Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/23006/2016**
HU/27068/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On Tuesday 2 July 2019	**On Tuesday 16 July 2019**

Before

MR JUSTICE MURRAY
(SITTING AS AN UPPER TRIBUNAL JUDGE)
UPPER TRIBUNAL JUDGE SMITH

Between

ENTRY CLEARANCE OFFICER

Appellant

And

MLA
SK
[ANONYMITY DIRECTIONS MADE]

Respondents

Representation:

For the Appellant: Mr D Clarke, Senior Home Office Presenting Officer
For the Respondent: Mr D Seddon, Counsel instructed by Farani Taylor solicitors

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
An anonymity order was made by the First-tier Tribunal. Although there is no appeal on protection grounds, there are concerns about the Respondents' safety in their home country. It is therefore appropriate to continue the order. Unless and until a tribunal or court directs otherwise, the Respondents, MLA and SK, are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their

family. This direction applies, amongst others, to both parties. Failure to comply with this direction could lead to contempt of court proceedings.

DECISION AND REASONS

PROCEDURAL BACKGROUND

1. This is an appeal by the Entry Clearance Officer. For ease of reference, we refer below to the parties as they were in the First-tier Tribunal albeit that the Entry Clearance Officer is technically the Appellant in this particular appeal. The Respondent appeals against a decision of First-Tier Tribunal Judge Cockrill promulgated on 31 January 2018 ("the Decision") allowing the Appellants' appeal against the Entry Clearance Officer's decisions dated 7 September 2016 and 13 November 2016 respectively, refusing the Appellants entry clearance as dependent relatives of their adult children who live in the UK.

2. The Appellants are a husband and wife from Syria. They are now aged 74 years and 60 years respectively. On 15 November 2013, they made an application for entry clearance as adult dependent relatives of their children who live in the UK under Appendix FM to the Immigration Rules ("the Rules"). Those applications were refused by the Respondent. By a decision promulgated on 2 December 2014, First-tier Tribunal Judge Paul allowed the appeals to the limited extent that the Respondent was required to reconsider his decisions under Article 8 ECHR and outside the Rules. The Respondent again refused the applications as aforesaid.

3. Judge Cockrill allowed the appeals on human rights grounds. By a decision sent on 8 June 2018, Designated First-tier Tribunal Judge McCarthy granted permission to appeal the Decision. By a decision promulgated on 11 September 2018, Deputy Upper Tribunal Judge Murray found material errors of law in the Decision, set that aside and re-made it, dismissing the appeals. The Appellants then appealed that decision to the Court of Appeal. Permission to appeal was granted by Lord Justice Flaux on 14 February 2019. The parties then consented to the setting aside of Deputy Upper Tribunal Judge Murray's decision and remittal to this Tribunal for reconsideration whether the Decision contains material errors of law, based on the permission grant of Judge McCarthy.

4. The Respondent raises only one ground of appeal namely that Judge Cockrill materially misdirected himself in law and/or gave inadequate reasons for allowing the appeal. Specifically, the Respondent complains that the Judge has failed to have regard to the Rules and has also failed to give any or any proper weight to the public interest.

5. By their Rule 24 response, the Appellants point out that the appeals have to be viewed through the lens of Judge Paul's earlier determination. The Judge had concluded that the Appellants could not meet the Rules and it was implicit in Judge Cockrill's recognition of the background including Judge Paul's decision

that he was aware that the Appellants could not meet the Rules. Furthermore, the Appellants accept that they cannot meet the Rules as they do not have significant care needs. However, the circumstances in this case are, they say, exceptional (for reasons we come to below). The Appellants accept that Judge Cockrill did not have regard to Section 117B Nationality, Immigration and Asylum Act 2002 ("Section 117B") as he perhaps should have done but any error in that regard was not material given the facts and circumstances. The Judge was also entitled to have regard to the very significant delay in the Respondent's handling of the Appellants' cases.

6. The grant of permission to appeal the Decision is in the following terms so far as relevant:

> "2. Before I examine the grounds, it is appropriate to identify the approach taken to Judge Cockrill in determining this appeal.
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> 3. It is evident from [52] onwards that he took a balance sheet approach to the article 8 ECHR issues. After considering the personal circumstances of the appellants and their sons on the UK, at [57] Judge Cockrill finds the appellants enjoy family life within the meaning of article 8(1) ECHR with their adult sons in the UK. In the next paragraph he finds that the proposed expulsion had the potential of seriously undermining the family life that exists.
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> 4. At [9] the judge acknowledges that the refusal decision is lawful. At [60] the judge found the appellants could not be expected to return to Syria because of the current conflict. At [61] the judge explained why the appellants could not live with their daughter in Qatar. At [62] the judge explained why the appellant's could not relocate to the country of their nationality, St Kitts and Nevis. At [64] the judge explains why it would not be reasonable to expect the appellants to maintain family life by regular visits from St Kitts and Nevis.
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> 5. Having established the family circumstances, Judge Cockrill refers to the public interest but he does not identify what the public interest factors are. At [66] he says the public interest is reduced by the respondent's delay in considering the applications for leave to remain but it is unclear from what level it is reduced. This is all the judge says about public interest, other than at [59] acknowledging that the decision to refuse was lawful.
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> 6. The grounds argue that Judge Cockrill failed to properly assess the public interest in expelling the appellants. The judge did not give any weight to the fact the appellants could not meet any provision of the immigration rules, particularly the adult dependent relative route in appendix FM. As per s.117B(1) of the 2002 Act, there was statutory requirement to consider this public interest point. In addition, the judge failed to properly apply case law regarding delay in decision making and the fact it does not reduce the public interest in the circumstances described by the appellants.
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> 7. It is arguable that instead of carrying out the necessary balancing exercise, Judge Cockrill has focused solely on the personal circumstances of the appellants. Therefore, it is arguable he has not determined what he was

> required to determine. That is an arguable error of law and permission is granted."

7. The matter comes back before us to decide whether the Decision contains a material error of law and, if we so conclude, to either re-make the Decision or remit the Decision to the First-tier Tribunal for re-making.

THE FACTUAL BACKGROUND

8. The Appellants accept that they cannot meet the Rules. They rely on their personal circumstances as being exceptional and, therefore, before turning to look at the Decision and the parties' cases, it is appropriate to set out what those circumstances are. None of the factual findings made by Judge Cockrill are put in issue by the Respondent and therefore we refer to the paragraphs of the Decision recording the relevant evidence and findings in the analysis which follows.

9. The Appellants are from Syria. They cannot return there. That is not simply because of the war which is ravaging that country but also the fate which has befallen some of their relatives who had remained in that country. There is a suggestion that the Syrian authorities may be interested in the Appellants. The Judge found that it would be unsafe for them to return to Syria ([12], [24], [30], [39], [40], [55], [60]).

10. The Appellants have several adult children – four sons and one daughter. Their daughter is married and settled in Qatar with their three children ([8]). The Appellants are only able to stay in Qatar for 30 days at any one time. Even the daughter who is married to a Syrian national born in Qatar and working there is unable to get residency ([36]).

11. One of the sons is a Canadian citizen, now living in Dubai ([7]). The Appellants are only able to spend 60 days at any one time in that country. The Appellants' son has to renew his residence documentation annually ([37])

12. Of the three sons living in the UK, two have indefinite leave to remain as Tier 1 (Entrepreneurs). The third has been living here for seventeen years and is a British citizen. He is practising as a dentist. He has two children, also British citizens. The two other sons run a business in Central London engaged in real estate, construction and the dealing and handling of antiques ([6], [9], [54]). The Second Appellant also owns a freehold property in London (currently empty) ([28]). It appears that the Appellants may also own another property here ([3], [47], [56]).

13. The First Appellant has permission to be able to stay in Saudi Arabia but that does not extend to the Second Appellant. They have also spent time in Turkey but restricted to 30 days at a time ([36]). Although the Appellants have stayed at various times in Lebanon, Egypt, Saudi Arabia and Turkey, they have not been able to settle in those countries ([60]).

14. The Appellants have made a substantial capital donation to St Kitts and Nevis which has entitled them to nationality. However, they are only permitted to leave that country to travel to other countries for up to four weeks at a time ([34], [60], [63]). They have never visited that country and have no connections there ([49], [62]).

15. Taking those facts together, the Appellants have lived an itinerant life since leaving Syria, mainly living in hotels ([47], [60], [64]). Prior to leaving Syria, the Appellants lived as a family unit with two of the sons who currently live in the UK ([10], [27], [46], [54]). Based on the Judge's acceptance that this was "an entirely culturally appropriate state of affairs", he accepted that there was family life between the Appellants and their adult sons ([54], [57]). No issue is taken with that finding.

16. The Appellants have some medical complaints, but it is accepted that they do not have significant care needs ([38], [67]).

17. As regards the delay, what is relied upon is the period following the decision of Judge Paul during which the Respondent was to reconsider the decisions refusing entry clearance in the context of Article 8 ECHR. The Judge refers to this at [14] of the Decision where he says that "despite that plain decision of the First-tier Tribunal, nothing was done by the respondent to implement the decision". The Appellants were obliged to issue judicial review proceedings to force a further decision. The decisions were not reconsidered until approximately two years after the decision of Judge Paul ([14], [15]).

THE DECISION

18. In light of the above analysis of the Judge's findings, we do not need to set out much of the Decision. We set out below only those paragraphs which are relevant to the submissions we have to consider and the issues we have to decide. The Judge's assessment begins as follows:

> "57. My own overall assessment of their situation is that there is in existence here family life. That is family life between these appellants and their adult sons. Their whole way of living has been disrupted because of circumstances beyond their control. I start from the premise therefore that the appellants have demonstrated that there is present here family life that requires respect.
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> 58. I approach the assessments that need to be made in relation to Article 8 in accordance with the 5 stage approach as set out in **Razgar v SSHD [2004] UKHL 27.** The decision of the respondent to refuse this couple permission to come here to settle constitutes a sufficiently marked interference with that right to respect for family life, such as to engage Article 8. I am mindful that there is not a high threshold set to demonstrate such interference.
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> 59. Whilst it could be said with some force that the decision is a lawful one in providing an answer to the third question that is posed in **Razgar**, I

conflate the fourth and fifth questions and examine the really critical issue in this set of cases which is the proportionality of the decision."

19. Having set out his findings about the family's circumstances which we have summarised at [9] to [16] above, which considered their family ties and where they might otherwise be able to continue their lives, the Judge asked himself at [63] of the Decision the question which he saw as the major issue in this case namely "where can this couple come and live?". He answered that question in the following way:

> "64. The answer to that question, in my judgment, is that they ought to be granted permission to come and live here, a country with which they have got fairly strong and meaningful ties. I have emphasised the fact that they have got 3 sons here. The 2 sons that gave evidence before me run a business which is now located in central London. It is in essence the family business. There can be no suggestion at all that these appellants would become a draw upon public funds. I have emphasised already that they are comfortably off. What they have been doing for some years now is moving from place to place, living in hotels, and then they are expected to move on. It is a wholly unsatisfactory state of affairs and the only reasonable fair and just course in my judgment, is to afford them the opportunity to be able to settle in this country with their close and immediate family.
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> 65. In looking at the public interest, I do not see that as much weight needs to be afforded to that interest, given the significant delay which occurred in processing and dealing with these cases. Even after the First-tier Tribunal Judge remitted the matters back for further consideration, it was an appreciable time before any action was taken by the respondent. It seems that rather than the Secretary of State addressing the critical issues that were raised in connection with Article 8 and analysing the appellants' situation against the country background situation in Syria, and identifying their risk profile, if I can term it such, the respondent has simply refused again their applications without making specific reference to the points that were addressed by at least one of their sons in relation to the earlier appeal hearing.
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> 66. I consider therefore that there is force in Mr Seddon's argument that, as a result of some measurable delay, the public interest is softened and weakened. The appellants have had to wait for their cases to be resolved and that is far from desirable.
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> 67. By permitting them to come here in order to settle, appropriate regard would be paid then to the age and the relative vulnerability of these appellants. They have some health issues which are arguably appropriate for their age, thankfully nothing grave. They wish, for perfectly proper and understandable reasons, to be re-united with their family, so that they can live together here in the United Kingdom in properties that they own, and in my judgment that must be a conclusion that is a far more desirable proportionate decision, whereas the contrasting situation is that if the decision is maintained to refuse them permission to live and settle here, that they will be obliged to continue that itinerant lifestyle, quite possibly into their old age. That is thoroughly undesirable and for all the reasons

therefore expressed in this document, it is my conclusion that the decision in respect of each appellant, looking at the totality of the material, is disproportionate."

SUBMISSIONS

20. Mr Clarke submitted that the Judge had erred in two ways. First there was a lack of recognition that the Appellants could not meet the Rules. That was relevant to the public interest. He relied in that regard on the Court of Appeal's judgment in Secretary of State for the Home Department v SS (Congo) and others [2015] EWCA Civ 387. That was a case dealing with the minimum income threshold requirements of the Rules relating to family settlement applications which the Respondents in those cases were unable to meet. The following passage is probably the most relevant to the facts of these cases:

> "14. However, the width of the gap between what the Immigration Rules set out by way of entitlement to enter or remain in the United Kingdom and the requirements resulting from application of a relevant Convention right – in these appeals, we are concerned with rights under Article 8 – may be highly relevant in certain contexts. This is because, in the immigration field, the fair balance required to be struck pursuant to Article 8 between individual interests protected by that provision and the general public interest typically involves bringing into account certain public interest considerations in relation to which the Secretary of State has a legitimate role to fulfil by formulating an approach which gives them proper value and weight. The Secretary of State is responsible for the overall operation of the immigration system as a fair system which properly reflects and balances a range of interests, including important aspects of the public interest, and she is accountable to Parliament for what she does.
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> 15. In the Convention case-law of the European Court of Human Rights ("ECtHR") it is well recognised that the national authorities are in principle better placed than the Court to make judgments regarding the needs and resources of their societies (see, e.g., *Stec v United Kingdom* (2006) 43 EHRR 47, para. [52]) and that "questions of administrative economy and coherence are generally matters falling within the margin of appreciation" which this approach implies (ibid.). Within the national legal order, it is the Secretary of State and Parliament who are in principle best placed to make such judgments. Accordingly, in appropriate contexts, weight may be given by the courts to their assessments about what is required. Typically, this finds expression in allowing a wider margin of appreciation or discretionary area of judgment where such considerations are required to be brought into play in striking the relevant balance between individual and public interests.
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> 16. This is not to say that the judgments made by the Secretary of State regarding what is required to satisfy Convention rights in an immigration context exclude a decision-making role for the courts: it is clear, not least from the leading decision in *Huang*, that they do not; and see *MM (Lebanon)* at para. [149] per Aikens LJ in the Court of Appeal. But if the balance to be struck in a particular case requires account to be taken of public interest considerations in relation to which the Secretary of State has

> a legitimate role, her assessment will be given the appropriate significant weight: see *Huang* at para. [16].
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> 17. If the gap between what Article 8 requires and the content of the Immigration Rules is wide, then the part for the Secretary of State's residual discretion to play in satisfying the requirements of Article 8 and section 6(1) of the HRA will be correspondingly greater. In such circumstances, the practical guidance to be derived from the content of the Rules as to relevant public policy considerations for the purposes of the balance to be struck under Article 8 is also likely to be reduced: to use the expression employed by Aikens LJ in *MM (Lebanon)* in the Court of Appeal, at [135], the proportionality balancing exercise "will be more at large". If the Secretary of State has not made a conscientious effort to strike a fair balance for the purposes of Article 8 in making the Rules, a court or tribunal will naturally be disinclined to give significant weight to her view regarding the actual balance to be struck when the court or tribunal has to consider that question for itself. On the other hand, where the Secretary of State has sought to fashion the content of the Rules so as to strike what she regards as the appropriate balance under Article 8 and any gap between the Rules and what Article 8 requires is comparatively narrow, the Secretary of State's formulation of the Rules may allow the Court to be more confident that she has brought a focused assessment of considerations of the public interest to bear on the matter. That will in turn allow the Court more readily to give weight to that assessment when making its own decision pursuant to Article 8. An issue arises on this appeal as to whether the Secretary of State has made a conscientious effort to use the new Immigration Rules to strike the fair balance which Article 8 requires and whether there is a substantial gap, or not, between the content of the FTE Rules and the requirements of Article 8."

21. The second point made by Mr Clarke is that the Judge erred by finding that the public interest was diminished by the Respondent's delay in making the further decisions. He referred us to the House of Lords judgment in EB (Kosovo) v Secretary of State for the Home Department [2008] UKHL 41 at [14] to [16] of the judgment where Lord Bingham set out the three ways in which delay might be relevant to the public interest. The first is that a person may establish closer ties during the period of delay. That does not apply here. Second, a person without leave who is in a very precarious position may be led to expect that the authorities do not intend to remove him which may reduce the sense of impermanence. Again, that cannot apply here. We note in passing that, so far as we are aware, the Appellants have only ever come to the UK as visitors and have never overstayed. They have always been here lawfully.

22. The third category is where "the delay is shown to be the result of a dysfunctional system which yields unpredictable, inconsistent and unfair outcomes". That third category arose in EB (Kosovo) due to the inconsistent decision making between the cases of two family members due to delay in the processing of one of the cases. Mr Clarke also reminded us that the only delay for which the Respondent could be held responsible was that between Judge Paul's decision in December 2014 and the reconsideration which took place in

July 2016 albeit that the decisions were not apparently served until September and November of that year. Mr Clarke submitted that the delay was not lengthy, the Judge's reasoning in this regard was wholly lacking in reasons and the Judge had failed to explain how that delay factored into the reduction in weight of the public interest.

23. Mr Seddon reminded us of the correct approach of the Tribunal to errors in decisions of the First-tier Tribunal. As the Court of Appeal put it in the recent case of UT (Sri Lanka) v Secretary of State for the Home Department [2019] EWCA Civ 1095 at [19], "although 'error of law' is widely defined, it is not the case that the UT is entitled to remake the decision of the FTT simply because it does not agree with it, or because it thinks it can produce a better one." In this case, he submitted that the Judge was well aware that the appeals were in the context of applications to settle under the adult dependent relative provisions of the Rules ("the ADR Rules") ([1] of the Decision). He was also aware that Judge Paul's allowing of the appeals previously was on a limited basis ([14]). We note however that the Judge did not expressly refer to Judge Paul having found that the Appellants did not meet the ADR Rules. Mr Seddon accepted that the Judge did not go so far. He said though that, having regard to the background to the appeals, the Judge must be taken to be aware that the Rules were not met. As such, a failure to make an express finding in that regard was not material.

24. Mr Seddon also accepted that the Judge made no express reference to Section 117B. He noted that Section 117B is not wholly applicable because the Appellants are not in the UK. He also said that the statutory reference to the maintenance of effective immigration control not being in the public interest did not arise. He submitted that since the Appellants did not claim to be able to meet the ADR Rules (except of course by making an application under those provisions), they were always seeking leave outside the Rules and there was no impact on the effectiveness of immigration control. Their case is that the circumstances here are exceptional.

25. Mr Seddon submitted in any event that the Judge had properly considered the public interest when he said at [59] of the Decision that the Respondent's decisions were lawful. He accepted that, in terms of the Razgar test, that is not generally the way in which "lawful" is to be construed. That refers rather to the Strasbourg requirements for predictable and transparent legal provisions. However, he said that [59] could not be read in any way other than as an acceptance that the Respondent was right to conclude that the Rules could not be met in the relevant category. He also suggested that [65] and [66] of the Decision could not be read other than on the basis that the Judge recognised that there was some public interest in refusing to allow the Appellants to enter. Those paragraphs did not make any sense otherwise. What other public interest could there be?

26. Turning then to the delay, Mr Seddon pointed out that the time between the Respondent being required to reconsider the decisions and communicating those decisions to the Appellants was very lengthy. They were outside the UK in very difficult circumstances and had to bring a judicial review to force the Respondent to carry out the reconsideration. Even when that judicial review was settled by consent, the Respondent did not reconsider within the timeframe which he had agreed. Mr Seddon relied on the third category in EB (Kosovo) although he did accept that this might be a case where the impact of delay was a factor favouring the level of interference rather than one reducing the weight of the public interest (if it could not be said to be a delay giving rise to a dysfunctional system). As we understood Mr Clarke's reply on this point, he accepted that delay could be relevant in that way.

DISCUSSION

27. We begin with the ground challenging the Judge's reliance on delay as a factor reducing the public interest. We accept Mr Clarke's submission that, following EB (Kosovo), it cannot sensibly be argued that a delay of this nature has the effect of reducing the weight of the public interest. The three categories set out by the House of Lords address problems with the immigration system, either by failures to remove those who have no right to remain in the UK or by making decisions which are inconsistent and reflect problems with the operation of the system. The delay in this case is not of that nature. However, although the delay was not perhaps as lengthy as some which are encountered in immigration cases, it was exacerbated by the circumstances in which the Appellants were living.

28. We do not need to decide whether the delay was unlawful as such. It is enough that it could certainly be said to have increased the interference with the Appellants' family and private lives by keeping them out of the country for longer if the decision were to go in their favour. We accept that, at that point in time, the decision was adverse to them. There is of course no question of them strengthening family or private life ties in reliance on the delay. However, we consider that it could be a factor weighing in the Appellants' favour. Indeed, we did not understand Mr Clarke to disagree with that proposition. Whether it is a factor increasing the interference on the Appellants' side or diminishing the public interest on the Respondent's side is in our view irrelevant to the assessment of the balance. We therefore accept that, although there is an error of law in the way in which the Judge factored this into the assessment, the error is not material.

29. Turning then to the overall assessment of the public interest, we accept that the Judge has not properly considered this. He has failed to take into account against the Appellants that they are unable to meet the Rules, particularly the ADR Rules. We accept that they could never conceivably have done so because the ADR Rules are premised on the need for care of the adult dependent relative and that is not the basis of the Appellants' case. It is however relevant

to the public interest because that is the basis on which the Respondent considers that it is appropriate to permit an elderly relative to be admitted to the UK. It is a narrow reason but deliberately so. It reflects the balance struck by the Respondent in making the Rules between the rights of an individual and the interests of the State. We reject Mr Seddon's submission that the Judge implicitly had regard to the failure to meet the Rules. He did not refer to that failure nor apparently take it into account. He certainly cannot be said to have given weight to it.

30. That then brings us on to the failure to have regard to Section 117B. We accept that the Respondent has not expressly referred to that failure in his pleaded case. Equally, however, we consider that to flow from what is said about the failure to consider the public interest through the lens of the Rules.

31. We accept Mr Seddon's submission that much of Section 117B is not relevant. The Judge may have had some regard in passing to Section 117B when he says at [64] of the Decision that the Appellants will not become a drain on public funds because they are comfortably off (as are their family members in the UK). There may be an issue whether the Appellants speak English. We do not know if they do as they were not present at the hearing before us or that before the First-tier Tribunal.

32. The major factor though is the maintenance of effective immigration control and in particular, that the Appellants cannot meet any of the provisions of the Rules in order to enter the UK. It was suggested that they might be able to meet the Rules in relation to protection, but they have deliberately not made a claim on that basis and Mr Clarke did make some brief submissions in reply which suggested that they probably could not do so. It is not in any event something considered by the Judge. Equally, although the Appellants' sons have Tier 1 (entrepreneur) status and the business is said to be a family one, the Appellants have not made any application under the Rules on that basis and there was no suggestion that they could meet these or any other provisions of the Rules.

33. For those reasons, we are satisfied that the Judge has made errors of law by failing properly to consider the public interest and the Appellants' failure to meet the Rules.

34. However, that is not the end of the matter. If it finds an error of law, the Tribunal "may" but is not obliged to set aside the Decision. It may decide not to do so if the outcome is considered not to be affected by the errors. Equally, it would be open to us to set aside the Decision and re-make the Decision based on the Judge's unchallenged findings about the Appellants' circumstances without a further hearing. We record that Mr Seddon suggested that if we did set aside the Decision, we should permit further evidence given the passage of time since the previous hearing.

35. Having considered the evidence in this case very carefully, however, we have come to the conclusion that although the Judge made errors of law, the outcome

in this case was the appropriate one and would be the one which would be reached if the decision were re-made. For that reason we decline to set the Decision aside. We provide brief reasons as follows.

36. It is recognised that, even when an appellant is unable to meet the Rules, a decision can be made in his favour on the basis that removal (or here the refusal of entry) is disproportionate because there would be "unjustifiably harsh" consequences. We have regard in particular to what is said by the Supreme Court in Agyarko and Ikuga v Secretary of State for the Home Department [2017] UKSC 11:

> "60. It remains the position that the ultimate question is how a fair balance should be struck between the competing public and individual interests involved, applying a proportionality test. The Rules and Instructions in issue in the present case do not depart from that position. The Secretary of State has not imposed a test of exceptionality, in the sense which Lord Bingham had in mind: that is to say, a requirement that the case should exhibit some highly unusual feature, over and above the application of the test of proportionality. On the contrary, she has defined the word 'exceptional', as already explained, as meaning 'circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that the refusal of the application would not be proportionate'. So understood, the provision in the Instructions that leave can be granted outside the Rules where exceptional circumstances apply involves the application of the test of proportionality to the circumstances of the individual case, and cannot be regarded as incompatible with article 8. That conclusion is fortified by the express statement in the Instructions that 'exceptional' does not mean 'unusual' or 'unique': see para 19 above."

37. As we have already explained, the Appellants cannot meet the ADR Rules because the Respondent has made a deliberate policy choice that elderly relatives coming to the UK should only be permitted to do so where their care needs are such that they can only be catered for by relatives living in the UK. We take into account that the Appellants cannot meet that requirement.

38. However, the Appellants too are living in circumstances outside the UK which are extremely difficult. They cannot return to live in their home country for circumstances entirely outside their control. There is no other place that they can make their permanent home except for St Kitts and Nevis and they have no knowledge of life in that country. Their citizenship of the country is simply bought, no doubt as a fall-back protection. Their family life, as the Judge finds, is with their sons in the UK. There can be no question of their sons going to live with the Appellants elsewhere. Their sons cannot return to Syria either. There is no other country of which they are nationals. They have settled status in the UK.

39. We also take into account when looking at the public interest in the maintenance of effective immigration control that these Appellants have not sought to flout the Rules. They have been in the UK as visitors. They have not

overstayed their leave. This is not a case such as Agyarko where a family member has stayed in the UK without permission and has sought to use Article 8 to avoid removal. To that extent, the public interest in this case is perhaps less than in those cases. Nevertheless, in those cases, the Supreme Court accepted that if the removal would have unjustifiably harsh consequences, the family member with no right to be here should be permitted to remain. The same must be the position for a person in the Appellants' position who is seeking to enter.

40. Having taken into account the circumstances of the Appellants' case and the level of interference with their family lives, in particular, which refusal of entry would entail, when balanced against the public interest as set out above, in our assessment, the only appropriate conclusion is that the consequences of the refusal of entry are unjustifiably harsh and therefore disproportionate. We therefore decline to set aside the Decision on the basis that the outcome would be the same if the errors had not been made. Even if we had been persuaded that it was appropriate to set aside the Decision, we would have re-made the decision in the Appellant's favour for the foregoing reasons without any need to hear further evidence.

CONCLUSION

41. For all of the above reasons, we are satisfied that, although the Decision does contain errors of law, those errors are not material and/or that the Decision should not be set aside as the outcome would be the same. Accordingly, we uphold the Decision.

DECISION

We are satisfied that, although the Decision does contain errors of law, it should be upheld. We uphold the decision of First-tier Tribunal Judge Cockrill promulgated on 31 January 2018 with the consequence that the Appellants' appeals remain allowed.

Signed Dated: 11 July 2019
Upper Tribunal Judge Smith