



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Numbers: UI-2023-004182

UI-2023-004183

Previous Appeal Numbers: HU/54505/2023

HU/54506/2023

THE IMMIGRATION ACTS

Heard at Field House

On 8 November 2023

**Decision & Reasons
Promulgated**

On 30th of November 2023

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL McCARTHY

Between

**ANDY SILVA TOULSON
ISAAC CHARLES GIEBITZ
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

ENTRY CLEARANCE OFFICER - SHEFFIELD

Respondent

Representation:

For the Appellants: Mr Craig Holmes, instructed by Ison Harrison, Solicitors

For the Respondent: Ms Hannah Gilmour, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellants appeal, with permission granted by First-tier Tribunal Judge Seelhoff, against the decision of First-tier Tribunal Judge Head (the judge), which was promulgated on 29/07/2023. The judge dismissed the appeal against the refusals of entry clearance to join Mr Nicolas Alexander Toulson in the UK.

Procedural matters

2. This was a hybrid hearing at the request of Mr Holmes and the Appellants. Mr Holmes joined by video, as did the Appellants and their sponsor. The Appellants were overseas but did not need permission to attend to observe the hearing. To ensure there was no compromise to the Presidential Guidance on evidence from overseas, I did not address the Appellants.
3. Ms Gilmour attended at Field House, where I was sitting.

The grounds

4. The grounds run to 20 paragraphs over six pages. There are two interrelated matters. First, whether the judge failed to apply the ratio in R (MM (Lebanon) & Others) v SSHD and another [2017] UKSC 10 as to when the family and private life rights of a person overseas might be engaged. This is a challenge to paragraph 33 of the judge's decision.
5. Second, whether the judge failed to strike a fair balance given that the only provision of the immigration rules that was not met was the fact that the Appellants and sponsor sought to rely on the income earned by the first Appellant. The judge found the source of income was transferrable to the UK because the first Appellant was a remote worker, that once in the UK, the first Appellant would pay taxes etc in the UK, and there was no doubt that the level of income exceeded the relevant threshold. Again, reliance was placed on the decision in MM (Lebanon).
6. A third ground is also raised, which does not relate to the first two grounds, but is a further allegation that the judge failed to strike a fair balance by effectively treating the Appellants as if they were immigration offenders by the application of section 117B of the 2020 Act.

The grant of permission

7. Judge Seelhoff identified that the first ground is arguable because the way the judge expressed herself, which left some ambiguity regarding whether she thought article 8 was engaged.
8. With regard to the second ground, Judge Seelhoff acknowledged that in a finely balanced case, a more nuanced approach needed to be taken to the weight to be given to the public interest in maintaining effective immigration control. He acknowledged that in this case where the sole reason for refusal was an inability to meet a technical requirement of Appendix FM-SE, that the judge may have misdirected herself as to proportionality or had failed to give adequate reasons .
9. Even though not raised in the grounds, Judge Seelhoff recalled that the immigration rules contain a framework for approach similar cases, and points to GEN.3.1 and paragraph 21A(2) of Appendix FM-SE.

10. Turning to the third ground, Judge Seelhoff suggested the judge was obliged to apply paragraph 117B and that in so doing she was not comparing the Appellants to immigration offenders. However, Judge Seelhoff did not restrict the grant of permission on this ground.

The rule 24 response

11. The response argues that the first ground is mere disagreement because it is clear when read as a whole that the judge accepted article 8 was engaged. The response argues that the second ground is misplaced because the judge understood the balancing exercise and gave appropriate weight to the various factors to consider. As the judge reached a reasoned decision that was open to her on the facts, there is no error. The response does not address the third ground.

Appellants' skeleton argument

12. In compliance with directions, the Appellants have provided a skeleton argument running to 34 paragraphs over 12 pages, much of which replicates the original grounds of application, albeit with some new emphases. The skeleton argument replies to the Entry Clearance Officer's (Secretary of State's) response, suggesting it is wrong.

Mr Holmes' submissions

13. Mr Holmes relies on the grounds and skeleton argument settled by Mr Jonathan Greer.
14. Mr Holmes began by saying he would be addressing the case of the first Appellant because whether the second Appellant succeeded was wholly dependent on the same facts as the second Appellant is the first Appellant's son.
15. After reminding me of the factual concessions and findings, that led to their being only one technical failing why the first Appellant did not meet the immigration rules, Mr Holmes said there were four areas of challenge. In fact, his submission fell into two parts, which I summarise.
16. Was article 8 engaged? This was a challenge to the judge's express finding at paragraph 33 that it was "not actually engaged at all with reference to family life". Mr Holmes said there had been no dispute between the parties that article 8 was engaged. The Entry Clearance Officer's position relied solely on the assessment of proportionality. Mr Holmes said that the judge's conclusion was contrary to what is said in MM (Lebanon). This error affects the remainder of the decision because the judge was not correctly directing herself.
17. How should the judge have applied the Supreme Court's judgment in MM (Lebanon), which distinguishes between immigration rules that are part of high policy and those that relate to the practicalities of implementation?

Rules that limit evidential requirements fall into the latter. Whilst the public interest is clearly linked to the former, and appropriate deference must be given to policies relating to immigration control, it is less clear that practicalities require the same level of deference.

18. Mr Holmes submitted that the judge failed to identify this distinction and therefore her balancing exercise was flawed. Having accepted the Entry Clearance Officer's position that the only area where the public policy considerations related to the ability of the Appellants and sponsor to maintain themselves, the judge went on to make findings of fact and concluded that the evidence in fact showed the first Appellant's income would be secure if he relocated to the UK because he was a remote worker. Mr Holmes said the judge failed to recognise that conclusion meant she accepted the policy requirements of the immigration rules were satisfied and the remaining question was whether it was proportionate to refuse admission to the UK because of a failure to meet a technical requirement of the same rules.
19. Mr Holmes said he would not make submission regarding the third ground but did not concede that ground.

Ms Gilmour's submissions

20. Ms Gilmour relied on the rule 24 response.
21. Ms Gilmour submitted that the Appellants' case is based on a proper application of MM (Lebanon). She argued that Mr Holmes' argument was misconceived because the judge did not find that the income threshold was met. Although in paragraph 37 of the decision, the judge found that the first Appellant's income was transferrable to the UK, she also concluded that there had been no proper consideration of any tax or jurisdictional issues. As it was unclear what deductions might be made in the USA before the income was transferred to the UK, the judge was right to be wary of taking the gross figure.
22. Furthermore, Ms Gilmour said it was evident from the same paragraph that the judge considered MM (Lebanon) and decided not to exercise her discretion. This further undermined Mr Holmes' arguments.
23. Turning to the issue arising from paragraph 33 of the decision, Ms Gilmour took me to paragraph 34 where the judge recalls the proper approach to article, and that thereafter the judge applied the proper approach. Any error in paragraph 33 were therefore immaterial as the judge demonstrates a balanced approach.
24. Ms Gilmour addressed me on the final ground and said that it was unfounded as the judge did not take into consideration anything about the Appellants being immigration offenders.

Discussion

25. Having reflected on the representations made, I have reached the following conclusions.
26. I find the judge erred in paragraph 33 by stating that article 8 was not actually engaged. This was contrary to the parties' positions and the evidence. The refusal of admission to the UK prevented the Appellants and the sponsor enjoying family life in the way they wanted. That may be a crude application of what the Supreme Court took care to describe in MM (Lebanon) but it shows why the judge was wrong to find there was no interference in the existing family life.
27. If the judge had not proceeded to consider article 8 from paragraph 34 onwards, the decision would be undermined. However, the judge did provide an alternative approach. Although the arguments allege that the judge made a fundamental error in paragraph 33 that casts a shadow over the remainder of her findings, that is not made out as the judge's approach, findings and analysis are thorough throughout the remainder of the decision.
28. It follows that I reject the first ground of appeal.
29. As I have indicated above, the parties have rolled up the issues in the second ground into one. I begin my consideration of these grounds by taking the dispute raised by Ms Gilmour about the judge's findings in paragraph 37 of the decision. I recall that Appendix FM-SE require proof of gross income from UK sources, which is supportive of Ms Gilmour's submission that the judge could not take the first Appellant's gross income from a USA source as evidence that the specified financial threshold of £22,400 was met.
30. I have examined what the judge said in paragraph 37. The judge recorded that the specified financial requirement was £22,400. After recording the submissions made by Mr Greer [The Appellants' Counsel below], the judge accepted that she could consider for herself the reliability of any alternative sources of finance before it. The judge found that the first Appellant's income from employment in the USA was transferrable, as was the employment itself. However, the judge also found that it only appeared that the income would exceed the relevant threshold because there had been no proper consideration of tax and jurisdictional issues.
31. I do not find it easy to accept Ms Gilmour's argument as there is no clear conclusion in paragraph 37 about what the judge thought about whether the assumed income would be sufficient. Paragraph 37 is discursive and not conclusive. It is necessary to turn to paragraph 35 and paragraph 38 for the judge's findings. She found that the Appellants would be financially independent in the UK and would have sufficient income to support themselves. A clearer finding would be hard to identify. This undermines

Ms Gilmour's argument about the judge not accepting that the minimum income requirement was met.

32. In addition, although the judge recorded Mr Greer's submission regarding MM (Lebanon) in paragraph 37, there is no indication that she thought to refer to that judgment or that she applied its analysis. If she had done so, then she could not have concluded as she did in paragraph 35 that, "Weighing in the respondent's favour however, is the strong public interest, in maintaining immigration control and the appellant's (sic) inability to meet the requirements of the rules." Doing so, means she did not take the required nuanced approach. I conclude that Ms Gilmour's submission that the judge decided not to exercise discretion and apply MM (Lebanon) is not made out.
33. This leaves me with Mr Holmes' submissions. I return to what the Supreme Court found in MM (Lebanon). At paragraphs 98 and 99, the Supreme Court discusses the tension between the rationality of the immigration rules regarding a minimum income requirement to ensure simplicity of operation, and the compatibility of such restrictions with article 8. Of course, the immigration rules were amended to accommodate the Supreme Court's judgment, for example with the expansion of paragraphs GEN.3.1 and 21A(2). However, the Appellants do not rely on those provisions, I assume because they accept they do not meet them. They rely on the principle that when applying article 8, the Tribunal must consider issues of public policy which go to the public interest and technicalities arising from a need to have practical requirements which do not require the same respect.
34. As I have indicated, I am satisfied that the judge failed to have regard to this legal approach and by ignoring it she erred in the balancing exercise by failing in effect to consider whether and to what extent the public interest in maintaining effective immigration controls was reduced from the usual high starting point.
35. For this reason, I find the second ground to be made out and that the judge's decision is flawed by legal error. This conclusion means the balancing exercise must be revisited. I will turn to that after I have assessed the final ground.
36. I understand why Mr Holmes did not pursue the final ground because it has no merit. I do not hold his position against him as no doubt he was having to balance his instructions and his duty to the Tribunal. Although I appreciate that the Appellants may feel that they are being treated in the same way as immigration offenders because of the reference to the maintenance of immigration control being in the public interest, the words come from the law that judges must apply. In this context, immigration control is not just the control before entry, on entry and after entry, but the public interest that the UK has a right to control who comes and who stays in the country.

Remaking the decision

37. Because I have found legal error in the way the judge undertook the balancing exercise, I set aside her decision.
38. At the end of the hearing on 8 November 2023, I canvassed the views of Mr Holmes and Ms Gilmour about remaking the decision. Both said that the factual findings should be preserved and therefore it would be fair, just and proportionate for me to remake the decision. Both agreed there was no need for further evidence or submissions.
39. I adopt the findings made by the judge, which are:
- (a) The first Appellant and sponsor have a genuine and subsisting relationship and enjoy family life together within the meaning of article 8.
 - (b) The first Appellant and sponsor want to enjoy their family life together and not separately as they have done so far in their relationship.
 - (c) It would be difficult for the sponsor to move to the USA as he lives with his mother, who is ageing and because of his strong links to the UK.
 - (d) Although the first Appellant has lived all his life in the USA and has family and other ties there, he is willing to move to the UK because of the difficulties the sponsor would have moving to the USA. In addition, he is not happy with anti-LGBTQ bills in Texas, where he lives.
 - (e) The second Appellant is wholly dependent on the first Appellant and in the absence of his own views, it must be presumed he would accompany his parent.
 - (f) The Appellants speak English.
 - (g) The Appellants would be financially independent in the UK because the first Appellant's employment is transferrable.
 - (h) The Appellants meet all the requirements of the immigration rules other than those in Appendix FM-SE about the evidence that must be provided to prove the minimum income requirement is met.
40. I conclude that the only factor weighing against the Appellants is the failure to meet a technical requirement of the immigration rules. I move to consider whether refusing admission to the UK is proportionate interference in the existing family life and their wish to establish the family unit permanently in the UK.
41. I find that the public interest in refusing the Appellants admission to the

UK is significantly weakened because the factual findings are that the policy concerns that underpin the public interest are met. The obstacle to granting entry clearance is purely technical.

42. A pure technicality based on procedural practicalities cannot override a right to family life. That underlies many judgments of domestic courts and the European Court of Human Rights. That is the ratio in MM (Lebanon), which draws from various authorities.
43. I conclude that the balancing exercise comes down in favour of the Appellants and entry clearances should be issued.

Notice of Decision

I find there is legal error in the decision of First-tier Tribunal Head.

I set aside that decision.

I remake the decision and allow the original appeals, with the effect that entry clearances are to be issued.

Judge John McCarthy
Deputy Upper Tribunal Judge

Date: