



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/01007/2013

THE IMMIGRATION ACTS

Heard at Field House
On 20th May 2014

Determination Promulgated
On 25th June 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

N B
(Anonymity Direction Made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Rahman, instructed by AR Immigration Services
For the Respondent: Mr E Tufan, Home Officer Presenting Officer

DETERMINATION AND REASONS

The Appellant

1. The appellant is a citizen of Bangladesh born on 8th August 1988 and she appeals against the decision of the respondent dated 25th November 2012 to refuse her entry clearance to the UK further to paragraph 281 of the Immigration Rules.

2. The reasons for refusal set out that there had been a previous application made by the appellant, which was refused, and then determined on appeal by Immigration Judge Davis who found that there was no credible evidence of the sponsor's circumstances and employment and found that it was wholly unbelievable that the sponsor was employed as claimed and dismissed the appeal. The Entry Clearance Officer stated that the appellant had still not satisfactorily addressed the reasons for the previous refusal and there was still no evidence that the sponsor's previous employment arrangements were as claimed. The Entry Clearance Officer expected the appellant to provide evidence to dispute the claims made by the judge and this indicated the judge was previously correct which seriously damaged the credibility of the sponsor and the appellant. The Entry Clearance Officer therefore assessed the statement and documents in the application with caution. In the event the application was refused on the basis of the relationship, in relation to accommodation and on the basis of maintenance.
3. In the event the circumstances as to the relationship and accommodation were accepted by the Entry Clearance Manager and the remaining issue was maintenance.
4. The reasons for refusal stated that in the application the sponsor was working as a waiter for Minar & Shefa Enterprise Ltd since 1st February 2012 earning £800 a month. The appellant had submitted an employment letter from India Night restaurant confirming the sponsor's employment but this was undated and not on headed paper. Also submitted were twelve payslips but all of the salary slips showed the exact amount of net pay being £200 and this did not appear to be credible bearing in mind the variability and the change of tax payable each month. The salary slips stated that he was paid by cash making it difficult to confirm such payments and there was no reliable evidence of any national insurance contributions or that the claimed employment was registered with a local Inland Revenue office. Further there was nothing to suggest the sponsor had ever been employed in the field before or that he had any qualifications. The doubts about his previous claimed employment and the lack of independent corroboratory evidence of this employment led the Entry Clearance Officer to doubt that he was genuinely employed.
5. Further the bank statements submitted as evidence showed no payments that corresponded with income and no evidence of the origin of funds contained. The Entry Clearance Officer could not be satisfied as to the provenance of these funds or that the money was an accurate reflection of his current financial position or that the funds would be available to adequately allow him and the appellant to maintain and accommodate themselves.
6. Following a hearing First-tier Tribunal Judge Obhi dismissed the appeal on 19th February 2014.

Application for Permission to Appeal

7. It was asserted by the appellant that the judge first stated that there were material differences between the first visa application and the second, but then went on to use the first as her starting point and referenced the appellant's lack of credibility. She

referred to Appendix FM and referred to the evidence required thereunder. She interpreted the P60 and P45 as generated by employer and not the HMRC. These are submitted to the HMRC and no further verification should be required. **KA Pakistan [2006] UKAIT 00065** identified the relevant income and expenses standard, and accommodation costs were the only relevant expense. The issue of expenses was not raised at the hearing.

8. First Tier Tribunal Judge Adio granted permission to appeal and he stated that the judge was wrong to require proof of specified evidence under Appendix FM as this application pre dated the application of Appendix FM. The judge accepted that the bank statements showed he was earning £200 per week.

The Hearing

9. Mr Rahman made clear that he relied on his written submissions and he did not represent the appellant previously. There had been a material difference in the application since the previous application. It was incorrect of the judge to use a law which was not in force and this placed too high a burden on the appellant.
10. Mr Tufan stated that the relevant findings were in paragraph 20 and the judge was entitled to come to the decision which she did.

Conclusions

11. It was accepted by the Entry Clearance Manager that evidence regarding accommodation and the relationship satisfied the requirements of the Immigration Rules.
12. Judge Obhi concentrated on the maintenance requirement. She considered the decision of Immigration Judge Davies and noted 'some' similarities although she accepted at paragraph 17 that there were changes to the information provided. She stated at paragraph 17

"The Immigration Judge found the sponsor's evidence to be wholly unbelievable and therefore made a credibility finding against him. The ECO states that the appellant has provided no additional evidence to rebut those findings of unreliability and lack of credibility."

13. Judge Obhi acknowledged that the appellant had produced evidence from HMRC confirming that he had registered his business and offering him tax assistance. Nonetheless the judge stated that

'the fact the sponsor was found to lack credibility in that appeal was a factor which I take into account and identified that there were similarities in his position now to that which it was then'.

14. The judge was entitled to make reference to a previous judge's determination following, **Devaseelen** [2003] Imm AR 1, in relation to the factor of credibility as found on the facts of that application and she clearly remarked that there was a difference in the circumstances before her. The fact that someone does not appeal

does not necessarily mean that they accept the contents of the determination but nevertheless the determination of Judge Davies still stands.

15. Judge Obhi found against the appellant in relation to maintenance. The judge was clear *"The evidence in relation to the sponsor's employment remains ambiguous"* [20]. She stated that *"He has now provided payslips from the India Night employment, a P60 and a P45. These documents are generated by the employer and are not produced by the HMRC"*. She was correct in this. The judge clearly found that the Entry Clearance Officer had commented on the unsatisfactory nature of the evidence provided by the appellant and that he needed to obtain some independent verification from HMRC about the payment of tax and national insurance. The Entry Clearance Officer and the Entry Clearance Manager both stated that the cash payments were difficult to evidence and there was no evidence to show tax or national insurance payments were being met. The judge referred to this and therefore criticised the evidence on the basis that independent verification from HMRC would have resolved the issue. The important aspect of **Devaseelen** is to decide each application on its own merits and that matters arising since the first determination are determined. That is the case here. There was no indication that the judge failed to take into account all relevant material.
16. Immigration Judge Davis's findings, with regard maintenance, appeared to be in relation to self-employment and whether there was a business or not, but the appellant was now employed. The appellant did produce some evidence that there had been in the past been a business. Nonetheless the Judge Obhi clearly stated that there was no independent evidence from the tax authorities and this was a similar feature in this case.
17. I find that the reference to Appendix FM is merely an example of what the evidence is required now and although not definitive under paragraph 281 is a matter which is open to the judge to have taken into account. She clearly states that she is aware that this is a pre-change of Rules case. Once again at paragraph 20 the judge states *"there is no independent verification of the sponsor's income in this case"*. She states *"He received his income in cash, there is no evidence except the tax documents prepared by the employer in the form of a P60 that the sponsor had actually earned the sums that he claims"*. Indeed the judge states that the purpose of the provisions, i.e. paragraph 281 is to ensure that the appellant does not come to the UK and become dependent on public funds. She does recorded *"I cannot be sure from the evidence provided by the sponsor that it will not be the case"*.
18. The judge makes it clear that she is aware that it is not Appendix FM-SE which is being applied.
19. I can appreciate that there was no application of **KA** in relation to income and expenses but the fact is that the underlying figure of the appellant's income was not accepted by the judge and on this basis and this basis alone the appeal was rejected. I note she stated that the sponsor's bank statements *'more recently show that he is earning £200'* but this reference to earning via bank deposits does not undermine the previous findings regarding an overall lack of independent evidence. Bank

statements are not tax documents confirming earnings and although the judge may have inadvertently referred to the appellant earning this does not undermine her finds or confirm indeed that he was employed.

20. Mr Rahman quite rightly pointed out that it was not him that represented the appellant in the previous matter and that the credibility of the appellant should not be the determining factor in an appeal. I do not find that the judge's determination reflected that it was.
21. I find that the judge was entitled to make reference to a previous determination by Judge Davis and in this particular instance appears to have assessed the facts afresh by assessing the evidence that was produced in the form of payslips from the employment, a P60 and a P45 but nonetheless commented on the lack of tax documentation. It was not just on the lack of credibility from the previous assessment or the previous assessment of Judge Davies that the judge rejected the appellant's appeal. She did accept that the documents were different.
22. It may have been an error to make a reference to Appendix FM but it is quite clear at the beginning of the determination where the judge set out paragraph 281 that she understood the law to be applied. As Mr Rahman pointed out the documentary requirements under Appendix FM are stringent and it is clear that the judge does not make reference to each and every requirement set out under Appendix FM which she would have to do if she had applied FM. I do find it is open to her to make reference to the requirement for independent evidence in her judgment.
23. In essence the evidence put before the judge was not accepted as being satisfactory and she based her determination on this.
24. I find there is no error of law and indeed no error which would have made a material difference and therefore I find that the determination should stand.

Signed

Date 24th June 2014

Deputy Upper Tribunal Judge Rimmington