**Upper Tribunal**
**(Immigration and Asylum Chamber)** **Appeal Numbers: HU/08367/2019 (V)**

**HU/08368/2019 (V)**

**THE IMMIGRATION ACTS**

| **Heard at Field House And via MS Teams On the 15 November 2021** | **Decision & Reasons Promulgated On the 23 December 2021** |
|---|---|

**Before**

**UPPER TRIBUNAL JUDGE KEITH**
**DEPUTY UPPER TRIBUNAL JUDGE MONSON**

**Between**

**MRS MANINDER KAUR**

First Appellant

**And**

**MISS NAVPEET KAUR**

Second Appellant

**(NO ANONYMITY DIRECTION MADE)**

**And**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellants: Mr Z Raza (Counsel instructed by Charles Simmons Solicitors)
For the Respondent: Mr T Melvin (Senior Home Office Presenting Officer)

**DECISION AND REASONS**

## Introduction

1. This is the judgment of the panel on the question of how the decision on the human rights appeals of the Appellants should be remade, the Appellants having been successful in their error of law challenge to the adverse decision of the First-tier Tribunal (Judge J. S. Burns). The decision of Judge Burns dated 18 January 2021 dismissing their appeals has been set aside as containing a material error of law, for the reasons given in the decision of Upper Tribunal Judge Keith promulgated on 22 March 2021, following an error of law hearing in the Upper Tribunal on 16 March 2021. A copy of that decision is attached as Appendix A.

2. As set out in the error of law decision, the First-tier Tribunal materially erred in law in failing to engage substantively with the Appellants' positive case that the Sponsor now met the minimum income requirement and to consider what weight to attach to that claim (if made out) in the assessment of proportionality.

## The Evidence filed for the Resumed Hearing

3. Under the directions made in the error of law decision, the Appellants were permitted to rely on new documentary evidence, provided that it was filed with the Upper Tribunal and served upon the Respondent's representatives no later than 14 days before the hearing. Those directions envisaged a single consolidated bundle containing all the documentary evidence upon which the Appellants intended to rely. In the event, the Appellants' evidence for remaking was made up of four separate bundles: AB1 to AB4. AB1 was the bundle that had been placed before the First-tier Tribunal. Bundles AB2 and AB3 had been filed at an earlier stage of the proceedings in the Upper Tribunal, and AB4 was filed late. However, the Appellants' representatives had a reasonable excuse for the late service of AB4, because, due to an administrative error, they had only been given very short notice of the date of the resumed hearing.

4. AB2 contained the Sponsor's P60 in respect of the tax year to 5 April 2020 for his employment as a security guard by Sri Guru Singh Sabha Southall ("SGSS"). It showed that his gross annual salary before tax was £24,656.51. AB2 also contained a letter from the Sponsor's employer dated 8 January 2021 confirming that the Sponsor was employed by them as a security guard, and that his employment had commenced on 1 February 2018.

5. AB3 contained witness statements from the Appellants and the Sponsor made on 22 June 2021, and a letter dated 17 June 2021 from Sigma Nursing Training Institute certifying that the second Appellant had been admitted on a four-year nursing degree course, and that she was currently studying in the second year of the four-year course.

6. AB4 was a more extensive bundle. It contained, among other things, the Sponsor's P60 for the tax year to 5 April 2021 showing that his gross earnings before tax were £20,183.56; the Sponsor's payslips and bank

statements for this period April to October 2021; a further letter from the Sponsor’s employer dated 12 November 2021 certifying that the Sponsor was currently earning £8.91 per hour and that, based on his average hours worked, he was on course to earn just over £24,000 per annum; and the Home Office’s published concession on the calculation of the minimum income requirement in cases which raise the impact of the 2020/2021 Covid-19 pandemic. The “Coronavirus (Covid-19) concession” is set out at page 71 of the Home Office guidance document entitled, “Family Migration: Appendix FM Section 1.7 of Appendix Armed Forces - Financial Requirement”, Version 5.0, which was published on 23 June 2021.

## The Resumed Hearing

7. At the outset of the hearing, we asked Mr Raza whether it was his case that the evidential requirements of Appendix FM-SE were met as of now; and, if so, he needed to take us through the documents to demonstrate this.

8. Mr Raza indicated that it was his case that the minimum income requirement was met as at the date of the resumed hearing before us; and that the documentary evidence upon which he relied to demonstrate this was compliant with the evidential requirements of Appendix FM-SE. However, Mr Melvin said that he did not see how the disclosed documents were compliant. In the light of this, Mr Raza agreed with our suggestion that it would be helpful to adjourn for 30 minutes to enable him to prepare his submissions on the issue, and to discuss them with Mr Melvin, in order to ascertain whether any common ground could be found.

9. On the resumption of the hearing 30 minutes later, Mr Melvin maintained his position that the Appellants could not show that the minimum income requirement was met on the documents that had been provided.

10. Mr Raza explained that he was relying on two separate time periods as demonstrating that the Sponsor’s gross annual income met the required threshold. The first time period was the six-month period prior to 1 March 2020. More specifically, it was the period between 1 August 2019 and 31 January 2020, as the last payslip available was a payslip dated 5 February 2020. In this six-month period, the Sponsor had received £12,076.71 from SGSS, which corresponded to an annual gross salary in excess of £24,000.

11. The second six-month period relied upon was the period 1 May to 30 October 2021, covered by a run of payslips beginning with a payslip issued on 6 June 2021 and ending with a payslip issued on 5 November 2021. The total received by the Sponsor from SGSS in this six-month period was £9,851.76. Although this was below the required level, he submitted that the effect of the published Home Office concession was that the Sponsor should be treated as having earned enough to meet the minimum income requirement.

12. With regard to the first period, Mr Raza acknowledged that there were two bank statements missing. There were no bank statements for January or

February 2020, so as to show the payments into the Sponsor’s bank account of the sums shown in the last two payslips for the period. However, his instructions were that the missing bank statements were available. Later in the hearing, Mr Melvin said he had no objection to their production so that the Upper Tribunal had the full picture. So, we gave permission to Mr Raza to file the missing bank statements within seven days. We received further bank statements for the period 1 January to 2 March 2020.

13. The Sponsor, Mr Havinder Singh, was called as a witness, and he spoke through the Punjabi interpreter whom he clearly understood. He adopted as his evidence in chief his witness statement signed by him on 22 June 2021.

14. In this statement, he said he had been born on 10 April 1972 and he had been given indefinite leave to remain in the UK. He wished to submit that he had been financially and emotionally supporting his family and it was in their best interest to join him in the UK. His daughter was currently studying for a degree in nursing, and he was funding her studies along with her routine living expenses.

15. In answer to supplementary questions from Mr Raza, the Sponsor said that his wife and daughter were living on their own. Mr Raza asked the Sponsor whether his daughter could remain on her own in the event that only his wife was allowed to enter the UK. He answered it would be very difficult. She had never lived on her own before. She would have difficulty in going out without being accompanied by her mother. Mr Raza asked whether there would be any other difficulties. He answered he really did not know. Only time would tell. He had a son who lived in India, but he had moved to Delhi. His daughter would not be able to go and live with him.

16. In cross-examination, the Sponsor agreed that he had been granted ILR in 2012. Mr Melvin asked him why therefore he had waited until 2019 to sponsor the application by his wife and daughter. He answered that his intention was to go back to India, and he thought that he would go back. The Sponsor agreed with Mr Melvin that he went back every year to see his wife and child. He would spend two to three months with them on each annual visit. He confirmed that his daughter was doing a nursing degree; and that she was in her second year; and that the degree course was due to finish in 2023. She lived at home and went to the hospital daily as part of her degree course.

17. We asked the Sponsor to clarify whether his daughter went to the hospital on her own or whether she was escorted by her mother. He answered that she would go with a group of two to three students who lived nearby and who were also studying with her at the hospital. She was not in a relationship with anyone at present. There was no re-examination.

18. In his closing submissions on behalf of the Respondent, Mr Melvin submitted that the appeals should be dismissed. He could not see how

the eligibility financial requirements were met on the evidence which had been provided. Turning to an Article 8 claim outside of the Rules, he could not see any exceptional circumstances. On the question of whether a possible outcome was that the appeal of the first Appellant was allowed, whereas the appeal of the second Appellant was dismissed, he submitted that the Appellants had made a joint application, and it had not been envisaged that the mother would come to the UK without the daughter. But he did not see any problems for the daughter living alone in India as a 21-year-old female student. She could apply to come to the UK when she had finished her nursing studies.

19. In reply, Mr Raza developed his case as to why the minimum income requirement was shown to be met either by reference to the first period or by reference to the second period. He submitted that the Appellants did not need to show that the requirement was met in both periods. However, he submitted, the second period was relevant in establishing that the Sponsor had held onto his job with SGSS, and that he was on track to earn a salary of £24,000 per annum in the tax year ending 5 April 2022.

20. With regard to the implications of the second Appellant being now well over the age of 18, Mr Raza principally relied on paragraph 27 of the Rules, which provides that an application for entry clearance is to be decided in the light of the circumstances existing at the time of the decision, except that an applicant will not be refused entry clearance where entry is sought in one of the categories contained in paragraphs 296-316 or paragraph EC-C of Appendix FM solely on the account of his attaining the age of 18 years between receipt of this application and the date of the decision on it. He submitted that the effect of paragraph 27 was that the second Appellant should continue to be treated as a child under the age of 18, and it was not necessary for her to establish that her relationship with her parents met the criteria of **Kugathas**.

21. Although the Appellants had made a joint application, there were two separate appeals, and so there was no reason in principle why there could not be differing outcomes for the two appeals. It would not be proportionate to require the Appellants to make a fresh application for entry clearance, as this would be highly prejudicial to the second Appellant, who could not now make an application under Appendix FM as she was over the age of 18. In reply, Mr Melvin observed that the Sponsor’s income has been up and down.

## Discussion and Findings

22. The Appellant’s application for entry clearance was made on 26 November 2018, and the date of the Refusal decision was 10 April 2019. The sole ground of refusal was that the Appellants had not shown that they met the eligibility financial requirements set out in paragraphs E-ECP.2.1-2.10 of Appendix FM. The Appellants needed to show that their Sponsor had a gross income of at least £22,400 per annum. However, based on the evidence provided, they had not demonstrated this.

23. The Entry Clearance Officer’s reasoning was that, although the Sponsor had been employed by SGSS since 1 February 2018, his annual salary was only £20,140.38. In order to meet the required minimum threshold, the Sponsor had undertaken a second employment with Ouze Global Services from 6 October 2018. However, in order for this second employment to be taken into account, it was necessary to look at his total earnings from employment over a period of 12 months prior to the date of application; and he had not shown that he had earned at least £22,400 over the past 12 months.

24. At the appeal hearing in the First-tier Tribunal, which took place on 18 January 2021, the Appellant’s solicitor agreed in opening that the required financial evidence was not provided for the applications. Instead, he argued the appeal on the basis that the Sponsor at the time of the appeal hearing and for some time previously had been earning more than the minimum income requirement.

25. Judge Burns acknowledged at paragraph [23] of his decision that the bundles of evidence provided by the Appellants contained wage slips, bank statements and documents that were not provided to the ECO but which suggested that in the year to April 2020 the Sponsor’s gross income was £24,656, and that he continued in stable employment as a security guard, *“now earning over £25,000 per year”.*

26. As stated in the error of law decision promulgated on 22 March 2021, all the findings of fact of the First-tier Tribunal are set aside, apart from the preserved finding that the Appellants’ applications did not meet the requirements of Appendix FM-SE of the Immigration Rules at the date of the application.

27. Accordingly, the starting point of this remaking is a recognition that the Appellants did not, and do not, qualify for entry clearance under Appendix FM of the Immigration Rules as they failed to tender the mandatory specified evidence to show that the minimum income requirement was met at the date of application. Thus, the evidence tendered by the Appellants for the purposes of remaking must be considered within the framework of the five stage **Razgar** test.

28. As there is no dispute that the marriage between the Sponsor and the first Appellant is genuine and subsisting, it follows that Article 8(1) ECHR is engaged on family life grounds as between wife and husband. Conversely, as the second Appellant is no longer a minor, there is no presumption that her family life rights are engaged as between her and her mother or as between her and her father. On the other hand, no negative inference should be drawn from the mere fact that the second Appellant has attained her majority since making her application just before her 18th birthday.

29. In **Asfar Uddin v SSHD [2020] EWCA Civ 338** the Senior President of Tribunals said:

*“40. Accordingly, the following principles can be described from the authorities:*

*i. The test for the establishment of Article 8 family life in the Kugathas sense is one of effective, real or committed support. There is no requirement to prove exceptional dependency.*

*ii. The test for family life within the foster care context is no different to that of birth families: the court or tribunal looks to the substance of the relationship and no significant determinative weight is to be given to the formal commerciality of a foster arrangement. It is simply a factual question to be considered, if relevant, alongside all others.*

*iii. The continued existence of family life after the attainment of majority is also a relevant question of fact. No negative inference should be drawn from the mere fact of the attainment of majority, while continuing cohabitation after adulthood will be suggestive of ongoing real, effective or committed support which is the hallmark of a family life.”*

30. The Sponsor has given credible and unchallenged evidence that his daughter continues to reside in the family home with her mother, and continues to be wholly financially dependent on him. We are thus persuaded that the second Appellant continues to receive real and effective support from both parents, while continuing – after childhood - to cohabit with her mother in the family home. This is sufficient to establish the continuation of family life between the second Appellant and her parents.

31. The upshot is that Questions (1) and (2) of the **Razgar** test should be answered in favour of both Appellants. Questions (3) and (4) of the **Razgar** test must be answered in favour of the Respondent. On the crucial issue of proportionality, the central question is whether the minimum income requirement is met as of the date of the resumed hearing before us.

32. Were it not for the published Home Office concession, we consider that the minimum income requirement would not be shown to be met. However, the Home Office concession undoubtedly changes the landscape. The relevant part of the concession reads as follows:

*“Income received via the Coronavirus Job Retention Scheme or the Coronavirus Self-Employment Income Support Scheme can count as employment or self-employment income. Where there is evidence of a temporary loss of income due to COVID-19 during the period 1 March 2020 and 31 October 2021 you will apply the following concessions:*

> *• a temporary loss of employment income between 1 March and 31 October 2021 due to COVID-19, will be disregarded provided the minimum income requirement was met for at least 6 months immediately prior to the date the income was lost - this is for a loss of employment income between 1 March 2020 to 31 October 2021 due to COVID-19 [A]n applicant or Sponsor furloughed under the Government's Coronavirus Job Retention Scheme will be deemed as earning 100% of their salary.*
>
> *…*
>
> *• evidential flexibility may be applied where an applicant or sponsor experiences difficulty accessing specified evidence due to COVID-19 restrictions."*

33. With regard to the first period relied on by Mr Raza, AB1 contains an employer's letter dated 6 February 2020 certifying that the Sponsor received a gross annual salary of just under £26,000 in the period from January 2019 to January 2020. For the six-month period preceding 1 March 2020, the Sponsor has provided a run of six-months payslips ending with the payslip that was issued to him on 5 February 2020 in respect of his monthly salary for the month of January 2020. The Sponsor received £12,076.71 from SGSS, which corresponds to an annual gross salary of just over £24,000.

34. The bank statements for January and February 2020 have now been provided. The January and February 2020 bank statements confirm net monthly salary received of £1,753.84 and £1,712.78 respectively. Even taking the lowest net monthly amount, (February 2020), this represents a gross annualised salary of in excess of the £22,400 minimum income requirement.

35. With regard to the second period relied on, the documentary evidence provided credibly demonstrates that the Appellant was credited with an annual salary of at least £24,000 in his P60 for the tax year to 5 April 2020; and that he was then furloughed at a rate of 80% of £24,000 per annum. His P60 for the tax year to April 2021 shows that he received an annual salary of £20,183, more than the £19,200 which represents 80% of £24,000.

36. The payslips in the six-month period leading up to November 2021 show that the Sponsor continued to receive furlough pay until the end of September 2021, although in July 2021 he received paid leave of 240 hours instead of furlough pay, which produced a higher gross pay amount for that month. In October 2021, the Sponsor worked 86 regular hours, and received paid leave of 466 hours, so as to produce a gross salary payment for the month of £2,245.32.

37. Mr Raza acknowledged that the total amount for the six-month period running up to the last payslip dated 5 November 2021 falls short of the required salary level to meet the minimum income requirement for both

Appellants. Even if the furlough pay element of the total is increased by multiplying the furlough amount by 1/0.8 (or 1.25) to arrive at a hypothetical 100% earnings figure, pursuant to the concession, this is still not quite enough. Our calculation is that the notional 100% earnings figure in the relevant period is £6,835.05. When the notional earnings figure is added to accrued earnings for 86 regular hours worked and accrued paid leave of £3,617.46, the total is £10,452.51. This produces an annual salary figure of £20,905.02 which is short of the required threshold of £22,400 per annum.

38. We nevertheless consider not only this later period, but the initial period immediately prior to 1 March 2020, where the Sponsor has met the minimum income requirement and the fact of the Respondent’s concession where income has been reduced or lost because of Covid after 1 March 2020. Notwithstanding the missing payslip for February 2020 (although we have the bank statement), meaning that there is evidence missing for the purposes of the mandatory requirements of Appendix FM-SE, we bear in mind, for the purposes of the proportionality assessment, the underlying policy aims of the income requirement, namely, to ensure, so far as practicable, that a family does not have recourse to welfare benefits and has sufficient resources to be able to play a full part in British life (see paragraph 82 of R (MM (Lebanon) and Others) v SSHD [2017] UKSC 10. Having regard to the totality of the evidence that has been provided, we are persuaded on the balance of probabilities that the minimum income requirement is met as of the date of the resumed hearing before us, by reference to the six-month period preceding 1 March 2020, and applying the Home Office concession, which means we disregard the Sponsor’s temporary loss of employment income due to Covid-19 in the period 1 March 2020 to 31 October 2021.

39. This is not determinative of the issue of proportionality, as there remains the argument that the Appellants have failed to qualify for entry clearance under the Rules, and so it is reasonable to require them to make a fresh application which complies with the evidential requirements of Appendix FM-SE. However, we consider that this would have unjustifiably harsh consequences, as the second Appellant no longer qualifies for entry clearance as a minor dependent of her father under Appendix FM. So, the practical effect of requiring the Appellants to re-apply would be to shut out the second Appellant who, as we have found, continues to share family life with her parents.

40. Bearing in mind the policy aim of the minimum income requirement and the fact that the Sponsor’s income exceeds that requirement at the date of this hearing, as adjusted for by the Covid concession, we regard the maintenance of the Refusal decision as not proportionate to the legitimate public end sought to be achieved. It does not strike a fair balance between, on the one hand, the rights and interests of the Appellants and the Sponsor, and, on the other hand, the wider interests of society. It is not proportionate to the legitimate public end sought to be achieved, which is

the maintenance of the country’s economic well-being and the maintenance of firm and effective immigration controls.

**Notice of Decision**

41. The decision of the First-tier Tribunal contained a material error of law, and accordingly the decision is set aside and the following decision is substituted: the appeals are allowed on human rights (Article 8 ECHR) grounds.

Signed Andrew Monson Date: 13 December 2021

Deputy Upper Tribunal Judge Monson

**TO THE RESPONDENT**
**FEE AWARD**

As we have allowed the appeals of the Appellants on remaking, we have given consideration as to whether to make a fee award in respect of any fee which has been paid or is payable, and we have decided to make no fee award as the Appellants needed to bring forward further evidence by way of appeal in order to succeed in their appeals.

Signed Andrew Monson Date: 13 December 2021

Deputy Upper Tribunal Judge Monson

IAC-AH-SAR-V1

**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Numbers:
HU/08367/2019

& HU/08368/2019 ('V')

**THE IMMIGRATION ACTS**

| **Heard at Field House And via Skype for Business On 16th March 2021** | **Decision & Reasons Promulgated On** |
|---|---|

**Before**

**UPPER TRIBUNAL JUDGE KEITH**

**Between**

**MRS MANINDER KAUR**

First Appellant

**and**

**MISS NAVPEET KAUR**

Second Appellant

**(NO ANONYMITY DIRECTIONS)**

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

| | |
|---|---|
| For the appellant: | Mr Z Raza, Counsel, instructed by Charles Simmons Solicitors |
| For the respondent: | Ms J Isherwood, Senior Home Office Presenting Officer |

**DECISION AND REASONS**

## Introduction

1. These are the approved record of the decision and reasons which I gave orally at the end of the hearing on 16th March 2021.

2. Both representatives and I attended the hearing via Skype, while the hearing was also available to attend at Field House. The parties did not object to attending via Skype and I was satisfied that the representatives were able to participate in the hearing.

3. This is an appeal by the appellants against the decision of First-tier Tribunal Judge J S Burns (the 'FtT'), promulgated on 18th January 2021, by which he dismissed the appellants' appeals against the respondent's refusal on 10th April 2019 to grant them entry clearance, to join a sponsoring Indian national with indefinite leave to remain, Harvinder Singh. Mr Singh is the husband of the first appellant and the father of the second appellant who was (just) a minor at the date of the application.

4. In essence, the appellants' claims involved the central issue of whether the sponsor met the income requirements of Appendix FM–SE of the Immigration Rules. Put very simply, the respondent did not accept the sponsor met the requirements to show a minimum annual income requirement of £22,400. The appellants had made the applications on 26th November 2018. The sponsor had two employments. He had been employed by the first employer since 1st February 2018, and by the time of his application, had an annual salary of £20,140.38, although his salary had only reached this amount in the last few months of his employment. He had been employed by the second employer since 6th October 2018. As a consequence, the respondent had to consider the sponsor's salary in the 12 months prior to the application, which it stated was only £9,003.27. The respondent noted that wage slips and bank statements for November and December 2018 had been provided after the date of application and so were not considered as relevant.

5. The respondent considered whether, under paragraph GEN .3 .1 and 3.2 of Appendix FM, refusal of the applications for entry clearance would result in unjustifiably harsh consequences for the sponsor or the appellants, noting the best interests of the second appellant, who at the time of the application was a minor, having been born on 1st December 2000.

6. The appellants appealed to the First-tier Tribunal, asserting that the respondent ought not to have discounted the additional income for November and December 2018 and that the respondent failed to consider the effect that refusal would have on the sponsor and the appellants, as a family.

## The FtT's decision

7. The FtT considered first the relevant provision of Appendix FM–SE, which stated:

*"2. In respect of salaried employment in the UK (except where paragraph 9 applies), all of the following evidence must be provided:*

*(a) Payslips covering:*

*(i) a period of 6 months prior to the date of application if the person has been employed by their current employer 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), or in the financial year(s) relied upon by a self-employed person.*

*(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 or in the name of the person and their partner jointly."*

8. The FtT noted that it was not enough for the sponsor to show that his gross annual income met the required threshold at the date of the application. For the first category of employment lasting more than six months (which he called, category 'A') the sponsor had to show that throughout the six-month period prior to the date of the application, the sponsor had received the required salary; and for the second category of employment not held for six months ('category B') he must show that the date of the application, he received a salary which met the required level and had done so for 12 months' prior to the date of the application.

9. The FtT concluded that the sponsor did not meet either category, as, taking the appellants' claim at its highest, the sponsor was only earning a salary equivalent to £20,140.38 from 1 February 2018 until the date of the application on 26th November 2018; and at a rate less than the minimum income requirement until less than two months before the application, even combining both incomes for the purpose of category B.

10. The FtT also carried out an assessment under article 8 ECHR, noting that the sponsor had lived in the UK since 2006 and had established a private life

here and had a genuine family life with the appellants, albeit he had lived apart from them. The FtT also accepted that whilst there was evidence of financial remittances, there was insufficient evidence to show emotional and financial dependency between the second appellant, who was now an adult and her parents, which went beyond normal emotional ties. Whilst article 8 ECHR was engaged, the sponsor had spent most of his life in India until aged 34. There were not very significant obstacles to his integration in India and in the alternative, if the appellants now met the Immigration Rules, they could reapply for entry clearance. Even if the sponsor were now earning over £25,000 a year, that would not be determinative of the article 8 balancing exercise, which needed be considered at the time of the appeal (paragraph 36). The situation had changed since the application 2 years' earlier, when the application was jointly made by the appellants on the basis that the second appellant was a minor, but was now an adult, said to be working as a nurse. The FtT concluded that the refusal of entry clearance was proportionate.

**The grounds of appeal and grant of permission**

11. The appellant lodged grounds of appeal which are essentially as follows:

11.1. Ground (1) - the FtT had erred in considering that it was not enough for the minimum income requirement to be met at the date of the hearing. The FtT had contradicted himself by considering that post-application evidence could be considered, and had accepted that the sponsor was currently earning over £25,000 a year.

11.2. Ground (2) - the FtT erred in not considering the Immigration Rules prior to his consideration of the appeal under article 8 ECHR.

11.3. Ground (3) - the FtT had erred in failing to explain why, if he accepted there were financial remittances, he did not accept that there was financial dependence between second appellant and her parents. There was no evidence that the second appellant was working.

11.4. Ground (4) – the FtT had failed to carry out an adequate proportionality assessment by reference to the sponsor's private life in the UK, developed in the UK over 14 years and the significant obstacles to his integration in India.

12. A Judge of the First-tier Tribunal, Judge Ford, granted permission on all grounds on 5th February 2021.

**The hearing before me**

**The appellant's submissions**

13. Mr Raza did not abandon any of the grounds but focused three points. The first was a misdirection by the FtT; the second was the failure to consider relevant evidence; and the third was a mistake of fact. Mr Raza indicated that he had no issue with the FtT's analysis up to and including paragraph

[23] of the decision. While he made no formal concession, he accepted that the appellants did not meet the evidential requirements of Appendix FM-SE at the date of their application, but the FtT had impermissibly narrowed consideration of matters outside the Immigration Rules when stating, at paragraph 24, as follows:

*"The Tribunal is not equipped to carry out checks about the sponsor's current and past income, which would be best carried out by the Respondent."*

14. This was not consistent with paragraphs [68] and [99] of the Supreme Court's decision in R (on the application of MM (Lebanon) and Others) v SSHD [2017] UKSC 10, which supported the proposition that the Immigration Rules were a starting point and that Tribunals could and should exercise greater latitude in considering evidence before them in a human rights appeal.

15. Section 85(4) of the Nationality, Immigration and Asylum Act 2002 permitted consideration of evidence up to the date of hearing, even if the Immigration Rules did not. The FtT clearly had before him post-application evidence, in the bundle produced in February 2020, including correspondence from the sponsor's current employer at page [24] which confirmed that he had earned in excess of £25,000 for the 12 months up to that date; payslips at pages [25] to [33] of six months; and corresponding bank statements at pages [37] to [57].

16. Whilst the Immigration Rules may draw a bright line between childhood and adulthood, there was no such bright line for the purposes of article 8 and even paragraph 27 of the Immigration Rules confirmed that where an applicant became an adult pending the outcome of a decision, their application should not be refused solely on the basis of becoming 18. It was quite common for the respondent and Tribunals to need to consider facts which post-dated applications, where there was an extended delay either in consideration of the evidence by the respondent or an eventual decision by a Tribunal.

17. In relation to the second point, the FtT had failed to consider the weight to be attached, as well as the degree to which family life would be disrupted, as a result of the refusal of entry clearance.

18. On a third point, Mr Raza had taken instructions from his instructing solicitor, who appeared below. His instructing solicitor had not told the FtT, nor was there any evidence that the second appellant was now working as a nurse. Instead, she was a student nurse, and continued to be dependent on her parents.

**The respondent's submissions**

19. In relation to Mr Raza's third point, first it was not appropriate for an issue to be raised in the absence of a statement or formal evidence. While not a

criticism of Mr Raza's integrity, the matter had not been addressed appropriately, for example by way of request for the Judge's note, or an agreed note between the parties.

20. Second, I should focus on what was now accepted, that the appellants had not met the requirements of the Immigration Rules at the date of the application. I was invited to consider the provision of Section 85(4) of the 2002 Act and the appeal relating to the respondent's decision. It was simply not open to a Tribunal to be expected to take over the role of a primary decision maker and in these circumstances the FtT had been asked to do exactly that, namely to consider a wider appeal not by reference to the decision itself, but in relation to human rights. In any event, the FtT had quite properly considered, as an alternative, the sponsor's income and included that in the proportionality assessment. In the circumstances, the proportionality assessment at paragraphs [28] to [38] was necessarily fact-specific, noting that the sponsor had chosen (as he was entitled) to live in the UK and it remained open to the appellants to reapply for entry clearance to the UK.

## Discussion and conclusions

21. I conclude that the FtT did err in law in respect of his analysis of the proportionality of the refusal of the appellants' applications. While he did not abandon the first three grounds, Mr Raza focussed his submissions on ground (4), namely the adequacy of that assessment and that is where the force of the appeal lies, particularly where he no longer sought to argue that the appellants met the requirements of Appendix FM-SE.

22. However, as Ms Raza pointed out, the appellants positively advanced a case before the FtT that they met the requirements of Appendix FM-SE at the date of the hearing, which should have had weight attached to it in the proportionality exercise, but in reality had none attached to it. Instead, the FtT had resolved that argument by stating that it was not equipped to carry out an assessment and in essence, did not do so. I considered MM (Lebanon), and in particular paragraph [99]:

*"99. Operation of the same restrictive approach outside the rules is a different matter, and in our view is much more difficult to justify under the HRA. This is not because "less intrusive" methods might be devised (as Blake J attempted to do: para 147), but because it is inconsistent with the character of evaluation which article 8 requires. As has been seen, avoiding a financial burden on the state can be relevant to the fair balance required by the article. But that judgment cannot properly be constrained by a rigid restriction in the rules. Certainly, nothing that is said in the instructions to case officers can prevent the tribunal on appeal from looking at the matter more broadly. These are not matters of policy on which special weight has*

*to be accorded to the judgment of the Secretary of State. There is nothing to prevent the tribunal, in the context of the HRA appeal, from judging for itself the reliability of any alternative sources of finance in the light of the evidence before it. In doing so, it will no doubt take account of such considerations as those discussed by Lord Brown and Lord Kerr in Mahad, including the difficulties of proof highlighted in the quotation from Collins J. That being the position before the tribunal, it would make little sense for decision-makers at the earlier stages to be forced to take a narrower approach which they might be unable to defend on appeal."*

23. The FtT alternatively attempted to resolve the appellants' case of now meeting the minimum income requirements by stating, at paragraph [36] of his decision, that:

*"Even if the sponsor is now earning over £25,000, in my judgment that is not determinative of the appeal. The joint applications….would no longer be appropriate as the [second appellant] is now an adult working."*

24. At paragraph [37], the FtT then briefly referred to it being possible that the second appellant was now financially independent, but the first appellant did not appear to be independent; and, by reference to section 117B of the 2002 Act, both appellants speaking some English. That was the extent of the proportionality assessment. What the FtT did not do was to state what weight, if any, he attached the positively advanced case that the sponsor now met the minimum income requirements, beyond saying that that was not 'determinative' and the reference to the second appellant no longer being a minor. I very conscious that any assessment of proportionality is a finely balanced one; that I should not substitute my view; and that as the FtT pointed out, the second appellant's circumstances may well have changed. I do not, for the avoidance of doubt, consider there was any error of law based on a distinction between the second appellant working as a nurse or studying to be a nurse, as to which there is no witness statement or agreed note. However, where I am satisfied that the FtT did materially err in law was to fail to engage substantively with the case that the sponsor now (it was said), met the minimum income requirement at the hearing and consider what weight to attach to that. That amounted to the FtT impermissibly restricting consideration of a factor, positively advanced by the appellants, which must be material to his decision. Therefore, I do regard the FtT as erring in law and I set aside his decision, while preserving his finding (not challenged by Mr Raza) that the appellants did not, at the date of their application, meet the income evidence requirements of the Immigration Rules.

## Decision on error of law

25. In my view there is a material error in the proportionality assessment and I must set the FtT's decision aside, while preserving the finding that the appellants did not meet the requirements of Appendix FM-SE of the Immigration Rules at the date of their application.

## Disposal

26. With reference to paragraph 7.2 of the Senior President's Practice Statement, given the limited scope of the issues, it is appropriate that the Upper Tribunal remakes the FtT's decision which has been set aside.

## Directions

27. The following directions shall apply to the future conduct of this appeal:

    27.1. The Resumed Hearing will be listed before any Upper Tribunal Judge for a hearing via Skype for Business, time estimate **2 hours**, with a Punjabi interpreter, to enable the Upper Tribunal to substitute a decision to either allow or dismiss the appeal.

    27.2. The appellants shall no later than 4pm, **no later than 14 days before the Hearing**, file with the Upper Tribunal and served upon the respondent's representative a consolidated, indexed, and paginated bundle containing all the documentary evidence upon which they intend to rely. Witness statements in the bundle must be signed, dated, and contain a declaration of truth and shall stand as the evidence in chief of the maker who shall be made available for the purposes of cross-examination and re-examination only.

    27.3. The respondent shall have leave, if so advised, to file any further documentation she intends to rely upon and in response to the appellants' evidence; provided the same is filed **no later than 4 pm, 7 days before the Hearing**.

## Notice of Decision

**The decision of the First-tier Tribunal contains material errors of law and I set it aside, subject to the preserved finding that the appellants' applications did not meet the requirements of Appendix FM-SE of the Immigration Rules at the date of the application.**

**Remaking is retained in the Upper Tribunal.**

**There are no anonymity directions.**

Signed J Keith Date: 22nd March 2021

Upper Tribunal Judge Keith