



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/05408/2014

THE IMMIGRATION ACTS

Heard at Field House
On 28th October 2015

Determination & Reasons Promulgated
On 23rd November 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

ENTRY CLEARANCE OFFICER, ABUJA

Appellant

and

MRS JOY LILIAN OBIAGELI OBIJESI

Claimant

Representation:

For the Appellant: Mr S Kotas, Senior Presenting Officer

For the Respondent: Mr J Plowright, Perera & Co Solicitors

DETERMINATION AND REASONS

1. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge Oakley allowing the Claimant's appeal under the Immigration Rules.
2. The Claimant applied for entry clearance as the spouse of a settled person via an application made online on 30 January 2014. In a Refusal Letter dated 19 March 2014, the Secretary of State refused the Claimants' application on the basis that the marriage was not genuine and subsisting and as the Claimant did not meet the financial requirements.

3. The First-tier Tribunal promulgated its decision allowing the Claimant's appeal against the refusal on 30 June 2015.
4. The Appellant appealed against that decision. The grounds may be summarised as follows:
 - (i) It is arguable that the judge made a material misdirection in failing to properly consider the financial requirements under Appendix FM of the Immigration Rules, and
 - (ii) It is arguable that the judge failed to provide adequate reasons for finding that the parties are in a genuine and subsisting relationship.
5. The Appellant was granted permission to appeal by First-tier Tribunal Judge Colyer on both grounds, but with considerable reluctance on the second ground.
6. I was not provided with a Rule 24 response from the Claimant however was provided with a skeleton argument from Mr Plowright of counsel. At the hearing before the First-tier Tribunal, it is noteworthy that the Claimant was unrepresented whereas the Appellant was.
7. At the close of submissions, I indicated that I found that there was a material error of law and set aside the decision, however reserved my determination and reasons on the remaking of the appeal, which I shall now give.
8. I express my thanks to both parties for their submissions on what was a convoluted appeal but upon which the parties were almost entirely in agreement. In his submissions before me, Mr Kotas also took the sensible stance of pursuing ground one upon which permission had been granted alone.

Error of Law

9. The sole basis of challenge by the Appellant was the judge's failure to properly consider the financial requirements under Appendix FM of the Immigration Rules. Both parties were agreed that there was an error of law in the determination because the appeal was allowed under the Immigration Rules without regard to the requirement to provide specified financial evidence by the Claimant's partner and sponsor, Mr A Obiejesi. Mr Plowright accepted that the judge should have noted the absence of three months' payslips but should have allowed the appeal and remitted the matter to the Appellant for consideration under Appendix FM-SE D(e). Mr Kotas submitted that as both parties were agreed there was an error concerning the absence of three months' payslips, and the only issue I needed to consider in re-making the decision was whether Mr Obiejesi's payslips could have been obtained or not and the upshot of that.
10. As both parties were in agreement, I was minded to follow the course of action they invited me to follow and consequently, I set aside the Tribunal's determination in relation to the discrete issue of the consideration of the three months' payslips and

remake that sole remaining issue concerning the Claimant's ability to satisfy the financial requirement through specified evidence as follows.

Remaking the Decision

11. The standard of proof is the civil standard and that of the balance of probability. It is for a party that makes any assertion to discharge the burden of proof in establishing their assertion, for example, in relation to the submission of relevant specified evidence. I have considered all the evidence in the appeal, including the Claimant's and Appellant's bundles. I heard submissions from both parties, which are set out in full in my record of proceedings.
12. According to the Immigration Rules, specifically Appendix FM-SE 2(a) and (c), Mr Obiejesi was required to submit six months' wage slips and corresponding bank statements that would substantiate the payment of funds into his account preceding the application made on 30 January 2014. Consequently, Mr Obiejesi needed to demonstrate such evidence from approximately July 2013 to within 28 days of the application made on 30 January 2014 according to Appendix FM-SE 1(l).
13. In remaking the decision, I only need to consider whether the Claimant had provided sufficient payslips in accordance with Appendix FM-SE and if so, any reasons for that omission and the consequences of it.
14. I heard evidence from Mr Obiejesi whom in answer to questions from his counsel confirmed that he had not provided six months' payslips because he could not find them all when he came to submit the application. Mr Obiejesi further stated that his employers were irregular in providing hard copies of his payslips. As he put it, sometimes they came, sometimes they did not and they may have been lost equally. He then recounted that he spoke to his employer, Walter Lilly, and asked for a copy of his payslips for that period. Walter Lilly confirmed that they could only give him a statement of what he had earned and could not go back past one year however the statement from the employer would show what Mr Obiejesi earned on a weekly basis for all of the relevant months. Mr Obiejesi was shown a copy of a schedule which both parties had accepted into evidence. That schedule appeared under cover of a letter from Walter Lilly, appending a schedule documenting weekly pay from 05/07/2013 to 27/12/2013 and reflecting weekly payments for the requisite six-month period and totalling £11,356.43 for the six-month period. Mr Obiejesi confirmed this was the schedule in question he had been given.
15. In cross-examination, Mr Kotas asked whether the employer's records could go back further in time and Mr Obiejesi answered that they did not. Mr Obiejesi also was unaware whether his employer kept an electronic copy but he had confirmed to the Tribunal all that he had been told by his employer.

Submissions

16. I was then addressed by Mr Kotas who submitted that no issue was taken with the amount that Mr Obiejesi earns, but I could only take into account evidence

appertaining to the date of decision. I was asked not to consider Mr Obiejesi's P60, as this was post-decision evidence. Mr Kotas stated that I could however take into account the schedule from Walter Lilly as it related to the status quo before the date of decision and went towards the issue of whether Appendix FM-SE D(e) was satisfied or not and indicated that documents cannot be reproduced and showed what Mr Obiejesi was earning previously.

17. Mr Plowright submitted on Mrs Obiejesi's behalf that the documents before the First-tier Tribunal previously included the bank statements, payslips for 3 months and a P60 which demonstrated the net money earned for the previous tax year, which cumulatively indicated earnings in excess of £18,600. Specifically, the First-tier Tribunal had a P60 for the year ending April 2014 at C29 of the bundle which shows an income for that year of £21,374.76. Mr Plowright also highlighted that there were also P60sw for 2012, 2013 anyhow which all exceeded £18,600. Mr Plowright contended that given the explanation previously given to the First-tier Tribunal regarding missing payslips which had been confirmed today before me also, the matter should be remitted to the Entry Clearance Officer (ECO) to consider whether or not to exercise their discretion in the light of the missing payslips and the schedule which corroborate whether Mr Obiejesi was earning the requisite sum. It was submitted that a valid reason was given for the absence of three months' payslips, namely that the documents are permanently lost. Mr Plowright submitted that the income threshold was met, it was just the technicality underlying the evidence submitted which remained at stake.

Findings of Fact

18. Having considered the evidence before me and the oral evidence of Mr Obiejesi and his reasons for failing to provide the three months' payslips and the schedule from Walter Lilly which is all that he can obtain for that period, I am satisfied that the appeal should be allowed to the extent that it is remitted to the ECO for consideration of whether to exercise discretion in light of my findings of fact that follow.
19. Appendix FM-SE D(e) states as follows:

'(e) Where the decision-maker is satisfied that there is a valid reason why a specified document(s) cannot be supplied, e.g. because it is not issued in a particular country or has been permanently lost, he or she may exercise discretion not to apply the requirement for the document(s) or to request alternative or additional information or document(s) be submitted by the applicant.'
20. Having heard evidence from Mr Obiejesi I accept that he is a witness of truth and has permanently lost his missing documentation, namely the three months' payslips. To his credit, Mr Obiejesi has produced evidence from his employer, Walter Lilly, in the form a schedule which appertains to the time of the missing payslips and prior to the date of application and which substantiates that his income was in excess of the requisite level so that his income over the course of six months preceding the

application, ending within 28 days of the application date, exceeds £9,300 gross by quite some measure. In fairness to Mr Kotas, he did not seek to suggest once that Mr Obiejesi was not making the required sum, simply that three payslips were missing which put him in a technical difficulty.

21. I am quite satisfied that there was a valid reason why those payslips could not and cannot be supplied still, namely because they are permanently lost, or worse still are wholly unavailable from Walter Lilly as it appears the evidence they can produce in that form does not go back more than one year. Consequently, if alternative or additional information or document(s) were to be deemed necessary by the ECO, it may be of assistance that I express my view that the schedule of income provided by Mr Obiejesi's employer is sufficient on balance to corroborate the funds entering his bank account and demonstrates his income for the relevant half year / six month period totalled £11,356.43 which surpasses the requisite financial threshold for a six month period. This sum is also in keeping with Mr Obiejesi's historic earnings evident from his P60s that precede the date of application which also exceed the financial threshold.
22. Given those findings of fact and as there is no further matter outstanding save for the failure to provide three payslips, I allow the appeal to the extent that this matter is remitted for the urgent attention of an ECO, so that he or she may consider whether to exercise their discretion *not* to apply the requirement for the document(s) or to request alternative or additional information or document(s) be submitted by the applicant, as deemed necessary.
23. I therefore, do not propose to deal with Appendix FM EX.1 nor Article 8 ECHR.
24. For the above reasons I set aside the judge's decision and remake the decision allowing the appeal under the Immigration Rules to the extent indicated.

Decision

25. I allow the appeal against the decision to refuse entry clearance and remit this matter for the urgent attention of the ECO for consideration of whether to exercise their discretion given my findings in relation to Appendix FM-SE D(e).

Fee Award

26. The First-tier Tribunal did not make a fee award and I also do not see fit to make such an award given that evidence appertaining to the time of and preceding the application which was crucial to the just disposal of the appeal under Appendix FM-SE D(e) was presented on appeal.

Signed

Date

Deputy Upper Tribunal Judge Saini