



**(IMMIGRATION AND ASYLUM CHAMBER)
OA/11539/2013**

**UPPER TRIBUNAL
APPEAL NUMBER:**

THE IMMIGRATION ACTS

Heard at: Field House

**Determination
Promulgated**

On: 30 July 2014

On: 12 August 2014

Prepared: 11 August 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

ENTRY CLEARANCE OFFICER

Appellant

and

MRS VAISHNAVI MURUGESWARAN

Respondent

Representation

**For the Appellant: Ms A Everett, Senior Home Office Presenting Officer
For the Respondent: Mr R Spurling, counsel (instructed by Biruntha Solicitors)**

DETERMINATION AND REASONS

1. For the sake of convenience I shall refer to the appellant as the entry clearance officer and the respondent as "the claimant."
2. The claimant is a Sri Lankan national born on 6th May 1990. She appeals against the decision of the respondent refusing her application for an entry clearance to the UK as a partner under Appendix FM of the Immigration Rules.
3. In a determination promulgated on 9th May 2014, First-tier Tribunal Judge Andonian allowed the claimant's appeal under the Immigration Rules.

4. At paragraph 4 of the determination, the Judge noted that the burden of proof was on the appellant. It was “true” that the sponsor's bank statements did not show credits that directly matched the payments that he had received from various employers but that was because they pay the sponsor in cash. He had however provided payslips and evidence that they pay him the required salary and that would have been sufficient. It was “....not fair to refuse to allow the appellant to join the sponsor just because the respondent expects people to be paid direct into the bank account and not by cash.”
5. He had earlier noted at paragraph 3 that the entry clearance officer made a number “of technical objections to the evidence of the sponsor's pay.” The sponsor had done his best to provide the missing evidence in the bundle before the Tribunal and to show that he continues to earn enough to support himself and the appellant without recourse to public funds. However, he could not provide everything as specified because he could not find the payslips for the weeks 22 and 36.
6. He noted that First Call had provided a letter to confirm the type of work that the sponsor does for them at the moment. He had asked for a letter from them with the information required for the entry clearance officer but they said they would not provide him with such information in writing other than the letter they had given him and which had been supplied.
7. On 12th June 2014, First-tier Tribunal Judge Colyer granted the entry clearance officer permission to appeal on the basis of the grounds prepared by the respondent. These were that the Judge paid no regard to the specified evidence comprehensively set out in the rules. Some documentation did not satisfy the requirements specified. He failed to deal with issues raised in the refusal letter. He did not have proper regard to the specified period before the relevant date, for example with regard to the sponsor's failure to provide payslips covering a six month period. It is not clear what the sponsor's actual gross income was as at the date of application.
8. Ms Everett on behalf of the entry clearance officer submitted that the rules relating to the specified evidence required to be produced are set out in Appendix FM-SE to the rules. These identify the type of evidence required, the period they cover and the format they should be in.
9. She submitted that the Tribunal had no regard to this. Whilst some documentation had been submitted, it did not satisfy the requirements of Appendix FM-SE as set out in the reasons for refusal letter. That included missing payslips which were required to be submitted. The payslips from First Call Services did not cover a six month period and were not dated within 28 days of the application, being weekly slips rather than monthly. Nor were they sequential and payslips for weeks 22 and 36 were missing.

10. Although letters were provided from each of the sponsor's employers, only the letter from Park Stores met the requirements of the rules. The letter from First Call Services did not state the sponsor's employment type or salary or the period over which the current level of salary had been paid. Moreover, the letter from ST Stores confirmed the sponsor's salary but did not confirm the length or type of employment, i.e. whether permanent, fixed term, contract or agency. Nor did it confirm the period over which the current level of salary had been paid.
11. Further, the sponsor's Halifax bank statements from 11th May 2012 until 24th December 2012 had been provided. Although they covered a six month period and are dated within 28 days of the date of the application, they only show salary credits from First Call Services but not the other two employers.
12. She submitted that these documents are specified in Appendix FM-SE and must be provided.
13. She submitted that the Judge dismissed the entry clearance officer's reasons as "technical objections". He did however accept that it was correct that the sponsor's bank statements did not show credits that directly matched the payments he had received from ST Stores and Park Stores. However, the requirements are plain. It had not been for the Judge simply to ignore the failure to comply with the appendix.
14. The entry clearance officer requires proof of income to be produced in particular ways. No specified documentation in this case had been provided. The statement by the Judge at paragraph 4 that it was not fair for the respondent to refuse to allow the claimant to join her husband just because the entry clearance officer expects people to be paid directly into their bank account and not by cash, constitutes a misdirection.
15. Nor was this a case where it could be found that a kind of evidential flexibility was apposite. There is still no documentation submitted to address the gaps in the claimant's evidence.
16. Ms Everett submitted that there is no dispute that the claimant cannot succeed under the rules. The only possible basis would be under Article 8. In the event that the determination is set aside, the Article 8 decision would have to be remade without any findings preserved. She submitted that there needs to be an assessment "ab initio."
17. Mr Spurling initially sought to resist the appeal. No Rule 24 response had been provided. He accepted that it was "not the clearest determination". The Judge had regard to such documentary evidence as was produced

coupled with the claimant's own oral evidence which he found to be credible.

18. Both parties accepted that the Judge failed to make any findings with regard to Article 8, notwithstanding the fact that Article 8 had been raised in the grounds of appeal to the First-tier Tribunal.
19. Mr Spurling noted that it is clear from the entry clearance manager's review dated 21st November 2013 that the claimant had raised Article 8 grounds. In fact the review dealt at some length with the Article 8 grounds.
20. Ms Everett accepted that in the circumstances this was a proper case for remitting the appeal to the First-tier Tribunal on the basis that there had been no consideration given to the Article 8 grounds and accordingly the claimant had been deprived of the benefit of a decision relating to Article 8 by the First-tier Tribunal.

Assessment

21. The First-tier Tribunal Judge was not entitled simply to ignore the requirements of Appendix FM-SE in respect of specified documentation. I also find that his assessment that it was "not fair to refuse to allow the appellant to join the sponsor just because the respondent expects people to be paid direct into the bank account and not by cash" is legally irrelevant.
22. There was no justification provided for simply ignoring the requirements under the Rules to provide documentation and to comply with the mandatory requirements as to the nature and extent of such documentation.
23. Accordingly, I set aside the decision of the First-tier Tribunal Judge allowing the appeal under the Immigration Rules.
24. There was no consideration given to the Article 8 claim. Ms Everett has properly conceded that in the circumstances the Article 8 decision would have to be remade without any findings preserved. She submitted that there needs to be an assessment "ab initio."
25. Both parties have submitted that this is in the circumstances an appropriate case for the appeal to be remitted to the First-tier Tribunal for a hearing relating to Article 8, which has not taken place before the First-tier Tribunal.
26. I have had regard to the Senior President's Practice Statement regarding the issue of remitting an appeal to the First-tier Tribunal for a fresh

decision. The normal approach would be for the Upper Tribunal itself to determine appeals where an error of law is found even if some further fact finding is necessary.

27. However, I am satisfied in this case that the failure to consider the claimants appeal at all under article 8 has meant that the claimant has been deprived of a proper opportunity to present her case. Furthermore, the extent of judicial fact finding which is necessary for a decision to be re-made is fairly extensive. There will be a complete re-hearing without findings preserved. I have also had regard to the overriding objective and conclude that it would be just and fair to remit the case.
28. I canvassed with Mr Spurling whether the best interests of the claimant would perhaps not be better served by making a fresh application from abroad. That is particularly so if the sponsor is currently able to meet all the relevant requirements under the rules and Appendix, including the annual gross income required. He indicated that this would indeed be discussed with his solicitors.
29. In the circumstances I remit the appeal to the First-tier Tribunal (Taylor House) for a fresh decision to be made, by any Judge other than First-tier Tribunal Judge Andonian.

Signed

Date 11/8/2014

C R Mailer

Deputy Upper Tribunal Judge