



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: OA/15817/2013

THE IMMIGRATION ACTS

Heard at Birmingham  
on 28<sup>th</sup> August 2014

Determination Promulgated  
on 1<sup>st</sup> September 2014

Before

UPPER TRIBUNAL JUDGE HANSON

Between

ENTRY CLEARANCE OFFICER (SHEFO/12483)

Appellant

and

MARIA TERESA HAMMOND

Respondent

**Representation:**

For the Appellant: Mr Mills – Senior Home Office Presenting Officer.

For the Respondent: Mr Kahn of Kings Court Chambers.

**DETERMINATION AND REASONS**

1. This is an appeal by the Secretary of State against a determination of First-tier Tribunal Judge Pirotta, promulgated on 12<sup>th</sup> June 2014, in which she allowed the appeal under both the Immigration Rules and Human Rights Convention.
2. Mrs Hammond is a citizen of the United States of America born on 25<sup>th</sup> November 1975. She sought leave to enter as the spouse of a British citizen Mr Philip Hammond. The application was refused on 5<sup>th</sup> July 2013 on a number of grounds the only one of which was live before the Judge being that relating to the ability of Mrs Hammond to satisfy the maintenance requirements.
3. The Judge notes some confusion regarding exactly who was the subject of the application in the mind of the Entry Clearance Officer (ECO) as a result of misleading information being included in the application form. In relation to the maintenance requirements the Judge states in paragraph 19 of her determination:

19. The Sponsor has established in this appeal by probative evidence that the facts are as stated and that he does meet the income threshold stipulated in Appendix FM. The Sponsor has shown an employment history, working abroad on a pattern with pay which is not liable to be taxed in any country, accounts show his fees were sufficient to meet the income criteria that he had disclosed all relevant information.
4. In relation to the human rights element the Judge finds in paragraph 22:
  22. The decision to refuse entry on the basis of the Appendix FM criteria was not unreasonable in the circumstances when made but the persistence of that decision is not proportionate as the ambiguities have been cleared and the true facts disclose the parties meet the threshold for income and durability of the relationship. A further refusal in these circumstances would unlawfully interfere with the Article 8 rights to private and family life of the Appellant and the Sponsor.
5. The Secretary of State seeks to appeal this decision on grounds which can be summarised as follows: (a) there is a lack of clarity on exactly what basis the Judge found the requirements of Immigration Rules to be satisfied including failure to provide adequate reasons as to why and on the basis of what evidence she found the sponsor to be a sole trader, (b) there was confusion over the level of income threshold actually applicable in this case. The Judge found the children had been incorrectly included in the application but failed to give adequate reasons for her findings on this matter, (c) the Judge failed to give adequate reasons for finding the sponsor had sufficient income to meet the threshold for one non-national dependent. It is unclear whether before the Judge there was evidence of self-employment required under paragraph 8 of Appendix FM-SE, (d) the Judge's assessment under Article 8 fails to undertake a full and proper assessment or to give adequate reasons.

### **Error of law**

6. The Judge erred in law but the question is whether such error is material to the decision to allow the appeal. There is, for example, in paragraph 7 a reference to the burden standard of proof being "on the balance of probabilities" yet in paragraph 17 to the Judge being satisfied to the "lower-level of proof required of an Appellant". In an appeal of this nature the correct standard is the civil standard, the balance of probabilities. Notwithstanding what may appear to be a contradictory statement regarding the lower-level of proof I do not find a reading of the determination demonstrates anything other than the correct burden being applied in arriving at the decisions under challenge.

7. The original application included Mrs Hammond and three children all of whom were declared to be citizens of the United States of America. The applications of all were refused as the ECO was not satisfied that it had been proved the required income level of £27,200 per annum had been shown to be available.
8. The appeal is in the name of Maria Hammond only and oral evidence was given by Mr Hammond to the Judge that two of the children will remain in the United States of America and will be the subject of separate applications in the future. Although the Judge fails to identify in the determination the minimum level of income required to be demonstrated it was accepted before the Upper Tribunal that this is the sum of £18,600 for Mrs Hammond only.
9. A substantial volume of material was provided by Mr Hammond relating to his work and income. It is clear that the application form contained incorrect information in describing him as being involved in a limited company and/or to his being employed, as the evidence clearly stipulates that the contracts Mr Hammond undertakes are in his capacity as a self-employed independent contractor with no employer/ employee relationship being proved. The evidence clearly shows that Mr Hammond is self employed. This is not disputed before the Upper Tribunal.
10. Notwithstanding the substantial income figures contained within the information made available to the Tribunal, Appendix FM-SE sets out the specified evidence that must be provided to prove that adequate funds are genuinely available. Paragraph 7 of FM-SE states that in respect of self-employment in the UK as a partner, as a sole trader, or in a franchise "all the following must be provided" and specifies a number of documents including HMRC annual self-assessment tax returns, personal bank statements, and evidence of ongoing self-employment, required to enable an individual to prove not only that they are self-employed but also that the income derived from that employment is sufficient to meet the requirements of the Rules. Mr Hammond is self-employed but outside the United Kingdom and therefore paragraph 8 is the relevant paragraph which states:

"8. In respect of self-employment outside the UK, evidence should be a reasonable equivalent to that set out in paragraph 7".
11. Mr Mills, in his submissions, accepted that as a result of the nature of income earned outside the United Kingdom, over which the Secretary of State has no control, paragraph 8 permits a broad discretion in relation to the nature of the evidence that can be taken into account by a decision maker.
12. Mr Hammond gave oral evidence to the Judge and was found to be a credible witness in relation to the situation appertaining at the date of decision and the evidence provided which shows an income considerably in excess of £18,600.

The only issue relating to that income is whether there was a reasonable equivalent to the documents set out in paragraph 7 to establish that the claimed income is in fact available. Where the Judge stated in paragraph 19 that the sponsor has established by “probative evidence that the facts are as stated” this appears to be acceptance that the evidence of contracts of engagement, bank statements, and schedules of income earned, satisfies this requirement.

- 13. Having reviewed all the material, and although the Judge did not approach her findings by specific reference to the relevant provisions of the Rules, I am satisfied that no material error is made in her allowing the appeal under the Immigration Rules as Mr Hammond has, by providing documents reasonably equivalent to those in paragraph 7, shown that more than adequate income is available.
- 14. As the income issue was the only matter outstanding before the Judge a finding that the appeal should be allowed under the Rules is therefore a finding with the range of those available to the Judge on the evidence. In relation to the Judge's decision under Article 8; there is no reference to relevant case law or an analysis of the Secretary of State's position which is a mandatory requirement as the Judge was purporting to undertake a proportionality assessment, but in light of the fact Mrs Hammond succeeds under the Immigration Rules there is not need to deal with Article 8 further although, as this is an error of law hearing, the finding will have to be that an any error is in form rather than substance and not material to the decision.

**Decision**

- 15. **There is no material error of law in the First-tier Tribunal Judge’s decision. The determination shall stand.**

Anonymity.

- 16. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....  
Upper Tribunal Judge Hanson

Dated the 29<sup>th</sup> August 2014