



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2023-000255

First-tier Tribunal Nos:
HU/52997/2022
IA/04681/2022

THE IMMIGRATION ACTS

**Decision & Reasons Issued:
On 12 July 2023**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

**MR MUHAMMAD UMAR TARIQ
(NO ANONYMITY ORDER MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Sponsor appeared in person

For the Respondent: Ms A. Ahmed, Senior Home Office Presenting Officer

Heard at Field House on 19 June 2023

DECISION AND REASONS

1. This appeal first came before the Upper Tribunal on 30 May 2023 for consideration of the issue of whether there was a material error of law in the decision of the First tier Tribunal. In a decision and reasons dated 1 June 2023, the Upper Tribunal found a material error of law and adjourned the appeal for a resumed hearing. A copy of that decision and reasons is appended. Prior to the hearing, in accordance with the directions, a copy of a supplementary bundle of evidence was submitted by the Sponsor and Ms Ahmed served a skeleton argument dated 18 June 2023.

Hearing

2. At the hearing on 19 June 2023, the Sponsor appeared in person. She adopted her previous statement dated 2 August 2022 and her new statement dated 13 June 2023. The Sponsor was then subject to extensive cross-examination by Ms Ahmed on behalf of the Secretary of State, who challenged her credibility on matters including the involvement of her former husband with their children; the offer of third party financial support from the Appellant's brother in law, Mr Sohail Zafar and whether or not the Sponsor had a support network in the UK.
3. The Sponsor stated that she had relocated from Nottingham to Hemel Hempstead in September 2022 so that her two eldest children could see their father more often and he could assist in their care. She stated that her former husband has his own family, a wife and a child and worked as a cab driver so he was able to work flexibly and take the children to school.
4. In the course of the hearing, the Sponsor submitted, in response to the Respondent's skeleton argument which she received 15 minutes before the hearing, her former husband's residence card and photographs of him with two young boys. Ms Ahmed objected to late admission of this evidence, however, I decided to admit it, given that one of the issues raised in Ms Ahmed's skeleton argument was to question whether the Sponsor's former husband had any relationship at all with his two sons and the Sponsor had not had prior opportunity to consider this submission and to adduce evidence on the point.
5. In her submissions, Ms Ahmed sought to rely upon the SSHD's refusal decision dated 21 April 2022, the Respondent's review and her skeleton argument. She stated that the SSHD maintained her original position. She asked that the Upper Tribunal find the Sponsor's evidence to be wholly incredible and that she has changed her evidence in that she is not all alone and does have a support network, including her former husband and the gentleman outside the courtroom looking after her baby and 9 year old son.
6. Ms Ahmed further submitted that the Sponsor had damaged her credibility in changing her evidence as to her former husband's involvement with their sons, in support of her contention that consequently she cannot join her husband outside the UK. Ms Ahmed made clear that it was not accepted that the Sponsor's former husband is involved with their children. She submitted that the Sponsor knew which points to address and is among the more erudite litigants in person.
7. Ms Ahmed submitted that there was nothing exceptional in the circumstances of the case; that the Appellant and Sponsor were aware of the requirements of the Immigration Rules at the point they applied for entry clearance. Ms Ahmed drew attention the judgment of the Supreme Court in Agyarko [2017] UKSC 11 at [54]-[60] and submitted that there was a high threshold for exceptionality and the Appellant had not shown that was met.

8. It had been conceded that the Appellant did not meet the financial requirements of the Rules. Ms Ahmed drew attention to paragraph 21(a) of Appendix FM SE which sets out sources of acceptable income and much of what the Sponsor sought to rely upon in terms of benefits was excluded from this list. Ms Ahmed submitted that the requirements of paragraph 21(A) needed to be met and the Appellant was unable to meet those requirements. Ms Ahmed submitted that the Appellant did not meet the requirements of GEN 3.1 and 3.2. either as no exceptional circumstances had been demonstrated. Ms Ahmed submitted that the Appellant had not shown that the documentation submitted on behalf of Mr Sohail was reliable, which was an adverse point that could be taken against the Appellant. She submitted that the Sponsor's bank statements do not show that the Sponsor's former husband was sending her £300 a month and this was indicative that the full circumstances were not being disclosed and that the evidence had changed.
9. Ms Ahmed further submitted, when assessing best interests, that there was no evidence that the child arrangements order was being complied with and no further written or documentary evidence as to the level of contact.
10. In response, the Sponsor indicated that she had found cross-examination to be very intimidating and had felt very pressurised and that she had only received Ms Ahmed's skeleton argument 15 minutes before the hearing and was disadvantaged.
11. The Sponsor stated that her brother in law was working on a ship and the relationship between the Appellant and his sister was shown on the family registration certificate and that she had provided a copy of his identity card which contained a chip and evidence that the Appellant's sister is married to Mr Zafar. She said that she had provided everything that she could and that the documents could be verified through the government database in Pakistan and were true documents. She also stated that she would not risk her husband's application by utilising false documents.
12. As to the child arrangements order, the Sponsor said that was a one time thing in order to resolve matters. She said that while she and her former husband were in dispute her children have a good bond with him and she would not stop them from seeing him. She pointed out that he had provided a signed statement and his email address and phone number are there and the Home Office could have contacted him. She stated that her former husband would not let her leave the UK with their children. The Sponsor stated that this impacted negatively upon her mental health as she lived in fear of her former husband attempting to take their children away from her as he told her he would do this if she left the UK. She said that her husband would not access public funds if he was admitted and he would find employment and that she also wanted to work but this would only be possible if her husband were to be admitted. The Sponsor denied that the evidence had changed but rather that it had been updated.
13. As to the Sponsor's relationship with the family of Naeem, who was caring for two of her children outside court, she said she had known the family for 10 years but had only met Naeem 2 months ago and that she had paid him £150 to bring her to court, look after the children and take them home

again. The Sponsor denied that she had a support network and that in any event no-one other than her husband could meet her all her needs.

14. As to the ability to meet the financial requirements, the Sponsor said when she met the Appellant in Turkey they got to know each other and decided to marry. She came to the UK in early 2020 and intended to find employment but the pandemic then started and she was unable to work.
15. The Sponsor submitted that there would be unjustifiably harsh consequences for her and for her daughter if the Appellant were to be excluded as her daughter would be deprived of the ability to live with her father. The Sponsor reiterated that she cannot go back to Pakistan as she has no protection there and that she would shortly be eligible for ILR. She said that she did not consider that it was reasonable or acceptable to expect her to leave the UK to go somewhere else. It was important that her children would have the right to apply for British citizenship. She asked that the appeal be allowed on the basis of exceptional circumstances.

Decision and reasons

16. I find the Sponsor to be a credible witness. She answered questions promptly and in a straightforward manner and her evidence was supported in material respects by the documentary evidence, including her bank statements, the statement of her former husband, Mr Muhammad Ahsan Zaheer, a copy of his residence card and photographs of him with two young children, who I accept are the Sponsor's sons. I find the evidence of the Sponsor was consistent with her previous evidence as to her former husband's involvement with their two sons and the fact that he is paying child maintenance and I accept that the evidence has been updated rather than has materially changed on that issue.
17. Given the concession that the Appellant was unable to meet the requirements of the Immigration Rules, including the specific requirements of Appendix FM-SE at the date of application on 18 January 2022 and decision of 21 April 2022, the issue to be determined is whether the Appellant is able to meet the requirements of GEN 3.1. of Appendix FM which provides:

GEN.3.1.(1) Where:

(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 in unjustifiably harsh consequences for the applicant, their partner or a relevant child; then the decision-maker must consider whether such financial requirement is met through taking into account the sources of income, financial support or funds set out in paragraph 21A(2) of

Appendix FM-SE (subject to the considerations in sub-paragraphs (3) to (8) of that paragraph).

(2) Where 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. is met following consideration under sub-paragraph (1) (and provided that the other relevant requirements of the Immigration Rules are also met), the applicant will be granted entry clearance or leave to remain under, as appropriate, paragraph D-ECP.1.2., D-LTRP.1.2., D-ECC.1.1. or D-LTRC.1.1. or paragraph 315 or 316B of the Immigration Rules.

GEN 3.3.(1) provides that: *“the decision-maker must take into account, as a primary consideration, the best interests of any relevant child.”*

18. Paragraph 21(A)(1) provides *inter alia* as follows:

“Other sources of income, financial support or funds in exceptional circumstances

21A(1). Where paragraph GEN.3.1.(1) of Appendix FM applies, the decision-maker is required to take into account the sources of income, financial support or funds specified in sub-paragraph (2).

(2) Subject to sub-paragraphs (3) to (8), the following sources of income, financial support or funds will be taken into account (in addition to those set out in, as appropriate, paragraph E-ECP.3.2., E-LTRP. 3.2., E-ECC.2.2. or E-LTRC.2.2. of Appendix FM):

(a) a credible guarantee of sustainable financial support to the applicant or their partner from a third party;

(b) credible prospective earnings from the sustainable employment or self-employment of the applicant or their partner; or

(c) any other credible and reliable source of income or funds for the applicant or their partner, which is available to them at the date of application or which will become available to them during the period of limited leave applied for...

(4) The onus is on the applicant to satisfy the decision-maker of the genuineness, credibility and reliability of the source of income, financial support or funds relied upon, on the basis of the information and evidence provided, having regard (in particular, but without limitation) to the factors set out below...

(8) In determining the genuineness, credibility and reliability of the source of income, financial support or funds relied upon under sub-paragraph (2), the decision-maker will take into account all the information and evidence provided, and will consider (in particular):

(a) in respect of a guarantee of sustainable financial support from a third party:

- (i) whether the applicant has provided verifiable documentary evidence from the third party in question of their guarantee of financial support;*
 - (ii) whether that evidence is signed, dated and witnessed or otherwise independently verified;*
 - (iii) whether the third party has provided sufficient evidence of their general financial situation to enable the decision-maker to assess the likelihood of the guaranteed financial support continuing for the period of limited leave applied for;*
 - (iv) whether the third party has provided verifiable documentary evidence of the nature, extent and duration of any current or previous financial support which they have provided to the applicant or their partner;*
 - (v) the extent to which this source of financial support is relied upon by the applicant to meet the financial requirement in paragraph E-ECP.3.1., E-LTRP.3.1., E-ECC.2.1. or E-LTRC.2.1. of Appendix FM (as applicable); and*
 - (vi) the likelihood of a change in the third party's financial situation or in their relationship with the applicant or the applicant's partner during the period of limited leave applied for.*
- (b) in respect of prospective earnings from sustainable employment or self-employment of the applicant or their partner:*
- (i) whether, at the date of application, a specific offer of employment has been made, or a clear basis for self-employment exists. In either case, such employment or self-employment must be expected to commence within three months of the applicant's arrival in the UK (if the applicant is applying for entry clearance) or within three months of the date of application (if the applicant is applying for leave to remain)*
- (c) in respect of any other credible and reliable source of income or funds for the applicant or their partner:*
- (i) whether the applicant has provided verifiable documentary evidence of the source;*
 - (ii) whether that evidence is provided by a financial institution regulated by the appropriate regulatory body for the country in which that institution is operating, and is signed, dated and witnessed or otherwise independently verified;*
 - (iii) where the income is or the funds are based on, or derived from, ownership of an asset, whether the applicant has provided verifiable documentary evidence of its current or previous ownership by the applicant, their partner or both;*
 - (iv) whether the applicant has provided sufficient evidence to enable the decision-maker to assess the likelihood of the source of income or funds being available to them during the period of limited leave applied for; and*
 - (v) the extent to which this source of income or funds is relied upon by the applicant to meet the financial requirement in paragraph E-ECP.3.1., E-LTRP.3.1., E-ECC.2.1. or E-LTRC.2.1. of Appendix FM (as applicable)."*

19. Summarising the above, I have to consider where the financial requirements are not met from the sources specified in Appendix FM SE, whether 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 in unjustifiably harsh consequences for the applicant, their partner or a relevant child. If so, then the decision-maker must consider whether such financial requirement is met through taking into account the sources of income, financial support or funds set out in paragraph 21A(2) of Appendix FM-SE (subject to the considerations in sub-paragraphs (3) to (8) of that paragraph).

Whether there are exceptional circumstances which would result in unjustifiably harsh consequences

20. The Sponsor's case is that there are exceptional circumstances because she is unable to relocate to Pakistan both because she is a refugee in the UK and because in any event her former husband would not permit her to take the children out of the UK where he now resides with settled status. There is a letter from Muhammad Ahsan Zaheer dated 12 June 2023 at SB 39 in which he states: *"I am reaching out to address the matter concerning my children, XX and XX. As their biological father, I am currently in the process of applying for their British citizenship. I want to emphasise that I do not consent to their relocation outside of the UK. In the event that this request is not honoured, I am prepared to take legal action by seeking a prohibited steps order. Moreover, I want to reaffirm that I fulfil my responsibility of providing child maintenance for both of my children. I contribute £300 per month to their mother ... for this purpose."*
21. I have taken account of the evidence of both the Sponsor and the written evidence of her former husband, which is supported by a copy of his residence card and 4 photographs with the children. I have also had regard to the Home Office guidance *"Family Policy; Family Life (as a Partner or Parent) and Exceptional Circumstances"* version 19, 15.5.23, which is set out in full at [14] of the error of law decision and provides *inter alia*: *"An example of where it might not be feasible for the family to live together elsewhere might be where the sponsor has gained their settled status in the UK through a refugee route, and the applicant is of the same nationality. In the absence of a realistic third country alternative, the settled person's inability to resume life in the country of origin is likely to constitute an obstacle to family life continuing or resuming overseas. In turn, that may mean that refusal of entry clearance will result in unjustifiably harsh consequences."*
22. I also bear in mind GEN 3.3.(1) which requires me to take account as a primary consideration the best interests of any relevant child. The Appellant's daughter has not, as yet, had the opportunity to meet her father in person and family life has been conducted to date via video calls. I do not consider that this is a reasonable substitute for family life exercised in person, particularly given her young age: see *RA* (s.117C: "unduly harsh"; offence: seriousness) Iraq [2019] UKUT 00123 (IAC) at [60]. I find that the Appellant cannot relocate to Pakistan on a permanent basis and it follows that she and her children need to remain in the UK, as it would not be in their best interests to be separated from their mother, on the evidence before me. I further find, bearing in mind the best

interests of the Sponsor's two sons, that it would not be in their best interests to leave the UK because that would entail separation from their biological father who is present and settled in this country, even if that were possible given opposition to that course of action by their father.

23. I have taken account of Ms Ahmed's submissions that there are no exceptional circumstances on the facts of this case and her reliance on the judgment of the Supreme Court in *Agyarko* (op cit) at [54]-[60]. However, that judgment is distinguishable on the basis that the appellants in that case were in the UK unlawfully and were seeking to remain despite having only precarious family life, whereas this Appellant has remained outside the UK and made an application for entry clearance, without entering or attempting to enter and remain in the UK in a precarious manner. Ms Ahmed did not submit or otherwise resile from the paragraph in the Respondent's own guidance set out at [21] above. I find in light of the evidence and guidance that there are exceptional circumstances which would result in unjustifiably harsh consequences for the Sponsor, the Appellant and their young daughter if the refusal to grant the Appellant entry clearance were to be maintained.

Whether the financial requirement can be met from funds set out in paragraph 21A(2) of Appendix FM-SE

24. It is conceded that the Appellant cannot meet the financial requirements of the Rules because, although her income which is made up of a combination of benefits and £300 a month in child maintenance from her former husband exceeds the minimum income requirement, some of the benefits upon which she relies ie child benefit and universal benefit are excluded from consideration by virtue of paragraph 20 of Appendix FM SE of the Rules.
25. Consequently, the issue is whether there are alternative funds that would be available if the Appellant is admitted to the UK that would meet the financial requirement. There are clear criteria set out in paragraph 21A(2) of FM SE that need to be met. The Appellant in his statement of 1.8.22 [AB 4] states that he has a Masters in International Relations; has worked as a Project Manager for Blades Sharp Mind, an event management company in Pakistan; a customer experience expert for VFS; a team leader in a call centre in the UAE and is employed for DHL express in Pakistan as a customer service adviser. Whilst I accept that there is a reasonable likelihood that the Appellant would be able to find employment in the UK given his work history, including former employment in the UAE as well as in Pakistan, he does not currently have an offer of employment.
26. I have carefully considered the offer of third party support from the Appellant's cousin and brother in law, married to his sister. Mr Sohail Zafer is a marine electrical engineer, currently employed as a marine electrician on board ship, working for Bimiks Industrial Co. I have had regard to paragraph 21A(8) of Appendix FM SE and the criteria therein for third party financial support. There is a statement from Mr Sohail Zafar dated 1 June 2023. It is unsigned, however, the Appellant was asked about why this was the case during cross-examination and she stated that it was because Mr

Zafar is on board ship, does not have access to a printer or a scanner and she had received everything from Mr Zafar via his wife, the Appellant's sister, through WhatsApp. I note that Mr Zafar has provided his email and telephone number. He has also provided wage slips stamped by the Master; copy bank statements, a copy of his seaman's book, a certificate of competency as a marine electrician and copies of his Pakistani identity card and passport. He earns \$1300 US a month. The Sponsor was questioned about his earnings by Ms Ahmed and she stated and I accept, that this is a sufficient amount of money to not only support his wife and family in Pakistan but to provide third party support to the Appellant if required.

27. I find that the offer of third party financial support by the Appellant's brother in law, Mr. Sohail Zafar to be genuine and credible. The wage slips submitted are not only consistent with the credits into his Habib Metropolitan US\$ bank account (bar a \$20 charge for each credit), but the evidence is consistent when considered holistically and I find that weight can be placed upon it and his offer of third party financial support, until such time that the Sponsor and/or Appellant are able to obtain employment to support themselves and the children. I anticipate that, based on the Appellant's work experience and qualifications and the current labour market in the UK that should not take long to achieve.
28. It follows that I find that the requirements of GEN 3.1 of Appendix FM of the Rules are met and that entry clearance should be granted pursuant to GEN 3.1(2). In these circumstances, given that the Appellant is able to meet these requirements of the Rules, it is not necessary to conduct a balance sheet proportionality assessment to ensure compliance with article 8 of ECHR. If I had been required to conduct such an assessment, whilst giving full weight to the public interest in maintaining immigration control, I would find that in light of the exceptional circumstances set out at [20]-[23] above that it would be disproportionate to maintain the decision to exclude the Appellant from the United Kingdom.

Notice of Decision

29. The appeal is allowed.

Rebecca Chapman

Deputy Upper Tribunal Judge
Immigration and Asylum Chamber

26 June 2023

Annex



**IN THE UPPER TRIBUNAL
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DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

**MR MUHAMMAD UMAR TARIQ
(NO ANONYMITY ORDER MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Sponsor appeared in person

For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

Heard at Field House on 30 May 2023

DECISION AND REASONS

1. The Appellant is a national of Pakistan born on 6 June 1984. He appeals against a decision of the First-tier Tribunal Judge Parkes, who heard his appeal on 5 December 2022 and dismissed it in a decision and reasons promulgated on 15 December 2022.
2. The background to the appeal is that the Appellant and Sponsor met online in 2018 and subsequently face to face in Turkey in December 2019 and October 2020. The Sponsor is present in the UK with refugee status granted in 2018 as a consequence of being subjected to domestic violence

by her previous husband. The Sponsor is also a national of Pakistan. The Appellant and Sponsor married on 5 October 2021 in Pakistan where the Sponsor had a special dispensation to travel due to the illness of her father. She fell pregnant during that visit and gave birth to a daughter in the United Kingdom on 3 June 2022.

3. On 18 January 2022 the Appellant applied for entry clearance as the partner of the Sponsor. This application was refused in a decision dated 21 April 2022 on the basis that the financial requirements were not met and the Entry Clearance Officer was not satisfied that refusal would result in unjustifiable harsh consequences for the Appellant or his family finding that they could live eg. in the UAE or Turkey.
4. The FtTJ at the hearing on 5 December 2022 noted at [7] that an application at the hearing to introduce more documentation was refused on the basis that there had been clear directions and sufficient time to comply with them, no explanation had been given for the late request and the case could be decided properly on the information available.
5. The FtTJ noted the Sponsor's evidence and made the following findings, which I set out in their entirety:

"10. Given the grant of refugee status the Sponsor cannot be expected to go and live permanently in Pakistan. There is the additional complication of the position of her 2 oldest children who maintain contact with their father in the UK. Permission would be required for them to leave the UK, and if his consent was not forthcoming then a court order would be needed.

11. The Appellant has worked in other countries including Dubai. The Sponsor's evidence is that she is confident that shortly after his arrival in the UK he would be able to find work and that there would be no issue of his reliance on public funds. There is no evidence that he would be able to do so and her evidence amounts to speculation that that would be the case.

12. It was not until cross-examination that the question of her finances was directly addressed. In evidence the Sponsor said that she receives universal credit and child benefit and also has help from her husband. She put the figure she receives at £2,000, a good amount as she said, and that she has a surplus of around £250 to £300 at the end of each month.

13. As the Appellant's representatives had not taken the opportunity to provide any evidence for his appeal there was no supporting evidence to show that the Sponsor's finances were as claimed. If the Appellant comes to the UK the support he is able to provide from Pakistan, the extent of which is unclear anyway, would cease and there would be a gap of uncertain duration before he could find work".

14. The circumstances of this appeal are clearly very unusual. The Sponsor is struggling with 3 young children and I accept would benefit from the support the Appellant would provide, including

financial. Their decision to get married was made at short notice and in the knowledge that the Appellant did not meet the Immigration Rules as indicated. Equally the Sponsor's pregnancy leading to the birth of their child may not have been planned, it will not have made the Sponsor's situation any easier. To that extent, the Appellant and Sponsor are in a situation of their own making and that detracts from the strength of the argument raised.

15. *Although the financial requirements are not met that is not a complete bar to the application being granted. If the exclusion of the Appellant is disproportionate then the appeal can be allowed but that is in the context of the public interest. There is a level below which it is contrary to public policy to expect a family to live, that is the income support level for a family of the size that would be created by the admission of the Appellant.*
 16. *There is no evidence to show that the benefits that the Sponsor receives come within the terms of paragraph E-ECP.3.1-E-ECP.3.4 of Appendix FM. Equally there is no evidence to show that the Sponsor's overall income exceeds the income support level for a family of 5 made up of 2 adults and 3 children or that, with the Appellant in the UK, their income would remain at or exceed that level.*
 17. *On the evidence presented it suggests that the Sponsor is finding life difficult and that she would benefit from the presence of the Appellant and that would probably be in the best interests of the children. However, their needs are undermined by the Appellant and Sponsor marrying when they knew that they did not meet the Immigration rules and exacerbated the position in having another child in circumstances where it could not be assumed he would be in a position to assist. As the evidence does not show that the Appellant would be maintained at the minimum level the Sponsor's circumstances do not outweigh the public interest".*
6. An application for permission to appeal was made by the Appellant himself, on 11 January 2023, which asserted *inter alia* at [4] that the judge had at [9] to [13] confused the Appellant with the Sponsor's previous husband in terms of financial support given that the Sponsor receives maintenance for her two children from her previous husband; that the judge failed to deal with whether the continued exclusion of the Appellant amounted to a disproportionate interference with his family life; that his approach to the financial requirements was erroneous; that the judge failed to address the issues set out in the skeleton argument based on the Respondent's own guidance and the fact that the Sponsor had gained settled status through a refugee route was not addressed; the judge failed to address the loss of rights of the children if they accompanied the Appellant overseas and failed to address the children's relationship with their father and their inability to live abroad without his permission.
7. Permission to appeal was granted to the Upper Tribunal on 2 February 2023 by First-tier Tribunal Judge Gumsley who held:

- "2. ... I have considered both the Grounds as pleaded and the Decision and Reasons itself for any obvious arguable error of law given that the Appellant is representing himself.*
- 3. Having done so I am satisfied that it is arguable that the FTT Judge has made a material error of law in the way he has considered the Appellant's Article 8 claim and that the analysis, findings and reasons were inadequate given the circumstances of the case. It is also arguable that sufficient and anxious scrutiny was not given to the case given the reference to matters of deception. Further, it is arguable that in considering the best interests of the children involved in the case, the FTT Judge placed too much weight on his apparent disapproval of the behaviour of the Appellant and the Sponsor.*
- 4. Permission to appeal is therefore granted. No restriction is placed on which matters set out in the Grounds may be argued".*

Hearing

8. At the hearing the Sponsor appeared in person. Due to the fact she was not legally represented I heard submissions from Ms Isherwood first, who submitted that there was no material error of law, that whilst the determination was brief the FtTJ sets out how the case should be viewed and that the Rules could not be met because the financial requirements of Appendix FM could not be met. She submitted the FtTJ acknowledged the evidence, the Sponsor's divorce and the children and was entitled to put weight on the fact that the Rules were not met. The FtTJ acknowledged that the oldest two children see their father and that the case was unusual and that the Sponsor would benefit from the support of the Appellant. However, for reasons that are not clear the FtTJ was not assisted by the absence of sufficient evidence on the part of the Appellant. Ms Isherwood submitted that the burden of proof was on the Appellant and unfortunately it had not been discharged and that is why the FtTJ had concluded that he was not satisfied the appeal should be allowed.
9. In her submissions the Sponsor, with some guidance from the Upper Tribunal, clarified that her brother had previously offered third party support but this position had changed by the date of hearing as he had changed jobs. She confirmed her evidence before the FtTJ recorded at [12] of the decision and reasons that she was in receipt of about £2,000 a month both in terms of benefits and maintenance from her previous husband. In essence, the Sponsor's concern is that the judge had not given proper consideration to the position of her children and her own position. She sought to rely on the Home Office guidance on exceptionality and she considered that the judge had not properly taken account of the evidence that she had submitted.
10. Ms Isherwood in a brief reply submitted that the Rules cannot be ignored and that exceptional circumstances created a high threshold which was not met on the facts of this case.

11. I found that there are material errors of law in the decision and reasons of First-tier Tribunal Judge Parkes. I announced my decision with brief reasons at the hearing. I now provide full reasons for that decision.

Decision and Reasons

12. It is apparent that on the basis of the Sponsor's oral evidence she receives in the region of £2,000 a month, which on the face of it was clearly sufficient to meet the equivalent income support comparator of two adults and three children [£19,047.60 on current rates from April 2023: <https://www.gov.uk/government/publications/benefit-and-pension-rates-2023-to-2024/benefit-and-pension-rates-2023-to-2024#income-support> thus at least arguably the minimum income requirement was met.
13. The judge at [13] expressed concern that the Appellant's representative had not provided supporting evidence, however it is clear from [7] that the Sponsor sought to introduce further evidence at the date of hearing which the judge refused to admit. Whilst as a consequence the Judge only had the Sponsor's oral evidence as to her income, this is evidence which can be taken into consideration and consequently I find that the FtTJ erred in finding at [16] that there was *no* evidence that the Sponsor's income exceeded the income support level for 2 adults and 3 children. Given that this was the only reason that the application for entry clearance had been rejected under the Immigration Rules, it was clearly the key issue that had to be determined in the appeal when deciding whether or not the requirements of GEN.3.2. were met and the error is material.
14. I find that the judge further erred in his assessment of the proportionality of the Entry Clearance Officer's decision. Whilst at [10] he acknowledged that the Sponsor is a refugee and is unable to reside in Pakistan with the Appellant, both for that reason and because her evidence was that her former husband would not, in any event, permit the children to leave the UK, the FtTJ did not appear to properly weigh those facts in the proportionality balance sheet exercise. Reference was made in the Appellant's skeleton argument to an extract from the Respondent's guidance contained in "*Family Policy; Family Life (as a Partner or Parent) and Exceptional Circumstances*" which provides as follows:-

*"Ability to lawfully remain in or enter another country. In respect of an entry clearance application, you should consider the ability of the members of the family unit (both the applicant and others) to lawfully remain in or enter another country. The onus is on the applicant to show that it is not feasible for the family to remain in or enter another country. A mere wish, desire or preference to live in the UK is not sufficient. **An example of where it might not be feasible for the family to live together elsewhere might be where the sponsor has gained their settled status in the UK through a refugee route, and the applicant is of the same nationality. In the absence of a realistic third country alternative, the settled person's inability to resume life in the country of origin is likely to constitute an obstacle to family life continuing or resuming overseas. In turn, that may mean that refusal of entry clearance will result in unjustifiably harsh consequences.***

You may consider relevant country information (but may not seek to go behind any decision to grant refugee status). (emphasis added)

15. Whilst this guidance was clearly material to an assessment of whether upholding the ECO's refusal would result in unjustifiably harsh consequences for the family members and this guidance was before the FtTJ nowhere is it referred to nor factored into the proportionality assessment.
16. Moreover, whilst the FtTJ was aware that there were three children living with the Sponsor in the United Kingdom, no consideration at all appears to have been given to their best interests. Further, I note from the skeleton argument before the FtTJ, drafted by the Appellant's previous legal representatives and also relied upon him in the grounds of appeal, no consideration appears to have been given to the argument that requiring the Sponsor and the children to leave the United Kingdom would result in a loss of their rights stemming from their refugee status, the two oldest children having been granted leave in line with their mother. This was a point made by Lord Justice Green in *GM (Sri Lanka)* [2019] EWCA Civ 1630, which was also referred to in the skeleton argument. The failure to factor in this consideration to the proportionality balancing exercise also amounts to a material error.
17. In fact, it does not appear from the FtTJ's findings set out in full at [5] above that any proper proportionality balancing exercise was conducted, taking account of all material considerations on both sides.

Decision

18. For those reasons I set aside the decision of First-tier Tribunal Judge Parkes. I adjourn the appeal to be re-made at a resumed hearing in the Upper Tribunal.

Directions

- 18.1. The appeal is to be listed before Deputy Upper Tribunal Judge Chapman for 2 hours on Monday 19 June 2023. No interpreter is required.
- 18.2. The Appellant/Sponsor is to provide a copy of the original bundle of evidence by email to the Home Office at [email]
- 18.3. The Appellant/Sponsor is to provide a supplementary bundle with any further evidence upon which they wish to rely, pursuant to Rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008, including evidence of the family's financial circumstances; the Sponsor's health and any issues relating to the children's health/wellbeing and any evidence relating to the position of the Sponsor's former husband as to where his children are required to reside.
- 18.4. All evidence is to be served on or by 4pm on Wednesday 14 June 2023 to the Upper Tribunal at [email] and the Home Office by email at [email]. The email header should contain the name of the Appellant and the UI reference number along with the hearing date of 19 June 2023.

Rebecca Chapman

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

1 June 2023