



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

Appeal Number: OA/15186/2013

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 4 March 2015**

**Determination Promulgated  
On 10 March 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE J G MACDONALD**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Appellant**

**and**

**MRS YEARUN NESA  
(ANONYMITY DIRECTION NOT MADE)**

**Respondent**

**Representation:**

For the Appellant: Mr T Melvin, Senior Home Office Presenting Officer

For the Respondent: Mr A Rahman, Legal Representative, instructed by Jalalabad Law Associates

**DECISION AND REASONS**

1. Mrs Nesa is a citizen of Bangladesh and I shall refer to her as the claimant. She applied for entry clearance as a partner under Appendix FM of the Immigration Rules and her application was refused by the Entry Clearance Officer (ECO) and again by the Entry Clearance Manager (ECM) although there was a concession in connection with the English language test. However, in respect of the financial

requirements the ECM maintained the decision and the claimant's subsequent appeal was allowed by Judge T Jones in a decision dated 11<sup>th</sup> November 2014.

2. The grounds of application set out that the judge had no regard to the Rules on specified evidence as set out in Appendix FM-SE and it was clear that the Appellant could not meet the requirements of Appendix FM-SE for the six month period prior to the date of application. Given that these were mandatory requirements it is said that the Appellant cannot succeed under the Rules. It was said that when the Sponsor was paid in cash for the gross income to be taken into account all of those monies received from employment must be paid directly into the bank and this was a mandatory requirement. The sums paid by the Sponsor varied, ranging between £15,080 at the very least and £18,720 at its very highest. Given that the deposits at their highest point were only slightly above the threshold it was reasonably likely that the Sponsor had not deposited sufficient income over the six month period to demonstrate the financial requirements were met.
3. The grounds were found to be arguable and permission to appeal granted. Thus the matter came before me on the above date.
4. For the Home Office Mr Melvin submitted that the judge had misdirected himself in law. There was insufficient evidence to show that the Appellant had complied with the necessary requirements. As such the decision should be set aside and a fresh decision made dismissing the appeal.
5. For the claimant Mr Rahman relied on his skeleton argument. Therein it is said that the crux of the judge's conclusion was at paragraph 9 where he noted that it was unfortunate cash was paid to him but he accepted that the Sponsor would not pay all of the cash into the bank but keep day-to-day living expenses in his pocket. The skeleton argument narrates that this was not likely to happen on any commonsense view where the wages are not going directly and automatically into a bank account. If they are paid cash in hand the employee would sometimes put in more and sometimes put in less. In these circumstances the judge had allowed the appeal and that conclusion must be right in law.
6. Mr Rahman accepted that, as stated in the grounds of application and the refusal notice, the specified documents had not been lodged but maintained that the judge was entitled to look at all the circumstances and had been correct to allow the appeal. It was important to note that in paragraph 9 of the decision the judge had noted a concession from the Presenting Officer that the Appellant was paid in cash. In all the circumstances Mr Rahman indicated that there was no material error in law and the decision should stand.
7. I reserved my decision.

### **Conclusions**

8. As the grounds of application say, the Rules on specified evidence are comprehensively set out in Appendix FM and Appendix FM-SE of the Rules. The

Rules are strict and prescriptive. They do not allow for any near miss. An Appellant must meet those requirements. As noted by the ECO, and unchallenged before me, the total cash payments in the qualifying six month period shown from 4<sup>th</sup> August 2012 to 4<sup>th</sup> February 2013 were payments of £8,900 giving an equivalent annual income of £17,800. It is true as Mr Rahman pointed out that as noted in the rules under Appendix FM -SE A1. (m) that cash income on which the correct tax has been paid may be counted as income under the Appendix but as the rule says that is subject to the relevant evidential requirements of the Appendix. Payslips covering a period of six months prior to the date of application must be provided.

9. The judge appears to be relying on what was the P60 for 2012/13 which suggested a shortfall which the judge found was made up by the cash payments. Even if that is so, that does not come close to meeting the specified document test set out in Appendix FM-SE. As stated Mr Rahman did not attempt to argue that it did but did argue that the judge was entitled to look at all the evidence placed before him and on the basis of that go on and allow the appeal.
10. However the case law consistently tells us that this approach is not permissible. Unless the Appellant meets the precise requirements of Appendix FM-SE the appeal cannot be allowed under the Immigration Rules. Unfortunately for the Appellant there is no scope for judges to be satisfied by evidence not of a nature specified in the rules which appears to have been the position adopted by Judge Jones.
11. The Appellant does not argue that the Secretary of State should have exercised her discretion differently in terms of paragraph 245AA of the Rules and no human rights argument has been presented. Given the acknowledged failure of the Appellant to produce the necessary documentation under the Rules there is a material error in law in the decision of Judge Jones which must be set aside and a fresh decision substituted dismissing the appeal. There is no need for an anonymity order.

### **Notice of Decision**

12. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.
13. I set aside the decision.
14. I remake the decision in the appeal by dismissing it.

Signed

Date **10 March 2015**

Deputy Upper Tribunal Judge J G Macdonald