



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM**  
**CHAMBER**

Case No: UI-2023-000731

First-tier Tribunal No:  
HU/55772/2022

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**  
**On 15 July 2023**

**Before**

**UPPER TRIBUNAL JUDGE CANAVAN**

**Between**

**RAJAN KUMAR PANDEY**

Appellant

**and**

**ENTRY CLEARANCE OFFICER (SHEFFIELD)**

Respondent

**(NO ANONYMITY ORDER MADE)**

**Remade without a hearing under rule 43**

**DECISION AND REASONS**

1. The appellant appealed the respondent's decision dated 12 August 2022 to refuse a human rights claim in the context of an application for entry clearance as a spouse. First-tier Tribunal Judge Malcolm dismissed the appeal in a decision sent on 15 February 2023.
2. On 24 May 2023 the Upper Tribunal found that the First-tier Tribunal decision involved the making of an error of law (Annex). The parties agreed that the decision could be remade without a hearing. The appellant filed and served further evidence in accordance with directions. At the date of this decision, the Upper Tribunal records show that no further submissions have been filed by the respondent by the relevant deadline. The respondent was aware of the direction. It was made at the last hearing and included in the error of law decision. I am satisfied that I can proceed to determine the appeal without a hearing.

3. The only issue is whether the appellant has produced sufficient evidence relating to the sponsor's income for the purpose of the 'Financial Requirement' of the immigration rules. At the date of the First-tier Tribunal hearing the judge noted various pieces of evidence relating to the sponsor's employment but did not make any findings as to whether the evidence showed that the sponsor was now earning the minimum threshold of £18,600.
4. The evidence before the First-tier Tribunal included a document with an Aldi logo, which was said to be a contract of employment. It was signed electronically by the sponsor and by a person authorised to do so by her employer. The contract indicates that the sponsor began employment with Aldi on 23 May 2022 on a rate of £11.55 an hour for 30 hours a week with an enhanced hourly rate if working within the area of the M25. If the sponsor worked the stated contract hours this would amount to a gross annual income of around £18,018.
5. The appellant's initial bundle before the First-tier Tribunal contained payslips from Aldi for the period from June to November 2022. Those payslips indicated a gross income of around £11,379.94. The net salary payments on the payslips correspond with the sponsor's Barclays bank statements over the same period.
6. The appellant has produced an up-to-date bundle of evidence for the purpose of remaking the decision. The bundle contains an unsigned electronic letter on headed paper dated 25 May 2023 from a named person in the payroll department, which confirms that the sponsor began employment with Aldi on 23 May 2022. The sponsor is now paid at a basic rate of £12.45 per hour. She is contracted to work 35 hours a week, which equates to an annual salary of £22,659. This does not include additional working hours because they cannot be guaranteed.
7. The bundle also includes copies of the sponsor's payslips for a seven-month period from November 2022 to May 2023. The payslips show gross monthly salaries of between £1,100 and £1,900. The evidence for November was already covered in the evidence before the First-tier Tribunal. The sponsor's total gross income for the period from December 2022 to May 2023 appeared to be around £8,228.31. The overall figure for that period is somewhat reduced from the average monthly income by a single lower salary payment of £335.40 in April 2023.
8. The bundle contains copies of the sponsor's bank statements covering a six-month period from 01 November 2022 to 28 April 2023. The net salary payments from Aldi are consistent with the net figures on the payslips. The bank statements are electronic, but with official Barclays Bank headings and additional information of the kind often found in PDF copies of bank statements. The respondent has made no submissions in relation to this evidence. I have been given no reason to doubt the authenticity of the documents produced in support of this appeal.

9. Appendix FM-SE of the immigration rules requires a sponsor who has worked for their employer for more than six months to produce (i) six months' payslips prior to the date of an application; (ii) a letter from the employer confirming specified details of employment; and (iii) bank statements covering the same period as the payslips showing the salary being paid into the account.
10. As I explained in the error of law decision, there is no longer a right of appeal on the ground that the decision is not in accordance with the immigration rules. However, the question of whether the appellant would meet the requirements of the immigration rules if an application was made the date this appeal is determined is relevant to the overall assessment of proportionality. If the appellant has produced sufficient evidence to show that he would meet the requirements of the immigration rules if he made an application at the date of this decision, it goes to the weight that should be given to the public interest in maintaining an effective system of immigration control given that the rules are said to reflect where the respondent considers that a fair balance is struck for the purpose of Article 8 of the European Convention on Human Rights (ECHR): see *OA and Others (human rights; 'new matter'; s.120) Nigeria* [2019] UKUT 00065.
11. Those representing the appellant have not assisted me to assess the evidence, which has been presented in a series of different bundles. A general assertion is made that the evidence meets the minimum income threshold, but no schedule or any other information was provided to help to explain why the evidence shows that the sponsor earned the relevant income.
12. When the figures contained in the last six months of payslips are analysed, the evidence is not so clear. If the sponsor worked the stated 35 contract hours at £12.55 an hour her gross monthly income should be around £1,900. The payslips show that, in fact, her gross monthly income fluctuates and was usually lower than that in the range of £1,400-£1,800. The overall figure for the six-month period preceding this decision from December 2022 to May 2023 shows a gross income from employment at Aldi of £8,228.31, which if extrapolated over a 12 month period would not reach the relevant threshold. I bear in mind that there appears to be an unexplained anomaly in April 2023, where the sponsor's income was significantly less than her usual income. It is unclear why the sponsor was paid so much less in that month.
13. However, I bear in mind that the key requirement is to show a gross annual income of £18,600. There is no requirement contained in Appendix FM-SE that the last six months' payslips must show half of the income. When the evidence is considered in the round it becomes clear that the sponsor's overall gross income from her employment at Aldi in the 11 month period from June 2022 to May 2023 amounted to £19,608.25 (£11,379.94 + £8,228.31).

14. I am satisfied that the evidence produced by the appellant, which covers a six-month period prior to the determination of this appeal, meets the evidential requirements of Appendix FM-SE. I bear in mind that those requirements are contained in the immigration rules to make the administration of an application more convenient for the respondent. The Supreme Court in *MM (Lebanon) v SSHD* [2017] UKSC 10 made clear that the key provision that engaged the public interest was the minimum income threshold of £18,600. The respondent has not disputed the evidence, but even if the documents did not meet every aspect of the complex evidential requirements, I am satisfied on the balance of probabilities that the sponsor's income in the 12 month period preceding this appeal exceeded the £18,600 threshold. The central policy consideration was quoted in *MM (Lebanon)* at [15]:
15. The aims of the MIR, as consistently stated both in the *Statement of Intent* and in the *Grounds of Compatibility* were that "those who choose to establish their family life in the UK ... should have the financial wherewithal to be able to support themselves and their partner without being a burden on the taxpayer. Moreover, the sponsor should bear the financial responsibility of ensuring that the migrant is well enough supported to be able to integrate and play a full part in British society" (*Grounds of Compatibility*, para 52). This policy "has a legitimate aim of safeguarding the economic well-being of the UK and it is considered that there is enough flexibility in the policy to prevent the policy from being a disproportionate interference with article 8 rights" (para 55).
15. The appellant was unable to show that he met the requirements of the immigration rules at the date of the application. In *AS (Somalia) v SSHD* [2009] UKHL 32 Lady Hale commented that in some circumstances it might well be disproportionate to require another application to be made with a prohibitive fee. *AS (Somalia)* was determined before the changes made to the appeal regime by the Immigration Act 2014 ('IA 2014'). It is no longer possible to appeal on the ground that the decision was not in accordance with the immigration rules. The only ground of appeal is whether the decision is unlawful under section 6 of the Human Rights Act 1998 ('HRA 1998'). The date of the relevant assessment is the date when this appeal is decided.
16. There is no dispute regarding the appellant's relationship with the sponsor. For this reason, I am satisfied that the decision to refuse entry clearance interfered with the appellant's right to family life with his wife in a sufficiently grave way as to engage the operation of Article 8(1). The only dispute relates to the financial requirements. For the reasons given above, I am satisfied on the balance of probabilities that the sponsor's current earnings exceed the minimum income threshold contained in Appendix FM and that the evidence produced in relation to that income also meets the requirements of Appendix FM-SE for the six-month period preceding this decision. Given that the immigration rules are said to reflect where the respondent considers a fair balance should be struck for the purpose of Article 8(2) I conclude that the decision to refuse entry clearance is disproportionate.

17. For the reasons given above, I conclude that the decision to refuse entry clearance is unlawful under section 6 HRA 1998.

**Notice of Decision**

The appeal is ALLOWED on human rights grounds

**M.Canavan**

Judge of the Upper Tribunal  
Immigration and Asylum Chamber

04 July 2023

**ANNEX**



**IN THE UPPER TRIBUNAL  
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**ENTRY CLEARANCE OFFICER (SHEFFIELD)**

Respondent

**(NO ANONYMITY ORDER MADE)**

**Representation:**

For the Appellant: Mr S. Ahmed, instructed by Direct Access

For the Respondent: Mr A. Basra, Senior Home Office Presenting Officer

**Heard at Field House on 24 May 2023**

**DECISION AND REASONS**

1. The appellant appealed the respondent's decision dated 12 August 2022 to refuse a human rights claim in the context of an application for entry clearance as a spouse. The sole reason for refusal was that the appellant had failed to produce the specified evidence required in the immigration rules to meet the 'financial requirement' contained in Appendix FM.
2. First-tier Tribunal Judge Malcolm ('the judge') dismissed the appeal in a decision sent on 15 February 2023. The judge noted that the appellant's representative accepted that he could not produce the specified evidence to meet the financial requirement at the date of the application. She noted that further evidence was produced on the day of the hearing relating to the sponsor's employment. The judge outlined what the documents were

at [17] of the decision. Having noted the concession made by the appellant's representative relating to the evidence as it stood at the date of the application, the judge went on to make the following findings:

- '21. I have given consideration to the further documents which were provided and while having noted the objection of the presenting officer given that evidence was not led, I have accepted the additional documents which have been lodged into evidence.
  22. I do not however consider that the additional documents greatly assist the appellant's case. The argument being put forward on behalf of the appellant is that account can be taken of evidence after the date of the application and up to the date of the hearing and that the documents which has been provided shows that the requirements of Appendix FM and Appendix FM-SE are satisfied if consideration is given to the 12 month period prior to the date of the hearing.
  23. The requirements of the Immigration Rules have not been satisfied. A further argument put forward by Mr Alhani that the requirements of the rules have been met if consideration is given to the evidence up to the date of the hearing can only be considered in the context of consideration of the appeal under Article 8 outwith the requirements of the Immigration Rules.
  24. The terms of the rules are perfectly clear, I do not consider that the argument of taking into account evidence which postdates the date of application gives rise to a finding of exceptional circumstances.
  25. The appellant does not satisfy the Immigration rules and I am not satisfied that in this case there are exceptional circumstances which would render refusal a breach of Article 8 of the ECHR such that it could or would result in justifiably harsh consequences for the appellant or his family.'
3. Under the heading 'notice of decision' the judge purported to refuse the appeal 'under the Immigration Rules' and with reference to Article 8 of the European Convention on Human Rights.
  4. The appellant applied for permission to appeal on the following grounds:
    - (i) The judge failed to findings of fact in relation to the up-to-date evidence as it stood at the date of the hearing.
    - (ii) The judge failed to give adequate reasons for finding that the evidence 'did not assist the appellant' nor to explain why she found that there were no 'exceptional circumstances'.
    - (iii) The judge failed to conduct a proper Article 8 assessment with reference to the *Razgar* questions and/or to conduct a proper assessment of the proportionality of the decision.

### **Decision and reasons**

5. Having considered the First-tier Tribunal decision, the grounds of appeal, and the submissions made at the hearing, I conclude that the First-tier Tribunal decision involved the making of an error of law and must be set aside.

6. It was open to the judge to conclude that the appellant did not produce sufficient evidence to meet the financial requirements at the date of the application. However, in addressing the submissions made on behalf of the appellant relating to the assessment at the date of the hearing the judge failed to conduct an adequate proportionality assessment with reference to the evidence and relevant principles of law.
7. Section 85(4) of the Nationality, Immigration and Asylum Act 2002 ('NIAA 2002') makes clear that a judge may consider any matter that is relevant to the substance of the decision including any matter arising after the date of the decision. It is trite law that in an appeal brought on human rights grounds that the assessment must be made at the date of the hearing.
8. The judge's approach concentrated solely on whether the appellant met the requirements of the immigration rules at the date of the application, but failed to consider whether the evidence produced at the date of the hearing would, if the appellant made an application at that date, in principle meet the requirements of the immigration rules. The question would then be how that fact might impact on the overall proportionality assessment.
9. In *OA and Others (human rights; 'new matter'; s.120) Nigeria* [2019] UKUT 00065 the Upper Tribunal recognised that a finding that a person would meet the requirements of the immigration rules was likely to be a factor weighing in favour of an appellant given that the rules reflect where the respondent considers a fair balance is struck for the purpose of Article 8.
10. In *MM (Lebanon) v SSHD* [2017] UKSC 10 the Supreme Court dismissed a challenge to the lawfulness of the Secretary of State's introduction of a minimum income threshold for family life applications made by spouses. The decision contains a discussion about the public policy considerations underpinning the threshold of £18,500 (as it was at the time).
11. The immigration tribunals have had no jurisdiction to consider whether a decision is not in accordance with the immigration rules since the NIAA 2002 was amended by the Immigration Act 2014. The only ground of appeal that the judge was required to determine was whether the decision was unlawful under section 6 of the Human Rights Act (section 84(2) NIAA 2002). It was not open to her to dismiss the appeal 'under the immigration rules'.
12. The question of whether the appellant had produced sufficient evidence to show that he would meet the financial requirements of the immigration rules, and/or whether his wife earned over the relevant threshold at the date of the hearing, was relevant to a proper assessment of proportionality under Article 8. If the evidence showed that the appellant would meet the strict requirements of the rules if he made a theoretical application at the date of the hearing it would impact on what weight should be placed on the importance of maintaining an effective system of immigration control: see *OA (Nigeria)*. Even if the strict evidential requirements were not met, if



the evidence showed on the balance of probabilities that the appellant's wife was, as a matter of fact, earning over the required threshold, that was also a matter that might be capable of addressing the public interest considerations underpinning the financial requirement in the rules: see *MM (Lebanon)*. The judge failed to engage with these principles and failed to conduct an adequate Article 8 assessment.

13. For the reasons given above, I conclude that the First-tier Tribunal decision involved the making of an error of law. The decision is set aside.
14. The parties agreed that it was appropriate for the Upper Tribunal to remake the decision. Although the First-tier Tribunal decision is fairly recent, it was agreed that the appellant should be given the opportunity to produce the most up to date evidence relating to his wife's income. The parties agreed that it would not be necessary to have a further hearing and that the decision could be remade following the receipt of written submissions from both parties. Mr Ahmed did not consider it necessary to include a reply in the directions timetable.

### **DIRECTIONS**

15. **The appellant** shall file and serve up to date evidence and written submissions in relation to remaking by Friday 26 May 2023 at 16.00hrs
16. **The respondent** shall file and serve any written submissions in response by Friday 09 June 2023 at 16.00hrs.
17. The Upper Tribunal will determine the appeal as soon as possible thereafter whether these directions have been complied with or not.
18. Liberty to apply.

### **Notice of Decision**

The First-tier Tribunal decision involved the making of an error on a point of law  
The decision will be remade on the papers in the Upper Tribunal in due course

**M.Canavan**  
Judge of the Upper Tribunal  
Immigration and Asylum Chamber

24 May 2023