



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/08350/2013

THE IMMIGRATION ACTS

Heard at Manchester
On 13th June 2014

Determination Promulgated
On 30th July 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE MCCLURE

Between

MRS FARZA MUDABAR
(NO ANONYMITY DIRECTION MADE)

Appellant

and

ENTRY CLEARANCE OFFICER - ISLAMABAD

Respondent

Representation:

For the Appellant: Mr Khan of Parkview Solicitors
For the Respondent: Miss Johnson, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant, Mrs Farza Mudabar, date of birth 14th October 1991, is a citizen of Pakistan.

2. I have considered whether or not it is appropriate to make an anonymity direction. Having considered all of the circumstances I do not consider it necessary to make an anonymity direction.
3. This is an appeal against the determination of First-tier Tribunal Judge Manuel promulgated on 13th January 2014. Leave to appeal was granted on 24th February 2014 in the following terms:-
 - (1) The Appellant seeks permission in time to appeal against the decision of First-tier Tribunal Judge (Judge N Manuel) promulgated on 13th January 2014 whereby it dismissed the Appellant's appeal against the Entry Clearance Officer's decision to refuse the Appellant entry with a view to settlement as the spouse of her husband under Appendix FM paragraph EC-P.1.1 with particular reference to the maintenance requirements.
 - (2) The Respondent's bundle contained a number of bank statements less than the requisite amount the Appellant and the Sponsor stated were sent with the Appellant's application. The Sponsor in oral evidence confirmed that the bank statements lodged in the Respondent's bundle were the ones which had been lodged not realising that not all of them had been reproduced. A full set of bank statements for the Sponsor covering the six month period were reproduced in particular with the Grounds of Appeal before the hearing. The original bank statements had been returned with the refusal notice enabling the Appellant to use them again in relation to the appeal process. It is arguable that the judge has misdirected herself by finding that not all of the specified evidence was provided with the original application which may make a material difference to the outcome.
 - (3) In addition, it is a further arguable error of law that the judge incorrectly calculated that the Sponsor only earned £18,000 without taking into account his increase in salary and overtime in the six month period before the date of the application.
4. Thus the matter now appears before me as an appeal in the Upper Tribunal to determine in the first instance whether there is a material error of law within the determination.
5. The letter of refusal dated 27th February 2013 appears to raise two issues. Those issues are:-
 - (a) That the Sponsor had to prove that he had income of £18,600 per annum in order to support himself and the Appellant in order to meet the requirements of the Rules. It was alleged that the evidence disclosed that his income was only £18,541 per annum. In order to qualify otherwise it was necessary for the Sponsor and the Appellant to show that they had savings otherwise of £16,147.50. There was only evidence that they had savings of £7,539.09.

- (b) The Sponsor similarly had to produce the required evidence to substantiate his financial circumstances. That included the last six wage slips as evidence of the Sponsor's gross income from their employment. Those were specified documents set out in Appendix FM and Appendix FM-SE to support the Sponsor's employment. The Sponsor it was alleged had not provided the required wage slips having provided only five.
6. With regard to the second issue it was asserted that the Sponsor had provided wage slips from May through to October 2012 including a wage slip for August 2012. The contention by the ECO was that the wage slip for August 2012 had not been included in the documentation. The judge found at paragraph 14 of the determination that she was satisfied that the Appellant had also provided the wage slips for August 2012 and that therefore the requirements in respect of providing the wage slips was met.
 7. However the judge took points with regard to the documentation not taken by the ECO.
 8. The first point relates to the personal bank statements submitted. In the documents that were before the judge there were bank statements covering the period of 12th July 2012 to 11th October 2012 rather than 6 months bank statements as required by the rules.
 9. The Rules as set out in paragraph 10 of the determination clearly required that bank statements covering the same six month period as the wage slips had to be provided. The bank statements before the judge therefore did not cover May and June 2012. The judge has recorded the evidence relevant to that issue in paragraph 16 of the determination. It was specifically put to the Sponsor whether or not those were "the only bank statements" sent to the ECO. He responded "yes".
 10. As a second point also taken by the judge as set out in paragraph 21 the letter from the Sponsor's employer did not confirm the length of the Sponsor's employment or the type of the employment as required under Appendix FM-SE paragraph 2(b).
 11. Those were not issues taken by the ECO in the refusal letter. It appears at the hearing that the Appellant's representative did not appreciate the significance of the question put with regard to the bank statements. He believed that all of the bank statements from May 2012 to 11th October 2012 had been submitted with the application and were before the Tribunal. However the Tribunal only had bank statements from 12th July to 11th October 2012.
 12. The notes of evidence by the Immigration Judge are on the file. It is clear at item 4 page 2 of her notes of evidence that the question was specifically put, "*You submitted bank statements- see resps bundle. Are these the only ones you sent*". To which the reply was "Yes". The appellant's bundle dated for the appeal the 5th December 2013 has bank statements going back to April 2012.
 13. In re-examination at page 3 question 6 the issue was dealt with by the representative. When asked whether or not the bank statements were sent for the relevant period it

is recorded that the Sponsor stated that he had sent *“six months’ wage slips and six months’ bank statements”*.

14. The judge also pointed out that no adjournment was sought at that stage to address the issue of the failure to provide the corresponding bank statements. The judge clearly considered the evidence that was before her. She had accepted in paragraph 14 that the required wage slips had been submitted. She however went on to consider the matter of the bank statements and found that in light of the Sponsor’s clear statement in evidence that those were the only bank statements he had submitted that an adjournment would in any event not have assisted the Appellant because of that clear statement that no other bank statements had been submitted.
15. That with respect seems not to have dealt with the issue raised in re-examination where the Sponsor had specifically stated that he had sent six months’ bank statements to correspond to the wage slips.
16. That however does not seem to deal with the further matter that the employer’s letter was also defective. That appears not to have been dealt with in any great detail by the letter of refusal or the Grounds of Appeal. The requirements are clearly set out in paragraph 10 that the employer’s letter must confirm specific details including the length of the employment and the period over which they had been paid at that rate and the type of employment, part-time etc. The judge has specifically set out at paragraph 21 that the Sponsor’s letter of employment does not contain the required details. The Grounds of Appeal do not appear to address that basis for saying that the documentation submitted with the application did not meet the requirements of Appendix FM-SE.
17. The Sponsor’s letter from his employers is set out at page 39. That letter in essence confirms the Sponsor’s salary and sets how the salary is to change from the period of October 2012. However it does not state the length of his employment or the nature of his employment whether it be permanent, fixed term, contract or agency. The judge within paragraph 21 has specifically noted that that letter does not meet the requirements of the Rules. It is for the Appellant to prove that she meets all the requirements of the rules and clearly that does not meet the rules.
18. Much was made of the issue of Sections 85 and 85A of the 2002 Act. It was being suggested that the Tribunal was capable of considering documentation submitted not with the application in order to assess whether or not the Appellant met the requirements of the Rules. However the requirements of Appendix FM-SE paragraph 2 stipulate that an individual has to produce a letter of employment setting out the required details. The Sponsor’s letter submitted with the application did not contain the required details. With that in mind for that reason if for no other the application by the Appellant could not succeed. The fact that further documents to show that they would meet the requirements of the Rules were put before the Tribunal does not show that they meet the requirements of the Rules.
19. Whilst there may be a point with regard to whether or not the bank statements were the required bank statements that does not alter the fact that the employer’s letter did

not meet the requirements of the Rules. Therefore the application had to be refused on that basis. Whilst it was a matter that may not have been taken by the ECO it was a matter that was evident on the evidence presented and the judge was entitled to find that having given the representative notice that the issue was being taken the representative chose not to adjourn the matter. Such an adjournment would have been to no avail because the documents submitted to the ECO did not meet the requirements of the Rules.

20. The judge has also considered the issue of any discretion in the policy guidance associated with Appendix FM-SE. The judge found specifically that sub-paragraph 3 may have been applicable in the circumstances, in that in refusing the matter the ECO may have thought that it would have been pointless to request any missing documentation as there were other grounds for refusing the application. Accordingly the judge has considered the issue of discretion and was entitled to deal with it in a manner that she did.
21. For those reasons if for no other the application had to be dismissed. The consequence is that the Appellant will have to make a new application providing the required documents.
22. With regard to the calculation of the income of the Appellant challenge was also made to that. The Immigration Directorate Instructions have been submitted to try and assist the points being made.
23. I draw attention to paragraph 5.1.4 in which it is stated that salary employment will be calculated at the lowest level of annual salary received during the six month relevant period. Thus if an individual has a pay increase within that period that will be discounted in assessing the annual salary.
24. In the present circumstances the employer's letter stated that the Appellant's employment pay was at a rate of £18,541 as from October 2012. However to reach that level there had been a 0.25% increase in the salary. Thus in order to calculate the lowest level of salary one had to take off the 0.25% from the salary figure given. That resulted in a figure of £18,499.
25. Added to that was the overtime payments received by the Sponsor during the relevant period on a six monthly basis then annualised to increase the salary. Thus in any 6 month period if a person received a bonus, one would divide that by six and then multiply by twelve.
26. On the basis of the documentation for one period in June the Sponsor received £82.80 by way of overtime payment. It is the only overtime payment made within the six month period. No explanation has been given as to why that overtime payment was made but it was. Giving effect therefore to the guidance given in the IDIs the guidance with regard to overtime is set out in paragraph 5.5.6 and states:-

“All overtime in salaried employment will be calculated based on the approach to income for non-salaried employment. This will be an annualised six month

average for the overtime which will be added to the level of gross annual salary.”

As the Sponsor earned £82.80 bonus in June the annualised figures for bonuses would have been £165.60. That added to the existing basis salary of £18,499 would mean that the gross salary for the Sponsor during the year would be £18,660.25. Thus the Sponsor would on the basis of the figures indicated meet the maintenance requirements of the Rules.

27. It appears that rather than taking the figures indicated the judge has taken the monthly salary at its minimum and then annualised that figure in order to come to the Sponsor’s annual salary. With respect that clearly is not correct. It may be that there are reasons why one month’s salary was lower than the rest. It may be that the accounts department have made a mistake. However the letter from the employer clearly states what the annual salary is to be. It would have been of assistance if some explanation had been given as to why for example May had a specifically lower level of income than other months. However there seems to be no reason why the judge should be annualising that salary figure as the lowest rather than taking a statement from the employer as the basis of the calculation. It would have assisted if the relevant calculations had been set out. However it does not appear that any of the parties had considered that an appropriate step to take. That left the judge with an inadequate explanation as to why the salary in May was specifically low and the judge took the step of calculating the annual income on the basis of that monthly salary. That would have been arguably not in accordance with the guidance given.
28. However insofar as the employer’s letter does not meet the requirements of the Rules that would be a ground for dismissing this matter in any event. The judge has dismissed it for that reason. Accordingly any other ground does make no material difference to the outcome of the appeal.
29. The matter was thereafter to be considered on the basis of Article 8. However as is evidenced from the cases of Gulshan 2013 UKUT 640, Nagre 2013 EWHC 720 and Haleemudeen EWCA Civ 558 the Immigration Rules are now Article 8 compliant and it would require something exceptional within the facts of the case to consider Article 8 outside of the Rules. The judge has considered Article 8 and given valid reasons for not allowing the appeal on the basis of Article 8. I do not find in the circumstances that there are any grounds for questioning the assessment of Article 8 made by the judge.
30. Accordingly for the reasons set out I find that there is no material error of law within the determination and the decision to dismiss this matter on all grounds stands.

Signed

Date

Deputy Upper Tribunal Judge McClure