



**Upper Tribunal  
(Immigration and Asylum Chamber)**  
(HU/00964/2020)

Appeal Number: UI-2021-000865

UI-2021-000866 (HU/00966/2020)

**THE IMMIGRATION ACTS**

**Heard at Birmingham Civil Justice Centre**      **Decision & Reasons Promulgated**  
**On 28<sup>th</sup> July 2022**      **On 8<sup>th</sup> January 2023**

**Before**

**UPPER TRIBUNAL JUDGE MANDALIA**

**Between**

**NEHARUN NESSA (1)  
MD NIZAM MIAH (2)**

Appellants

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr. M Nazir, Counsel, instructed by ASM Immigration Services

For the Respondent: Ms Z Young, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellants are nationals of Bangladesh. The first appellant is the mother of the second appellant, who is now 20 years old. On 16<sup>th</sup> October 2019 (*when the second appellant was 17 years old*), the appellants applied for leave to enter the United Kingdom under Appendix FM of the immigration rules on the basis of their family life with Mr Md Makhon Miah, who is the husband of the first appellant and father of the second appellant.

2. The applications for entry clearance were refused by the respondent for reasons set out in two separate decisions. In the decision dated 10<sup>th</sup> December 2019 directed to the first appellant, the respondent concluded that her application does not fall for refusal on grounds of suitability under section S-EC of Appendix FM, but she does not meet all of the eligibility requirements of Section E-ECP of Appendix FM. The respondent accepted the eligibility relationship requirement is met but concluded the eligibility financial requirements are not met. The respondent also concluded that the eligibility English language requirement is not met, and the first appellant is not exempt from that requirement. The decision directed to the second appellant was also dated 10<sup>th</sup> December 2019 and as far as he is concerned, the respondent was not satisfied that the eligibility requirements of Section E-ECC.1.2 to 1.6 of Appendix FM are met. In particular the respondent concluded the eligibility relationship requirement and eligibility financial requirements are not met. In each case the respondent concluded that there is no evidence to establish that there are exceptional circumstances which would render refusal, a breach of Article 8.
3. The appellants' appeals against those decisions were dismissed by First-tier Tribunal Judge Mehta ("Judge Mehta") for reasons set out in a decision promulgated on 25<sup>th</sup> August 2021. The appellants claim the decision of Judge Mehta is vitiated by material errors of law as set out in the appellants' grounds of appeal settled by counsel and dated 29<sup>th</sup> September 2021. The grounds focus upon the evidence before the Tribunal regarding the financial requirements and specified evidence required in support. The grounds can be summarised as follows:

  - a. The appellants had provided the sponsors personal bank statements corresponding to the same six-month period as the payslips from his employment with VB Halesowen Ltd and LMT Services Bham Ltd. The fact that the salary paid into the appellant's bank account was "*slightly above*" the amount shown on the payslips was not fatal to the application, since the evidence

established that the sponsor was earning an annual income sufficient to meet the minimum income requirement of £22,400. Judge Mehta failed to consider the sponsor's explanation for the disparity between the income set out in the payslips and the sums paid into the bank account, and failed to have regard to the letter dated 30<sup>th</sup> October 2019 from LMT Services Bham Ltd setting out an explanation for the disparity.

b. Contrary to what is said at paragraph [33] of the decision, the sponsor had provided the letters required from each of his employers setting out the information required under paragraph 2(b) of Appendix FM-SE. Those letters had been provided to the respondent when the applications for entry clearance were made.

c. Alternatively:

i. Judge Mehta should have considered the application of the evidential flexibility under Section D of Appendix FM-SE.

ii. Judge Mehta erred in failing to take into consideration that the second appellant is now an adult and would be unable to apply for entry clearance under the same immigration rule, and thus the decision to refuse entry clearance potentially has harsh consequences for him.

**4.** Permission to appeal was granted by First-tier Tribunal Judge Haria on 4<sup>th</sup> November 2021. Judge Haria said:

" 2. Having found the appellants met the financial requirements and the first appellant was exempt from the English language requirement of the Immigration Rules, it is arguable that the judge erred in the proportionality assessment under Article 8. While there is less merit in the other grounds, I do not consider it appropriate to limit the grant of permission.

**5.** I pause to note that when granting permission, the reference to the appellants meeting the immigration rules, is a reference to paragraph [47] of the decision of Judge Mehta that the "appellants are accepted as

meeting the financial requirements of the rules as of now...". Judge Mehta had concluded at paragraph [33] of his decision, that the appellants did not meet the requirements of the immigration rules when they made their applications for entry clearance.

6. After hearing the parties submissions, I informed the parties that I accept the decision of the First-tier Tribunal Judge is vitiated by a material error of law but only insofar as the judge's assessment of the Article 8 claim outside the immigration rules is concerned. I informed the parties that as accepted by the respondent, Judge Mehta had failed to have regard to the fact that the second appellant is now 20 years old and if he is required to make a further application for entry clearance, he would have to meet the more stringent requirements for entry clearance as an adult dependent relative set out in Section EC-DR of the immigration rules.
7. As I rejected the first and second grounds of appeal and concluded it was open to Judge Mehta to find that the eligibility financial requirements were not met by the appellants when the applications were made, I determined that the appropriate course is for the decision to be remade in the Upper Tribunal. The sole issue is whether the appeals can succeed outside the immigration rules. There is a presumption that if the decision of the First-tier Tribunal is set aside, the Upper Tribunal will proceed to remake the decision at the hearing of the appeal. I heard further submissions from the parties representatives and I informed the parties that I would provide my decision as to the outcome of the appeal in writing. This I now do.

#### The decision of the First-tier Tribunal

8. Mr Md Makhon Miah attended the hearing before the First-tier Tribunal and gave evidence with the assistance of an interpreter. The appellant's case is summarised at paragraph [14] of the decision:

"14. The appellants claim that any discrepancies in relation to the financial requirements and specifically discrepancies between the payments made

into their sponsors account and their sponsors payslip is a genuine mistake and has been clarified by their sponsor in his witness statement. In relation to the English language requirements of the rules the appellants claim that the first appellant is exempt from passing an English language test as she suffers from a disability in the form of a large cerebral infarct and left MCA territory with Mass effect which has affected her ability to remember or memorise activities.”

**9.** Judge Mehta summarises the respondent’s case at paragraphs [16] and [17] of his decision. He set out the relevant immigrations rules and the legal framework at paragraphs [18] to [31] of the decision. As far as the immigration rules are concerned, there were two issues for Judge Mehta to consider. The first is whether the eligibility financial requirements are met by reference to the sponsor’s income and the specified evidence. Second, whether the appellant meets the eligibility English language requirement, or more particularly, whether she can establish that she is exempt from the English language requirement under paragraph E-ECP.4.2 of Appendix FM.

**10.** As to the eligibility financial requirements, Judge Mehta said:

“33. The first issue to be decided under the immigration rules is whether the appellants sponsor meets the financial requirements of the rules. The relevant date is the date of the application. The appellant’s sponsor accepts that there is a discrepancy between the amounts of money deposited in his bank account and the corresponding amounts shown on his payslip. It is a requirement of the immigration rules that the appellants sponsors pay on his payslip matches the deposit or salary credit into his bank account. I have also considered the application that was made and contained within the respondent’s bundle. There was no letter from the appellant sponsor’s employers who issued the payslips confirming his employment, gross annual salary, length of employment, type of employment or the period over which he has been paid. This is a requirement of the immigration rules and the letter, forming part of the financial requirements, should have been submitted at the time of the application. The appellants therefore do not meet the financial requirements of the immigration rules.”

**11.** As to the English language requirement, Judge Mehta carefully considered the evidence before him and for reasons set out in paragraphs [34] and [35] of his decision, he found the first appellant is exempt from meeting the English language requirements of the immigration rules. That finding is not challenged by the respondent.

- 12.** Having found the requirements of the immigration rules are not met, Judge Mehta went on to consider whether the respondent's decision is nonetheless disproportionate. He considered the public interest considerations set out in s117B of the Nationality, Immigration and Asylum Act 2002, and the factors that weigh in favour of, and against the appellant. He concluded, at paragraph [48] that he was not satisfied that there are exceptional circumstances in the appellants' cases, that would warrant a grant of leave outside the immigration rules.

### Error of law

- 13.** At the outset of the hearing before me, Ms Young confirmed that the respondent submits there is no merit to the first and second grounds of appeal, and that it was open to the judge to find that the appellants did not meet the eligibility financial requirements set out in Appendix FM and Appendix FM-SE of the immigration rules for the reasons given in the decision. She did however accept that Judge Mehta had erred in his consideration of the Article 8 claim outside the immigration rules. She accepts that at paragraph [47], Judge Mehta states the appellants are accepted as meeting the financial requirements of the immigration rules as of now. She accepted that as set out in 'ground 3', paragraphs (b) and (c) of the grounds of appeal, Judge Mehta failed to take into account the fact that the second appellant is now an adult, and would now be unable to apply for entry clearance under the same immigration rules and benefit from the fact that he was a child at the time of his previous application. She accepts that is a relevant factor in the balancing exercise and the assessment of proportionality.
- 14.** Before me, Mr Nazir submits that in the respondent's decision, the respondent acknowledged that there was a letter dated 30<sup>th</sup> October 2019 provided by LMT Services Bham Ltd. A copy of that letter was to be found at page 27 of the appellant's bundle. Mr Nazir submits the respondent did not claim in her decision that the letter does not contain the information identified at paragraph 2(b) of Appendix FM-SE. Mr Nazir

submits that the respondent also said in the decision that “.. *The sponsor has not provided an employment letter for his employment at VB Halesowen Ltd confirming gross annual salary and length of employment..*”. Mr Nazir submits that is not to say that a letter was not provided in support of the application. The respondent’s case appeared to be that the letter did not confirm the sponsors gross annual salary and length of employment. In any event, a copy of the letter the appellants claim was provided with the application, is to be found at page 21 of the appellant’s bundle. Mr Nazir submits the respondent’s bundle before the First-tier Tribunal did not include the evidence provided by the appellants in support of the application, but the letters had been included in the appellant’s bundle. Mr Nazir submits Judge Mehta erred in saying, at paragraph [33]: “*There was no letter from the appellant sponsor’s employers who issued the payslips confirming his employment, gross annual salary, length of employment, type of employment or the period over which he has been paid.*”.

- 15.** Mr Nazir acknowledged that paragraph 2(b) of Appending FM-SE expressly requires:

“A letter from the employer(s) who issued the payslips at paragraph 2(a) confirming:

- (i) the person’s employment and gross annual salary;
- (ii) the length of their employment;
- (iii) the period over which they have been or were paid the level of salary relied upon in the application; and
- (iv) the type of employment (permanent, fixed-term contract or agency).”

- 16.** He accepts the letter from VB Halesowen Ltd at page 21 of the appellant’s bundle and the letter from LMT Services Bham Ltd at page 27 of the appellant’s bundle, both refer to the sponsor’s ‘gross monthly income’ and do not state the sponsor’s “gross annual salary”. He accepts neither letter states the period over which the sponsor has been or was paid the level of salary relied upon in the application. Furthermore, he accepts the letter from LMT Services Bham Ltd does not

confirm the sponsor's 'type of employment' and whether it is 'permanent' or a 'fixed term contract'. Nevertheless, Mr Nazir submits those omissions were not fatal to the application because the gross annual salary should have been easy to work out simply by multiplying the 'gross monthly income' by twelve. Mr Nazir submits Judge Mehta should have "applied some evidential flexibility". Mr Nazir submits the information missing from the employers letters was verifiable by reference to the wage slips and bank statements.

- 17.** Mr Nazir submits the sponsor had explained in his witness statement that was at pages 17 to 20 of the appellant's bundle, that there were discrepancies between the income set out in the payslips issued by VB Halesowen Ltd and the credits into the sponsor's bank account. He had claimed that it was his mistake not to deposit the exact amount every month into his account. He had also explained the discrepancies between the income set out in the payslips issued by LMT Services (Bham) Ltd and the credits into his bank account. He had explained that his employers had transferred more than the sum stated on the payslips, and when the mistake came to light, the sponsor refunded the overpayment in cash. Mr Nazir refers to the letter from LMT Services (Bham) Ltd that is at page 27 of the appellant's bundle which states: "*I confirm that we transferred more wage than stated on the payslips. We have realised our mistake and rectified internally. He refunded balancing figure internally...*". Mr Nazir submits that on any view, the deposits into the sponsor's bank account exceed the income set out in the payslips and it must have been apparent from the evidence that the sponsor had a specified gross annual income of at least £22,400 per annum, as required.
- 18.** In reply, Ms Young submits that paragraph [33] of the decision cannot be read in isolation. In paragraph [14] of his decision, Judge Mehta had summarised the appellant's case and referred to the explanation provided by the appellants for the discrepancies between the payments made into the sponsor's bank account and the income shown on his



payslips, as set out in his witness statement. The sponsor had acknowledged that there were discrepancies.

- 19.** Ms Young submits Appendix FM-SE sets out the specified evidence applicant's need to provide to meet the requirements of the rules contained in Appendix FM. Ms Young submits that on a proper reading of the respondent's decision, the respondent does not accept that the appellants had provided a letter from VB Halesowen Ltd in support of their applications, and if it is the appellant's case that a letter had been provided, they should have provided the Tribunal with evidence to support that claim, including a copy of any covering letter under which that letter was provided. The appellant's have failed to do so. Ms Young submits that although the two letters from the sponsor's employers were before the First-tier Tribunal, the letters do not, as Judge Mehta properly found, confirm his gross annual salary, type of employment or the period over which he has been paid, as required by Appendix FM-SE. Any failure to refer to the two letters is therefore immaterial. Ms Young submits the letters relied upon by the appellants did not contain all of the specified information and the applications were bound to fail in any event because the discrepancies between the pay slips and bank statements were such that the bank statements did not show that the salary claimed by the sponsor had been paid into an account in the name of the sponsor. Quite simply, the respondent could not be satisfied that the sponsor was earning the sums claimed, given the discrepancies. Ms Young submits it was therefore open to the judge to find that the appellants were unable to satisfy the eligibility financial requirements.
- 20.** However, Ms Young accepts that in considering the appellants' Article 8 claims outside the immigration rules, at paragraphs [42] and [44] of his decision, Judge Mehta did not have proper regard to the age of the second appellant, who is now over the age of 18 and would have to meet substantially different requirements to secure entry clearance if a further application is required.

## Discussion on error of law

**21.** Judge Mehta's reasons for concluding that the eligibility financial requirements were not met at the date of application, are twofold. First, as the sponsor candidly accepted, there were discrepancies between the amount of money deposited in his bank account and the corresponding income shown on his payslips. Judge Mehta said, at [33]:

“.. It is a requirement of the immigration rules that the appellants sponsors pay on his payslip matches the deposit or salary credit into his bank account.”

**22.** Second, Judge Mehta said that there was no letter from the appellants' sponsor's employers who issued the payslips confirming his employment, gross annual salary, length of employment, type of employment or the period over which he has been paid. Again, the judge noted that this is a requirement of the immigration rules and the letter that forms part of the financial requirements should have been submitted at the time of the application.

**23.** I accept that Judge Mehta does not refer in his decision to the two letters from the sponsor's employers that were at pages 21 and 27 of the appellant's bundle. The respondent's decisions are vague as to the evidence that was before the decision maker. For present purposes, I am prepared to take the submission made by Mr Nazir that the lack of a reference in the respondent's decision to a letter from VB Halesowen Ltd is not to say that a letter was not provided in support of the application, at its highest. I am prepared to accept the respondent's case appeared to be that the letter did not confirm the sponsors gross annual salary and length of employment. However, in my judgment, the omission of Judge Mehta to have regard to the letters from the appellant's employers is immaterial to the outcome of the appeal.

**24.** Paragraph 2(b) of Appendix FM-SE, which was referred to by the respondent in the decisions to refuse the applications, expressly requires that the letter from the employer confirms *inter alia*, “the person's

employment and gross annual salary” and “the period over which they have been or were paid the level of salary relied upon in the application” and “the type of employment (permanent, fixed-term contract or agency).”. The letters from LMT Services (Bham) Ltd and VB Halesowen Ltd did not provide the required information and each letter was deficient. I reject the submission made by Mr Nazir that although the letters provided by the appellants did not contain all of the specified information, it should have been requested. The difficulty with that submission is that paragraph 2(D)(c) of Appendix FM-SE provides that a decision maker will not request documents where he or she does not anticipate that addressing the error or omission will lead to a grant because the application will be refused for other reasons. Here, the application would be refused in any event because paragraphs 2(a) and (c) of Appendix FM-SE required the appellants to provide payslips covering a period of six months prior to the date of application, and personal bank statements corresponding to the same period as the payslips showing that the salary has been paid into an account in the name of the person. As the sponsor himself and Mr Nazir acknowledge, there were discrepancies between the sums the sponsor earned as set out in his payslips and the sums credited into his bank account, and so there was in my judgement no proper audit trail to establish that the sponsor was in fact earning the sums claimed. Furthermore, the sponsor had not provided any ‘contract of employment’ from which the period over which the sponsor was paid the level of salary relied upon, or the ‘type of employment’ in the case of LMT Services (Bham) Ltd, might have been apparent. In the end, the evidence regarding the sponsor’s income was unsatisfactory and it was open to Judge Mehta to conclude that the appellants do not meet the financial requirements of the immigration rules, notwithstanding the failure to specifically refer to the two letters from the sponsor’s employers.

- 25.** In considering the appellants Article 8 claims outside the immigration rules, Judge Mehta had regard to the fact that the appellants were unable to meet the requirements of the immigration rules and the public interest

in the maintenance of effective immigration control. He noted, at [42], that family life has continued since the appellants' sponsor came to the UK in 2017. He said:

"42. .. Separation for a short period whilst an application is made from Bangladesh would not be disproportionate.

43. The second appellant's best interests would be served by him remaining with his mother in Bangladesh, a country in which she was born and has resided in since birth. There is no evidence of dependency on his father in the UK. There is no evidence of the second appellant's father having sole responsibility for him. The second appellant is now an adult.

44. There is no evidence that the time taken to make an application from Bangladesh will result in a substantial interference with the appellant's (*sic*) family lives.

45. In the Upper Tribunal case of Younas (section 117B(6)(b); Chikwamba; Zambrano) [2020] UKUT 00129 (IAC) it was held that neither the case of Chikwamba nor Agyarko (relied upon by the appellant) support the contention that there cannot be a public interest in removing the person from the UK. The same principle applies in relation to entry clearance and it cannot be said that just because the appellant is likely to succeed in an application for entry clearance if one was to be made from Bangladesh now there is no public interest in denial of entry clearance."

- 26.** At paragraph [47] in weighing in the balance factors that weigh in favour of the appellant, Judge Mehta noted that the "appellants are accepted as meeting the financial requirements of the rules as of now and the first appellant is exempt from passing the English language test."
- 27.** Ms Young concedes that in reaching his decision, Judge Mehta did not have adequate regard to the age of the second appellant, who is now over the age of 18, and would have to satisfy the requirements for entry clearance as an adult dependent relative, if required to make a further application. I accept her submission that to that extent, the decision of Judge Mehta to dismiss the appeal on Article 8 grounds is vitiated by a material error of law and must be set aside.

### Remaking the decision

- 28.** Mr Nazir confirmed no application has been made by the appellants in accordance with Rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 to adduce any further evidence. The appellant's sponsor had

attended the hearing but Mr Nazir confirmed that he does not speak English and there has been no request made for the Tribunal to arrange an interpreter.

- 29.** The evidence relied upon by the appellants is set out in the appellant's bundle comprising of 29 pages that was before the First-tier Tribunal previously. The evidence before the Tribunal is limited to a witness statement made by Mr Md Makhon Miah, the sponsor and the documentary evidence set out in the appellants bundle.
- 30.** I heard submissions from the parties representatives. On behalf of the appellants, Mr Nazir submits Judge Mehta recorded, at [47], that the appellants are accepted as meeting the financial requirements of the rules as of now and the first appellant is exempt from passing the English language test. Although Mr Nazir could not assist me as to the basis upon which the judge had concluded that "the appellants are accepted as meeting the financial requirements of the rules as of now", he submits that is a conclusion that has not been challenged by the respondent and should form the starting point for my consideration of the Article 8 claim outside the rules. He submits the second appellant made his application for entry clearance on 10<sup>th</sup> October 2019 when he was 17 years old, albeit only 20 days from his 18<sup>th</sup> birthday. Although not set out in the witness statement of the sponsor, Mr Nazir submits the sponsor arrived in the UK in 2017 having established a right of abode. Prior to that the family had lived together in Bangladesh. He submits the sponsor entered the United Kingdom lawfully and there was a delay in making an application for him to be joined by his wife and son, because the sponsor had no employment history in the UK prior to April 2019. Mr Nazir submits the refusal of entry clearance is disproportionate in circumstances where the family have spent all their lives together. As at the date of the application the second appellant, albeit almost aged 18, remained emotionally and financially dependent on his parents. The first appellant and sponsor are at a stage in their lives that they would undoubtedly want to live together and it is ultimately the second

appellant that they will look to, to support their needs, including emotional needs, in the future.

- 31.** In reply, Ms Young submits it is clear that the requirements of the immigration rules were not met at the date of application. She submits there is nothing in the decision of the First-tier Tribunal to indicate that any concession had been made by the respondent that the financial requirements of the rules are now met by the appellants. She accepts that the respondent has not challenged what is said by Judge Mehta in paragraph [47] of his decision. Ms Young submits that there is no explanation, supported by evidence, as to why the appellants waited until 20 days before the second appellant turned 18, before making their application for entry clearance. She submits the appellants left themselves insufficient time in the event that there was a finding that they cannot meet the requirements of the immigration rules. She submits there is nothing in the evidence before the Tribunal to establish that the appellants and sponsor could not continue to live together in Bangladesh, or that the second appellant could not continue to live in Bangladesh in the event that the first appellant made a successful application for entry clearance. She submits there is no evidence of any prejudice to the second appellant apart from the fact that he would now be required to meet more stringent requirements for entry clearance. She submits the second appellant would continue to receive the support of his parents. The family has been separated since 2017 and have continued to enjoy family life, despite their geographical separation. They would be able to continue with their family life in much the same way in the future, and in all the circumstances, the decision to refuse entry clearance is not disproportionate to the legitimate aim of immigration control.

## Discussion

- 32.** This is an appeal brought under Article 8 of the European Convention on Human Rights (“ECHR”). The burden of proof is upon the appellants to show, on the balance of probabilities, that they have established a family life and that their exclusion from the UK as a result of the respondent’s decision, would interfere with that right. It is then for the respondent to justify any interference caused. The respondent’s decision must be in accordance with the law and must be a proportionate response in all the circumstances.
- 33.** I find the appellants enjoy a family life with each other and the sponsor and Article 8 is plainly engaged. I find that the decision to refuse the appellants leave to enter has consequences of such gravity as to engage the operation of Article 8. I accept that the interference is in accordance with the law, and that the interference is necessary to protect the legitimate aim of immigration control and the economic well-being of the country. The issue in this appeal, as is often the case, is whether the interference is proportionate to the legitimate public end sought to be achieved. The importance of, and weight to be given to immigration control has been underscored by Parliament in s117 of the Nationality, Immigration and Asylum Act 2002 (as amended).
- 34.** The appellants were unable to satisfy the requirements of Appendix FM and Appendix FM-SE of the Immigration Rules when they made their applications for entry clearance. That is particularly relevant since the respondent’s policy on immigration control is expressed through the rules and it is entitled to be afforded ‘*considerable weight*;’ TZ (Pakistan) [2018] EWCA Civ 1109 at [34].
- 35.** There is force in the submission by Ms. Young that there is nothing in the decision of Judge Mehta to indicate that any concession had been made by the respondent that the appellants now meet the financial requirements of the rules. The appellants relied upon the salaried employment of the sponsor. Appendix FM-SE sets out the specified evidence that the appellants were required to provide. Judge Mehta referred to the discrepancy between the money deposited in the

sponsor's bank account and the income shown on the payslips. Judge Mehta referred, at [33], to the application that was made by the appellants as contained in the respondent's bundle. He noted there were no letters from the sponsor's employers who issued the payslips "*..Confirming his employment, gross annual salary, length of employment, type of employment or the period over which he has been paid*". He noted that is a requirement of the immigration rules and the letter, forming part of the financial requirements, should have been submitted at the time of the application. At paragraph [47] of his decision, Judge Mehta said, "*The appellants are accepted as meeting the financial requirements of the rules as of now and the first appellant is exempt from passing the English language test.*". Judge Mehta proceeds upon the basis that the letters that were not provided in support of the application but were before the Tribunal. However, on closer analysis it is clear, as Mr Ahmed accepts, the letters from the sponsor's employers do not provide the information set out in paragraph 2(b) of Appendix FM-SE. It is clear therefore that the requirements of the eligibility financial requirements are not met.

- 36.** I have considered whether there are exceptional circumstances which would render refusal of entry clearance a breach of Article 8 because such refusal would result in unjustifiably harsh consequences for the appellants and the sponsor. I accept the decision to refuse the second appellant entry clearance will undoubtedly have a more significant impact upon his relationship with his parents because although it is possible for the first appellant to make a further application for entry clearance as a partner, any application now made by the second appellant will have to be for entry clearance as an adult dependent relative.
- 37.** I do not have a statement from either appellant. In his witness statement dated 8<sup>th</sup> June 2021 that appears at pages 1 to 4 of the appellants' bundle the sponsor states that he is now living in the UK on a permanent basis and has established a personal, social and family life in the UK. He states that the second appellant was a minor at the date of his application for entry clearance and he does not believe that his son's



best interests have been properly taken into account. He confirms he has a close relationship with his son who spent the majority of his life with him.

- 38.** I acknowledge that separation of a married couple or of a parent and child caused by an inability by one of them to secure entry clearance is likely to be 'harsh', but in this context I am not satisfied that the refusal of entry clearance results in unjustifiably harsh consequences for the appellants and sponsor. I accept the appellants lived together in Bangladesh until the sponsor came to the UK. I accept they would all wish to live together in the UK. There is however nothing in the evidence before me regarding the way in which the family has continued their family life together since 2017 or any other evidence that establishes that the second appellant has any particular needs that require the presence of his parents. The first appellant remains in Bangladesh with the second appellant and there is no evidence before the Tribunal regarding the family circumstances in Bangladesh. The sponsor moved to the UK knowing that he would be separated from his wife and son, and without any assurance that they would be able to join him. He candidly accepted that the appellants were unable to make an application for entry clearance earlier because his circumstances in the UK were such that an application would be unsuccessful. The only expectation the appellants' can have had is that each application made to the respondent would be considered upon the facts and circumstances as they are when an application is made, and will be determined by reference to the relevant rules and legal framework in place at that particular time.
- 39.** Nevertheless I have considered whether refusal of leave to enter would be a "fair balance" for the purposes of Article 8(2) ECHR. In reaching my decision I have regard to all the evidence before me and carried out an evaluative assessment of the circumstances this family find themselves in. I acknowledge that if the first appellant were able to secure entry clearance, but the second appellant could not, there is the possibility of the family being separated.

- 40.** In reaching my decision I have had regard to the best interests of the second appellant as a primary consideration. He was a child at the time of his application. Section 55 Borders, Citizenship and Immigration Act 2009 requires immigration functions to be discharged having regard to the need to safeguard and promote the welfare of children who are in the UK. The leading authority on section 55 is ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4. In her judgment, Lady Hale confirmed that the best interests of a child are “a primary consideration”, which, she emphasised, was not the same as “the primary consideration”, still less “the paramount consideration”.
- 41.** The assessment of what is in the best interests of a child is inherently fact sensitive and I must carry out the assessment on the evidence before me. The second appellant was just shy of his eighteenth birthday when the application for entry clearance was made but is now over the age of eighteen. As a starting point, I readily accept that the best interests of a child are usually best served by being with both or at least one of their parents. The second appellant lived with both his parents until 2017, and since then, he has continued to live with his mother. The family dynamics changed when his father moved to the UK having established a right of abode. The second appellant has lived in Bangladesh all his life and I am quite satisfied that he is familiar with the culture and traditions in Bangladesh. A move to the United Kingdom would enable him to reunite with his father, but that would mean a change in the place of residence where he has grown up. I am not satisfied from the extremely limited evidence before me that the second appellant’s reliance upon his father is as great as it would have been, when he left Bangladesh in 2017. There is no evidence before me of any adverse impact upon the second appellant. The second appellant will undoubtedly be upset, but it is also generally in the interests of children to have both stability and continuity of social and educational provision and the benefit of growing up in the cultural norms of the society to which they belong. Although I accept that the best interests of the second appellant would be for him to be able to live with one or both of his parents, that is a primary consideration and can be outweighed by other factors. It is not decisive.

**42.** I have had regard to the fact that it is open to the appellants to make a further application for entry clearance, and ensure the required evidence is provided in support of any such application. That is relevant to whether the decision to refuse entry clearance is proportionate since there may be nothing to be gained by requiring the first appellant to make a further application if it is now accepted that she meets the requirements of the immigration rules; Chikwamba v Secretary of State for the Home Department [2008] UKHL 40. I acknowledge the difficulty that causes for the second appellant who is now over the age of 18 and will have to meet more stringent requirements.

**43.** It is now well established that the Chikwamba principle is not a general dispensing power. In Kaur v Secretary of State for the Home Department [2018] EWCA Civ 1423. Holroyde LJ, said at [45], (emphasis added):

“I have quoted in paragraph 26 above the passage in which Lord Reed (at paragraph 51 of his judgment in Agyarko) referred to Chikwamba. It is relevant to note that he there spoke of an applicant who was certain to be granted leave to enter if an application were made from outside the UK, and said that in such a case there might be no public interest in removing the applicant. That, in my view, is a clear indication that the Chikwamba principle will require a fact-specific assessment in each case, will only apply in a very clear case, and even then will not necessarily result in a grant of leave to remain.”

**44.** In Younas (section 117B(6)(b); Chikwamba; Zambrano) [2020] UKUT 129 (IAC) the Upper Tribunal summarised the position in the judicial head note in these terms:

“An appellant in an Article 8 human rights appeal who argues that there is no public interest in removal because after leaving the UK he or she will be granted entry clearance must, in all cases, address the relevant considerations in Part 5A of the Nationality, Immigration and Asylum Act 2002 (‘the 2002 Act’) including section 117B(1), which stipulates that ‘the maintenance of effective immigration controls is in the public interest’. Reliance on Chikwamba v SSHD [2008] UKHL 40 does not obviate the need to do this.”

**45.** The difficulty for the first appellant here is that on the findings already and the evidence before me, I cannot be satisfied that the first appellant would be certain to be granted leave to enter if a further application were made. I simply do not have the evidence before me to be satisfied that the eligibility financial requirement is met. While the respondent has not

sought to formally resile in this appeal from what is said in paragraph [47] of the decision of Judge Mehta, it does not follow that, if she were seized of an application for entry clearance afresh, the respondent would be bound to reach the same conclusion on this point. Of course, she may do so. But equally, she may not. Whether she does so or not is a matter for her, and not for this Tribunal. The institutional competence of the Entry Clearance Officer extends to making careful value judgments of precisely that nature having careful regard to the specified evidence required in support of an application.

- 46.** The ultimate issue is whether a fair balance has been struck between the individual and public interest. In carrying out the balancing exercise, I have had regard to the delay in making an application for entry clearance that is not attributable to the appellants. The sponsor arrived in the UK in 2017 and the appellants were unable to make an application because the sponsor's circumstances did not permit an earlier application. The sponsor accepts there was some delay because he was unable to meet the minimum income requirement to sponsor the appellants.
- 47.** There are factors that weigh in favour of the appellants; (i) the impact of the refusal of an application for entry clearance made by the second appellant, at a time when he was a child, and who is now an adult; (ii) the potential separation of the family if the sponsor remains in the UK, either with or without his partner and son; (iii) the fact that family life was established long before the sponsor's arrival in the UK; (iv) the sponsor arrived in the UK having established a right of abode and the appellant's have sought to enter the UK lawfully; (v) the sponsor now appears to be in settled employment and will have established a private life in the UK.
- 48.** The family no doubt wishes to continue living together in the UK, but that does not equate to a right to do so. I have had regard to the health of the first appellant, albeit the evidence before the Tribunal is in the vaguest of terms, and very limited. The appellants might well feel a sense of loss because of their separation from the sponsor or from each other. That is not to say that they cannot continue to receive the love, care and emotional support that they provide each other. The appellants will be able to continue contact, albeit remotely. The appellants and their

sponsor have demonstrated their resilience in the way that they have been able to support each other since the sponsor's arrival in the UK in 2017. There will be nothing preventing the first appellant from living with her son in Bangladesh if that is the choice she makes, or alternatively nothing preventing the sponsor and first appellant travelling to Bangladesh to visit the second appellant if the first appellant makes a successful application for entry clearance.

- 49.** Factors that weigh against the appellants include; (i) the fact that the family dynamics changed when the sponsor left Bangladesh to live in the UK; (ii) the absence of any reliable or cogent evidence that the family could not live together in Bangladesh if they wish to continue their family life as it was before the sponsor's departure from Bangladesh; (iii) the absence of any evidence demonstrating any impact upon the relationships between the sponsor and appellants' since the sponsor's departure from Bangladesh; (iv) the absence of evidence before the Tribunal that the requirements of Appendix FM and Appendix FM-SE of the immigration rules are met.
- 50.** In my final analysis and in carrying out the balancing exercise, I have also had regard to the respondent's policy as set out in the immigration rules. The appellants are unable to satisfy the requirements of the immigration rules for the reasons I have set out. I have also had regard to the public interest considerations set out in s117B of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). I acknowledge that the maintenance of immigration control is in the public interest. On the findings made, the first appellant is exempt from the English language requirement. I acknowledge that there was no English language requirement to be met for entry clearance by the second appellant as a child.
- 51.** I find the appellants' protected rights, whether considered collectively or individually, are not in my judgement such as to outweigh the public interest in the maintenance of immigration control. It follows that in my judgement, the decision to refuse the appellants leave to enter is in the public interest and not disproportionate to the legitimate aim.

## **NOTICE OF DECISION**

- 52.** The decision of First-tier Tribunal Judge Mehta promulgated on 25<sup>th</sup> August 2021 is set aside.
- 53.** I remake the decision and the appeal is dismissed.

Signed **V. Mandalia**

Date 16<sup>th</sup> December 2022

Upper Tribunal Judge Mandalia