Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/04984/2018**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19th March 2019	**On 16th April 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between

MR SUNIL CHAUDHARY
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Reynolds of Counsel instructed by Law Gate Solicitors
For the Respondent: Mr L Tarlow, a Senior Home Office Presenting Officer of the Specialist Appeals Team

DECISION AND REASONS

1. This is the Appellant's appeal against the decision of First-tier Tribunal Judge Woolley promulgated on 16th November 2018 in which he dismissed the Appellant's human rights appeal.

2. The Appellant applied for entry clearance as the partner of the Sponsor under Appendix FM of the Immigration Rules. He is a citizen of India who is married to a British national. He had previously been issued with a visa to come to the UK as a Tier 4 (General) Student from 17th November 2009 to 18th April 2013. He had thereafter been refused leave to remain on 1st March 2013.

3. At the appeal before the First-tier Tribunal Judge the Sponsor was required to show a gross income of at least £18,600 per annum. Her own personal earnings were £9,125

per annum. However, she was also in receipt of money from Coventry Social Services for her role as a special guardian to two children and received £12,000 from that special guardian role. Those two children are now aged 14 and 12. The Sponsor has a special guardianship order from the Family Court at Coventry dating back to 2011 in respect of them. As part of that special guardianship, she has parental responsibility for the two children. But the special guardianship order did not in itself remove the parental responsibility of the parents but obviously meant that she had primary responsibility. There is also in this case regular contact as documented within the bundle between the children's natural mother and then on a supervised basis every six weeks

4. The First-tier Tribunal Judge when dealing with the appeal looked first at the financial requirements under paragraphs E-ECP 3.1 and E-ECP 3.2 of the Immigration Rules and found that the money from the special guardianship allowance could not be taken into account under those provisions of the Immigration Rules when determining the level of the Sponsor's income.

5. However, the Judge noted that Mrs Hodgson's, who represented the Appellant at the First-tier Tribunal, primary submission was in respect of the provisions of GEN 3.1 and Article 8. The judge noted that GEN 3.1 of Appendix FM had been introduced to govern the position where the relevant financial conditions were not met and that required there to be exceptional circumstances, which could render refusal of breach of Article 8, because such a refusal could result in unjustifiably harsh consequences for the applicant, their partner or the relevant child and that in those circumstances the decisionmaker can take into account, the source of income, the financial support or funds set out in paragraphs 21A(2) of Appendix FM-SE. It was argued by the Appellant that that encompassed the special guardianship allowance.

6. However, after having set out the requirements of GEN 3.1, the First-tier Tribunal Judge at paragraph 29 stated that:

> "*It is noteworthy that this gloss is not present in Article 8 itself. Similarly, there is no mention of 'exceptional circumstances' or even 'unjustifiably harsh consequences' in the Article, although Lord Bingham in* ***Razgar*** *recognised that successful applications under Article 8 might be the exception (and* ***Agyarko (Secretary of State for the Home Department [2017] UKSC 11*** *recognised that something very compelling must be required to outweigh the public interest*)".

7. The Judge then went on to discuss the case of **Hesham Ali** and **MM and Others v Secretary of State for the Home Department [2014] EWCA Civ 985** and concluded that she had to carry out a full **Razgar** assessment of the Appellant's rights under Article 8, as a separate exercise to that envisaged in GEN 3.1, which he then proceeded to do before then at paragraph 44 considering GEN 3.1 of Appendix FM. The Judge concluded ultimately that there was no breach of the Appellant's human rights under Article 8 having conducted that exercise.

8. The Appellant now seeks to appeal against that decision for the reasons set out within the Grounds of Appeal. That document is a matter of record and is therefore not repeated in its entirety, here but in summary it is argued that the Judge wrongly made a decision under the Rules without properly considering GEN 3.1 of Appendix

FM of the Immigration Rules and misapplied that provision. It was also arguable the judge then failed to consider GEN 3.2 and made a decision which is said to be unreasonable.

9. Permission to appeal in this case had being granted by First-tier Tribunal Judge Keane on 8th February 2019 who said that "*in particular that in omitting Sections GEN 3.1, GEN 3.2 the Judge omitted considerations of matters which dependent upon the Judge's findings might arguably have borne materially on the outcome of his assessment in the proportionality decision under appeal*".

10. At the appeal hearing before me today the Appellant has been represented by Mr Reynolds of Counsel and the Secretary of State was represented by Mr Tarlow, the Senior Home Office Presenting Officer.

11. The Secretary of State in this case had submitted a Rule 24 reply dated 12th March 2019 in which it was argued that the Respondent opposed the Appellant's appeal and that the Judge had directed himself appropriately. It was argued that the Judge had considered there were any exceptional compelling circumstances that would need the Tribunal to consider whether the Appellant could benefit from Appendix FM-SE paragraph 21A and the Judge had given valid reasons for finding there were not. It was submitted that it is immaterial that the FTTJ had done so within the context of the Rules or under Article 8, as there is nothing the Appellant can point to that the FTTJ has failed to consider under the Rules that he has not considered in his Article 8 assessment.

12. Notwithstanding that Rule 24 reply Mr Tarlow quite properly today noting his duties to the Tribunal has conceded that in this case the fact that the Sponsor has a special guardianship order in her favour in respect of the two minor children for whom she has care is an exceptional circumstance, which ought to have been properly considered and taken into account by the First-tier Tribunal Judge, which he concedes was not fully taken account of and given sufficient weight by the Judge in his decision. He concedes that this does amount to a material error of law.

13. As conceded by Mr Tarlow, the Sponsor in this case could not simply go and live in India with the Appellant, as to do so would have required specific permission by the Family Court. The Special Guardianship order would have allowed the Sponsor to take the children abroad only for periods of up to four weeks at a time and there is an order for regular supervised contact between the two children and their biological mother. Mr Tarlow concedes that there was an issue there that should have been properly considered, which was not and that thereby the judge failed to properly consider GEN 3.1 and the decision does therefore contain a material error.

14. It is also apparent having looked at the decision of the First-tier Tribunal Judge that although the Judge set out the provisions of GEN 3.1 at paragraph 28 and went on at paragraph 29 of the decision to find that the 'gloss' as he described it in GEN 3.1 of Appendix FM requires that "there must be exceptional circumstances which could render refusal a breach of Article 8 because such a refusal could result in unjustifiably harsh consequences to the Applicant, the Sponsor or relevant child by any breach", there was no mention of exceptional circumstances or justifiably harsh consequences in Article 8 itself, although the judge said that Lord Bingham in **Razgar**

recognised that successful applications under Article 8 might be the exception and that the Supreme Court in case of **Agyarko v Secretary of State for the Home Department [2017] UKSC** recognised something very compelling must be required to outweigh the public interest.

15. The Judge therefore considered that he had to conduct a full **Razgar** assessment of the Appellant's rights under Article 8 as a separate exercise to that envisaged in GEN 3.1. He proceeded to do so before then considering at paragraph 43 that as there had not been a breach of Article 8 and the refusal did not result in unjustifiably harsh consequence for the Appellant, Sponsor or child, he was not allowed under GEN 3.1 to take account of other sources of income under paragraph 21A(1).

16. However, the wording of GEN.3.1(1) is

> "*a) the financial requirement in paragraph E-ECP 3.1, E-LTRP 3.1 (in the context of an application for limited leave to remain as a partner), E-ECC 2.1 or E-LTRC 2.1 applies and is not met from the specified sources referred to in the relevant paragraph; and*
>
> *b) It is evident from the information provided by the Applicant that there are exceptional circumstances which could render refusal of entry clearance or leave to remain a breach of Article 8 of the European Convention on Human Rights, because such refusal could result being unjustifiably harsh consequences for the Applicant, their partner or relevant child; then*
>
> *the decision maker must consider whether such an actual requirement is met to be taken account of the sources of income, financial support or funds set out in paragraph 21A(2) of Appendix FM-SE.*"

17. In that regard what GEN 3.1(1)(b) is looking at is whether or not there are exceptional circumstances which could render refusal a breach of Article 8 because such refusal could result in unjustifiably harsh consequences. The difference in wording between GEN 3.1 and GEN 3.2 is that whereas in GEN 3.1 that the operative word is "could", in GEN 3.2 which is a general catchall provision thereafter the operative word is "would", such that GEN 3.2(2) reads that where sub-paragraph (1) applies the decision maker must consider

> "*On the basis of the information provided by the Applicant whether there are exceptional circumstances which would render refusal of entry clearance or leave to enter or remain in breach of Article 8 of the European Convention on Human Rights, because such refusal would result in unjustifiably harsh consequences for the Appellant, their partner, a relevant child or another family member whose Article 8 rights it is evident from that information would be affected by the decision to refuse the application*".

18. It is GEN 3.2 which is the general catchall provision. GEN 3.1 is based upon whether there 'could' be a breach of Article 8 because of exceptional circumstances such that then other sources of financial income can be taken into account other those which are permitted to be considered for the purposes of E-ECP 3.1 and 3.2.

19. GEN 3.1 did not require the judge to conduct a full Article 8 assessment in that regard and reach findings on whether or not there would actually be a breach of

Article 8 in that regard. In consideration of whether or not there are exceptional circumstances which could render refusal of entry clearance or leave to remain a breach of Article 8 because of unjustifiably harsh consequences, as Mr Tarlow quite properly concedes, the judge has not properly dealt with that issue by not applying the correct test and not properly considering the effect of the special guardianship. As Mr Tarlow properly concedes that is a material error of law.

20. It is further apparent that when considering proportionality, one of the factors the Judge took account of was whether the fact that the appellant met the requirements of the Immigration Rules at the time of the application. In that regard the judge has also effectively 'put the cart before the horse' because in determining that the requirements of the Immigration Rules were not met the judge has not taken account of the test under GEN 3.1 at that stage. It was only after considering Article 8 that he has then considered if GEN 3.1, being a provision of the Immigration Rules was met.

21. In light of the material errors in this case I find that the decision of the First-tier Tribunal Judge should be set aside.

22. In circumstances where the correct test has not been applied and findings need to be made on issues such as unjustifiably harsh consequences and exceptional circumstances, I think it is appropriate that the case be remitted back to the First-tier Tribunal for rehearing in its entirety.

23. The decision of the First-tier Tribunal Judge does contain material error of law and is set aside in its entirety. The matter to be remitted back to the First-tier Tribunal for rehearing before a First-tier Tribunal Judge other than First-tier Tribunal Judge Woolley.

Notice of Decision

The decision of the First-tier Tribunal Judge Woolley does contain material error of law and is set aside in its entirety. The case is remitted back to the First-tier Tribunal for rehearing before any First-tier Tribunal Judge other than First-tier Tribunal Judge Woolley.

The First-tier Tribunal Judge did not make any directions in respect of anonymity and no such direction has been sought before me and therefore I do not give any directions for anonymity.

Signed Date 14th April 2019

RFMcGinty

Deputy Upper Tribunal Judge McGinty