



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: OA/06539/2013

THE IMMIGRATION ACTS

Heard at Field House  
On 15 July 2014

Determination Promulgated  
On 22 August 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE G A BLACK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS KURINJITHA PIRATHEEPAN

Respondent

Representation:

For the Appellant: Mr S Walker (Home office presenting officer)  
For the Respondent: Mr Alexander (Counsel)

DECISION AND DIRECTIONS

1. This is an appeal by the Secretary of State. I shall refer to the parties herein as the Secretary of State and the claimant. The claimant whose date of birth is 30 June 1991 is a citizen of Sri Lanka. This matter comes before me for consideration as to whether or not there is a material error of law in the decision made by First-tier Tribunal Judge Raymond promulgated on 11 April 2014.

## **Background**

2. The claimant applied for entry clearance as the spouse of a person present and settled in the UK. Her first application was refused on 10 October 2012. She reapplied on 3 November 2012. This was refused on 1 February 2013 and the refusal upheld in a review by the Entry Clearance Manager on 18 September 2013.
3. The reasons for refusal were that the claimant failed to provide the specified documents to show that her spouse was a self-employed person who could meet the financial threshold of £18,600 pursuant to paragraph 7 Appendix FM-SE in the form of:
  - (1) SA300/SA302 for one year;
  - (2) the same for the previous financial years, if the latest return does not show the necessary gross income but the average of the last two financial years does;
  - (3) twelve months of bank statements concomitantly supporting tax return income;
  - (4) evidence of ongoing employment through national insurance class 2 contributions; or
  - (5) specified documents supporting savings.

No issue was raised as to the genuine and subsisting marriage, accommodation or the citizenship of the spouse.

4. The Entry Clearance Manager considered the evidence of an HMRC document and took the view that it related only to how much the sponsor was required to pay based on self-assessment. He failed to provide the self-assessment form SA300/SA302 which showed how his self-employment was assessed and the figure for income from his work. The claimant did not provide personal bank statements and failed to show income paid into his personal bank account. There was evidence of payments made from a business bank account. There was no evidence from HMRC to confirm national insurance class 2 contributions were paid.
5. The First tier Tribunal determination fully and comprehensively set out the law, evidence, discussion and findings. The Tribunal Judge allowed the appeal on the basis that discretion could have been otherwise exercised by the Secretary of State seeking clarification over the documentation of SA300/SA302, personal bank statements, and evidence of class 2 national insurance, as against a background of very substantial and solid evidence showing an income produced by the sponsor through his active business. [22]

6. The Tribunal found as follows:

- There was considerable evidence at the time of the application before the ECO that the sponsor had a personal income from his VAT registered newsagent's business, from which he had an income on which he was paying tax. It was not accepted that the documentation, without a tax return was sufficient, so far as specified documents were concerned, so as to establish that his income was generating over £18,600. [19]
- Although the SA302 to April 2012, meaning the accounting period to April 2011 in fact, had it been provided only showed profits of £15,107, falling short of the £18,600 threshold by £3,493, it was also above £13,400. [20]
- The sponsor did neglect to submit personal bank account statements. He submitted business bank account statements, which on their face had the effect of reinforcing the very substantial evidence which could not leave in doubt that there was an active business generating income that was clearly also going into other accounts, and it would have been appropriate to allow the sponsor to produce personal bank statements with information detailing how it and his business account, he was receiving his income. [21]
- Not least because the July 2012 SA300 itself, however inadequate in isolation, clearly showed that the sponsor was being taxed on such income, a similar discretion could have been exercised over the omission of class 2 NI evidence, and an appropriate request would have been productive as something akin to the December 2013 letter in this regard at an earlier stage.

7. The First-tier Judge set out the Rules at FM-FE paragraph (d)(iii) "*a document that does not contain all of the specified information, but the missing information is verifiable from one other document submitted with the application ... the application may be granted exceptionally providing the decision-maker is satisfied that the document is genuine and that the applicant meets the requirement to which the document relates ...*

*(f) Before making a decision under Appendix FM or this Appendix, the decision-maker may contact the applicant and their representative in writing or otherwise to request further information or documents. The material requested must be received at the address specified in the request with a reasonable timescale specified in the request."*

### **Grounds of Appeal**

8. The Tribunal at [21] disregarded its findings on the type of evidence required, the format, and the periods to be covered under Appendix FM-SE. The Tribunal was selective in its active application of the Rules and must give full consideration to their actual wording.

9. Further the Tribunal had no regard to the relevant date as the date of application and the significant evidence is from the specified period before that date. The Tribunal disregarded the fact that no personal bank statements were provided as required by the Rules.
10. Accordingly it was unclear as to what the sponsor's gross annual income was at the date of application. If the sponsor's current income exceeded the income threshold a fresh application can be made with the specified evidence required.

### **Permission to Appeal**

11. Permission was granted on 28 May 2014 by First-tier Tribunal Judge Ransley for reasons set out in paragraph 4:

*"The judge [at 6] set out the specified evidence for a self-employed person at paragraph 7 of Appendix FM. The judge found [at 19-22] that the appellant had failed to provide the specified evidence: the sponsor's tax returns, personal bank statements and class 2 national insurance. Furthermore the judge found that the sponsor's SA302 to April 2012 (for the accounting period ending April 2011), had it been provided by the appellant, would only have shown profits of £15,107, falling short of the £18,600 threshold under the Immigration Rules. In this light, the judge's decision to allow the appeal on the basis that the respondent's discretion could have been otherwise exercised in seeking the missing specified evidence from the appellant involves an arguable error of law that might have made a material difference to the outcome of the appeal. Permission to appeal granted on all grounds".*

### **Error of Law Hearing**

12. For the hearing before me on 15 July 2014 the claimant's solicitors produced a bundle of documents amounting to 84 pages in addition to which I had the appeal bundle. Mr Alexander confirmed that he did not have and had never had a copy of the Secretary of State's bundle. I provided him with a copy of the same and gave him the opportunity during the hearing to look at the bundle.

### **Submissions**

13. At the start of the hearing Mr Walker indicated that he and Mr Alexander had had a preliminary discussion and reached a tentative agreement that as at the date of decision there was evidence of £22,133 profit from the sponsor's business.
14. There was further discussion as to what evidence was before the Tribunal to establish that the rules were met at the date of the application and /or the date of decision , and whether or not the evidence covered the financial year, the tax year or the accounting period.
15. Mr Walker relied on the grounds of appeal. He sought leave to amend the grounds (which I granted) that the Judge erred by allowing the appeal outright and failing to

refer the matter to the Secretary of State for further consideration. He submitted that there was no evidence of specified documents to establish the sponsor's income for the relevant period of time, no personal bank statements and no evidence of national insurance contributions. It remained open to the claimant to make a fresh application based on the evidence showing £22,000 profit.

16. Mr Alexander submitted that all the specified documents were before the Entry Clearance manager who failed to properly consider the same. In the alternative he submitted that the Judge's decision was correct save that he should have remitted the matter to the Secretary of State for reconsideration in light of the evidence available rather than to allow the appeal outright. He submitted that the error was not material given there was evidence that the requirements were met.

### **Discussion and Decision**

17. I am satisfied that the Tribunal Judge correctly found that the claimant failed to provide the specified documents with the application and failed to show an income meeting the required threshold for the relevant period of time in the required format. The findings as set out in paragraph 6 above were sustainable on the evidence before him.
18. The error of law arises because the Tribunal Judge allowed the appeal outright on the grounds that discretion ought to have been exercised by the Secretary of State with reference to App FM-SE (d)(iii) or in other words the decision made was not in accordance with the law. The Judge took the view that had the Secretary of State exercised discretion by contacting the claimant to request further information or documents in accordance with paragraph FM-SE, the claimant would have been able to establish an income of £22,000. I find that this was not a conclusion open to him on the evidence. It was not open to the Judge to find that discretion should have been exercised and to allow the appeal outright. The outcome was certainly not inevitable and there was no proper consideration as to how App FM FE (d)(iii) applied. Where discretion ought to have been exercised the proper course was for the matter to be remitted to the Secretary of State. Where it is alleged that the discretion was or should have been exercised differently it would have been open to the Judge to perform that exercise. Having reached the conclusion that the rules were not met with the specified documents there was no discretion, as the conditions in paragraph (d)(iii) above were not met. I was not persuaded by Mr Alexander's submissions and it was clear that the claimant had not submitted the specified documentary evidence.
19. Although the Judge correctly found that personal bank statements for NatWest account ending 0033 covering the period April 2011 to November 2013 [15] were produced, he nevertheless found statements for September 2011 onwards were missing. Evidence of payment of national insurance contributions appeared in a letter dated 18.12.13 and was not therefore available nor produced with the application. The SA302 for 2011/12 and SA302 for 2012/13 were produced with a

letter dated 16.5.13. Accounts produced for the period ending 30.4.2012 were not audited and were not signed and dated by the accountants. There was no evidence to establish the sponsor's income for the significant and relevant period of time in the format required to meet the rules.

20. There is a material error of law in that the Judge failed to make findings that established that the application came within the Secretary of State's discretion under FM- FE (d) (iii) and reached a decision that was not open to him to make or sustainable on the facts.
21. At the hearing I indicated that I would seek the views of the representatives as to the remaking of the decision in the event of finding an error of law. At that stage I considered that remitting to the Secretary of State was a possible outcome. However as is clear from my decision I find no basis for the exercise of discretion. The fact of the matter remains that there was no tax return for the relevant period and the Judge found that any tax return for the relevant full financial year showed a profit of £15,107 which comes below the income threshold. I conclude that the proper course of action is for a fresh application to be made relying on the claimed current income of £22,000 evidenced by specified documentation. Accordingly there is no necessity for further submission or evidence and I remake the decision on the evidence before me.

## **DECISION**

22. The determination is set aside. I remake the decision by refusing the appeal.

Signed

Date 20.8.2014

Deputy Upper Tribunal Judge G A Black