



UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

APPEAL NUMBER: OA/04107/2013

THE IMMIGRATION ACTS

Heard at: Field House
On: 2 July 2014 and 2 October 2014
Prepared: 10 October 2014

Determination Promulgated
On 16 October 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

ENTRY CLEARANCE OFFICER

Appellant

and

MR KISHOR RIJAL

Respondent

Representation

For the Appellant: Ms Kenny, Senior Home Office Presenting Officer
Mr S Whitwell, Senior Home Office Presenting Officer
For the Respondent: No appearance

DETERMINATION AND REASONS

1. For the sake of convenience I shall refer to the appellant as "the entry clearance officer" and the respondent as "the claimant."
2. Notice of hearing of this appeal was sent by first class post to the claimant care of Mrs Neeva Karki, his sponsor, at her Hillingdon address. Its date, time and place were clearly set out in the notice itself. The notice was sent to the sponsor herself and to Aschfords Law at their address in Harrow, Middlesex. The claimant had been represented before the First-tier Tribunal by counsel, instructed by Aschfords Law. Directions were also set out in the notice of hearing.

3. The claimant has not filed any Rule 24 response.
4. In the circumstances, having regard to paragraph 38 of the Tribunal Procedure (Upper Tribunal) Rules 2008, being satisfied that the parties have been notified of the hearing or that reasonable steps have been taken to notify them, I consider that it is in the interests of justice to proceed with the hearing in the absence of the claimant or representative.
5. The claimant is a national of Nepal born on 19th September 1984. His appeal before the First-tier Tribunal against the decision of the respondent to grant him an entry clearance as a partner under Appendix FM of the Immigration Rules was allowed by the First-tier Tribunal Judge in a determination promulgated on 23rd April 2014. The entry clearance officer refused the application on the basis that the claimant had not provided evidence relating to the financial requirements under Appendix FM-SE of the Immigration Rules.
6. In allowing his appeal under the rules, the Judge was satisfied that the claimant and his sponsor met the threshold “as should have been calculated with the correct figure from the P60 for April 2013”. Despite an overlap between the figure in 2012 and 2013, the right figure to use is that in the P60 for April 2013 as the 2012 P60 could not have included any of the correct figures for the claimant's application. As this was not a points based system case, the Judge held that he was entitled to take into account evidence pertaining to the date of decision, namely the P60 for April 2013 as it covers the wages the sponsor was earning as at the date of application and the date of decision.
7. The Judge also had regard to the calculation of the figure relating to savings which was over £21,000. The Judge accepted that counsel had correctly calculated the figure in respect of savings with all the documents before him. That meant that the sponsor and the claimant went beyond the threshold which was wrongly calculated in the reasons for refusal letter. The balance statements presented showed funds over the period April 2012 to September 2012, which is six months before the application was made. The various statements are set out.
8. On 21st May 2014, First-tier Tribunal Judge Shimmin granted the entry clearance officer permission to appeal against the decision of the First-tier Tribunal Judge. He found that the grounds of appeal and the determination disclosed an arguable error of law inasmuch as the immigration rules, Appendix FM-SE set out the types of evidence required but the Judge “has had no regard to this in the determination”; nor had he had any regard to the relevant date, the date of the application and the evidence prior to that date and the claimant's sponsor's annual gross income was below the threshold.
9. Ms Kenny submitted that the rules regarding the specified evidence required to be produced are comprehensively set out in Appendix FM-SE. This includes the

evidence required, the periods they cover and the format that they should be in. The First-tier Tribunal has had no regard to this in the determination. Accordingly there has been a failure to comply with the immigration rules and the findings are in the circumstances unsustainable.

10. Nor has the Tribunal had regard to the relevant date. For Appendix FM, the significant date is the date of the application and the significant evidence is from the specified period before that date. The Tribunal did not address that evidence from prior to the date of application. That also renders the conclusions unsustainable.
11. In the event, she submitted that the evidence as at the date of application meant that the sponsor's actual gross annual income was below the threshold and as such the maintenance requirement could not be fulfilled. It is stated by entry clearance officer that it is also worth noting that if the sponsor's current income does exceed the income threshold, there is no reason to prevent the claimant from making a fresh application based on the sponsor's income at this time.
12. At the hearing on 2nd July 2014, Ms Kenny produced a consolidated version of the current immigration rules relating to Appendix FM-SE. The date of application was 1st October 2013. The evidence subsequently presented was the P60 to April 2014. However, the said P60 had not been available as at the date of the decision in this case. The Judge nevertheless accepted figures relating to employment with regard to the April 2013 P60.
13. Ms Kenny submitted that in order to meet the financial requirements of the rules, the claimant's sponsor needed a gross income of at least £18,600 per annum. His wife was employed since 2006. She provided a P60 as evidence of her income which stated that she earned £11,562.40 in the last tax year (that was for the period 2011-12).
14. In order to meet the financial requirements the claimant and his sponsor had to demonstrate that the total of £33,594 had been held in savings for the relevant six months, i.e., £7037.60 times 2.5 plus £16,000.
15. The Judge had at paragraph 32 referred to the Entry Clearance Officer's contentions relating to the amount of £33,594 required to be held in savings for six months in order to meet the financial requirements. It was noted that although the sponsor stated on the sponsorship declaration that she held to the tune of £17,500, from her bank statements she had not held those funds for a consecutive period of six months.
16. Ms Kenny submitted that the P60 should not have been accepted as evidence of earnings. However, the amount required was £33,594 in savings. It is asserted that

there is thus a deficit of over £12,500 as the First-tier Judge accepted that the figure of savings with all the documents before him amounted to £21,000.

17. The Judge had no regard at all to the requirements and in particular the kind of evidence that was required from Appendix FM-SE. The relevant date was the date of the application.
18. The Judge however had regard to the P60 for April 2013. That was 'impermissible'. There was no explanation or evidence as to what that showed the salary of the sponsor to have been for the six months prior to the date of application. It is not known, for example, whether substantial amounts of that income occurred evenly over the period or whether the earnings were greater after the date of application.
19. It is also significant that no wage slips for the six months prior to the date of application had been submitted.

Assessment

20. I find that the Judge has not had regard to Appendix FM-SE as part of the determination. There is no reference to that appendix regarding the specified evidence required to be produced. Nor is there any regard to the evidence required in respect of the periods they cover or indeed the format that they should be in.
21. Moreover, the relevant date is the date of the application and the evidence required to be furnished relates to the period of six months before that date. That evidence has not been considered or addressed for the period prior to the date of application.
22. It appears that the sponsor's actual gross annual income was below the threshold and that the maintenance requirements could not be fulfilled. The figures presented did not add up to the £21,000 relied on for the period April to October 2012.
23. I am accordingly satisfied that there has not been a proper regard to the relevant immigration rules and in particular Appendix FM-SE. Further, there has been reliance on evidence that was not in existence prior to the date of application. In any event, it is not clear what the claimant's income was for the six months prior to the date of application.
24. I accordingly find for the reasons given that the decision of the First-tier Tribunal involved the making of an error on a point of law. The decision is accordingly set aside.
25. Ms Kenny very fairly submitted that it would be inappropriate to make a final disposal of the appeal and that the claimant should be afforded an adequate opportunity to make submissions relating to the proper disposal. In that respect,

she submitted that there should be a case management review where both parties are required to attend in order to make appropriate submissions.

26. It is unfortunate that there was no attendance or representation on behalf of the claimant. The directions clearly stated that the parties were to prepare for the hearing on the basis that if it were decided to set aside the determination, any further evidence, including supplementary oral evidence that the Upper Tribunal may need to consider if it decides to re-make the decision, can be so considered at that hearing.
27. In the circumstances, I accept that it would be in the interests of justice to afford the claimant, his sponsor and representatives the opportunity to make submissions at a CMR which should be scheduled within six weeks of the decision being sent to the parties.

Hearing on 2 October 2014

28. On 1st August 2014, the claimant's solicitors, Aschfords Law wrote to the Tribunal, stating that "we on behalf of the appellant and the sponsor had withdrawn the hearing by a letter dated 25th June 2014 which was posted first class."
29. The letter was placed before the Upper Tribunal Judge for his consideration. A notice was subsequently issued in response to that letter. It was noted that the appeal in the Upper Tribunal was by the Entry Clearance Officer. It was not open to the claimant to withdraw another party's appeal. It was accordingly directed that the appeal would remain in the system for hearing and it would be a matter for the claimant whether he wishes to attend.
30. Notice of hearing was given to the claimant and his sponsor. The matter was stood down until the end of the list. There was however no appearance on behalf of the claimant.
31. I accordingly proceeded with the Entry Clearance Officer's appeal.
32. Mr Whitwell submitted that there had been a failure to provide the necessary specified evidence in accordance with Appendix FM-SE. Further, the sponsor's actual gross income was below the threshold and accordingly the maintenance requirements could not be fulfilled. I accept those submissions for the reasons already given.

Decision

The First-tier Tribunal Judge made material errors of law. The following decision is substituted:

The claimant's appeal is dismissed.

The fee award made by the Judge of the First-tier Tribunal is set aside.

No anonymity direction made.

Signed

Date 10/10/2014

C R Mailer

Deputy Upper Tribunal Judge