



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: OA/14076/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 7 November 2014**

**Determination Promulgated
On 10 December 2014**

Before

DEPUTY JUDGE DRABU CBE

Between

THE ENTRY CLEARANCE OFFICER, CHENNAI

Appellant

and

MRS MALKI MEENUKA ABHAYA LUNAWARDANA PAHALAGE

Respondent

ANONYMITY DIRECTION IS NOT MADE

Representation:

For the Appellant:

Mr S Whitwell, Senior Presenting Officer

For the Respondent:

Mr R Solomon of Counsel Instructed by Jein Solicitors.

DECISION AND REASONS

1. This appeal has been brought by the Entry Clearance Officer, Chennai against the decision of Judge Afako, a Judge of the First Tier Tribunal who, following a hearing at Taylor House on 22 July 2014, allowed the appeal of Mrs Malaki Pahalage, named as respondent in this determination. The Entry Clearance Officer had refused her application for entry clearance to settle in the United Kingdom as the spouse of Mr Nissanka Biddelama on the ground that the appellant was not satisfied that the respondent and sponsor (the husband) were in a subsisting

relationship as according to the appellant the parties to the marriage had maintained contact following their marriage. Secondly the sponsor had not provided evidence of his gross annual income in the specified documents. Thirdly that the respondent had not provided evidence of her ability relating to English language.

2. The Judge noted that the Entry Clearance Officer had now conceded the English language requirement.
3. Judge Afako heard oral evidence from the sponsor and received documentary evidence. On the basis of the evidence before him the Judge said, "From the evidence I have heard and considered, I am prepared to accept that the appellant is in a subsisting relationship." He went on to say, "I accept that the sponsor has been in regular contact with his wife, including by Skype." He further finds, "I am also prepared to accept that the appellant has been receiving money from her husband. Such post decision evidence speaks to the nature of the relationship and is admissible." Judge Afako then went on to determine what he called "The key outstanding issue". The Judge's consideration of this issue is set out in paragraphs 9, 10, 11 and 12 of his determination. He accepted the evidence of the appellant that his rental income comes to £685 per annum out of which some is paid as cash in hand and that the two tenants share a bedroom in the same house that the sponsor lives in. He found the explanation given for not producing evidence of the income in the specified documents as reasonable. Adding up the salaried annual income of £11710 to the rental income of £685 per month, the Judge concluded that the annual income of the sponsor was above the £18600 threshold. In paragraph 12 of his determination Judge Afako found, "Accordingly, the appellant meets the requirements of the rules with respect to maintenance." The appeal was allowed as per the Judge's determination promulgated on 13 August 2014. He made no fee award and no anonymity direction was sought or given.
4. On 13 August 2014 the appellant (Entry Clearance Officer) sought permission to appeal to the Upper Tribunal. Whilst conceding that the sponsor's income (the husband of the applicant before the Entry Clearance Officer) current income 'does exceed the income threshold, there is no reason to prevent the appellant making a fresh application based on the sponsor's income at this time' asserts that the decision made by Judge Afako was in material error of law as he had failed to show any regard to Appendix FM. The appellant (Entry Clearance Officer) was granted permission to appeal on 1 September 2014 by Judge Heynes, a Judge of the First Tier Tribunal in the following terms "The grounds complain that the Judge failed to have regard to the requirements set out in Appendix FM-SE of the Immigration Rules relating to rental income."
5. At the hearing before me Mr Whitwell amplified the written grounds of appeal. He argued that it was a material error on the part of the Judge to have taken into account the rental income of the sponsor as it was derived from his "main house". According to him the income came from a room in the same building as was used by the sponsor for his own residence. He asked me to pay due regard to the wordings of the relevant rule.
6. Mr Solomon for the respondent spoke to his written skeleton arguments. Mr Solomon reminded me that the ground advanced by the appellant was an

“afterthought” to prevent the respondent from succeeding in his appeal. He pointed out that the sponsor and respondent had been honest and transparent throughout in that they had relied on the rental income when making the application for entry clearance in March 2013. This is proved by the terms of the declaration and the respondent’s covering letter in support of the application. The application for entry clearance had not been refused on the grounds that were being advanced now. No such argument had been advanced before the Judge at the First tier Tribunal. It was not suggested to Judge Afako that he could not take account of the rental income for the reasons now advanced before this Tribunal. It was note worthy said, Mr Solomon that the Entry Clearance Officer was represented at the hearing before the First Tier Tribunal. Mr Solomon argued that it is completely wrong to now criticise the Judge for failing to deal with an argument or a point that was never raised before him and to suggest that this amounted to a material error of law in his decision. Mr Solomon then went on to explain and clarify the factual situation. He said that the sponsor owns the flat at 216 Bellgrove Close. The flat has two separate bedrooms as well as a living room. One of the bedrooms is rented to the two tenants who together pay him £685 per month for the use of that room. The income comes from renting a room and not from renting the flat. The sponsor has exclusive use of the room that he lives in but the room is not his main residence. The sponsor had not let out his whole flat in which he continued to live in as his residence. This situation, said Mr Solomon, is precluded by the rules but the Rules do not preclude the sponsor from renting out a room in his property or from reliance on the income received from such rental arrangement. Mr Solomon submitted that there was no error in the determination of Judge Afako and his decision to allow the appeal should not be interfered with.

7. In his final response Mr Whitwell said that a point of law can be taken up at any time and he argued that in any event the Entry Clearance Officer had mentioned this point on rental income in his letter stating reasons for refusal. With the first point I broadly agree. With the second assertion I find no evidence to substantiate the assertion. Further more it is clear to me that the representative of the Entry Clearance Officer did not raise this point before the First Tier Tribunal. There is merit therefore in Mr Solomon’s argument that the suggestion that the Judge made a material error of law by not addressing this matter is rather unfair as no such argument was advanced before him. I have a statutory duty under the Procedure Rules to decide cases fairly and justly. It is also proven fact as asserted by Mr Solomon that the sponsor and the respondent have been honest and transparent throughout in their dealings with the appellant as well as the First Tier Tribunal.
8. In my judgement a close analysis of the ground of appeal relating to the rental income has no substance. The wording of the relevant rule is being construed by the appellant at this late stage of the proceedings without good reason. Such construction is clearly not supported by the wording of the Rule and nor by rules of common sense. As far as guidance to Entry Clearance Officers is concerned the legal principles established by the case of Alvi take care of that. The Rule itself does not prohibit aggregation of rental income derived from one room in a flat owned by the sponsor. It is perhaps noteworthy that taxpayers are encouraged to let out a room in their property to gain tax benefits. Moreover when you look at the overall picture, the respondent has now been found to be in a genuine and subsisting relationship with the sponsor. No aspersion is cast on the bona fides of the

marriage. No factual objection is raised on the capacity of the sponsor to maintain and support his wife in the UK. It is conceded that the appellant now meets all the requirements of the Rules and it is suggested that she should make a fresh application to secure her entry clearance. This concession is demonstrative of the kite-flying propensity shown by the appellant in this case. It also demolishes the grounds of appeal in that on the one hand it is argued that the Judge of the First Tier made a material error of law in adding up the income derived from the second bedroom in his flat and yet it is conceded that the respondent has now met the requirements of the rules when factual situation on income has not changed.

9. For the reasons given above, I do not find any error of law in the determination of Judge Afako and see no reason to interfere with his decision to allow the appeal. Judge Afako's decision to allow the appeal of Mrs Malik M A L Pahalage is upheld. Further his directions on costs require no change too as do his directions on anonymity.

K Drabu CBE
Deputy Judge of the Upper Tribunal.
4 December 2014