



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/16452/2019

THE IMMIGRATION ACTS

Heard at Field House by Teams
On 25 November 2021

Decision & Reasons Promulgated
On 13 December 2021

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN
DEPUTY UPPER TRIBUNAL JUDGE FROOM

Between

RIAZ BEGUM
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr A Mian, Counsel, instructed by Mondair Solicitors
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. In a decision promulgated on 25 May 2021 the Upper Tribunal set aside the decision of the First-tier Tribunal and directed that the appeal would be reheard in the Upper Tribunal with no findings preserved. The Decision and Reasons of Upper Tribunal Judge O'Callaghan is attached to this decision as an appendix.
2. The Upper Tribunal made a decision to set aside the anonymity direction made by the First-tier Tribunal. No application was made for such a direction to be remade

and we saw no reason to do so.

3. The appellant in this appeal is a citizen of Pakistan born on 1 January 1953. She has appealed against the respondent entry clearance officer's decision, made on 22 August 2019, refusing her application for leave to enter to join her husband, Mr Mahmood Ataf, in the United Kingdom. Mr Ataf is British citizen. The appellant married Mr Ataf in Pakistan on 6 October 1970. She has remained living in Pakistan and has had four children from the marriage, all of whom took British nationality. Mr Ataf lives most of the time in the United Kingdom. Sadly, one of the children died. Over time the children moved to the United Kingdom. One has returned to Pakistan to look after the appellant.
4. Mr Ataf is a pensioner and his income is below the minimum income requirement so as to satisfy the Financial requirement of Appendix FM of the Immigration Rules. In her application the appellant sought to show that she met the rules through third party support received from her son, Mr Qaisar Mehmood.
5. In order to rely successfully on third party support, an applicant must first show that there are exceptional circumstances which could render refusal of entry clearance a breach of article 8 of the Human Rights Convention because such refusal could result in unjustifiably harsh consequences for the applicant or their partner.
6. Appendix FM of the Immigration Rules reads in relevant part as follows:

“Exceptional circumstances

GEN.3.1.(1) Where:

(a) the financial requirement in paragraph E-ECP.3.1., E-LTRP.3.1. (in the context of an application for limited leave to remain as a partner), E-ECC.2.1. or E-LTRC.2.1. applies, and is not met from the specified sources referred to in the relevant paragraph; and

(b) it is evident from the information provided by the applicant that there are exceptional circumstances which could render refusal of entry clearance or leave to remain a breach of Article 8 of the European Convention on Human Rights, because such refusal could result in unjustifiably harsh consequences for the applicant, their partner or a relevant child;

then the decision-maker must consider whether such financial requirement is met through taking into account the sources of income, financial support or funds set out in paragraph 21A(2) of Appendix FM-SE (subject to the considerations in subparagraphs (3) to (8) of that paragraph).

Financial requirements

E-ECP.3.1. The applicant must provide specified evidence, from the sources listed in paragraph E-ECP.3.2., of-

(a) a specified gross annual income of at least-

(i) £18,600;

...

alone or in combination with

(b) specified savings of-

...

E-ECP.3.2. When determining whether the financial requirement in paragraph E-ECP. 3.1. is met only the following sources will be taken into account-

(a) income of the partner from specified employment or self-employment, which, in respect of a partner returning to the UK with the applicant, can include specified employment or self-employment overseas and in the UK;

(b) specified pension income of the applicant and partner;

(c) any specified maternity allowance or bereavement benefit received by the partner in the UK or any specified payment relating to service in HM Forces received by the applicant or partner;

(d) other specified income of the applicant and partner; and

(e) specified savings of the applicant and partner.”

7. The requirements of Appendix FM-SE include the following:

“Other sources of income, financial support or funds in exceptional circumstances

21A(1). Where paragraph GEN.3.1.(1) of Appendix FM applies, the decision-maker is required to take into account the sources of income, financial support or funds specified in subparagraph (2).

(2) Subject to sub-paragraphs (3) to (8), the following sources of income, financial support or funds will be taken into account (in addition to those set out in, as appropriate, paragraph E-ECP.3.2., E-LTRP.3.2., E-ECC.2.2. or E-LTRC.2.2. of Appendix FM):

(a) a credible guarantee of sustainable financial support to the applicant or their partner from a third party; ...”

8. The respondent was not satisfied that the appellant met the requirement to show exceptional circumstances. The notice of decision explained:

“You have told us that you wish to travel to the United Kingdom to be reunited with your family, including your husband and adult children. Letters from your representatives, husband and children confirm that you are unable to live alone and that one of your sons is currently in Pakistan assisting you with your care. However, he is now wanting to return to the UK. You have submitted a medical summary from Shifa International Hospitals in Pakistan dated 22/05/2019,

confirming a number of ailments including osteoarthritis, Parkinson's disease and diabetes. The letter does not confirm that you require long term care, or that you are unable to perform everyday tasks for yourself. It also states your illnesses began in 2014. As stated, your family are willing to provide third party support and there is no evidence submitted as to why they cannot provide this to you in Pakistan and, if necessary, finance the necessary care available to you. The letter confirms multiple visits to different departments showing that care is available to you in Pakistan."

9. The First-tier Tribunal erred principally in its assessment of the evidence of the proposed third party support from Mr Mehmood. We noted that the respondent entry clearance officer did not take issue with the evidence of third party support and the application was refused solely because the appellant did not succeed in passing through the 'gateway test' of showing there were exceptional circumstances. Indeed, Mr Tufan accepted that the requirements of the rules to show third party support were met by Mr Mehmood. We took this to mean that there was no challenge to the evidence showing that there was a credible guarantee of sustainable financial support from Mr Mehmood to the appellant which would satisfy the Financial requirement of the rules. We therefore focused in remaking the decision on the evidence of exceptional circumstances.
10. We heard oral evidence from Mr Ataf, through an Urdu interpreter, and from Mr Mehmood in English. We heard oral submissions from both Mr Tufan and Mr Mian. We took a full note of the evidence and submissions, which we took into account alongside the bundles submitted by the parties. At the end of the hearing we reserved our decision.
11. This hearing was held remotely over the Teams video platform. The panel were located in a hearing room at Field House but Mr Mian and the witnesses appeared on screen. The equipment worked well and we consider the hearing was fair. No submissions were made to us to the contrary.
12. The burden of proof rests on the appellant and the standard of proof applicable to making our findings of fact is the civil standard of a balance of probabilities. We may take account of evidence up to the date of hearing.
13. We recognise that the words 'exceptional circumstances' are not further defined in the rules and that our task is to consider all the circumstances in order to decide whether the refusal would have unjustifiably harsh consequences so as to amount to a disproportionate interference with the appellant's family and private life.
14. We now turn to the evidence put forward on behalf of the appellant in order to show that the requirement was met. However, before we do so, we should record that a point was reached in his submissions at which Mr Mian requested an adjournment so that the appellant could file and serve additional medical evidence. This followed from our observation that the only recent medical evidence lacked detail. Applying the overriding objective of the procedure rules, which requires us to deal with cases fairly and justly and also to avoid delay so far as compatible with the proper consideration of the issues, we refused the application. In short, it was made far too

late, the appellant having already had ten months since the grant of permission to appeal to provide additional evidence. It would not be fair to the respondent to grant an adjournment at this stage solely to enable the other party to augment her case.

15. The appellant's case has consistently been made on the basis that her health began to decline after the death of her son, Nasar Mahmood, in February 2009. Her eldest son, Rashad Mahmood, moved to Pakistan in 2015 to assist the appellant to look after her and his maternal grandfather. In October 2016 the appellant's father passed away and, in 2019, Rashad Mahmood decided he wanted to return to the United Kingdom. However, he could not do so because there was no one else to care for the appellant. He is forced to remain in Pakistan. The appellant suffers from osteoarthritis, Parkinson's disease, a fractured right ankle, diabetes, hypertension and urinary incontinence. The appellant requires constant assistance with her daily tasks and is unable to live alone. In addition to the practical problems, the appellant would face stigmatization as a result of the perception that her family have abandoned her, which is seen as shameful.
16. All of the above was set out in the solicitor's letter, dated 22 July 2019, which accompanied the entry clearance application.
17. The bundle prepared for the hearing in the First-tier Tribunal, which took place in October 2020, contained witness statements made by the appellant, Mr Ataf and Mr Mehmood, as well as letters from Rashad Mahmood, among others. The tenor of the witness evidence was that the appellant's conditions had worsened. She had undergone knee replacement surgery but that had not really helped her and she could not walk without a walker or help from another person. She suffered from Parkinson's disease, which seemed to be getting worse every single day.
18. Medical evidence was submitted to support these assertions, although most of it predated the application for entry clearance. There is a 'medical summary' prepared by Dr Zeba Nasir, a medical officer at the Shifa International Hospital in Islamabad, dated 22 May 2019, which confirms that the appellant was diagnosed with Parkinson's disease after a consultation in the neurology outpatients department on 25 April 2014. She was a known case of hypertension and diabetes and she presented complaining of left-sided tremors and pain in her knees. She was started on medication which we accept included medication for Parkinson's (Sinemet and Kemadrin). She was assessed again by a neurologist in October 2016. She was diagnosed with osteoarthritis in December 2014. In November 2016 she complained of pain in both knees and her right ankle. In October 2018 she was diagnosed as having a non-united fracture of her right ankle which was treated conservatively with a POP cast. Total knee replacement on the right leg was advised. She saw a urologist in October 2018 complaining of urinary incontinence.
19. The bundle contains notes, receipts and prescriptions from these consultations. The notes show the appellant underwent a right knee arthroplasty in September 2019. She was mobilized well and discharged home. She was noted to have resting tremors in her hands. On 28 September 2019, Dr Fahim Khan, a consultant orthopaedic

surgeon wrote to confirm that he had performed the knee replacement surgery on 24 September 2019. He says nothing about the appellant's condition post-surgery other than to say he recommends the appellant receive family support for recovery from knee surgery and any other medical co-morbidities. He mentioned that her right ankle was malunited and she now had post-traumatic arthritis. She also suffered from Parkinson's disease and bladder issues. She was fully dependent on her family with all basic activities of daily living.

20. The appellant's bundle prepared for the hearing in the Upper Tribunal contains a single piece of additional medical evidence. This is a letter, dated 4 November 2021, from Dr Ashfaq Ahmed Raja, a urologist at the Alesha Care Hospital in Mirpur. This states that the appellant is under his treatment for an overactive bladder but he does not say what the treatment consists of or the severity of the condition. He confirms the appellant has other underlying medical conditions including Parkinson's (sic) and osteoarthritis. Again, no detail is given of these conditions. He does say the appellant is dependent on her family for daily living activities and he recommends close family support.
21. The updated witness statements prepared by Mr Ataf and Mr Mehmood do not throw much light on the appellant's current condition and circumstances. For example, Mr Ataf's statement, signed on 8 November 2021, replicates word-for-word at [38] to [42], what he had said in his previous statement signed on 16 March 2020 at [35] to [39]. We therefore invited the representatives to focus on the up to date position, particularly with regard to the appellant's Parkinson's disease.
22. We are aware that Parkinson's disease is an incurable neurological disease which presents with a range of symptoms. It is also progressive and can lead to severe levels of disability. We considered that our findings on the degree to which the appellant was suffering from the symptoms of Parkinson's disease might well prove central to our decision on whether there were exceptional circumstances in this case and we informed the representatives of our view so that they could address the point fully.
23. Mr Ataf's oral evidence about his wife's conditions and treatment was, with the greatest of respect, vague and added little to the picture already painted by the documents. Mr Tufan put it to him that the appellant was able to obtain the medication she needed in Pakistan. Mr Ataf replied that it is possible to find medication but it is not good quality and might be "second-hand". Asked directly how far advanced the appellant's Parkinson's is, he replied that his son helps her go to the toilet because she cannot walk. In answer to our questions, Mr Ataf said the reason the appellant had consulted a neurologist was that her hands were shaky and she could not walk. He thought his wife continued to seek assistance from neurologists but they were not helping her. The tablets they prescribed were not having any effect.
24. Mr Mehmood's evidence was clearer but also limited. Asked whether the appellant's Parkinson's disease was controlled by medication, he said it was not. The dosage had

been increased and she was suffering from side-effects. Her condition was difficult to treat.

25. In our judgement, the evidence did not establish that the appellant's Parkinson's disease is advanced or that it is not currently relatively well controlled by the medication available to her in Pakistan. We accept she has symptoms of Parkinson's but these appear to be limited to a tremor in her hands. This would create some difficulties for her but, absent more specific evidence, the evidence does not establish severe disability.
26. We accept the appellant suffered from an arthritic knee but she underwent a total knee replacement in 2019 and there is no medical evidence to confirm the oral evidence that she now suffers from very restricted mobility, even when combined with her swollen and arthritic ankle. We accept this would cause some restriction and she will find mobilising painful but, if she were as disabled as we were told by the witnesses, it is reasonable to expect to see this confirmed either by her surgeon, Dr Khan, or the doctor who saw her most recently, Dr Raza. We find there is some restriction with mobilisation but not as much as we were told.
27. We accept the appellant has bladder problems which would cause her discomfort and distress. However, as said, Dr Raza's letter does not help us to understand how badly this affects her and what care she needs with tasks that she cannot accomplish for herself. The appellant has mentioned not wanting strangers to assist her with her personal hygiene but it has not been made clear to us who would assist her with those personal tasks at present. We are only told she is assisted to walk to the toilet.
28. We accept the appellant suffers from hypertension but this is a common ailment and is usually treated with medication which we consider would be available in Pakistan.
29. Mr Mehmood confirmed that the appellant's diabetes is "borderline" and we see no reason this could not be treated in due course in Pakistan if the condition became worse.
30. We accept that Mr Rashad Mahmood is currently living in Pakistan with his mother and that he has done so for six years. We were told he wishes to return to the United Kingdom to live but the fact he has not left the appellant since 2019, despite stating a wish to do so, suggests he would not do so. We do not therefore accept that the appellant is completely isolated.
31. There is no suggestion of any mental health problems.
32. There is no suggestion of the appellant having difficulty supporting herself. She has managed to pay for what we assume to be relatively expensive treatment, such as knee replacement surgery.
33. In summary, we find the appellant is an elderly lady, who is now relatively frail and who has lived apart from her husband for almost the entirety of their 51-year marriage. There is no realistic prospect of her husband returning to Pakistan

permanently. Of her three surviving sons, two reside in the United Kingdom. The appellant has significant health conditions and she is no doubt much assisted by the presence of her son, Rashad Mahmood. However, the evidence to us has been exaggerated to the extent the appellant's plight has been presented to us as showing a situation of total dependency on family members to enable her to accomplish her tasks of daily living. We find that treatment is available and accessible in Pakistan for all of the appellant's health conditions.

34. We accept that there are compassionate circumstances in play in this case. The appellant is separated from her husband and two of her children, although this appears to us to have been a situation which has been willingly tolerated by all parties since the marriage. The appellant's health is not good. However, the circumstances do not, in our judgement, amount to a situation of exceptional circumstances.
35. Accordingly, we find the requirements of paragraph GEN.3.1.(1)(b) are not met and the appellant cannot rely on third party support. The Financial requirement of the rules not being met, the decision to refuse entry clearance is at present proportionate and lawful.
36. Although we have dismissed the appeal, we wish to point out that our conclusions are based on the evidence presented to us of the current circumstances. As we have pointed out, Parkinson's disease is a progressive and incurable condition and circumstances may change over time to the extent that the appellant could show the rules are met.

Notice of Decision

The decision of the First-tier Tribunal is set aside. The following decision is substituted:

The appeal is dismissed on human rights grounds.

No anonymity order is made.

Signed

Date 6 December 2021



Deputy Upper Tribunal Judge Froom

Fee Award Note: this is **not** part of the decision.

As the appeal has been dismissed we cannot make a fee award.

Signed

Date 6 December 2021

A handwritten signature in black ink, consisting of a large, stylized 'N' followed by a horizontal line with a small upward curve at the end.

Deputy Upper Tribunal Judge Froom

APPENDIX: ERROR OF LAW DECISION

Heard at Field House *via Skype for Business*
On 12 May 2021

Decision & Reasons Promulgated
On

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

RIAZ BEGUM
(ANONYMITY DIRECTION NOT MADE)

and

ENTRY CLEARANCE OFFICER, SHEFFIELD

Appellant

Respondent

Representation:

For the Appellant: Mr. A Mian, Counsel, instructed by Mondair Solicitors

For the Respondent: Mr. C Avery, Senior Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of Judge of the First-tier Tribunal Row ('the Judge'), sent to the parties on 13 October 2020 by which the appellant's human rights (article 8) appeal against the decision of the respondent to refuse to grant her entry clearance was refused.
2. The appellant appeals with permission of Upper Tribunal Judge Grubb by means of a decision dated 13 January 2021.
3. Though I am satisfied upon reading his decision that it was the clear intention of Judge Grubb not to grant the appellant permission to appeal in respect of the ground addressed at paragraph 4(c), he did not limit the grant of permission in the section of the standard form document that contains the decision and so the grant of permission to appeal is considered by this Tribunal to be on all grounds: *Safi and others (permission to appeal decisions)* [2018] UKUT 00388 (IAC), [2019] Imm AR 437.

Remote Hearing

4. The hearing before me was a Skype for Business video conference hearing held during the Covid-19 pandemic. I was present in a hearing room at Field House. The hearing room and

the building were open to the public. The hearing and its start time were listed in the cause list. I was addressed by the representatives in the same way as if we were together in the hearing room. I am satisfied: that this constituted a hearing in open court; that the open justice principle has been secured; that no party has been prejudiced; and that, insofar as there has been any restriction on a right or interest, it is justified as necessary and proportionate.

5. The appellant's husband, Mr. Mehmood Ataf, and her son, Mr. Qaisar Mehmood, attended the hearing remotely¹. I was informed that Mr. Mehmood Ataf has travelled to Pakistan and is presently residing with the appellant.

Anonymity

6. The Judge made an anonymity order. Unfortunately, he detailed no reasons for making such order. I was informed by Mr. Mian, who represented the appellant before the First-tier Tribunal, that no application for an anonymity order had been sought. It appears that the decision to make an order was a unilateral one taken after the conclusion of the hearing.
7. The requirement that justice should be administered openly and in public is a fundamental tenet of the domestic justice system. It is inextricably linked to freedom of the press and so any order as to anonymity must be necessary and reasoned: *R. (Yalland) v. Secretary of State for Exiting the European Union* [2017] EWHC 630 (Admin).
8. The public enjoys a common law right to know about court proceedings and such right is also protected by article 10 ECHR.
9. As observed by the Supreme Court in *re Guardian News and Media Ltd and Others* [2010] UKSC 1, [2010] 2 AC 697 where both articles 8 and 10 of the ECHR are in play, it is for the Tribunal to weigh the competing claims under each article. Since both article 8 and article 10 are qualified rights, the weight to be attached to the respective interests of the parties and family members will depend on the facts. A judge is therefore obliged to provide reasons as to why article 10 rights are given lesser weight than those given to the appellant's article 8 rights. Such reasons may permissibly be short, with reference to Guidance Note 2013, No. 1 which is concerned with anonymity orders, but they are required.
10. Rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 ('the 2008 Rules') contains a power to make an order prohibiting the publication of information relating to the proceedings or of any matter likely to lead members of the public to identify any person whom the Upper Tribunal considers should not be identified.
11. Mr. Mian made no request for the anonymity order to remain in place and was content that the order made by the Judge be set aside.
12. The reporting of the identities of parties and witnesses is an important element of open justice. I observe that the appellant is not a child nor a protected person consequent to concerns as to competency. Even in cases involving exploration of intimate details of an appellant's private and family life, including serious medical conditions the full force of the open justice principle should not readily be denigrated from: *Zeromska-Smith v. United Lincolnshire Hospitals NHS Trust* [2019] EWHC 552 (QB); [2019] Med LR 250. Revelation of

¹ I refer to both men by their full names in this decision so as to avoid any potential confusion.

the identity of the parties is an important part of open justice: *re: Guardian News and Media Limited*. Though I have sympathy for the appellant as to her present medical health, this is not a suitable matter for the issuing of an anonymity direction as it is sufficient for article 10 purposes to publicly observe within the decision that the appellant has health concerns. There is no requirement that the precise nature of the health concerns be identified.

13. I therefore set aside the anonymity order issued by the First-tier Tribunal.

Background

14. The appellant is a citizen of Pakistan and is aged 68. Her husband is presently aged 70 and is a British citizen.

15. The appellant applied for leave to enter the United Kingdom in July 2019 as the wife of a British citizen. The couple were married in 1970 and the appellant has remained in Pakistan since that date. Her husband resided in the United Kingdom at the time of the marriage and returned to this country soon after. He has continued to reside in the United Kingdom, returning frequently to Pakistan to visit his wife.

16. The couple have four children all of whom are British citizens. They were born and resided in Pakistan, but over time relocated to the United Kingdom to live with their father. One child unfortunately died. A second child returned to Pakistan in 2015 and presently lives with the appellant. This child states that he wishes to return to the United Kingdom. The other two children either reside with the appellant's husband or lives close by.

17. The appellant contends that the present arrangement with her husband cannot continue. She is of an age where she requires personal care consequent to her deteriorating health condition. She presently receives medical treatment in Pakistan and is supported financially by members of the family. Her husband also has deteriorating health, much of it related to age.

18. The respondent refused the application by means of a decision dated 22 August 2019. In respect of the Immigration Rules ('the Rules') the respondent stated that there were no exceptional circumstances in the appellant's case and so third-party support would not be taken into consideration. Consequently, as her husband was not earning the required £18,600 per annum the application was refused under paragraph EC-P.1.1(d) of Appendix FM of the Rules.

19. The appellant's application was considered under paragraphs GEN.3.1. and GEN.3.2 of Appendix FM. The health conditions of both the appellant and her husband were noted as was the appellant's desire to be reunited with her family in the United Kingdom. However, it was decided that the evidence provided did not confirm that the appellant required long-term care or that she was unable to perform everyday tasks by herself. The respondent was satisfied that the evidence presented confirmed that care was available to the appellant in Pakistan.

Hearing before the First-tier Tribunal

20. The appeal came before the Judge sitting at Birmingham on 8 October 2020. Mr. Mehmood Ataf and Mr. Qaisar Mehmood attended the remote hearing and gave oral evidence.

21. The Judge was informed by the appellant's counsel, Mr. Mian, that the appeal was not being advanced under the adult dependent relative rule.
22. Mr. Mian confirmed it was accepted that the appellant's husband did not have an income of £18,600 per annum, being in receipt of a state pension in the sum of £8,697. However, it was asserted that he had a credible guarantee of sustainable financial support from his son, Mr Qaisar Mehmood, which could properly be taken into account under paragraph 21A(1) of Appendix FM-SE. In addition, it was submitted that there were exceptional circumstances which would render the refusal of entry clearance a breach of article 8 because such refusal could result in unjustifiably harsh consequences for the appellant and her husband. It was therefore submitted that the appellant met the requirements of paragraph GEN.3.1.(1)(b) and GEN 3.2.(1) of the Rules.
23. The Judge concluded that Mr. Qaisar Mehmood could not satisfy the relevant third-party sponsor requirements, at [16]-[18] of the decision:

'16. In assessing whether this is a credible guarantee I take into account the provisions of paragraph 21A(8) of Appendix FM-SE. [Mr. Qaisar Mehmood] has produced evidence of his income and his financial circumstances. There is evidence that he has been paying money to support his mother and elder brother in Pakistan. He produced in his bundle evidence of money transfers of between £200 and £400 per month. His evidence was that this averaged about £300 per month.

17. I do not find that this is a credible guarantee of sustainable financial support. [Mr. Qaisar Mehmood] would have to guarantee to provide £9903 per annum. This is over half of his net income. The shortfall is large. It is more than half of the £18,600 required. Although [Mr. Qaisar Mehmood] has been supporting his mother he has not been paying anything like the £9903 per annum required. If his circumstances changed he would not be able to afford that amount. It is not credible that he would be either able or willing to pay his father and mother the £9903 per annum required over a sustained period. He has not paid it before. He is charging his 87-year old grandmother a commercial rent for allowing her to stay in his house.

18. Consequently, I am not satisfied that there is a credible guarantee of sustainable financial support.'

24. The Judge further concluded that exceptional circumstances did not arise, at [19], and that the respondent's decision was not a disproportionate breach of article 8 rights, at [22]-[33].

Grounds of Appeal

25. By means of his notice of appeal, the appellant relies upon four grounds of challenge that are detailed over 6 pages. The respective grounds are identified as:
 - 1) The Judge adopted an incorrect approach when assessing the financial requirement and the third-party sponsor's finances (para. 4 of grounds)
 - 2) The Judge made findings unsupported by evidence and erred in law (para. 5).
 - 3) The Judge did not conduct a proportionality exercise to assess the rights a British citizen will have to relinquish in this matter (para. 6)

4) The Judge erred in law in dismissing the appeal under article 8 (para. 7)

26. In his grant of permission to appeal UTJ Grubb reasoned:

‘2. It was accepted that the sponsor did not have the income necessary to meet the financial requirements (£18,600 per annum) as his state pension was only £8,697 per annum. The appellant relied upon their guarantee for the shortfall of £9,903 from the appellant and sponsor’s son. In total (including employment and rent received) he earned a net income of £2,500 per month. His expenses were £13,000 per year, leaving him about £17,000 per year. The son had provided some support for the appellant previously of about £300 per month on average, i.e. £3,600 per year. The judge did not accept that it was credible that he would pay £9,903 (over half of his net income) to support the appellant and his father over a sustained period.

3. The Grounds raise a number of points challenging the judge’s assessment of the son’s guarantee as not being credible and his assessment under Art. 8. In para. 4, it is contended that the judge should not have taken the £18,600 per annum as the required amount but a net figure after deductions. That is unarguable. The Rules require that the appellant establish she would have a gross income available of £18,600. Given the sponsor’s pension, the shortfall was correctly taken as £9,903.

4. However, in paras 4 and 5, it is also contended that the judge wrongly calculated the son’s available income by ignoring, when assessing his net income, that as part of his expenses the £300 per month he paid to the appellant had already been taken into account. There is arguable merit in this ground, although the calculation in the Grounds is based on the improper ‘net calculation’ of the £18,600 as the base-line income required by the appellant. The substance of the point remains even if the shortfall per annum to be met by the son is £9,903 which is approximately £825 per month. Given his net annual/monthly income (including an additional £300 per month already paid to his mother) and what would remain if he supported his mother as required, the judge arguably failed to give adequate reasons for finding that the son’s guarantee was ‘not credible’.

5. Consequently, I grant permission for these reasons in paras 4(c) and (d) and para 5. The Grounds in paras 6 and 7 are, perhaps, less meritorious but I would not exclude consideration of them even though they may ultimately, if standing alone, prove to be unsuccessful.’

27. The respondent filed a rule 24 response authored by Ms. Willocks-Brown, dated 1 February 2021.

Decision on error of law

28. Consequent to discussion and having taken instructions, Mr. Mian withdrew reliance upon paragraph 4(c) of the grounds. This was a bald construction challenge seeking to establish that in requiring an applicant to provide specified evidence of ‘a specified gross annual income of at least £18,600’, paragraph E-LTRP.3.1.(a)(i) of Appendix FM to the Immigration Rules (‘the Rules’) simply required an applicant to establish a net income of £16,289.80.

29. The appellant was correct to withdraw this ground. As Judge Grubb observed the contention that the requirement as to ‘gross income’ can be read as requiring the provision of specified evidence establishing ‘net income’ is unarguable. The interpretation of the Rule

is limited to its grammatical meaning. Lord Reid enunciated the classic consideration of literal construction in *Jones v. DPP* [1962] AC 635, at 662, namely, '*It is a cardinal principle applicable to all kinds of statutes that you may not for any reason attach to a statutory provision a meaning which the words of that provision cannot reasonably bear. If they are capable of more than one meaning, then you can choose between those meanings, but beyond that you must not go.*' It is well-established that, in general, secondary or delegated legislation is construed on lines similar to those applicable in the case of statute.

30. The appellant's strongest ground was an amalgamation of elements of paragraphs 4 and 5. In simple terms it identified a factual error by the Judge at [17] of his decision as to the shortfall to be met by the third-party sponsor of £9,903 being 'over half' of Mr. Qaisar Mehmood's net annual income when it was closer to one-third. Mr. Avery accepted that an error of fact had been made but contended that ultimately it did not amount to a material error of law. Upon careful consideration of the decision, I am satisfied that the error of fact amounts to a material error of law: *R (Iran) v. Secretary of State for the Home Department* [2005] EWCA Civ 982. At [17] the Judge weighed the fact that Mr. Qaisar Mehmood had not devoted £9903 per annum to his mother (or father) to date. When considering his ability to meet the shortfall, the Judge did not conclude that Mr. Qaisar Mehmood had insufficient savings to fall back upon if required, nor that he was at risk of losing his employment. The primary concern of the Judge was that the shortfall would eat up over half of his available funds. However, the calculation that £9,903 amounted to over half of Mr. Qaisar Mehmood's disposable income was incorrect and cannot properly be said to be borderline in its error. The erroneous fact was core to the Judge's adverse conclusion on the availability of third-party support and consequently was a material error of law. For these reasons I confirmed at the hearing that the decision could not properly stand and would be set aside.
31. There are no merits to the remaining grounds, which can properly be addressed in brief terms. A complaint was made as to the Judge erring in law by reaching conclusions upon which no evidence was presented. The challenge entirely fails to grapple with the fact that the Judge was required to reach a decision as to whether appropriate third-party support was available, and therefore was required to make relevant findings on that issue, which he did in this matter and for which he gave adequate reasons.
32. Paragraph 6 of the grounds of appeal is simply a disagreement with the Judge's conclusion as to the appellant's husband being able to continue to visit his wife as has been the case over many decades.
33. Paragraph 7 is misconceived. It is a challenge to a purported finding at [25] which is, on simple consideration, not actually a finding of fact. The Judge has simply indicated to the unsuccessful appellant that she could make a future application with the support of three of her children, rather than solely upon Mr. Qaisar Mehmood. I am somewhat surprised that this observation, which I conclude was made in the spirit of helpfulness, was subject to a challenge running to half a page within the grounds.
34. Paragraph 7 further errs by baldly asserting that the Judge failed to take certain personal issues into account when conducting the proportionality exercise. I am satisfied that the Judge was aware of these matters and gave cogent reasons when considering proportionality.

35. I have concluded that the Judge erred at [17] of his decision, in respect of the consideration of the appeal under the Rules. I am, just, satisfied that the requirement to reconsider the appeal under the Rules properly requires that all matters are reconsidered in this matter, including article 8 outside of the Rules. Mr. Avery did not seek to dissuade me from this course of action.

Remaking the decision

36. The parties agreed that this is a matter where it is appropriate that the remaking of the decision be undertaken by the Upper Tribunal: paragraph 7.2. of the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal.

37. In light of the present need to take precautions against the spread of Covid-19 and the overriding objective, both the parties and the Tribunal agreed that it would in this case be appropriate to determine the appeal by remote hearing.

Direction

38. The following direction is made:

- i) The appellant is to file and serve, if so advised, any additional evidence to be relied upon, accompanied an appropriate rule 15(2A) application, no later than 14 days before the resumed hearing.

Notice of Decision

39. The decision of the First-tier Tribunal, dated 13 October 2020, involved the making of a material error on a point of law and is set aside.

40. No findings of fact are preserved.

41. The decision is to be remade by the Upper Tribunal at a resumed hearing, the date of which is to be fixed at a future date.

Signed: *D O'Callaghan*
Upper Tribunal Judge O'Callaghan

Date: 14 May 2021