



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/00990/2019

THE IMMIGRATION ACTS

Heard remotely via video (Skype for Business)
On 23 February 2021

Decision & Reasons Promulgated
On 4 March 2021

Before

UPPER TRIBUNAL JUDGE BLUM

Between

ENTRY CLEARANCE OFFICER

Appellant

and

NUSRAT AMJAD
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the appellant: Ms S Cunha, Senior Home Office Presenting Officer

For the respondent: Mr A Haq, solicitor of Global Immigration Ltd

This decision follows a remote hearing in respect of which there has been no objection by the parties. The form of remote hearing was by video (V), the platform was Skype for Business. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

DECISION AND REASONS

Background

1. The Entry Clearance Officer (“ECO”) has been granted permission to appeal against the decision of Judge of the First-tier Tribunal Caskie (“the judge”),

promulgated on 19 September 2019, in which he allowed the human rights appeal (in the form of an entry clearance application) of Mrs Amjad against the ECO's decision dated 11 December 2018 refusing her entry clearance as a spouse under Appendix FM and Appendix FM-SE of the Immigration Rules.

2. Mrs Amjad is a national of Pakistan who was born on 6 February 1982. She is married to Mr Mohammed Amjad ("the sponsor") who is a British citizen. Mrs Amjad made an application for entry clearance to join her sponsor on 5 September 2018 under the partner provisions of Appendix FM of the Immigration Rules. She relied on her sponsor's employment as a chef with a company called EZE Bradford Ltd.
3. The ECO refused the application on the basis that Mrs Amjad did not meet the eligibility financial requirements of E-ECP.3.1. of Appendix FM. This provides, in material part:

E-ECP.3.1. The applicant must provide specified evidence, from the sources listed in paragraph E-ECP.3.2., of-

 - (a) a specified gross annual income of at least- (i) £18,600;
 - (b) ...
4. E-ECP.3.2. provides, in material part:

E-ECP.3.2. When determining whether the financial requirement in paragraph E-ECP. 3.1. is met only the following sources will be taken into account-

 - (a) income of the partner from specified employment or self-employment, which, in respect of a partner returning to the UK with the applicant, can include specified employment or self-employment overseas and in the UK;
 - (b) ...
5. The 'specific evidence' that must be provided is set out in Appendix FM-SE to the Immigration Rules. Mrs Amjad relied on her sponsor's salaried employment. The specified evidence he had to provide consisted of payslips covering a 6 months period prior to the date of the application (Appendix FM-SE 2(a)), a letter from the employer (confirming the sponsor's employment and gross salary, the length of his employment, the period over which he was paid the level of salary relied on in the application, and the type of employment) (Appendix FM-SE 2(b)), and personal bank statement corresponding to the same period as the payslips showing that the salary has been paid into the account in the sponsor's name (Appendix FM-SE 2(c)). Under Appendix FM-SE 2A(i) an applicant may, in addition to the payslips and personal bank statements, submit a P60 for the relevant period(s) of employment relied upon.
6. The sponsor and an account manager from EZE Bradford Ltd were interviewed by telephone on 26 November 2018.

7. The application was refused for two reasons. Firstly, the payslips provided by the sponsor did not correspond with the total payments received into his bank account. There were additional deposits that appeared to come from his employer that were not accounted for. By way of example, in addition to the deposit corresponding to the sponsor's February 2018 payslip (deposited on 1 March 2018), a total of £1,500 was deposited into the bank account in three payments of £500 on 7th, 15th and 26 March (I note that all the employer related deposits into the sponsor's bank account covering the period March to 1 May 2018, and the salary deposit on 8 June 2018, emanated from "EZE Manc LTD SW", which appears to correspond with the EZE branch located in Manchester; all the remaining deposits, both corresponding to payslips and other amounts, appeared to emanate from the Bradford EZE branch). The letter from the Human Resources Manager of EZE Bradford Ltd, dated 10 September 2018, indicated that the sponsor was initially employed at their Manchester branch and was then transferred to the Bradford branch. I further note, by way of observation only, that neither the sponsor nor the representative from EZE Bradford Ltd who was interviewed on 26 November 2018 were asked any questions concerning the additional deposits into the sponsor's bank account.
8. The second reason advanced by the ECO was that the August 2018 payslip was incorrectly paid. The payslip noted a net pay of £1,332.65 but the amount paid into the sponsor's bank account was £1,332.64. There was therefore a difference of 1p.
9. Based on the discrepancy of 1p and the absence of adequate evidence of the origin of the additional funds being deposited into the sponsor's bank account, the ECO was not satisfied that Mrs Amjad had provided the specified evidence to accurately represent her sponsor's employment.
10. Mrs Amjad appealed the respondent's decision to the First-tier Tribunal pursuant to s.82 of the Nationality, Immigration and Asylum Act 2002.

The Decision of the First-tier Tribunal

11. The judge heard oral evidence from the sponsor which supplemented his written statement dated 16 July 2019 which was contained in the bundle of documents provided by Mrs Amjad in support of her appeal. The bundle additionally contained the documents accompanying her application including, *inter alia*, the sponsor's bank account statements covering the months March 2018 to August 2018, his salary slips, and the letter from his employer dated 10 September 2018. In addition, Mrs Amjad's bundle also contained a P60 issued to the sponsor in respect of his employment with EZE Manchester Ltd for the tax year ending 5 April 2018. According to this P60 the sponsor's employment was £3,166.68.

12. At the appeal hearing a new issue arose concerning the P60. The letter from EZE Bradford Ltd accompanying the entry clearance application, and the solicitor's covering letter, confirmed that the sponsor had been employed since 1 November 2017 and that he had initially been employed at the Manchester branch before being transferred to Bradford. At the hearing the sponsor confirmed, during cross-examination, that his earning from his employer to 31 March 2018 came to a total of £6,650. His P60 however disclosed a total figure for 'pay' of £3,166.68. The Presenting Officer submitted, in addition to the concerns already identified in the Reasons for Refusal Letter, that the difference between the income detailed in the P60 and that reflected in the sponsor's other evidence undermined his claimed income such that the judge could not be satisfied the sponsor actually earned the amount he claimed to earn.
13. At [15] of his decision the judge found it "clear that the information provided in the sponsor's P60 does not accurately reflect the level of salary it is said he is paid as demonstrated in his payslips." The judge then stated:

"There is clearly an analogy between the alleged discrepancy in the recent case law, in the Court of Appeal regarding those who have sought Leave to Remain in the UK on the basis of specific earnings but have declared significantly lower earnings in respect of the extent of the tax liability payable to HMRC. I am of course conscious that as an employee the [respondent's] role in the preparation of and accuracy with a P60 is limited as that responsibility rests (at least initially) with the employer and not the employee. I consider that the employer in this case may not be fully declaring the [sponsor's] earnings to HMRC or in the alternative may have inaccurately declared the [sponsor's] earnings of the payslips."
14. At [16] the judge indicated that he had the benefit of seeing and hearing the sponsor give evidence and was satisfied that he was a truthful witness. The judge noted that the Presenting Officer, despite making significant criticism of the documentary evidence, did not specifically attack the sponsor's credibility or the reliability of the sponsor's evidence, and noted that the sponsor gave his evidence in a clear and direct manner.
15. At [17] the judge noted the discrepancy in the August 2018 payslip and deposit and did not consider that this discrepancy was material in respect of Appendix FM, although the judge stated that it may be relevant as to whether Appendix FM-SE was met.
16. At [18] the judge noted the sponsor's explanation for the additional deposits into his bank account (the sponsor claimed he was purchasing daily produce on behalf of his employer from wholesalers, including Booker Wholesale, and the employer later transferred the monies owed into the sponsor's bank account). The judge observed that the Presenting Officer's suggestion that the mechanism used to pay the wholesalers could have been done through a business account "... was belied by the nature of a cash-and-carry business." The judge stated:

“that some payments were made into the sponsor’s bank account in that respect and on other occasions payments were said to be made in cash to the “sponsor” does not appear to me to be particularly relevant to the real question, which of course is whether [Mrs Amjad] may be maintained by the sponsor’s income which must exceed the minimum income requirement.”

17. At [18] the judge stated:

“I do accept that the precise requirements of appendix FM SE and [sic] not apparently complied with because of the one penny discrepancy in the August 2018 payslip and bank statement. Had the sponsor not been such a clear and direct witness that I might have taken a different view, in the sense that cumulatively the three potential discrepancies as described above might undermine the reliability of the evidence that I was being given. In fact, I did not consider that on consideration two of those matters were material and in a world where tax and national insurance contributions are calculated on the basis of percentages I consider that the 1p discrepancy was much more likely to be as a result of a rounding error rather than anything else.”

18. Having found that the immigration rules were met, and applying the guidance in **TZ (Pakistan) and PG (India) v SSHD** [2018] EWCA Civ 1109, the judge allowed the human rights appeal.

The challenge to the judge’s decision

19. The grounds of appeal, amplified by further written submissions dated 12 May 2020 and the oral submissions of Ms Cunha, contend that there was no appropriate analogy between **Balajigari** [2019] EWCA Civ 673, the Court of Appeal authority that the judge referred to without mentioning by name, and that the approach consequently adopted by the judge was wrong in law. The grounds further contend that the judge’s finding that the sponsor’s employer had under-declared his income to HMRC was overly speculative and was not supported by any evidential basis. The judge’s finding that the sponsor carried no responsibility for the discrepancy in relation to the P60 was also speculative as it was open to the sponsor to seek evidence from the employer at the hearing to explain the position and because the sponsor himself had received the P60 and he therefore would have been aware that it did not accurately reflect his earnings. He was in turn responsible for rectifying this and taking the matter up with his employer or HMRC as needs be. The respondent additionally contended that the judge’s credibility assessment was based on the sponsor’s appearance which was “as credible as phrenology”, and the submission that none of the payments the sponsor claimed had been advanced by his employer to cover purchases tallied with the documentary evidence. The evidence it was submitted did not demonstrate the sponsor’s income over a sustained period of time and did not meet the requirements of appendix FM-SE. The finding at [19] that the precise requirements of Appendix FM-Essie had not been complied with was dispositive of the appeal under the immigration rules.

The directions of Upper Tribunal Judge Plimmer

20. permission to appeal was granted by Designated First-tier Tribunal Manuell. A hearing listed before Upper Tribunal Judge Plimmer on 12 March 2020 was adjourned because the Presenting Officer was ill. At this hearing Judge Plimmer indicated to Mr Haq, who has represented Mrs Amjad at all the hearings, her concern with the P60 discrepancy. Mr Haq sought to defend the judge's decision arguing that there had been full compliance with Appendix FM-SE and the P60 was merely an additional document. He submitted that the figure contained in it might be explained by a degree of confusion caused by the sponsor moving from his employer's Manchester restaurant to the Bradford restaurant. Judge Plimmer made clear to Mr Haq that, in order for the case to fairly proceed it would need to be adjourned because the Upper Tribunal would need to hear from the ECO in relation to the points that Mr Haq sought to raise. Judge Plimmer suggested that it might be helpful for Mrs Amjad to file and serve evidence that might explain the figure contained in the P60. Although this would be fresh evidence and any application to rely on it would have to be formally made, judge Plimmer considered it might be helpful for the ECO to have this information in any event, should there be a willingness to consider matters pragmatically. Judge Plimmer issued directions requiring Mrs Amjad's representative to file and serve, within 21 days, a respondent's notice and a bundle containing any further evidence relied upon, together with the necessary application seeking to rely on that evidence. The directions were issued on 13 March 2020.
21. Further directions, reflecting the Covid-19 pandemic, were issued on 6 April 2020. On 11 May 2020 an email from Mrs Amjad representatives was received containing a 50 page bundle, pages 48 to 50 of which contained evidence it was not available to First-tier Tribunal. The ECO's 'response' was received on 12 May 2020. On 16 September 2020 Judge Plimmer considered that the appeal was appropriate to be heard remotely. As Mrs Amjad's representatives had failed to comply with the previous directions Judge Plimmer issued further directions requiring the representatives to file and serve within 14 days further written submissions containing or accompanying a rule 24(3) response, a notice that complies with the rule 15 (2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008, and a clear response to the ECO's grounds of appeal. So far as I am aware these directions were not complied with.
22. At the error of law hearing Mr Haq acknowledged that the further evidence that had been provided by Mrs Amjad's representatives (which consisted of a letter from the Human Resources Manager dated 29 April 2020, and P60s for the tax years ending 5 April 2019 and 2020), even if a formal application to adduce that evidence had been made, did not account for the discrepancy in the 2018 P60. He indicated that he was in difficulty in defending the judge's decision respect of discrepancy arising between the figure in the sponsor's 2018 P60 and the other evidence of the sponsor's income.

23. I indicated at the hearing that I was satisfied the decision contained errors on points of law that required it to be set aside.

Discussion

24. Given Mr Haq's acceptance that the decision contains a material error of law in respect of the judge's assessment of the P60 discrepancy, I can deal with this point relatively briefly.
25. Although the sponsor had provided the type documents specified in Appendix FM-SE for demonstrating his income, and although he was not required to provide a P60 (and in fact none was provided with Mrs Amjad's application), the judge accepted there was a clear discrepancy between the income disclosed in the wage slips and the sponsor's bank account on the one hand, and that disclosed in the 2018 P60 on the other. This discrepancy was sufficient to establish legitimate concern relating to the sponsor's income. The judge appears to have approached this discrepancy by reference to **Balajigari** which, although not named, was the Court of Appeal authority dealing with differences in income figures disclosed to HMRC and the Home Office in the context of refusals under paragraph 322(5) of the general grounds of refusal under the Immigration Rules. It is wholly unclear how this authority was analogous to the instant appeal. The judge fails to explain how the issues under consideration in **Balajigari** and the principles that authority established are relevant or analogous with the instant appeal. Moreover, the judge's conclusion that the discrepancy in the P60 was the result of not fully declaring the sponsor's income to HMRC or not accurately declaring the sponsor's income on his payslips is without any evidential foundation. The judge has engaged in an unwarranted degree of speculation. Further, if either of these alternatives did in fact occur, the sponsor would have been aware either that his P60 for the year ending April 2018 did not reflect his actual income, or that his payslips did not reflect his actual earnings, matter that may then have reflected on his credibility.
26. I have additional concerns with the judge's assessment of the explanation provided by the sponsor concerning the additional deposits in his bank account from his employer and the evidence he adduced in support of that explanation. It is apparent from the decision that the Presenting Officer was relying on several inconsistencies in the sponsor's written and oral evidence (detailed at [11] of the judge's decision). Whilst the judge may ultimately have been entitled to accept the sponsor's explanation for the additional deposits he was required to have engaged with the respondent's concerns and give, at least in brief form, a reasoned explanation for rejecting those concerns.

27. For these reasons I am satisfied the decision is infected by material errors of law and must be set aside to be redetermined at an entirely fresh hearing, all issues open.

Remittal to First-Tier Tribunal

28. Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 18 June 2018 the case may be remitted to the First-tier Tribunal if the Upper Tribunal is satisfied that:
- (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
 - (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.
29. As highlighted in Judge Plimmer's directions of 16 September 2020, "... if the FTT decision is set aside, it is likely to be necessary to hear oral evidence from the sponsor and/or his employer regarding the evidence relied upon regarding the financial requirements of the Immigration Rules." The effect of the error is that the judge's findings are not sustainable and further/fresh evidence will need to be considered. In these circumstances it is appropriate to remit the matter back to the First-tier Tribunal for a fresh (de novo) hearing.

Notice of Decision

The making of the First-tier Tribunal's decision involved the making of an error on a point of law and is set aside.

The case is remitted back to the First-tier Tribunal to be decided afresh (de novo) by a judge other than judge of the First-tier Tribunal Caskie.

D. Blum

Signed
Upper Tribunal Judge Blum

Date 25 February 2021