



UT Neutral citation number: [2022] UKUT 00155 (IAC)

Fatima (paragraph 1 (d) Appendix FM-SE: interpretation) Pakistan

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

Heard at Field House via Microsoft Teams

THE IMMIGRATION ACTS

**Heard on 8 March 2022
Promulgated on 20 April 2022**

Before

**UPPER TRIBUNAL JUDGE ALLEN
DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN**

Between

**SURIYA FATIMA
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

ENTRY CLEARANCE OFFICER - SHEFFIELD

Respondent

Representation:

For the Appellant: Mr M Hussain, the Sponsor

For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

Interpretation of the phrase “lawfully derived” in paragraph 1 (d) of Appendix FM-SE is to be on a case-to-case basis. The drafter of the Rule did not see fit to provide a definition, and it would not be appropriate for the Tribunal to do so.

DECISION AND REASONS

1. The appellant is a national of Pakistan. She appealed to the First-tier Tribunal against the respondent’s decision of 4 February 2020 refusing her leave to enter the United Kingdom on the basis of family life with her husband, Muzaffar Hussain, who is a UK citizen.
2. The judge allowed the appeal, but subsequently the Secretary of State sought and was granted permission to appeal the decision and following a hearing on 14 January 2022 Upper Tribunal Judge Allen found an error of law in the judge’s failure to address a point of law which arose in the course of the hearing.
3. Specifically, this point arises in connection with the judge’s conclusion at paragraph 44 of his decision that it was not for him to decide if Mr Hussain, the sponsor’s employers were in breach of UK employment legislation and income tax laws.
4. The detail of the judge’s decision is set out in the earlier error of law decision. In summary, he found it to be credible that Mr Hussain had worked for a company called Chicago Pizza from 2017 to 2020, at which time, on 6 March, he was put on furlough due to the pandemic. In essence, it appeared that unknown to Mr Hussain, prior to the original application for entry clearance being submitted his employer had apparently removed him from the payroll for the purposes of paying national insurance contributions and income tax in March 2019, without his notice. The respondent had alleged that the employment had been contrived and produced a Document Verification Report deeming that the payslips provided were false.
5. As we have noted above, however, the judge accepted the credibility of Mr Hussain, accepting that on the evidence taken as a whole he had shown that his bank statements and wage slips attracted sufficient evidential weight to satisfy the judge that on the balance of probabilities they were genuine.
6. In the grounds of appeal the Secretary of State drew attention to paragraph 1(d) of Appendix FM-SE, which requires that all income and savings must be lawfully derived.
7. Mr Avery observed that this was the issue for determination before the Tribunal today. He argued that clearly although the judge had found the sponsor to be credible with regard to his income it was apparent that there was no record of his employment after a certain date and tax and national insurance had not been paid to the Revenue. It was argued that that meant it could not be said his income was

lawfully derived as it was not in accordance with the United Kingdom employment laws. The normal English meaning should be applied and it was difficult to see how it could be interpreted in any other way. It was hard to see how the income could be said to be lawfully derived. There were good reasons for this as the requirements of the Rules were quite prescriptive and designed to make decision-making consistent.

8. With regard to the argument that the sponsor, who had been found to be credible, was in effect on the basis of this argument being tainted by his employers' "fraud", Mr Avery argued that it made the assessment of the evidence much more straightforward. The Tribunal had the judge's positive findings but it was a question of the operation of the overall system, so when one assessed the evidence one had a consistent picture of what was happening and if there were inconsistencies between what the appellant's evidence was and the position for the HMRC it was much more complicated and less reliable. It was not desirable for the Secretary of State to be seen to endorse a process where employment was not lawful. It was the case that there were positive credibility findings but the Tribunal was left with the interpretation of what the Rule actually said and it was clear.
9. In his submissions Mr Hussain argued that the fact that the tax and national insurance were not paid over to the Revenue was not his responsibility. He had been given payslips. He would have not been making payments to his family member of £300 a week if he had not been working in that employment. The deductions for tax and national insurance were written on the payslips and it was a question whether they were written there or not. The payslips showed that tax and national insurance were deducted. His issue was the fact of having done the work there.
10. We reserved our decision.

Discussion

11. As far as we are aware, and Mr Avery's researches came to a similar conclusion, there is no decided authority on the interpretation of the phrase "lawfully derived" in paragraph 1(d) of Appendix FM-SE.
12. We have set out above the respondent's arguments in this regard, based on a combination of what is said to be the natural meaning of the words in the Rule and the potential difficulties arising if an alternative interpretation were adopted. On the other hand, Mr Hussain argues that all that concerned him was the fact of the money he received and the issue regarding whether or not tax and national insurance were paid over to the Revenue was a matter between his employer and the Revenue.
13. It is clear from the judge's findings that Mr Hussain's income was derived from employment that he carried out in his work for Chicago Pizza. There is no suggestion that can be maintained that he did not do that work and nor is there any suggestion that can any longer be maintained that he was in any sense complicit in the non-payment by his employer of tax and national insurance deductions to the

Revenue. It seems to us clear that the income in this case was, on a common sense interpretation of the phrase, lawfully derived by Mr Hussain. The fact that in the background the tax and national insurance deducted from his wages which should have been paid to the Revenue were, unknown to him, not so paid, cannot in our view detract from the fact that his income arose perfectly lawfully from lawful employment. It seems to us that it would be significantly too broad an interpretation of the Rule to regard Mr Hussain's income as not having been lawfully derived on the basis that his employer failed to pass on the deducted tax and national insurance to HMRC. We do not think that the interpretive approach urged on us by Mr Avery can be sustained. Each case must be decided on its own facts, and that, we think, is a proposition that finds support from the absence of any attempt to provide any further clarification of the phrase "lawfully derived" either in the Immigration Rules or in any policy document. In a case as here where an employee has behaved perfectly lawfully it would in our view be quite wrong to interpret paragraph 1(d) in such a way as to taint him with what may well have been fraud on others on the part of his employer.

14. We do not propose to make any attempt to define what is meant by "lawfully derived" in paragraph 1(d). As we say, this is a matter that must be considered on the facts of each case as and when they arise. In this case we are confident that the income of Mr Hussain was lawfully derived. In line with the guidance in TZ (Pakistan) [2018] EWCA Civ 1109; [2018] Imm AR 1301, at paragraph 34, "where a person satisfies the Rules ... this will be positively determinative of that person's article 8 appeal, provided their case engages Article 8(1), for the very reason that it would then be disproportionate for that person to be removed" [refused entry clearance] the appeal is allowed.
15. As a consequence, the appeal is allowed on Article 8 grounds.

Notice of Decision

The appeal is allowed.

No anonymity direction is made.



Signed

Date 7 April 2022

Upper Tribunal Judge Allen