeleton argument and the additional evidence included within the rule 15 (2A) application. The Secretary of State did not oppose the application under rule 15(2A) for that material to be admitted.
14. Furthermore, at paragraph 3 of the rule 24 response, it was stated that upon review of the fresh evidence and the consideration of the CPIN Sudan: humanitarian situation version 2.0 dated February 2024 and in particular paragraph 3.1.1, the appellant is currently residing in an area that falls within South West Dafur, therefore the Secretary of State invited the Upper Tribunal to allow the appeal following the principles of *E v SSHD* [2004] EWCA Civ 49 as set out and referenced in the skeleton argument filed on behalf of the appellant.
15. Thus at the hearing before the Upper Tribunal, both parties were in agreement that in light of the unusual factual circumstances of this appeal that was supported by fresh evidence that the Secretary of State accepted, and in view of the humanitarian circumstances in Sudan where the appellant was living unaccompanied, fell within the principles in *E v SSHD* (as cited) and that the appeal should be allowed on that basis.
16. Mr Diwncyz explained the rule 24 response further and that there was no objection to the fresh evidence that had formed the rule 15(2A) application being admitted given they set out matters of such gravity. As to paragraph 3, and the reference to the humanitarian circumstances in Sudan, he confirmed that the area where the appellant was residing fell within Southwest Darfur and that the conditions where the fighting is concentrated was likely to be so severe that there are substantial grounds for believing that there is in general a real risk of serious harm are set out in paragraph 339C and 339CA (iii) of the IR/ECHR. He invited the Tribunal to allow the appeal as had been set out in the written confirmation of the Secretary of State's Rule 24 response.
17. Ms Cleghorn relied upon her grounds of challenge and her skeleton argument. By reference to the grounds she submitted that the appellant's home area in Sudan was at risk of significant deterioration in view of the civil war. She submitted the

point was that the judge should have considered whether exceptional circumstances were met taking into account all the circumstances including not only that his stepmother was responsible for the child's care but what would have been the situation of the prospect of the minor child being left alone. In essence this was a holistic view of the facts and not simply relying upon the child being looked after at that point. The exceptional circumstances demanded that there should have been a holistic view. Once the FtTJ had made a finding that he could not live with his siblings as a result of cultural reasons, the support by way of remittances would not have been sufficient for a minor child living in a war zone who needed a home with family members. She further submitted that the judge must have been aware that there was a strong likelihood of success, given the relationship between the sponsor and the evidence from the sponsor. In essence she submitted, when considering exceptional circumstances that needed to be put into the assessment and should not have stopped at the fact that E's position was temporary looking after the appellant and that the judge needed to take a holistic view of all the facts. She stated that the error of law was that the judge did not consider what would be the situation facing the applicant who would be left in Sudan to fend for himself, in the event of E's appeal being allowed as proved to be the case as set out in the fresh evidence.

18. Both parties agree that in the unusual circumstances of this particular appeal and taking into account the principles in E and R v Secretary of State for the Home Department[2004] EWCA Civ 49, at [91]) apply and that the evidence demonstrates an established fact as it confirms the correct position as seen by objective and uncontentious evidence that there had been a mistake or unfairness which played a material part in the reasoning of the circumstances of the care of the appellant.
19. Ms Cleghorn has submitted that the Ladd v Marshall principles as required by E and R are satisfied. The Secretary of State also accepts that the evidence set out in the rule 15(2A) does satisfy those principles. There is no dispute between the parties as to the nature of that evidence.
20. The parties are in agreement that the way in which the decision of the FtTJ is challengeable is that set out in E and R whereby the tribunal should take account of new evidence demonstrating that mistake or unfairness. That mistake or error relates to the matters set out in the grounds which in turn challenge the assessment of exceptional circumstances and his assessment that there was no reason why the sponsor's wife could not continue to care for the appellant and that in essence whilst he considered her presence as a protective factor, and therefore exceptional circumstances were not shown, he did not factor into the assessment the effect upon the appellant of her application when granted in circumstances when they were made at the same time. This, I think, is the unfairness point. In the alternative, her submissions appear to be that there was as an error in his approach by failing to take account of that factor in the assessment of whether there were exceptional circumstances.
21. In summary both parties agree that the evidence plainly meets those principles and that the fact that the appellant's de facto mother is in the United Kingdom, leaving the applicant and accompanied in a war zone as accepted on behalf of the Secretary of State acting for the entry clearance officer.
22. As referred to earlier the principles in Ladd v Marshall could be modified in exceptional circumstances and both parties in this appeal agree that there are exceptional circumstances based on the rare and unusual circumstances on the

factual circumstances of this particular appeal. Whilst in theory there might be the ability to make a fresh application, that would lead to further delay and the extension of the circumstances which the Secretary of State accepts would leave a minor in humanitarian conditions where he is unaccompanied by a family carer.

23. For those reasons, the decision of the FtTJ is set aside and the appeal is remade as follows: the appeal is allowed.

Notice of decision:

The decision of the FtTJ is set aside and remade allowing the appeal on human rights grounds (Article 8).

Upper Tribunal Judge Reeds
Upper Tribunal Judge Reeds

6 June 2024