IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-000967
FtT No: HU/01954/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 11 April 2023

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

B H
(anonymity order in place)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Heard at Edinburgh on 6 February 2023

For the Appellant: Mr S Winter, Advocate, instructed by R H & Co, Solicitors
For the Respondent: Mr A Mullen, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Pakistan. She lives there with her son M H, now aged 8. Her UK citizen husband died in 2014. Her daughter F H, aged 12, moved to the UK in 2018, and lives with the appellant's sister. The children are UK citizens.

2. On 28 October 2019, the appellant applied for entry clearance to the UK under appendix FM of the immigration rules as a parent of a child in the UK. The ECO refused that application on 17 January 2020.

3. FtT Judge Connal dismissed the appellant's appeal by a decision promulgated on 15 November 2021.

4. On 16 May 2022 UT Judge Blundell granted permission to appeal to the UT:

> … before the FtT … the only matter in issue was the adequacy of the maintenance available to the appellant in the UK.

> 2. The appellant submitted that she would be adequately maintained through a combination of her prospective earnings and third-party support. In a thorough and cogently reasoned decision, Judge Connal found, in summary, that the appellant could not rely on either of these sources of funding under the Immigration Rules and that her continued exclusion was a proportionate measure for Article 8 ECHR purposes.
>
> 3. The first ground seeks to challenge the judge's assessment under the Immigration Rules. Had that ground stood alone, I would have refused permission. As far as I am aware, the point is free from authority but the judge's analysis of the relevant provisions of Appendices FM and FM-SE of the Immigration Rules is compelling and, in my judgment, unarguably correct. Whilst there are certain categories of applicant who are permitted to rely on third party support (or prospective earnings), those who apply under section EC-PT are not permitted to do so. The rationale for that distinction is not apparent from the Rules or, for that matter, from the Family Migration Guidance entitled Appendix FM Section 1.7A – Adequate maintenance and accommodation, version 10.0 but that is immaterial to the enquiry under the Rules.
>
> 4. I am just persuaded that ground two is arguable, however. That ground focuses on the judge's assessment of proportionality outside the Immigration Rules. It seems to me that it is arguable that the judge erred in that assessment in failing to make a clear finding as to whether the appellant would be adequately maintained through her own prospective earnings and the third-party support proposed. Whilst both sources of funding were excluded from the assessment under the Rules, they remained relevant to the Article 8 ECHR assessment for the reasons given by Lady Hale and Lord Carnwath at [99] of *MM (Lebanon) & Ors v ECOs* [2017] UKSC 10; [2017] Imm AR 729.

5. I make no direction limiting the scope of the arguments which may be pursued before the Upper Tribunal, although those representing the appellant may wish to reflect on what is said above before addressing any argument to ground one.

6. In *MM (Lebanon)* the appellants directly challenged the rules on financial requirements. The observations made at [99] were:

> Operation of the same restrictive approach outside the rules is a different matter, and in our view is much more difficult to justify under the HRA. This is not because "less intrusive" methods might be devised … but because it is inconsistent with the character of evaluation which article 8 requires. As has been seen, avoiding a financial burden on the state can be relevant to the fair balance required by the article. But that judgment cannot properly be constrained by a rigid restriction in the rules. Certainly, nothing that is said in the instructions to case officers can prevent the tribunal on appeal from looking at the matter more broadly. These are not matters of policy on which special weight has to be accorded to the judgment of the Secretary of State. There is nothing to prevent the tribunal, in the context of the HRA appeal, from judging for itself the reliability of any alternative sources of finance in the light of the evidence before it. In doing so, it will no doubt take account of such considerations as those discussed by Lord Brown and Lord Kerr in *Mahad*, including the difficulties of proof highlighted in the

> quotation from Collins J. That being the position before the tribunal, it would make little sense for decision-makers at the earlier stages to be forced to take a narrower approach which they might be unable to defend on appeal.

7. The ECO responded on 7 June 2022 to the grant of permission:

> The grounds are a disagreement with the findings of the judge. The determination shows that the judge concluded at [41] that the decision was proportionate under Article 8 … based on their findings at [37-41]. It is clear that the judge accepted that the appellant would be able to work and this was found to be a factor in favour of the appellant. However this was balanced against the public interest considerations. The judge conducted a careful and detailed assessment and came to properly reasoned conclusions. There is no error of law.

8. In his skeleton argument and at the outset of the hearing Mr Winter (wisely, and no doubt on full consideration of the grant of permission) restricted the case for the appellant to the point in paragraph 2 (iii) of the original grounds, as follows:

> … the informed reader is left in real and substantial doubt as to why it is proportionate for the appellant and FH to be separated should the appellant's child choose to remain in the UK. In particular where: the FTT accepts at paragraph 32(ii) that it is not in the best interests of FH to be separated from the appellant; that bearing in mind MH is a British national in any event; the FTT noted at paragraph 32(iii) that the respondent accepted there was a difference in standards of education provision; and lastly that this ground is broad enough to encompass the point raised by the UT when granting permission that the informed reader is left in real and substantial doubt as to whether the FTT believes the appellant would be adequately maintained through her own prospective earnings and third party support proposed. The FTT does not come to a firm view at paragraph 38. Whilst both sources of funding were excluded from the assessment under the Immigration Rules, they remain relevant to the best interests assessment and whether the best interests outweigh immigration control. Whilst the FTT recognises that no positive right flows from that, it is relevant to the public interest element if the appellant is financially independent with the result that the public interest justification is reduced (*Rhuppiah v Secretary of State for the Home Department* [2018] 1 WLR 5536 at paragraphs 52-58 per Lord Wilson JSC). That is still material to the outcome. If the ground is not wide enough for the latter point to be included in the grounds, the point having been identified in the UT's grant of permission, the appellant would seek the UT to exercise its inherent discretion to allow the point to be argued (*RGJ v Secretary of State for the Home Department* [2016] EWCA Civ 1042 at paragraph 51 per Lloyd Jones LJ). The appellant is prejudiced where the income available to her would allow her to maintain herself without recourse to public funds.

9. In his further submissions, Mr Winter accepted that the case in the FtT was advanced mainly within the rules. However, he was able to show from the skeleton argument before the FtT and its record of the submissions that the case in financial terms was also put outside the rules. He suggested that the phrase at [38], "… even if the appellant was financially independent", was a failure to resolve the point. He accepted that even if financial independence had been proved that would, in terms of section 117B of the 2002 Act, be a factor

neutralising the public interest against her entry, rather than a positive in her favour.

10. Mr Mullen relied on the response above. He further argued that this was a case where the obligation to promote family life did not extend to a right for the appellant to have the rules waived to permit her entry, and where the FtT's analysis did not err on any point of law.

11. We observed from the ECO's decision, which contains a calculation, and from the evidence provided by the appellant to the FtT, that it appeared difficult to come to any other conclusion than that the sums available from family sources would leave the appellant and her children at a level of poverty deemed unacceptable in this country. Mr Winter did not demonstrate that the evidence might have led to a calculation of the financial position resolving the case in the appellant's favour.

12. We reserved our decision.

13. The appellant's financial independence, outside the terms of the rules, was not the focus in the FtT, but more of a passing issue. The Judge provided a closely reasoned decision which reflected all aspects of the case as it was put to her. The respondent had raised the adequacy of income, and the appellant's evidence fell short of answering it, either in or out of the strict requirements of the rules.

14. The alleged error raised by the grounds is subtle and, at best, academic. For all that we have been referred to, there was no evidence by which the FtT might realistically have held that the appellant would be able to support herself and her children adequately by a combination of her earnings and third-party support. If the FtT had explored further in that direction, the case for the appellant would not have become any better.

15. Although it is of course not a matter for us to predict, any further attempt to show that the appellant has a right to enter the UK, focused perhaps outside the rules, would need a stronger basis of evidence, and a clear and comprehensive calculation.

16. We thank both representatives for their well-focused assistance. We also echo Judge Blundell's description of Judge Connal's decision. It is exemplary, has not been shown to err on any point of law, and shall stand.

17. The FtT made an anonymity order, of its own initiative, as the case involves children. No application was made to us. In ordinary course, we would not name any children. Beyond that, the case does not call for anonymity. However, we have referred to the appellant by initials only.

Hugh Macleman
Judge of the Upper Tribunal, Immigration and Asylum Chamber
8 February 2023