



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/11764/2015

**THE IMMIGRATION ACTS**

Heard at : IAC Manchester  
On : 31 March 2016

Determination Promulgated  
On 13 April 2016

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

IRFAN SALEEM

Respondent

**Representation:**

For the Appellant: Ms C Johnstone, Senior Home Office Presenting Officer

For the Respondent: Mrs T K Zahoor of Prestige Solicitors

**DETERMINATION AND REASONS**

1. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing Mr Saleem's appeal against the respondent's decision to refuse his application for leave to remain as a spouse.
2. For the purposes of this decision, I shall hereinafter refer to the Secretary of State as the respondent and Mr Saleem as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

3. The appellant is a citizen of Pakistan born on 15 June 1988. He entered the United Kingdom with entry clearance as a student valid until 15 November 2011 and was subsequently granted periods of leave to remain as a Tier 4 (General) Student Migrant until 30 January 2015.

4. On 28 January 2015 the appellant applied for leave to remain as a spouse. His application was refused on 10 March 2015 on the basis that he had failed to produce satisfactory evidence to show that he could meet the financial requirements in E-LTRP 3.1. The respondent considered that the appellant had provided satisfactory evidence to show that he and his wife were employed by S & S (Manchester) Ltd. The respondent noted that the appellant had provided employer's letters, wage slips dated from July 2014 to December 2014 and bank statements for himself and his wife. The respondent noted further that the payslips showed a combined income of £21,629.40. However between July 2014 and September 2014 the appellant and his wife were paid in cash and the income during that period could not, therefore, be used towards meeting the financial requirement of £18,600. The income which could be used towards meeting the financial requirement was not sufficient to meet the £18,600 threshold and accordingly the appellant was not able to meet the requirements of the R-LTRP.1.1(c). The respondent went on to consider the appellant's family life and private life within the immigration rules, but considered that the criteria in Appendix FM and paragraph 276ADE(1) could not be met. With regard to family life, the respondent considered that the requirements of EX.1(b) were not met as there was no evidence to show that there were insurmountable obstacles to family life being continued outside the UK. The respondent considered that there were no exceptional circumstances justifying a grant of leave outside the immigration rules.

5. The appellant appealed against that decision. His appeal was heard by First-tier Tribunal Judge Smith on 22 July 2015. Judge Smith noted that it was not in dispute that the bank statements produced by the appellant for the relevant six month period prior to the application showed salary going into the account for only four of the six months, and that the appellants were being paid in cash for the other two month period. He noted that it was therefore accepted that the appellant could not meet the requirements of paragraph 2 of Appendix FM-SE of the immigration rules. However, the judge found that the fact that the appellant's and sponsor's salary had not been paid into a bank account for a two month period was a "minor evidential problem" for the purposes of paragraph D(e) of Appendix FM-SE and paragraph 3.4.2 of the Immigration Directorate Instructions (IDIs) and that, in failing to recognise that and to apply her own policy on evidential flexibility principles, the respondent had not acted in accordance with the law. The judge found that, since all the other requirements of the immigration rules had been met, leave should be granted. He allowed the appeal under the immigration rules.

6. Permission to appeal to the Upper Tribunal was sought by the respondent on the grounds that the judge had no power to allow the appeal outright under evidential flexibility, but that in any event his application of evidential flexibility was irrational.

7. Permission to appeal was granted on 10 December 2015 on the basis that the judge had arguably incorrectly applied the evidential flexibility provisions.

### Appeal Hearing

8. At the hearing Ms Johnstone submitted that the evidential flexibility provisions in paragraph 245AA and Appendix FM-SE paragraph D, and the IDIs did not apply in this case, as it was not a matter of minor evidential problems with the appellant's application, but rather evidence that was entirely missing. The appropriate course would be for the appellant to make a fresh application with the relevant evidence. Ms Johnstone asked that the judge's decision be set aside and that the decision be re-made by dismissing the appeal. It was noted at this point that the judge had dealt with Article 8 in his decision.

9. Mrs Zahoor submitted that the judge was entitled to rely on the evidential flexibility provisions, given that the appellant was able to meet the financial requirements of the immigration rules, having met the income threshold of £18,600, and had produced evidence of more than six months' salary deposited into a bank account, but had failed only as a result of two months' missing evidence. The appellant had provided an explanation about the missing deposits in the bank accounts from his employer, and his wife's employer, namely that their salary had been paid in cash for those two months. That had been explained by the appellant at page 40 of his FLR(M) application form. The respondent ought to have considered that a valid reason had been given and that there was only a minor evidential problem, for the purposes of paragraph D(e) of Appendix FM-SE and the IDIs and ought to have applied her own policy. The respondent could also have reconsidered the matter in the light of the additional evidence submitted for the appeal showing further salary payments. Mrs Zahoor relied on the case of Sultana and Others (rules: waiver/further enquiry; discretion) [2014] UKUT 540 in regard to the respondent's discretion and powers of waiver and submitted that the judge had the power to review the respondent's discretion and had properly allowed the appeal.

### Consideration and Findings

10. No issue has been taken with the judge's reference at [19] to "entry clearance" as constituting a material error and clearly that must be the case. The judge, at [1] plainly understood that this was an application for leave to remain and not an entry clearance application, and the reference at [19] was plainly a typing error which had no material impact on the decision.

11. It is clear, however, that the judge erred in law in his interpretation of the evidential flexibility provisions and the discretion available to the respondent. It is equally clear that Mrs Zahoor, in seeking to justify the judge's decision, also misunderstood the same provisions and proceeded on a misunderstanding of the principles set out in Sultana. Indeed, rather than assisting the appellant, the case of Sultana makes it clear that he cannot succeed.

12. At [16] of Sultana, the President set out the full requirements of paragraph [D] of Appendix FM -SE, as follows::

“[D](a) In deciding an application in relation to which this Appendix states that specified documents must be provided, the ..... decision maker will consider documents that have been submitted with the application and will only consider documents submitted after the application where subparagraph (b) or (e) applies.

(b) If the applicant -

(i) has submitted:

(aa) a sequence of documents and some of the documents in the sequence have been omitted (eg if one bank statement from a series is missing);

(bb) a document in the wrong format (for example, if a letter is not on letter head paper as specified); or

(cc) a document that is a copy and not an original document; or

(dd) a document which does not contain all of the specified information; or

(ii) has not submitted a specified document,

the decision maker may contact the applicant or his representative, in writing or otherwise, and request the document(s) or the corrected version(s). The material requested must be received at the address specified in the request within a reasonable time scale specified in the request.

(c) The decision maker will not request documents where he or she does not anticipate that addressing the error or omission referred to in (b) will lead to a grant because the applicant will be refused for other reasons.

(d) If the applicant has submitted:

(i) a document in the wrong format; or

(ii) a document that is a copy and not an original document,

the application may be granted exceptionally, provided the decision maker is satisfied that the document is genuine and that the applicant meets the requirements to which the document relates. The decision maker reserves the right to request the certified original document in the correct format in all cases where (b) applies and to refuse applications if this material is not provided as set out in (b).

(e) Where the decision maker is satisfied that there is a valid reason why a specified document cannot be supplied eg 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 or to request alternative or additional information or document(s) be submitted by the applicant.”

13. Judge Smith, in quoting paragraph D(e) of Appendix FM-SE at [17] of his decision, was somewhat selective in his consideration of the evidential flexibility provisions. He did not make it entirely clear upon which other part of paragraph D he relied. When referring to the IDIs, he appears to have proceeded on the basis that part of the specified evidence was missing, but did not explain how that fitted within paragraph D of Appendix FM-SE, which referred to various different circumstances.

14. In any event it is clear from the requirements of paragraph 2 of Appendix FM-SE, as set out at [14] of the judge’s decision, that bank statements corresponding to the entire period of six months, corresponding to the payslips for the same period, showing the salary being paid into the appellant’s and/or his sponsor’s account was a mandatory requirement of the rules. It was, therefore, a case of a mandatory document not having been submitted, whereas the judge appears to have considers the situation as being one where part of the evidence was missing. Furthermore, whilst the situations in Appendix FM-SE paragraph D(e) for specified documents not having been supplied are given as examples and do not form an exhaustive list, it is clear that the appellant’s circumstances do not fall within this provision and Judge Smith did not explain how they did.

15. As the President found in Sultana at [18] in regard to that appellant’s circumstances, so too in this case the evidential flexibility provisions are “*far removed from the present case*”, where the infirmities in the appellant’s application arise out of “*an outright failure to provide*” mandatory documents. This was not a matter of a document which was lost or missing, but was a document that simply did not exist. Thus, as in Sultana, there is no basis for concluding that the respondent’s failure to exercise the discretion available to her was not in accordance with the law.

16. Accordingly Judge Smith erred in law in his consideration of the respondent’s discretion under the evidential flexibility provisions in the rules and policy and for all of these reasons his decision cannot stand. I therefore set aside his decision.

17. For the same reasons the appellant cannot succeed in his appeal. He cannot meet the evidential requirements in Appendix FM-SE. The evidential flexibility provisions in paragraph D of Appendix FM-SE and paragraph 245AA of the immigration rules do not apply to his circumstances. Accordingly the decision in the appellant’s appeal has to be re-made by dismissing the appeal.

18. With regard to Article 8, Judge Smith, whilst stating at [20] that, having allowed the appeal under the immigration rules, it was not necessary for him to go on to consider Article 8, nevertheless did consider Article 8. He found that, in the absence of his findings on evidential flexibility, the respondent’s decision was otherwise not in breach of Article 8. The appellant has not sought to challenge that finding in the Rule 24 response or by way of a cross-appeal and neither was there any challenge raised before me. On the evidence before me it is clear, in any event, that the appellant cannot succeed on an Article 8 claim.

There is no suggestion, nor evidence to suggest that there would be insurmountable obstacles to family life continuing outside the UK for the purposes of EX.1.(b) and neither are there any compelling circumstances justifying a grant of leave outside the immigration rules. That was the conclusion properly reached by the judge and the appeal therefore also fails on that basis.

## **DECISION**

19. The making of the decision of the First-tier Tribunal involved an error on a point of law. The Secretary of State's appeal is accordingly allowed and the decision of the First-tier Tribunal is set aside as stated above. I re-make the decision by dismissing Mr Saleem's appeal on all grounds, under the immigration rules and on human rights grounds.

Signed  
Upper Tribunal Judge Kebede