



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/02816/2016

**THE IMMIGRATION ACTS**

Heard at Field House  
On Wednesday 4 October 2017

Decision & Reasons Promulgated  
On Wednesday 1 November 2017

Before

UPPER TRIBUNAL JUDGE SMITH

Between

MRS DAHABO HIRSI ROBLE

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr A Slatter, Counsel instructed by CNA solicitors

For the Respondent: Mr I Jarvis, Senior Home Office Presenting Officer

**DECISION AND REASONS**

**Background**

1. The Appellant appeals against a decision of First-Tier Tribunal Judge Callow promulgated on 21 April 2017 ("the Decision") dismissing her appeal against the Respondent's decision dated 14 January 2016 refusing her leave to remain as the spouse of a person settled in the UK.
2. The Appellant is the spouse of Mr Abdi Ali Dini ("the Sponsor"). The couple are both from Somalia. They were married in Mogadishu on 15 April 1998. The Sponsor came to the UK in 2006, seeking asylum and was naturalised as a British

citizen on 11 April 2012. The Appellant came to the UK on 29 December 2012 with entry clearance as a spouse, giving her leave to remain until 26 August 2015.

3. The Appellant's in-time application for further leave was initially rejected as invalid for failure to pay a fee and then for failure to provide an original passport. Her subsequent valid application made on 23 September 2015 was refused by the Respondent's decision under appeal for failure to provide evidence to show that she meets the income threshold requirements in Appendix FM to the Immigration Rules ("the Rules"). Since the Respondent did not accept that the Appellant met all the eligibility requirements under the Rules, she considered her application also applying EX.1 of Appendix FM but rejected the case on that basis because the Appellant had not provided evidence of insurmountable obstacles to family life continuing in Somalia. It is worthy of note at this juncture that, although the Sponsor claimed asylum in the UK, that was not apparently the basis on which he was granted leave to remain as his grant of indefinite leave did not show any restriction to him travelling back to Somalia.
4. Judge Callow found that the evidence before him did not satisfy the evidential requirements in Appendix FM-SE. He found that the Respondent had not unlawfully failed to exercise her discretion in relation to evidential flexibility. He went on to suggest that the Respondent ought to consider granting the Appellant leave to remain outside the Rules as, if further evidence had been requested, it would have been possible for the Appellant and the Sponsor to provide evidence showing that they could satisfy the Rules. The Judge purported to dismiss the appeal "under the Rules and Article 8 of the ECHR".
5. Permission to appeal the Decision was granted by First-tier Tribunal Judge Page on 1 August 2017 in the following terms:-

"[2] The grounds of appeal are arguable. It is argued that the judge has failed to take into account material evidence, namely the sponsor's payslips, when considering whether the appellant could meet the financial requirements of Appendix FM, namely £18,600 minimum income. It is argued that the judge has failed to consider the payslips in the appellant's bundle which went up to August 2015, incorrectly concluding that the sponsor's payslips ended on 26 June 2015. It is argued that if the judge [had] not made this mistake the appellant's proven income would have made a total of £18,905.82, in excess of the minimum threshold requirement of £18,600..."

6. The matter comes before me to decide whether the Decision contains a material error of law and, if so, to re-make the decision or remit the appeal for rehearing to the First-Tier Tribunal.

### **Legal Framework**

7. The requirements for limited leave to remain as a partner are to be found at R-LTRP.1.1 of Appendix FM to the Rules as follows:-

“The requirements to be met for limited leave to remain as a partner are –

- (a) the applicant and their partner must be in the UK;
- (b) the applicant must have made a valid application for limited or indefinite leave to remain as a partner; and either
- (c) (i) the applicant must not fall for refusal under Section S-LTR: Suitability leave to remain; and
- (ii) the applicant meets all of the requirements of Section E-LTRP: Eligibility for leave to remain as a partner; or
- (d) (i) the applicant must not fall for refusal under S-LTR: Suitability leave to remain; and
- (ii) the applicant meets the requirements of E-LTRP.1.2-1.12. and E-LTRP.2.1.; and
- (iii) paragraph EX.1.1. applies.”

8. The Respondent refused the application on the basis that the Applicant does not meet the eligibility requirement as to income requirements. The application was not rejected on the basis of any other of the eligibility requirements. The relevant eligibility requirement reads as follows (so far as relevant in this case):-

**“Financial requirements**

E-LTRP.3.1. The applicant must provide specified evidence, from the sources listed in paragraph E-LTRP.3.2., of –

- (a) a specified gross annual income of at least –
  - (i) £18,600

.....

E-LTRP.3.2. When determining whether the financial requirement in paragraph ELTRP.3.1 is met only the following sources may be taken into account –

- (a) income of the partner from specified employment...
- (b) income of the applicant from specified employment...”

9. What is considered to be specified evidence of the income relied upon is set out in Appendix FM-SE to the Rules which, so far as relevant, reads as follows:-

“A1. To meet the financial requirements under ...E-LTRP.3.1...of Appendix FM, the applicant must meet:

- (a) The level of financial requirement applicable to the application under Appendix FM; and
- (b) The requirements specified in Appendix FM and this appendix as to:
  - (i) The permitted sources of income and savings;
  - (ii) The time periods and permitted combinations of sources applicable to each permitted source relied upon; and
  - (iii) The evidence required for each permitted source relied upon.

1. In relation to evidencing the financial requirements in Appendix FM the following general provisions shall apply:

- (a) Bank statements must
  - .....
  - (iv) cover the period(s) specified...
  - .....

- (l) Where this Appendix requires the applicant to provide specified evidence relating to a period which ends with the date of application, that evidence, or the most recently dated part of it, must be dated no earlier than 28 days before the date of application.
- .....
2. In respect of salaried employment in the UK (except where paragraph 9 applies), all of the following evidence must be provided:
- (a) Pay slips covering:
- (i) a period of 6 months prior to the date of application if the person has been employed by their current employment for at least 6 months (and where paragraph 13(b) of this Appendix does not apply); or
- (ii) any period of salaried employment in the period of 12 months prior to the date of application if the person has been employed by their current employer for less than 6 months (or at least 6 months but the person does not rely on paragraph 13(a) of this Appendix)...;
- .....
- (b) 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)
- (c) Personal bank statements corresponding to the same period(s) as the payslips at paragraph 2(a), showing that the salary has been paid into an account in the name of the person and their partner jointly.
- .....

**Calculating Gross Annual Income under Appendix FM**

13. Based on evidence that meets the requirements of this Appendix, and can be taken into account with reference to the applicable provisions of Appendix FM, gross annual income under...E-LTRP.3.1. will be calculated in the following ways:

- (a) Where the person is in salaried employment in the UK at the date of application, has been employed by their current employer for at least six months and has been paid throughout the period of six months prior to the date of application at a level of gross annual salary which equals or exceeds the level relied upon in paragraph 13(a)(i), their gross annual income will be (where paragraph 13(b) does not apply) the total of:
- (i) the level of gross annual salary relied upon in the application..
- (b) Where the person is in salaried employment in the UK at the date of application and has been employed by their current employer for less than 6 months (or at least 6 months but the person does not rely on paragraph 13(a)), their gross annual income will be the total of:
- (i) the gross annual salary from employment as it was at the date of application;

....

In addition, the requirements of paragraph 15 must be met.

.....

(k) Where the application relies on the employment income of the applicant and the sponsor, all that income must be calculated either under sub-paragraph 13(a) or under sub-paragraph 13(b) and paragraph 15, and not under a combination of these methods.

15. In respect of paragraph 13(b)...the provisions in this paragraph also apply:
- (a) In order to evidence the level of gross annual income required by Appendix FM, the person must meet the requirements in paragraph 13(b)...and;
  - (b) The person must also meet the level of annual gross income required by Appendix FM on the basis that their income is the total of:
    - (i) The gross income from salaried employment in the UK ... earned by the person in the 12 months prior to the date of application
- .....”

10. Appendix FM-SE has its own evidential flexibility rules which, again so far as relevant read as follows:-

“D. (a) In deciding an application in relation to which this Appendix states that specified documents must be provided, the Entry Clearance Officer or Secretary of State (“the decision-maker”) will consider documents that have been submitted with the application, and will only consider documents submitted after the application where sub-paragraph (b), (e) or (f) applies.

(b) If the applicant:

(i) Has submitted:

(aa) A sequence of documents and some of the documents in the sequence have been omitted (e.g. if one bank statement from a series is missing);

(bb) ..... or

(cc) ..... or

(dd) A document which does not contain all of the specified information; or

(ii) Has not submitted a specified document

the decision-maker may contact the applicant or his representative in writing or otherwise, and request the document(s) or the correct version(s). The material requested must be received at the address specified in the request within a reasonable timescale specified in the request.

(c) The decision-maker will not request documents where he or she does not anticipate that addressing the error or omission referred to in sub-paragraph (b) will lead to a grant because the application will be refused for other reasons.

(d) If the applicant has submitted:

(i) .....; or

(ii) ...., or

(iii) A document that does not contain all of the specified information, but the missing information is verifiable from:

(1) other documents submitted with the application,

(2) ...., or

(3) .....,

the application may be granted exceptionally, providing the decision-maker is satisfied that the document(s) is genuine and that the applicant meets the requirement to which the document relates. The decision-maker reserves the right to request the specified original document(s) in the correct format in all cases where sub-paragraph (b) applies, and to refuse applications if this material is not provided as set out in sub-paragraph (b).

(e).....

(f) Before making a decision under Appendix FM or this Appendix, the decision-maker may contact the applicant or their representative in writing or otherwise to request further information or documents. The material requested must be received at the address specified in the request within a reasonable timescale specified in the request.”

11. In the event that the Applicant is unable to show that she does not meet all the eligibility requirements, she may nonetheless succeed under the Rules if she meets EX.1.1. That reads as follows (so far as relevant):-

“EX.1.1. This paragraph applies if

(a) (i)....

(b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK

EX.2. For the purposes of EX.1.(b) “insurmountable obstacles” means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner.”

12. Section 117B Nationality, Immigration and Asylum Act 2002 (“section 117B”) is also relevant. That reads, so far as relevant as follows:-

***“Article 8: public interest considerations applicable in all cases***

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English –

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons –

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to –

(a) a private life, or

(b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious."

### **Error of law decision and reasons**

13. Mr Jarvis for the Respondent accepted there is an error of law in relation to [21] of the Decision which reads as follows:-

"[21] While in *Miah [2012] EWCA Civ 261* the Court of Appeal rejected the idea of there being a free-standing 'near miss' argument in immigration cases where the applicant falls just short of the requirements of the Rules, I presume to recommend the respondent exceptionally grant the appellant leave to remain outside the Rules. Had the case been prepared with an eye to detail, it could reasonably have been expected that the sponsor's missing payslips would have been produced and the appellant's letter from her erstwhile employer would have been drafted to comply with the Rules. Had the payslips in particular been produced their production would have resulted in satisfying the MIR of £18,600"

That is the Appellant's ground [8].

14. As Mr Jarvis rightly accepted, this is an appeal against the refusal of a human rights claim. The issue for the Judge was therefore whether removal would breach Article 8 ECHR. Applying Section 117B, the Judge could take into account whether the Appellant might be able to show that she meets the income threshold even if, technically, she cannot meet Appendix FM for failure to satisfy the evidential requirements. As such, Mr Jarvis accepted that it was incumbent on the Judge to consider whether the ability to meet the income threshold albeit not in compliance with the evidential requirements was sufficient to amount to compelling circumstances so as to justify allowing the appeal on the basis that removal would be disproportionate.

15. The extent of that concession and potential impact of the error conceded depends though, at least to some extent, on whether the Appellant's other grounds, dealing with the income threshold and evidential requirements of the Rules are made out. I therefore consider those issues before dealing with the effect of the error of law which is conceded.

16. The starting point for the errors asserted in relation to the income threshold is the Respondent's decision. The Appellant's application is dated 22 September 2015. She therefore needed to show that she or she and the Sponsor together earned more than £18,600 in the six months prior to the application. The most recent documents relied upon had to be dated no earlier than 28 days before the date of the application. The Appellant and her spouse had to provide six or twelve months of payslips, a letter from employer confirming employment, gross annual

salary, length and type of employment and bank account statements corresponding with the payslips.

17. The documents which the Appellant submitted are listed on page [4] of the refusal letter. The Appellant had two jobs but, at least in this appeal, relies only on the job working for Bayleaf Cleaning Co ("Bayleaf"). She supplied four payslips for the period March to June 2015 showing a total gross income of £3253.25. The Sponsor works for ISS UK Ltd ("ISS"). In relation to his employment, P60s were submitted for 2012, 2014 and 2015. Fortnightly payslips were supplied for the period 9 January to 26 June 2015 but those were not verified. In addition, the Appellant submitted Halifax joint account bank statements for the period 2 February to 21 July 2015 showing, it is said, monthly cash deposits of approximately £700/£800 and BACS payments of approximately £250.
18. It is clear from the foregoing, that the documents submitted with the application fell well short of the evidential requirements both in terms of the period covered by the documents, the type of documents and content of those documents. The Respondent could not have been expected to exercise evidential flexibility given the serious deficiencies and that the remedying of any one of those deficiencies would have made no difference to the outcome.
19. It is though common ground that the Tribunal is not restricted in its consideration of the income requirements to looking only at documents which were before the Respondent. It is not for the Tribunal to exercise the evidential flexibility which is for the decision-maker to apply but if a Judge is satisfied that the documents produced at the appeal hearing show substantial compliance with the evidential requirements as at the date of the application, then Mr Jarvis accepted that a Judge could "hypothetically" review the exercise of discretion to ascertain whether the income requirement is satisfied. I did not understand that submission to be that a Judge could directly apply the evidential flexibility rule which is for the Respondent in order to find that the Appellant could satisfy the evidential requirement under the Rules. The Tribunal no longer possesses the power to find the Respondent's decision to be "not in accordance with the law" and to require her to re-take the decision exercising her discretion. It is though relevant to consideration of the human rights' claim outside the Rules, particularly in relation to the weight to be given to the public interest, that an appellant meets the relevant rule.
20. I turn then to consider how the Judge dealt with this aspect of the Appellant's case in the Decision. This is dealt with at [15] to [17] of the Decision as follows:-

"[15] As the appeal is not under the Points-Based System, notwithstanding a requirement to submit supporting documents as at the date of application, for example payslips covering a period of six months prior to the date of application, account will be taken of all the documents submitted by the appellant in support of



the appeal. These reveal however a failure to comply with the mandatory requirement of the Rules.

[16] At the outset, an examination of the appellant's Bayleaf employment letter reveals that contrary to the provisions of para 2(b) of Appendix FM-SE no annual salary and the level of salary relied upon are recorded. As to her gross annual income (15(b)(i) of Appendix FM) a consideration [of] the payslips and P60 for the year ended 5 April 2015 reveal an annual income of £8,364.22 supported by payslips, a P60 and bank statements. Insofar as the sponsor is concerned, despite being in continuing employment with ISS up to the date of the appellant's application, the payslips produced in support of the appeal ended on 26 June 2015 revealing an accumulated gross salary with effect from 6 April 2015 of £2,635.20. [Had the payslips between 26 June and 23 September 2015 been produced the accumulated gross salary would obviously have been higher.] His employment letter compliant with para 2(b) of Appendix FM-SE asserts that his annual salary is £11,731.20. His P60 for the year ended 5 April 2015 records a gross annual taxable income of £12,606.80. Prorated his monthly salary for the tax year ended 5 April 2015 is £1,050.56 wherein his accumulated income for the period October to March 2015 is £5,252.83 and which added to the said sum of £2,635.20 reveals a proved annual income of only £7,888.03. The sponsor's proven annual income of £7,888.03 added to the appellant's proven annual income of £8,364.22 results in a grand total [of] £16,252.25 which obviously falls far short of the minimum of £18,600.

[17] As the Rules are expressed in mandatory terms the issue of discretion does not arise. As to the appellant herself, she has failed to submit a valid employment letter meeting the requirements of para 2(b) of Appendix FM-SE. For his part the sponsor has not submitted payslips covering a period of six months prior to the date of the appellant's application in accordance with para 2(a) of appendix FM-SE. The result of those failures also means that the appellant does not meet the minimum threshold of £18,600"

21. The Appellant's grounds in this regard can be summarised as follows. The Judge accepted that the Appellant provided payslips, a P60 and bank statements which together showed that she earned £8,364.22 in her employment with Bayleaf over the twelve months' period prior to the date of application. It is accepted that the Appellant did not produce a letter from Bayleaf compliant with the evidential requirements. It is said though either that the other evidence was sufficient to show that she met the requirements and/or that the evidential flexibility requirements in Appendix FM-SE D(d)(iii) could be applied so that the application could have been granted exceptionally.
22. In relation to the Sponsor, the error is said to be that the Judge left out of account payslips which were before him running to August 2015 which, if taken into account, would have provided evidence of twelve months' income to satisfy the Rules. The Sponsor did provide a letter from ISS. It is also said that the Sponsor's bank statements corroborated the payslips.
23. The witness statement of the Sponsor clearly refers to the ISS payslips from 6 February 2015 to 7 August 2015. Those payslips disclose a gross salary in that six months' period of £5,929.20. The payslips are clearly in the bundle before the First-tier Tribunal. There is also a letter from ISS which confirms that the Sponsor

remains in permanent part-time employment and confirms his gross annual salary. The bank statements are not in the paginated bundle but are produced separately. Those show receipts in the same period corresponding to the payslips. The grounds make the point that if one works on the figure being £439.20 per fortnight, that equates to £878.40 per month or £10,540.80 per annum. In fact, given that the Sponsor is paid fortnightly, the calculation may be slightly different; if one calculates the gross annual salary by extrapolating directly from the payments being made fortnightly, the figure is if anything slightly higher (which may also account for the fact that the employer's letter refers to a salary of £11,731.20). Either way, though the documents relied upon do demonstrate that the couple's joint annual income exceeds £18,600.

24. The Judge therefore clearly left out of account evidence which was before him. However, the evidence which was before the Judge cannot meet the evidential requirements of Appendix FM-SE for the following reasons. First, the Appellant has not produced a letter from her employer in compliance with Appendix FM-SE. Although that letter does confirm the fact of her employment, start date and the nature of that employment, it confirms her salary only by way of an hourly rate. Second, although Mr Jarvis submitted that the six months' period which needed to be covered by the payslips and bank statements was from 19 August 2015 dating back to 19 February 2015, that appears to be incorrect by reference to paragraph [1(l)] of Appendix FM-SE. By my calculation, since the application was dated 22 September 2015, the period was 25 August 2015 to 25 February 2015. The most recent payslip for the Appellant is dated 7 August 2015. The most recent account statement for the joint account ends on 10 August 2015.
25. In relation to the Sponsor, although there were payslips dating beyond 7 August 2015, which confirmed that he continued to be paid at the same rate up to date of application and although he did produce an employer's letter which complied with the requirements of Appendix FM-SE, the bank account credits which corroborate the payslips are to his sole bank account and not to an account in joint names with the Appellant. There is no evidence that the amounts paid in are paid out during the period and credited to the joint account. For that reason, the documents relating to the Sponsor do not comply either with the strict evidential requirements.
26. I can for that reason deal succinctly with Mr Slatter's submission that, since the Appellant could rely on paragraph 13(b) of Appendix FM-SE in place of paragraph 13(a), there was no requirement for the employer's letter for the Appellant to be produced. I prefer Mr Jarvis' submission in any event that reliance on paragraph 13(b) does not obviate the need to produce a compliant employer's letter but, since the evidence in relation to the Sponsor also fails to comply with the evidential requirements, the deficiencies are not limited to that employer's letter.

27. That also disposes of the evidential flexibility point. As I have already indicated, I do not accept that it is for me to exercise the discretion which the Rules provide in that regard and the Respondent was clearly entitled to exercise the discretion as she did at the time of her decision. However, since there are a number of deficiencies in the evidence, there could be no reason in any event to exercise that flexibility in relation to the employer's letter because the application would still fail for other reasons.
28. For the foregoing reasons, I am satisfied that there is no material error of law in relation to the Judge's findings as regards whether the Appellant and the Sponsor could meet Appendix FM and in particular Appendix FM-SE. As I have already indicated, though, there is an error conceded in relation to the Article 8 assessment. I have also accepted that the documents show that the Appellant's and the Sponsor's joint income exceeds £18,600. That is material and relevant to the Article 8 assessment.
29. I therefore set aside the Decision. I indicated at the hearing that I proposed to take this course, certainly in relation to Article 8 ECHR. Both representatives accepted that there was no need for the appeal to be remitted. Both representatives were content that I should re-make the decision on the basis of the documents before me. However, Mr Slatter did ask that, if I found there to be no error of law in relation to compliance with Appendix FM-SE, the Appellant be given a further opportunity to provide evidence in relation to what would be the insurmountable obstacles to family life continuing in Somalia, having regard also to the need to consider Article 8 on the basis of up-to-date information.
30. No application was made by the Appellant to adduce further evidence. In light of my decision below, I did not consider it necessary to call for further evidence.

### **Re-Making of Decision**

31. It is accepted that the Appellant and the Sponsor are in a genuine and subsisting relationship. The Appellant came to the UK with entry clearance as a spouse. She did not enter under any pretext or seek to circumvent immigration control. As such, she also came here with the expectation that she would in due course be able to remain as the spouse of the Sponsor. The Appellant did overstay her leave by 28 days but that is because an application made in time was rejected as invalid. She has not flouted immigration laws other than in relation to that short period of overstaying before her valid application and she had attempted to comply by earlier applications. The period is in any event short.
32. On the other hand, the Appellant and the Sponsor do not meet the strict requirements of the Rules. True it is that I have accepted that they can now show that at the date of the application, their joint income exceeded the minimum income requirement but I have not accepted that the couple can meet the Rules

because the evidence which they have produced to demonstrate compliance still falls short of meeting the evidential requirements of those Rules.

33. Even though the Appellant does not meet the eligibility requirement in relation to income because of the evidential failures, she could still meet Appendix FM if she were able to show that paragraph EX.1.1.(b) applies. However, I agree with what is said by Judge Callow at [18] of the Decision. There has been no attempt by the Appellant and the Sponsor to show that there are any obstacles let alone any insurmountable ones to them continuing family life in Somalia. I note that there is no evidence that the Sponsor is a recognised refugee from that country.
34. The Appellant cannot therefore qualify for leave to remain based on her family life applying Appendix FM. I turn therefore to consider her claim outside the Rules.
35. The genuine and subsisting relationship between the Appellant and the Sponsor engages Article 8 in relation to their family life (and also their private lives but I do not need to deal with that issue). There will be a sufficiently serious interference with the family life of both the Appellant and the Sponsor occasioned by the Appellant's removal whether or not the Sponsor chooses to return to Somalia with her. That interference therefore requires justification. There is no doubt that the Respondent's decision to refuse to allow the Appellant to remain is one which accords with the law. The issue is whether that decision is a proportionate response.
36. As recently restated by the Supreme Court in MM (Lebanon) and others v Secretary of State for the Home Department [2017] UKSC 10 ("MM"), the starting point is that a state has the right to control who may enter and remain in that state. Under the ECHR, there is no general obligation to respect a couple's choice where they would prefer to enjoy their family life. That is the more so when, as here, there are no obstacles to the couple enjoying family life in the country from which they both originate.
37. The Supreme Court has recently recognised in Agyarko and Ikuga v Secretary of State for the Home Department [2017] UKSC 11 that, in the assessment of a claim based on family and private life, the Rules are to be given considerable weight as reflecting where the Secretary of State considers the balance to be struck in the public interest. This also finds recognition in the requirement placed on this Tribunal to have regard to the factors in Section 117B, the first of which is that the maintenance of effective immigration control is in the public interest. As such, if an appellant cannot satisfy the requirements under the Immigration Rules, that will generally favour the public interest in removal.
38. Although in MM, the Supreme Court held that some aspects of the Rules and Home Office instructions in relation to the application of the minimum income requirement were unlawful or required revision, in general they recognised that

the Respondent was entitled to specify a minimum income threshold and to require that threshold to be met provided that an overly rigid approach was not adopted by decision makers. The need to ensure that, in general, those permitted to remain are able to support themselves is also reflected in Section 117B(3) that financial independence of such persons is in the public interest.

39. I take into account though at this point my finding that the evidence shows that the couple in fact earned in excess of the minimum income threshold. I of course give weight to the fact that the evidence they produce does not meet the evidential requirements of the Rules and that those evidential requirements are there for a purpose to ensure that applicants are able to demonstrate by cogent evidence that they meet the requirements. However, although there are a number of deficiencies in the evidence in terms of compliance with those requirements, none is substantial, whether considered singly or cumulatively.
40. The letter from the Appellant's employer provides most of the information to confirm her employment and that is corroborated by the payslips. Although the letter refers to earnings based on an hourly rate and not a gross annual salary, the payslips do show a consistent level of earnings by the Appellant over the requisite period (albeit that period falls short by about two weeks from the evidential requirements under the Rules). The amounts shown in the payslips are corroborated by matching credits in the bank statements which are to a joint account.
41. In relation to the Sponsor, his payslips show that he has been working for some time in the same job, working a consistent number of hours and earning broadly the same amount. He has also produced payslips and bank statements within the period required as well as an employer's letter which confirms his employment. The main difficulty with the evidence in relation to the Sponsor is that his wages are paid into an account in his sole name. However, there is no dispute as to the relationship between the Appellant and the Sponsor. It appears from the bank statements submitted in relation to both the joint and sole account that both are used for general household expenses. Both show credit balances throughout the period.
42. I am satisfied on the evidence that the couple are financially independent and moreover that they jointly earn in excess of the minimum income threshold requirements of the Rules albeit that the evidence they produce does not satisfy the evidential requirements. I am able to give weight to those factors in their favour. That is not to apply any "near miss" principle. It is simply to recognise that it is one factor in the balancing equation in their favour under Article 8 that they are able to show that they, in fact, earn an amount which exceeds the level which the Respondent requires to be shown.
43. Although the Appellant has not shown that there are any insurmountable obstacles to her relationship being continued on return to Somalia, I do bear in

mind that, if the Appellant and the Sponsor had overcome the evidential deficiencies in the documentation produced to support their application, leave to remain would have been granted. Failure to meet the minimum income threshold is the reason given for the Respondent's refusal of the application on eligibility grounds. As such, this is one of those very unusual cases where there is some certainty to an application for entry clearance succeeding – as indeed it did in 2012.

44. It is also relevant to the weight to be given to the family life versus public interest balance that the couple's relationship has been continued in the UK while both have been here lawfully. I also take into account that, although the Sponsor originates from Somalia, he is a British citizen. That is by no means a determinative factor but it is something to be factored into account. The Appellant would have needed to satisfy the Respondent that she speaks English to a sufficient standard in order to obtain entry clearance as a spouse although I do note that she required an interpreter in order to give evidence at the hearing before the First-tier Tribunal.
45. This case is finely balanced. On the positive side for the Appellant, she has observed immigration laws and sought to comply with immigration control at every step. She has been here lawfully and her family life has been developed against a backdrop of lawful residence. That reduces the weight which needs to be given to the maintenance of effective immigration control in her case. However, she could not and on the basis of the evidence available before me still has not met the requirement of the Rules. That would tend to favour the public interest in removal. However, as I have explained, the weight is reduced by reason of the nature and extent of the reasons why the Appellant is unable to meet the Rules. She has demonstrated on the evidence that, in fact, she and the Sponsor jointly earned in excess of the minimum income threshold at the date of application. They have shown that they are financially independent. Having carefully balanced the factors for and against, I am satisfied that, by reason of the exceptional factors at play in this case, the Respondent's decision to refuse the Appellant leave is a disproportionate interference with her Article 8 rights. It follows that removal would breach the Appellant's human rights. I therefore allow the appeal.

### **DECISION**

**I am satisfied that the Decision contains material errors of law. The decision of First-tier Tribunal Judge Callow promulgated on 21 April 2017 is set aside.**

**I re-make the decision and I allow the appeal on human rights grounds on the basis that removal of the Appellant would breach Article 8 ECHR.**



Signed  
Upper Tribunal Judge Smith

Dated: 1 November 2017