



IAC-AH-LEM-V1

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

Appeal Number: OA/09880/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 9 November 2015**

**Decision & Reasons Promulgated
On 17 December 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

ENTRY CLEARANCE OFFICER - NEW DELHI

Appellant

and

**MR RAMESH ADHIKARI
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr Jaisri instructed by Sam Solicitors
For the Respondent: Ms S Sreeraman, Home Office Presenting Officer

DECISION AND REASONS

1. The application for permission to appeal was made by the Entry Clearance Officer but nonetheless I shall refer to the parties as they were described before the First-tier Tribunal that is Mr Ramesh Adhikari as the appellant and the Entry Clearance Officer, New Delhi as the respondent.

The Appellant

2. The appellant is a citizen of Nepal born on 9 August 1987 and applied, on 18 February 2014, for entry clearance to the United Kingdom as a partner under Appendix FM of the Immigration Rules.
3. That application was refused by the Entry Clearance Officer on 6 August 2014 on the basis that the appellant did not meet the income threshold requirement under Appendix FM and all the related evidential requirements under Appendix FM SE. It is a requirement that the sponsor needed a gross income of at least £18,600 per annum.
4. The Entry Clearance Officer stated that the sponsor was employed as a staff trainer with McDonald's earning £14,611 per annum and was an IT officer with Podamine Limited earning £366.56 per month. However, the most recent pay slips from McDonald's were dated 5 October 2013 which was more than 28 days before the application and the most recent pay slips from Podamine Limited were dated December 2013 which were more than 28 days prior to the date of the application. Appendix FM SE required that the appellant provide specified evidence relating to a period which ended with the date of the application and the application was therefore refused under paragraph ECP.1.1(d) of Appendix FM of the Immigration Rules (E – ECP 3.1). The Entry Clearance Officer specifically set out to satisfy the financial requirements the appellant was required to submit the following documents relating to their sponsor
 - 'six months wage slips (latest pay slip must be no earlier than 28 days before the date of application).
 - bank statements corresponding to the same six month period (latest bank statements must be no earlier than 28 days before the date of application).
 - letter from employer confirming employment type salary length of employment and period paid salary for'.
5. In the event the appeal was allowed by First-tier Tribunal Judge Miles on 24 June 2015.
6. An application for permission to appeal was made on the basis that Appendix FM SE of the Immigration Rules sets out exacting requirements of the type of corroborative evidence that it is necessary for an applicant to provide to make out their claim. Among the requirements are that wage slips and corresponding bank statements need to be provided for the six months prior to the date of application. In this case that means the sponsor needed to provide this evidence for the whole of the period 18 August 2013 to 18 February 2014.
7. It was clear from the Tribunal's findings at paragraph 14 of the determination that this evidence was not before the 'court'. Instead, the Tribunal made findings based on the credibility of the sponsor this was unacceptable and could not replace the

requirements of the Rules for the purposes of any assessment under 276ADE (sic) of the Rules. It thereby followed that the conclusion of the Tribunal was wrong in law.

8. At the hearing Ms Sreeraman submitted that the judge misdirected himself in relation to law under Appendix FM SE. The relevant period was from August 2013 to February 2014. The appellant had presented pay slips from July 2013 and then produced at the hearing further pay slips from McDonald's. She claimed she received payments from Podamine Limited but the evidence regarding the February pay slip was not in the bank statement. The judge should have looked at the totality of the evidence and it was clear that the following three issues fell short of the requirements. The January and February Podamine pay slips were absent. With regard to the employer's letter that fell short of the 28 day requirement as it was dated 23 October 2013 and further the appellant needed to show the Podamine deposits in the bank statement of February 2014.
9. The appellant had not demonstrated the requirements under Appendix FM SE. There was a further point that whilst the judge was entitled to take into account the earnings from McDonald's she had only shown £15,919 from the pay slips to December. At the end of December she had earned £18,118 when including the pay slips from Podamine and thus there was an insufficiency of income to amount to £18,600.
10. Mr Jaisri indicated that the specified evidence could be divided into two - that from McDonald's and that from Podamine. The point was that the appellant had stated that she had included all the necessary evidence as part of her application and this had been referred to in the judge's findings for example McDonald's had reconfigured their pay slips and these new pay slips had been sent to the respondent. Ms Sreeraman did not have those on file but it is clear that those pay slips were reflected in the bank statements and what was before the decision maker.
11. Mr Jaisri stated that the only absent pay slip was that of 31 January 2014 from Podamine which was not before the Entry Clearance Officer and the pay slips from July to December were before the Secretary of State. That absent pay slip of 31 January 2014 was produced before the judge on the date of the hearing. Mr Jaisri considered that the judge could consider that under Section 84(5)(a) or alternatively the matter should have been considered under paragraph 245AA.
12. Mr Jaisri submitted that the income from Podamine could be determined from the bank statements. I was referred to the Halifax Bank statements which were before the Secretary of State. The deposits from page A75 onwards showed salary from Podamine employer at the rate of £293.33 per month which was the net equivalent of a gross payment of £366.53 per month. Mr Jaisri submitted that this should be scaled up on an annual basis and for twelve months would be the equivalent of £4,398 as a salary from Podamine. He submitted that the 28 day period should only apply to the bank statements and pay slips and not to the employment letters. All bar one pay slip was produced which was the January pay slip from Podamine.

13. Ms Sreeraman pointed out that the letter from the employer made no reference to the gross annual salary and if the judge had proper regard to the employer's letter he would not have allowed the appeal because the employer's letter was not in the prescribed format.
14. Mr Jaisri pointed out that the grounds of appeal could not be widened to include everything that was deficient because it would mean that the Secretary of State could merely refer to the fact that an appellant had not complied with the Immigration Rules without more. He submitted that the December 2013 pay slip was before the Entry Clearance Officer.
15. I considered whether the judge was in error in his assessment of the evidence. At paragraphs 12 he assessed the income from McDonald's and would appear to refer to evidence of the appellant's earnings from McDonald's by way of her P60 for the year ending 5 April 2014 which stated that her gross earnings were £15,919. That was an error because the judge should have been looking at evidence as at the date of application which was in fact in February 2014.
16. That said the requirement is for the bank statement and payslips to fall within the 28 day period of the date of application which this instance it was 18th February 2014. The period can run to 20th January 2014 to fulfil the requirement. The pay slips for 31st January 2014 for McDonalds were said to have been submitted by the sponsor and thus did run up to within 28 days of the application. Even if the appellant had not provided those payslips the Secretary of State could have requested those pay slips because they form part of a series under Appendix FM SE(D)(b)(i)(aa)(documents missing from a series). The pay slips which were said to be submitted with the application from August 2013 to January 2014 demonstrate an income of £7,989.22 gross. That is the equivalent of the salary of £15,978.44. Although it was maintained that the letter was not sufficient there is no doubt that a letter was produced from McDonald's and genuine pay slips were produced and the judge accepted that the appellant had been employed by McDonald's since November 2011 and continued to be employed by them and that the bank transfers into her account were reflected in the Halifax Bank statements which showed the relevant regular credits and which corresponded to the net payments identified in the pay advice slips. Her gross earnings, when analysed from the six months pay slips provided and which should have been considered by the Secretary of State indicated a six monthly income of £7,989.22 with an annual equivalent of £15,978.44. The judge's assessment was in fact £15,919 albeit that it was taken from the wrong evidence. I therefore that there is an error of law but on the papers before me I proceeded to consider whether it is a material error of law.
17. The judge also at 13 found that there was a letter from Podamine and that there were pay advice slips for the totality of the period until 31 December 2013. There were pay slips also provided for the period from July 2013 until 31 December 2013 and the sponsor produced an advice slip dated 31 January 2014. Once again the payments were reflected by deposits into the bank account of a net payment of £293.33 and related to an equivalent gross payment of £366.53 per month. The appellant had

been working for this company for six months prior to the application and the judge found that on the basis of gross earnings of £2,932 that that was an annual equivalent sum of £2,932. At the hearing before me Ms Sreeraman confirmed that in fact before the Secretary of State were the pay slips until December 2013. Hence the Secretary of State was in fact correct in the refusal letter to state that the pay slips were 28 days outside of the time but once again I find that the series could have been requested under paragraph 245D(b)(i)(aa). There was clear evidence in the bank statements of the corresponding sum of payments from Podamine.

18. The sponsor maintained that she had produced the payslips and bearing in mind the originals payslips produced and the bank statements showing her income I have no reason to doubt this would have been the case. Had the one further pay slip from Podamine (and if necessary McDonalds) been requested even on the basis of gross earnings to date of £2,932 from Podamine the appellant's salary reached £18,910.44. I therefore find that the income of £18,600 per annum had been demonstrated because from the earnings of McDonald's were the equivalent of £15,978.44.
19. There was clearly evidence which was placed before the Entry Clearance Officer which was not considered and extending the principle in the case of **Mandalia v SSHD [2015] UKSC 59**, I consider that that evidence, which formed part of a series, should have been requested. The payslip from Podamine could be seen to be available evidence because the Halifax bank statement dated 31st January 2014, and which was before the Entry Clearance because it was in the Entry Clearance bundle, showed the wage payments from both McDonalds and from Podamine on 30th and 31st January 2014 respectively. Both these payments were within the 28 day period and the wage slips and consistent bank deposits for the previous six months had been supplied. The wage slips were before the First-tier Tribunal and by that I mean the evidence which predated the date of the application.
20. There was criticism by Ms Sreeraman of the letters from the employers because they did not comply with the 28 day period. I do not find that this 28 day limit attaches to the letters but rather the bank statement and payslips. It is correct that Appendix FM-SE (I) imposes a requirement of a 28 day period prior to the date of application in relation to 'evidence relating to a period which ends with the date of the application'. That applies to the payslips and the bank statements but FM-SE does not impose such a time restriction or confinement on the employer's letter.
21. Even if that is not correct, as pointed out in the decision of Judge Miles, no objection was made regarding the employers' letters by the Entry Clearance Officer at the appeal hearing before him and I consider it too late to raise the issue of the letters before the Upper Tribunal when this was not a matter which was specifically taken by the Entry Clearance Officer prior to the actual hearing before me or in the permission to appeal.
22. For completeness the permission to appeal referred to Paragraph 276ADE which is an application to remain in the United Kingdom on the basis of private life. This was

in fact an out of country application for entry clearance to join a spouse and thus the reference to 276ADE appeared to be made in error.

23. I therefore find that there was no error of law made by the First-tier Tribunal Judge which was material to the outcome and therefore the decision shall stand.

No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge Rimington