



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: OA/14865/2013

**THE IMMIGRATION ACTS**

Heard at Field House  
On 5 June 2014

Determination Promulgated  
On 9<sup>th</sup> July 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

ENTRY CLEARANCE OFFICER

Appellant

and

MR GRANT LOXTON  
(NO ANONYMITY ORDER MADE)

Respondent/Claimant

**Representation:**

For the Appellant: Mr P. Deller, Senior Presenting Officer  
For the Respondent/Claimant: None

**DETERMINATION AND REASONS**

1. The Specialist Appeals Team appeals on behalf of an Entry Clearance Officer (Manila) from the decision of the First-tier Tribunal allowing the claimant's appeal against the refusal of entry clearance as the spouse of a British national.

2. The appellant is a national of Australia, whose date of birth is 20 June 1981. He made an online application for entry clearance on 30 April 2013. He was married to Amy Alexandra Loxton, a British national, who was living with him in Australia. They had had one child Kobe, who had been born on 16 May 2012. They proposed to live in the UK with his wife's mother in Dorset. He was asked whether he intended to work in the UK. He answered yes. He and his wife intended to buy a business, and they were currently looking at buying a country pub. His wife was currently working as a nurse at Gold Coast Hospital, and had been doing so since 1 May 2008. She earned £30,000 sterling equivalent from this employment before tax. They owned three properties together, and had large cash savings. In answer to question 3.75, he said that he had 60,000 Australian dollars in an account which had been held since January 2012, and the total cash savings held by his wife amounted to £45,000. They were looking to return to the UK so that his wife's family could spend some time with their little boy, who had dual citizenship.

### **The Reasons for Refusal**

3. On 20 June 2013 an Entry Clearance Officer in Manila gave his reasons for refusing the application. In order to meet the financial requirements of the Rules, his wife needed a gross income of at least £18,600 per annum. As his wife was returning to the UK, she did not have to be in employment at the point of application. But she had to have confirmed salaried employment to return to the UK, starting within three months of her return. The employment had to have an annual starting salary sufficient to meet the financial requirement applicable to the application. In addition, he also needed to demonstrate that in the twelve months prior to his application his sponsor had received the level of income specified to meet the financial requirement based on salaried income overseas, non-employment income and/or pensions.
4. He had not provided evidence to demonstrate his wife had confirmed employment in the UK starting within three months of her returning there. Indeed he had indicated in Appendix 2 that his wife did not have any employment arranged in the UK. Therefore, in order to qualify, his wife was required to show £62,500 in savings, which must have been held for at least six months.
5. As evidence of his savings, he had provided a bank statement from RAMS covering a period from 1 October 2012 to 31 March 2013. The lowest balance in the last six months was 19,671 Australian dollars, which was equivalent to £12,642 according to OANDA. Therefore, these savings were not sufficient to meet the financial requirements. Accordingly his application was refused under paragraph EC-C.1.1(d) of Appendix FM of the Immigration Rules.

### **The Grounds of Appeal**

6. The claimant wrote a letter in which he set out his grounds of appeal. He had not realised that they needed to show proof of employment for his wife in the UK. During the pending visa application, his wife had been in contact with a possible employer that she had met in December 2012 whilst back home in the UK on holiday. She was successful at interview, and he was attaching supporting documents to

show that she had employment which was supposed was to commence in August 2013.

7. He disputed the Entry Clearance Officer's assertion that he had not demonstrated that in the last twelve months his wife had received the level of income required. They had submitted a 2012 income tax return for both himself and his wife which showed that she earned 65,921 Australian dollars (approximately £44,000) for the year.
8. He and his wife had three houses here in Australia, and they had a healthy savings account. The reason for them not having appropriate savings for the entire time required was purely a matter of shuffling money around from bank to bank. It was not until March 2013 they definitely decided they would like to move to the UK, so all their money was not in one account. They also needed to sell their boat to help finance their move.

### **The Decision of the First-tier Tribunal**

9. The appellant's appeal came before Judge Nixon sitting at Birmingham on 20 February 2014 for determination on the papers. In his subsequent determination, Judge Nixon said he had seen a letter dated 9 July 2013 from Kia Smith of Kiki's Boutique stating a job offer was made to the sponsor prior to the date of decision, namely on 29 May 2013. She was offering her a job with an annual salary of £20,400 to commence in August 2013 or as soon as her husband got a visa. The judge continued:

This letter fulfils the criteria I am surprised to note that the ECM was provided with this letter but seems to ignore it. Whilst it is correct to state the [claimant] has not provided the necessary documents as specified by the Rules to show the sponsor's annual income in Australia, it is unnecessary in any event, as the letter provided meets the requirements under the Rules and shows that the sponsor is earning sufficient to meet the Rules. Whether or not the couple have sufficient savings is irrelevant as the gross annual income is over £18,600. I find that this appeal must succeed.

### **The Application for Permission to Appeal**

10. A member of the Specialist Appeals Team settled an application for permission to appeal, contending that the judge had made a material misdirection of law:
  - (a) The Rules on specified evidence are comprehensively set out in Appendix FM-SE of the Immigration Rules; these set out what types of evidence are required, the periods they cover and the format they should be in. The judge fails to have adequate regard to this Appendix in making findings on this issue and, as such, the conclusions arrived at are unsustainable.
  - (b) The judge indicates that the letter provided by the sponsor's employer is sufficient to establish the Immigration Rules are met. It is respectfully submitted that this conclusion is misguided and the judge has erred by failing

to consider the totality of the evidence provided (or, indeed, not provided) in assessing the Rules

- (c) It follows from this that it is not clear what the sponsor's actual gross annual income was at the date of application; it then follows the appeal can therefore not be made out. It is worth noting that if the sponsor's current income does exceed the income threshold there is nothing to prevent the appellant from making a fresh application based on the sponsor's income at the present time.

### **The Grant of Permission**

- 11. On 20 March 2014 First-tier Tribunal Judge Davidge granted permission, observing that the grounds revealed an arguable material error of law.

### **The Hearing in the Upper Tribunal**

- 12. At the hearing in the Upper Tribunal there was no appearance on behalf of the claimant, nor had any representations been received by the Upper Tribunal from him following the grant of permission to appeal. Mr Deller submitted that the decision was clearly erroneous in law, and that the appeal could not succeed due to the failure by the claimant to provide all the specified documents in accordance with Appendix FM-SE.

### **Reasons for Finding an Error of Law**

- 13. The judge misdirected himself in holding that the only evidential requirement that the claimant needed to discharge was to show that at the date of decision his wife had a confirmed offer of employment in the United Kingdom which would yield an annual income of at least £18,600.
- 14. The financial requirements for entry clearance as a partner are set out in E-ECP.3.1. The applicant must provide specified evidence, from the sources listed in paragraph E-ECP.3.2, of a specified gross annual income of at least £18,600.
- 15. E-ECP.3.2 provides that when determining whether the financial requirement is met, only the following sources will be taken into account –
  - (a) income of the partner from specified employment or self-employment, which, in respect of a partner returning to the UK with the applicant, can include specified employment or self-employment overseas and in the UK; and...
  - (e) specified savings of the applicant and partner.
- 16. Paragraph 13 of Appendix FM-SE is entitled "Calculating gross annual income under Appendix FM." Paragraph 13(a) prescribes that where the person is in salaried employment in the UK at the date of application and has been employed by their current employer for at least six months, their gross annual income will be the total of

- (i) the level of gross annual salary relied upon in the application ...
17. Paragraph 13(c) provides that where the person is in salaried employment outside of the UK at the date of application, has been employed by their current employer for at least six months, and is returning to the UK to take up salaried employment in the UK starting within three months of their return, the person's gross annual income will be calculated:
- (i) on the basis set out in paragraph 13(a); *and also* (my emphasis)
  - (ii) on that basis but substituting for the gross annual salary at paragraph 13(a)(i) the gross annual salary and the salaried employment in the UK to which they are returning.
18. Paragraph 2 of Appendix FM-SE provides that in respect of salaried employment in the UK all of the following evidence must be provided
- (a) payslips covering
    - (i) a period of six months prior to the date of application if a person has been employed by their current employer for at least six months ...
  - (b) a letter from the employers who issued the payslips at paragraph 2(a) confirming:
    - (i) the person's employment and gross annual salary,
    - (ii) the length of their employment;
    - (iii) the period over which they have been or were paid the level of salary relied upon in the application; and
    - (iv) the type of employment (permanent, fixed-term contract or agency).
  - (c) personal bank statements corresponding to the same periods as the payslips at paragraph 2(a) showing that salary has been paid into an account in the name of the person or in the name of the person and their partner jointly.
19. Paragraph 2(a) provides that in respect of salaried employment in the UK the applicant may, in addition to payslips and personal bank statements submit the P60 for the relevant periods of employment relied upon (if issued). If they do not, the Entry Clearance Officer or Secretary of State may grant the application of otherwise satisfy the requirements of this Appendix relating to that employment are met.
20. Paragraph 3 of Appendix FM-SE provides as follows
- In respect of salaried employment outside of the UK, evidence should be a reasonable equivalent to that set out in paragraph 2 and where relevant paragraph 2(a).
21. In respect of a job offer in the UK, a letter from the employer must be provided:

- (a) Confirming the job offer, the gross annual salary and the starting date of the employment which must be within three month's of the applicant's partner's return to the UK; or
  - (b) Enclosing a signed contract of employment which must have a starting date within three months of the applicant's partner's return to the UK.
22. As asserted in the refusal of entry clearance, the claimant needed to demonstrate that in the relevant period prior to his application his sponsor had received the level of income specified to meet the financial requirement based on salaried income overseas, non-employment income and/or pensions. The judge accepted that the claimant had not provided the necessary documents as specified by the Rules to show the sponsor's annual income in Australia. On that basis, he ought to have held that the appeal had to be dismissed. He was wrong to treat compliance with this requirement as unnecessary. As I have sought to demonstrate above, the Rules required specified evidence to show that the sponsor was achieving the required level of annual income overseas, as well as showing that the sponsor would achieve the required level of annual income in the UK.

### **The Re-Making of the Decision**

23. In his grounds of appeal, the claimant argued that his wife's annual income in Australia was shown by their 2012 income tax return for himself and wife. But even if this is treated as equivalent to a P60, it is apparent from paragraph 2(a) of Appendix FM-SE that this type of evidence is merely optional. As stated by the Entry Clearance Manager when giving reasons for upholding the refusal decision, the claimant did not provide payslips or bank statements to support his wife's asserted annual income in Australia. So the First-tier Tribunal Judge was right to hold that the claimant had not provided the specified documents to show his wife's annual income in Australia.
24. Arguably the Entry Clearance Manager was not required to take into account the job offer, as the document had not been provided with the application. Moreover, as noted in the refusal decision, the claimant had not relied in the application on his wife having such a job offer. Instead, he plainly represented that what was in contemplation was himself and his wife setting up a business in the UK. However, the Entry Clearance Manager was prepared to take the job offer at its face value, and Mr Deller does not invite me to disregard it.
25. Nonetheless, having failed to provide specified evidence to show the sponsor's annual income in Australia, the only other way in which the appeal can succeed is if the claimant can show that he and/or his wife held the sum of £62,500 for a continuous six month period as at the date of application or at least as at the date of decision. As contended by the Entry Clearance Manager in his review, the additional documents provided by the claimant for the purposes of the appeal did not demonstrate that the claimant, or the couple, had held this level of savings for a continuous six month period.

**Decision**

The decision of the First-tier Tribunal contained an error of law, and it is accordingly set aside and the following decision is substituted: this appeal against the refusal of entry clearance is dismissed.

**Anonymity**

The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Signed

Date

Deputy Upper Tribunal Judge Monson

**TO THE RESPONDENT**  
**FEE AWARD**

Signed

Date

Deputy Upper Tribunal Judge Monson