



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal number: HU/01500/2020  
HU /01501/2020, HU /01503/2020 (V)

**THE IMMIGRATION ACTS**

Heard Remotely at Manchester CJC  
On 2 August 2021

Sent to parties on  
20 August 2021

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MH

LAO

MAO

(ANONYMITY ORDER MADE)

Respondents

**DECISION AND REASONS (V)**

For the appellant: Mr M Diwnycz, Senior Presenting Officer  
For the Respondents: Ms G Patel, instructed by MCR Solicitors

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was video by Skype (V). A face-to-face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing. At the conclusion of the hearing, I indicated that I found an error of law and briefly summarised my reasons, reserving the full reasons to a written decision, which I now give. The order made is described at the end of these reasons.

1. For the purpose of this decision and in order to avoid confusion, I have referred below to the parties as they were before the First-tier Tribunal.
2. The first appellant is a citizen of the Palestinian Territories with date of birth given as 18.3.94. The second and third appellants are her daughters, citizens of Syria, with dates of birth given as 31.12.16 and 4.8.15, respectively.
3. The Secretary of State has appealed with permission to the Upper Tribunal against the decision of the First-tier Tribunal (Judge McCall) promulgated 27.1.21, allowing on human rights grounds the appellants' appeals against the decision of the Entry Clearance Officer, dated 7.1.20, and upheld in the Entry Clearance Manager's Review of 11.5.20, to refuse their applications made on 27.11.19 for entry clearance family reunion as the daughter-in-law and granddaughters of the sponsor with refugee status in the UK, pursuant to section EC-DR of Appendix FM and paragraph 319X of the Immigration Rules.
4. Permission to appeal was refused by the First-tier Tribunal on 23.3.21. However, when the application was renewed to the Upper Tribunal, Upper Tribunal Judge Macleman granted permission on 21.4.21, considering that it was arguably erroneous for the First-tier Tribunal to decide the case on the basis that it had been conceded that the appellants met the eligibility financial requirements of E-ECDR3.1-3.2, as incorrectly stated in the respondent's refusal decision. At the First-tier Tribunal appeal hearing, the judge refused, on grounds of fairness and as having not previously been raised, the presenting officer's submission that as the sponsor is unemployed and dependent on state benefits, the eligibility financial requirements under the Rules could not be met.
5. The grounds of application for permission to appeal also argued that the judge materially misdirected himself in law, failed to provide adequate reasoning for allowing the appeals, and erred in allowing the appeals on article 8 exceptionality, finding that family life could not continue elsewhere, despite the fact that first appellant's parents and other family members live in Turkey.
6. The Upper Tribunal has received Ms Patel's Rule 24 Reply, dated 25.5.21.
7. I have carefully considered the decision of the First-tier Tribunal in the light of the oral and written submissions and the grounds of application for permission to appeal to the Upper Tribunal.
8. Whilst at [33] the judge was not satisfied that the sponsor had provided financial support to the level and amount claimed, the judge accepted that some financial support had been provided and continued to be provided. However, it appears from [18] that the financial support had ceased when the sponsor came to the UK in 2017 and only recommenced after the death of the first appellant's husband in 2019.
9. This was a human rights appeal in which the judge had to assess the circumstances, including the financial circumstances of the sponsor, as at the

date of hearing. Although the respondent's refusal decision did not challenge the eligibility financial requirements of any of the appellants, I am satisfied that the judge was required to do so in the light of the respondent's submissions made that they could not meet those requirements.

10. As the judge noted at [7], the Rules remained relevant to the human rights appeal as they represent the respondent's proportional response to article 8 claims and, therefore, the extent to which an appellant meets or does not meet the Rules is relevant to the proportionality balancing exercise between the public interest and the appellants' article 8 rights to respect for private and family life. It is beyond dispute that the sponsor was unemployed and in receipt of state benefits; provided for the support of himself and his own family. The respondent's case at the appeal hearing was that such benefit income is not intended and would not be sufficient to support the three appellants, even though the judge found that the sponsor has been sending some monies, although less than the amount claimed, to the first appellant in Syria. The respondent was effectively submitting that the three appellants would inevitably become a burden on the state if permitted entry.
11. It is further relevant to the article 8 consideration that the first appellant does not meet the relationship requirement of E-ECDR, as the judge accepted at [24] of the decision.
12. The judge relied not only on the refusal decision's acceptance in respect of the first appellant that she met the eligibility financial requirements but in respect of the second and third appellants that they also met the adequate accommodation and maintenance requirements of paragraph 319X (vi) and (vii). However, the judge accepted that they could not meet 319X(v) because they have been living a life independent of the sponsor. At [37] and again at [38] the judge clearly relied on the respondent's acceptance that the second and third appellants would not be a burden on the UK taxpayer.
13. Before me, Ms Patel accepted that the Rules could not be met regardless of the financial requirements. However, she pointed to the documents in the appellant's First-tier Tribunal bundle relating to the grant of benefits and submitted that the sponsor was in receipt of Universal Credit, Personal Independent Payment, Carer's Allowance, and Child Benefit. The UC document at AB93 indicated that it was granted on the basis of the sponsor's limited capacity for work. Ms Patel not only submitted that the sum total of the monies would be sufficient to meet the 'income support' level for adequate maintenance but that the sponsor was or should have been considered as exempt from the financial requirements given the excluded benefits he received. Effectively, Ms Patel was seeking to transpose the Appendix FM requirements in relation to the minimum income threshold figures to the considerations in E-ECDR and in paragraph 319X, referring to (unspecified) case law that parties are entitled to count certain benefits as income provided there would be no additional recourse to public funds. In summary, Ms Patel

argued first that the refusal decisions were correct to consider the financial eligibility requirements and the adequate maintenance requirements were met. In the alternative, she submitted that any error by the First-tier Tribunal was immaterial as it could be demonstrated that the sponsor was either exempt, or his income sufficient, or the requirements met. She also pointed to the judge's consideration under article 8 at [37] of the decision that the conditions in which the appellants were living were unjustifiably harsh as the basis upon which the appeal was allowed.

14. However, none of Ms Patel's arguments about the financial circumstances were advanced at the First-tier Tribunal, as the judge effectively closed off all judicial consideration of the adequate income argument raised by the respondent's representative, and did so solely because of what was stated in the respondent's refusal decisions. It may be that with some thought or preparation Ms Patel, who represented the appellants at the First-tier Tribunal appeal hearing, could have advanced the arguments she raised with me today so that they could have been properly considered by the First-tier Tribunal. The fact remains that there was no consideration of any of those arguments or of the maintenance requirements. In respect of all three appellants, the judge effectively turned a blind eye to the clear and indisputable facts and the argument that the appellants could not be maintained adequately by the sponsor and would inevitably become a financial burden on the state.
15. I am satisfied that relying on the refusal decisions to the exclusion of the facts as they really are in relation to the sponsor's financial circumstances to allow the appeal was perverse and irrational, amounting to a clear and material error of law. The correct remedy for any prejudice caused by the late notification by the respondent's representative that financial circumstances were relied on, was to consider an adjournment to allow the appellants to provide any evidence to the contrary and prepare appropriate submissions. It was an error of law to simply ignore the argument that the appellants could not be adequately maintained by the sponsor.
16. The financial circumstances were also relevant to the article 8 proportionality assessment in respect of the public interest considerations of s117B of the 2002 Act. It follows that I am satisfied that the article 8 proportionality balancing exercise was entirely unbalanced and flawed by material error of law.
17. In the circumstances and for the reasons set out above, I find such material error of law in the decision of the First-tier Tribunal that it must be set aside to be remade.
18. When a decision of the First-tier Tribunal has been set aside, section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions, or it must be remade by the Upper Tribunal. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal.

Where the facts are unclear on a crucial issue at the heart of an appeal, as they are in this case, effectively there has not been a valid determination of those issues.

19. In all the circumstances, I relist this appeal for a fresh hearing in the First-tier Tribunal, I do so on the basis that this is a case which falls squarely within the Senior President's Practice Statement at paragraph 7.2.

## **Decision**

The appeal of the Secretary of State is allowed.

The decision of the First-tier Tribunal is set aside to be remade de novo with no findings of fact preserved.

The remaking of the decision in the appeal is remitted to the First-tier Tribunal.

I make no order for costs.

Signed: *DMW Pickup*

Upper Tribunal Judge Pickup

Date: 2 August 2021

## **Anonymity Direction**

I am satisfied, having had regard to the guidance in the Presidential Guidance Note No 1 of 2013: Anonymity Orders, that it would be appropriate to make an order in accordance with Rules 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 in the following terms:

*"Unless and until a tribunal or court directs otherwise, the appellants are each granted anonymity. No report of these proceedings shall directly or indirectly identify him/her or any member of their family. This direction applies to, amongst others, both the appellants and the respondent. Failure to comply with this direction could lead to contempt of court proceedings."*

Signed: *DMW Pickup*

Upper Tribunal Judge Pickup

Date: 2 August 2021