



**Upper Tribunal**

**(Immigration and Asylum Chamber)**

**Appeal Number: HU/17687/2019**

**HU/17685/2019**

**HU/17682/2019**

**THE IMMIGRATION ACTS**

**Heard at Bradford (Via Microsoft Teams)**

**On 1 December 2021**

**Decision & Reasons promulgated**

**On 10 December 2021**

**Before**

**UPPER TRIBUNAL JUDGE HANSON  
DEPUTY UPPER TRIBUNAL JUDGE KELLY**

**Between**

**RAZMIN BEGUM  
KOLSUMA BEGUM  
AYSHA BEGUM**

**(Anonymity direction not made)**

**Appellant**

**and**

**AN ENTRY CLEARANCE OFFICER**

**Respondent**

**Representation:**

For the Appellant: No appearance.

For the Respondent: Mr Tan, a Senior Home Office Presenting Officer.

**DECISION AND REASONS**

## **Background**

1. An Entry Clearance Officer (ECO) refused the applications for entry clearance of this family unit to join their sponsor, the husband of the first appellant and father of the second and third appellant's, in the UK pursuant to Appendix FM of the Immigration Rules or outside the Rules pursuant to article 8 ECHR.
2. A decision of the First-tier Tribunal allowing the appeal was set aside by the Upper Tribunal and the matter returns to the Upper Tribunal for the purposes of enabling it to substitute a decision to either allow or dismiss the appeal.
3. The appellants have been represented throughout the proceedings but shortly prior to the hearing the Upper Tribunal received correspondence indicating that a fresh application for entry clearance had been made as a result of a fundamental change in circumstances relating to the sponsor's circumstances in the United Kingdom, in relation to both his employment, income, and accommodation. The appellants representative stated that her specific instructions were not to provide advocacy services but to request the Upper Tribunal to determine the merits of the appeal on the basis of the documents that have been made available, without more.

## **Discussion**

4. It was found at the Error of Law stage that the documentary evidence relied upon by the appellants in support of their appeals did not meet the requirements of Appendix FM-SE.
5. The starting point for reconsideration is therefore that on the evidence that was previously made available it had not been established that the appellants could meet the requirements of the Immigration Rules.
6. No issue was raised before this Tribunal in relation to the relationship between the above appellants and their UK-based sponsor both in terms of any biological connection or there being a subsisting relationship.
7. In relation to the application of article 8 ECHR to an entry clearance case, in MM (Lebanon) [2017] UKSC 10 the Supreme Court surveyed the Strasbourg jurisprudence when considering the case of *Jeunesse v Netherlands* [2015] 60 EHRR 17 and said that the distinction was rather between positive and negative obligations. Refusing to admit or removing migrants with no settled right of residence involves the potential breach of a positive obligation to afford respect to private or family life by allowing a person to enter or remain in the host country. Technically, therefore, the question is whether the host country has such an obligation rather than whether it can justify interference. Contrast the position of removal of a settled migrant's right of residence where the state has to justify interference. The Supreme Court noted ECHR guidance that the principles applicable were similar [40]. This follows on from the analysis in *Hesham Ali* at [32] "whether one poses the question whether, striking a fair balance between the interests of the individual

in his private or family life and the competing interests of the community as a whole, his right to respect for his private and family life entails an obligation on the part of the state to permit him to remain in the UK; or whether, striking a fair balance between the same competing interests, his deportation would be a disproportionate interference, one is asking essentially the same question. It is true, as counsel pointed out, that the onus is on the state to justify an interference, whereas there is no such onus on the state to demonstrate the absence of a positive obligation, but questions of onus are unlikely to be important where the relevant facts have been established. Ultimately, whether the case is considered to concern a positive or a negative obligation, the question is whether a fair balance has been struck”.

8. The main documentation the appellants seeks to rely upon to suggest an entitlement to leave to enter the United Kingdom is that provided with the fresh application that has been made for entry clearance. We have seen a copy of that application and the supporting paperwork sent by email very shortly before this hearing but there is no evidence that an ECO or anyone else has had the opportunity to undertake the necessary enquiries to establish whether that evidence satisfies the requirements of Appendix FM.
9. In relation to the minimum income requirement set out in the Rules, in MM (Lebanon) and others [2014] EWCA Civ 985 it was said that in setting the maintenance limits the Secretary of State had "discharged the burden of demonstrating that the interference was both the minimum necessary and strikes a fair balance between the interests of the groups concerned and the community in general. Individuals will have different views on what constitutes the minimum income requirements needed to accomplish the stated policy aims. In my judgment it is not the court's job to impose its own view unless, objectively judged, the levels chosen are to be characterised as irrational, or inherently unjust or inherently unfair. In my view they cannot be". The Supreme Court in MM (Lebanon) (supra) held that the challenge to the acceptability in principle of the minimum income requirement failed. The minimum income requirement pursued the legitimate aim of ensuring so far as was practicable that a couple did not have recourse to welfare benefits and had sufficient resources to be able to play a full part in British life. That legitimate aim justified interference with Article 8 rights.
10. Although it was found by the Supreme Court that
  - (i) the rules left a gap regarding the welfare of children which was not adequately filled by the instructions to entry clearance officers particularly so far as treating the best interests of children as a primary consideration was concerned. The rules failed unlawfully to give effect to the duty under s55 of the 2009 Act in respect of the welfare of children and the instructions were also unlawful;

- (ii) So far as alternative funding sources were concerned (such as prospective earnings of the foreign partner or third-party support), whilst it was not irrational for the Secretary of State to give priority in the rules to simplicity of operation and ease of verification, operation of the same restrictive approach outside the rules was a different matter and much more difficult to justify under the Human Rights Act. Nothing said in the instructions to case officers could prevent the tribunal on appeal from looking at the matter more broadly. There was nothing to prevent the tribunal, in the context of the Human Rights Appeal, from judging for itself the reliability of any alternative sources of finance in the light of the evidence before it. In so doing, it would no doubt take account of such considerations as were discussed in Mahad v Entry Clearance Officer [2009] UKSC 16 including the difficulties of proving third party support.
- 11.** The issue of third-party alternative funding does not arise in this appeal and we have not been referred to sufficient evidence regarding the impact of the decision upon any children that would make the ECO's decision unlawful or disproportionate when considering section 55.
  - 12.** Mr Tan identified in his submissions a number of concerns/anomalies that arose from the evidence that had been provided in support of the appeal prior to the fresh application being made and while he speculated those issues had perhaps been resolved in the fresh application there was nothing further from the appellants to establish this was the case; both in relation to the accommodation and the provision of sufficient compliant evidence of employment.
  - 13.** Mr Tan also raised the issue of fairness in the use of article 8 ECHR by the appellants as a means to circumvent the requirements of making a valid application through an ECO as any other applicant seeking entry clearance for settlement from abroad is expected to do.
  - 14.** The issue in this appeal is the fifth of the Razgar questions; whether the decision is proportionate to any interference in a protected right including the positive obligation upon the Secretary of State identified in the case law above.
  - 15.** In this case we find that Secretary of State has made out her case that any interference is proportionate to the legitimate aim of the maintenance of effective system of immigration control and the economic well-being of the United Kingdom. We do not find that the decision on the facts is a disproportionate breach of the obligation to afford respect to the family life of this unit by permitting the appellants to enter the United Kingdom on the evidence. We find having weighed up the competing interests that any interference is justified.
  - 16.** We accept this finding will prevent this family joining each other in the United Kingdom but in the light of the fact a fresh application has been made which the appellants and their representatives believe is now supported by adequate evidence, which was filed in November 2021, and which will no doubt be considered with the required degree

of anxious scrutiny by an ECO, any delay is likely to be only for a short period of time and wholly proportionate. If the appellants do not succeed with that application for good reason that will reinforce the finding made pursuant to article 8; which does not give a person the right to choose where they wish to live.

- 17.** The Higher Contracting States to the ECHR have a margin of appreciation in relation to the application of those provisions. The Secretary of State sets out in detail the requirements an applicant is required to demonstrate they can satisfy within the Immigration Rules in relation to matters such as family migration into the United Kingdom. Those rules have not been shown to be unlawful by reference to ECHR or any other provision. It is accepted that Rules have been found not to provide a complete answer to question such as that posed in this appeal but the inability of the appellants to satisfy the Rules is a material factor in favour of the Secretary of State as it demonstrates the public interest.
- 18.** We find the Secretary of State has established that the decision is proportionate on the facts especially in light of the failure of the appellant to attend the hearing or to instruct their representative to attend the hearing or to provide sufficient evidence to rebut the Secretary of State's argument.
- 19.** Had no further application been made we would have completed this determination by indicating to the appellants that there is always the option open to them of making a fresh application which we can be considered afresh by an ECO. They have already done so and that should be the focus of their attentions now.

## **Decision**

### **20. We dismiss the appeal.**

Anonymity.

- 21.** The First-tier Tribunal made no order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

We make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed  
Upper Tribunal Judge Hanson

Dated 1 December 2021