Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA005022015

THE IMMIGRATION ACTS

Heard at : Field House
On : 6 June 2016

Decision & Reasons Promulgated
On : 8 June 2016

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

RIZWAN UL BADAR

Respondent

Representation:

For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer
For the Respondent: Mr A Jafar, instructed by Eden Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department (SSHD). For the purposes of this decision, I shall refer to the SSHD as the respondent and Mr Ul Badar as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

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2. The appellant is a citizen of Pakistan, born on 13 October 1990. He applied for entry clearance to the United Kingdom as a spouse under paragraph EC-P.1.1 of Appendix FM of the immigration rules. His application was refused on 20 November 2014 on the grounds that he could not meet the financial requirements in paragraph E-ECP.3.1 since he had not provided the specified evidence required under Appendix FM-SE of the immigration rules to demonstrate that his sponsor's gross annual income met the level required under the rules. The respondent noted that the appellant was relying upon the sponsor's gross annual income from £14,153 from employment with Oxford University Hospitals NHS Trust, together with her earnings of £5,471 from her self-employment as a designer and tailor, but considered that the required specified evidence had not been produced for either.

3. The appellant lodged an appeal against that decision, claiming that the specified evidence had been provided.

4. In response to the appeal the respondent, in an ECM Review, accepted that the specified evidence had been provided to demonstrate the sponsor's salaried employment. However, with regard to the income from self-employment, the respondent noted that whilst the sponsor's tax return stated that she had self-employment income of £5,471, her bank statements showed hardly any money going into the account and not sufficient to suggest an income of £5,471. The respondent was not able, therefore, to include the self-employment income and as such the income from employment did not meet the required threshold under the immigration rules. The respondent therefore maintained the decision. The respondent, furthermore, did not consider that the decision was in breach of the appellant's Article 8 rights.

5. The appellant's appeal came before the First-tier Tribunal on 8 October 2015. The only additional evidence not already contained in the respondent's bundle consisted of a witness statement from the sponsor. In that statement, the sponsor stated that the ECM had acknowledged that she had produced all the required evidence with her application but had raised a new issue, namely that her self-employment income had not been paid into her account. She explained that that was due to the fact that she kept the cash generated through her tailoring business to pay for her day to day expenses. She had kept a record of all her self-employment earnings which had been provided to her accountant, who had then prepared her annual accounts. Her tax liability had then been calculated from those accounts. The sponsor stated that the ECM should have taken into account that her self-employment business was a very low scale, side business and she did not earn large amounts from it. She therefore used the cash rather than banking it. The sponsor then went on to explain that she had a family life with the appellant which was protected under Article 8 and that she could not relocate to Pakistan.

6. The appeal was heard by First-tier Tribunal Judge Baker and was allowed in a decision promulgated on 17 November 2015. The judge noted that the facts of the case were not disputed and the only issue was the specified evidence. It was accepted that the appellant used the cash from her business to live on and did not deposit it into her bank account. The judge considered that the evidential flexibility provisions in paragraph 245AA(d)(iii)

applied and that the further information provided on appeal would have allowed verification from the HMRC website as to the sponsor's earnings from self-employment, under paragraph 245(d)(iii)(2). The judge considered that, whilst the appellant could not provide the required bank statements showing earnings from self-employment, the decision-maker could have exercised discretion by exceptionally and alternatively considering the other documents instead, namely the HMRC documents, which had not been taken into account, in accordance with paragraph 245AA(d)(iii)(1). The judge considered that the ECM ought to have exercised that discretion but failed to do so and she therefore exercised discretion herself and accepted, from the HMRC self-assessment form and tax calculations, that the sponsor's earnings were as claimed and that sufficient evidence had been provided to satisfy the requirements of the immigration rules. She allowed the appeal under the immigration rules.

7. Permission to appeal to the Upper Tribunal was sought by the respondent on the basis that the judge had erred by relying on paragraph 245AA(d)(iii) which applied only to applications made under the Points-Based System; that the judge had wrongly considered circumstances at the date of decision rather than the evidence available at the date of the application; and that the judge had erred by expecting the ECO to make out the appellant's case for him.

8. Permission to appeal was granted on 3 May 2016.

Appeal hearing and submissions

9. At the hearing Mr Tufan referred to Appendix FM-SE [D] as being the correct evidential flexibility provision, rather than paragraph 245AA which applied only to the Points-Based System. He submitted that the judge had wrongly considered that she was able to exercise discretion under those provisions. If allowing the appeal, the correct course would have been to refer the matter back to the ECO rather than allowing it outright. However the appellant's circumstances did not fall with the evidential flexibility provisions.

10. Mr Jafar submitted that the judge was able to exercise discretion herself, as it was a discretion under the immigration rules. The facts were not in dispute and it was therefore accepted that the sponsor lived on the money earned from self-employment. The only issue was the money not being paid into her account. However that could be evidenced by alternative means, namely through the HMRC website. The appellant had provided a valid reason for not being able to produce the specified document and therefore, pursuant to Appendix FM-SE [D](e), discretion could be exercised in the appellant's favour.

The relevant Immigration Rules

11. The immigration rules setting out the required specified evidence are to be found in Appendix FM-SE, as follows:

"7. In respect of self-employment in the UK as a partner, as a sole trader or in a franchise all of the following must be provided:

(a) Evidence of the amount of tax payable, paid and unpaid for the last full financial year.

(b) The following documents for the last full financial year, or for the last two such years (where those documents show the necessary level of gross income as an average of those two years):

(i) annual self-assessment tax return to HMRC (a copy or print-out); and

(ii) Statement of Account (SA300 or SA302).

(c) Proof of registration with HMRC as self-employed if available.

(d) Each partner's Unique Tax Reference Number (UTR) and/or the UTR of the partnership or business.

(e) Where the person holds or held a separate business bank account(s), bank statements for the same 12-month period as the tax return(s).

(f) personal bank statements for the same 12-month period as the tax return(s) showing that the income from self-employment has been paid into an account in the name of the person or in the name of the person and their partner jointly.

(g) Evidence of ongoing self-employment through evidence of payment of Class 2 National Insurance contributions, or (where the person has reached state pension age) through alternative evidence (which may include, but is not confined to, evidence of ongoing payment of business rates, business-related insurance premiums, employer National Insurance contributions or franchise payments to the parent company).

(h) One of the following documents must also be submitted:

(i) (aa) If the business is required to produce annual audited accounts, such accounts for the last full financial year; or

(bb) If the business is not required to produce annual audited accounts, unaudited accounts for the last full financial year and an accountant's certificate of confirmation, from an accountant who is a member of a UK Recognised Supervisory Body (as defined in the Companies Act 2006) or who is a member of the Institute of Financial Accountants;

(ii) A certificate of VAT registration and the VAT return for the last full financial year (a copy or print-out) confirming the VAT registration number, if turnover is in excess of £79,000 or was in excess of the threshold which applied during the last full financial year;

(iii) Evidence to show appropriate planning permission or local planning authority consent is held to operate the type/class of business at the trading address (where this is a local authority requirement); or

(iv) A franchise agreement signed by both parties.

(i) The document referred to in paragraph 7(h)(iv) must be provided if the organisation is a franchise."

12. The relevant evidential flexibility provisions are to be found in Appendix FM-SE [D] as follows:

D. (a) In deciding an application in relation to which this Appendix states that specified documents must be provided, the Entry Clearance Officer or Secretary of State ("the decision-maker") will consider documents that have been submitted with the application, and will only consider documents submitted after the application where sub-paragraph (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 (e.g. if one bank statement from a series is missing);

(bb) A document in the wrong format (for example, if a letter is not on letterhead 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 correct version(s). The material requested must be received at the address specified in the request within a reasonable timescale specified in the request….

(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."

Consideration and findings

13. It seems to me that Judge Baker made several errors in her decision. Clearly she erred in applying the provisions in paragraph 245AA when those apply only to applications made under the Points-Based System. However given that the correct provisions in Appendix FM-SE[D] are identical, I find nothing material in such an error.

14. More significant is her decision to allow the appellant's appeal outright under the immigration rules on the basis of the evidential flexibility provisions. I do not agree with Mr Jafar that it was open to the judge herself to exercise discretion. The evidential flexibility provisions, albeit now inserted into the immigration rules, differ from the other immigration rules conferring a discretion which may be reviewed by a judge. Appendix FM-SE[D](e) makes it clear that the discretion is that of the decision-maker who is defined at Appendix FM-SE[D](a) as the Entry Clearance Officer or the Secretary of State (in this case the Entry Clearance Officer). It was therefore not open to the judge to exercise discretion herself. The proper course, in allowing the appeal, was therefore to allow it to the limited extent that the decision was not in accordance with the law and that the matter was to be referred back to the ECO to exercise the required discretion.

15. However it seems to me that the judge fundamentally erred in finding that the evidential flexibility provisions applied in the first place. The requirements of Appendix FM-SE are strict and are mandatory requirements. The appellant was required to provide the documents set out at Appendix FM-SE, section 7, which included at section 7(f) personal bank statements for the same 12-month period as the tax returns showing that the income from self-employment has been paid into an account in the sponsor's name. Whilst the appellant provided bank statements for the sponsor, those bank statements did not show the income from self-employment as shown in her HMRC documents. Therefore a mandatory document was missing.

16. As the judge identified, the only evidential flexibility provision that could potentially have been applicable was Appendix FM-SE[D](e) as that referred to a specified document not being supplied. However for that provision to apply, and for the decision-maker to consider exercising discretion, the decision-maker, namely the ECO, had to have been provided with a valid reason for the document not being supplied. The reason given to the judge, by way of a witness statement from the sponsor, was that the sponsor used the cash from her self-employed earnings for her day-to-day living. However that reason was not given to the ECO, or indeed to the ECM. No reason was given. I do not see how it can possibly be asserted that the ECO (or the ECM) was required to initiate an enquiry of his own volition, when it was clear from the rules what was required and when the appellant had simply failed, without any reason, to supply that mandatory evidence. That is the point made by the respondent in ground 3 and I find merit in that ground.

17. Furthermore, it seems to me that the judge also erred by considering that Appendix FM-SE[D](e) permitted the consideration of the sponsor's HMRC documents as an alternative document, when that was in itself a mandatory piece of evidence required under Appendix FM-SE section 7 in addition to the bank statements. The judge wrongly referred to the respondent having failed to consider the HMRC documents when that was clearly not the case since the tax returns were specifically referred to in the ECM Review. As the ECM said in the Review, the respondent had to see evidence of the declared earnings being received into the sponsor's bank account in order to be satisfied that the self-employment income was as claimed. There was therefore clearly a reason for the requirement, in the rules, for bank statements to be produced to demonstrate an income consistent with that shown in the tax returns for the same period. To consider that the respondent should permit such mandatory evidence to be omitted was clearly to undermine the purpose of the rules and the judge plainly misunderstood or misinterpreted the provisions in Appendix FM-SE[D](e).

18. Accordingly I find that material errors of law were made by the judge, in considering that it was open to her to exercise discretion under the evidential flexibility provisions and in considering that those provisions were in any event applicable in the appellant's case. For all of these reasons the judge's decision cannot stand and must be set aside and re-made.

19. For the reasons already given, the appellant was not able to satisfy the specified evidence requirements in Appendix FM-SE section 7 in relation to the sponsor's income

from self-employment. That income could not, therefore, be taken into account in considering the ability of the appellant to meet the income threshold as set out at paragraph E-ECP.3.1 of Appendix FM of the immigration rules. The sponsor's income from employment in the NHS fell below the £18,600 threshold and the appellant could not, therefore, meet the income threshold requirements of the rules. As already set out above, there was no basis for the ECO or the ECM to consider exercising discretion under the evidential flexibility provisions in Appendix FM-SE[D] and those provisions did not apply in the circumstances. The respondent's decision to refuse the appellant's application under the immigration rules was therefore lawfully and properly made.

20. Since Judge Baker allowed the appellant's appeal under the immigration rules, she did not go on to consider Article 8. The grounds of appeal before the First-tier Tribunal referred at [9] to Article 8, but only in so far as it was claimed that the immigration rules had not been applied fairly and it was stated in that paragraph that the appellant did not propose to rely on Article 8 other than in respect to the rules. The appellant's Rule 24 response makes no submissions on Article 8 and no further evidence was produced before me in that respect. Whilst I did not specifically invite submissions on Article 8, there was no indication by Mr Jafar that that was a ground being pursued independently. In any event, given that the relevant date of consideration is the date of the ECO's decision and that evidence relating to events subsequent to that date is not relevant, and that it is open to the appellant to make a fresh application with the required specified evidence (the sponsor ensuring that her earnings are deposited into her bank account), it cannot properly be argued, on the evidence available at the relevant time, that the ECO's decision was in breach of the appellant's or sponsor's Article 8 human rights. The appellant simply cannot meet the requirements of the immigration rules and there are no compelling circumstances justifying a grant of entry clearance outside the rules.

DECISION

21. The making of the decision by the First-tier Tribunal involved the making of an error on a point of law. The decision is set aside and the SSHD's appeal is allowed. I re-make the decision and substitute a decision dismissing Mr Ul Badar's appeal under the immigration rules and on human rights grounds.

Signed

Upper Tribunal Judge Kebede

Date 8th June 2016