



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: OA/00207/2013

**THE IMMIGRATION ACTS**

Heard at Field House  
On 11 February 2014

Determination Promulgated  
On 20 February 2014

Before

UPPER TRIBUNAL JUDGE MOULDEN

Between

ENTRY CLEARANCE OFFICER ISLAMABAD

Appellant

and

MRS ZAKIA ISHAQ  
(No Anonymity Direction Made)

Respondent

**Representation:**

For the Appellant: Ms A Everett a Senior Home Office Presenting Officer  
For the Respondent: Mr S Bhanji of counsel instructed by Malik and Malik

**DETERMINATION AND REASONS**

1. The appellant is the Entry Clearance Officer in Islamabad ("the ECO"). The respondent is a citizen of Pakistan who was born on 5 November 1980 ("the claimant"). The ECO has been given permission to appeal the determination of First-Tier Tribunal Judge Malone ("the FTTJ") who allowed the claimant's appeal against the ECO's decision of 15 November 2012 to refuse her entry clearance for settlement in the UK as the wife of her husband and sponsor, a British citizen present and settled here.

2. The ECO accepted that the claimant met the requirements of the Immigration Rules except for the financial requirements. She needed to show that the sponsor had a gross income of at least £18,600 per annum under Appendix FM paragraph E-ECP 3.1. He had claimed an income of 52,199 per annum but had not provided the documents which were required to establish this as set out in the eight sub paragraphs (a) to (h) in paragraph 7 of Appendix FM-SE.
3. The claimant appealed and the FTTJ heard her appeal on 5 November 2013. Both parties were represented and the sponsor gave evidence. The FTTJ found the sponsor to be an honest and reliable witness, a conclusion which the ECO does not seek to dispute. The Presenting Officer conceded and the FTTJ found that the claimant had established that the sponsor had an income in excess of the £18,600 per annum required by Appendix FM paragraph E-ECP 3.1. The claimant had submitted specified evidence which satisfied all the requirements of paragraph 7 of Appendix FM-SE other than sub paragraphs (c), (e) and (f).
4. In paragraph 28 the FTTJ recorded the important concession made by the Presenting Officer in the following terms; "(the Presenting Officer) very properly conceded that the evidence submitted to the ECO by the appellant when she made her application, demonstrated, on the balance of probabilities, that (the sponsor) had a gross annual income for financial period ending 31 March 2012 in excess of £18,600".
5. The FTTJ relied on this concession and reached his own conclusion that the claimant had established that the sponsor had an income in excess of that required by Appendix FM paragraph E-ECP 3.1. He found that the appellant had established that she met the requirements of the Immigration Rules. This case was not a "near miss". The non-compliance with parts of paragraph 7 of Appendix FM-SE was de minimis. He allowed the appeal under the Immigration Rules.
6. The FTTJ went on to consider the Article 8 human rights grounds. He found that the claimant was not able to satisfy the family life criteria set out in Appendix FM and went on to consider the grounds outside these provisions. He took into account the fact that the claimant lived in a dangerous and volatile part of Pakistan and had a family life with the sponsor the development of which had been inhibited by the refusal of entry clearance. Applying the Razgar principles set out by the House of Lords the FTTJ found that to refuse entry clearance to the claimant would be a disproportionate interference with family life. As both the ECO and the Presenting Officer had accepted that the sponsor met the annual income requirements of the Immigration Rules the legitimate aim of maintaining a firm but fair immigration policy fell away.
7. The FTTJ allowed the appeal under the Immigration Rules and on Article 8 human rights grounds.

8. The ECO applied for and was granted permission to appeal. The grounds argue that the FTTJ erred in law. The claimant was not entitled to succeed unless she could establish that she met the requirements of paragraph 7 of Appendix FM-SE. There were good policy reasons for insisting on this. The concession made by the Presenting Officer was not that the appeal should be allowed outright either under the financial requirements or the Article 8 human rights requirements of the Immigration Rules. There could be no lawful application of any de minimis rule. In reality there had been a near miss and there was clear authority to show that the claimant could not succeed on any near miss principle.
9. I have a skeleton argument from Mr Bhanji, an extract from Macdonald's Immigration Law and Practice and the judgement of the Supreme Court in Patel, Anwar and Alam v SSHD [2013] UKSC 72.
10. Ms Everett submitted that the concession made by the Presenting Officer in paragraph 28 was not the end of the matter. The Immigration Rules still require the claimant to demonstrate that the financial requirements were met in a very particular way. What was said by the Presenting Officer did not include a specific concession that the claimant met all the requirements of the Immigration Rules. In reply to my question Ms Everett accepted that the concession was made in the precise terms recorded by the FTTJ in paragraph 28. She did not wish to go behind this or withdraw the concession. She accepted that this Tribunal could apply considerations of common law fairness but did not accept that this was a case where this should be done.
11. As to the sub paragraphs which the claimant had not met, Ms Everett accepted that subparagraph (c) had been changed on 13 December 2012 which was after the date of the decision in this case. At the date of the decision in this case (15 November 2012) the requirement was; "proof of registration with HMRC as self-employed. This evidence must be either an original or certified copy of the registration documentation issued by HMRC". After 13 December 2012 the requirement became "proof of registration with HMRC as self-employed if available".
12. It remained common ground that the sponsor had not produced documents to show that he met the full requirements of subparagraph (e) because those which he had produced did not cover the whole of the same 12 month period as the tax return.
13. Ms Everett accepted that the FTTJ was correct to conclude that subparagraph (f) did not apply because the claimant did not pay his income from self-employment into a personal bank account. All he had was the business bank account.
14. Mr Bhanji submitted that the claimant had established that the sponsor met all the requirements of the sub paragraphs other than two, one of which had

since been changed to a form which the sponsor would have met. The concession made by the Presenting Officer meant that the FTTJ was entitled to conclude that the claimant succeeded under the Immigration Rules. The Concession covered not only Appendix FM paragraph E-ECP 3.1 but the "satellite" requirements. In any event there was a common law duty of fairness which meant that the ECO should not be permitted to go behind the clear intention of the concession. There was no sensible point in requiring the claimant to make a fresh application. As to the Article 8 grounds, the FTTJ reached conclusions open to him on the evidence. The claimant and the sponsor had suffered a long period of separation and in the light of the concession it could not be said that the interests of immigration control required both a fresh application and further delay.

15. I reserved my determination.

16. Appendix FM paragraph E-ECP 3.1 provides that; "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". In this case it is not suggested that the requirements of E-ECP 3.2 are not met. The "specified evidence" for a self-employed person such as the sponsor is that set out in paragraph 7 of Appendix FM-SE.

17. I accept that the concession made by the Presenting Officer recorded in paragraph 28 needs to be read in the light of what the FTTJ said in the preceding paragraph namely; "As I have already recorded (the Presenting Officer) did not cross examine (the sponsor). She did not do so because she accepted that the Notice of Refusal did not assert that the appellant had failed to demonstrate that (the sponsor) had the required gross annual income of 18,600. It only asserted that she had failed to demonstrate he had such income in the prescribed manner i.e. that laid down by Appendix FN-SE (sic). She told me that she had taken instructions from her superiors on the morning of the hearing who were of the view that, as the appellant had not demonstrated the required income in the prescribed manner, (the Presenting Officer's) stance should be that she should make a further application supported with evidence that did comply with Appendix FM-SE."

18. If as I find, the intention of Appendix FM paragraph E-ECP 3.1 is to ensure that claimants can show that their sponsor has a sufficient level of income and that the level is placed at £18,600 per annum common law fairness dictates that whilst it would be permissible for an ECO to say to a claimant "you have not shown that you have the required level of income because you have not produced the specified documents" it is inconsistent and unfair to say, as in this case, "I accept that you have established that you have the required level of income but you still fail because you have not produced the specified documents to prove it". I find authority for the proposition that a decision which is unfair is not in accordance with the law in Naved (Student - fairness - notice of points) [2012] UKUT 14(IAC) and Sapkota [2011] EWCA Civ 1320.

19. I find that the concession made by the Presenting Officer was sufficient to concede the appeal under the Immigration Rules and that it was open to the FTTJ find that this had been done and to allow the appeal under the Immigration Rules. In the alternative, if there was any ambiguity in the terms of the concession, then these should be construed against the ECO and in favour of the claimant.
20. In relation to the decision to allow the appeal on Article 8 human rights grounds outside the Immigration Rules I find that the FTTJ took into account all the factors relevant to proportionality and that the public interest including the interest in the preservation of proper immigration control was substantially diminished, if not extinguished, by what was accepted by the ECO and conceded by the Presenting Officer namely that the claimant had established that the sponsor met the income requirements as well as all the other requirements of the Immigration Rules.
21. I have not been asked to make an anonymity direction and see no good reason to do so.
22. I find that the FTTJ did not err in law and I uphold his decision.

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Signed  
Upper Tribunal Judge Moulden

Date 12 February 2040