**Upper Tribunal**
**(Immigration and Asylum Chamber)**

Appeal Number: OA102892014
OA102902014
OA102912014

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 17 January 2017** | **On 18 May 2017** |

**Before**

**MR CMG OCKELTON, VICE PRESIDENT**
**UPPER TRIBUNAL JUDGE KAMARA**

**Between**

**MR PRABHAKAR RAO NANNAM**
**MR PRATHAP NANNAM**
**MISS NAVYA NANNAM**
(ANONYMITY DIRECTION NOT MADE)

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Mr B Quee, solicitor, Quee & Mayanja Solicitors
For the Respondent: Mr T Wilding, Senior Home Office Presenting Officer

**DECISION AND REASONS**

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge Traynor, promulgated on 20 August 2015. Permission to appeal was granted by First-tier Tribunal Judge Lambert, on 4 January 2016.

Anonymity

2. No direction has been made previously, and there is no reason for one now

Background

3. The appellants are the spouse, son and daughter of Mrs Prabhakar, the sponsor who is a British citizen. On 30 July 2013, they sought entry clearance to settle in the United Kingdom with the sponsor. The Entry Clearance Officer (ECO) deferred a final decision on the applications pending the outcome of the Secretary of State's challenge to the judgment in MM & Ors v SSHD [2013] EWHC 1900 (Admin). Nonetheless, initial assessments took place on 25 February 2014 and 3 July 2014, following which the ECO noted that the sponsor failed to meet the minimum income requirements of Appendix FM.

4. The notices of decision are dated 4 August 2014. They advised the appellants that the Secretary of State's appeal in MM had been upheld as to the lawfulness of the income threshold requirement; that additional information and documents had been taken into account but that the applications were refused because the income threshold requirement of Appendix FM was not met. Specifically, the ECO noted from the Appendix 2 form submitted with the application, that the sponsor said that she earned a total of £25,200 from salaried employment and self-employment. Referring to paragraph 13(3) of Appendix FM-SE, the ECO explained that only the gross income from both sources for the last financial year could be considered. The ECO's calculation for the financial year ending on 5 April 2013, was that the sponsor earned £14,949.00 from salaried employment and £2,400.00 from self-employment, making a total of £17,349.00. E-ECP 3.1(a) stipulates that an income of £24,800 is required in the absence of savings, which the sponsor did not have.

5. The ECO assessed new evidence submitted after the application but did not take it into consideration because it did not relate to the sponsor's circumstances at the time of the application. The appellants were informed that if they wished the ECO to consider that evidence, they would need to apply again and the sponsor's income would be assessed at the time of the application. Lastly, the ECO considered there to be no exceptional circumstances raised by the applications.

6. The appellants appealed to the First-tier Tribunal. The grounds of appeal argued that the ECO had failed to consider all the evidence or compassionate circumstances and asserted that the sponsor's income up until 31 March 2014 was £25,375.00. Thus, it was argued that the appellants met the requirements of the Rules and further that the

decision to refuse entry was unlawful pursuant to Section 6 of the Human Rights Act 1998.

7. An Entry Clearance Manager (ECM) reviewed the decisions under appeal on 3 December 2014. The decisions were maintained. It was said that while there was evidence to suggest that the sponsor had earnings which exceeded the financial threshold in the financial period which followed the applications, this was irrelevant in relation to the applications submitted. On the matter of Article 8, the ECM did not consider it unreasonable for the sponsor to visit or live with the appellants in India.

The hearing before the First-tier Tribunal

8. At the hearing before the First-tier Tribunal, the judge heard oral evidence from the sponsor and submissions from her representative. The respondent was not represented. The sponsor mainly relied on evidence of her income for the 2013/2014 financial year. It was argued on the appellants' behalf that owing to section 85(4) of the Nationality, Immigration and Asylum Act 2002, that the judge was permitted to consider evidence about any matter relevant to the decision including evidence submitted after the applications but prior to the decisions. The judge concluded that he was only obliged to consider evidence submitted with the applications; that the income threshold was not met and that it was open to the appellants to submit fresh applications. He found there to be no breach of their Article 8 rights; reiterating the point made by the ECM.

The grounds of appeal

9. The grounds of appeal in support of the applications for permission to appeal argued that the judge erred in stating that section 85(4) of the 2002 Act only came into force after the decisions in question and he was therefore obliged to take the sponsor's circumstances into consideration at the time of those decisions. It was said that her income exceeded the income requirement. It was stated that at the time of the application, the sponsor had been self-employed for just 6 months but her projected income from all sources during the 12-month period January 2013 until December 2013 would be £25,200.00. Furthermore, her tax return for the year ending April 2014 was £25,375.00. The grounds also asserted that the judge erred in his Article 8 assessment because the sponsor was unable to live in India with her family because she lost her Indian citizenship when she was naturalised as a British citizen.

*10.* Permission to appeal was granted on following basis

*3. Whilst there is clearly arguable error by the judge in the above respect, it could be equally argued to lack materiality insofar as the provisions of Appendix FM-SE require the specified evidence to be submitted at the date of application. In the absence of firm authority as to resolution of the tension between the judge's discretion under S85(4) to consider evidence relevant to the substance of the decision and the requirements of Appendix FM as to submission of evidence with the application the grounds are arguable.*

*11.* The respondent's Rule 24 response indicated that the appellants' complaint relating to section 85(4) was wholly erroneous because the Rules precluded consideration of evidence not submitted with the application and Appendix FM-SE expressly referred to the last financial year in relation income from self-employment and not projected income.

The hearing

12. Mr Quee handed up a skeleton argument which referred to Immigration Directorate Instructions dating from May 2016. He reiterated what was said in the grounds that at [24] of his decision and reasons, the judge had erred in saying section 85(4) was not applicable.

13. At this point, Mr Wilding interjected to clarify that the respondent accepted that a decision maker could consider further evidence adduced by an appellant to improve their case, but that the evidence had to relate to the date of the application and not otherwise.

14. Mr Wilding argued that the difficulty with the evidence of the sponsor's income was not just insufficiency of that income but missing evidence. While some documents were missing from a series, there were other deficiencies.

15. Mr Quee indicated an acceptance that the Rules were not met at the time of the application and that "we may be in new application territory." He also asked us to note that the appellants were unrepresented at the time of the applications.

16. Mr Wilding took us through the documentary evidence relating to the date of application, with reference to Appendix FM-SE. Essentially, he submitted, in respect of the sponsor's salaried employment, that 3 months' pay slips were missing and one personal bank statement. He contended if these were the only items missing, it would be difficult to argue that evidential flexibility should not be applied, however there were significant omissions in relation to the evidence of self-employment.

17. Considering Part 7 of Appendix FM/SE, Mr Wilding submitted that sub-paragraph 7(a) was not met, in that evidence of tax payable, paid and unpaid was not submitted for the 2012-2013 financial year. In respect of 7(b), no self-assessment for the last full financial year before the application was provided and the statement of account provided, namely SA302 was for the 2013-2014 financial year. Moving on to 7(f), there were no personal bank statements for 2012 and those from January 2013 and April 2013 were missing. He added that it was also questionable whether 7(h)bb was met.

18. In reply, Mr Quee admitted to being in some difficulty. He conceded that the specified documents referred to by Mr Wilding, were indeed missing and that was the case before the ECO as well as the First-tier Tribunal. He informed us that there were difficulties with making a new application at the time the ECO suggested it, which meant such an application would have failed. Mr Quee commented that there had been no references to the defects in the evidence or lack of documents in the

ECM's review. He reminded us that the ECM's view was that the additional material submitted after the application, indicated that the financial threshold may have been exceeded. He also said that the appellants were not represented at the time of the ECO's decision. Regarding the First-tier Tribunal hearing, he explained that his firm could only provide evidence which had been given to them by the sponsor.

19. Mr Quee asked us to note that the only requirement not met was the financial requirement and that the ECO ought to have given the appellants an opportunity to provide the missing documents. After querying whether Article 8 ground was included in the grant of permission and being advised that it was not, Mr Quee nonetheless argued that the second and third appellants were financially dependent upon the sponsor, who owing to her British nationality could not live in India.

20. At the end of the hearing, we reserved our decision which we now give with reasons.

Decision on error of law

21. Permission to appeal was granted solely in relation to the argument that the judge erred in finding that section 85(4) of the 2002 Act was not in force at the time of the decision to refuse entry clearance in this case. The judge granting permission did not do so in relation to the Article 8 grounds.

22. The relevant section of the 2002 Act, given the date of the decision in this case was in fact section 85(5) which reads;

*(5) But in relation to an appeal under section 82(1) against refusal of entry clearance or refusal of a certificate of entitlement under section 10 –*

*(a)subsection (4) shall not apply, and*

*(b) The Tribunal may consider only the circumstances appertaining at the time of the decision to refuse.*

23. Section 85(4) of the Act was, therefore, not relevant. What the judge did was, correctly in our view, to consider the evidence submitted by the appellants with the applications for entry clearance, having reference to paragraph D(a) of Appendix FM-SE;

*"D.(a) In deciding an application 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. "*

24. The judge considered whether the exceptions in sub-paragraph (b) or (e) applied at [26] and concluded that they did not. There is no challenge to this aspect of his decision.

*25.* It is the case that in relation to the sponsor's employment there were missing documents, in that one of a series of bank statements was missing and three out of

six of the pay slips were missing, however owing to paragraph D(c) of the said Appendix, a decision-maker will not request such documents where it is not anticipated that addressing those omissions would lead to a grant of entry because the application will be refused for other reasons. Other reasons in the appellants' case are that there were serious omissions in respect of the evidence of self-employment. That there was no evidence of tax payable, paid and unpaid for the financial year 2012-2013, which was the last financial year prior to the applications being made was not disputed by Mr Quee in his closing submissions. Accordingly, we reject the submission that the ECO ought to have exercised evidential flexibility in this case.

*26.* Nor did Mr Quee dispute that the evidence of income declared to HMRC in the form of a SA302, related to the financial year following the application and that in relation to the sponsor's personal bank statements showing income from self-employment, only two out of twelve were provided for the 2012-2013 financial year.

*27.* These missing specified documents were not before the judge at the hearing. Had they been, they could have been considered by the judge. Instead, the appellants relied on evidence relating to the financial year ending in 2014, too late for the present application, arguing that the sponsor's income was anticipated to exceed the income threshold.

*28.* The judge, rightly, did not take this post-application evidence into consideration. At [28], referring to Appendix FM-SE 13(e) where it states that the evidence of self-employment must relate to the last full financial year prior to the application being made, the judge remarks, that this provision "*strongly implies that it is not possible to provide evidence of part of the financial year in order to illustrate earnings but rather it is the full financial year.*"

29. Any error made by the judge in relation to section 85 could not have affected the outcome of the appeals, which were bound to be dismissed.

Conclusions

**The making of the decision of the First-tier Tribunal did not involve the making of an error of on a point of law.**

**The decision of the First-tier Tribunal is upheld.**

Signed Date: 17 May 2017

Upper Tribunal Judge Kamara