



Upper Tribunal (Immigration and Asylum Chamber)

Appeal Numbers: OA/13540/2014, OA/13555/2014

THE IMMIGRATION ACTS

Heard at Field House
On 14 March 2016

Decision & Reasons Promulgated
On 4 April 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE FROOM

Between

SAEEDA KHAN
ZAHID ULLAH
(NO ANONYMITY DIRECTION MADE)

Appellants

and

THE ENTRY CLEARANCE OFFICER, ISLAMABAD

Respondent

Representation:

For the Appellant: Mr R Sharma, Counsel

For the Respondent: Ms A Fijiwala, Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are citizens of Pakistan born on 10 January 1976 and 15 June 1996 respectively. The second appellant is the child of the first appellant. The appeals have therefore been linked and heard together. Both appellants are seeking to join the first appellant's husband, Mr Mohammed Hassan Khan ("the sponsor"), in the UK for settlement. The sponsor is the father of the second appellant, who was under 18 at the date of application.

Error of law – Appendix FM-SE

2. The issues in these appeals are well summarized in the decision of the First-tier Tribunal granting the appellants permission to appeal:

“1. In a Decision promulgated on 3 September 2015 Judge of the First-tier Tribunal Hussain dismissed the Appellants’ appeals against the Respondent's decisions to refuse them entry clearance for settlement in the UK with their husband/father.

2. The issue in the appeal was whether the Appellants had produced the evidence required by Appendix FM-SE relating to the Sponsor’s income, specifically whether the bank statements covering the same period as the tax return had been produced.

3. The Respondent assessed the evidence with reference to the Sponsor’s claimed income of £22,798. That is the income shown on his tax calculations for the year 2013/14. The Respondent found that the bank statements produced did not cover that entire year.

4. The Judge approached the matter on the basis that the relevant year was 2012/13, and that since the Sponsor’s income in that year was only £12,869 the appeal could not succeed under the Immigration Rules.

5. The grounds on which permission to appeal is sought submit that the Judge misdirected himself as to the year on which the appellants were basing their application.

6. There appears to be confusion, which I cannot unravel, as to the correct year. The Respondent quoted the income for 2013/14 but the entry clearance applications were made before that year had ended. The ECM took the correct year to be 2012/13. I consider that this part of the grounds is arguable.

7. The grounds make further submissions in respect of Article 8. These have no arguable merit.”

3. I heard submissions from the representatives as to which year the Judge should have taken into account. However, at the beginning of the hearing, Mr Sharma also indicated that he wished to apply for permission to appeal on the ground on which permission had been refused by the First-tier Tribunal, namely article 8. I said I would hear submissions on the matter of the interpretation of the rules first because, if the appellants could succeed on that ground, there would be no need to consider article 8.
4. Before setting out the submissions and my interpretation of the rules, it is helpful to set out the background in more detail.
5. It appears to be common ground that, if the correct financial year is 2012/13, then

the appellants cannot succeed under the rules for the reasons given by Judge Hussain, namely that the sponsor's income from self-employment as a mini-cab driver fell below the threshold of £22,400. The sponsor earned only £12,869 in that year according to HMRC records. Moreover, he had not provided a complete set of bank statements to correspond to that tax year. On the other hand, if the correct year were 2013/14, then the appellants might succeed under the rules provided they could meet the evidential requirements of Appendix FM-SE. If the specified evidence could not be provided then any error on the part of the First-tier Tribunal was immaterial.

6. The date of application was 5 March 2014 and the date of decision was 16 October 2014. In other words, there had been a change of tax year in between the applications and the decisions being made. This matter lies at the heart of the dispute in this case.
7. In their visa applications the appellants indicated they relied on the sponsor's self-employment and that they could meet the £22,400 threshold. Submitted with the applications were copies of the sponsor's tax returns, statements of account and evidence of the payment of tax for 2012/13. The sponsorship details contained in the appendix to the visa application forms indicated the sponsor's earnings were £24,798. However, this is the figure taken from the sponsor's accountant's letter of 3 March 2014 which confirmed he earned £24,798 profit before tax during the 12-month period 1 March 2013 to 28 February 2014, which straddles the two tax years.
8. In the notice of decision the entry clearance officer notes the claimed income as being £24,798 and then sets out the evidential requirements of Appendix FM-SE. There were two reasons for refusal. Firstly, the sponsor's bank statements only covered the period 14 January 2013 to 7 March 2014, which did not cover the same 12-month period as the tax return submitted. Secondly, the bank statements were not originals. In relation to the first point it can be observed that the bank statements considered fell within the 2013/14 tax year whereas the tax returns related to the previous year.
9. The grounds of appeal submitted on behalf of the appellants do not address the point about which tax year should be taken into account. They argue the entry clearance officer should have requested any missing bank statements, relying on paragraph 245AA(b)(i) of the rules (missing documents from a sequence). The grounds assert the bank statements were genuine.
10. In reviewing the decision the entry clearance manager picks up on the point about the tax year. The sponsor's tax returns related to 2012/13. However, the bank statements provided covered the period from 16 November 2012 to 13 December 2013. It is curious that the notices of decision showed the statements ran until 7 March 2014 but it is at least clear that bank statements for the period 6 April 2012 to 15 November 2012 had not been provided. In relation to evidential flexibility, the entry clearance manager notes that the missing statements had still not been

provided.

11. At the hearing in the First-tier Tribunal it appears to have been accepted on behalf of the appellants that the appropriate year to consider was 2012/13. The Judge notes the appellants accepted they could not comply with the requirements of Appendix FM-SE at the date of application (see paragraph 10) and also that the relevant period was 6 April 2012 to 5 April 2013 (see paragraph 11).
12. The relevant provisions of Appendix FM-SE are 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.
- (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); (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.

...

Calculating Gross Annual Income under Appendix FM

13. Based on evidence that meets the requirements of this Appendix, and can be taken into account with reference to the applicable provisions of Appendix FM, gross annual

income under paragraphs E-ECP.3.1., E-LTRP.3.1., E-ECC.2.1. and E-LTRC.2.1. will be calculated in the following ways:

...

(e) Where the person is self-employed, their gross annual income will be the total of their gross income from their self-employment, from any salaried or non-salaried employment they have had or their partner has had (if their partner is in the UK with permission to work), from specified non-employment income received by them or their partner, and from income from a UK or foreign State pension or a private pension received by them or their partner, in the last full financial year or as an average of the last two full financial years. The requirements of this Appendix for specified evidence relating to these forms of income shall apply as if references to the date of application were references to the end of the relevant financial year(s). The relevant financial year(s) cannot be combined with any financial year(s) to which paragraph 9 applies and vice versa."

13. The Judge of the First-tier Tribunal directed himself that paragraph 7(f) of Appendix FM-SE was mandatory. He said that, as the applications had been made on 5 March 2014, the "relevant period" was 6 April 2012 to 5 April 2013.
14. Mr Sharma told me the sponsor's financial year runs from February to February, which reflects the accountant's letter sent with the application. He also argued that, if the rules should be interpreted as meaning the last full year before the date of application, there was a tension with section 85A(2) of the Nationality, Immigration and Asylum Act 2002, which provided that the tribunal should consider the circumstances appertaining at the date of decision. He argued that it was not sensible to restrict the appellants to consideration of the 2012/13 year, which was so long ago. To do so leads to absurdity.
15. Ms Fijiwala argued the rules mean the last full financial year before the application because that interpretation enables an entry clearance officer to consider the documents submitted with the application. If an application had been made late in the financial year the entry clearance officer would have to request further documents before reaching a decision. The tribunal should look at the same year as the entry clearance officer.
16. I remind myself of the guidance given by Lord Brown in *Mahad* [2009] UKSC 16 that the proper approach to the construction of the rules depends on the language used construed against the relevant background, which involves consideration of the rules as a whole and the function they serve in the administration of immigration policy. The rules are not to be construed with all the strictness applicable to the construction of a statute but, instead, sensibly according to the natural and ordinary meaning of the words used, recognising they are statements of the Secretary of State's administrative policy.
17. I was told there is no definition of "full financial year" in the rules.
18. I have looked at the Collins online dictionary definition of "financial year" which

highlights that the term can mean any period used by a particular firm at the end of which its annual accounts are made up, as well as the period ending on 5 April, which functions as the tax year.

19. I have also looked at the respondent's guidance document Immigration Directorate Instruction Family Migration: Appendix FM Section 1.7 Appendix Armed Forces Financial Requirement of August 2015. The section on self-employment states as follows:

"9.1 Category F: Last full financial year

9.1.1 Where the applicant's partner ... is in self-employment ... in the UK, at the date of application, they can use income from **the last full financial year** to meet the financial requirement."

20. Paragraph 9.3.1 of the same document states as follows:

"For those self-employed as a sole trader ... the relevant financial year(s) will be that covered by the self-assessment tax return and in the UK this runs from 6 April to 5 April the following year."

21. I appreciate this guidance had not been published when the appellants made their applications or even by the date of decision. Nor is the guidance to be used as an aid to the correct construction of the rules (*ZH (Bangladesh) v SSHD* [2009] EWCA Civ 8, paragraph 32). They are not surrogate rules even though they may illuminate the intention behind the rules. They are written primarily for decision-makers rather than applicants. I mention the IDIs in this case simply to exclude the possibility of the appellants relying on them as a support to the interpretation of the rules which they seek.
22. It might be said that it would have been a simple matter for Parliament to restrict the meaning of "full financial year" to the complete tax year immediately prior to the date of application. The rules set out above do not in terms contain any such restriction. It is possible to make sense of them without reading such a restriction into them, albeit this could cause the kind of confusion which concerned Ms Fijiwala and which this case amply illustrates.
23. I note that Appendix FM-SE begins with general requirements which envisage there being specified periods during which income must be shown: see, for example, paragraphs A1(b)(ii), 1(a)(iv) and 1(l). I also note that, for example, the requirements for employed persons receiving a salary contain a specific provision that payslips must cover a six-month period prior to the date of application (paragraph 2(a)(i)).
24. Having carefully considered the rules and the arguments made, I incline towards giving the rules a meaning which provides for a uniform approach and which therefore requires the reference to the last full financial year to mean the year which

ended prior to the date of application. Whilst ‘financial year’ can have a meaning different from tax year in ordinary parlance I also conclude that the term means the tax year in the particular context of the rules so as to mesh with the evidential requirements to provide HMRC documents.

25. For the purposes of this appeal it follows that the appellants cannot succeed and Judge of the First-tier Tribunal Hussain was correct to interpret the rules as requiring the appellants to show the financial requirements were met by reference to the tax year 2012/13, as counsel who represented the appellants on that occasions appears to have conceded.
26. This interpretation does not lead to absurdity. Whilst delays in listing appeals means the period under consideration may be fairly distant this interpretation avoids the difficulty caused by shifting the period forwards and thereby imposing fresh specified evidence requirements on appellants. There is no tension between this approach and section 85A(2). As seen, the rules contain many instances of evidential requirements being linked to a time period. Appellants are permitted to adduce evidence of the period in question at their appeals.
27. On the issue on which permission to appeal was granted, I find no error in the decision of the First-tier Tribunal. The appellants do not meet the financial requirements of Appendix FM-SE.

Article 8 – permission to appeal refused

28. The Judge of the First-tier Tribunal found there was no need to consider article 8 outside the rules because there were no compelling or exceptional circumstances to require him to do so. In the alternative, he found the public interest prevailed.
29. The appellants’ grounds seeking permission to appeal argue the Judge did not appear to have considered that the family was separated and a second-stage consideration had not been given. As noted, the First-tier Tribunal refused to grant permission to appeal on this ground.
30. Mr Sharma provided a completed IAUT-1 application form and sought permission to appeal against the Judge’s decision on article 8. He reminded me of the discussion in *Ferrer (limited appeal grounds; Alvi)* [2012] UKUT 00304 (IAC) in which the Upper Tribunal appeared to recommend that there was little utility in refusing to grant permission on some grounds but granting permission on others. More significantly for the purposes of this appeal, it provided guidance on the need, at least in this Chamber, for the obtaining of permission to appeal.
31. In making his submissions as to why I should grant permission to appeal at this late stage, Mr Sharma emphasized what he considered to be the strong merits of the article 8 ground. He reminded me of what the Court of Appeal said about “near misses” under the rules in the context of overseas appeals concerning family

members in *SSHD v SS (Congo)* [2015] EWCA Civ 387 (paragraphs 54 to 58). He pointed out that there was no remedy for the second appellant in re-applying because he had now reached the age of 18.

32. Ms Fijiwala made no submissions on whether I should grant permission to appeal but said that, in the event I did so, she would ask for an adjournment to consider this new matter.
33. I refuse permission to appeal on article 8 grounds for the following reasons.
34. Neither the grounds originally submitted to the First-tier Tribunal nor Mr Sharma's amplified grounds contain arguable merit. The grounds are no more than mere disagreement with the Judge's primary decision, which was that the circumstances did not merit consideration outside the rules.
35. The Judge was plainly aware that the family is currently separated. He was told the family members missed each other and dreamed of being together. The refusal had led to unnecessary hardship. These matters are contained in the sponsor's statement. The original letter accompanying the applications stated the sponsor and the first appellant married in 1994 and the visa application form stated they had lived together for eight years after the marriage. The Judge was not told anything about when or why the sponsor left his family to come to the UK or why no application had been made until now. It appears family life was maintained chiefly through annual visits made by the sponsor to Pakistan.
36. The Court of Appeal in *SS (Congo)* made it clear that the compelling circumstances test applied with equal vigour to Appendix FM-SE as to the substantive rules in Appendix FM (see paragraphs 50 to 53). Judge Hussain applied the correct test. Although he does not go on to give clear reasons for his finding that there were no compelling or exceptional circumstances, they are implicit in his alternative consideration of article 8 outside the rules. In fact, his emphasis on the importance of the financial requirements being met as an element of the public interest in maintaining immigration controls echoes the Court of Appeal's justification for its decision that the compelling circumstances test should apply. It held that the specified evidence rules were a necessary part of ensuring applicants were not a burden on public resources.
37. Judge Hussain did not arguably err in considering near-miss arguments, as discussed in *SS (Congo)* unless the point was put to him and it is not possible to say from the decision that it was. There was some evidence showing the sponsor's earnings from self-employment were sufficient to meet the threshold during the tax year in which the date of decision fell. However, it is far from clear that the available evidence would have met all the specified evidence requirements contained in paragraph 7 of Appendix FM-SE for that year. Therefore it has not been shown any error was material.

38. Finally, the grounds are incorrect in suggesting the Judge failed to make a second-stage assessment. His primary finding was that a second-stage assessment was not required. However, he went on to make one in case he was wrong in any event. The Judge took account of section 117B of the 2002 Act and referred to the need not to use article 8 as a means of circumventing the rules. He also took account of the best interests of the second appellant. He was almost 18 at the date of application and had lived all his life in Pakistan with his mother. It was in his best interests to remain with his mother. The Judge therefore appears to have taken into account all relevant matters, weighed them and reached a rational conclusion. I see no arguable error or law in his approach.

NOTICE OF DECISION

The First-tier Tribunal's decision dismissing the appeals under the Immigration Rules did not contain a material error of law and shall stand.

Permission to appeal against the First-tier Tribunal's decision dismissing the appeals on article 8 grounds is refused.

Signed

Date 15 March 2016

**Judge Froom,
sitting as a Deputy Judge of the Upper Tribunal**