Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number:**
HU/00083/2016

HU/00084/2016

THE IMMIGRATION ACTS

Heard at Field House
On 4 January 2018

Decision Promulgated
On 10 January 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

ENTRY CLEARANCE OFFICER – New Delhi

Appellant

and

JASMIN [B]
(Anonymity direction not made)

First Appellant

[F J]
(Anonymity direction not made)

Second Appellant

Representation:
For the Appellant: Ms J Isherwood, Senior Home Office Presenting Officer
For the Respondent: Mr Miah (counsel) Instructed by Lincoln's Chambers solicitors

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of the Appellants. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. The Secretary of State for the Home Department brings this appeal but, to avoid confusion, the parties are referred to as they were in the First-tier Tribunal. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Cassel, promulgated on 10 May 2017 which allowed the Appellants' appeals on article 8 ECHR grounds.

Background

3. The first Appellant was born on [ ] 1987. The second appellant is her daughter, who was born on [ ] 2010. Both appellants are nationals of Bangladesh.

4. On 16 October 2015 both appellants applied for entry clearance to join the sponsor in the UK under appendix FM of the rules. On 30 November 2015 the respondent refused entry clearance.

The Judge's Decision

5. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Cassel ("the Judge") allowed the appeals against the Respondent's decision. Grounds of appeal were lodged and on 16 November 2017 Judge Pickup gave permission to appeal stating

> It is arguable that the First-tier Tribunal Judge misunderstood the nature of the application and the requirements of the Rules, including under FM-SE as to required documentary evidence, which was one of the reasons for refusal. It is arguable that the conclusion that the appellants met the Rules was mistaken and thus infected the conclusion that the decision was disproportionate.

The Hearing

6. For the respondent Ms Isherwood moved the grounds of appeal. She told me that the Judge erred in his consideration of article 8 ECHR, which is the only competent ground of appeal. She took me to the reasons for refusal letter and told me that the appellants did not produce details of the sponsor's earnings, and that the HMRC letters relied on in the appellants' bundle provides inadequate evidence to address the financial requirements of appendix FM. She told me that the Judge failed to engage with the core issues in the case, & that the Judge's conclusion that the appellants meet the rules cannot be sustained because of the requirements of appendix FM-SE. Ms Isherwood told me that the Judge's article 8 assessment was so flawed that the decision cannot stand. She asked me to set the decision aside.

7. (a) Mr Miah, counsel for the appellants, told me that the decision does not contain material errors of law. He conceded that [8] of the decision is irrelevant, but said that does not undermine the decision because at [9] the Judge identifies the correct legal test & the core issues - and then proceeds to deal with the determinative matters in this appeal.

(b) Mr Miah told me that the Judge makes clear findings, drawn from the evidence, that the appellants meet the requirements of appendix FM of the immigration rules. He told me that if the appellants meet the immigration rules, then, by analogy their appeals must succeed on article 8 ECHR grounds. He told me that at [5] of the decision the Judge rehearses the evidence which he found reliable. He told me that it was that evidence which enabled the Judge to find that the appellants meet the requirements of appendix FM. He took me to the HMRC letters produced in the appellants' bundle and told me that they are determinative of the appeal.

(c) Mr Miah asked me to dismiss the appeal and allow the decision promulgated on 10 May 2017 to stand.

Analysis

8. The sponsor in this case is the husband of the first appellant and father of the second appellant. The respondent's decisions were made on 30 November 2015. The respondent refused the applications because the respondent believes the sponsor does not meet the financial requirements set out in E-ECP.3 of the rules. The respondent compared the information available from an enquiry with HMRC against the evidence provided by the appellants to support their applications, and preferred the evidence obtained from HMRC.

9. In addition, the respondent decided that the appellants failed to provide specified evidence, in particular bank statements showing the sponsor's cash salary, and so found that the requirements of appendix FM - SE are not met.

10. At [8] of the decision the Judge sets out the statutory scheme relevant to family visitors. What is said at [8] of the decision has no relevance at all to these appeals. Neither of the appellants submitted applications as family visitors. Although that is an error, it is not a material error because it is clear that the Judge understands that the only competent appeal is on article 8 ECHR grounds.

11. At [5] of the decision the Judge rehearses the evidence which is placed before him. At [9] of the decision the Judge turns to the immigration rules. The Judge finds that the appellant meets the financial threshold. When [5] and [9] are read together it is clear that the Judge relied on the sponsor's oral evidence supported by the documentary evidence, which properly

vouches the sponsor's income. The findings at [9] are findings which are well within the range of reasonable conclusions available to the Judge.

12. What the Judge does not engage with is appendix FM-SE. In the respondent's decision the respondent clearly says that bank statements, which form part of the necessary specified evidence, were not produced.

13. Paragraph 76 of MM (Lebanon) [2017] UKSC 10 says that the tribunal should attach considerable weight to judgments made by the Secretary of State in the exercise of her constitutional responsibility for immigration policy. However "*not everything in the rules need be treated as high policy or peculiarly within the province of the Secretary of State, nor as necessarily entitled to the same weight. The tribunal is entitled to see a difference in principle between the underlying public interest considerations, as set by the Secretary of State with the approval of Parliament, and the working out of that policy through the detailed machinery of the rules and its application to individual cases. The former naturally include issues such as the seriousness of levels of offending sufficient to require deportation in the public interest (Hesham Ali, para 46). Similar considerations would apply to rules reflecting the Secretary of State's assessment of levels of income required to avoid a burden on public resources, informed as it is by the specialist expertise of the Migration Advisory Committee. By contrast rules as to the quality of evidence necessary to satisfy that test in a particular case are, as the committee acknowledged, matters of practicality rather than principle; and as such matters on which the tribunal may more readily draw on its own experience and expertise.*"

14. The Judge's findings are brief. At [9] the Judge finds that the appellants meet the financial requirements of the immigration rules. The Judge does not address the evidential requirements of appendix FM-SE. In the decision notice the respondent says that the appellant has not produced bank statements. In the grounds of appeal, the appellants argue that all of the specified evidence required accompanied the applications. The appellants' bundle contains a letter dated 2 October 2015 submitting the applications for both appellants. That letter details the documents sent in support of the application, which include the sponsor's bank statements and payslips.

15. The requirements of appendix FM-SE are an area of dispute which is not resolved, but that is not a material error of law because there is no appeal under the immigration rules. The only competent ground of appeal is on article 8 ECHR grounds. At [9] (accepting the evidence rehearsed at [5]) the Judge finds that the appellants meet the substantive requirements of appendix FM. It is that finding which forms the platform for the consideration of article 8 ECHR grounds of appeal.

16. The Judge's findings in relation to article 8 are contained at [11] of the decision. The findings are brief, but they are sufficient to demonstrate an

adequate proportionality assessment. In essence, the Judge finds that because the appellants meet the suitability, eligibility and financial requirements of appendix FM, and because the appellants are the wife and child of the sponsor, then by analogy the respondent's decision is a disproportionate interference with the right to respect for family life.

17. In Mostafa (Article 8 in entry clearance) [2015] UKUT 112 (IAC) (at paragraph 24) it was said that *"It will only be in very unusual circumstances that a person other than a close relative will be able to show that the refusal of entry clearance comes within the scope of Article 8(1). In practical terms this is likely to be limited to cases where the relationship is that of husband and wife or other close life partners or a parent and minor child..."*. The Tribunal further held that in appeals against refusal of entry clearance under Article 8, the claimant's ability to satisfy the Immigration Rules is capable of being a weighty, though not determinative, factor when deciding whether such refusal is proportionate to the legitimate aim of enforcing immigration control. At paragraph 9 it was said that where the ground of appeal is limited to human rights " ... *if ...the claimant has shown that refusing him entry ... does interfere with his ...family life then it will be necessary to assess the evidence to see if the claimant meets the substance of the rules. This is because... the ability to satisfy the rules illuminates the proportionality of the decision to refuse him entry clearance*". At paragraph 19 the Upper Tribunal said "*Subject to two sets of considerations we can see no justification for stopping a husband joining his wife when a Tribunal is satisfied that their circumstances satisfy the requirements of the Rules. The first relates to their candour....The second set of considerations relates to the impact of refusal on the relationships that have to be promoted*."

18. In Agyarko v SSHD [2017] UKSC 11 The Supreme Court held that the Immigration Rules are compatible with ECHR, article 8, as this provision requires there to be a fair balance struck between competing public and individual interests involved, applying a proportionality test, and the policies adopted by the Secretary of State are within the margin of appreciation. The respondent's own rules indicate that the decision is a disproportionate interference with the right to respect for family life.

19. On the facts as the Judge found them to be, the appellants meet the requirements of the Immigration Rules. On any reasonable and proper application of the Secretary of State's own policy, it cannot be said that the interests of immigration control require that entry clearance should be refused.

20. The decision the Judge reached is well within the range of reasonable decisions available to the Judge. Although the reasons for the decision are brief, an adequate proportionality balancing exercise has been carried out.

21. In Shizad (sufficiency of reasons: set aside) [2013] UKUT 85 (IAC) the Tribunal held that the Upper Tribunal would not normally set aside a decision of the First-tier Tribunal where there has been no misdirection of law, the fact-finding process cannot be criticised and the relevant Country Guidance has been taken into account, unless the conclusions the Judge draws from the primary data were not reasonably open to him or her.

22. In this case, there is no misdirection in law & the fact-finding exercise is beyond criticism. The decision is not tainted by a material error of law. The Judge's decision; when read as a whole, sets out findings that are sustainable and sufficiently detailed.

CONCLUSION

23. No errors of law have been established. The Judge's decision stands.

DECISION

24. The appeal is dismissed. The decision of the First-tier Tribunal promulgated on 10 May 2017 stands.

Signed Paul Doyle Date 8 January 2018

Deputy Upper Tribunal Judge Doyle