



UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

APPEAL NUMBER: OA/12496/2014

THE IMMIGRATION ACTS

Heard at: Field House
On 18th April 2016

Decision and Reasons Promulgated
On 17th May 2016

Before

Deputy Upper Tribunal Judge Mailer

Between

THE ENTRY CLEARANCE OFFICER – KINGSTON

Appellant

and

MR GARFIELD ROWE
NO ANONYMITY DIRECTION MADE

Respondent

Representation

For the Appellant: Ms N Wilcocks-Briscoe, Senior Home Office Presenting Officer
For the Respondent: Mr P Turner, counsel, instructed by Greater London Solicitors

DECISION AND REASONS

1. I shall refer to the appellant as “the entry clearance officer” and to the respondent as “the claimant.”
2. The entry clearance officer appeals with permission against the decision of the First-tier Tribunal Judge promulgated on 25 September 2015, allowing the claimant’s appeal against the decision of the entry clearance officer dated 21 August 2014 refusing his application for leave to enter the UK as a partner under Appendix FM of the Immigration Rules.

The entry clearance officer's case

3. In refusing the claimant's application for entry clearance as a partner under Appendix FM of the Rules, the entry clearance officer asserted in respect of the financial requirements that had to be met, that his sponsor provided evidence showing that she is employed as a teaching assistant and meal supervisor at a school earning a total salary of £15,842.15 a year which is lower than the minimum income threshold required, namely £18,600 per year.
4. With regard to the assertion that the sponsor is also self-employed and has submitted a letter from her accountant dated 2 October 2013, stating that she earned £6,324 in September 2013 and £14,124 in March 2014, the dates on this letter did not correspond as the letter is dated October 2013 while it is dealing with the sponsor's accounts from March 2014.
5. Additionally, it is asserted that various specified documents demonstrating self-employment, as set out in Appendix FM-SE of the Immigration Rules, had not been provided. The application was accordingly refused under paragraph EC-P.1.1 (d) of Appendix FM of the rules.
6. On 19 February 2015, the Entry Clearance Manager reviewed the decision. It is noted at paragraph 2 that following the refusal of the application, the refusal notice advised the claimant to submit any additional evidence they may have in order that concerns mentioned in the notice could be properly addressed. The ECM identified ten of the documents which had been submitted with the application.
7. The ECM also set out documents "submitted with the appeal". That included bank statements; CT600, evidence of registration with HMRC; accounts and invoices.
8. The ECM referred at paragraph 3 of the Review, to the fact that the application had been refused as the claimant had not provided evidence of the sponsor's income from self-employment. As the business is a limited company, the claimant is required to provide documents listed at paragraph 9 of Appendix FM-SE. The documents provided by the claimant did not meet the requirements as:
 - i. The CT 600 tax return has been provided but there is no evidence that it has been submitted to HMRC;
 - ii. A certificate of incorporation has been provided stating that the company was incorporated in March 2013. No evidence was provided showing the sponsor was operating her business before then. As the application was submitted in January 2014, the business was operating for less than one year before the application was

submitted. The claimant could accordingly not show that his sponsor had earned the required annual amount prior to the application;

iii. The appointments report, P60, payslips and documents relating to dividends or anything set out at paragraph 9(b)(vii) of Appendix FM-SE had not been submitted.

iv. As the claimant is relying on a combination of the sponsor's income from salaried employment and self employment, he is required to show that she earned the required amount over the same period. This had not been done as documents produced related to the sponsor's salaried employment going back as far as April 2013 whereas the application was made in January 2014.

9. The First-tier Tribunal Judge stated at [3] that in considering the appeal, he bore in mind the legal provisions of the relevant paragraphs of the Immigration Rules as amended. He has borne every provision of these paragraphs in mind meticulously during the assessment of the claimant's case.
10. There was no presenting officer in attendance at the hearing. The sponsor attended the hearing and adopted her witness statement dated 10 September 2015. There was also a statement from the claimant. The Judge stated that he read the statements of the claimant and his wife and other documents in the bundle. He also took into account the oral evidence.
11. He found that the sponsor gave evidence consistent with the assertions made by the claimant in his application. She also told the Judge that she was of the opinion that the refusal was totally incorrect. The Judge noted that the sponsor asserted that there was clear documentary evidence showing that she was earning over £19,000 per annum [7].
12. The Judge stated at [8] that he has outlined the evidential elements of the evidence adduced on behalf of the claimant. He has taken into account the documentary and oral evidence in making up his mind on factual issues.
13. He concluded at [10a] that it was helpful that the sponsor's oral evidence corroborated her evidence in her statement. The only issue raised was whether the sponsor had the income of £18,600 required by the new Rules. He found that, "as was elicited by admissible evidence" the entry clearance officer had failed to look at the evidence neutralising that point - indubitably, I was left in no doubt that the ECO concerned had failed to look at the evidence at his/her disposal" [10b].
14. The Judge took into account the reasons set out in the refusal notice of 21 August 2014 [11]. He noted that it had been submitted before him that the ECO had made a mistake about the income; all the requirements under the Immigration Rules were met [12].

15. He further stated that the “rule of law” demands that a person should be able to benefit from the ECHR so long as the UK remains a party to that Convention [15]. He stated at [17] that he is pleased to assist this claimant to have some family life and allow this appeal. He is fully conscious of the “legal requirements” stipulated by immigration law. It was incumbent upon him to advert to the new rules giving respect to the *animus legis* dictated by the supremacy of Parliament. The rule of law demands that this claimant should be helped by the system because respect has to be shown by the obligations imposed on the Court of this country by the ECHR [18].
16. He went on to find that “the appeal, of course, can be allowed under the Immigration Rules because the ECO had manifestly failed to look at the relevant evidence.” Alternatively, the appeal can be allowed under ECHR [18].
17. He stated that in view of his deliberations in the preceding paragraphs, he is persuaded that the claimant comes within law and can benefit from the relevant Immigration Rules, as amended [19].
18. On 11 March 2016, First-tier Tribunal Judge Chohan granted the entry clearance officer permission to appeal. The grounds contended that the Judge failed to make any findings of fact in relation to the Immigration Rules and Article 8. Judge Chohan stated that he had carefully considered the Judge’s decision and “...I have to say that it is difficult to understand on what basis the Judge allowed the appeal under the Immigration Rules and Article 8 of the EHCR. No specific findings have been made on the facts and evidence before the Judge.” It was accordingly an arguable error of law.
19. Ms Wilcocks-Briscoe submitted that no findings had in fact been made and no reasons had been given. The Judge accordingly did not set out the basis upon which the claimant met the Rules. The issues relating to specified evidence was raised both in the reasons for refusal and the subsequent ECM review. She referred to the decision of the Upper Tribunal in Shizad (sufficiency of Reasons: set aside) [2013] UKUT 00085 (IAC).
20. The Tribunal held in Shizad – an appeal against a negative asylum decision – that although there is a legal duty to give a brief explanation of the conclusions on a central issue on which an appeal is determined, those reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the Judge. Although a decision may contain an error of law, where the requirements to give adequate reasons are not met, the Upper Tribunal would not normally set aside a decision of the First-tier Tribunal where there has been no misdirection of law, the fact-finding process cannot be criticised and the relevant country guidance has been taken into account unless the conclusions the Judge draws from the primary data were not reasonably open to him.

21. Ms Wilcocks-Briscoe submitted that there was no reference to the specified evidence required. The appellant had not provided the documents identified as being required by Appendix FM-SE. The claimant could therefore not show that there was the minimum amount of £18,600 established. There was no reference to any documents, let alone how the documents satisfied the relevant parts of Appendix FM-SE.
22. Nor was there any analysis, assessment or reasons given as to how the appeal was allowed under the Human Rights Convention.
23. On behalf of the claimant, Mr Turner submitted that the bundle of some 250 pages of documents was produced before the Tribunal.
24. He made reference to the evidence of financial requirements under Appendix FM set out in Appendix FM-SE. He referred to paragraph A1(9), relating to income from employment and/or shares in a limited company based in the UK.
25. A1(2) set out the evidence to be provided in respect of salaried employment in the UK except where paragraph 9 applies. This includes payslips covering a period of six months prior to the date of application if the person has been employed by the current employer for at least six months (and where paragraph 13(b) of the appendix does not apply).
26. Paragraph 2(c) also requires personal bank statements corresponding to the same period(s) as the payslips at paragraph 2(a) 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.
27. Paragraph A1(7) sets out the documents that must be provided in respect of self employment in the UK, inter alia, as a sole trader.
28. Mr Turner submitted that documents were in the bundle as noted by the Judge at [7] and [8]. The Judge was therefore alive to the assertions made by the entry clearance officer and manager as to missing documents. They had been supplied. Mr Turner accepted that he did not take the Judge through all the documents specified in Appendix FM-SE.
29. Mr Turner submitted that in the circumstances, it is a bit late in the day to unpick what was or was not read by the Judge. The Judge said that he had read it and that was the basis of his conclusions. This amounted to a finding that the ECO and the ECM were wrong.
30. In reply, Ms Wilcocks-Briscoe submitted that even if the Judge had had regard to these documents in the bundle, some of the specified evidence was supplied "post decision". She referred by way of example to page 47 containing an income certificate for Jacinth Associates Ltd dated 16 September 2014. The letter is sent to "Chief Clearing Officer". It is asserted that they have prepared the accounts for Jacinth Associates Ltd for the

financial year 1 April 2013 to 31 March 2014 and confirmed the figures from the accounts and balance sheet for the said period.

31. That evidence post-dates the decision. She referred to the application for entry clearance at D of the entry clearance officer's bundle. At D21, the section dealing with the sponsor's income from self-employment has been left blank. The application was submitted online on 12 November 2013.
32. She submitted that in the circumstances the decision should be set aside and remitted to the First-tier Tribunal for a decision to be re-made.

Assessment

33. I find that the decision of the First-tier Tribunal Judge was diffused and unfocused. There has been no attempt to grapple with the assertions made by the ECO or the ECM relating to the documents that were required to be provided, including those that had to be supplied as at the date of application.
34. As noted by Wilcocks-Briscoe the application submitted online by the claimant on 12 November 2013, did not set out at D21 any of the detail required in respect of the sponsor's income from self employment. Nor was there any accompanying letter from either the claimant or his solicitors.
35. I have had regard to the claimant's grounds of appeal to the First-tier Tribunal against the decisions of the ECO dated 24 March 2014. It is asserted that if evidence was missing in line with Appendix FM-SE, the "secretary of state" should have made contact with the claimant for this evidence. There was no good reason why the claimant was not contacted. That was unfair in the circumstances. The appeal against the decision dated 24 March 2014 in appeal number OA/05760/2015 was set down for hearing on 25 March 2015.
36. Even though there was a pending appeal, the ECO issued a new decision giving a fresh right of appeal. That was the decision - dated 21 August 2014 - that was before the First-tier Tribunal Judge. Accordingly the solicitors stated that "we submit a fresh appeal with the requested documents. Since we have already submitted grounds of appeal, we submit the same grounds of appeal and request the ECM to rely on the grounds that address issues raised by the decision dated 21 August 2014." Further documents were submitted. Those documents are set out in the ECM review.
37. It was as noted, still asserted that the documents provided did not meet the requirements for the purpose of paragraph 9 of Appendix FM-SE.

38. The Judge did not however consider the ECO's contentions relating to such documentation referred to at paragraph 3 of the ECM appeal review dated 19 February 2015. There had merely been an assertion that documentary evidence has been provided. That is what the sponsor stated during her evidence [7].
39. The Judge was left in no doubt that the ECO concerned had failed to look at the evidence at his/her disposal [10b]. That was not correct, having regard to the detailed report from the ECM as well as the evidence before the ECO.
40. It had merely been submitted that the appeal should be allowed as the ECO made a mistake about the income and that all the requirements had been met.
41. Mr Turner has been frank in informing me that he did not take the Judge through the evidence which the claimant and sponsor asserted had been provided to demonstrate that the requirements relating to specified evidence had been met.
42. It is an essential feature in the making of any decision for a party to know why they lose or succeed. The decision itself should contain sufficient and appropriate reasons demonstrating that the contentious issues have been properly assessed and considered.
43. I find in this case that the failure to provide adequate reasons renders the decision unsafe. It also appears that some of the documentation relied on, and which needed to be provided as at the date of the application, had only been produced after the date of decision.
44. I accordingly find that the making of the decision by the First-tier Tribunal Judge involved the making of errors on a point of law. I accordingly set it aside. The parties agreed that in that event it would have to be re-made. There will be substantial fact finding that will be necessary. This is accordingly an appropriate case to be remitted to the First-tier Tribunal for the decision to be re-made.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and the decision is set aside. The claimant's appeal is remitted to the First-tier Tribunal (Taylor House) for a fresh decision to be made by another Judge.

No anonymity direction is made.

Signed

Date 9 May 2016

Deputy Upper Tribunal Judge C R Mailer