Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/14430/2018 (V)**

THE IMMIGRATION ACTS

Heard at Field House by Skype
On 31 March 2021

Decision & Reasons Promulgated
On 14 April 2021

Before

THE HON. MR JUSTICE LANE, PRESIDENT
MR C M G OCKELTON, VICE PRESIDENT

Between

ASMA BEGUM
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr A Seelhoff, Solicitor, A Seelhoff Solicitors
For the respondent: Ms S Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

A. THE APPELLANT AND HER HUSBAND

1. The appellant is a citizen of Bangladesh, born in 1995. On 12 February 2018, she applied for entry clearance to the United Kingdom under Appendix FM to the Immigration Rules, on the basis of her family life with Shahin Ahmed, her British citizen husband, who is present and settled in the United Kingdom. The couple were married in Bangladesh in December 2016.

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B. THE IMMIGRATION RULES

2. The relevant provision for our purposes of Appendix FM are as follows:-

"Relationship requirements

E-ECP.2.1. The applicant's partner must be -

(a) a British Citizen in the UK, subject to paragraph GEN.1.3.(c); or

(b) present and settled in the UK, subject to paragraph GEN.1.3.(b); or

(c) in the UK with refugee leave or with humanitarian protection.

E-ECP.2.2. The applicant must be aged 18 or over at the date of application.

E-ECP.2.3. The partner must be aged 18 or over at the date of application.

E-ECP.2.4. The applicant and their partner must not be within the prohibited degree of relationship.

E-ECP.2.5. The applicant and their partner must have met in person.

E-ECP.2.6. The relationship between the applicant and their partner must be genuine and subsisting.

E-ECP.2.7. If the applicant and partner are married or in a civil partnership it must be a valid marriage or civil partnership, as specified.

E-ECP.2.8. If the applicant is a fiancé(e) or proposed civil partner they must be seeking entry to the UK to enable their marriage or civil partnership to take place.

E-ECP.2.9. Any previous relationship of the applicant or their partner must have broken down permanently, unless it is a relationship which falls within paragraph 278(i) of these Rules.

E-ECP.2.10. The applicant and partner must intend to live together permanently in the UK.

Financial requirements

E-ECP.3.1. The applicant must provide specified evidence, from the sources listed in paragraph E-ECP.3.2., of-

(a) a specified gross annual income of at least -

(i) £18,600;

(ii) an additional £3,800 for the first child; and

(iii) an additional £2,400 for each additional child; alone or in combination with

(b) specified savings of-

(i) £16,000; and

(ii) additional savings of an amount equivalent to 2.5 times the amount which is the difference between the gross annual income from the sources listed in paragraph E-ECP.3.2.(a)-(d) and the total amount required under paragraph E-ECP.3.1.(a); or

(c) the requirements in paragraph E-ECP.3.3. being met.

In this paragraph 'child' means a dependent child of the applicant or the applicant's partner who is

(a) under the age of 18 years, or who was under the age of 18 years when they were first granted entry under this route;

(b) applying for entry clearance as a dependant of the applicant or the applicant's partner, or is in the UK with leave as their dependant;

(c) not a British Citizen, settled in the UK, or in the UK; and

(d) not an EEA national with a right to be admitted to or reside in the UK under the Immigration (European Economic Area) Regulations 2006.

E-ECP.3.2. When determining whether the financial requirement in paragraph E-ECP. 3.1. is met only the following sources will be taken into account -

(a) income of the partner from specified employment or self-employment, which, in respect of a partner returning to the UK with the applicant, can include specified employment or self-employment overseas and in the UK;

(b) specified pension income of the applicant and partner;

(c) any specified maternity allowance or bereavement benefit received by the partner in the UK or any specified payment relating to service in HM Forces received by the applicant or partner;

(d) other specified income of the applicant and partner; and

(e) specified savings of the applicant and partner."

3. Appendix FM-SE (Family members – specified evidence) sets out the specified evidence which applicants need to provide, in order to meet the requirements of the rules contained in Appendix FM. At paragraph 13 of Appendix FM-SE (calculating gross annual income under Appendix FM), we find the following:-

"13. Based on evidence that meets the requirements of this Appendix, and can be taken into account with reference to the applicable provisions of Appendix FM, gross annual income under paragraphs E-ECP.3.1., E-LTRP.3.1., E-ECC.2.1. and E-LTRC.2.1. will, subject to paragraph 21A of this Appendix, be calculated in the following ways:

(a) Where the person is in salaried employment in the UK at the date of application, has been employed by their current employer for at least 6 months and has been paid throughout the period of 6 months prior to the date of application at a level of gross annual salary which equals or exceeds the level relied upon in paragraph 13(a)(i), their gross annual income will be (where paragraph 13(b) does not apply) the total of:

(i) The level of gross annual salary relied upon in the application;

(ii) The gross amount of any specified non-employment income (other than pension income) received by them or their partner in the 12 months prior to the date of application; and

(iii) The gross annual income from a UK or foreign State pension or a private pension received by them or their partner.

(b) Where the person is in salaried employment in the UK at the date of application and has been employed by their current employer for less than

6 months (or at least 6 months but the person does not rely on paragraph 13(a)), their gross annual income will be the total of:

(i) The gross annual salary from employment as it was at the date of application;

(ii) The gross amount of any specified non-employment income (other than pension income) received by them or their partner in the 12 months prior to the date of application; and

(iii) The gross annual income from a UK or foreign State pension or a private pension received by them or their partner.

In addition, the requirements of paragraph 15 must be met.

(c) Where the person is the applicant's partner, is in salaried employment outside of the UK at the date of application, has been employed by their current employer for at least 6 months, and is returning to the UK to take up salaried employment in the UK starting within 3 months of their return, the person's gross annual income will be calculated:

(i) On the basis set out in paragraph 13(a); and also

(ii) On that basis but substituting for the gross annual salary at paragraph 13(a)(i) the gross annual salary in the salaried employment in the UK to which they are returning.

(d) Where the person is the applicant's partner, has been in salaried employment outside of the UK within 12 months of the date of application, and is returning to the UK to take up salaried employment in the UK starting within 3 months of their return, the person's gross annual income will be calculated:

(i) On the basis set out in paragraph 13(a) but substituting for the gross annual salary at paragraph 13(a)(i) the gross annual salary in the salaried employment in the UK to which they are returning; and also

(ii) On the basis set out in paragraph 15(b).

(e) Where the person is self-employed, their gross annual income will be the total of their gross income from their self-employment [(and that of their partner if that person is in the UK with permission to work)], from any salaried or non-salaried employment they have had or their partner has had (if their partner is in the UK with permission to work), from specified non-employment income received by them or their partner, and from income from a UK or foreign State pension or a private pension received by them or their partner, in the last full financial year or as an average of the last two full financial years. The requirements of this Appendix for specified evidence relating to these forms of income shall apply as if references to the date of application were references to the end of the relevant financial year(s). The relevant financial year(s) cannot be combined with any financial year(s) to which paragraph 9 applies and vice versa.

(f) Where the person is self-employed, they cannot combine their gross annual income at paragraph 13(e) with specified savings in order to meet the level of income required under Appendix FM.

(g) Where the person is not relying on income from salaried employment or self-employment, their gross annual income will be the total of:

(i) The gross amount of any specified non-employment income (other than pension income) received by them or their partner in the 12 months prior to the date of application; and

(ii) The gross annual income from a UK or foreign State pension or a private pension received by them or their partner.

(h) Where the person is the applicant’s partner and is in self-employment outside the UK at the date of application and is returning to the UK to take up salaried employment in the UK starting within 3 months of their return, the person’s gross annual income will be calculated:

(i) On the basis set out in paragraph 13(a) but substituting for the gross annual salary at paragraph 13(a)(i) the gross annual salary in the salaried employment in the UK to which they are returning; and also

(ii) On the basis set out in paragraph 13(e).

(i) Any period of unpaid maternity, paternity, adoption, parental or sick leave in the 12 months prior to the date of application will not be counted towards any period relating to employment, or any period relating to income from employment, for which this Appendix provides.

(j) The provisions of paragraph 13 which apply to self-employment and to a person who is self-employed also apply to income from employment and/or shares in a limited company based in the UK of a type to which paragraph 9 applies and to a person in receipt of such income.

(k) Where the application relies on the employment income of the applicant and the sponsor, all of that income must be calculated either under subparagraph 13(a) or under sub-paragraph 13(b) and paragraph 15, and not under a combination of these methods.”

C. THE RESPONDENT’S DECISION

4. On 7 June 2018, the respondent refused the appellant’s application for entry clearance. The letter of refusal had this to say about the eligibility financial requirement, which was the only matter at issue:-

“**Eligibility Financial Requirement**

You have stated in your Visa Application Form that you meet the financial requirement through salaried employment. I am not able to take into account any potential employment you have available to you in the UK or any offers of financial support from third parties. In order to meet the financial requirements of Appendix FM your sponsor needs a gross income of at least £18,000 per annum. You state that your sponsor is employed by Renowned Investments Limited since 01/04.2917 and earns an annual salary of £30,000. As evidence of your sponsor’s employment you have submitted 6 months’ payslips covering the period August 2017 to January 2018 and Lloyds Bank statements covering the period August 2017 to January 2018.

The Immigration Rules state that in respect of salaried employment in the UK, all of the following evidence must be provided.

(a) Payslips covering

(i) a period of 6 months prior to the date of application if the person has been employed by their current employer for at least 6 months (and where paragraph 13(b) of this Appendix does not apply); or (ii) any period of salaried employment in the period of 12 months prior to the date of application if the person has been employed by their current employer for less than 6 months (or at least 6 months but the person does not rely on paragraph 13(a) of this Appendix), or in the financial year(s) relied upon by a self-employed person.

(b) A letter from the employer(s) who issued the payslips at paragraph 2(a) confirming: (i) the person's employment and gross annual salary; (ii) the length of their employment; (iii) the period over which they have been or were paid the level of salary relied upon in the application; and (iv) the type of employment (permanent, fixed-term contract or agency).

(c) Personal bank statements corresponding to the same period(s) as the payslips at paragraph 2(a), showing that the salary has been paid into an account in the name of the person or in the name of the person and their partner jointly.

- You have provided payslips for this employment covering the period August 2017 – January 2018. I note the amount on the pay slips from June 2018 onwards does not match the amounts being paid in to your bank account with no explanation for this.
- You have not provided a letter from the employer confirming salary, length of employment, period showing level of salary paid or employment type.
- You have submitted bank statements issued by Lloyds Bank (account number ending **63) covering the period August 2017 – January 2018. There are discrepancies between the payment amounts on the payslips and those credited on the bank statements with no explanation for this.

In addition we attempted to contact your employer during a routine interview multiple times on 27/02/2018 and 02/03/2018, however, we were unable to speak with your employer to verify your employment.

Furthermore I do not find it credible that your employer can conduct a business with volunteers which included yourself and then to offer employment to yourself on a salary of £30,000. Given the above, I am satisfied on the balance of probabilities that your sponsor is not genuinely employed as stated.

To summarise you have not provided a letter from the employer confirming salary, length of employment period showing level of salary paid or employment type. The amounts shown on the payslips differ from those paid in to the bank account from June onwards. We attempted to call your employer during a routine interview multiple times on 27/02/2018 and 02/03/2018, we were unable to contact them to verify your employment.

I therefore refuse your application under paragraph EC-P.1.1 (c) (d) of Appendix FM of the Immigration Rules (E-ECP.3.1)"

5. The respondent did not consider that there were exceptional circumstances in the appellant's case, which would render refusal a breach of Article 8 of the ECHR because it could or would result in unjustifiably harsh consequences for her or her family. The respondent therefore refused the application.

D. THE APPEAL

6. It is common ground that the refusal of the application constituted the refusal of a human rights claim made by the appellant. Accordingly, the refusal gave rise to a right of appeal to the First-tier Tribunal under section 82 of the Nationality, Immigration and Asylum Act 2002. Section 113(1) provides that a "human rights claim" means a claim made by a person that (amongst other things) to refuse her entry into the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998. Section 6 prohibits a public authority from acting contrary to the ECHR. Section 84(2) of the 2002 Act states that an appeal under section 82(1)(b) (Refusal of a human rights claim) must be brought on the ground that the decision is unlawful under section 6 of the 1998 Act.

7. The appellant appealed to the First-tier Tribunal. Following a hearing at Taylor House on 17 May 2019, First-tier Tribunal Judge Gibb dismissed the appellant's appeal in a decision promulgated on 24 June 2019. At paragraph 6 of his decision, the judge noted that any matters relevant to the substance of the decision under appeal can be considered by the First-tier Tribunal, including those arising after the date of decision (section 85(4) of the 2002 Act).

8. The judge heard evidence from the sponsor, who was cross-examined. The sponsor told the judge that he had stopped working for Renowned Investments Ltd in April 2018 and had become self-employed.

9. Under the heading "Findings" the judge said as follows:-

> "16. The sponsor was not a clear witness, but having said that the evidence that he gave about his previous employment was supported by a range of unchallenged evidence. In particular there was an employer's letter and an employment contract, supported by two documents from HM Revenue & Customs, both of which showed his income, along with tax and national insurance paid, between May 2017 and April 2018. The minor concerns that arose from the telephone interview that the Entry Clearance Officer conducted with the sponsor were adequately addressed, as was the issue of the small difference in amount between the payslips and the credits to the bank statement. I also accept that the sponsor's previous employer was in fact registered on Companies House. The record of this provided by the appellant's Counsel was not challenged at the hearing. Looking at all of this as a whole, particularly the documentary evidence from HMRC and Companies House, my finding is that the sponsor has established on the balance of probabilities that he was genuinely employed as claimed by Renowned Investments Limited between April 2017 and April 2018, and that he was earning in excess of the required £18,600.
>
> 17. I was not invited to make any findings as to the sponsor's financial circumstances at the date of hearing. It was accepted that, having recently become self-employed, and set up his own company, he was not in a position to provide any documentary evidence to establish his income."

10. At paragraph 18, the judge said that he had decided to dismiss the appeal. His reasons can be summarised as follows. The judge considered it to be "a matter of

considerable concern" that considerable time and effort had been spent in showing that the respondent's reasons for refusing the application were unjustified. This was because, in the judge's view, the appeal "could not succeed given the change in the sponsor's circumstances since the date of decision". The entire focus of the appellant's representatives had been on the position at the date of the respondent's decision, and on countering the points made by the respondent in the letter of refusal. The judge considered that the representatives had "missed the glaringly obvious point that successfully countering the refusal would not lead to an outcome in the appellant's favour, where the sponsor no longer met the financial requirements by the date of the hearing". The judge said that "even in the days when there were appeals that focussed on the date of decision, it was still always the case that entry clearance would not have been granted if relevant circumstances had altered following the date of decision".

11. At paragraph 20, the judge concluded that, in the light of his findings, "the decision [of the respondent] was not justified, in that the appellant has established that he was employed as claimed. The suitability point falls with the point about his earnings". The judge acknowledged that this "may lead the appellant and the sponsor to feel a sense of injustice, in that if the decision had been correct, entry clearance might have been granted". Nevertheless, according to the judge, from the moment the sponsor left his job in April 2018, "the entire legal position changed". Success for the appellant was, thereafter, "going to depend on the sponsor gathering together and presenting sufficient evidence to establish earnings over the required level".

12. At paragraph 21, the judge accepted that there "may be certain cases where an appeal can succeed on Article 8 grounds even where the financial and specified evidence requirements are not met". The judge observed, however, that no submission to that effect had been made in the present case. There was no mention in the witness statements or other documents "that could form the basis of an exceptional circumstances Article 8 argument".

E. PERMISSION TO APPEAL

13. Permission to appeal to the Upper Tribunal was refused by the First-tier Tribunal on 13 September 2019. On 10 October 2019, the Upper Tribunal refused the appellant's renewed application for permission. The grounds of application were drafted by the appellant's present solicitor, Mr Seelhoff, who had not appeared before First-tier Tribunal Judge Gibb.

14. Mr Seelhoff's grounds submitted that the First-tier Tribunal judge had failed to follow the process of questions and answers set out by Lord Bingham in R (Razgar) v Secretary of State for the Home Department [2004] UKHL 27 at paragraph 17. The questions are:-

> "(1) Will the proposed removal [or, as here, refusal to admit] be an interference by a public authority with the exercise of the … right to respect for his private or [as the case may be] family life?

> (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?
>
> (3) If so, is such interference in accordance with the law?
>
> (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?
>
> (5) If so, is such interference proportionate to the legitimate public end sought to be achieved?"

15. The grounds drew attention to the fact that, in paragraph 13 of Appendix FM-SE, where a person is in salaried employment in the United Kingdom, what is required to be shown is evidence of such employment, with the same employer, for at least six months; and evidence of pay throughout the period of the six months prior to the date of application, at a level of gross annual salary that equals or exceeds the level relied upon. The gross amount of any specified non-employment income is also to be determined by reference to income received in the twelve months prior to the date of application.

16. In the light of the positive findings by First-tier Tribunal Judge Gibb, the grounds contended that the appellant had satisfied the requirements of the relevant Immigration Rules. This meant that the respondent could not point to the importance of maintaining immigration controls as a factor weighing in her favour, in striking the proportionality balance under ECHR Article 8. In refusing to allow the appeal, the judge had effectively imported into the Rules a requirement that is not present in them; namely, a requirement to maintain income at the specified level throughout the duration of the period of initial entry clearance/leave to remain as a partner under Appendix FM. According to the grounds, the "requirement is clearly only to prove an ability to earn at the level at the date of application".

F. JUDICIAL REVIEW

17. Following the refusal of permission by the Upper Tribunal, the appellant sought judicial review of that refusal, by application to the High Court under CPR 54.7A. On 10 December 2019, Mostyn J granted permission to bring judicial review. Citing the case of Marbury v Madison (1803) 5 U.S. (1 Cranch) 137 for the proposition "that where there is a right there must be a remedy", Mostyn J said:-

> "In my provisional opinion to say that the appeal hearing is in fact no more than a complete re-hearing, giving only cursory weight to the original decision, robs section 82(1)(b) of its true meaning. That provision allows an appeal against a decision of the Secretary of State. It does not merely say that the tribunal can make a new decision on new evidence. The provision allows the decision to be challenged, root and branch. The provision grants a right and in vindication of that right there must be an effective remedy. That remedy was denied to the appellant in this case."

18. Following the quashing, by High Court Order, of the refusal of permission, the application for permission accordingly comes before the Upper Tribunal to be

decided afresh. With the helpful consent of Ms Cunha, we found that permission should be granted to the appellant. Having granted permission orally, dispensing under rule 7 of the Tribunal Procedure (Upper Tribunal) Rules 2008 with the relevant procedural requirements, we proceeded to hear submissions from Mr Seelhoff and Ms Cunha on the substantive appeal.

G. DISCUSSION

19. Ms Cunha confirmed that the respondent did not take issue with the conclusion of the First-tier Tribunal Judge that the decision taken in respect of the Immigration Rules was wrong, in that, as at the date of application, the appellant did, in fact, meet the requirements of those Rules. The question, therefore, is whether the judge was right to hold that the human rights appeal nevertheless fell to be dismissed. It is plain that the judge reached his conclusion because of his view that "the entire legal position changed" when the sponsor left his salaried employment in April 2018 and became self-employed.

20. There can be only two reasons why the First-tier Tribunal Judge would have been entitled to reach such a conclusion. The first would be if the Rules were framed in such a way that the appellant not only had to show her husband was in the requisite employment at the date of application (and had been in it for the past six months), but also that he had continued in that employment, not only at the date of the respondent's decision but also at the date of the hearing of the appellant's appeal. In this scenario, the appellant's failure to meet the requirements of the Rules would have meant she could only succeed in her human rights appeal by showing that her exclusion from the United Kingdom would still represent a disproportionate interference with Article 8 family life. In other words, she needed to make a case for admission on human rights grounds, outside the Rules. As the judge remarked, no such case was advanced on behalf of the appellant.

21. The second reason why the judge would have been entitled to dismiss the appeal would be if he had reason to conclude that, even though the appellant met the requirements of the Rules, it was nevertheless not a disproportionate interference with Article 8 rights to refuse her admission.

22. It is clear from paragraphs 19 and 20 of his decision that the First-tier Tribunal Judge based his dismissal of the appeal on the first reason. He was of the view that the Immigration Rules relating to income from employment have the "ambulatory" character described in paragraph 20 above.

23. At the end of paragraph 19 of his decision, we have seen how the judge recalled that, even in the days when appeals were focussed on the date of decision, it was still the position that entry clearance would not be granted, if relevant circumstances had altered. This was, however, because the pre-July 2012 Rules possessed an ambulatory or forward-looking nature. An applicant had to show that there *would be* adequate maintenance, without recourse to public funds, during the currency of the leave granted by the respondent. The question is whether that is still the position.

24. It is well-established that the Immigration Rules are to be given their ordinary meaning: Mahad v Entry Clearance Officer [2009] UKSC 16. As we have seen, E-ECP.3.1. requires the applicant to "provide specified evidence from the sources listed … of … a specified gross annual income of at least … £18,600". E-ECP.3.2. provides that only certain specified sources of income will be taken into account "when determining whether the financial requirement in paragraph E-ECP.3.1. is met". None of these provisions can, in our view, properly be construed as imposing any sort of ambulatory requirement to continue in the relevant employment, beyond the date of application. That conclusion is reinforced when one examines paragraph 13 of Appendix FM-SE. This paragraph is firmly focussed on the past six months or, in some cases, twelve months, preceding the date of application. The only exception is at paragraph 13(c) and (d), where the applicant's partner has been outside the United Kingdom but is returning to salaried employment within it. Even here, however, the reference to paragraph 15(b) of Appendix FM-SE focusses attention on relevant earnings over the previous twelve months. Particularly given the amount of detail in paragraph 13, it would have been perfectly possible for the respondent to make specific provision if, in the case of the partner's employment in the United Kingdom, the employment in question (or some at least equally remunerative alternative) has to subsist beyond the date of application. One looks in vain for any such provision.

25. The terms of the financial requirements in E-ECP.3.1. also stand in stark contrast with those of E-ECP.3.4., where the applicant "must provide evidence that there *will be* adequate accommodation, without recourse to public funds, for the family …" (our emphasis). E-ECP.3.4. is, thus, a forward-looking provision, with the result that any materially adverse change in the accommodation position after the date of application will amount to a change in circumstances.

26. What this means is that, if any such change in the accommodation relied on occurs before the respondent makes her decision on the application, paragraph 27 of the Immigration Rules entitles the respondent to refuse the application. Paragraph 27 provides that an "application for entry clearance is to be decided in the light of the circumstances existing at the time of the decision …". In addition, if a person is granted entry clearance (and, thereby, leave to enter) but an Immigration Officer establishes, at the port of entry, that "there has been such a change in the circumstances of that person's case since the leave was given, that it should be cancelled", paragraph 321A of the Immigration Rules provides for the cancellation of the leave.

27. Since the Immigration Rules have been framed in such a way as to fix the relevant financial requirements at the date of application, it follows that rule 27 does not enable the respondent to refuse an application on the basis that the evidenced employment has ceased, after the date of application. Likewise, paragraph 321A does not enable the respondent to cancel leave to enter at port, since there has been no change of circumstances in this scenario.

28. Although the present case does not involve the points-based system of Immigration Rules ("PBS"), the provisions of Appendix FM-SE share much in common with it, so

far as concerns the highly prescriptive nature of the specified evidence requirements. In the context of the PBS, the Higher Courts have been at pains to explain that the reduction in administrative discretion and in the risk of inconsistent decision-making comes at a price: see eg Mandalia v Secretary of State for the Home Department [2015] UKSC 59, paragraph 2; R (Pathan) v Secretary of State for the Home Department [2020] UKSC 41, paragraphs 1, 65, 68; R (Taj) v Secretary of State for the Home Department [2021] EWCA Civ 19, paragraph 57. An individual who might objectively be regarded as worthy of leave to enter or remain – and who may under the previous regime have merited the exercise of discretion in their favour - can nevertheless now be denied leave, as a result of the mechanistic operation of the PBS. The PBS rules do not fall to be judicially re-written, in order to favour such an individual. It seems to us that the present case is an example of the other side of this coin. The respondent has decided that earnings from employment will be determined wholly by reference to the position up to (but not beyond) the date of application. That is her choice. But, just like the unsuccessful individuals in the cases just mentioned, she cannot expect the Tribunal to interpret the Rules in order to give her the best of both worlds.

29. The First-tier Tribunal judge was, therefore, wrong to dismiss the appeal on the basis that the appellant did not meet the requirements of the Immigration Rules at the date of the hearing. That error would not, nevertheless, be a material one if the appeal would still have fallen to be dismissed for the second reason, set out in paragraph 21 above.

30. This means we must assess the significance in a human rights appeal of the fact that the appellant meets the requirements of the Immigration Rules, which the respondent considered she did not meet. The basic position is now settled. As explained in Charles (human rights appeal: scope) [2018] UKUT 00089 (IAC), the significance lies in the application of the "Razgar questions" (see paragraph 14) above. If both questions (1) and (2) are answered in the affirmative, we enter the realm of Article 8(2). This provides:-

> "(2) There should be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

31. As was pointed out at paragraph 58 of Charles, the requirement, addressed in question (3), that the interference be "in accordance with the law" can still be met, even if the application of that law in the particular circumstances of an individual case involves an error on the part of the respondent. Both Strasbourg and domestic authority holds that the nature of question (3) is whether the proposed interference has a proper basis in domestic law, including whether that law is accessible to the person concerned and foreseeable as to its effects. We consider that the relevant provisions of Appendix FM and Appendix FM-SE have such a proper basis and are

sufficiently accessible and foreseeable. Question (3) is therefore answered in the affirmative.

32. Given that the Article 8 interference inherent in the minimum income requirement of these provisions of the Rules has been held by the Supreme Court in MM (Lebanon) and Others v Secretary of State for the Home Department [2017] UKSC 10 not to be inherently unlawful, question (4) falls to be answered in the affirmative.

33. As is almost always the position in cases of this kind, the only real issue is, thus, whether the interference is proportionate to the legitimate public end sought to be achieved. In OA and Others (human rights; "new matter"; s.120 Nigeria [2019] UKUT 65 (IAC), paragraph 1 of the headnote reads:-

> "*(1) In a human rights appeal under section 82(1)(b) of the Nationality, Immigration and Asylum Act 2002, a finding that a person (P) satisfies the requirements of a particular immigration rule, so as to be entitled to leave to remain, means that (provided Article 8 of the ECHR is engaged), the Secretary of State will not be able to point to the importance of maintaining immigration controls as a factor weighing in favour of the Secretary of State in the proportionality balance, so far as that factor relates to the particular immigration rule that the judge has found to be satisfied.*"

34. In the same vein, Sir Ernest Ryder, Senior President of Tribunals held in TZ (Pakistan) and Another v Secretary of State for the Home Department [2018] EWCA Civ 1109 that:-

> "Where a person satisfies the rules, whether or not by reference to an article 8 informed requirement, then this will be positively determinative of that person's article 8 appeal, provided their case engages article 8(1), for the very reason that it would then be disproportionate for that person to be removed." (paragraph 34)

35. Those cases were concerned with persons, all of whom were in the United Kingdom. There is, however, in our view no relevant difference between that category of case and the one with which we are concerned; namely, an entry clearance case in which an individual wishes to live with his or her settled partner in the United Kingdom. As Lord Wilson held at paragraph 44 of MM:-

> "… while the Strasbourg court has not found it necessary to carry out the article 8(2) proportionality analysis in family unification cases, this Court has adopted that approach in *Huang* [[2007 UKHL 11] *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41 … *Quila* [2011] UKSC 45 , *Zoumbas v Secretary of State for the Home Department* [2013] UKSC 74… and in *Bibi* [2015] UKSC 68 … As this Court has also held in *Hesham Ali v Secretary of State for the Home Department* [2016] UKSC 60 … there is no objection to our employing this useful analytic tool. The issue is always whether the authorities have struck a fair balance between the individual and public interests and the factors identified by the Strasbourg court have to be taken into account, among them the "significant weight" which has to be given to the interests of children".

36. There may, of course, be situations in which, even though a person shows on appeal that they meet the requirement of a particular rule, which the respondent wrongly

concluded that person did not meet, and which led the respondent to refuse the application, circumstances have, nevertheless, come to light that mean the respondent can legitimately invoke some other provision of the Rules, in order to deny entry. For example, it may subsequently appear that deception has been employed or that the applicant has behaved in such a way that public policy requires their exclusion. One can also envisage an extreme case where, whether or not the Rules make express provision for it, the true position is such that the very purpose of Article 8 would be subverted by allowing entry. Such a situation would, in our view, arise where, in an entry clearance case involving marriage, cogent evidence emerges to show that the applicant has undergone a forced marriage and that it would be contrary to her human rights if she were to be admitted in order to live with her husband in the United Kingdom. In this regard, it is important to bear in mind the general purpose of Appendix FM, which is to give effect to Article 8 considerations.

37. There is, however, no suggestion whatsoever in the present case that any such hypothetical situation may exist. The refusal of entry clearance was entirely due to the respondent's view about the sponsor's ability to meet the financial requirements of the Rules by virtue of employment. The First-tier Tribunal found that view was wrongly held. That mistaken view continues to be the sole ground for refusal. As such, the present case falls squarely within the scope of cases envisaged in OA and TZ (Pakistan). It would manifestly be a disproportionate interference with the Article 8 family life that exists between the appellant and her husband for the respondent to refuse the appellant entry clearance.

DECISION

The decision of the First-tier Tribunal contains the making of an error on a point of law. We set that decision aside and substitute a decision allowing the appellant's appeal on Article 8 grounds.

No anonymity direction is made.

Mr Justice Lane

12 April 2021

The Hon. Mr Justice Lane
President of the Upper Tribunal
Immigration and Asylum Chamber