



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

**Case No: UI-2022-006552**  
**First-tier Tribunal No:**  
**HU/00880/2022**

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**  
**On the 10 July 2024**

**Before**

**UPPER TRIBUNAL JUDGE SHERIDAN**  
**DEPUTY UPPER TRIBUNAL JUDGE WILDING**

**Between**

**Entry Clearance Officer**

Appellant

**and**

**Sandeep Mohan Khera**  
**(NO ANONYMITY DIRECTION MADE)**

Respondent

**Representation:**

For the Appellant: Mr Lindsay, Senior Home Office Presenting Officer  
For the Respondent: Mr Coleman, Counsel instructed by Raiyad Solicitors

**Heard at Field House on 19 April 2024**

**DECISION AND REASONS**

1. By our decision promulgated on 20 September 2023 we set aside the decision of the First-tier Tribunal. We now remake the decision.

**Introduction**

2. The appellant is an Indian citizen (living in India) who wishes to join his wife (Mrs Khera) and son (Mr Khera) in the UK.
3. Mrs Khera and Mr Khera are both British nationals. The appellant and Mrs Khera married in India in 1999. Mr Khera was born in India in 2000. Mr Khera is the appellant's and Mrs Khera's only child.
4. The appellant, Mrs Khera and Mr Khera lived together, as a family unit, in India until May 2019 when Mr Khera moved to the UK and Mrs Khera decided to join him. There was no basis under the Immigration Rules for the appellant to

accompany Mrs Khera and Mr Khera to the UK as the financial eligibility requirements could not be met. The appellant therefore remained in India without Mrs Khera and Mr Khera.

5. Since arriving in the UK Mrs Khera has not worked. Mr Khera, however, has worked and his evidence (considered below) is that he earns a substantial amount that is more than sufficient to support the appellant.
6. On 21 October 2021 the appellant applied for entry clearance under Appendix FM of the Immigration Rules. He accepted that he could not meet the financial eligibility requirement under Appendix FM as Mrs Khera did not have an income. He relied, instead, on Mr Khera's income.
7. The respondent considered whether Mr Khera's income (which at the time of the application was said to be £26,593 per year) meant that the appellant satisfied the requirements of paragraph GEN.3.1(1) of Appendix FM and concluded that it did not. The respondent did not accept that Mr Khera would be in a position to provide financial support to the appellant. It is stated that if he were to provide the appellant with the minimum required, he would have only £7,993 remaining for himself. The respondent also stated that there was no reason Mrs Khera could not return to India in order to resume family life with the appellant and therefore this was not a case where there could be unjustifiably harsh consequences.

### **Relevant Law**

8. It was common ground that this case turns on whether the appellant falls within the scope of GEN.3.1(1). This provides:

GEN.3.1.(1) Where:

(a) the financial requirement in paragraph E-ECP.3.1., E-LTRP.3.1., E-LTRP.3.7. (in the context of an application for limited leave to remain as a partner), E-ECC.2.1., E-ECC.2.5., E-LTRC.2.1., or E-LTRC.2.5. applies, and is not met from the specified sources referred to in the relevant paragraph; and

(b) it is evident from the information provided by the applicant that there are exceptional circumstances which **could** render refusal of entry clearance or leave to remain a breach of Article 8 of the European Convention on Human Rights, because such refusal **could** result in unjustifiably harsh consequences for the applicant, their partner or a relevant child; then

the decision-maker must consider whether such financial requirement is met through taking into account the sources of income, financial support or funds set out in paragraph 21A(2) of Appendix FM-SE (subject to the considerations in subparagraphs (3) to (8) of that paragraph). [Emphasis added]

9. As can be seen from the wording of GEN.3.1(1), there are three conditions that must be satisfied.

*Condition 1: financial eligibility requirement in Appendix FM not met*

10. GEN.3.1(1)(a) requires that the relevant financial eligibility requirement specified in Appendix FM is not satisfied through the sources of income specified

in Appendix FM. In this case, the requirement that would need to not be met is that specified in paragraph E-ECP.3.1 of Appendix FM.

*Condition 2: there could be unjustifiably harsh consequences*

11. GEN.3.1(1)(b) requires that there must be exceptional circumstances which **could** render refusal of entry clearance a breach of article 8 because such refusal **could** result in unjustifiably harsh consequences.
12. We have highlighted the word “could”, which is used twice in subparagraph (b) of GEN.3.1(1), because the meaning of this word is critical. At the hearing, following consideration of oral argument about its meaning, we invited the parties to make written submissions on this issue. We are grateful for the helpful submissions that were provided.
13. GEN.3.1 is located in a section of Appendix FM headed “Exceptional circumstances”. Under this heading are GEN.3.1 and GEN.3.2. There is also GEN.3.3, but this is not relevant to this appeal.
14. GEN.3.2 is applicable where an application does not otherwise meet the requirements of Appendix FM (or Part 9 of the Rules). It states:
  - (1) Subject to sub-paragraph (4), where an application for entry clearance or leave to enter or remain made under this Appendix, or an application for leave to remain which has otherwise been considered under this Appendix, does not otherwise meet the requirements of this Appendix or Part 9 of the Rules, the decision-maker must consider whether the circumstances in sub-paragraph (2) apply.
  - (2) Where sub-paragraph (1) above applies, the decision-maker must consider, on the basis of the information provided by the applicant, whether there are exceptional circumstances which **would** render refusal of entry clearance, or leave to enter or remain, a breach of Article 8 of the European Convention on Human Rights, because such refusal **would** result in unjustifiably harsh consequences for the applicant, their partner, a relevant child or another family member whose Article 8 rights it is evident from that information would be affected by a decision to refuse the application. [Emphasis added]
15. The wording in GEN.3.2(2) is almost identical to that in GEN.3.1(1)(b) save for one significant difference. Whereas in GEN.3.1(1)(b) the test is whether refusing entry **could** give rise to unjustifiably harsh consequences, the test in GEN.3.2(2) is whether it **would** do so.
16. The distinction between “could” and “would” in paragraphs GEN.3.1 and GEN.3.2 is acknowledged in the respondent’s guidance dated 14 February 2024: Family life (as a partner or parent) and exceptional circumstances (“the Guidance”), where on page 63 the following is stated:

Applicants for entry clearance or limited leave to remain as a partner under the 5-year route are generally required to demonstrate that they meet the minimum income requirement under Appendix FM with reference to the specified forms and evidence of income or cash savings under Appendix FM-SE (excluding paragraph 21A). The level of the minimum income requirement set, and the general requirement to demonstrate compliance with it in accordance with Appendix FM-SE (excluding paragraph 21A), was upheld by the Supreme Court in *MM (Lebanon)*.

However, in some cases, applicants will be permitted to demonstrate that they meet the minimum income requirement with reference to other credible and reliable sources of income, financial support or funds.

Paragraph GEN.3.1. of Appendix FM sets out the threshold test to be met before it is necessary for you to consider such other sources. You will ask whether the refusal of the application could breach ECHR Article 8, because it **could result in unjustifiably harsh consequences** for the applicant, their partner or a relevant child (taking into account, as a primary consideration, the best interests of that child).

This is a high threshold. After all, it is only in exceptional circumstances that Article 8 requires entry to or leave to remain in the UK to be granted when a person does not otherwise meet the requirements of the Immigration Rules.

However, the threshold to be met before it is necessary to consider other credible and reliable sources of income, financial support or funds under the minimum income requirement is not as high as the ultimate test, under paragraph GEN.3.2. of Appendix FM, of whether refusal of the application would be disproportionate under Article 8 because it **would result in unjustifiably harsh consequences** for the applicant or their family, taking account, as a primary consideration, of the best interests of any relevant child. Where this test is met, entry clearance or leave to remain has to be granted in any event, regardless of whether the minimum income requirement (or indeed any other requirement of the rules) is met. [Emphasis in the original]

17. Although the Guidance indicates that “could” connotes a lower threshold than “would”, it does not provide any assistance, for example by way of examples, in understanding how, as a result of the different wording, an analysis of exceptional circumstances and unjustifiably harsh consequences differs under GEN.3.1 and GEN.3.2.
18. Neither party was able to identify any authority where the difference between GEN.3.1 and GEN.3.2 – or, more generally, the words “would” and “could” – has been considered.
19. The principles applicable when interpreting provisions of the Immigration Rules are well established. As explained in *Mahad v Entry Clearance Officer* [2009] UKSC 16, [2010] 1 WLR 38 at paragraph 10:

10. There is really no dispute about the proper approach to the construction of the Rules. As Lord Hoffmann said in *Odelola v Secretary of State for the Home Department* [2009] 1 WLR 1230, 1233 (paragraph 4):

“Like any other question of construction, this [whether a rule change applies to all undetermined applications or only to subsequent applications] depends upon the language of the rule, construed against the relevant background. That involves a consideration of the immigration rules as a whole and the function which they serve in the administration of immigration policy.”

That is entirely consistent with what Buxton LJ (collecting together a number of dicta from past cases concerning the status of the rules) had said in *Odelola* in the Court of Appeal ([2009] 1 WLR 126) and, indeed, with what Laws LJ said (before the House of Lords decision in *Odelola*) in the present case. Essentially it comes to this. The Rules are not to be construed with all the strictness applicable to the construction of a statute or a statutory instrument but, instead, sensibly according to the natural and ordinary meaning of the words used, recognising that they are statements of the Secretary of State’s administrative policy. The respondent’s counsel readily accepted that what she meant in her written case by the proposition

“the question of interpretation is . . . what the Secretary of State intended his policy to be” was that the court’s task is to discover from the words used in the Rules what the Secretary of State must be taken to have intended. After all, under section 3(2) of the Immigration Act 1971, the Secretary of State has to lay the Rules before Parliament which then has the opportunity to disapprove them. True, as I observed in *Odelola* (para 33): “the question is what the Secretary of State intended. The rules are her rules.” But that intention is to be discerned objectively from the language used, not divined by reference to supposed policy considerations...”

20. Mr Coleman argued that there is no legal basis or precedent to give the words “could” and “would” anything other than their ordinary and natural meanings; and that the consequence of this is that there is a significant difference between the tests under GEN.3.1(1)(b) and GEN.3.2(2), with the threshold under the former being significantly lower.
21. Mr Lindsay accepted that the words “could” and “would” should be construed sensibly and according to their natural and ordinary meaning, but argued that the threshold in GEN.3.1(1)(b) is a high one that includes a requirement that “there are exceptional circumstances”. He submitted that, under GEN.3.1(1)(b), just as under GEN.3.2(2), the question of whether the refusal could result in unjustifiably harsh consequences only arises where it is evident that there are “exceptional circumstances”; and the assessment of exceptional circumstances requires an article 8 proportionality assessment. Mr Lindsay accepted that there is a deliberate distinction between “could” and “would” and that the latter connotes a less demanding test. However, he maintained that because GEN.3.1 and GEN.3.2 both require there to be exceptional circumstances, they both establish a high bar.
22. We are not persuaded by Mr Lindsay’s arguments because the interpretive approach he advocates would effectively render meaningless the distinction between “could” and “would”. Applying his approach, under both GEN.3.1 and GEN.3.2, a judge would need to determine whether there are exceptional circumstances, with the test of exceptional circumstances being the same under both provisions. This would effectively leave no meaningful difference between the provisions and it is difficult to conceive of circumstances where, if this approach is followed, the threshold in GEN.3.1(1)(b) would be met but the threshold in GEN.3.2(2) would not.
23. We agree with Mr Coleman that the focus must be on the natural and ordinary meaning of the words “could” and “would”, as this is the way in which the Immigration Rules distinguish GEN.3.1(1)(b) from GEN.3.2(2). As is apparent from a review of several dictionaries, the natural and ordinary meaning of “*could*” is that there is a possibility something will occur whereas the meaning of “*would*” is that it is likely something will occur. Plainly, this is a very substantial difference: whether there would be (in the sense of being likely) unjustifiably harsh consequences is very different to whether there could be (in the sense of being a possibility) unjustifiably harsh consequences.
24. Our view is reinforced by considering the different purposes of the provisions. Paragraph GEN.3.2 (where “would” is used) encapsulates, at a high level, the legal test applicable where an appellant is unable (for any reason) to establish that he or she should be granted leave under Appendix FM and a proportionality assessment under Article 8 ECHR is required. The wording in GEN.3.2 matches that used by the Supreme Court in *Agyarko and Ikuga, R (on the applications of) v Secretary of State for the Home Department* [2017] UKSC 11, where at

paragraph 48 it is stated that an appellant who is unable to meet the requirements of Appendix FM needs to establish that:

“the refusal of the application **would** result in unjustifiably harsh consequences, such that refusal would not be proportionate”. [Emphasis added].

25. The Explanatory Memorandum in the Statement of Changes in Immigration Rules dated 20 July 2017 (“the Explanatory Memorandum”) explains, in respect of GEN.3.2:

This brings the test of proportionality under Article 8 into the Rules. That test was previously applied by the Secretary of State (through guidance) in considering whether to grant leave outside the Rules on Article 8 grounds. The substance of the test was upheld by the Supreme Court in *Agyarko & Ikuga v the Secretary for the Home Department* [2017] UKSC 11. These changes mean that the Immigration Rules now provide a complete framework for the Secretary of State’s consideration on Article 8 grounds of applications under Appendix FM by a partner, child, parent or adult dependent relative.

26. In contrast, and as explained in the Explanatory Memorandum, GEN.3.1 was introduced to give effect to what was said by the Supreme Court in *MM (Lebanon) & Others v the Secretary for the Home Department* [2017] UKSC 10 about alternative sources of funding. Paragraph 101 of *MM(Lebanon)* states:

We conclude therefore that, while the rules as such are not open to challenge, there are aspects of the instructions to entry clearance officers which require revision to ensure that the decisions made by them are consistent with their duties under the HRA. In the light of that conclusion, the Secretary of State might wish to consider whether it would be more efficient to revise the rules themselves, to indicate the circumstances in which alternative sources of funding should or might be taken into account, rather than simply to revise the guidance. But that would be a matter for her.

27. Given their different purposes, it is unsurprising that the test in GEN.3.1(1)(b) differs significantly to that in GEN.3.2(2).

*Condition 3: financial requirement met through sources of income, financial support or funds set out in Appendix FM-SE*

28. Paragraph 21A(2) of Appendix FM-SE sets out sources of income, financial support and funds that can be relied on when considering whether the financial requirements are met for the purposes of GEN.3.1. It states:

(2) Subject to sub-paragraphs (3) to (8), the following sources of income, financial support or funds will be taken into account (in addition to those set out in, as appropriate, paragraph E-ECP.3.2., E-LTRP. 3.2., E-ECC.2.2. or E-LTRC.2.2. of Appendix FM):

(a) a credible guarantee of sustainable financial support to the applicant or their partner from a third party;

(b) credible prospective earnings from the sustainable employment or self-employment of the applicant or their partner; or

(c) any other credible and reliable source of income or funds for the applicant or their partner, which is available to them at the date of application or which will become available to them during the period of limited leave applied for.

29. Sub-paragraphs (3)-(8) set out a range of considerations. Relevant to this appeal are:

(4) The onus is on the applicant to satisfy the decision-maker of the genuineness, credibility and reliability of the source of income, financial support or funds relied upon, on the basis of the information and evidence provided, having regard (in particular, but without limitation) to the factors set out below.

....

(8) In determining the genuineness, credibility and reliability of the source of income, financial support or funds relied upon under sub-paragraph (2), the decision-maker will take into account all the information and evidence provided, and will consider (in particular):

(a) in respect of a guarantee of sustainable financial support from a third party:

(i) whether the applicant has provided verifiable documentary evidence from the third party in question of their guarantee of financial support;

(ii) whether that evidence is signed, dated and witnessed or otherwise independently verified;

(iii) whether the third party has provided sufficient evidence of their general financial situation to enable the decision-maker to assess the likelihood of the guaranteed financial support continuing for the period of limited leave applied for;

(iv) whether the third party has provided verifiable documentary evidence of the nature, extent and duration of any current or previous financial support which they have provided to the applicant or their partner;

(v) the extent to which this source of financial support is relied upon by the applicant to meet the financial requirement in paragraph E-ECP.3.1., E-LTRP.3.1., E-LTRP.3.7., E-ECC.2.1., E-ECC.2.5., E-LTRC.2.1. or E-LTRC.2.5. of Appendix FM (as applicable); and

(vi) the likelihood of a change in the third party's financial situation or in their relationship with the applicant or the applicant's partner during the period of limited leave applied for.

### **Findings of Fact**

30. The following is not in dispute:

- a. The appellant and Mrs Khera married in 1999 in India and lived there together for 20 years. They have one child (Mr Khera) who was born in 2000. Mrs Khera and Mr Khera are British citizens.
- b. In 2019 Mr Khera and Mrs Khera moved to the UK without the appellant.
- c. The appellant and Mrs Khera are in a genuine and subsisting relationship and would like to continue their relationship in the UK.
- d. Mrs Khera suffers from a variety of physical problems including a hernia (which was diagnosed when she still lived in India), as well as with

depression and anxiety. She would be able to receive adequate treatment in India.

e. Mrs Khera and Mr Khera live with Mrs Khera's brother in the UK.

31. Mrs Khera claims that she is not physically able to travel to India due to her hernia. Mr Khera expressed the same view. Whilst we accept that this is their genuine belief, we are not persuaded that it is a belief that is objectively well-founded. No medical evidence was adduced confirming that Mrs Khera would be unable to manage the journey. Nor is there any evidence that efforts had been made to ascertain ways to minimise the discomfort Mrs Khera might face whilst travelling to India, for example by speaking to the airline about assistance that could be provided or by travelling business class so as to have more room. We find as a fact that Mrs Khera is able to travel to India.
32. Mr Khera adduced documentary evidence in the First-tier Tribunal showing a gross income of over £36,000 in the tax year April 2021 to April 2022. In his oral evidence before us he claimed to now be in a different job, where his gross income is approximately £45,000 (including overtime and bonuses). He did not provide an updated witness statement or any documentary evidence to corroborate this. Mr Lindsay submitted that there was an absence of reliable evidence as to Mr Khera's current financial circumstances. We are sympathetic to this argument. Given the significance of Mr Khera's income to the case, it is surprising that he did not provide an updated witness statement with documentary evidence of his new employment and earnings. However, Mr Khera's oral evidence about his income was clear, consistent and straightforward, and left us in no doubt that he was telling the truth about his new employment and income. We find as a fact that Mr Khera has, and for the last several years has had, a gross income of between £35,000 and £45,000.
33. The evidence indicates – and we find as a fact – that Mr Khera and Mrs Khera have a close relationship where Mr Khera provides Mrs Khera with financial support and they provide each other with emotional support. Although they currently live together (in Mrs Khera's brother's home), it is likely that if the appellant is permitted to move to the UK he and Mrs Khera will, in due course, live in their own home, and Mr Khera will live separately. The evidence submitted by the appellant, which we accept, is that he has savings of over £35,000. Mr Khera stated (and we accept as likely) that the appellant, if permitted to come to the UK, will use these funds to help establish himself.
34. Mr Khera has stated (including in a statutory declaration) that he undertakes to support, and take full financial responsibility for, the appellant. After hearing Mr Khera give oral evidence, we formed the view that he is genuinely committed to financially supporting his parents in the UK.

## **Analysis**

35. The part of Appendix FM relevant to this application is section EC-P: Entry clearance as a partner. It was common ground that the appellant cannot succeed under section EC-P because the financial requirements in paragraph E-ECP.3.1 are not met.
36. Where an appellant does not meet the financial requirements in paragraph E-ECP.3.1, it is open to him to argue that he falls within the scope of GEN.3.1,



GEN.3.2, or both. The appellant contends that he meets the conditions of GEN.3.1.

37. As explained above, an individual who (i) does not meet the relevant financial requirements in Appendix FM through the sources of income specified in Appendix FM; but (ii) does meet those requirements through sources of income, financial support or funds set out in Appendix FM-SE, (iii) will fall within the scope of GEN.3.1 if he or she can show that refusing entry or leave to remain could (in the sense of it being a possibility) result in unjustifiably harsh consequences. Establishing that refusal could result in unjustifiably harsh consequences is significantly easier to establish than that it would (i.e. is likely to) result in unjustifiably harsh consequences, the latter being the test under GEN.3.2 which adopts the language used by the Supreme Court in *Agyarko* to describe what must be established for an Article 8 ECHR claim to succeed outside the Rules.
38. As the relevant financial requirements under Appendix FM are not satisfied through the sources specified in Appendix FM, it is necessary to determine whether they are met through the sources specified in Appendix FM-SE. We are satisfied that the condition specified in paragraph 21A(2)(a) of Appendix FM-SE is met because Mr Khera has a stable income (of over £35,000 a year) that is sufficient for him to support the appellant without compromising his ability to support himself, and he has provided a credible guarantee of sustainable financial support.
39. In accordance with paragraph 21A(2), we have considered sub-paragraphs (3) - (8). Sub-paragraphs (3), (5), (6) and (7) are not relevant. Sub-paragraphs (4) and (8) are satisfied as the source of the financial support is genuine, credible and reliable and Mr Khera has provided sufficient evidence to demonstrate that he is likely to continue to be in a position to provide the appellant (and Mrs Khera) with financial support for the foreseeable future.
40. The remaining question under GEN.3.1 is whether there are exceptional circumstances which could render refusal of entry clearance a breach of Article 8 because it could result in unjustifiably harsh consequences for the appellant, Mrs Khera or Mr Khera.
41. The consequence of the appellant being refused entry is that his family life with Mrs Khera cannot be enjoyed in the UK and, in order for their family life to continue, Mrs Khera, who is a British citizen, would need to leave the UK and return to India. This is a significant interference with Mrs Khera's private and family life. However, it is not an interference that, in our view, would result in unjustifiably harsh consequences for her. This is because there not any significant obstacles to Mrs Khera returning to India where she will be able to access the medical treatment she needs and enjoy family life with the appellant. Similarly, we do not consider that Mr Khera would face unjustifiably harsh consequences because he, too, can return to India in order to avoid being apart from his parents.
42. Although we do not consider it likely that refusing the appellant entry clearance will result in unjustifiably harsh consequences for any of the appellant, Mr Khera or Mrs Khera, there is nonetheless a possibility that it could do so. For example, the family may make choices that result in Mrs Khera being permanently separated from the appellant and this could lead to a significant deterioration in her mental health. It is also possible that a deterioration in Mrs Khera's health may make it impossible for her to travel to India, thereby preventing her from

visiting the appellant in the event that she decides to remain in the UK without him. These are only possibilities; but mere possibility is enough to satisfy the conditions of GEN 3.1(1)(b).

43. This is a human rights appeal under section 82(1)(b) of the Nationality, Immigration and Asylum Act 2002 where the only ground of appeal available to the appellant is that the decision to refuse him entry clearance is unlawful under section 6 of the Human Rights Act 1998. To succeed, he therefore needs to establish that refusing him entry violates Article 8 ECHR; not that he meets the requirements of the Immigration Rules. However, it is well established, as explained in para. 34 of *TZ (Pakistan) and PG (India) v The Secretary of State for the Home Department* [2018] EWCA Civ 1109, that:

[W]here a person satisfies the Rules, whether or not by reference to an article 8 informed requirement, then this will be positively determinative of that person's article 8 appeal, provided their case engages article 8(1), for the very reason that it would then be disproportionate for that person to be removed.

44. As the appellant has a family life with Mrs Khara that engages Article 8(1) and the requirements of GEN 3.1 are met, it follows that it would be disproportionate to refuse him entry clearance.

**Notice of Decision**

45. The appeal is allowed.

D. Sheridan

**Upper Tribunal Judge Sheridan**  
Judge of the Upper Tribunal  
Immigration and Asylum Chamber

**7 July 2024**