



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/10047/2014

THE IMMIGRATION ACTS

Heard at Field House
On 28 January 2016

Decision and Reasons Promulgated
On 11 February 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JAVIERA FIRDOUS
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr C Avery, Senior Home Office Presenting Officer

For the Respondent: Mr R Ahmed (counsel) instructed by SBM solicitors LLP

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. The Secretary of State for the Home Department brings this appeal but in order to avoid confusion the parties are referred to as they were in the First-tier Tribunal. This is an

appeal by the Secretary of State against a decision of First-tier Tribunal Judge O'Brien, promulgated on 03 August 2015, which allowed the Appellant's appeal.

Background

3. The Appellant was born on 1st May 1991 and is a national of Pakistan. On 7 August 2014 the Secretary of State refused the Appellant's application for entry clearance as the partner of a person present and settled in the UK because the entry clearance officer was not satisfied that the financial requirements of appendix FM were met, nor that sufficient documentary evidence was provided to satisfy the requirements of appendix FM-SE.

The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge O'Brien ("the Judge") allowed the appeal under the Immigration Rules.

5. Grounds of appeal were lodged and on 16 December 2015 Judge Keane gave permission to appeal stating *inter alia*

"... The Judge made an arguable error of law in failing to apply paragraph 1(n) of appendix FM-SE to HC 395 (as amended). Rather, if the Judge's decision at paragraphs 18 to 21 inclusive and particularly at paragraph 21 is read with care he accorded weight to the sponsor's evidence that he received payment in cash from Tariq Petroleum UK Ltd between January and April 2014 in the sum of £631 each month as going towards satisfaction of the financial requirements of appendix FM (from which the sponsor was not exempt). Arguably, the Judge did not take into account a relevant consideration namely the provisions of paragraph 1(n) of appendix FM-SE but rather had regard to an irrelevant consideration namely the sponsor's evidence tendered at the hearing."

The Hearing

6. Mr Avery moved the grounds of appeal and told me that the appellant simply could not succeed in terms of the rules. He referred me to paragraph 1(n) of appendix FM-SE, and told me that at [18] the Judge takes account of the sponsor's oral evidence that he had received payments in cash from his employer which had not been paid into his bank account, whereas paragraph 1(n) dictates that only the net amount shown on specified bank statements may be counted. He urged me to set the decision aside and remake the decision by dismissing the appeal, offering the opinion that the best option for the appellant is to gather his financial information and submit a fresh application.

7. Mr Ahmed, counsel for the appellant, candidly conceded that the decision contains a material error of law and that he could not resist the submission made by Mr Avery. He asked that I preserve the positive findings made by the Judge and, in the light of [23] of the decision, remit the case to the respondent with a recommendation that the respondent exercises discretion in the appellant's favour

Analysis

8. It is now common ground that the decision in this case contains a material error of law. The Judge found that the appellant's income is more than £18,600 per annum, but this

calculation does not take account of the evidential requirements of paragraph 1(n) of appendix FM-SE. The Judge's findings at [21] to [23] ignore paragraph 1(n), which says

"1. In relation to evidencing the financial requirements in Appendix FM the following general provisions shall apply:

...

(n) The gross amount of any cash income may be counted where the person's specified bank statements show the net amount which relates to the gross amount shown on their payslips (or in the relevant specified evidence provided in addition to the specified bank statements in relation to non-employment income). Otherwise, only the net amount shown on the specified bank statements may be counted."

9. As it is conceded that the appellant cannot meet the evidential requirements of paragraph FM-SE the Judge's conclusion that the appeal should be allowed under the Immigration Rules cannot be sustained. The Judge's failure to pay heed to paragraph 1(n) of appendix FM-SE means that his conclusions between [18] and [25] of the decision contain a material error of law. The Judge's conclusion at [25] that the appellant satisfies paragraph E-ECP3.1 is wrong.

10. Because the decision contains material errors of law I set it aside. Because it is conceded that the appellant cannot satisfy paragraph E-ECP3.1 I remake the decision by substituting the following decision.

11. The appellant does not satisfy the evidential requirements of appendix FM-SE. the appellant cannot therefore satisfy paragraph E-ECP3.1 of the Immigration Rules. The respondent's decision is therefore correct. The appeal is dismissed under the immigration rules.

12. In SS (Congo) and Others [2015] EWCA Civ 387 Lord Justice Richards said at paragraph 33 "*In our judgment, even though a test of exceptionality does not apply in every case falling within the scope of Appendix FM, it is accurate to say that the general position outside the sorts of special contexts referred to above is that compelling circumstances would need to be identified to support a claim for grant of LTR outside the new Rules in Appendix FM. In our view, that is a formulation which is not as strict as a test of exceptionality or a requirement of "very compelling reasons" (as referred to in MF (Nigeria) in the context of the Rules applicable to foreign criminals), but which gives appropriate weight to the focused consideration of public interest factors as finds expression in the Secretary of State's formulation of the new Rules in Appendix FM. It also reflects the formulation in Nagre at para. [29], which has been tested and has survived scrutiny in this court: see, e.g., Haleemudeen at [44], per Beatson LJ*".

13. Insufficient evidence is produced by the appellant to establish that there are compelling circumstances which merit considering any article 8 rights the appellant might have out-with the Immigration Rules.

Decision

14. The decision is tainted by a material error of law. I set the decision aside.

15. **I substitute the following decision.**
16. **The appeal is dismissed under the Immigration Rules**
17. **The appeal is dismissed on article 8 ECHR grounds.**

Signed

Date 5 February 2016

Deputy Upper Tribunal Judge Doyle