Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/24700/2018 (V)

THE IMMIGRATION ACTS

Heard at Field House on **On 10 June 2021 by Skype**	**Decision & Reasons Promulgated** **On 16 August 2021**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

K M
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms F. Connolly, Counsel instructed by Fisher and Fisher Solicitors
For the Respondent: Mr T. Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Syria born in 1994, presently living in Germany. On 3 August 2019 he made an application for entry clearance under paragraph 352D of the Immigration Rules ("the Rules") in order to join his mother. In other words, this was a refugee family reunion application.

2. The respondent refused the application in a decision dated 26 October 2018. The respondent was not satisfied that the appellant met the

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requirements of the Rules in terms of age (not being under the age of 18), and in terms of his relationship to the sponsor, his mother.

3. The appellant appealed against that decision and his appeal came before First-tier Tribunal Judge S T Fox ("the FtJ") at a hearing on 28 November 2019 whereby the appeal was dismissed. Permission to appeal having been granted on the basis of arguable errors in the FtJ's Article 8 assessment, the appeal came before me.

The FtJ's decision

4. The following is a summary of the FtJ's decision. The FtJ noted that it was accepted on behalf of the appellant that he was not able to meet the requirements of the Rules, specifically because he was not under the age of 18 years. At the date of the application he was 25 years of age, and 26 years of age at the time of the hearing before the FtJ. The appeal, therefore, proceeded before the FtJ as an Article 8 appeal.

5. The FtJ's summary of the evidence included the evidence of the appellant's mother, SM, who said she had difficulties because of her health and age. She does not speak English and was, at the time of the hearing before the FtJ, 55 years of age. Her husband had died in 2013. She last saw the appellant seven years ago. The FtJ at [19] said that there was no evidence before him to suggest that the appellant's mother was not "in a state of robust good health".

6. He referred to her evidence that she has two children JM and SBM, aged 31 and 29 years, respectively. They are both profoundly deaf. SM said in evidence that they can both lip-read but not in English, although he observed that at the same time she claimed that they were unable to communicate. He found that to be an overstatement. With reference to her evidence that they are "unable to do a lot of things" he referred to medical records, specifically letters from their GP dated 23 August 2018. He summarised that medical evidence.

7. At [22] the FtJ said that in relation to both of the children there was no mention of any depression requiring treatment, support, referral to psychiatry, psychology or community mental health assistance. There was, similarly, no indication of any medication or outside input that they were receiving from other sources of an educational or social support nature. That evidence would have been included in the GP's report, he concluded. He thus found that SM's statement and evidence had been "coloured by exaggeration".

8. Although SM claimed that the appellant would be able to provide stimulation for his brother and sister, he noted that he remained in contact with his family by various means, and that contact was not disputed.

9. At [24], the FtJ referred to the circumstances of the appellant's youngest sibling MM, who was aged 15 at the date of the hearing. Referring to the

claim that he was extremely upset by separation from the appellant, the FtJ noted that there was no witness statement from MM in support of that contention, stating that there was “no evidence before me today that this contention can be supported”. He said that MM would appear to be doing well at school if he was studying for GCSEs, and if he was not doing well it may be that correspondence from the school could have been provided to that effect.

10. In the same paragraph he noted that there was no medical evidence to suggest that MM suffers any adverse consequences from being separated from the appellant, referring to that separation as having been ongoing for seven years. He said that there was no evidence before him to suggest that MM was in anything other than robust good health. He found that MM was an integral member of the family unit and there was no evidence before him that would support a claim that he would benefit from the presence of his older brother within the family unit, over and above the contact that they already have.

11. At [25], the FtJ said that all the family would probably grieve and miss their father who died in or around 2013. Although SM claimed that the appellant had not had the opportunity to grieve for his father and deceased sister within the comfort and confines of a family unit, and that she longed for him to be reunited with her and his siblings, no supporting evidence had been adduced in that respect.

12. At [27], referring to a lack of evidence in relation to any community support provided by social services, the FtJ said that it was clear on the evidence that the appellant’s family unit functions well in all the areas of daily living and would appear to thrive as a family unit, particularly as far as the youngest child, MM, is concerned.

13. The FtJ accepted that both the elder children have hearing and communication difficulties and again noted that medical evidence had been provided by their GP. Nevertheless, at [29] he concluded that looking at the evidence in the round, the family is functioning well both individually and as a unit. He found that there was “no evidence before me today that would amount to conditions that could be interpreted as being unjustifiably harsh, including the consequences of a refusal to admit the Appellant to the United Kingdom”. He further found that adequate support services are available to them in the UK.

14. He also said at [30] that he was not aware of any conditions that would inhibit the appellant and his family from meeting elsewhere in the world and continuing the standard of contact that they already have.

15. Although it was argued on behalf of the appellant that he could help the family in relation to contact with the outside world, it was noted that he does not speak English and is only studying German. He found, therefore, the appellant’s presence in the United Kingdom would not assist in any contact that may be required over and above what is already available to

the family. He concluded that MM, the youngest child, is best placed to provide a medium of contact in English.

16. The FtJ referred to Article 8 at [33] in the context of an entry clearance appeal. He concluded that the refusal of entry clearance was in accordance with the law and pursued a legitimate aim. He also added this, however,

> "I have also considered whether removal by the UK Government is proportionate in a democratic society to the legitimate aim to be achieved".

17. At [35], the FtJ said this:

> "The Appellant fails to adduce evidence of any exceptional circumstances or insurmountable objects that would present as making his entry to the UK unduly harsh or impossible, or indeed generating consequences of such nature that he and/or his family would suffer. Still exists between the family and the appellant (sic)."

18. In the same paragraph he concluded that he enjoyed "a form of family life that is acceptable and reasonable, in all the circumstances." He repeated that MM appeared to be thriving in spite of the fact that he may not have seen the appellant in seven years. He still has contact with him and, he said, MM has not suffered as a result of no direct personal contact. He found that the appellant appeared to be in "a state of robust good health" and appeared to be to be getting on well in Germany.

19. Again referring to Article 8, the FtJ concluded that the decision was proportionate and that although there "has been family life that has been interfered with" that interference is proportionate.

20. I quote [42] in full as follows:

> "The Immigration Rules now include provisions for applicants wishing to remain in the United Kingdom based on their family or private life. These rules are located at Appendix FM and paragraph 276 ADE respectively. Should the Appellant wish the UK Immigration Authority to consider an application on this basis then the Appellant should make a separate charged application using the appropriate specified application forms, for the 5-year partner route, or for the 5-year parent route, or the 10-year partner or parent route, or the 10-year private life route. As the Appellant has not made a valid application for Article 8 consideration, consideration has not been given as to whether the Appellant's removal from the UK would breach Article 8 of the ECHR. I also have not considered such removal within an Article 8 ECHR context. It is to be noted that the decision not to issue a Residence Card does not require the Appellant to leave the United Kingdom if the Appellant could otherwise demonstrate that they have a right to reside under the Regulations.

The grounds of appeal and submissions

21. The parties' written and oral submissions can be summarised as follows. On behalf of the appellant it is contended that in various respects the FtJ failed to have full regard to SM's evidence, in particular as set out in her witness statement. That witness statement explains the difficulties that the family have on a day-to-day basis. It is also pointed out on behalf of the appellant that SM's evidence was not challenged in cross examination at the hearing before the FtJ. Emphasis is placed in particular on SM's evidence in terms of the impact on MM of separation from the appellant in the context of his already having suffered the loss of his father and sister when he was aged 10. It is argued that the FtJ's conclusions in respect of the effect of separation on MM are perverse.

22. Likewise, the conclusion that the family appear to be thriving as a unit is contrary to the evidence, for example in relation to two of the children being profoundly deaf and the difficulties that they have communicated to their GP as set out in the medical evidence.

23. It is argued further, that there was an inadequate assessment in relation to s.55 of the Borders, Citizenship and Immigration Act 2009 in relation to MM. Various authorities are relied on.

24. What the FtJ said at [42], apparently considering that this was an Article 8 removal case, was plainly in error, given that this was not a removal case but a refusal of entry clearance.

25. In written submissions on behalf of the respondent it is contended that the FtJ was entitled to conclude that the evidence of SM was exaggerated. He was also entitled to take into account the lack of supporting evidence in relation to SM's evidence. Similarly, there was no independent evidence in relation to MM. It was open to the FtJ to take into account that all the family, except one, were adults. At [6] of the respondent's written submissions it is argued that it was open to the FtJ to find that there had been no interference with family life as the evidence failed to show that their ties were over and above the normal emotional ties between adult family members.

26. The high threshold for establishing perversity or irrationality is also relied on by the respondent. The FtJ's s.55 assessment was open to him on the evidence. Overall, the grounds amounted only to a disagreement with the FtJ's findings of fact.

27. In oral submissions before me, Ms Connolly relied on her written submissions. She submitted that there was a 'domino effect' of errors of law in the FtJ's decision, illustrated by what the FtJ said at [42].

28. Mr Melvin, similarly, relied on the respondent's written submissions. It was argued that, read holistically, clear findings of fact had been made on the evidence provided. The FtJ had noted a lack of documentary evidence of the appellant's status in Germany and a lack of medical evidence apart from the two very brief letters from the GP.

29. The FtJ was entitled to find that the family were settled in Northern Ireland, and had been for three years. There was a lack of evidence of any community support provided to the family in respect of the difficulties that the two children have in relation to their deafness.

30. So far as s.55 is concerned, there is no actual evidence from the youngest son and the only evidence being from his mother in terms of his upset in being separated from the appellant.

31. It was accepted on behalf of the appellant that he was not able to meet any of the requirements of paragraph 352D. He left Syria at least a year before the family went to Iraq. He left to seek work and to escape conscription. His witness statement was not signed or dated, and he was not available for cross examination from Germany. The FtJ was entitled to conclude that little weight could be attached to the assertions in that witness statement.

32. Similarly, the FtJ was entitled to find that SM's evidence was exaggerated. He found that there were no exceptional circumstances or unjustifiably harsh consequences in separation and he referred to Gen.3.2.2 .

33. Although [42] was unusual in its inclusion in the decision, read as a whole the decision was completely sustainable. There was no medical evidence in relation to SM. The family is able to remain in contact. The FtJ concluded that because the appellant did not speak English there was nothing to indicate that they would be able to obtain assistance from him in that respect.

34. Although the FtJ's decision could have been structured better, and better proof read, looking at all the evidence and the six or seven year interval between the appellant leaving the family and the hearing before the FtJ in 2019, as well as the contact that they already have, the decision is sustainable.

35. In relation to the death of the appellant's father in 2013, there was nothing in the appellant's witness statement or his application for entry clearance about that. He left some 18 months after his father died. That is ample time to grieve the loss of his father and the FtJ did not need to comment on that issue particularly in the assessment of whether there were exceptional circumstances. There was no evidence that they needed an extended time to grieve. Although the FtJ found that there was family life, there was nothing exceptional about that family life. It was the appellant's choice to leave in 2013. As a Syrian citizen he was required to fight in the Syrian military. There was little from the authorities in Germany about the appellant's status there.

36. In reply, Ms Connolly submitted that this was a clear case of multiple errors of law in the FtJ's decision. The article 8 assessment needed careful scrutiny which is lacking.

37. It was wrong to characterise the medical evidence as being simply letters from a GP. Those letters in respect of the family set out the background of their attendance at the GP's surgery in terms of their health and lack of integration.

38. What the FtJ said at [42] illustrates that he was wrong about the nature of the appeal, for example stating that he had not considered removal within the Article 8 context. The whole basis of the appeal before the FtJ was in terms of Article 8. On that basis alone, the error of law is sufficient for the decision to be set aside.

39. The analysis of s.55 in [24] fails to take proper account of SM's witness statement, for example [11] in which she refers to her youngest son's upset in being separated from the appellant. In the witness statement she also refers to the loss of her husband, the appellant's father, and the loss of their sister. None of this evidence was challenged in cross-examination.

40. Although the appellant's witness statement was neither signed nor dated, had the judge said that no weight could be attached to the statement that would have been a different matter. However, stating that less weight would be attached to the evidence meant that the evidence was still before him. The fact that the case involved a minor was something that needed particular consideration.

41. The FtJ's conclusion at [27] that the family functions well, fails to take into account other aspects of SM's witness statement, in particular the difficulties faced by the two deaf children who, for example, need to be accompanied outside their home. The conclusion that the family are thriving is not supported by the evidence.

42. In addition, Ms Connolly drew my attention to the entry clearance application, in particular at question 82, and the detail given there by the appellant.

Assessment and Conclusions

43. Although [42] appears at the end of the FtJ's decision, that paragraph illustrates what I consider to be indictive of an error of approach by the FtJ amounting to an error of law. The appeal was plainly an entry clearance appeal and not a removal case. The concluding paragraph or paragraphs of a decision are very often a summary or synthesis of conclusions, involving a stepping back from the detail to give a bird's eye view of how the judge sees the case overall. It is evident that the FtJ, in apparently undertaking a reflection of all that had gone before, fell into serious error.

44. Quite apart from seeming to consider this as a removal case rather than an entry clearance appeal (an error foreshadowed in the last sentence of [33]), the FtJ said in terms in that paragraph that consideration had not been given as to whether the 'removal' decision (as he described it),

would breach Article 8. I agree with Ms Connolly that that paragraph alone is sufficient to undermine the FtJ's decision wholesale.

45. But even if I am wrong about that, I am in any event satisfied that the FtJ's decision fails fully to reflect the evidence that was before him, not only as revealed in SM's witness statement, in the various respects to which I was referred, but also in terms of the medical evidence. There are two letters from the GP, both dated 23 August 2018, in relation to the children JM and SBM. Both letters state that both of them have attended on multiple occasions from May 2018 to recently. Various concerns were expressed in terms of their mental health and social isolation, in particular because of their language difficulties caused by their deafness. Issues in relation to integration were also apparently raised on those visits. Although the FtJ referred to a lack of evidence in terms of psychiatric or social support, that was not a rational basis for what was, in effect, a side-lining of that medical evidence. That similarly undermines the FtJ's conclusion that SM's statement and evidence were coloured by exaggeration.

46. Likewise, the conclusion at [27] that he had not been referred to any "specific difficulty" and that on the evidence the appellant's family functions well, is inconsistent with the unchallenged evidence from the GP. To the same effect, the conclusion that the family thrives as a family unit, particularly so far as the youngest child is concerned.

47. Furthermore, as was pointed out on behalf of the appellant in submissions, the FtJ's decision fails to take into account what is said on the application form by the appellant to the effect that his mother struggles to care for his brother and sister who are profoundly deaf and have speech problems and depression, and that JM cannot be left alone and is unable to care for himself. He also refers in the answer to that question to his sister's isolation. The family's circumstances are consistent with his assertion in answer to question 82 that he needs to join the family in the UK to assist them.

48. Additionally, I am satisfied that the FtJ's s.55 assessment is incomplete at best and irrational at worst. It fails fully to reflect the uncontested circumstances in terms of the death of their father in 2013 and the death of their sister. Although the FtJ referred to separation for a period of seven years and ongoing, the conclusion that there was no evidence that would support a claim that he would benefit from the presence of his elder brother over and above the contact they already have, does not fully reflect SM's written and oral evidence, the evidence from the GP, the age of MM (15 years) the profound difficulties encountered by his elder two siblings in the UK, and the family's circumstances overall.

49. It does seem to me that further evidence could have been provided in support of the appeal in various respects. Nevertheless, I am satisfied, for the reasons given above, that the FtJ erred in law in his assessment of the appeal. Those errors of law are such as to require the decision to be set aside, and for the appeal to be remitted to the First-tier Tribunal for a *de*

novo hearing before the First-tier Tribunal with no findings of fact preserved.

50. Although the listing of the appeal is a matter for the First-tier Tribunal, I would encourage as early a listing as possible.

Decision

51. The decision of the First-tier Tribunal involved the making of an error on a point of Law. The decision is set aside, and the appeal is remitted to the First-tier Tribunal for a *de novo* hearing before a Judge other than First-tier Tribunal Judge S T Fox, with no findings of fact preserved.

Signed

A.M. Kopieczek
Upper Tribunal Judge Kopieczek 12/08/2021