Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/04139/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7 March 2018	**On 3 April 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

ENTRY CLEARANCE OFFICER

Appellant

and

MR ZAKARIA AHMED ALI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms A Everett, Home Office Presenting Officer
For the Respondent: Mr C Jacobs, Counsel, instructed by Minority Development & Advocacy

DECISION AND REASONS

Background

1. The appellant is a citizen of the United States of America, born on 1 January 1980, who appealed the decision of an Entry Clearance Officer dated 25 January 2016 to refuse the appellant's application for entry clearance as a partner under Appendix FM on the basis that the appellant had failed to evidence that there would be adequate maintenance and accommodation available to the appellant.

2. In a decision promulgated on 20 June 2017 Judge of the First-tier Tribunal Miles allowed the appellant's appeal on human rights grounds under Article 8 ECHR, which, it was not disputed, was the only ground of appeal.

3. The appellant before the First-tier Tribunal was Mr Zakaria Ahmed Ali. The appellant before the Upper Tribunal was the Entry Clearance Officer. However, for the purposes of this Decision and Reasons I refer to the parties as they were before the First-tier Tribunal.

4. The Secretary of State appeals with permission on the grounds that:

   (1) Ground 1: the judge made a material misdirection in law in allowing the appeal on the basis that that appellant automatically satisfies the financial requirements by virtue of the receipt by the sponsor of the carer's allowance;

   (2) It was further submitted that the Tribunal erred in failing to provide adequate reasons as to why the appeal succeeded under Article 8, particularly as the couple have lived apart for almost ten years with no attempt by the couple to be reunited and that this had been a choice and the decision caused no breach as it simply maintains the status quo.

Error of law discussion

5. Mr Jacobs accepted that the provisions of EC-P.1.1 required an applicant, in addition to showing that their partner was in receipt of one of the qualifying benefits (it is not disputed that the sponsor is in receipt of carer's allowance) also had to show, under E-ECP.3.3(b), that their partner was able to maintain themselves, the applicant and any dependants adequately in the UK without recourse to public funds.

6. The Tribunal Judge misdirected himself in stating, as he did at page 3 of the Decision and Reasons (in which the paragraphs were, unfortunately, unnumbered) that the financial requirements of Appendix FM can be satisfied where the applicant's partner is in receipt of carer's allowance, E-ECP.3.3(a)(v). He failed to give adequate reasons or indeed any reasons as to why the appellant satisfied the requirements for adequate maintenance and accommodation or to address the respondent's concerns that, following the relevant formula, the appellant's income was not adequate.

7. Although Mr Jacobs submitted that the error was not material given the evidence before me I do not agree. The First-tier Tribunal failed to consider the evidence as to whether the funds available to the appellant and his sponsor were adequate, given that the judge continued under the misdirection that receipt of carer's allowance was sufficient in itself.

8. Although this was an appeal under Article 8 and the judge gave reasons (including the history of the case and that the appellant had previously been granted limited leave as the sponsor and this was interrupted by him being required to return to the United States to care for his sick father and that the couple have a disabled child, whose welfare must be given significant weight) the judge also took into consideration that in his findings the requirements of Appendix FM were met. It cannot be said, therefore, that the decision would inevitably have been the same if he had properly considered the issue of adequacy of maintenance.

Error of law

9. I find, therefore, a material error of law in the decision of the First-tier Tribunal. I preserve the Tribunal's findings of fact other than the finding that the receipt of carer's allowance is enough in itself to satisfy the requirements of E-ECP.3.3.

Remaking the Decision

10. Both parties before me confirmed that they were in a position to proceed. I heard oral evidence from the sponsor, who gave evidence in English and adopted her witness statement. The sponsor gave evidence in relation to the benefits that she is in receipt of and her representatives also provided a handwritten schedule to the Tribunal setting out how it was argued the appellant would now have adequate maintenance available to him.

11. Ms Everett accepted that the Tribunal could take into consideration matters arising after the date of the decision; the decision was reached after 6 April 2015 by virtue of the Immigration Act 2014 (Commencement No. 4, Transitional and Saving Provisions and Amendment) Order 2015, 2015 No. 371 (C. 18) there is no longer a restriction on consideration of evidence restricted to the date of decision.

12. In terms of adequacy of maintenance it was not disputed that the relevant formula is as set out by the respondent in the refusal letter (see **Ahmed (benefits; proof of receipt; evidence) [2013] UKUT 00084 (IAC))** i.e. that the formula is A minus B and this must be greater than or equal to C; where A is the projected net income after deduction of income tax and national insurance contributions, B is housing costs, i.e. what needs to be spent on accommodation, and C is the amount of income support that would be received by a British family of equivalent size.

13. The appellant's representative provided figures for the sponsor as follows:

Benefits received per Week		
Child tax credit	£279.00	
Child benefit	£61.00	
Carer's allowance	£62.00	
Disability allowance £310 ÷ 4 =	£77.50	
Housing benefit	£149.00	
Total per week		**£628.50**

Income Support per Week		
Couple:	£114.85	
Dependent children £66.90 x 4 =	£267.60	
Family premium	£17.45	
Carer premium	£34.60	
Disabled child	£60.06	
Total		**£494.56**

14. The sponsor's net income therefore is £628.50. The housing costs, in my findings, are £149. The sponsor confirmed in oral evidence that she did not pay any additional housing costs and the £149 benefit per week for housing was the sum total of her housing costs. Therefore, the calculation must be £628.50 minus £149, giving a total of £478. It was not disputed before me that this is just (almost £17) of the total requirement of £494.56, the amount of income support that would be received by a British family of equivalent size.

15. However, there was also considerable evidence before me in relation to the financial position of the appellant in the United States, including evidence of savings in the UK of almost £5,000 and evidence of income in the United States of approximately $4,000 a month and bank statements indicated that the sponsor had fluctuating amounts of savings in his US bank account and that as of 11 May 2017 there was a balance of $7,000 in his account. I accept, including relying on the documentary evidence and the consistent oral evidence of the sponsor, which was not substantively challenged by Ms Everett, that the appellant's financial circumstances are as claimed. In addition, I accept the evidence of the sponsor, which again was not challenged, that her husband also owns a truck worth approximately $40,000, which is an asset he intends to sell when he is in a position to enter the UK.

16. Ms Everett could not point to any provision to support the contention that the appellant was unable to rely on his own savings and assets, ensuring that there was adequate maintenance.

17. It was not disputed and I preserve the findings of the First-tier Tribunal Judge that the appellant had demonstrated that there was adequate accommodation available to the family and these findings were not challenged. Considering the totality of the documentary and oral evidence before me I am satisfied that the appellant meets the requirements of Appendix FM E-ECP.3.3(a) and (b) and that there is adequate maintenance and accommodation available to the sponsor to maintain the appellant and any dependants without recourse to public funds. Even if I am wrong in relation to the ability of the appellant to rely on his own assets and savings, such is not fatal to my ultimate conclusion that this appeal falls to be allowed.

18. Under Article 8 I have applied the five-stage test set out in **Razgar** [2004]. I am satisfied that family life exists and has continued to exist. I accept the oral and written evidence of the sponsor and I also had the benefit of a witness statement from the appellant. It is clear that the relationship between the couple has endured despite the fact that they have lived apart for ten years and the sponsor gave evidence that during the winter the appellant would come to the UK to stay for an extended period and during the summer she and the children would travel to the US and that their lives had continued in this way. I accept the reasons why the appellant had to leave the UK in 2006, given that his father suffered a heart attack in the United States, and that he was then unable to return on his two year spousal visa. I am satisfied that the decision of the Entry Clearance Officer interferes with that family life and given the low threshhold would potentially constitute a breach of Article 8. The decision is in accordance with the law and for the purposes of immigration control. I turn therefore to whether or not the decision is proportionate.

19. In so doing I take into consideration the provisions of Section 117 of the Nationality, Immigration and Asylum Act 2002, the public interest considerations applicable in all cases. I accept that the maintenance of effective immigration control is in the public interest. It was not disputed that the appellant could speak English and Ms Everett confirmed that she took no point in this regard. I have also considered that it is in the public interest that persons seeking to enter the UK are financially independent. In considering in my findings that the appellant is financially dependent, therefore, no weight is attached to the public interest in this regard. I take into consideration that he has considerable savings, that he previously worked in the UK and intends to work on his return and in addition the combination of his savings and the benefits to which the sponsor is entitled are sufficient to adequately maintain the appellant such that he will be financially independent.

20. I accept the sponsor's evidence that she received poor advice in relation to the appellant's re-entry to the UK. Although I accept that the regime in relation to the requirements of Appendix FM and the maintenance level did not come into force until 2012 when the appellant has been outside the UK since 2006, the sponsor was candid in her evidence that she was unsure when exactly she and the appellant started their research and obtained advice in relation to his return to the UK. I also take into consideration that the evidence indicates that the appellant tried to return to London on his original visa and had not realised that it was no longer valid given his absence from the UK.

21. The sponsor also gave evidence that the sponsor's mother had a difficult relationship with the appellant and this in part affected the decision to return although I note the application to return was made in September 2015, prior to the death of the sponsor's mother in August 2016. I accept that the sponsor may well have received (erroneous) evidence prior to that date and indeed prior to 2012 that at that point they did not meet the financial threshold because she had become a full-time carer. I further accept the evidence that the couple realistically considered the prospect of the family moving to the United States but that they took into consideration that this would be potentially damaging to the health and development of their son I, who has been diagnosed with autism. Such was not disputed. The life of the family has continued through these visits and indeed three or four of their children have been born whilst the appellant has been residing overseas. However, I am satisfied that the separation is not one of choice and that throughout this time it has been the intention of the family to reunite subject to obtaining the correct immigration permission.

22. In considering the appellant's appeal I have considered the best interests of the children as a primary consideration. Absent any evidence to the contrary it is in the children's best interests to reside with both parents and I accept that this is the case in this appeal. All the evidence both oral and documentary points to the appellant and the sponsor both being committed parents to all of their children and I take into consideration that there were letters before me from the children indicating that they want their father to stay in the UK for good. There was also evidence in the form of a medical letter for I dated 17 May 2017 which confirmed that he suffers from autism, developmental delay and weakness in his muscles. It indicated that his mother struggles to care for him, particularly as he gets bigger, and that he requires his

father's help. I am satisfied that the best interests of the children are best served in being reunited with their father.

23. Taking into consideration all the factors, including that I am satisfied that on balance that the maintenance requirements are satisfied and that the appellant therefore meets the requirements of Appendix FM (and even if they were not I am of the view that this is a case where refusal would be disproportionate taking into account all the factors discussed above) I am satisfied that the appeal falls to be allowed.

Notice of Decision

The decision of the First-tier Tribunal contains an error of law. I remake the decision allowing the appeal on human rights grounds.

No anonymity direction sought or made.

Signed Date: 28 March 2018

Deputy Upper Tribunal Judge Hutchinson

TO THE RESPONDENT
FEE AWARD

No fee award application was sought or is made.

Signed Date: 28 March 2018

Deputy Upper Tribunal Judge Hutchinson