



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/11992/2019 (V)

THE IMMIGRATION ACTS

Heard at Bradford by Skype for business
On the 9 December 2020 and 6 January 2021

Decision & Reasons Promulgated
On 15 February 2021

Before

UPPER TRIBUNAL JUDGE REEDS

Between

HAITHAM ABDELBASET MOUSTAFA HEFNY

Appellant

AND

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Iqbal, Counsel instructed on behalf of the appellant.

For the Respondent: Ms Everett, Senior Presenting Officer.

DECISION AND REASONS

Introduction:

1. The appellant appeals with permission against the decision of the First-tier Tribunal Judge Mills (hereinafter referred to as the "FtTJ") promulgated on the 13 March 2020, in which the appellant's appeal against the decision to refuse his human rights application dated 20 February 2019 was dismissed.

2. The hearing took place on 9 December 2020 and resumed on the 6 January 2021, by means of *Skype for Business*. which has been consented to and not objected to by the parties. A face-to-face hearing was not held because it was not practicable, and both parties agreed that all issues could be determined in a remote hearing. I conducted the hearing from court at Bradford IAC. The advocates attended remotely via video as did the sponsor so that she could hear and take part in the proceedings remotely. There were no issues regarding sound, and no substantial technical problems were encountered during the hearing and I am satisfied both advocates were able to make their respective cases by the chosen means.
3. I am grateful to Mr Iqbal and Ms Everett for their clear and helpful oral submissions.

Background:

4. The appellant is a national of Egypt. He married his wife (the “sponsor SR”) who is a British Citizen, on the 24 September 2013 in Egypt having met through friends and originally via the telephone. In 2013 the sponsor went to visit the appellant; they became engaged and subsequently married there.
5. Following the marriage in September 2013 the parties remained living together in Egypt. In 2014 the sponsor obtained employment in Saudi Arabia and they moved to live and work there.
6. Whilst in Saudi Arabia, their child was born on 15 May 2016. They returned to Egypt and after a short period of time, the sponsor and her son moved to the United Kingdom leaving the appellant in Egypt.
7. On 20 February 2019 he made an application for entry clearance as the partner of the sponsor who is a British citizen. In the covering letter sent with the application, it was said that the sponsor was not earning enough to meet the minimum income requirement of the rules because she could only work part-time was caring for their child who had been born in May 2016. Thus the application relied on there being “exceptional circumstances” such that GEN 3.1 of Appendix FM applied, and alternative sources of income could be relied upon to make up the shortfall. The alternative source relied upon was third party support from sponsor’s father.
8. The ECO refused the application in a decision dated 10 June 2019. The reasons given for refusing the application can be summarised as follows. The ECO considered the application under section EC – P of Appendix FM but found the rules were not met. Specifically, the ECO considered that the sponsor had failed to demonstrate that she could meet financial requirements of the rules. The ECO also considered whether there were any “exceptional circumstances” with reference to GEN 1.3 but concluded that there were none and that third-party support could not therefore be relied upon.

9. The appellant appealed against this decision on 11 July 2019 setting out the same arguments in his grounds of appeal. The ECM undertook a review of that decision in light of the grounds of appeal, but, in a decision dated 10 September 2019 upheld the decision to refuse entry clearance for the reasons given.
10. The sponsor and their child went to visit the appellant in August 2019 and stayed for a period of 18 days.

The appeal before the First-tier Tribunal:

11. The appellant's appeal against the respondent's decision to refuse leave to enter the UK came before the First-tier Tribunal (Judge Mills) on the 26 February 2020.
12. In a determination promulgated on the 13 March 2020, the FtTJ dismissed the appeal on human rights grounds, having considered that issue in the light of the appellant's compliance with the Immigration Rule in question and on Article 8 grounds.
13. The FtTJ heard evidence from the appellant by way of video link from Egypt and also evidence from the sponsor. At paragraph [18] the judge set out the documentation that had been provided to the tribunal which included a bundle sent by the appellant running to 753 pages. A great deal of that material related to the evidence relevant to the issue of third-party support. There was also an updated letter from the sponsors employer.
14. At [19] the FtTJ set out that it had been conceded by the presenting officer at the outset of the hearing that the evidence of third-party support was satisfactory. The FtTJ recorded that "she accepted that the sponsors father was in a position to make up the shortfall between the sponsor's income and the £18,600 threshold required by the rules. The question was whether there were exceptional circumstances in the case such that the appellant was able to rely on that third-party support. Ms Tasmin (presenting officer) agreed that if I found that there were then I should allow the appeal."
15. The First-tier Tribunal Judge set out his findings and reasons at paragraphs [20]-[28] as follows:
 - (1) the appellant's son's interests were a primary consideration and the judge found that it was in his best interests to reside with both parents and agreed that it was regrettable that this had not been possible for most of his life.
 - (2) The judge accepted that the sponsor had good reason decide to leave Egypt with her son in September 2016 to return to live in United Kingdom, given the instability in Egypt as well as her own past experience of having originally come to the United Kingdom as a refugee many years before.

- (3) The judge stated that “were in the case that there was no prospect of the appellant’s sponsor being able to earn enough to meet the financial requirements of Appendix FM, such the separation of his family was likely to be very lengthy or even indefinite, I would likely accept that this amounted to an exceptional circumstance, however I cannot find that this is the case” (at [21]).
- (4) The judge found that at the date of the hearing the sponsor was earning £11,624 which was a shortfall of just under £7000 compared to the income threshold and the rules. The judge considered the evidence from her employer (dated 24/2/20) which described her as a “valued member of the team”. It also stated that with her skill set she would have no difficulty in securing additional employment if she wished. Specifically it is said that there were several vacancies that she could apply for in the next couple of months) at [[22]).
- (5) The judge noted the sponsor’s oral evidence that if she were to undertake a current role on a full-time basis, which was possible then she would be earning more than £19,000 per annum. Her evidence was that she forgone an opportunity for promotion last year because of the childcare issues; had she taken that job she would now be earning over £20,000 per annum.
- (6) The judge found that “it is quite clear that it would be easy for the sponsor to obtain employment needed to satisfy the requirements of the rules and it has simply been a matter of choice that she has not yet done so” (at [23]).
- (7) The judge considered the reasons given by the sponsor as to why she would not or had not increased her hours; her evidence was that the sole reason that she had not already increased her hours because she did not wish to put her son into full-time childcare (see paragraphs 8 – 10 of her witness statement).
- (8) At [25] the FtTJ stated that he understood and respected the sponsors wish to provide direct care to her young son but could not find that the choice that she faced was “an exceptional one”. The FtTJ stated “it is a commonplace situation in modern society that parents have to make the difficult choice to put their young children into daily childcare because their financial circumstances dictate that they must return to work. I have not been provided with any evidence to suggest that the appellant’s son has suffered any specific detriment during the three days a week that is already spending in nursery, between 8:45 AM and 3 PM. Moreover, he will soon turn four years of age and so will be expected to start full-time education in September 2020.”
- (9) The FtTJ stated that he did not find it unreasonable to expect sponsor to work longer hours, which were already available to her, so that she could sponsor an application for entry clearance without reliance on third-party support. The judge found that she could already have done this long before now and the delay in reuniting the family was “largely down to the choices

are to be made by the appellant and his wife, rather than because of the ECO's decision (at [26]).

- (10) The judge concluded that it was reasonable and proportionate to expect the appellant and the sponsor to arrange their affairs so that they could meet the immigration rules and then to make a fresh application for entry clearance (at [26]).
- (11) Taking all matters into the round and treating the interests of their child as a primary consideration, the judge stated that he did not find that the appellant had satisfied him on the balance of probabilities that there were "exceptional circumstances" (meaning unjustifiably harsh consequences) on the facts of this case such that GEN 1.3 applied. The judge therefore concluded the appellant was not entitled to rely on the third -party support from his father-in-law to meet the immigration rules.
- (12) At [28] the judge went on to state that "being unable to meet the rules is not necessarily fatal to in Article 8 human rights appeal. However, the testing met outside of the rules as established by the Supreme Court in *Agyarko*, is essentially the same as that under GEN1.3 of Appendix FM. The judge therefore concluded that the appeal must fail on the sole ground of appeal, namely the refusal of entry clearance as a disproportionate breach of his rights under Article 8 of the ECHR.
16. The appellant sought permission to appeal that decision and permission to appeal was issued and on 12 August 2020, permission to appeal was granted by FtTJ Adio stating:-

"At paragraph 23 the judge noted that had the sponsor taken full-time employment she would now be earning over £22,000 per annum and that it is quite clear that it would be easy for the sponsor to obtain employment needed to satisfy the requirements of the rules and it had been a matter of choice that she had not yet done so. The judge went on to state at paragraph 24 the reasons given by the sponsor from her witness statement. In analysing that reason, the judge found that he fully understood and respected the sponsors wish to provide direct care to her young son but could not find that the choice that she faced was an exceptional one. The judge went on to find that it is a commonplace situation in modern society that parents have to make the difficult choice about the young children into daily childcare because their financial circumstances dictate that they must return to work. The judge found that he had not been provided with any evidence to suggest that the applicant son had suffered any specific detriment during the three days a week that he was already spending in nursery. Moreover, he would soon turn four years of age and so would be expected to start full-time education September 2020. The judge referred to the interests of the sun as a primary consideration paragraph 27.

The grounds on the application for permission to appeal raise an arguable error of law. All the money that the sponsor is in receipt of has been accepted as being more than £18,600. This is also conceded by the respondent at the hearing albeit this is made up of the sponsor's income and benefits, however, as is argued by the sponsor and her son are entitled to these in their own right. It was argued

that there was no increased reliance on public funds, it is also argued that the judge has not had regard to the evidence that the applicant has skills that would enable him to work that following his arrival the difficulties the family face in respect of childcare would be ameliorated allowing them to meet the financial threshold. It is therefore argued that conducting a holistic assessment of whether the families continue separation is a disproportionate interference these matters should have been considered as pointed out by counsel.

It is an arguable point that the applicant's son still needs to be cared for by his parents thereby strengthening the bond with his primary caregiver. There is no reference to the mental health issues of the sponsor as pointed out by counsel in the grounds. He also argues that there was evidence for the judge in the sponsor had continuing mental health issues in particular her diagnosis with reactive depression and anxiety said by her doctor to be due to ongoing social issues relating to her husband's immigration status. I find all the grounds raise arguable errors of law."

The hearing before the Upper Tribunal:

17. In the light of the COVID-19 pandemic the Upper Tribunal issued directions on the 28 August 2020, inter alia, indicating that it was provisionally of the view that the error of law issue could be determined without a face- to- face hearing and that this could take place as a remote hearing. Following those initial directions the hearing was listed for a Skype hearing. Both parties have indicated that they were content for the hearing to proceed by this method. Therefore, the Tribunal listed the hearing to enable oral submissions to be given by each of the parties with the assistance of their advocates.
18. Mr Iqbal on behalf of the appellant relied upon the written grounds of appeal and his skeleton argument and a further skeleton argument prepared for the hearing on the 6 January 2020.
19. There was a written rule 24 response filed on behalf of the respondent.
20. I also heard oral submission from the advocates, and I am grateful for their assistance and their clear oral submissions.

The grounds:

21. It is submitted on behalf of the appellant that the evidence before the FtTJ given by the sponsor was that she did not wish to place their child in full-time childcare because she was concerned that it would affect her bond with him and would adversely affect him as he became older. It is asserted that she provided evidence as to how the continued separation was adversely affecting the couple's son. In addition, it is said that there was evidence before the judge of the sponsor's continuing mental health issues and in particular her diagnosis with reactive depression and anxiety which was said by her doctor to be due to ongoing social issues relating to her husband's immigration status. Thus it is submitted that those relevant issues which should have been considered as part of the assessment of whether the family circumstances were such that the test relying upon third-party support under the immigration rules was met. It is

submitted that these were “key pieces of evidence” and the judge should have addressed those points.

22. It is further argued that at paragraph 25 where the judge noted that the couple’s and will be starting school in September 2020 was an “irrelevant matter”. The judge was required to look at the position as at the date of the hearing and not what the position would be in September 2020. In any event, their son would be seven months older and thus at a slightly different stage of his childhood. Whilst he may be due to start school in September it is submitted that did not lead to the conclusion that he should be cared for by someone other than a parent outside of the time he is attending school. The point remains that their son still needed to be cared for by his parents thereby strengthening his bond with his primary caregiver.
23. The grounds further submit that in concluding at [28] that is the test to be met outside the rules is essentially the same as under GEN 1.3 of Appendix FM, the appeal must therefore fail was a material error of law. It is submitted that there were a number of factors relating to the family’s present circumstances which were not considered. Furthermore, when considering the position outside of immigration rules there are a number of other matters that should have been considered but which have not been considered.
24. The grounds highlight the matters that have not been considered by the FtTJ.
25. They are summarised as follows:
 - (1) if his spouse’s entire income, including universal credit was considered the appellant will be able to show that the sponsor was in receipt of income in excess of £18,600. Whilst it was accepted that the immigration rules exclude reliance upon universal credit, it was argued that there was no reasonable justification for this. The sponsor is working part-time and is receiving benefits that she and the couple’s British son are entitled to in their own right. Thus it was argued that there would be no increased reliance on public funds and there appears to be no proper justification for preventing those who have to demonstrate that earnings of at least £18,600 relying on public funds in order to meet the requirement when the public funds relied upon ones the sponsor and any British children are entitled to receive. The judge failed to address this argument. This was a material issue which should have been considered by the judge when considering whether the decision to refuse entry clearance was in all circumstances disproportionate.
 - (2) The judge did not have regard to the evidence the appellant had skills that would enable him to work or that following his arrival the difficulties of the family face in respect of childcare would be ameliorated allowing them to meet financial threshold. When conducting a holistic assessment of whether the families continue separation is a disproportionate interference in their article 8 rights, these matters should also have been considered.

26. Mr Iqbal on behalf of the respondent submitted that it had been conceded on behalf of the respondent that the third-party support was sufficient but because there were no exceptional circumstances the third-party support could not be taken into consideration. Thus the case rested on whether there were “exceptional circumstances”.
27. In this respect he submitted that whether there are “exceptional circumstances” is a subjective test and not an objective one because otherwise there would be either an exhaustive list of circumstances that are (or can be) accepted as exceptional/unjustifiably harsh. Or, at the very least, they will be examples demonstrate what might be the circumstances/consequences that may be exceptional/unjustifiably harsh.
28. Mr Iqbal submitted that what is exceptional to one person may be normal to another and vice versa. He referred to his skeleton argument where he had set out 2 particular points or examples. The first one related to parents opting to go into a care home may be normal for ethnic British families but it is unthinkable (or at least exceptional) in South Asian and Middle Eastern families living in the UK. Similarly, arranged marriages in South Asian and Middle Eastern families are normally an exception amongst British families.
29. Thus he submitted there is “no one size fits all” formula in the world. Therefore it was material error of law for the judge to treat “exceptional circumstances” or “unjustifiably harsh consequences” as an objective test when he held at paragraph 25 “it is a commonplace situation one society that parents have to make the difficult choice to put their children today childcare because the financial circumstances dictate that they must return to work.”
30. Mr Iqbal submitted that it is not commonplace in modern societies to do so and had it been so then it is genuinely hard to think of a reason why the sponsor (who had a choice to earn £19,000 per annum) would choose on one hand to personally care for her child so that she is refusing to send him into daily childcare yet, on the other hand, with this very action she is depriving her child’s company of his father in the UK. As she is able to easily choose to earn £19,000 by working full time which would enable her husband to come to the UK to be with the sponsor and their child she knows that this could be achieved only if she chose to start full-time work which would be open to her. Mr Iqbal posed the question that it was remarkable to think why on earth isn’t she picking up full-time work and putting a child into daily care when it is “commonplace in modern society the parents have to make the difficult choice to put their young children today childcare because their financial circumstances dictate that they must return to work? The answer to that question according to Mr Iqbal’s submission is that firstly because the sponsor’s father is able and willing to give financial support so financial circumstances did not dictate her to take up full-time work and secondly, the sponsor does not fall into the commonplace of the modern society that the judges referred to and thirdly, in the real world there is no utopia where parents do not have to make

difficult decisions for their children or dystopia where parents have to make difficult decisions for their children.

31. He further submitted that the judge could have taken into account that when the appellant came to the UK could take the employment and therefore respective employment could be taken into account.
32. He therefore submitted that the FtTJ erred in law on a point of principle by putting objective criteria to a subjective question. He submitted that there was no set definition for “exceptional circumstances” and was fact sensitive and that there were no legal authorities available where a definition is given of “exceptional circumstances”. He invited me to set aside the decision.
33. There was a rule 24 response on behalf of the respondent dated 29th of September 2020. In that response it is submitted that the judge directed himself to the law, immigration rules and case law at length in the determination. In particular, there was no challenge the fact that the appellant could not meet the financial requirement of the rules. There was no precedent case law to give any weight to the submission that a combination of benefits and salary which meet the financial threshold should counter the proportionality assessment/exceptional circumstances required to show breach of article 8 outside of the rules. Given the fact that benefits are not acceptable evidence of meeting the financial requirements it would be irrational if those same benefits can be used to circumvent the rules.
34. The response submits that the judge considered the sponsor’s evidence in respect of her employment from paragraph 23 finding at paragraph 25 that the reason given the sponsor’s choice not to work extra hours, in order to meet the rules was not an exceptional one. At [26] the FtTJ found that it was not unreasonable for the couple to arrange their affairs so that they could meet the requirements of the Immigration Rules and that the delay in reuniting the family was down to those choices made by the couple. The judge also taken into account the best interests of the child in making a decision.
35. The response states that it was not accepted that it was incumbent on the judge to make findings on the diagnosis of depression and anxiety caused by the failure to meet the immigration rules when the judge found that it was the sponsor’s choice not to work extra hours in order to meet those immigration rules. Thus it was inferred that the sponsor is the author of her own anxiety.
36. In her oral submissions Miss Everett submitted that there was no material error of law in the decision and that the grounds focused on a submission that the judge applied an objective test to exceptional circumstances but routinely judges consider this issue.
37. She submitted that clearly everyone’s circumstances are “exceptional” in the sense that they are “unique” to them and there can be no exhaustive list and the rules cannot cover every eventuality. However it is a high threshold. She submitted that contrary to the submissions made by Mr Iqbal that the judge

should have considered cultural expectations, there was no evidence that this related to the circumstances of the appellant and the sponsor.

38. She submitted that whilst the ongoing separation may be causing them distress, this was not an “exceptional circumstance” and the fact that the sponsor was having to make difficult decisions for childcare and work was a matter that the judge was rationally able to make on the evidence. A majority of people have to do this regardless of immigration matters and thus it did not make it an “exceptional circumstance”.
39. As to the medical evidence but did not go so far as meeting any test for “exceptional circumstances”.
40. Miss Everett accepted that the test applicable will be subjective to a degree but that the judge took into account that what people have to do routinely would not constitute an exceptional circumstance and that just because people have cogent reasons for example wanting to care full time, does not make it “exceptional “to meet the rules. The rules are proportionate and whilst Ms Everett submitted that she understood the sponsor’s reasons, the rules did not accommodate them, and it did not amount to an “exceptional circumstance” and thus the judge did not misdirect himself.
41. At the conclusion of the submissions, I discussed with the advocates the submission made by Mr Iqbal where he stated that there was no authority or any definition of “exceptional circumstances” available. In this context I referred the advocates to the respondent’s guidance available on this issue.
42. Miss Everett accepted that neither Advocate had referred the judge to the guidance and that the guidance had not been raised. Mr Iqbal confirmed that the guidance had not been before the judge and that he had not addressed it in the skeleton argument and that this could rank as a “Robinson obvious” point and that the judge would have to consider relevant factors.
43. Neither Advocate had considered the issue of the guidance or whether it was material to the decision. Having taken instructions from the sponsor, Mr Iqbal submitted that he would like the opportunity to consider the guidance and to seek to persuade the court that this was a material issue.
44. I therefore adjourned the hearing for the advocates so that they could put before the tribunal any further submissions that either party wish to make.
45. The hearing reconvened on 6 January 2021. No further documents were provided on behalf of the respondent.
46. Mr Iqbal provided a skeleton argument which he relied upon for the purposes of the hearing. He also provided two additional documents which was fresh evidence and accepted that this would only be relevant in the event of the Upper Tribunal setting aside the decision and re-making the decision. He submitted that the policy set out a number of factors which must be taken into

account as to whether there were “exceptional circumstances”. He submitted that they were set out in the bullet points in the skeleton argument which addressed the evidence.

47. Mr Iqbal submitted that the points should be given cumulative weight from paragraph 9 onwards including the best interests of the child. He submitted that there was an obligation on the FtTJ to look at the factors and those which were in favour of the appellant. He submitted this was lacking in the decision and thus there was a material error of law.
48. The factors set out and identified by Mr Iqbal were as follows.
 - Ability to lawfully remain in or enter another country. The appellant is an Egyptian national and his wife and child are British citizens. Whilst the sponsor has lived with the appellant in Egypt when she moved there in September 2013 the cohabitation lasted for less than two years because the sponsor felt intimidated, scared, and isolated because she lived in the UK forever 21 years. She was unable to lead a normal life and carry out simple day-to-day tasks due to the language barrier (paragraph 17 – 19).
 - The nature and extent of the family relationships involved. This is a genuine subsisting marriage and thus the element was not an issue.
 - The likely impact on the applicant, their partner and child of the application is refused. The sponsor and the child cannot live in Egypt permanently. The natural impact of the refusal to grant entry clearance is that the relevant child would be unable to spend time with his father, the sponsor will be unable to spend time with her husband and overall the family unit would not be able live together like a normal family.
 - Serious cultural barriers to relocation overseas. Egyptian national language and heritage traditions and festivals patriarchal, familial uniqueness food et cetera are all unknown to the sponsor and indeed to the child who was in full-time education in the UK.
 - The impact of mental or physical disability or of a serious illness which requires ongoing medical treatment. The appellant’s witness statement (paragraphs 27-28) that the appeal and separation from him led to her suffering with depression and anxiety.
 - The absence of governance or security and of the country. Skeleton argument refers to the witness statement and country guidance.
 - The immigration status of the applicant. The applicant is a national of Egypt.
 - Lack of knowledge of language spoken in the country in which the family will be required to continue or resume living. The sponsor and child do not speak Arabic. The child is in full-time education in England.

- Being separated from extended family members. The sponsor's sibling and mother reside in the United Kingdom. Her father resides in the USA the sponsor and child have a close bond.
- A material change in the quality of life and family in the country in which they will be required to continue or resume living. Reference is made to seeing the witness statements of the appellant and the sponsor.
- The appellant and their partner have a child in the UK with serious mental health or learning difficulties. This is not applicable.
- the applicant's partners are genuine subsisting parental relationship with the child in the UK. This is not an issue.

49. Factors relevant to the best interests of the child:

- whether the parent or parents are expected to remain outside or to leave the UK. Here the child lives with the sponsor and the United Kingdom, he attends school, both are British citizens and as such are not expected to leave the UK.
- The age of the child at the date of the application; two years and eight months
- the child's nationality, with particular importance to be accorded to British citizenship where the child has this. The mother and child are British citizens.
- The child's current country residence and length of residence there. The child was born May 2016 in Saudi Arabia and moved to the UK three months later and has lived in the UK since.
- Family circumstances in which a child is living; child is living with his mother and attends school and has a close bond with the appellant. The child visited the appellant in Egypt in 2018 for two weeks and otherwise is in contact with the appellant through modern means of communication. The child started foundation stage in September 2020.
- The extent to which the decision will interfere with, or impact on child's family or private life. The child will be unable to live with both his parents under the same roof in the United Kingdom.

50. Mr Iqbal submitted that the cumulative effect of the relevant factors was such that the refusal to grant entry clearance amounted to "unjustifiable harsh consequences" for the appellant, the sponsor, and the child. He therefore submitted that there was a material error of law in the decision and that the appeal should be allowed.

51. Ms Everett on behalf of the respondent submitted that as identified at the previous hearing there was no reference to the guidance however

notwithstanding the submissions that were made on behalf of the appellant in the skeleton argument, none of them dislodge the relevant finding made by the FtTJ when dealing with the issues.

52. Miss Everett submitted that most people have cogent reasons for wanting a particular outcome and Mr Iqbal had not demonstrated with the guidance that the outcome before the FtTJ although not desired, would be unjustifiably harsh. The judge had noted that the remedy was open to the appellant and that he had taken the view on the evidence that the sponsor could earn sufficient money to reach the threshold and therefore whilst there was no detailed reference to the guidance the judge's findings offset this and therefore the decision should stand.

Decision on error of law:

53. There is no dispute about the legal framework to this appeal. As the FtTJ set out in his decision, in light of the Supreme Court judgement in *MM (Lebanon) and others v SSHD* [2017] UKSC 10, the financial requirements set out in Appendix FM have changed. Whilst the Supreme Court held that the minimum income threshold itself was lawful, the court also found that the rules and policies used by the Home Office to assess such cases would need to be amended to take account of the impact on children and other possible sources of income and support. The decision of the Supreme Court led the Home Office to amend its guidance. Thus the general requirements have been amended to require the decision-maker to consider whether the minimum income rule can be met from other sources of income, financial support or funds as set out in Paragraph 21A of Appendix FM-SE. this includes third-party support where there is a credible guarantee of sustainable financial support, prospective earnings of the applicant from the sustainable employment or self-employment or any other credible and reliable sources of income or funds which is available to the couple at the date of the application or will come available to them during the period of limited leave applied for. This includes cash savings which have been held for less than six months and funds for mortgaging a property.
54. Notwithstanding the argument made, payments from Universal credit cannot be taken into account when considering whether an applicant meets the minimum income threshold (see Para 4.2.1 ID) (see Paragraph 6 of the IR which defines benefits considered as public funds for the purposes of the immigration rules and it includes universal credit).
55. Paragraph 21A of Appendix FM-SE also sets out objective criteria to which the decision-maker must have regard in assessing genuineness, credibility, and reliability of the sources of income, financial support, or funds.
56. In circumstances where there are "exceptional circumstances" which would render refusal of entry clearance, or leave to enter or remain, a breach of Article 8 of the ECHR because such refusal would result in unjustifiably harsh consequences for the applicant, their partner, or relevant child or another

family member whose Article 8 rights is evident from the information will be affected by decision to refuse the application, the rules require the applicant "will generally be granted" appropriately.

57. Thus the changes to the Rules now state that other sources of income can be relied upon in "exceptional circumstances" as set out in paragraph GEN 3.1 (1) of Appendix FM. This applies where:
- the minimum income requirement applies, and it is not met from the specified sources; and
 - it is evident from the information provided by the applicant that there are exceptional circumstances which could render refusal of the application a breach of Article 8 because it could result in unjustifiably harsh consequences for the applicant, their partner, or a relevant child.
58. As set out at paragraph [19] of the FtTJ's decision and in the oral submissions of Mr Iqbal, the parties were in agreement that the evidence as to third-party support was satisfactory and thus the question was whether there were "exceptional circumstances" in the case such that the appellant was able to rely upon this third-party support.
59. The grounds and the oral submissions made by Mr Iqbal seek to challenge the FtTJ's consideration of whether there were such "exceptional circumstances."
60. Mr Iqbal submits the test is a subjective one and that "no size fits all" and thus the judge was wrong to apply the test in an objective way as he did at paragraph 25.
61. I have given careful consideration to that submission however I do not accept that the FtTJ applied the wrong test to the question of whether there were "exceptional circumstances" in the way that Mr Iqbal has submitted. At [25] the FtTJ set out his conclusion upon the issue of "exceptional circumstances" as relied upon by the sponsor and the appellant. As set out in the skeleton argument at paragraph 5, the "exceptional circumstances" that was relied upon for the hearing was that the sponsor did not want to work full time due to the impact on her son and that she did not want to have to rely on childcare on a full-time basis.
62. The FtTJ had set out his findings of fact earlier at paragraphs [21] - [24]. In doing so the FtTJ accepted "without hesitation" that it would be in the best interests of the child concerned to live with both parents. The judge went on to state "were in the case that there was no prospect of the appellant's sponsor being able to earn enough to meet financial requirements of Appendix FM, such that the separation of this family was likely to be very lengthy or even indefinite, I would likely accept that this amounted to an exceptional circumstance. However, I cannot find that this is the case."

63. The FtTJ then set out the appellant's salary at [22] and at [23] referred to the sponsor's oral evidence which was that if she had worked full-time she would have a salary of £19,000, which was in excess of the minimum income requirement. The oral evidence of the sponsor set out at [23] was that she had forgone the opportunity of promotion where she would have obtained a salary of £22,000 because of childcare issues. The FtTJ had the opportunity of considering the evidence advanced before him and made the following finding at [23]:

"It is quite clear that it would be easy for the sponsor to obtain the employment needed to satisfy the requirements of the rules, and it has simply been a matter of choice that she has not yet done so.

64. At [24] the FtTJ set out the further evidence of the sponsor and her confirmation that she had chosen not to increase her hours because she did not want to put her son into full-time childcare and cited from the written evidence at paragraphs 8 - 10 of her witness statement.

65. This led to the FtTJ's analysis at [25]-[26] as follows:

"25. While I fully understand and respect SR's wish to provide direct care to her young son, I cannot find the choice that she faces is an exceptional one. It is a commonplace situation in modern society that parents have to make the difficult choice to put their young children into daily childcare because their financial circumstances dictate that they must return to work. I have not been provided with any evidence to suggest that the appellant's son has suffered any specific detriment during the three days a week that he is already spending on nursery, between 8:45 AM and 3 PM. Moreover, he will soon turn four years of age and so will be expected to start full-time education in September 2020."

26. I do not find that it is unreasonable to expect SR to work longer hours, which are apparently already available to her, so as to be able to sponsor an application for entry clearance without reliance on third-party support. Indeed, she could already have done this long ago before now and the delay in reuniting this family is largely down to the choices that had been made by the appellant and his wife, rather than because of the ECO's decision. It is, I find, reasonable and proportionate to expect this couple to arrange their affairs such that they can meet the immigration rules, and then to make a fresh application for entry clearance.

27. Taking all matters in the round, treating as I must the interests of his son as a primary consideration, I do not find that the appellant to satisfy me on the balance of possibilities there are exceptional circumstances (meaning unjustifiably harsh consequences) on the facts of his case such that GEN 3.1 applies. He is not, therefore, entitled to rely on the third-party support from his father-in-law in his attempt to meet the immigration rules."

66. In those paragraphs the judge conducted an analysis of whether the evidence given by the sponsor concerning her reasons for not working amounted to “exceptional circumstances”. I consider that the submission made by Miss Everett is correct that the judge properly took into account the sponsor’s evidence and that it was rationally open to the judge to conclude that the choice the sponsor was facing was not “exceptional” and that many parents have to make the difficult choice to put their children into daily childcare because their financial circumstances dictate they must return to work and that it was not unreasonable to expect her to do so.
67. Whilst Mr Iqbal referred to different circumstances which might give rise to “a set of circumstances”, such as the position of care homes to demonstrate what might be a “cultural norm”, as Miss Everett pointed out on the facts of this particular case, such cultural considerations did not apply nor were they advanced on behalf of the appellant and the sponsor.
68. It is also not the case that the judge failed to take into account the circumstances of the appellant’s child in this context. At [25] the judge expressly considered the evidence before the tribunal and stated, “I have not been provided with any evidence to suggest that the appellant’s son has suffered any specific detriment during the three days a week he is spending at nursery..”. Thus the submission set out in the skeleton argument (and also in the grounds of challenge), that the appellant had not wished to work full-time because of the effect upon her child was not supported by the evidence before the FtTJ.
69. Whilst the judge made reference to the appellant’s son soon attaining the age of four and therefore would be starting full-time education in September 2020, I do not consider that to be a material error as the grounds assert. Whilst the judge was required to consider the circumstances at the date of the hearing, the observation made was to support his earlier finding that on the current evidence that had been no detrimental effect upon the sponsor’s child and also that it supported his overall finding that it would not be unreasonable for the appellant to make that choice.
70. When considering the decision of the FtTJ it is plain that he gave careful consideration to the “exceptional circumstances” that were advanced on behalf of the appellant and sponsor. He was mindful of the ongoing separation between the family members in the UK and the appellant but the FtTJ’s decision that the sponsor was having to make a difficult decision, was a decision that many people had to face regardless of whether it was in an immigration context, was one that was rationally open to the judge to make on the evidence that was before him.
71. I note that the skeleton argument provided at the hearing by counsel (paragraph 5) and as argued before the FTT firmly identified this as the “exceptional circumstances” relied upon. Therefore whilst the grounds refer to other issues such as the sponsor’s mental health and the issue of the appellant’s

employment, it has not been established that those issues which were in fact identified or argued before the judge as “exceptional circumstances” either separately or relied upon cumulatively.

72. Even if they were, the evidence as to the appellant’s employment consisted of applications made via an online recruitment agency (see 53 – 61AB). None of that evidence demonstrated that the appellant had been offered terms of employment or for the FtTJ to make any assessment of any income he might receive from specific employment. The evidence at page 119 (GPs letter) made reference to reactive depression suffered by the sponsor but in the light of the evidence as to the sponsor’s employment, it did not demonstrate that her circumstances were such that it affected her ability to work. Neither of those points referred to in the grounds of challenge undermine the conclusions the FtTJ reached.
73. I now deal with a further point. At the error of law hearing, Mr Iqbal had made a submission that there was no definition of “exceptional circumstances” in the context of this appeal. I indicated to him that in fact there was guidance to caseworkers on this issue. He was not aware of that guidance nor did he have a copy of it. Neither advocate before the FtTJ had made any reference to it. Therefore I gave Mr Iqbal the opportunity to make submissions on this point at the adjourned hearing. For the purposes of that hearing, he prepared written submissions which I have summarised earlier in this decision. In essence he submits that the decision of the FtTJ made no reference to the guidance and whilst neither advocate has referred to this, it was “Robinson obvious”. He then listed the factors set out in the guidance referring to the appellant and the sponsor’s position. Mr Iqbal concludes his submissions by stating that by the cumulative effect of those factors show that the refusal to grant entry clearance amounted to “exceptional circumstances” or “unjustifiably harsh consequences” and therefore the appeal should be allowed.
74. Whilst Mr Iqbal submits that the points not taken about the guidance were “Robinson obvious”, if that was so it is surprising that not only did the advocates failed to refer to it but also that the author of the grounds of appeal made no reference to them.
75. Mr Iqbal did not seek to argue the context of “Robinson obvious” by reference to any case law. However in general terms an appellant who does not raise an issue as a specific ground of appeal to the tribunal bears a heavy burden in seeking to persuade the court that the tribunal erred in law in failing to take or determine that issue. The appellant must satisfy the court that the tribunal has failed to take or determine a point which is obvious in the sense that it must be one “which has a strong prospect of success if it is argued”.
76. Having considered with care the submissions from both advocates, I am led to the conclusion that it is not been demonstrated that the judge made any material error of law in his decision.

77. "Unjustifiably harsh consequences" are defined in the guidance as:
"ones which involve a harsh outcome(s) for the applicant or their family which is not justified by the public interest, including in maintaining effective immigration controls, preventing burdens on the taxpayer, promoting integration, and protecting the public on rights and freedoms of others."
78. The guidance describes this as a "high threshold" and that it is likely to only be "unusual cases" where applicants will be permitted to rely on "other credible and reliable sources of income" as a result of meeting it.
79. The factors set out in the guidance to case workers are as follows:-
- best interest of the child (see section 13.6)
 - ability to lawfully enter or remain in another country.
 - the nature and extent of the family relationships involved.
 - where relevant, the circumstances giving rise to the applicant being separated from their partner and/or child in the UK.
 - the likely impact on the applicant, their partner and/or child of the applications refused.
 - serious cultural barriers to relocation overseas
 - the impact of the mental or physical disability or of a serious illness which requires ongoing medical treatment.
 - the absence of governance or security in another country
 - the immigration status of the applicant and their family members
 - whether there are any factors which might increase the public interest in refusal
 - cumulative factors should be considered.
80. The guidance also states that it would not be "unjustifiably harsh" when considering whether the couple chose to commence their family life together whilst living in separate countries, while one of them was temporarily in another country, therefore knowing that they would have to meet the immigration requirements of one country or another in order to live together.
81. The submissions made by Mr Iqbal in essence make reference to the factors set out above and seek to identify evidence relevant to the particular factors. However, by carrying out that exercise it does not make those factors identified as "exceptional circumstances". By way of example, the written submissions refer to the ability to lawfully remain in or enter another country (factor (a)). However the FtTJ made a finding upon that issue at paragraph [21] and did so in the context of his acceptance that the sponsor had a good reason to leave Egypt in September 2016. However, he was entitled to consider that on the basis that if it were the case that there was no prospect of the sponsor being unable to earn enough to meet financial requirements such as the separation of the family was likely to be very lengthy or even indefinite, that he would accept that it amounted to an exceptional circumstance. However for the reasons he went on to give, the FtTJ did not accept that there would be such a separation. Therefore

whilst he did not have the guidance, that was a factor he properly had regard to.

82. Other factors referred to in the written submissions were those which were not in dispute, or had not been argued before the FtTJ relying on any factual evidence, for example, those relating to the nature and extent of the family relationships involved (factor (b)), the immigration status of the applicant (factor (h), being separated from extended family members (k), or whether the appellant's partner had a genuine and subsisting parental relationship with the child (factor (n)), the age of the child, the child's nationality and current country of residence.
83. Consequently none of the submissions made identify why on the particular factual circumstances relied on they would lead to "unjustifiably harsh consequences". Furthermore Mr Iqbal has not identified what particular factors were supported by reference to evidence that was given before the FtTJ and actively relied upon. It is for the appellant to identify the particular factual circumstances which it is said give rise to "exceptional circumstances" or "unjustifiably harsh consequences". As can be seen from both the skeleton argument and the decision of the FtTJ, the circumstances relied upon before the judge and were explicitly advanced before the FtTJ related to the sponsor and her decision that she did not wish to work full time.
84. Even if it can be said that the judge did not take into account the appellant's employment as set out in the grounds (a point that I have referred to earlier in this decision), when looking at the guidance it sets out specific evidence as to prospective earnings.
85. As to prospective earnings and employment or self-employment of the applicant, consideration is given to whether, at the date of the application, a specific offer of employment had been made, or a clear basis the self-employment exists. In either case such employment or self-employment must be expected to commence within three months of the applicant's arrival in the UK. Consideration is given to whether the applicant has provided verifiable documentary evidence of the offer of employment on the basis the self-employment and whether the applicant has provided verifiable documentary evidence at the date of the application, the person to be employed or self-employed is in or has recently been in sustained employment or self-employment of the same or similar type, or the same or similar level of complexity and at the same or a simple similar level of responsibility. Whether the persons provide documentary evidence that the person to be employed or self-employed is relevant professional, occupational education qualifications that they are recognised in the UK.
86. On the material before the FtTJ there was no evidence of any specific offers of employment nor as to any realistic prospect of employment. The evidence consisted of applications that were made to an online recruitment agency. Whilst the applicant had set out his qualifications in his witness statement

(paragraph 9) it had not been demonstrated from the evidence that there was an offer of employment which would have led to the judge reaching the conclusion that he would so obtain employment for the threshold to be met.

87. Having reviewed the evidence in the light of the submissions made by the advocates, I have reached the conclusion that Miss Everett is correct in her submission that notwithstanding the references made to the guidance now, those submissions do not dislodge the relevant findings made on the points advanced on behalf of the appellant and the sponsor at the hearing and that whilst most appellant's would have cogent reasons for wanting a particular outcome, Mr Iqbal has not demonstrated that within the guidance, that the outcome although not the desired outcome, is "unjustifiably harsh".
88. As the FtTJ found, on the particular factual arguments as advanced before the tribunal, it was reasonable and proportionate to expect the couple to arrange their affairs so that they could meet the Immigration Rules.
89. Whilst it is not necessary to identify any "unique" or any "exceptional" factors (see Agyarko at [47], [60]), in my judgement the circumstances that relate to the appellant and the sponsor as were relied upon before the FtTJ, were properly considered by the FtTJ and the decision he reached was one rationally open to him on the evidence available before him.
90. I remind myself that I can only interfere with a decision of the First-tier Tribunal if it has been demonstrated that the FtTJ fell into legal error. I further remind myself that the question whether the decision contains a material error of law is not whether another Judge could have reached the opposite conclusion but whether this Judge reached a conclusion by appropriately directing himself and assessing the evidence on a rational and lawful basis.
91. In *UT (Sri Lanka) v Secretary of State for the Home Department* [2019] EWCA Civ 1095 where Floyd LJ said at [19]:

"I start with two preliminary observations about the nature of, and approach to, an appeal to the UT. First, the right of appeal to the UT is "on any point of law arising from a decision made by the [FTT] other than an excluded decision": Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act"), section 11(1) and (2). If the UT finds an error of law, the UT may set aside the decision of the FTT and remake the decision: section 12(1) and (2) of the 2007 Act. If there is no error of law in the FTT's decision, the decision will stand. Secondly, although "error of law" is widely defined, it is not the case that the UT is entitled to remake the decision of the FTT simply because it does not agree with it, or because it thinks it can produce a better one. Thus, the reasons given for considering there to be an error of law really matter. Baroness Hale put it in this way in *AH (Sudan) v Secretary of State for the Home Department* at [30]:

"Appellate courts should not rush to find such misdirection's simply because they might have reached a different conclusion on the facts or expressed themselves differently."

92. Whilst this might not have been a decision every judge may have reached, for the reasons given above, it has not been demonstrated that the decision of the FtTJ involved the making of a material error on a point of law and therefore the decision stands.
93. I note that the sponsor has now provided further evidence that would be relevant to an application for entry clearance. Consequently, it would be open to the appellant to make a fresh application relying upon that evidence. Given that the FtTJ expressly found that the third -party support was satisfactory and indeed this was accepted on behalf of the respondent, that would also be a factor that the appellant would be able to place reliance upon in any fresh application to the ECO in addition to any fresh evidence available to them.

Notice of Decision:

94. The decision of the First-tier Tribunal did not involve the making of a material error on a point of law and therefore the decision stands.

Signed *Upper Tribunal Judge Reeds*

Dated 31 January 2021

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be received by the Upper Tribunal within the appropriate period after this decision was sent to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:
2. Where the person who appealed to the First-tier Tribunal is in the United Kingdom at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is 12 working days (10 working days if the notice of decision is sent electronically).
3. Where the person making the application is in detention under the Immigration Acts, the appropriate period is 7 working days (5 working days if the notice of decision is sent electronically).
4. Where the person who appealed to the First-tier Tribunal is outside the United Kingdom at the time that the application for permission to appeal is made, the appropriate period is 38 days (10 working days if the notice of decision is sent electronically).

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday, or a bank holiday.
6. The date when the decision is "sent" is that appearing on the covering letter or covering email.