



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

Case No: UI-2024-000016

First-tier Tribunal Nos:  
HU/52458/2023  
LH/05946/2023

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**

21<sup>st</sup> February 2024

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE JARVIS**

**Between**

**THE ENTRY CLEARANCE OFFICER**

Appellant

**and**

**JOYCELYN ASAMOAH  
(NO ANONYMITY ORDER MADE)**

Respondent

**Representation:**

For the Appellant: Ms J. Isherwood, Senior Home Office Presenting Officer

For the Respondent: Ms S. Ferguson, Counsel instructed by Danbar Solicitors

**Heard at Field House on 6 February 2024**

**DECISION AND REASONS**

**Introduction**

1. This is a composite decision constituting both a decision in respect of the Secretary of State for the Home Department's challenge to the decision of First-tier Tribunal Judge Shepherd (hereafter "the Judge") promulgated on 9 December 2023 and a remaking of the decision.

2. For ease of reference with the decision of the First-tier Tribunal, I shall refer to the parties as they were during that hearing.

### **Relevant background**

3. The Appellant is a national of Ghana, born on 15 November 2004 who made an application for permission to enter the United Kingdom under Appendix FM on 15 September 2022, when she was 17 years old.
4. The Appellant's application centres around the presence of her mother in the United Kingdom who had, at that time, limited Leave to Enter the United Kingdom extant from 7 February 2021 until 22 October 2023 (for completeness, Ms Isherwood informed me that the Appellant's mother's Leave has recently been extended until 27 May 2026).
5. The Appellant's mother is married to the Sponsor, Mr Alex Amponsah who has Indefinite Leave to Remain in the UK.
6. The application was refused by the Respondent on 20 January 2023 and the Appellant duly appealed to the First-tier Tribunal by reference to ss. 82 & 113 of the NIAA 2002.

### **The decision of the Judge**

7. As the Appellant concedes that the Judge made a material error of law in her decision, I need not lay out the specifics of that decision in great detail, other than to record that:
  - a. Ms Ferguson, who appeared on behalf of the Appellant at the First-tier Tribunal, conceded that the relevant financial threshold to be shown by the Sponsor and/or the Appellant's mother was £22,400, see §§11 & 31.
  - b. By the date of the hearing, the Sponsor was working in two jobs as a cleaner for ABM and MITIE, and the Appellant's mother had also found herself a job as a cleaner for Churchill from 1 September 2022, §18.
  - c. Ms Ferguson conceded that there was missing evidence in respect of the financial requirements in the Rules but submitted that they were not relevant, §30.
  - d. After the hearing had finished, the Judge questioned whether the agreed threshold of £22,400 was in fact applicable on the basis that the Appellant's brother (Richard) is a British citizen (and therefore not a 'child' for the purposes of the definition in Appendix FM). The Judge therefore thought that the income threshold might be £18,600.
  - e. The Appellant's solicitors responded to the direction (the Respondent did not) and agreed that in fact the minimum income threshold figure should be £18,600 (see §38) - there is no indication in the decision

why Danbar Solicitors took that view bearing in mind Counsel's submission at the First-tier hearing that the threshold was higher.

- f. Drawing this together at §69, the Judge observed that the Respondent's own calculation of the Sponsor's earnings with ABM based on the figures for the six month period prior to the date of application amounted to £21,833.
- g. The Judge therefore concluded that the minimum threshold requirement of £18,600 was met, §70.

8. On that basis, the Judge concluded that all of the relevant aspects of the child route in Appendix FM had been met and therefore the appeal should be allowed. The Judge therefore concluded that she did not need to consider whether there were exceptional circumstances by reference to the proportionality assessment in Article 8(2) ECHR.

### **The Upper Tribunal hearing**

9. At the beginning of the hearing, Ms Ferguson indicated that she conceded that her instructing solicitors had been wrong to inform the First-tier Tribunal that the minimum income threshold was £18,600 and agreed with the Respondent's position that the figure had to be £22,400. This is predicated upon the fact that the Appellant's mother is residing in the United Kingdom with limited Leave to Remain. That being the case, the Appellant had to show that her Sponsor and/or her mother had sufficient finances: firstly for the Appellant's mother's maintenance (£18,600) and then an additional amount for her (£3800) - therefore amounting to £22,400.

10. On the basis of the Appellant's concession (which I agreed with) I concluded that the decision of the Judge should be set aside.

11. The parties indicated that they were ready to proceed to a remaking hearing.

### **The remaking hearing**

12. I should, at this stage, also indicate that I share the First-tier Tribunal's concerns about the way the Appellant's representatives prepared this case. At §51 of the decision, the Judge criticised both the way the evidence had been put together, as well as the way it was presented in the hearing describing it as haphazard and disorganised.

13. Unfortunately, and for reasons which are simply not clear, the Upper Tribunal found itself in precisely the same position when seeking to remake the decision.

14. Despite the Judge's clear disquiet at the way in which the case was presented there, inexplicably, has been no attempt by the Appellant's representatives to provide a coherent bundle for this hearing (albeit I must

also note that the Respondent failed to provide the Upper Tribunal with a consolidated bundle for the error of law hearing).

15. Additionally Ms Ferguson had plainly not been given sufficient instruction as she was not able to assist the Tribunal with why it was that her instructing representatives had submitted that the £18,600 threshold was appropriate when that had not been her position during the First-tier Tribunal hearing.
16. Instead, Ms Ferguson sought to admit further documentary evidence during the course of the hearing. I note that there was no r. 15(2A) application from the representatives in respect of any of the new evidence - I was simply told that it was thought that some of the evidence had in fact already been provided to the First-tier Tribunal.
17. This failure to assist was compounded by a request from Ms Ferguson during cross-examination for the Tribunal to have sight of a recent tenancy document which was on the Sponsor's mobile phone.
18. Additionally, when I asked Ms Ferguson to take instruction from her solicitors about the circumstances of the appeal, she told me that she would not be able to contact anyone because the relevant legal representative was away.
19. Overall, I think it important to record in the substance of this decision that Danbar Solicitors have continued to fail to properly assist the Tribunal in this particular appeal.
20. I also add that I am grateful to Ms Isherwood for her flexible, professional and pragmatic approach to the way in which the Appellant sought to adduce further evidence during the remaking hearing. Ms Isherwood did not object to the absence of a rule 15(2A) application and was content, given appropriate time, to consider the further documentary evidence.
21. I further record that I heard oral evidence from the Sponsor and the Appellant's mother; they were cross-examined and I received oral submissions from both representatives.

### **Findings and reasons**

22. In coming to my conclusions, I have had careful regard to the First-tier Tribunal bundle of 394 PDF pages, as well as the Sponsor's 2023 P60 for MITIE limited; his 2023 P60 for his employment with ABM; the hospital medical report for the Appellant's grandmother dated 13 September 2023; the three current account statements from Halifax relating to the Sponsor and a general transaction history from March 1, 2022 to 16 November 2023.
23. In assessing the relevant material issues, I have applied the balance of probabilities looking at all of the evidence at the date of the hearing.

### ***The Immigration Rules***

24. I start by noting that the only issue between the parties in respect of the requirements in Appendix FM and Appendix FM-SE relates to the financial Eligibility criteria.
25. The requirements of Appendix FM-SE read with E-ECC.2.1. of Appendix FM are indeed demanding as Ms Ferguson submitted. I record that Ms Ferguson went on to accept that the Appellant did not meet the requirements in the Rules to show a minimum income threshold of £22,400 in accordance with the requirement E-ECC.2.1.(a) on the basis that at the material date: the date of application (15 September 2022), the Appellant's Sponsor had only one permissible form of income (with ABM).
26. This is because the requirements in paragraph 2 of Appendix FM-SE (relating to salaried income from employment which had been in existence for more than six months prior to the date of application) required payslips to be provided for that six month period ((2)(a)(i)); a detailed and compliant letter from the relevant employer ((2)(b)) and confirmation of the net salary shown in the personal bank account of, in this case, the Sponsor - ((2)(c)).
27. This means that the Sponsor's employment with MITIE which began on 1 September 2022 could not meet the evidential requirements of Appendix FM-SE.
28. Similarly, the Appellant's mother's employment with Churchill which, I am told began on 1 September 2022, also cannot be taken into account for the same reason.
29. On that basis then, the financial Eligibility requirements in Appendix FM and Appendix FM-SE are not met.

### ***Exceptional circumstances***

30. The failure to meet the requirements of the rules is not ultimately determinative of the Article 8 ECHR issues, albeit binding authority makes it clear that it is an important starting point in the assessment of Article 8(2) ECHR.
31. It is also relevant to note that the Rules make clear that a former child applicant will not be refused on the basis of reaching 18 years of age after the date of the application and before the decision is made:

*27. An application for entry clearance is to be decided in the light of the circumstances existing at the time of the decision, except that an applicant will not be refused an entry clearance where entry is sought in one of the categories contained in paragraphs 296-316 or paragraph EC-C of Appendix FMM solely on account of his attaining the age of 18 years between receipt of his application and the date of the decision on it.*

*The financial evidence*

32. I have therefore also looked at the overall documentary evidence relating to the Sponsor's employment.
33. I should start by re-emphasising that whilst the documentary evidence before me is erratic, I have ultimately concluded that this is not because of a lack of credibility on the Sponsor's part as to his current employment. I have certainly paused to consider carefully the evidence, which the Sponsor confirmed in response to a question I asked during the hearing, that he works around 80 hours per week for ABM and MITIE.
34. In his oral evidence, the Sponsor confirmed that this was correct and that he worked those hours in order to seek to support his family, pay for accommodation and so on.
35. Despite the concerns that I have as to the suggestion that the Sponsor is able to work for that length of time in a demanding job as a cleaner, I nonetheless note that this is precisely what the wage slips state and that they are confirmed by the P60s and the evidence showing the funds being transferred from the Sponsor's employers: initially into his Barclays account and then into his Halifax account after he changed banking institutions.
36. I also bear in mind that Ms Isherwood did not challenge the reliability of the wage slips/bank statements and did not cross-examine the Sponsor about the number of hours the documents shows that he works for. I therefore find that the Sponsor is earning between £2500 and £3000 per month and that this money is transferred into his own bank account.
37. The documentary evidence before me still does not meet the detailed requirements in Appendix FM-SE but I have borne in mind the Supreme Court's guidance in MM (Lebanon) & Ors, R( on the applications of) v Secretary of State and another [2017] UKSC 10 at §99:

*"99. Operation of the same restrictive approach outside the rules is a different matter, and in our view is much more difficult to justify under the HRA. This is not because "less intrusive" methods might be devised (as Blake J attempted to do: para 147), but because it is inconsistent with the character of evaluation which article 8 requires. As has been seen, avoiding a financial burden on the state can be relevant to the fair balance required by the article. But that judgment cannot properly be constrained by a rigid restriction in the rules. Certainly, nothing that is said in the instructions to case officers can prevent the tribunal on appeal from looking at the matter more broadly. These are not matters of policy on which special weight has to be accorded to the judgment of the Secretary of State. There is nothing to prevent the tribunal, in the context of the HRA appeal, from judging for itself the reliability of any alternative sources of finance in the light of the evidence before it. In doing so, it will no doubt take account of such considerations as those discussed by Lord Brown and Lord Kerr in Mahad,*

*including the difficulties of proof highlighted in the quotation from Collins J. That being the position before the tribunal, it would make little sense for decision-makers at the earlier stages to be forced to take a narrower approach which they might be unable to defend on appeal."*

38. I therefore conclude that the financial evidence before me is sufficient to show that the Sponsor earns well over the minimum income threshold of £22,400 at the date of the hearing and that therefore there is no real prospect of the Appellant or family having to resort to reliance on public funds.
39. I consider this to be a materially important aspect of the Article 8(2) proportionality exercise because the Appellant made her application just a short time before she turned 18 years old and therefore, if she was compelled to make a new application now, she could not do so under the Appendix FM child route.
40. I accept that the Appellant's mother only came to the United Kingdom at the beginning of 2021 and the evidence before me that an application for the Appellant could not be made earlier because of financial restraints.

*The Appellant's circumstances in Ghana*

41. The evidence before the Tribunal is that the Appellant spends most of her time residing at boarding school but, during the holidays, she resides with her maternal grandmother who relatively recently experienced a stroke.
42. The letter from Dormaa Hospital dated 13 September 2023 indicates that the Appellant's grandmother has been treated by the hospital for over five years for hypertension and diabetes mellitus. The letter goes on to explain that her health has recently deteriorated involving the loss of her swallowing reflex, aphasia and loss of power in her right upper and lower limbs rendering her incapacitated and bedridden.
43. The letter also confirms a cerebrovascular accident stroke and additional aspiration pneumonia with stage 5 severe renal impairment. The severity of her condition is also confirmed by the evidence in the letter which shows that she is currently being fed (and given medication) via a nasogastric tube.
44. Ms Isherwood did question, during her submissions, who the letter had been written for on the basis that the final sentence asked for the Appellant's grandmother to be accorded the "necessary assistance", but she did not directly challenge the Appellant's mother's oral evidence that the letter was written after her request. I find the document to be worthy of material weight.
45. I therefore accept the overall evidence that the Appellant's grandmother, who she lives with at times during the year, is severely incapacitated. Whilst I note that there was some inconsistency between the Sponsor and the

Appellant's mother as to the nature of any support the Appellant's grandmother is receiving in Ghana (the Appellant's mother suggested that a local pastor cooks for her mother whilst the Sponsor seemed unsure as to whether any additional support was being given), I conclude that the difference arises from the Appellant's mother's involvement in the organisation of her mother's care whereas the Sponsor is not so involved.

46. I also accept the oral evidence that the Appellant's grandmother, as well as the Appellant during holiday times, live in a single room as part of a family house with four bedrooms. Both witnesses were consistent in explaining that the three other rooms in the house were originally given to other family members but are now rented privately as the other family members have left Ghana to live abroad.
47. I also accept that the Sponsor and the Appellant's mother send money back to Ghana in order to pay for the Appellant's schooling, day-to-day expenses as well as the Appellant's grandmother's medical care which costs around £100 per month.
48. Furthermore, I accept that the Appellant is in constant contact with her mother in the UK and that it is her mother who makes the important decisions about the Appellant's life despite now being a young adult. I find that there is no other person acting as a parent for the Appellant in Ghana.
49. Overall then, I conclude that there is plainly Article 8(1) family life between the Appellant and her mother/Sponsor in the UK despite her being an adult. As I have explained, she is still a student who is heavily dependent upon the support of her mother both financially and emotionally.
50. Standing back and considering the public interest requirements as part of the balancing exercise. I conclude that the only reason for the Appellant's failure to meet the requirements of the child route in Appendix FM is because of the Sponsor's admissible earnings amounting to just under the threshold of £22,400.
51. Although this is important, I have also explained why the documentary evidence does reliably show that the Sponsor earns well over £22,400 threshold as of today's date. This is not to be construed as a finding that the Appellant succeeds because of a near miss but to recognise that the underlying policy requirements in the financial eligibility rules are met at the date of the hearing.
52. I have already explained that this is not determinative of the balancing exercise in the Appellant's favour but it is a relevant material issue because I have also found that the application for entry clearance could not really have been made any earlier because of the timing of the Appellant's mother's relocation to the United Kingdom and the family's financial issues.
53. I have also taken into account that the Appellant is no longer under the age of 18 years old and would not be able to apply under the child route if



she was required to make a new application. Additionally, the Appellant's options for an application for entry clearance are extremely limited as an adult.

54. I set these findings into the context of the very difficult circumstances in which the Appellant is required to live when she is not at boarding school: I have accepted that her grandmother is in an extremely serious state of ill health and is quite plainly not able to provide the Appellant with any care or assistance at all.
55. Finally, I add that the Appellant has a brother (Richard) in the UK who is a British citizen and born on 25 November 2021. Despite his very young age, it is plainly in the best interests of Richard that they are able to live in the same household albeit this cannot be determinative of the balancing exercise in the Appellant's favour.
56. I also apply section 117B of the NIAA 2002 and conclude that the Appellant does take the neutral benefit of ss. 117B(2) & (3) on the basis that there is no dispute that she speaks English sufficiently well and the underlying policy in the financial requirements is met.
57. I also accept the recent tenancy evidence showing that the Sponsor's friend no longer lives with him and that there is adequate accommodation for her in the UK.
58. Taking into account all of the material issues in the Article 8(2) proportionality assessment in respect of both the public interest and the family life circumstances of the Appellant, Sponsor and her mother, I conclude that there are exceptional circumstances in this case. In other words, I find that the Respondent's decision does lead to unjustifiably harsh consequences meaning that the decision is a disproportionate interference with the Article 8 rights of the Appellant.

### **Notice of Decision**

The decision of the Judge contained a material error of law such as to require it to be set aside.

The remaking appeal is allowed under Article 8 ECHR.

### **To the Respondent** **Fee Award**

In light of the fact that the Appellant has succeeded partly by reference to evidence which was not before the Respondent, I decline to make a fee award.

***I P Jarvis***

Deputy Judge of the Upper Tribunal  
Immigration and Asylum Chamber

17 February 2024