



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: OA/09333/2014

THE IMMIGRATION ACTS

Heard at North Shields  
On 26 February 2016

Decision & Reasons Promulgated  
On 13 April 2016

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

MRS SYEDA SALATUZZHA  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Marfat, Newcastle Legal Centre  
For the Respondent: Mr J Kingham, Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge Stuart P J Buchanan promulgated on 16 June 2015, dismissing her appeal against the decision of the respondent to refuse her entry clearance to the United Kingdom as the spouse of a person present and settled here.

2. The appellant is married to Mr Abdullah Rahman (“the sponsor”), who is settled in the United Kingdom. She sought permission to join him here on the basis that she met the requirements of Appendix FM of the Immigration Rules. It is a part of her case that, as at all material times the sponsor was in receipt of Disability Living Allowance (“DLA”), it was not necessary for her to show that his earnings in the United Kingdom were at or above the minimum threshold of £18,600 as established in paragraph E-ECP.3.1.(a) of the Immigration Rules because she is a person to whom E-ECP.3.3 applies.
3. The appellant was, however, required to show that there would be adequate maintenance and accommodation available for her and her husband; this evidence had to comply with Appendix FM-SE of the Immigration Rules. It is said that the sponsor’s income from DLA, Working Tax Credits and employment together with the fact that he was living in rent-free accommodation, showed that he could maintain and accommodate his wife.
4. The respondent refused the application on the grounds that:-
  - (i) the appellant had failed to substantiate the income from Working Tax Credit because:
    - (a) documentation from the Department for Work and Pensions (“DWP”) confirming receipt of benefit in the twelve month period prior to the date of application had not been submitted; and
    - (b) personal bank statements for the twelve month period prior to the date of application had not been provided;
  - (ii) as the income from DLA did not meet the relevant threshold, she was not satisfied that the appellant and sponsor would be able to maintain and accommodate themselves adequately without recourse to public funds;
  - (iii) the payslips submitted from the previous employer and current employer did not cover the twelve months prior to the date of application and were not within the 28 days before the date; and, no letter from the current employer had been supplied; and, accordingly, the claimed income of £900 per month could not be taken into account it being noted that the bank statements supplied covered only 8 November 2013 to 9 April 2014;
  - (iv) accordingly, the application was refused under paragraph EC-P.1.1(d) of the Immigration Rules as the documents specified within the Immigration Rules had not been provided.
5. The decision was reviewed by the Entry Clearance Manager on 30 January 2015 and the decision was upheld, it being concluded also that it was not a breach of Article 8 of the Human Rights Convention to refuse entry clearance.

#### **The hearing before the First-tier Tribunal**

6. The judge heard evidence from the sponsor as well as submissions made on behalf of the appellant. He noted [4.3] that the sponsor had been asked if he had provided

documents from HMRC about Working Tax Credit and said he had provided them to the legal representative but they were not used in the application.

7. The judge found that:-

- (i) while the appellant need only satisfy the requirements of E-ECP3.3 (not E-ECP3.1) [5.5] paragraph 12A (d) of Appendix FM-SE provides that evidence of Working Tax Credit must be submitted [5.6];
- (ii) whilst the documents submitted after the application in respect of Working Tax Credit may be considered, the material provided showed only that tax credits had been received at a point *in* the period and thus the sponsor could not by letter or reference to bank statements show that he had been in receipt of Working Tax Credit *for* a period of twelve months as specified in the Rules [5.7];
- (iii) while the most recent wage slip and the letter from the current employer were missing [5.8, 5.9], these were documents which could have been called for pursuant to Appendix FM-SE at D;
- (iv) while Appendix FM-SE states the decision maker will not request missing documents if addressing the error or omission would not lead to a grant because the application would be refused for other reasons, there was in this case no mention made of such other overriding reasons for failing to call for the missing documents [5.10] but, as the appellant was unable to claim that the sponsor was in receipt of Working Tax Credit for the period mentioned in paragraph 10 then he could not satisfy the requirements of the Rules and thus the appeal was dismissed.

8. The appellant sought permission to appeal on the grounds that the judge had erred:-

- (i) In not taking into account all of the evidence [i]; that the sponsor had provided evidence of his employment [ii]; and, the judge had not taken into account the change in circumstances [iii];
- (ii) in confusing at [5.11] the requirement set out in paragraph 10(f) of Appendix FM-SE that the documents from DWP showed that the sponsor was in receipt of the benefit in question at a point in the twelve month period to the date of application with the requirement to provide evidence for a twelve month period of income, the Rules not requiring that the sponsor had received the benefit for the twelve months in question;
- (iii) in not considering the relevant bank statements and tax credit documents even though the respondent had failed to consider or apply evidential flexibility, this error being material because it was on this basis that the judge had concluded that the failure to apply evidential flexibility to the Working Tax Credit documents on the part of the respondent would have made no difference.

9. On 31 December 2015 First-tier Tribunal Judge Adio granted permission stating:-

“It is arguable that in view of the lack of clarity in interpretation of the Rules contained in the judge’s decision on a number of matters there is an arguable error of law that is apparent in the decision.”

### The Hearing on 24 February 2016

10. It was agreed that the sponsor was in receipt of DLA and so what had to be shown was that there was adequate maintenance and accommodation. It was accepted also that the relevant specified documents must be provided with the application subject to the applicability of paragraph D within Appendix FM-SE.
11. Mr Marfat submitted that it was not necessary for the appellant to have shown that the sponsor was earning £900 a month from his wages; the income derived from DLA and Working Tax Credits was, he submitted, sufficient to show adequacy of maintenance, adequacy of accommodation not being in issue. Mr Marfat submitted that the judge's error arose from a misdirection at paragraph [5.11] and that this had infected his conclusion that the failure to apply the evidential flexibility set out in Appendix FM-SE (D) would have made no difference.
12. Mr Marfat submitted that the evidential flexibility requirements could and should have been applied in this case, the omissions with respect to the bank statements being the omission of one of a sequence of documents.
13. For the reasons set out below, I was satisfied that the decision of the First-tier Tribunal involved the making of an error of law and that his decision insofar as it related and that this had infected the apparently inconsistent conclusions at 5.10 and 5.11 thus the conclusion that this is not a case in which evidential flexibility should be considered was flawed, and thus the decision needed to be set aside in part. I heard submissions on that basis.
14. Mr Kingham submitted that there was in this case no basis in which evidential flexibility is set out in D was relevant, following the decision in **Sultana and Others (Rules: waiver/further enquiries; discretion) [2014] UKUT 00540**. He submitted further that there was no basis, given the numerous defects in the case to submit or require to be submitted additional documents.
15. Mr Marfat submitted that the evidential flexibility Rule should apply on the facts of this case.

### The Law

16. It is accepted that in order to obtain entry clearance pursuant to Appendix FM an applicant must provide the specified evidence set out in Appendix FM-SE to meet the requirements of the Immigration Rules, see Appendix FM-SE at A.
17. What specified evidence is required varies according to the provisions of Appendix FM under which an applicant seeks entry or a variation of leave. In this case, as the sponsor was in receipt of DLA, paragraph E- ECP 3.3 applies, and so the specified evidence was required in respect of the financial requirements which are set out at paragraph E-ECP3.3 which provides as follows, so far as is material:

(b) the applicant must provide evidence that their partner is able to maintain and accommodate themselves, the applicant and any dependents adequately in the UK without recourse to public funds

18. It is then necessary to consider what is set out in Appendix FM-SE 12 and 12A which provides as follows (so far as is relevant):

12. Where a person is in receipt of ..., Disability Living Allowance, ..., all the following must be provided:

(a) Official documentation from the Department for Work and Pensions or Veterans Agency confirming the current entitlement and the amount currently received.

(b) At least one personal bank statement in the 12-month period prior to the date of application showing payment of the amount of the benefit or allowance to which the person is currently entitled into their account.

12A. Where the financial requirement the applicant must meet under Appendix FM relates to adequate maintenance, paragraphs 2 to 12 apply only to the extent and in the manner specified by this paragraph. Where such a financial requirement applies, the applicant must provide the following evidence:

(a) Where the current salaried employment in the UK of the applicant or their partner, parent, parent's partner or sponsor is relied upon:

(i) A letter from the employer confirming the employment, the gross annual salary and the annual salary after income tax and National Insurance contributions have been paid, how long the employment has been held, and the type of employment (permanent, fixed-term contract or agency).

(ii) Payslips covering the period of 6 months prior to the date of application or such shorter period as the current employment has been held.

(iii) personal bank statement covering the same period as the payslips, showing that the salary has been paid into an account in the name of the person or in the name of the person and their partner jointly.

...

(c) Where self-employment in the UK of the applicant or their partner, parent, parent's partner or sponsor, or income from employment and/or shares in a limited company based in the UK of a type to which paragraph 9 applies, is relied upon, paragraph 7 or 9 applies as appropriate.

(d) Where the non-employment income of the applicant or their partner, parent, parent's partner or sponsor is relied upon, paragraph 10 applies and paragraph 10(f) shall apply as if it referred to any UK welfare benefit or tax credit relied upon and to HMRC as well as Department for Work and Pensions or other official documentation.

...

19. The requirement to provide the specified documents is to an extent varied by paragraph D which provides 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:

- (1) (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);
- (2) (bb) A document in the wrong format (for example, if a letter is not on letterhead paper as specified); or
- (3) (cc) A document that is a copy and not an original document; or
- (4) (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.

(c) The decision-maker will not request documents where he or she does not anticipate that addressing the error or omission referred to in sub-paragraph (b) will lead to a grant because the application 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, or

(iii) A document that does not contain all of the specified information, but the missing information is verifiable from:

- (1) other documents submitted with the application,
- (2) the website of the organisation which issued the document, or
- (3) the website of the appropriate regulatory body, the application may be granted exceptionally, providing the decision-maker is satisfied that the document(s) is genuine and that the applicant meets the requirement to which the document relates. The decision-maker reserves the right to request the specified original document(s) in the correct format in all cases where sub-paragraph (b) applies, and to refuse applications if this material is not provided as set out in sub-paragraph (b).

(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.

(f) Before making a decision under Appendix FM or this Appendix, the decision-maker may contact the applicant or their representative in writing or otherwise to request further information or documents. The material requested must be received at the address specified in the request within a reasonable timescale specified in the request.

20. In addition it is observed that although paragraph 12A of Appendix FM-SE affects the application of paragraphs 2 to 12 of that Appendix, the provisions of paragraph 1 still apply. That paragraph sets out, amongst other things, the prescribed format and content of bank statements.
21. The Immigration Rules make a distinction between what is required to show that an individual has been in receipt of a relevant benefit, such as DLA, and the Rules as to what evidence is required to show income derived from that benefit. In the case of the former all that is required is evidence showing that the individual was in receipt of benefit at any point in a period of twelve months, that is a letter from the DWP or HMRC and a bank statement confirming payment at one point in that twelve month period. That is contrasted with the position regarding income. In that case what is required is, in addition to the letter from DWP or HMRC, a series of bank statements covering the whole of the twelve month period.
22. The rationale for the distinction is clear; it is the fact that somebody who has been awarded a specific benefit in a period which determines which provisions of the Immigration Rules relating to maintenance (and income) must be followed. Similarly, a person in receipt of DLA or Working Tax Credits will get an award letter covering a period, normally a year. Evidence that the payments are made is therefore by reference to deposits into a bank account.
23. In this case it was important to show that the applicant was in receipt of DLA, which was accepted, and also Working Tax Credit. That the sponsor had been awarded both was not in dispute but what was in dispute was the level of the income derived under Working Tax Credit which the appellant needed to demonstrate by reference to the specified documents in order to prove that there was adequate maintenance.
24. At [5.7] the judge appears to have confused the issue of the award of Working Tax Credit with the income paid because of the award. Similarly it is unclear from [5.6] as to whether the judge was concerned whether there was evidence of income from Working Tax Credits or whether there was evidence of the fact that an award had been made, the evidential requirements being different.
25. This confusion need not necessarily have been material. It is not in dispute that a full set of bank statements were not provided. Where it is, however, material is in the judge's approach to whether the respondent erred by failing to consider whether additional documents should have been called for, as set out in Appendix FM-SE at D. If, which is unclear, the judge was concerned with documents showing receipt of Working Tax Credit rather than that there was income derived from it, then his approach to the absence of some bank statements is incorrect. Accordingly, I am satisfied that the error is material and that the decision should be set aside in order to be remade.
26. I am satisfied that the appellant had not provided the specified evidence in respect of the income from Working Tax Credit which was required. That required the production of the relevant document from DWP and the production of bank

statements covering the whole period of twelve months prior to the date of application. Further it appears from the sponsor's evidence that no document relevant to Working Tax Credit had been provided.

27. Whilst I accept that other documents such as those relating to income from employment were not provided, it is evident that it was not necessary to provide these, given that it was not necessary to rely upon that income to show that there was an adequacy of maintenance.

28. It is at this point pertinent to set out what was set out in **Sultana** at 20:-

20. We add the following by way of general guidance. When visa applications of this kind are being compiled, applicants and their advisers must obviously be alert to the totality of the applicable requirements enshrined in Appendix FM-SE. Alertness to the various obligatory requirements is obviously essential. We would also encourage applicants and their advisers who consider that any of the discretionary powers conferred on the ECO by paragraph [D] should be exercised in their favour to proactively make this case when submitting their applications. ...

29. Given the acceptance by the sponsor that the Working Tax Credit documents were not provided and given that this was not raised in the grounds of appeal to the First-tier Tribunal, there appears, despite what was said in **Sultana** at 20, to be no explanation for the failure to produce the relevant documents to the respondent. Given the failure to provide both the document evidencing that there had been an award of Working Tax Credit and the documents to show the amount of Working Tax Credit paid, that is the absence of a substantial number of bank statements, I am not satisfied that the respondent erred in failing to exercise discretion in favour of the applicant. She was not asked to do so; on the contrary, it was averred in the application that the documents required had been provided. No proper explanation for their omission is provided. It is recalled what was said in **Sultana** at 25:-

25. Where a decision is challenged on the basis of an unlawful failure to exercise a discretionary power of further enquiry or waiver or an unlawful exercise of such power, Judges will be guided by considering the purpose underlying powers of this kind. We consider that such powers are to be viewed as dispensing provisions, designed to ensure that applications suffering from minor defects or omissions which can be readily remedied or forgiven do not suffer the draconian fate of refusal. In such cases, the blunt instrument of immediate, outright and irrevocable rejection is softened to accommodate applicants whose applications suffer from insubstantial imperfections which can be easily and swiftly rectified or excused. Furthermore, in our estimation, discretionary powers of further enquiry and waiver promote the values of fairness and common sense, while simultaneously minimising unnecessary dominance of and emphasis on bureaucratic formality. They also fortify the overall integrity of the United Kingdom immigration system, as expressed in the UKBA letter dated 19 May 2011 wherein the origins of these powers can be discovered: see Appendix A to the decision of the Upper Tribunal in **Rodriguez** (*supra*). We further consider that, in the particular context of paragraph 245AA of the Immigration Rules, these powers are properly to be viewed as measures capable of promoting the



economic wellbeing of the country and should be construed accordingly. Thus the mechanism initially known as “evidential flexibility” and promulgated in a policy, now superseded and expressed in more elaborate and regimented terms in the Immigration Rules, serves to advance an identifiable public interest of some importance. Neither party has in this case provided the relevant instructions to Immigration Officers nor is it suggested that these would in this case have the effect of suggesting that these were circumstances in which a discretion should have been considered or exercised.

30. Accordingly, for these reasons, although I find that the decision of the First-tier Tribunal did involve the making of an error of law, and it is set aside, I re-make the decision by dismissing the appeal on all grounds, there having been made no submission that the decision would constitute a breach of the United Kingdom’s obligations pursuant to Article 8 of the Human Rights Convention.

### **SUMMARY OF CONCLUSIONS**

1. The decision of the First-tier Tribunal did involve the making of an error of law and I set it aside. I remake it by dismissing the appeal on all grounds.

Signed

Date

Upper Tribunal Judge Rintoul

### **TO THE RESPONDENT** **FEE AWARD**

I have dismissed the appeal and therefore there can be no fee award.

Signed

Date

Upper Tribunal Judge Rintoul