

THE IMMIGRATION ACTS

Heard at Field House
On 1 May 2014
Oral determination given following the hearing

Determination Promulgated
On 20 June 2014

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

ENTRY CLEARANCE OFFICER - ISTANBUL

and

MRS MAHSHID YADOLLAHI

Appellant

Respondent

Representation:

For the Appellant (Entry Clearance Officer): Mr I Jarvis, Home Office Presenting Officer
For the Respondent (Mrs Yadollahi): Mr D Hart, legal representative (non-practising barrister) of Matini Montecristo Solicitors

DETERMINATION AND REASONS

1. This is the Entry Clearance Officer's appeal against a decision of First-tier Tribunal Judge Walters allowing an appeal by Mrs Yadollahi against a decision made by the Entry Clearance Officer refusing Mrs Yadollahi's application for leave to enter this country as a spouse. For ease of reference I shall refer throughout this determination to the Entry Clearance Officer (who was the original respondent) as "the ECO" and to Mrs Yadollahi (who was the original appellant) as "the claimant".
2. The claimant who was born on 15 July 1985 is a citizen of Iran who is married to the sponsor. As noted, her application for entry clearance to allow her to join her

husband as a spouse was refused by the ECO and she appealed against this decision. Her appeal was heard before First-tier Tribunal Judge Walters sitting at Taylor House on 13 February 2014 and in a determination promulgated on 3 March 2014, Judge Walters allowed her appeal under the Immigration Rules.

3. The ECO now appeals against that decision, permission having been granted by First-tier Tribunal Judge Foudy on 19 March 2014.
4. It is unnecessary for the purposes of this determination to go into a great deal of detail but the grounds of appeal can be summarised briefly. In order to comply with the requirements under the Rules it is necessary for an applicant for entry clearance as a spouse to show not only that there is a subsisting marriage and that there is satisfactory accommodation but also that the financial requirements (in this case that there would be an income available of £18,600 a year) are established by the production of specified documents. It is not necessary for these documents to have been produced at the time of the application but insofar as it is said that the necessary income is as a result of salaried employment, it is necessary at some time for wage slips and other documents to be provided for a six month period prior to the date of application. At the time of the hearing before Judge Walters it is accepted that these documents had not in fact been provided.
5. It would seem that Judge Walters was unaware of the requirements under the Rules because at paragraph 40 of his determination he states that: "I was unable to find a list of specified documents, however, in the Immigration Rules". These are in fact set out in paragraph 2 of Appendix FM-SE of the Rules (and if he had looked this up in the Eighth Edition of Phelan and Gillespie Immigration Law Handbook 2013 he would have found this reproduced at page 1059). The relevant requirement is as follows:
 - "2. In respect of salaried employment in the UK, all of the following evidence must be provided:

... [The relevant information which is required is then set out which includes wage slips covering a period of six months prior to the date of application if the applicant has been employed by their current employer for at least six months]".
6. Because Judge Walters was not aware of the provisions within the Rules he did not consider them. Had he done so on the basis of the evidence which was before him he would not have been able to allow the appeal. It follows that the judge's failure to consider properly the application of the relevant Rules was a material error of law and I so find. It follows that I must remake the decision.
7. Fortunately for the claimant matters have moved on since the hearing before Judge Walters as will appear below. Equally fortunately for the claimant not only was he represented by an advocate who clearly understands the Rules extremely well and was able to give very great assistance to this Tribunal but also the ECO was represented by Mr Jarvis who with his typical fairness was prepared to consider

fresh documents which were now put before the Tribunal. Mr Hart was able to refer both Mr Jarvis and the Tribunal to the appropriate guidance document in the Immigration Directorate Instructions in which with regard to Appendix FM at 1.7 it is provided that the calculation for gross earnings is carried out by reference to a six month period of evidence and that effectively it boils down to a calculation based on gross average earnings over that six month period multiplied by 2 to assess what a twelve month income is. Mr Jarvis very fairly told the Tribunal that with the help of Mr Hart it could be shown from the documents submitted on behalf of the claimant which the ECO now accepted that the sponsor's income amounted to £1,550 per month gross. It was accepted that the wage slips which were required under the Rules for a six month period ending with the date of application had now been supplied and that also the Tribunal had been now supplied with the bank statements showing the net income being paid into the bank account which is a requirement of part 2 of FM-SE. The calculation which appears to be used by caseworkers in accordance with the guidance to which the Tribunal was referred indicated that the financial requirements under the Rules were satisfied.

8. Pursuant to section 85(4) of the Nationality, Immigration and Asylum Act 2002 on an appeal under section 82(1) of that Act (which this appeal is) the Tribunal

“may consider evidence about any matter which it thinks relevant to the substance of the decision, including evidence which concerns a matter arising after the date of the decision”.

However, by section 85(5) subsection (4) “is subject to the exceptions in section 85A”.

9. The relevant exception in this case is set out at section 85A(2) which is that

“in relation to an appeal under section 82(1) against an immigration decision of a kind specified in section 82(2)(b) or (c) the Tribunal may consider only the circumstances appertaining at the date of the decision”.

The decision being appealed against is of a kind specified in section 82(2)(b) being a refusal of entry clearance and so for the purposes of this appeal I may consider only the circumstances appertaining at the date of the decision. However, that does not mean that I am precluded from considering evidence which was not available at the time of the decision (or indeed at the time that Judge Walters made his determination) but I may consider any evidence appertaining to the date of decision which obviously includes the evidence which is in compliance with the requirements under the Rules. It follows that Mr Jarvis is right in accepting that the evidence now provided is admissible for the purposes of this appeal. It is accepted on behalf of the ECO that the only basis upon which the appeal was or remains contested is that it had been argued that the financial requirements were not satisfied in accordance with the specific requirements within Appendix FM-SE and as it is now accepted on behalf of the ECO that in fact the financial requirements have been met in accordance with the Rules it follows that this appeal must be allowed and I will so order.

Decision

I set aside the determination of the First-tier Tribunal, which had allowed the claimant's appeal but I substitute the same decision in substance as had been made as follows:

The claimant's appeal is allowed under the Immigration Rules.

Signed:

Date: 18 June 2014

Upper Tribunal Judge Craig