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

Appeal Numbers: HU/03875/2018
HU/06495/2018
HU/06500/2018

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 11 March 2019** | **On 29 March 2019** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE DAVEY**

**Between**

***G* T (FIRST APPELLANT)**
**F T (SECOND APPELLANT)**
**V T (THIRD APPELLANT)**
**(ANONYMITY DIRECTION MADE)**

Appellants

**and**

**ENTRY CLEARANCE OFFICER**

Respondent

**Representation:**

For the Appellants: Mr A Mackenzie, counsel
For the Respondent: Ms S Cunha, Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellants, nationals of Turkey, appealed against the ECO's decisions, dated 4 January 2018, to refuse applications for entry clearance made on 9 October 2017.

2. Their appeals came before First-tier Tribunal Judge K R Moore (the Judge) who on 2 January 2019 dismissed [D] their appeals on human rights grounds with reference to Appendix FM and Appendix FM-SE of the Immigration Rules.

3. The Entry Clearance Officer, for reasons given, had rejected the sufficiency of the evidence concerning the IQ/abilities of the First Appellant, with its consequential effects on her English language abilities, and with reference to the Sponsor meeting the minimum income requirements.

4. The Judge set out, seemingly under a mistake of fact, that the relevant psychiatric evidence concerning the First Appellant originated in August 2014 whereas in fact it was 29 May 2017. The Judge also, it was accepted, seemed to have been labouring under a misapprehension that it was a requirement under the Rules for the First Appellant to provide a completed "exemption form" from a doctor confirming the mental or physical condition of the First Appellant. The Judge misunderstood that position. To that extent, bearing in mind the First Appellant had, when making the application, identified a mental health issue as to her ability to comply with the English language requirements, was a point that in fact was not really to be held generally against the First, Second or Third Appellants.

5. The Judge went on to consider what he thought was the relevant evidence, particularly as to whether the Appellants had, as at the date of the ECO's decision, met the relevant minimum income requirements. I was taken to evidence, before the Judge, which appeared to show really without contradiction that the Sponsor did meet the relevant financial requirements at the material time.

6. Nevertheless, the Judge went on to set out the basis on which he was entitled, or believed himself entitled, to take into account the issue of the minimum income requirements and the impact of the requirements of Appendix FM-SE of the Immigration Rules. Regrettably it seemed to me the Judge was either misled or

misled himself as to the relationship that existed in a human rights based appeal with the Rules being met, or not, at material date of application/date of the decision.

7. Be that as it may the Judge went on to essentially constrain himself from considering material evidence which plainly bore on the public interest question and if absence of compliance with the Rules to a material degree affected the extent to which the Judge was entitled to take into account the factual position as at the date the Judge was making his decision.

8. I accept the arguments raised on behalf of the Appellants that the Judge did not assess this matter in the context of the Supreme Court case law of Agyarko [2017] UKSC 11 and MM (Lebanon) [2017] UKSC 10. I concluded that in fact when looking at the Article 8 ECHR issue in the context of the Immigration Rules that MM is of assistance in understanding to what extent, even assuming as a fact it occurred, there was a failure to meet the requirements of the Rules. More importantly also the issue of the public interest and the weight that will be given to that in the context of the degree to which there is or is not non-compliance with the Rules, as material in the overall assessment of proportionality.

9. In the circumstances I concluded that the Judge did err in law because he had failed to properly apply the wider considerations which bear upon the issue as reflected both in the case of MM (Lebanon) and to a degree in the case of SS (Congo) [2017] UKSC.

10. In the circumstances I find that the Original Tribunal's decision cannot stand and the matter will have to be remade. The parties invited me to do so.

11. I proceed to consider this matter in the context of the cases of Hesham Ali [2016] UKSC 60 and Agyarko [2017] UKSC 11 as well as MM (Lebanon) [2017] UKSC 10. I take into account that contrary to the Secretary of State's usual position there was no high threshold or otherwise to decide whether or not Article 8 can be looked at

outside of the Rules. However, I looked at Article 8 through the prism of the Rules. I consider the approach identified in Agyarko as helpful to look at the pros and cons of the particular circumstances of the case. I apply Section 117A and Section 117B of the NIAA 2002 as amended attaching as I do significant importance to the public interest.

12. Material of course to the assessment of the public interest was the extent to which Appellants are potentially able to integrate and form part of UK society as well as the extent to which they may or may not be a financial burden upon society. In assessing that matter I consider, since I look at this matter as of now, the relevant position vis-á-vis the ability to support themselves, or be supported by their Sponsor father, and the extent to which they might fall to be a burden on the public purse.

13. So far as that is concerned I find from the evidence which the Judge had, which I have been taken to, and the way the Judge expressed it, that the Appellants' Sponsor meets the necessary financial threshold of £24,800. In fact, as last evidenced, he had an income of about £26,400 as demonstrated by pay slips that formed part of the Appellants' bundle before the Judge. I also noted that the Judge did not expressly demur from the reliability of that documentation but the extent it was discounted was driven by the Judge's view of the material date at which matters should be in evidence and established. The was no substantive dispute about the Sponsor's earnings on the evidence that had been provided.

14. I also consider that there was no evidence to show that the First Appellant cannot integrate into UK life and cannot form a part caring for the Second and Third Appellants in conjunction with the Sponsor. I bear in mind the First Appellant has had that burden of caring for the Second and Third Appellants for a significant period on any view. There was no suggestion that her coming to the United Kingdom was transferring a burden to the public purse from costs that fell previously upon the Turkish state or that there was any sensible reason why there was likely to be an increase in burden upon the taxpayer.

15. I consider in my assessment of the pros and cons the fact that the Sponsor has been in the United Kingdom for a significant period of years, has worked and supported his family, as well as being able to return and see his family and maintain familial contact. The fact that he could do it or continue to do that from abroad was really no answer to the point clearly in terms of the objectives of Article 8 ECHR to enable the exercise family/private life rights. The significance of direct contact and the best interests of the children plainly was a relevant matter. It seemed to me that whilst the Judge concluded that the best interests of the children remain being with their mother, he had failed to address the potential benefits, within the objects of Article 8, of reuniting families and enabling that kind of control which can be exercised by parents in direct daily contact with their children; rather than simply through holiday visits, Skype or other electronic means. I found the view that there were positive benefits to the Second and Third Appellants of being reunited as a family in daily contact with mother and Sponsor.

16. There was nothing to suggest that the Second and Third Appellants would not be able to integrate into life in the United Kingdom and that for some reason or other there would be any wish to prevent that integration. What was clear was that since the Sponsor has come to the United Kingdom he has undoubtedly participated in life in the United Kingdom as well as supporting his family from abroad.

17. For these reasons I conclude in this case that the public interest was outweighed and in doing so I particularly take into account the objective of immigration control through the prism of the Rules. The reality was that this appeal could well have succeeded at an earlier time and that the continued prevention of the Appellants from entering the United Kingdom was not in their best interests nor did it evidently serve purposes that might fall within Article 8(2) of the ECHR. I find the ECO's decision did not demonstrate an assessment which reflected the realities of the factual circumstances that were before him. In coming to that conclusion, I take into account the material consideration which was identified in MM (Lebanon) in terms

of the weight that might be given to policy reasons raised by the Secretary of State now as opposed to the complications caused by the significant interference in the resumption of family life in its true sense. For these reasons, I find that the evidence before the Judge and as it stands before me was sufficient to show that the correct decision was that the appeals of the Appellants should be allowed. under Article 8 ECHR.

**DECISION**

18. The appeal of each Appellant is allowed on Article 8 ECHR grounds

**ANONYMITY**

19. Given the age of the Second and Third Appellants I find an anonymity order was appropriate and necessary.

**DIRECTION REGARDING ANONYMITY – RULE 14 OF THE TRIBUNAL PROCEDURE (UPPER TRIBUNAL) RULES 2008**

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 21 March 2019

Deputy Upper Tribunal Judge Davey

**TO THE RESPONDENT**

**FEE AWARD**

Fees of £140 were paid by each Appellant. Their appeals have succeeded and I conclude that a fee award in respect of each Appellant in the sum of £140 should be made.

Signed Date 21 March 2019

Deputy Upper Tribunal Judge Davey