



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/15405/2014
OA/15400/2014
OA/15402/2014
OA/15404/2014

THE IMMIGRATION ACTS

Heard at Field House, London
On the 7th April 2016

Decision & Reasons Promulgated
On the 15th April 2016

Before:

DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between:

MRS HAMISHA SHAZADA
MR TAMIM SHAH YAGUBY
MISS SABRINA YAGUBY
MISS ZARIFA YAGUBY
(Anonymity Direction not made)

Appellants

And

ENTRY CLEARANCE OFFICER - ISLAMABAD

Respondent

Representation:

For the Appellants: Mrs Heidar (Solicitor)

For the Respondent: Miss Fijiwala (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the Appellants' appeal against the decision of First-tier Tribunal Judge Rose dated the 4th June 2015 following a hearing before him at Sheldon Court,

Birmingham on the 1st June 2015. Mrs Hamisha Shazada is the mother of Tamim, Sabrina and Zarifa Yaguby. They are all citizens of Afghanistan. The Entry Clearance Officer refused the Appellants' applications for entry clearance, as the wife and children of Mr Meraab Shah Yaqubi, under Appendix FM of the Immigration Rules in decisions made on the 28th August 2014. Within the original refusal decisions it was stated that the Sponsor needed to establish that he was earning at least £27,200 per annum, in order to satisfy the minimum income requirements, in respect of the applications by Mrs Shazada and the three children and that although it was said that the Sponsor was self-employed as a decorator and had been since the 1st November 2010, with an annual income of £33,691, although the Sponsor's declared earnings were £33,691 his bank statements for the period between the 6th April 2012 and the 5th April 2013 only showed deposits amounting to £17,342.50. It was therefore found that the Sponsor's declared income had not been paid into his bank account and that as a result the specified evidence requirements of Appendix FM-SE, in respect of the Sponsor's income, had not been met, as he had not complied with the requirement to provide "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."

2. The Appellants sought to appeal that decision to the First-tier Tribunal, and that appeal in respect of all of the Appellants was heard by First-tier Tribunal Judge Rose on the 1st June 2015, with his decision dated the 4th June 2015.

The Decision of First-tier Tribunal Judge Rose

3. Within his decision First-tier Tribunal Judge Rose found that paragraphs E-ECP.3.1 and E-ECC.2.1 of Appendix FM required the Appellants to provide specified evidence of the necessary income, totalling £27,200 and that the Sponsor was said to have an income from self-employment of £33,691 in the relevant year. It was disputed but his bank statements only showed deposits amounting to £17,342.50. It was also not disputed before Judge Rose that the specified evidence,

which in relation to self-employment in the UK was set out within paragraph 7 of Appendix FM-SE, included personal bank statements for the same 12 month period as the necessary tax return(s) showing that the income from self-employment had been paid into an account in the name of the Sponsor.

4. Judge Rose noted that Mrs Heidar relied in her submissions upon the IDI of April 2015 at paragraph 9.3.8 which provided that:

“Self-employed income can be cash-in-hand, if the correct tax is paid. In line with paragraph 3.1.5 of this guidance, it will generally be expected that the person’s business or personal bank accounts would fully reflect all gross (pre-tax) cash income. Flexibility may only be applied where the decision-maker is satisfied that the cash income relied upon is fully evidenced by the relevant tax return(s) and the accounts information”.

5. Judge Rose found that the nature of the flexibility to be applied was not expressed, but in his judgment the flexibility related to the expectation that the person’s bank account would reflect all gross cash income rather than net income. He further found that an undated IDI produced by Mrs Heidar contained no reference to such flexibility. In respect of paragraph 5.4.2 of the IDI, where it stated that in respect of earnings from self-employment “employment can be cash-in-hand if the correct tax is paid”, Judge Rose found that this guidance simply referred to the way in which money from self-employment was received by the self-employed person, in the form of cash and that it was then open to him to pay such money into his bank account. Judge Rose was not satisfied that there was any published policy that flexibility should be applied if the necessary income was not reflected in the bank statements as required by paragraph 7(f) of Appendix FM-SE, beyond that provided for in paragraphs D and (1)(n). He found that the provisions of paragraph D did not assist the Appellants as there was no missing information.
6. Judge Rose further found that the decision of the Upper Tribunal in the case of *Sultana and Others* (rules: waiver/further enquiry; discretion) [2014] UKUT 540 (IAC) did not assist the Appellants as in that case, as he found in the present

appeal, there were incurable deficiencies in meeting the requirements of the Rules. Judge Rose found that not having complied with the specified evidence requirements, the Appellants could not succeed under the Immigration Rules. He further found that an appeal on Human Rights outside of the Immigration Rules was not pursued, either in Mrs Heidar's skeleton argument, or in any oral submissions before him.

7. The Appellants have sought to appeal that decision to the Upper Tribunal. Within the Grounds of Appeal, it is argued, inter alia, that following the Supreme Court decision in the case of Mandalia v Secretary of State for the Home Department [2015] UKSC 59, that if there was an evidential flexibility policy in place, the Respondent was under a duty to apply that policy in the Appellants' case. It is argued that the First-tier Tribunal Judge's findings at [15 and 16] amount to a material error of law and that the Judge was wrong to find that the Appellants could not benefit from paragraph D of Appendix FM-SE. It is said that the Sponsor in his witness statement had provided a full explanation as to why his income had not been deposited into his account and that this explanation was supported by evidence from an accountant. It is further argued that in respect of the IDI that cash-in-hand is acceptable and that the IDI makes it clear that flexibility can be applied where the cash income is evidenced by the tax return and other supporting documentation. It is argued that the First-tier Tribunal Judge failed to understand the meaning of "cash-in-hand", which it is argued in business terms simply means money not going through the bank account and it was argued that cash-in-hand was defined in the dictionary as "money and notes, kept to pay small amounts but not deposited in the bank" and that all that had to be established was that the correct tax was paid. It was argued that it had been established that it was in fact the IDI dated July 2014 that was applicable given the refusal decisions were dated the 28th October 2014 and that the Entry Clearance Officer had not followed the applicable IDI and that the Sponsor had submitted all requisite information including his tax returns and SA302, as well as evidence that he had paid tax on his declared income to HMRC and that in such circumstances

the IDI allowed flexibility regarding the fact that not all of the Sponsor's income had been deposited into his bank account.

8. Although permission to appeal was initially refused by First-tier Tribunal Judge Wellesley-Cole, permission to appeal was subsequently granted by Upper Tribunal Judge Bruce on the 15th November 2015, when she found that although the Grounds of Appeal were repetitive and unhelpfully sought to rely upon unreported decisions, they did identify an arguable issue of law arising from the decision and the "evidential flexibility" paragraph of the IDI, namely that where the only defect in an Appendix FM application is the failure to produce bank statements as evidence of salary, to what extent can this defect be remedied by other evidence, for instance by evidence of payments made to HMRC.
9. I am most grateful to Miss Heidar for her helpful skeleton argument, which I have fully taken account of, and for the oral submissions made at the Upper Tribunal appeal hearing by Mrs Heidar on behalf of the Appellants and by Miss Fijiwala on behalf of the Respondent. I have fully taken account of all of the arguments raised both within the original Grounds of Appeal to the First-tier Tribunal, the initial Grounds of Appeal to the Upper Tribunal, the Supplemental Grounds of Appeal to the Upper Tribunal, the skeleton argument, and the oral submissions. I have further taken account of the original reasons for refusal letters, the decision of First-tier Tribunal Judge Rose, the initial refusal of permission to appeal, the subsequent grant of permission to appeal, the relevant IDI and all of the evidence contained within the respective bundles, which I have carefully considered in reaching my decision.

My Findings on Error of Law and Materiality

10. When the appeal originally came before me on the 25th February 2016, at that time it was unclear as to which IDI actually applied and as to the exact wording of that IDI. I therefore adjourned the appeal on that occasion in order that that situation could be clarified by the parties, and it has now been agreed that the appropriate

and applicable IDI was that dated the 29th July 2014, given that the decisions in the case were made on the 28th August 2014.

11. It was not in dispute before me that under the provisions of paragraph E-ECP.3.1 and E-ECC.2.1 of Appendix FM that the Appellants were required to show a specified gross annual income totalling £27,200, given that there were three children Appellants in addition to Mrs Shazada, the wife. It was also not in dispute before me, as it was not in dispute before First-tier Tribunal Judge Rose, that although the Sponsor said that he had an income from self-employment of £33,691 in the relevant year, his bank statements only showed deposits totalling £17,342.50.
12. The requisite specified evidence in respect of self-employment in the UK are set out within paragraph 7 of Appendix FM-SE and the specified evidence in respect of the sponsor's self-employment in the UK that had to be produced at the time of the application is set out paragraph 7 of Appendix FM-SE. At paragraph 7(f) that included "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".
13. Mrs Heidar on behalf of the Appellants argued that evidential flexibility could be exercised under paragraph D of Appendix FM-SE, in that under paragraph D(d)(iii), as a document had been submitted that did not contain all of the specified information, but she argued that the missing information was verifiable from "other documents submitted with the application", in respect of the evidence from the SA302, saying that tax was payable, together with the subsequent payment of tax by the Sponsor and all of the tax documentation, and evidence from the Sponsor himself and accountant.
14. However, this case is very different from the situation of a case where, for example, a letter from a bank or building society does not contain specified information, such as the account number or the date of the letter or the financial institution's name and logo. In this case, the actual specified evidence required

under paragraph 7(f) is that the income from self-employment has been paid into an account in the name of the person or the name of the person and their partner jointly. The specified evidence is not simply the level of the gross and/or net income, the specified evidence is evidence of payment of that income from self-employment into the bank account. The requirement under paragraph 7(f) for the 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 the name of the person and their partner jointly, clearly indicates and establishes that this is evidence needed to corroborate the contents of the tax return. The tax return itself and the statement of account under SA300 or SA302, although also specified evidence under paragraph 7(b) are not, under paragraph 7, themselves sufficient. The bank statements have to show for that same 12 month period as the tax return, payment of the income from self-employment into the account. That is the specified evidence, the evidence of payment of the income into the account. Given that not all of the Sponsor's income, it is conceded was paid into his account, then the Appellants cannot benefit from paragraph D of Appendix FM-SE, as the missing specified information in terms of the payments into the bank account, are not verifiable from other documentation submitted with the application. The level of the gross or net income might be ascertainable by other parts of the specified evidence that had to be submitted under paragraph 7 including the tax return and SA302, but not the specified evidence in respect of payments into the bank account.

15. Nor does the flexibility contained within paragraph 1(n) assist the Appellants in this case. Paragraph 1(n) states that:

“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”.

16. In this case, it was agreed and conceded on behalf of the Appellants that not all of the net income went through the Sponsor's bank account. This is not a case therefore where simply the full net amount of the income having gone through the bank account, this could be utilised in conjunction with other evidence provided by the Sponsor as a self-employed person, to show the gross amount. Here, not all of his income went through the bank account.
17. In respect of the IDI dated the 29th July 2014 and the argument raised by Mrs Heidar that as a result of paragraph 9.3.7 of the IDI, that not all of the Sponsor's income had to go through the bank account, I note in this regard the wording of paragraph 9.3.7 of the IDI. That paragraph states:

“9.3.7 Self-employed income can be cash-in-hand if the correct tax is paid. In line with paragraph 3.1.5 of this guidance, it would generally be expected that the person's business or personal bank statements would fully reflect all gross (pre-tax) cash income. Flexibility may only be applied where the decision-maker is satisfied that the cash income relied upon is fully evidenced by the relevant tax return(s) and the accounts information”.
18. Paragraph 3.1.5 states:

“3.1.5 Under paragraph 1(n) of Appendix FM-SE 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 on their payslips (or 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.”
19. In my judgment, it is perfectly clear that paragraph 9.3.7 is referring to paragraph 3.1.5, and the flexibility under paragraph 1(n) of Appendix FM-SE that 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 in the relevant specified evidence provided in addition to the specified bank statements, in relation to non-employed income, and that otherwise only the net amount shown

on the specified bank statement may be counted. The specific reference to paragraph 3.1.5 in paragraph 9.3.7, in my judgment makes it clear that the paragraph is providing further guidance in respect of paragraph 3.1.5 and the flexibility contained within paragraph 1(n) of Appendix FM-SE. It is not seeking to establish that there is a general flexibility to consider the relevant tax return(s) and the relevant accounts information, in circumstances where not all of the net income goes through the bank account. There would have been flexibility here had the Sponsor's net income fully gone through the bank account. It has not. I do not find that the IDI whether under paragraph 9.3.7 or otherwise, nor the Immigration Rules, provide the flexibility asserted by the Appellants in such circumstances. If not all of the Sponsor's net income has gone through the bank account, as is the case here, then the specified evidence requirements of Appendix FM-SE are not met.

20. In respect of Mrs Heidar's argument regarding "cash-in-hand", she submits the definition provided on the website businessdictionary.com as being "money and notes, kept to pay small amounts but not deposited in the bank". This does not assist the Appellants given that the reference at paragraph 9.3.7 of the IDI to "self-employed income can be cash-in-hand if the correct tax is paid" does not simply mean that the Sponsor's net income does not need to wholly go through his bank account, it is just referring to the evidential flexibility that the full amount of the gross income does not need to be paid into the bank account if the net income has been paid into the bank account and that the flexibility contained within paragraph 1(n) of Appendix FM-SE can be taken advantage of if the requisite and relevant specified information has been provided which shows the net and the gross income.
21. In such circumstances, the decision of First-tier Tribunal Judge Rose does not contain any material error of law and is maintained.

Notice of Decision

The decision of First-tier Tribunal Judge Rose does not contain any material error of law and is maintained.

Signed

Rob McGinty

First-tier Tribunal Judge McGinty

Dated 6th April 2016