



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/15645/2016

THE IMMIGRATION ACTS

Heard at Field House
On 9 May 2018

Decision & Reasons Promulgated
On 18 May 2018

Before

UPPER TRIBUNAL JUDGE WARR

Between

TAHMINA BEGUM
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Mustafa (solicitor), Kalam Solicitors
For the Respondent: Mr S Kotas, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Bangladesh born on 28 October 1994. She applied on 26 April 2016 for leave to enter the United Kingdom with a view to settlement as the wife of the sponsor ([MK]). The application was refused on 26 May 2016 on financial grounds as follows:

“Your sponsor is not exempt from the financial requirements as defined paragraph ECP.3.3. In order to meet the financial requirements of the Rules your sponsor needs a gross annual income of at least £22,400 for you and your child. In your application form, you state that your sponsor has two jobs. The first job is an cook with Bonani Limited, a job in which she has been employed for over six months and you have provided pay slips and bank statements to support this claimed employment. However, the bank statements submitted show no deposits to match exactly the claimed income and therefore fails to support the claimed income from this employment. This alone is insufficient to meet the £22,400 requirement. You state that your sponsor has another job as a Chef with S.T.R.L. Limited. However, I am not satisfied that you have provided the required documents relating to this employment. Specifically, paragraph 2(c) of Appendix FM-SE of the Immigration Rules states that you must submit 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. I am aware that you have submitted bank statements in your sponsor’s name showing regular credits but these fail to match any of the payslips provided. However, there is no evidence whatsoever of salary being paid into a bank account from either of your sponsor’s employment. I recognise that they are paid in cash for that job, but there is no evidence of any credits whatsoever in your account which could be attributed to their employments. I am therefore not satisfied that you have provided adequate evidence of your sponsor’s employment with either company, and I am therefore not satisfied that you have met the £18600 gross annual income requirement.

In light of the above, I am not satisfied that you have demonstrated that your sponsor has received an actual gross amount of £22,400 or more during the 12 month period prior to the date of application. I therefore refuse your application under paragraph EC-P.1.1 (d) of Appendix FM of the Immigration Rules. (E-ECP.3.1)

I have considered whether Paragraph D of Appendix FM-SE (‘Evidential Flexibility’) is applicable to your application. I note, however, that Paragraph D(c) states that documents will not be requested where it is not anticipated that addressing the error or omission will lead to a grant because the application will be refused for other reasons. For the reasons stated above, I am unable to accept the claimed income from their claimed employment. From the documents submitted, you have failed to do this, and I am not satisfied that you do, or you would meet the requirement. Given this, I am satisfied that I do not need to apply evidential flexibility.”

2. Before the First-tier Judge the sponsor simply adopted his witness statement. He confirmed that he was married to the appellant and that their child, who was born on

21 December 2015 in Bangladesh, was a British citizen and had her British passport. In relation to the financial issues the sponsor said as follows:

"I would like to confirm that in the relevant period (the 6 months period prior to the date of my wife's application) I was working for two employers namely Bonani Limited, T/A Mela Restaurant at []. I was employed as a Cook on a permanent basis with a gross salary of £14,284.40 per annum. In addition to the above employment, I was also working with S.T.R.L Limited T/A Shalimar Indian Restaurant at []. I was employed as a Chef on a permanent basis with a gross salary of £8,547.76 per annum. I would like to state that I met the financial criteria at the time of my wife's application. My total earnings are shown in my payslips from my employers as well as P60's which meet the financial requirements as required by the immigration rules. The ECO had failed to put proper attention and weight in my wife's case before refusing. The ECO expressed his concern that the salary of my payslips not match with my bank statements. I would like to confirm that I have always been receiving my salary by cash and I have deposited over £9,300.00 into my bank account during the relevant period. However, unfortunately, the ECO has failed to calculate the amount of my bank statements. I would like to confirm that I am currently working with Blue Cobra (UK) Ltd T/A [] as a Chef since 01 February 2017 with a gross salary of £18,800 per annum. I would also like to inform that we are currently facing mental turmoil due the uncertainty of my wife's entry clearance. We have been suffering from anxiety because of this present situation and if you grant my wife's appeal, we will retain my confidence and alleviate the emotional and mental turmoil we currently face."

3. The judge concluded his determination as follows:

"The sponsor has claimed that he has two jobs, one with STRL or STLR (as he says in his statement). He has provided wage slips from the 9th October 2015 to the 12th February 2016. All of these payslips show that he was paid by bank transfer. However, the bank statement that he has provided does not show any of these payments into his account. From the 19th February 2016 to 15th April 2016 his salary reverts to being paid cash. He was paid £130 per week and again there are no correspondence entries. His salary from Bonani Limited is about £260 per week. Clearly he cannot show that there payments into his account to match his claimed income. The rules say that if not all cash payments are made into the account then only that which is deposited can be taken into account, the balance is to be ignored. Of the nearly £400 that he has earned he has only banked about £364 per week which equates to about £18,928 or so a year. This is nearly £3500 short of the required amount. That is taking into account the STRL/STLR income which is not shown on the bank statements when it should be."

4. Accordingly the judge dismissed the appeal under the Rules.

5. Permission to appeal was sought on the basis that the judge had erred in finding that the appellant had not met the requirement of the Rules because as the appellant's child was a British citizen the target figure was £18,600 per annum and not £22,400. Permission to appeal was granted on 30 January 2018 by the First-tier Tribunal. Reference was made in the grant of permission to paragraph E-ECP 3.1: it was clear a child for whom the additional funding requirement of £3,800 applied did not include a British citizen. At the hearing it appeared that there was no issue between the parties that the judge had erred as claimed in relation to the child as she was a British citizen. Mr Mustafa accordingly submitted that the judge had not materially erred in law since it had been found that the appellant satisfied the lower figure of £18,600.
6. Mr Kotas disagreed with this analysis since he argued that on its true construction paragraph 10 of the determination was based on the judge's assessment that the material relied upon by the appellant did not satisfy the financial requirements of the Rules and that the judge had made that clear in the last sentence of paragraph 10. The reference to £18,928 was made on an "even if" basis. The judge had correctly decided that he could not take into account the STRL income and even if he had been able to take it into account it would have fallen short of the sum required.
7. I noted that no response had been filed in this case and Mr Mustafa might not have been alerted to this particular problem.
8. Mr Mustafa submitted that reliance could be placed on paragraph (m) of Appendix FM-SE - "cash income on which the correct tax has been paid may be counted as income under this Appendix, subject to the relevant evidential requirements of this Appendix". Reliance had been placed on a schedule of bank deposits showing a total sum of £9,480 had been deposited in the relevant six month period prior to the date of the application and when multiplied by two gave rise to the figure of £18,960. Although the appellant was receiving £400 a week he had only banked £364 a week, which was an indication that tax had been paid on the difference.
9. Reliance was placed by Mr Kotas on subparagraph (n) of Appendix FM-SE, which reads as follows:

"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."

Mr Kotas pointed out that paragraph (m) was subject to the relevant evidential requirements of the Appendix and he referred me to paragraph 2(c) of the Appendix, which reads as follows:

“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.”

10. Paragraph 2(a) refers to the requirement for payslips to cover “a period of six months prior to the date of application if the person has been employed by their current employer for at least six months ...” Mr Kotas submitted that the schedule of payments into the bank account was an amalgam of two forms of income and it could not be seen to which employment the money related. The judge had been correct.
11. At the conclusion of the submissions I reserved my decision. I can only interfere with the judge’s decision if there was a material error of law. It is conceded that there was an error but it is argued that that error was not material.
12. In relation to the confusion about the status of the child it is clear that the appellants were originally to blame in making an application which included her daughter, who was described wrongly as a Bangladeshi citizen. This was an error made by an agent which had since been corrected and it was clear that the child was in fact British and this was not the subject of dispute. However, the confusion was understandable and indeed in the decision reference is made to two figures, as Mr Mustafa pointed out.
13. I have come to the conclusion that the error was not material for the reasons given by Mr Kotas. The financial requirements are strict and although reliance was placed on subparagraph (m) this is subject to the requirements of the Appendix and there has been no challenge to the findings in relation to evidential flexibility. Essentially the two forms of employment have been, as Mr Kotas put it, amalgamated into one account so it was not possible to ascertain the source and the evidence provided falls short of the requirements to provide personal bank statements corresponding to the payslips. The point of these requirements includes the need to identify that proper tax has been paid. I was asked to infer that that had been done because of the difference in the appellant’s salary and the amount banked but, as Mr Kotas points out, reliance on an “amalgam” where one account covers two employments does not provide the necessary clarity about the issue. The First-tier Judge was accordingly correct on this aspect of the case and his analysis of the evidential requirements in paragraph 10 was not materially flawed in law.
14. As I have mentioned, no response was filed in this case. Mr Kotas submitted that it was not mandatory to file a response and he is of course right in that respect – see **Thapa (costs: general principles; s9 review) [2018] UKUT 54 (IAC)** at paragraph 33:

“For the respondent, Mr Wilding emphasised the discretionary nature of Rule 24. The respondent, in an appeal in the Upper Tribunal brought by the original appellant, has liberty to file a response. There is no duty on her to do so. Although we agree that it would be wrong to construe the power in Rule 10 to award costs so widely as, in effect, to turn the Rule 24 power into a general duty, the submission goes too far. There will be cases where (regardless of whether the

respondent files a response), she will be at risk of costs for unreasonable behaviour; for example, if she does not concede an appeal which is, on the facts of which she is aware, simply bound to succeed. That, however, is not the position in the present case.”

15. The problem in this case is that the appeal was not conceded but the issue identified when permission was granted was on a point that was conceded. Although the respondent is not obliged to provide a response the standard directions issued in this case included the direction that a decision not to provide a response also had to be notified to the Tribunal within one month of the date of directions. Accordingly there is a need under the standard directions to file a response or to notify the Tribunal that one is not being provided. Perhaps more importantly there is a duty to assist the Tribunal with the overriding objective under Rule 2. There is no doubt that it would have assisted the appellant’s representative if he had been made aware that the point which the First-tier Tribunal had identified when granting permission had been conceded by the respondent but that there were other issues outstanding. I note the First-tier Tribunal did not limit the arguments to the point that is now conceded. I understand that Mr Kotas and Mr Mustafa were able to discuss the point now relied upon in the short interval before the hearing and I make no criticism of Mr Kotas personally. I make these observations because there does appear to have been recently a falling off in the number of responses provided. Mr Kotas told me that concentration was placed on cases that required a response. This case should not have been overlooked in that exercise.

Notice of Decision

For the reasons I have given the appeal of the appellant fails and the decision of the First-tier Tribunal stands.

Anonymity Order

The First-tier Judge made no anonymity direction and I make none.

TO THE RESPONDENT

FEE AWARD

The First-tier Judge made no fee award and I make none.

Signed

Date 14 May 2018

G Warr, Judge of the Upper Tribunal