Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: UI-2023-005094
UI-2023-005095
First-tier Tribunal: HU/60626/2022
HU/60627/2022

THE IMMIGRATION ACTS

Decision & Reasons Promulgated
On 28th of March 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

AN ENTRY CLEARANCE OFFICER

Appellant

And

MRS NINDER KAUR
MISS RAMANDEEP KAUR
(NO ANONYMITY ORDER MADE)

Respondents

Representation:

For the Appellant: Ms Ahmed, Senior Home Office Presenting Officer
For the Respondent: Mr A Chohan, Counsel, instructed by Glen Solicitors

Heard at Field House on 6 March 2024

DECISION AND REASONS

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1. This is an appeal by the Entry Clearance Officer. However, I refer to the parties as they were before the First-tier Tribunal, where Mrs Ninder Kaur and Miss Ramandeep Kaur were the first and second appellants. In an error of law decision promulgated on 26 January 2024, the Upper Tribunal found an error of law in the decision of First-tier Tribunal Judge Sweet (promulgated on 21 October 2023) to allow the appellants' appeals. The error of law decision is appended to this decision.

Background

2. The background to this appeal is set out in the papers in the electronic file and specifically the electronic bundles lodged by the appellants. The appellants, citizens of India, are the wife and daughter of Gurdev Singh, ('the sponsor') and had appealed to the First-tier Tribunal against the refusal by the respondent of their entry clearance applications, on the basis of their family life as the sponsor's partner/child.

HEARING

Preliminary issues

3. The appellants' sought to rely on the birth of a further child to the first appellant and the sponsor, with arguments made that the child was a British Citizen.

4. Ms Ahmed contended that this was a new matter. The Tribunal has no jurisdiction to consider a "new matter" raised in an appeal without the respondent's consent (except for deprivation of citizenship cases) (Nationality, Immigration and Asylum Act 2002, s. 85(5)). It is for the Tribunal to determine whether a matter raised is a "new matter", Mahmud (S85 NIAA – 'new matter' [2017] UKUT 418 (IAC).) A new matter is a one which has not been considered by the respondent in the decision under appeal or considered in response to a .section 120 notice (Nationality, Immigration and Asylum Act 2002. It must be a matter which could raise or establish a ground of appeal.

5. I have considered that a new matter is a factual matrix which has not previously been raised by an appellant and considered by the respondent. It must be factually distinct from the claim previously raised by an appellant, as opposed to further or better evidence of an existing matter. It should be something distinguishable from and outside the context of the original claim and decision in response to it. Although the appellants indicated that the first appellant's pregnancy was raised before the First-tier Tribunal, I accept that a pregnancy is distinct from a child and I accept on balance that the issue of the first appellant's new-born child and its citizenship, was a new matter. Ms Ahmed withheld consent and accordingly this decision does not consider that issue.

Issues in Dispute

6. The judge's findings of fact at [11], [12], [14] to [15] of the decision of the First-tier Tribunal are preserved. In terms of Appendix FM therefore, it was agreed that the sole remaining dispute before the Upper Tribunal on remaking the decision, was whether the appellants could meet the financial requirements of Appendix FM, E-ECP.3.1 to 3.4 (and specifically the specified evidence requirement in relation to Appendix FM:SE).

7. The respondent in the refusals of entry clearance dated 17 November 2022, indicated that the requirements of E-ECC.2.1 to 2.4 were not met as the requirements of E-ECP.3.1 to 3.4 were not met. The respondent noted that the sponsor needed to earn a gross income of at least £18,600 per annum. The sponsor is self-employed, since 1 September 2021, indicated an annual income of £24, 586.67.

8. The refusal of entry clearance set out the documents that must be provided under Appendix FM-SE- paragraph 9(b) and indicated that 'numerous pieces of evidence covered by Appendix FM-SE paragraph (9)(b) had not been provided.

9. In addition the respondent considered GEN.3.1 and GEN.3.2 of Appendix FM but was not satisfied that there were exceptional circumstances which would render the refusal a breach of Article 8 as it would result in unjustifiably harsh consequences for the appellants or their family. The respondent took into account the best interests of the second appellant as a primary consideration.

Evidence and submissions

10. Mr Singh (whom I shall refer to in this decision as 'the sponsor') gave evidence with the assistance of a Punjabi interpreter and I ensured they understood each other. The sponsor was cross-examined. Both representatives made submissions. I reserved my decision.

LEGAL FRAMEWORK

11. The question is whether the refusal breaches the appellants' right to respect for private and family life under Article 8 ECHR. That right is qualified. The appellants must establish on the balance of probabilities the factual circumstances on which they rely, and that Article 8 (1) is engaged.

12. If it is, then I have to decide whether the interference with the appellants' right is justified under Article 8 (2). If an appellant does not meet the immigration rules, the public interest is normally in refusing leave to enter or remain. The exception is where refusal results in unjustifiably harsh consequences for the appellants or a family member such that refusal is not proportionate. I take into

account the factors set out in s.117B Nationality Immigration and Asylum Act 2002 and balance the public interest considerations against the factors relied upon by the appellant.

FINDINGS AND REASONS

Facts in dispute

E-ECP.3.1

13. The respondent was not satisfied that the appellants met the eligibility financial requirements of E.ECP.3.1 to .3.4. This includes that the evidence specified in Appendix FM.SE must be provided.

14. The appellant asserted that he met the financial requirements, which specify that the appellants' sponsor must have a gross income of at least £18,600, through their sponsor's self-employment, it being asserted that the sponsor earns an annual income of £22,600. The respondent did not specifically dispute the sponsor's level of earnings, but rather the evidence provided to support that claimed income.

15. The appellants were required to provide the following documents in respect of the sponsor's self-employment:

"Appendix FM-SE paragraph (9)(b)

(i) Company Tax Return CT600 (a copy or print-out) for the last full financial year and evidence this has been filed with HMRC, such as electronic or written acknowledgment from HMRC.

(ii) (Evidence of registration with the Registrar of Companies at Companies House.

(iii) If the company is required to produce annual audited accounts, such accounts for the last full financial year.

(iv) If the company is not required to produce annual audited accounts, unaudited accounts for the last full financial year and an accountant's certificate of confirmation, from an accountant who is a member of a UK Recognized Supervisory Body (as defined in the Companies Act 2006).

(v) Corporate/business bank statements covering the same 12-month period as the Company Tax Return CT600.

(vi) A current Appointment Report from Companies House.

(vii) One of the following documents must also be provided:

(1) A certificate of VAT registration and the VAT return for the last full financial year (a copy or print-out) confirming the VAT registration

number, if turnover is in excess of £79,000 or was in excess of the threshold which applied during the last full financial year.

(2) Proof of ownership or lease of business premises.

(3) Original proof of registration with HMRC as an employer for the purposes of PAYE and National Insurance, proof of PAYE reference number and Accounts Office reference number. This evidence may be in the form of a certified copy of the documentation issued by HMRC.

9(c) Where the person is listed as a director of the company and receives a salary from the company, all of the following documents must also be provided:

(i) Payslips and P60 (if issued) covering the same period as the Company Tax Return CT600.

(ii) Personal bank statements covering the same 12-month period as the Company Tax Return CT600 showing that the salary as a director was paid into an account in the name of the person or in the name of the person and their partner jointly.

9(d) Where the person receives dividends from the company, all of the following documents must also be provided:

(i) Dividend vouchers for all dividends declared in favour of the person during or in respect of the period covered by the Company Tax Return CT600 showing the company's and the person's details with the person's net dividend amount and tax credit.

(ii) Personal bank statement(s) showing that those dividends were paid into an account in the name of the person and their partner jointly.

16. The appellants then provided further evidence on appeal (in the appellants' bundle pages 12-60). The respondent's (joint) review dated 4 August 2023, having considered the additional evidence on appeal, stated as follows in relation to the financial requirements:

"The grounds of the RFRL are maintained. The R relies on the RFRL (A1 RB,
RFRL: pages 3 – 10) & (A2 RB, RFRL: pages 3 – 7).
31. The As were originally refused as they failed to meet the eligibility financial
requirement through their sponsor's self-employment in the UK.
32. The As' arguments in the ASA are noted (AB, ASA: pages 1 – 10); however,
the R can find no reason to differ from the consideration in the RFRL (A1 RB,
RFRL: pages 3 – 10) & (A2 RB, RFRL: pages 3 – 7).

33. The R notes the As have provided further evidence regarding the sponsor's
self-employment (AB: pages 12 – 60).
34. However, the As have proceeded to fail in providing all the specified evidence
under paragraph 9 of Appendix FM-SE to adequately demonstrate the sponsor earned the required threshold through the sponsor's self-employment.
35. As this is regarding a limited company, the specified evidence in para 9(b)(i)
of Appendix FM-SE must be provided. This includes the below:

(i) Company Tax Return CT600 (a copy or print-out) for the last full financial
year and evidence this has been filed with HMRC, such as electronic or
written acknowledgment from HMRC.
(ii) Evidence of registration with the Registrar of Companies at Companies
House.
(v) Corporate/business bank statements covering the same 12-month period
as the Company Tax Return CT600.
36. Therefore, the R continues to rely on the RFRL, and the R maintains the As
do not meet the eligibility financial requirements under paragraph E-ECP.3.1
of Appendix FM of the Immigration Rules."

17. The appellants provided, in compliance with directions, further evidence to the Upper Tribunal in the form of the 686-page bundle available to the First-tier Tribunal and an additional bundle 183 consisting primarily of financial information. I considered the relevant requirements of Rule 15(2A) of The Tribunal Procedure (Upper Tribunal) Rules 2008 and admitted the additional evidence by consent.

18. It was agreed that the relevant date was the date of application. The first appellant's application was 1 April 2022 and the date of the second appellant's application was 24 June 2022.

19. Considering the evidence which the respondent's review stated was still in dispute (at paragraph 15 above), namely Appendix FM-SE 9(b)(i), 9(b)(ii) and 9(v):

20. Ms Ahmed conceded, in respect of Appendix FM 9(b)(ii) Evidence of registration with the Registrar of Companies at Companies House, that this had now been provided at pages 17-26 of the additional evidence. I accept that this is the case.

21. In relation to Appendix FM-SE 9(b)(ii) at CT600 was provided at pages 27-37 of the additional evidence.

22. The first document is the Company Tax Return CT600 for the last full financial year and evidence this has been filed with HMRC. This was to be found at pages 27-37 of the appellants' additional bundle for the Upper Tribunal. The tax return indicates it was for the period 1 June 2021 to 31 May 2022.

23. Although Ms Ahmed submitted that there was no electronic or written acknowledgement from HMRC as required, 9b)(i) requires evidence that the CT600 has been filed with HMRC, with the electronic/written acknowledgment being given as non-exhaustive examples.

24. I am satisfied that the cumulative evidence, including the letter dated 13 April 2023 from JV Accountants which confirms that the tax return was lodged with HMRC and the subsequent evidence including the HMRC VAT Certificate (pages 38-43) the HMRC payment receipts for corporation tax (including in the original bundle) demonstrate on balance that the requirement to file the company tax return CT600 has been satisfied.

25. The third and final issue which the respondent's review indicated was still outstanding, were corporate/business bank statements covering the same 12 month period as the CT600. These are found in the additional bundle from pages 68-164. The appellants have provided, for the sponsor, business bank statements for his company and I accept that there were no business bank statements prior to him beginning his self-employment in July/ August 2021 (the appellant previously being employed).

26. I am satisfied therefore on balance that the appellants have demonstrated that the requirements of Appendix FM-SE as set out in the refusals of entry clearance and the respondent's review have been satisfied.

27. Although Ms Ahmed argued that the outstanding information required goes beyond that set out in the respondent's review, I am satisfied, on the balance of probabilities, that such is a misreading of the respondent's review (which had considered the additional evidence provided on appeal). Although I note the respondent's review refers to the documents required 'includes the below' which Ms Ahmed argued meant that the respondent (who maintained the refusals of entry clearance) was still not satisfied in relation to the remainder of the cited sections of Appendix FM, that cannot be the case.

28. I am satisfied on balance that a proper reading of paragraphs 29 to 36 of the respondent's review indicates that if any additional requirements of Appendix FM-SE were still outstanding, the respondent would have detailed them there. If this were not the case

the respondent would have simply maintained and/or restated that part of the refusal without further comment.

29. Instead, the respondent's review at [35] detailed three separate sub-paragraphs of 9(b) that it was said were outstanding. The refusals of entry clearance had detailed outstanding evidence in 9(b), 9(c) and 9(d), whereas the respondent's review detailed only that evidence was missing at 9(b).

30. Further and in the alternative, if Ms Ahmed is correct and in fact, contrary to the respondent's review, the respondent was not satisfied in relation to the parts of Appendix FM-SE paragraph 9 as set out in the refusals of entry clearance, I am satisfied on balance that a combination of the evidence in the application, on appeal and produced to the Upper Tribunal, demonstrates that the sponsor and therefore the appellants satisfy those requirements of Appendix FM:SE:

31. Appendix FM-SE paragraph 9(b)(iii) states that audited accounts for the last financial year be provided if the company is required to produce these or 9(b)(iv) unaudited accounts if not required to produced audited accounts and an accountant's certificate of confirmation. Ms Ahmed accepted that there were accounts provided to the First-tier Tribunal but that what was missing was an accountant's certificate of confirmation.

32. However, the sponsor provided, to the First-tier Tribunal, a letter from their accountants dated 13 April 2023 indicating that accounts for the year ended 31 May 2022 had been filed and a full copy was attached. Whilst Ms Ahmed accepted that this certification was provided, she argued that there was no evidence that these accountants were a member of a UK Recognized Supervisory Body/or who is a member of the institute of Financial Accountants. However. The evidence from JV accountants, Chartered Tax Advisors & Accountants, confirms that they are supervised by the Chartered Institute of Taxation. I am satisfied on balance that this satisfies the requirements of 9(b)(iv). In my view the respondent was satisfied on appeal in relation to this issue which explains why it was not mentioned in the respondent's review.

33. A current appointments report was also in my findings provided to the First-tier Tribunal at pages 16 and 17 of the First-tier Tribunal bundle, and again in my findings the respondent, who had included this in the refusal of entry clearance, did not repeat this in the respondent's review. I am satisfied Appendix FM-SE (vi) is satisfied.

34. Although Ms Ahmed's submissions argued that some of the documents from 9(b)(vii) were missing, she indicated that the certificate of VAT registration, 9(b)(vii)(1) was there. As paragraph 9(b)(vii) clearly states that '**One of the following**' (my emphasis)

must be provided, the certificate of VAT registration and VAT return have been provided which are sufficient to meet the requirements of 9(b)(vii). Contrary to Ms Ahmed's submissions, which appear to disclose a misreading of the relevant sub-paragraphs, the appellants were not therefore required to additionally provide 9(b)(vii)(2) and/or (3).

35. Although Ms Ahmed also went on to list what documents she asserted were missing from paragraph 9(c) and 9(d) of Appendix FM-SE, as already noted, in my findings the respondent's review was clear that the only outstanding missing evidence was in respect of 9(b) and for the reasons given I am satisfied on balance that these requirements have been met.

36. In the further alternative, I am satisfied on balance that Appendix FM-SE paragraph 9(c) and (d) are satisfied (the evidence indicating that the sponsor took both a salary and dividends in the relevant period) through the payslips and P60 provided and the bank statements showing the sponsor's dividends being paid into the sponsor's account with a dividend voucher in the sponsor's favour also provided. The details of the dividends provided are consistent with the BACS transfers into the appellant's account in 2021/2022.

37. In conclusion, as I am satisfied on balance that the documents demonstrate that the sponsor and therefore the appellants meet the relevant requirements of Appendix FM-SE, I am satisfied on balance that the appellants have demonstrated that they satisfy the financial requirements of E-ECP.3.1 to 3.4, it not being disputed that this was the only outstanding disputed element of Appendix FM.

38. As I am satisfied that the appellants satisfy all the requirements of Appendix FM and Appendix FM-SE it is not necessary to reach any further findings in relation to exceptional circumstances.

Application of the law to the facts

39. I have found the Immigration Rules are met (and I rely on the preserved findings from the First-tier Tribunal). Article 8(1) is engaged, the Immigration Rules are met and there is no public interest in refusal, therefore the refusal of entry clearance to both appellants is disproportionate (**TZ (Pakistan) and PG India [2018] EWCA Civ 1109**).

Notice of Decision

The appeals are allowed.

The decision of the First-tier Tribunal contains an error of law and was set aside (other than preserved findings). I remake that decision allowing the appellants' (before the First-tier Tribunal) appeals.

TO THE RESPONDENT

FEE AWARD

As I have allowed the appeals and because a fee has been paid or is payable, I have considered making a fee award and have decided to make no fee award because the appeals were allowed on the basis of the documentary and oral evidence presented on appeal.

Signed M M Hutchinson Dated: 22 March 2024

Deputy Upper Tribunal Judge Hutchinson

APPENDIX

**IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER**

Case Nos: UI-2023-005095
UI-2023-005094

First-tier Tribunal Nos:
HU/60626/2022
HU/60627/2022
LH/04529/2023
LH/04530/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

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Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

An Entry Clearance Officer

Appellant

and

**Mrs Ninder Kaur (First Appellant)
Miss Ramandeep Kaur (Second Appellant)
(NO ANONYMITY ORDER MADE)**

Respondents

Representation:
For the Appellant: Mr E Terrell, Senior Home Office Presenting Officer
For the Respondents: Mr A Maqsood, of Counsel, instructed by Glen Solicitors

Heard at Field House on 10 January 2024

DECISION AND REASONS

Introduction

1. This is an appeal by the Entry Clearance Officer. However, I refer to the parties as they were before the First-tier Tribunal, where Mrs Ninder Kaur and Miss Ramandeep Kaur were the first and second appellants. They are citizens of India with the first appellant before the First-tier Tribunal born on 1 May 1977 and the second appellant, her daughter, born on 1 August 2005.

2. The appellants made applications to the respondent on 1 April 2022 and 24 June 2022 respectively on the basis of their family life with their partner/parents. The respondent refused those applications on 17 November 2022. The appellants' appeals against those decisions were allowed by First-tier Tribunal Judge Sweet on 21 October 2023 following a hearing on 18 October 2023.

3. Permission to appeal was granted by Judge of the First-tier Tribunal Boyes on the basis that it was arguable that the First-tier Tribunal had erred in-law, in allowing the appeal under Article 8 on the basis that the appellants met the Immigration Rules when this was not the case.

4. The matter came before me to determine whether the First-tier Tribunal had erred in law and if so whether any such error was material and thus whether the decision should be set aside.

<u>Submissions – Error of Law</u>

5. In the grounds of appeal and in oral submissions by Mr Terrell it was argued in summary for the entry clearance officer, as follows: with regard to the financial requirements under paragraph 9 of Appendix FM-SE, if attempting to demonstrate sufficiency of income on the basis of self-employment through a limited company, the specified evidence must include:

   (a) Company tax returns CT600 (a copy or printout) for the last full financial year and evidence that has been filed with HMRC, such as electronic or written acknowledgment from HMRC.

   (b) Evidence of registration with the registrar of companies at Companies House.

   (c) Corporate/business bank statements covering the same 12-month period as the company tax return CT600.

6. It was argued that the appellants had failed to produce such evidence and the First-tier Tribunal Judge ("the judge") ignored this requirement in reaching his conclusion at paragraph [13] and therefore any conclusion that the Immigration Rules were satisfied was a misdirection in law.

7. Whilst Mr Maqsood provided on the morning of the hearing a copy of what he indicated were the missing documents, no Rule 15 application was made, following the indication of the Tribunal that such evidence would be relevant to any potential remaking of the decision rather than the error of law.

8. In relation to Ground 1, Mr Terrell submitted that Appendix FM-SE is clear that there is specified evidence that has to be provided and Judge Sweet's error was straightforward, in that he found that the Immigration Rules in relation to financial provision were met whereas that was not the case as the evidence was missing. If the judge had directed himself properly he would have had to make a full freestanding assessment under Article 8 outside of the Rules.

9. On Ground 2, Mr Terrell initially argued that this was both a rationality challenge and a reasons challenge. Ground 2 argued that whilst the first appellant may have produced evidence that she is currently suffering from moderate depression caused by complex grief referred to at [15] this was insufficient to demonstrate the exemption requirements and therefore her associated eligibility under E-ECP.4.2. of Appendix FM of the Immigration Rules.

10. It was argued that the appellants had failed to sufficiently evidence their reasons for exemption. The judge accepted at [15] that the first appellant had not made any attempt to sit an English language test nor show any previous efforts to access learning materials. Whilst it was accepted that the first appellant's depression may have impacted on her ability, the evidence did not indicate that her symptoms are such that she is incapable of passing any requirements.

11. The medical evidence that was provided consisted of a report from Deora Psychiatry Centre and a completed form. Mr Terrell submitted that the judge's findings were illogical in that the medical evidence stated that it would impact on the appellant's ability/learning, but it did not state that she was prevented from taking such a test. It was submitted that it was irrational for the judge to find that the medical evidence was sufficient in itself. In the alternative Mr Terrell argued that the findings were inadequately reasoned as it was not clear why the judge considered that the medical evidence provided confirmed that the first appellant's medical conditions prevented the appellant from taking the test.

12. It was agreed that ground 3, which argued that given that Article 8 is based solely on the premise that the Rules were satisfied the judge's findings must be in error, could not stand alone and was relevant if either ground 1 or 2 were made out.

13. Although no Rule 24 response was provided, in oral submissions for Miss Ramadeep Kaur and Mrs Ninder Kaur, Mr Maqsood argued, in

short summary as follows: Mr Maqsood submitted that at [13] the judge considered the financial requirements and noted that the "The documentary evidence provided in support of his financial earnings include (sic) HMRC and accountants' documents meet the requirements of Appendix FM-SE paragraph 9(b)…". Mr Maqsood noted the list at paragraph 9(b) of Appendix FM-SE and that there were three documents as listed above (at paragraph 5), which the respondent stated were missing.

14. Mr Maqsood argued that the missing documents were clearly available and that it was his instructing solicitor's view that this evidence "must have been provided" at the hearing, but the instructing solicitor could not conclusively confirm this. He indicated that he had no reason to doubt Mr Terrell's indication that such information was not on CCD and Mr Terrell indicated that from his review of the documents everything that appeared on CCD was also in the bundle before the Upper Tribunal.

15. Mr Maqsood submitted that the respondent would have been in a position to exercise evidential flexibility in relation to the financial issue. The respondent had refused the appellant's application on three grounds: the relationship, finance and the English language test.

16. The respondent in the refusal indicated that evidential flexibility was not exercised in respect of the missing documents, as the application was also being refused for other reasons. It was Mr Maqsood's argument that paragraph 9(b) of Appendix FM considered together with the provisions in relation to evidential flexibility, meant that the judge was entitled to find that the documents that had been provided satisfied paragraph 9(b); as to the other missing documents not provided it was then for the decision maker to consider exercising evidential flexibility once the appeal had been allowed. Mr Maqsood set out why, in his view, it was clear on the evidence before the respondent and the First-tier Tribunal, that those documents existed. Mr Maqsood submitted therefore that ground 1 was not made out and in the alternative he argued that any error was not material.

17. In relation to ground 2 Mr Maqsood argued that the judge not only set out what the exemption requirements were, he went on to note what the doctor, who provided the medical report said, noting moderate depression and somatic symptoms following the death of the appellant's son and indicating no computer knowledge and heavy depression would impact on the appellant's performance. The judge was persuaded from the medical evidence that disability prevented the appellant from meeting the financial requirements.

18. It was submitted that the judge had been fully aware of the criteria and made findings of what was accepted and not accepted and had

considered the evidence at pages 193 to page 203 of the consolidated bundle. This included the exemption forms which provided answers as to the nature of the appellant's condition and the impact of that condition and how it would prevent her from learning English and also how it would prevent her from studying. The expert also provided a report which stated that in the expert opinion of the doctor, that the appellant would likely be better in the future. However, the judge was concerned with the date of application. Mr Maqsood submitted that the judge was entitled to make findings based on the evidence provided, with the weight to be attached to that evidence being a matter for the judge. This did not meet the high threshold of irrationality and Mr Maqsood submitted this was not how the ground was articulated.

Conclusions

19. I indicated at the hearing that although ground 2 was not made out, grounds 1 and 3 were. I preserved the judge's findings of fact at paragraphs of fact at [11] to [12] and [14] to [15] of the decision and reasons.

20. Notwithstanding Mr Maqsood's valiant effort to suggest otherwise, Appendix FM-SE is clear. Although Mr Maqsood argued that these documents must have been before the First-tier Tribunal, he did not dispute that such documents were not, on the face of the evidence, uploaded to the First-tier Tribunal CCD system. It is insufficient to attempt, on the morning of the Upper Tribunal hearing, to mount an argument that in fact the documents were before the First-tier Tribunal; the appellants were aware of the Entry Clearance Officer's grounds of permission to appeal to the Upper Tribunal, which were submitted in October 2023, with permission granted in November 2023. No Rule 24 response was provided, with no suggestion prior to the Upper Tribunal hearing that the missing documents were in fact before the First-tier Tribunal.

21. If, as it was initially suggested at the hearing, the sponsor had submitted these missing documents in court, I do not accept that this would not have been detailed in the judge's decision. Although the judge's decision is silent in relation to the list of all the documents specifically before him, he did make reference to some of the documents including a supplementary bundle.

22. If the appellants had submitted additional evidence over and above the supplementary bundle, on the day of the hearing, even if the judge had not properly recorded any decision in relation to the late admission of such evidence, I am of the view that his findings at [13] would have identified that the additional missing documents under Appendix FM-SE had been produced.

23. The respondent's review had highlighted that the grounds of the Reasons for Refusal Letter, including in relation to the financial requirements were maintained and that although the appellants had provided further evidence regarding the sponsor's self-employment at the appellant's bundle pages 12 to 60, they had failed to provide all the specified evidence under paragraph 9(b) of Appendix FM-SE to adequately demonstrate that the sponsor met the required threshold including.

24. There is no merit in Mr Maqsood's belated submission on behalf of the appellants (albeit that he quite properly did not pursue this) that this evidence was before the judge. I find that it was not.

25. Although Mr Maqsood sought to persuade me in relation to the relevance of this evidence before the judge and that this was an issue for the respondent to then exercise evidential flexibility given the judge had allowed the appeal on the other two grounds, such an argument is misconceived.

26. If the judge was taking this claimed approach to the missing documents, he could not have done as he did, which was to allow the appeal under Article 8 on the basis that the decision was disproportionate as the appellants met all the requirements of the Immigration Rules.

27. In any event, the judge was not allowing the appeal on that basis, but rather in my view, on a misunderstanding that all of the Appendix FM-SE evidence had been provided whereas that was not the case.

28. Ground 1 is therefore made out. Ground 3 is also made out as the appeal had been allowed on the basis that the appellants fulfilled the Immigration Rules whereas they could not, given the lack of the specified documents and a full assessment under Article 8 outside of the Immigration Rules was therefore required.

29. In relation to ground 2, there is no error of law made out and the judge's findings are preserved. Read fairly, the ground cannot properly be construed to amount to a rationality challenge to the judge's findings.

30. In terms of adequacy of reasons, the grounds of appeal in relation to the English language are no more than a disagreement. The judge was entitled, having taken into account the form (dated 12 February 2022) and the medical report, to reach the decision he did that the appellant had met the test to show that she was prevented from taking the test. Although it is correct that the medical report refers to the appellant's conditions 'impacting' rather than preventing her, it was properly open to the judge to attach the weight he did to that evidence.

31. In providing that evidence, Dr Deora, a consultant psychiatrist, was answering the questions in the respondent's form; this initially requested the nature of the first appellant's conditions, which were listed as 'moderate depression with somatic symptoms and complicated grief. The form went on to ask how the condition impacted the appellant's daily life, with the doctor noting that the appellant's activities of daily living were affected. The form then goes on to specifically ask 'how would this condition **prevent** (my emphasis) them from learning English'. The doctor was therefore clearly aware that the test was whether the appellant was prevented, rather than impacted, from learning English. The doctor answered that on the basis of 'being semi-literate and having complicated grief (death of son), now having syndromal depression, new learning will be impaired'. The form then asked at question 4 'how would this condition prevent them from studying for the knowledge of life in the UK test' and the doctor cited 'chronic depression (grief) features impact on learning'. At question 5 of the form, the doctor was asked how the appellant's condition would prevent her from sitting the life in the UK test/or taking an English test, and the doctor was of the view that 'no computer knowledge and having depression will impact on her performance'. The doctor's use of the word 'impact' must be considered in the context of the questions that he was answering, specifically how the appellant's conditions would prevent her from completing the tests.

32. The judge had this evidence before him and considered this at paragraph [14] where he noted that the exemption requirements state that at the date of application the appellant has a disability (physical or mental condition) which prevents the applicant from meeting the requirement, or there are exceptional circumstances which would prevent the applicant from being able to meet the requirement. At [15] the judge considered the medical evidence, including the form dated 12 February 2022 from Dr Deora and was 'persuaded by the medical evidence that the first appellant has a disability which prevents her from meeting the English language requirement'. Ground 2 amounts to a disagreement with those reasoned findings. No error is disclosed in ground 2.

Notice of Decision

33. The decision of the First-tier Tribunal contains a material error on a point of law and is set aside other than [11], [12], [14] to [15], which are preserved.

34. The decision will be remade at a further hearing before the Upper Tribunal.

DIRECTIONS

A The appeal is to be relisted before a single judge or a Deputy Judge of the Upper Tribunal.

B The appellants' representative is to ensure that any further evidence relied on, including the evidence provided at the Upper Tribunal error of law hearing, but not considered, should be properly filed and served including with any Rule 15(2A) application, which has not yet been made (Mr Terrell indicated that there could be no sensible objection to the additional material available at the error of law hearing). This should be lodged no later than two weeks prior to the relisted hearing. This should be in the form of a consolidated bundle.

C The appellants' representative is to file a consolidated indexed appellant's bundle. The bundle is to separately tabulate: (i) the evidence relied upon before the First-tier Tribunal; and (ii) the additional evidence that it is now sought to rely upon before the Upper Tribunal.

D The appellant's representative is to file and serve an updated skeleton argument.

E The Entry Clearance Officer is to file and serve, and no later than one week prior to the hearing, any evidence relied that is not contained the bundle relied upon before the First-tier Tribunal and a respondent's review setting out the position in relation to any additional financial evidence lodged.

F The case is to be listed for three hours. Punjabi interpreter required, one witness.

G Any failure to comply with these directions may lead the Tribunal to exercise its powers to decide the appeal without further oral hearing, or to conclude that the defaulting party has no relevant information, evidence or submission to provide

M M Hutchinson

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

19 January 2024