



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Numbers: HU/25950/2016  
HU/26536/2016

**THE IMMIGRATION ACTS**

Heard at Field House  
On 12<sup>th</sup> September 2018

Decision & Reasons Promulgated  
On 24<sup>th</sup> September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR MARCELO GUERRA BUSTAMANTE (1)  
MISS AMIRAH ANTIGO BUSTAMANTE (2)  
(ANONYMITY DIRECTION NOT MADE)

Respondents

**Representation:**

For the Appellant: Ms N Willocks-Briscoe, Home Office Presenting Officer  
For the Respondents: Ms C Simpson, Counsel

**DECISION AND REASONS**

1. The Appellants are citizens of the Philippines born respectively on 2<sup>nd</sup> December 1958 and 26<sup>th</sup> September 1995. They are father and daughter. On 28<sup>th</sup> June 2016 they applied for leave to remain in the United Kingdom based on the grounds that their family life

as a partner (in respect of the first Appellant) and private life. Those applications were refused by Notice of Refusal dated 8<sup>th</sup> November 2016. The Appellants appealed and the appeal came before Judge of the First-tier Tribunal Moore sitting at Taylor House on 9<sup>th</sup> March 2018. In a decision and reasons promulgated on 12<sup>th</sup> March 2018 the Appellants' appeals were allowed on human rights grounds by reference to Appendix FM of the Immigration Rules.

2. On 27<sup>th</sup> April 2018 the Secretary of State lodged Grounds of Appeal to the Upper Tribunal. Those Grounds of Appeal make two contentions. Firstly that the First-tier Tribunal Judge fell into error at paragraph 17 and 18 in finding that the first Appellant met the financial requirements of the Immigration Rules and secondly that the First-tier Tribunal Judge had failed to provide any consideration or reasoning as to why the appeal of the second Appellant would succeed.
3. On 2<sup>nd</sup> July 2018 Judge of the First-tier Tribunal Hollingworth granted permission to appeal.
4. It is on that basis that the appeal comes before me to determine whether or not there are any material errors of law in the decision of the First-tier Tribunal Judge. I note that this is an appeal by the Secretary of State but for the sake of continuity throughout the appeal process Mr and Miss Bustamante are referred to herein as the Appellants and the Secretary of State as the Respondent. The Appellants appear by their instructed Counsel, Ms Simpson. The Secretary of State appears by her Home Office Presenting Officer Ms Willocks-Briscoe

### **Submissions/Discussions**

5. Ms Willocks-Briscoe takes me to paragraphs 17 and 18 of the decision. It is noted therein that the first Appellant's spouse Mrs Amor Bustamante is paid in cash and has been paid for a considerable number of years on such a basis. It is Ms Willocks-Briscoe's submission that she does not meet the requirements of the Immigration Rules of her income in that there have been no deposits within her bank statements and consequently it is difficult to reflect the cash flow to show that she meets the requirements. She submits that the Sponsor's bank statements do not reflect her payslips and that the judge erroneously then goes on at paragraph 18 to take into account the Sponsor's income in finding that the financial requirements are met. She submits that the analysis at paragraph 19 when consideration is given to Section 117B of the 2002 Act is limited.
6. Secondly she contends that there has been no analysis on the case brought by the second Appellant who is an adult and she submits that there are no very significant obstacles to integration particularly bearing in mind that the judge has recognised the second Appellant is an adult aged 22. She submits that the judge has failed to provide any consideration or reasoning as to why the appeal of the second Appellant succeeds and as to how she can succeed under the Rules or outside the Rules under Article 8 in her own right. Further she submits that as an adult there was no route available to the Appellant under Appendix FM and that it was incumbent upon the judge to consider paragraph 276ADE and whether she could succeed in her own right outside the Rules.

7. In reply I am taken by Ms Simpson to her detailed skeleton argument pointing out that the first Respondent was able to successfully extend his leave in February 2007 as a family dependant but when his Sponsor applied for indefinite leave to remain he was unable to join as he failed to pass the required Life in the UK Test. Thus he applied together with his children for further leave as family dependants. She goes through the history of this matter in some detail thereafter and then addresses the grounds which are challenged. She accepts that the First-tier Tribunal Judge has failed to make specific findings on the appeal of the second Appellant and that she can only apply with her father but the judge dealt with both appeals and consequently to a certain extent she acknowledges that the decision made therein is defective. So far as the first Appellant is concerned she submits that whilst it is accepted that the Sponsor's income was not shown in her bank statements since she was receiving her salary in cash since 2003 until 2016 and that she has complied with the payments of her national insurance contribution and tax as shown in her payslips that it is accepted that her employment is genuine. Importantly she maintains it was accepted that this arrangement took place until the Sponsor's settlement in the UK. However she points out the Appellant's P60 had been accepted by the Secretary of State in the Respondent's application and a copy has been produced during the hearing.
8. Further she submits that the Sponsor has genuine employment and that the Secretary of State has to make a substantial reason for not accepting the Sponsor. As for guidance on this fact she relies on the decision of the Supreme Court in *MM (Lebanon) and Others v SSHD [2017] UKSC* that provides that if the decision could otherwise result in unjustifiably harsh consequences then other sources of income should be considered. Bearing in mind if the Sponsor's income is considered genuine or credible and reliable then she submits that the Appellant has met the maintenance requirement and that this is exactly what the First-tier Tribunal Judge has done. She points out that the appellants' incomes together amount to a total of some £28,000 and that the financial requirement consequently is met.

## **The Law**

9. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.
10. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality

is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

### **Findings on Error of Law**

11. I address firstly the position of the first Appellant. In this appeal the judge has been satisfied and has set out in detail at paragraphs 17 and 18 exactly why he is satisfied that the first Appellant meets the financial requirements. I am satisfied that this judge has given a very thorough and detailed consideration of the basis upon which the financial settlement is made and has, following the decision in *MM (Lebanon)*, made findings that he was entitled to. In such circumstances I am satisfied that there is no material error of law and that the appeal of the Secretary of State is dismissed.
12. However the position is not quite the same so far as the second Appellant is concerned. It is effectively conceded by Ms Simpson that the judge has not addressed the second Appellant's case. To that extent there is a material error of law and I set aside that decision and proceed to reconsider and thereafter remake the decision.

### **The Remaking of the Decision so Far as it Affects the Second Appellant**

13. In this matter I have given due consideration to the submissions made by Ms Willocks-Briscoe namely that if there has been a failure to consider the second Appellant's claim it must be looked at as a matter of law. I accept that the second Appellant does not meet the Immigration Rules but I have given due consideration to the factors to be found in paragraphs EX.1 and EX.2. Further when looking at those factors I take into account that the second Appellant came to the UK when she was aged 15 as a dependant. It is not challenged that she is not still a dependant albeit that she is 22 and that she had no alternative but to apply at the same time that her father did in order for her application to be allowed. She has been here for a period of seven years. The Secretary of State does not challenge that she lives with her parents and is dependent upon them.
14. In such circumstances I am satisfied that the second Appellant's claim based on private and family life succeeds outside the Rules and that the decision of the First-tier Tribunal Judge was effectively correct in allowing the appeal but that the judge failed to separate the two cases and deal with them on the facts firstly as they relate to the first Appellant and secondly as they relate to the second Appellant. However for all the above reasons I am satisfied that the second Appellant's appeal should be allowed on Article 8 grounds.

### **Notice of Decision**

So far as the first Appellant is concerned the decision of the First-tier Tribunal discloses no material error of law and the appeal of the Secretary of State is dismissed.

So far as the second Appellant is concerned whilst the decision of the First-tier Tribunal Judge does disclose material errors of law I set aside that decision and I proceed to remake the decision allowing the Appellant's appeal.

No anonymity direction is made.

Signed

Date 19 September 2018

Deputy Upper Tribunal Judge D N Harris

**TO THE RESPONDENT  
FEE AWARD**

No application is made for a fee award and none is made.

Signed

Date 19 September 2018

Deputy Upper Tribunal Judge D N Harris