



IAC-FH-AR-V2

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

Appeal Number: OA/15235/2014

THE IMMIGRATION ACTS

**Heard at Birmingham
On 14 September 2015
Prepared 14 September 2015**

**Decision & Reasons Promulgated
On 30 October 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

ECO - ISLAMABAD

Appellant

and

**MRS SIDRA QASIM SHAKEEL
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Miss R Petterson, Senior Presenting Officer

For the Respondent: Mr M Bradshaw, Counsel, instructed by Sultan Lloyd Solicitors

DECISION AND REASONS

1. In this decision the Appellant is referred to as the ECO and the Respondent is referred to as the Claimant.
2. The Claimant, a national of Pakistan date of birth 11 April 1988, applied for entry clearance as the partner of the Sponsor, Mr Mohammed Qasim Shakeel, a United Kingdom citizen. The application was refused on 5 November 2014 on the basis that the Claimant had failed to provide the required document, namely a bank statement

that showed payments into the account of cash earnings which he had received from a particular part of his employment with a bakery.

3. The Claimant in making representations to the ECO had not explained the lack of the specified evidence, namely the bank statements, evidencing the receipt of those earnings. Similarly in the grounds of appeal against the ECO's decision the document submitted to the Entry Clearance Manager had done no more than say that there had been non-compliance with the specific evidence because it was regarded as a waste of time for the Sponsor to pay into his bank account cash in hand payments and then take them out again. It was not suggested at the time that the Sponsor could not have a bank account because of a poor credit record.
4. What is clear is that ultimately bank statements were produced much later which went to show that a relative of the Claimant had had the bank account which ultimately was put into the Sponsor's name. However, the continued problem was that the bank account did not show the necessary level of income from the Sponsor's bakery activities as an employed person. In the circumstances the evidence was not sufficient to show that taken with his self-employment activities the Sponsor had the combined financial income threshold of £18,600 as evidenced by the specified documents required.
5. That position remained so before First-tier Tribunal Judge Stott who, in his decision of 31 March 2015 allowed the appeal on the basis that other information had been provided which demonstrated the Sponsor did have the necessary earnings in total.
6. A factual error is to be found in paragraph 7 of the decision but it makes no material difference to the point as to when the Sponsor had a bank account because he did not have on the evidence, showing through the account, sufficient moneys to meet the financial threshold under the Rules.
7. In a Rule 24 response from Counsel, Mr Pipe, and in submissions by Mr Bradshaw, the point was generally put that the Secretary of State had a discretion under the guidance on Appendix FM-SE specified evidence as at 5 November 2014 to waive the requirements of the Rules and in particular reference was made to paragraph D(e) which states

"Where the decision maker is satisfied there is a valid reason why a specified document 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."
8. In this case two things are evident. Firstly, this issue was not raised before the ECO nor was it raised as part of the grounds of appeal considered by the ECM, and simply there was nothing to indicate why discretion should be exercised, nor that there was evidently other documentation highlighted which would demonstrate the required issue that the necessary funds were passing through a bank account at the material time.
9. Therefore it does not seem to me that the matter was highlighted for the exercise of discretion. Similarly it seemed to me that as a matter of law the judge was wrong to

embark upon such a course which was the primary function of the Secretary of State to exercise. It is accepted in the submissions made by Mr Bradshaw that those matters were not argued before the judge whether or not there was a discretion open to him to exercise to show that the Appellant, notwithstanding he had not met the requirements of Appendix FM-SE, could put together other evidence to show the financial threshold was met even if that did not inevitably follow from the documents that were before the judge, the ECO or the Entry Clearance Manager on review.

10. In these circumstances therefore I have considered the case of Sultana and Others (Rules: waiver/further enquiry; discretion) [2014] UKUT 540 (IAC). It seemed to me that it was not for an Immigration Judge to exercise discretion when the Secretary of State has not done so.
11. I find the judge in exercising the discretion he did, notwithstanding the Sponsor could not meet the specified documents required under the Rules, was in error of law that could not be remedied. In any the purpose of a bank statement being required is to avoid the problems of false receipts/payslips or lack of evidence of actual payments being made. In this case the only reason the Sponsor did not bank his wages from the Bakery was his choice: He regarded the Respondent's requirement as irrational (witness Statement paragraph 2, dated 18 March 2015) because he would deposit the cash and "... withdraw it instantly." Yet had he done so there would have been no problem and the specified evidence established. I have considerable doubts whether D(d) or D(e) of Appendix FM-SE would apply as a valid reason from the Sponsor of why the specified document could not be supplied: A matter for the Secretary of State.
12. The Original Tribunal's decision can not stand.
13. In the light of the judge's findings of fact it is plain that the Claimant/ Sponsor could not meet the relevant specified document requirements under Appendix FM of the immigration rules. The following decision is substituted.

Notice of Decision

14. The appeal of the Claimant is dismissed.

Anonymity

15. No anonymity order was sought nor was one appropriate or necessary.

Fee Award

16. A fee of £140 was paid. The appeal has failed and therefore no fee award is appropriate.

Signed
Deputy Upper Tribunal Judge Davey

Date 21 October 2015

PS. I regret the delay in promulgation which was caused by the case file being mislocated.