



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/01391/2019 (V)

THE IMMIGRATION ACTS

Heard at Field House (by remote means)  
On 24<sup>th</sup> March 2021

Decision & Reasons Promulgated  
On 23 April 2021

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

MAHMUDUL HASAN RIPON  
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

ENTRY CLEARANCE OFFICER (SHEFO)

Respondent

**Representation:**

For the Appellant: Mr I Ali of Counsel, instructed by Samad & Co Immigration

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

**DECISION AND REASONS**

1. This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was by video, using Skype. A face to face hearing was not held to take precautions against the spread of Covid-19 and as all issues could be determined by remote means. There were technical difficulties for Ms Isherwood accessing the video call, which were improved significantly by her camera being switched off, such that with the agreement of the parties, the hearing proceeded with her joining the video call orally. The file contained the documents in paper format and in part available electronically.

2. The Appellant appeals with permission against the decision of First-tier Tribunal Judge Parkes promulgated on 4 February 2020, in which the Appellant's appeal against the decision to refuse his application for entry clearance to join his wife in the United Kingdom dated 12 June 2018 was dismissed.
3. The Appellant is a national of Bangladesh, born on 4 July 1994, who made an application for entry clearance on 19 March 2018. The Respondent refused the application on the basis that the requirements in paragraph EC-P.1.1(c) of Appendix FM and paragraph S-EC.2.2(a) of the same were not met as the Appellant's partner was not genuinely employed as claimed. As such, there was an issue of suitability and the financial requirement had not been met. Further, there were no exceptional circumstances to warrant a grant of entry clearance. An entry clearance manager reviewed and maintained the decision on 20 September 2019.
4. Judge Parkes dismissed the appeal in a decision promulgated on 4 February 2020 on human rights grounds. In essence, although the First-tier Tribunal found that the Appellant's partner was genuinely employed at the date of application as claimed, she had still not established that she had met the minimum income threshold required of £18,600 based on her annual earnings information from HMRC. In any event, the First-tier Tribunal had, in the context of a human rights appeal, to consider the circumstances at the date of hearing (rather than the date of application) and by that time, the Appellant's partner had changed employment completely and there was insufficient evidence to show that the requirements of the Immigration Rules were met for the required income at that date. In particular, the Appellant's partner had only very recently commenced employment in a second job, with less than six months' income and evidence as required in the Immigration Rules. Overall, the First-tier Tribunal took into account that the Immigration Rules had not been met and that there were no circumstances to justify leave outside of them.

### **The appeal**

5. The Appellant appeals on three grounds as follows. First, that the First-tier Tribunal materially erred in law in its calculation of the Appellant's partner's earnings at the date of application by failing to calculate her gross average income from the accepted employment in accordance with paragraph 13 of Appendix FM-SE to the Immigration Rules. A calculation on this basis shows that the minimum income requirement was met at the date of application. Secondly, that the First-tier Tribunal materially erred in law in assessing the Appellant's partner's employment at the date of hearing by reference to the requirements of Appendix FM and Appendix FM-SE rather than making an independent assessment under Article 8 of the European Convention on Human Rights on the balance of probabilities, i.e. without strict application of the evidential requirements in the Immigration Rules. On this basis, there was sufficient evidence to establish that the minimum income requirement was met at the date of hearing. Finally, that the First-tier Tribunal materially erred in law in failing to undertake a proportionality balancing exercise for the purposes of Article 8 of the European Convention on Human Rights, failing to assess the impact of the refusal on the Appellant and his British partner.

6. Permission to appeal was granted on all grounds by First-tier Tribunal Judge Neville on 28 April 2020, albeit without access to the Tribunal file held electronically and only on the assumption that the grounds were correct. That is a matter of concern for the reasons given in SYR (PTA; electronic materials) Iraq [2021] UKUT 64 (IAC), but does not affect the consideration of whether there was an error of law in the First-tier Tribunal decision and there is no suggestion that the grounds of appeal were anything other than factually accurate.
7. Further to the grant of permission to appeal and further to a provisional view that this may be a case in which the error of law issues could be determined without a hearing; there were written submissions on behalf of the parties.
8. On 31 July 2020, the Respondent opposed the appeal in a rule 24 notice on the basis that the relevant date for the First-tier Tribunal to consider the circumstances was the date of hearing and the primary issue being whether the Appellant could be supported without recourse to public funds at that date. He could not in accordance with the requirements of the Immigration Rules, in particular those in Appendix FM-SE, as his partner's second employment relied upon had commenced less than two months before the hearing. Further, even if looking at an earlier date, the evidence from HMRC showed that the minimum income requirement had not been met in any previous financial years and there was no reason to consider anticipated income at the date of application because as a matter of fact, the second employment at that time ended two weeks after the refusal of entry clearance. In any event, there were no factors identified which could have possibly led to the appeal being allowed on Article 8 grounds.
9. Written submissions were made on behalf of the Appellant on 5 and 22 August 2020 which referred to the only live issue before the First-tier Tribunal being the genuineness of the Appellant's partner's employment at the date of application and once that had been accepted, there being no dispute that Article 8 was engaged, that was determinative of the appeal being allowed further to TZ (Pakistan) v Secretary of State for the Home Department [2018] EWCA Civ 1109. In any event, on the correct calculation, the minimum income requirement was met both at date of application and date of hearing and the refusal would be disproportionate for a couple married in 2016. A number of other authorities were relied upon as well as the factors in section 117B of the Nationality, Immigration and Asylum Act 2002 but none were pursued at the oral hearing, it being accepted that these were not relevant in an application for entry clearance. For completeness, I add that the reliance on these additional points had in any event been appropriately challenged by the Respondent in a further written response dated 7 December 2020.
10. At the oral hearing, on behalf of the Appellant, Mr Ali submitted that there was only one live issue before the First-tier Tribunal which was the genuineness of the Appellant's partner's second employment at the date of application; no issue having been taken with the level of earnings, such that once the First-tier Tribunal made a finding that the employment was genuine, the appeal should have been allowed. In any event, if the First-tier Tribunal had correctly applied paragraph 13 of Appendix

FM-SE to the employment, the threshold would have been met at the date of application.

11. Mr Ali accepted that this was a human rights appeal such that the relevant date was the date of hearing but submitted that there was a delay in this case between the application being made on 19 March 2018 and the appeal hearing on 17 January 2020 in which there was a significant likelihood that circumstances could have changed. At the date of hearing, the Appellant's partner had employment with two different employers, the second of which she was in her second month of. Mr Ali submitted that the First-tier Tribunal erred in law in assessing her income by reference to the evidential requirements in Appendix FM-SE of the Immigration Rules in circumstances where Article 8 could not be qualified in that way but should have been considered as a standalone remedy, for which there was sufficient evidence of the required income level. Mr Ali accepted that there was only limited evidence of the Appellant's partner's recent employment, consisting of one payslip (supported by a corresponding bank statement) and a brief letter from an accountant; but that there was no issue taken with the genuineness of this employment.
12. In relation to the assessment of proportionality, Mr Ali accepted that there was little evidence before the First-tier Tribunal as to the impact of the refusal of entry clearance on the Appellant or his partner. However, it was known that the Appellant's partner was a British citizen, settled in the United Kingdom with employment and there was no evidence that she had ever had recourse to public funds. The couple had been married for five years so had had a long period of separation already. These were all matters which the First-tier Tribunal should have considered even in the absence of any further detail or supporting evidence.
13. On behalf of the Respondent, Ms Isherwood opposed the appeal on the basis that there was no material error of law in the First-tier Tribunal's decision. Paragraph 3 of the decision correctly identifies that the relevant date in a human rights appeal is the date of hearing and the decision follows the requirements for consideration of Article 8, with consideration of whether a person meets the requirements of the Immigration Rules being a weighty but not determinative factor in the assessment.
14. As to the income requirements, Ms Isherwood noted that there has been no explanation of the application of paragraph 13 of Appendix FM-SE to the income at date of application and no indication that any submissions were made to the First-tier Tribunal relying on this. There would in any event when considering income need to be a reference back to paragraph GEN.3.1.1 of Appendix FM that the refusal would be unduly harsh. The Appellant did not put his case on that basis and there is no evidence that the refusal would have any such consequences.
15. The First-tier Tribunal concluded in paragraph 12 that the Appellant did not meet the requirements of the Immigration Rules at the date of application or at the date of hearing and there is nothing in the decision to suggest that in those circumstances, the refusal was a disproportionate interference with the Appellant's right to respect

for family life. Whilst the conclusion and reasons on the appeal were relatively brief, they were sufficient on the facts before the First-tier Tribunal.

### **Findings and reasons**

16. There is no material error of law on the first ground of appeal as to the First-tier Tribunal's calculation of the Sponsor's income at the date of application for entry clearance, the matters put forward are simply not material to the outcome of a human rights appeal which, as correctly identified by the First-tier Tribunal and accepted by the Appellant, concerns the situation at the date of hearing and not the date of application. In this case, the Sponsor's employment originally relied upon in the application ended in part only two weeks after the refusal of entry clearance and completely by the time the appeal was heard. Whilst it will often be the case that there has been a change of circumstances between application and any appeal hearing due to the passage of time, that does not detract from the Tribunal's duty to consider the circumstances at the date of hearing in a human rights appeal. On the facts, whether or not the minimum income requirement was met at the date of application, however calculated, was not relevant to the issue of whether it was met at the date of hearing (to support the proposition that the Appellant met the requirements of the Immigration Rules at the date of hearing such that there would be little or no public interest in the refusal of entry clearance and the appeal should therefore be allowed on human rights grounds) as the income relied upon was by then from completely different sources.
17. There was reference to a significant delay between the date of application and date of hearing, but nothing to suggest that this was in any way unlawful or due to the Respondent. Only if it could be even arguable that satisfaction of the Immigration Rules at the date of application may have been a relevant consideration when assessing the public interest in the refusal of entry clearance.
18. In relation to the second ground of appeal, the issue of calculation of the Sponsor's earnings at the date of hearing was raised during the hearing, as set out in paragraph 12 of the decision. The Tribunal noted that the requirements of Appendix FM and FM-SE were mandatory and that, *"As matters stand there is no evidence to show that the Sponsor's earnings yet meet the minimum required and the fact that they may do if both jobs are retained would support a future application but is not sufficient for the position at the date of hearing. In addition the evidence would [not] meet the requirements of Appendix FM-SE and the Appellant's case would fall on that basis too."*
19. The Tribunal found in paragraph 12 firstly, that the Sponsor's income did not yet meet the minimum income threshold and secondly, that the evidence did not meet the requirements of Appendix FM-SE. The same findings are repeated in paragraph 14 of the decision.
20. Although Counsel was unable before me to identify any authority for the proposition that in a human rights appeal the Tribunal should adopt a broader brush assessment of the income threshold rather than assessing whether it is met by reference to all of the evidential requirements in Appendix FM-SE; there is at least some support for

that in the Supreme Court's decision in MM (Lebanon) v Secretary of State for the Home Department [2017] UKSC 10, see in particular paragraphs 99 and 100. However, this does not assist the Appellant because of the primary finding of the Tribunal that the Sponsor's income did not, on the evidence before the Tribunal, meet the minimum income threshold required and in addition, did not meet the evidential requirements.

21. The evidence before the First-tier Tribunal as to the Sponsor's income at the date of hearing was that she was working 30 hours per week for World Duty Free with an annual salary of £13,587.70 (which does not appear to have been in dispute) and that she had commenced employment in a second job on 1 December 2019. The evidence of that second employment was very limited. The Sponsor's written statement includes the start date with Flower Wall Shop Ltd on a flexible hours' contract and an annual salary of £7599.95. There is a letter from SKN Chartered Accountants confirming a PAYE reference, start date and monthly salary of £633.33 gross; supported by a single payslip for that amount and a corresponding bank statement showing receipt. There is no contract of employment, no detail of the hours worked or whether these were fixed per month and to the contrary, the Sponsor's evidence was that the hours were flexible such that it was at best unclear whether her monthly earnings would be consistent and not even two months' history to support regular earnings. In these circumstances and where the employment was very recent with only a single month completed, it was entirely open to the First-tier Tribunal to find that there was insufficient evidence to show that the minimum income threshold was met at the date of hearing.
22. For these reasons there is no material error of law on the second ground of appeal either. The First-tier Tribunal found that the substance of the Immigration Rules in relation to the minimum income was not met at the date of hearing, not solely because the evidential requirements for the same not being met (this being given as an additional reason for the requirement not being met) and therefore TZ (Pakistan) does not assist the Appellant.
23. In relation the third ground of appeal, the First-tier Tribunal's findings were brief, contained only in paragraph 14, which essentially concluded that the Appellant does not meet the Immigration Rules, which was a significant factor and there were no circumstances to justify a grant of leave outside of the Immigration Rules. The Appellant identifies that the decision does not contain any consideration of whether the couple could enjoy family life together outside of the United Kingdom or what the impact of the refusal of entry clearance would be on them. However, there was simply no evidence from either the Appellant or Sponsor on either point that could have been considered in substance by the First-tier Tribunal on either point. The background facts that the Sponsor was settled in the United Kingdom and employed here fall far short of identifying any factors which would even arguably support a finding that the refusal of entry clearance would amount to a disproportionate interference with the Appellant and Sponsor's right to respect for family life. On the basis of the lack of evidence before the First-tier Tribunal, the brief conclusion on Article 8 in the context of an appeal pursued essentially on the basis that the

Immigration Rules had been met was adequate and I find no error of law on the third ground.

**Notice of Decision**

The making of the decision of the First-tier Tribunal did not involve the making of a material error of law. As such it is not necessary to set aside the decision.

The decision to dismiss the appeal is therefore confirmed.

No anonymity direction is made.

Signed *G Jackson*

Date 13<sup>th</sup> April 2021

Upper Tribunal Judge Jackson