



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: OA/16448/2013

THE IMMIGRATION ACTS

Heard at Birmingham  
on 6<sup>th</sup> November 2014

Determination Promulgated  
On 10<sup>th</sup> November 2014

Before

UPPER TRIBUNAL JUDGE HANSON

Between

ENTRY CLEARANCE OFFICER - DHAKA

Appellant

and

FARJANA YASMIN  
(Anonymity order not made)

Respondent

**Representation:**

For the Appellant: Mr Smart – Senior Home Office Presenting Officer.

For the Respondent: Mr R Khan of Khirri Solicitors.

**DETERMINATION AND REASONS**

1. This is an appeal by an Entry Clearance Officer (ECO) against a determination of First-tier Tribunal Judge Ghaffar, promulgated on the 3 June 2014, in which the Judge allowed the appeal against the refusal of entry clearance for settlement as the spouse of a person present and settled in the United Kingdom.
2. The ECO was not satisfied that Ms Yasmin had supplied sufficient evidence to establish that she could meet the financial requirements of the Immigration Rules, as the sponsor's deposits into his bank account did not match the wage slips supplied and evidence of previous years earnings were not as great as the amount he now claimed to be earning. It was therefore concluded that the sponsor was not earning the amount required by Appendix FM or that he had not provided specified evidence of same.

3. Having read the documentary evidence and having heard oral evidence from the sponsor the Judge set out his findings, in very brief form, in paragraphs 15 and 16 of the determination in the following terms:
  15. I have carefully considered all the evidence before me as well as the oral evidence of the Sponsor. I find that there is a plethora of evidence of the Sponsor's earnings which were independently verified by the Tax Office. The Sponsor had provided all the Specified Evidence and explained the few pounds of his earnings that were not banked each week. This was explained in the covering letter sent with the application. I find, based on the evidence before me that the Sponsor had provided all evidence required of his earnings in excess of £18,600 gross per annum.
  16. I find that the Sponsor fulfils the financial requirements of Appendix FM of the Immigration Rules and I allow the immigration appeal.

### Discussion

4. Although not raised as a ground of appeal it is important to remember that it is not the sponsor who needs to show they fulfil the requirements of the Rules but the applicant. The ECO sought permission to appeal on the basis Appendix FM-SE sets out the nature of the evidence required to establish the income earned, the periods they cover, and the format they should be in. One of the requirements is that the wage deposits must be reflected in the sponsor's bank account which the evidence showed has not occurred in this appeal. It is stated the First-tier Tribunal had no regard to this requirement in its findings and therefore failed to comply with the requirements of the Immigration Rules.
5. Permission to appeal was initially refused by another judge of the First-tier Tribunal on the basis Judge Ghaffar had given adequate reasons for finding that the Appellant before him had, on the balance of probabilities, showed a gross annual income in excess of £18,600 and that the grounds failed to take into account the explanation proffered by the sponsor and accepted by the First-tier Tribunal that he banked all but a few pounds of his weekly earnings which were paid to him in cash. The application was renewed to the Upper Tribunal and granted by Upper Tribunal Judge McGeachy on the basis that the grounds as pleaded were arguable.
6. The refusal of entry clearance, dated 16<sup>th</sup> June 2013, noted the information provided with the application but found that that information did not meet the specified guidance set out in the Immigration Rules. The ECO also noted that the amounts and dates shown on the payslips for The Spice Lounge do not match the cash credits shown on the bank statements. The ECO records that in making the decision account had been taken of previous earnings as confirmed by HMRC and listed in the refusal. Thereafter the refusal states:

“The earnings listed above demonstrate that your sponsor's highest earnings in any one previous tax year were only £10,155 (2009-2010). I also note that your sponsor was in receipt of Job Seekers Allowance at the latter end of 2011 and that he received Housing and Council tax benefit up to and including January 2012. In view of the discrepancies noted above I am not satisfied that he is now earning the salary claimed currently which is significantly higher at £18,720. As such I am satisfied that your sponsor's earnings have been contrived for the purposes of this application and to demonstrate that he has met the financial maintenance rules. He has therefore not demonstrated an income of £18,600 per annum and not submitted the specified guidance in respect of his employment in the UK.”

7. Appendix FM is a very detailed provision of the Rules which sets out the requirements for individuals making applications for leave to enter or remain in the various classes provided for. There is an additional section within Appendix FM, headed Appendix FM-SE – Family members - Specified Evidence, which sets out the specified evidence applicants need to provide to meet the requirements of relevant provisions within Appendix FM.
8. Paragraph D (a) of Appendix FM-SE provides that in deciding an application in relation to which this appendix states specified documents must be provided, the Entry Clearance Officer or Secretary of State (“the decision maker”) will consider documents that have been submitted with the application, and will only consider documents submitted after the application where subparagraph (b) or (e) applies. Subparagraph (b) is not relevant to this matter. Subparagraph (e) states that where a decision maker is satisfied that there is a valid reason why a specified documents cannot be supplied, e.g. because it is not issued in a particular country or has been permanently lost, he or she may exercise discretion not to apply the requirement for the document or to request alternative or additional information or documents be submitted by the applicant. Such wording appears to confirm discretion upon a decision maker but the term ‘decision maker’ is specifically defined in the Appendix to include an ECO or the Secretary of State only and such a discretion is conditional upon there being a valid reason why documents cannot be supplied, which is not the issue in this case. Therefore, although Mr Khan accepted that discretion had been exercised by the ECO from his reading the notice that may not necessarily be so, although he also accepted that if the discretion had been exercised the way in which it was exercised has not been challenged in the grounds of appeal and was therefore not a live issue before the First-tier Tribunal.
9. Appendix FM, paragraph 1, sets out a number of general provisions in relation to evidencing the financial requirements in Appendix FM which are to be found in sub paragraphs (a) to (l) of paragraph 1. Of these the only one Mr Khan though may assist is paragraph (k) which states:

“where the gross (pre-tax) amount of any income cannot be properly evidenced, the net (post-tax) amount will be counted, including towards a gross income requirement.”

10. The difficulty in relying upon this provision is that it is the Appellants case that a number of wage slips were provided which proved the gross income asserted as being paid to the sponsor. Such wage slips and documents from HMRC were relied upon as properly evidencing the gross income.
11. Mr Khan also sought to argue that if there is merit in the ECO's grounds in relation to the evidence of income paid into the bank accounts, the First-tier Tribunal should have been able to accept the evidence of the funds paid into the account as the gross income corroborated by the fact such income is recorded in the bank statements. If such an approach is adopted the appeal must fail as it was calculated that on such a basis the gross income proved would only be between £17,000 and £18,000 per annum, less than the minimum required sum.
12. After the general provisions of Appendix FM-SE a number of specific provisions are to be found. Paragraph 2 contains provisions in respect of salaried employment in the United Kingdom, in relation to which it states "all of the following evidence must be provided" (my emphasis). Subparagraph (a) relates to wage slips for requisite periods, (b) to a letter from the employer who issued the wage slips confirming specified evidence relating to salary, length of employment, period for which the level of salary being relied upon in the application has been paid, the nature of the employment, and, at (c) personal bank statements corresponding to the same period(s) as the wage slips at paragraph 2 (a) showing that the salary has been paid into an account in the name of the person or in the name of the person and their partner jointly.
13. This part of Appendix FM-SE creates a mandatory requirement that these requirements are met. In this case it is conceded that the requirements of paragraph 2 (c) were not met. The submission by Mr Khan that this paragraph does not state that all the salary had to be paid into an account, hence admitting part payment, as the wording does not specifically make such a statement has no arguable merit. The wording of the provision is clear that "the salary" must be paid into the account. It does not state that part payment is acceptable and the reason for the requirements that all the salary shown in the wage slips must be paid into that person's account is to allow the evidence of the claimed income to be corroborated.
14. The fact the sponsor paid less than his alleged net income into the account has been established by the ECO and was also conceded by Mr Khan as was the fact the requirement to have paid all the net income into the account is mandatory and that his client was unable to satisfy this requirement of the Immigration Rules.

15. On this basis I find the Judge has materially erred in law in failing to make adequate findings in relation to why the Appellant was able to meet the requirements of the Immigration Rules and to specify the legal basis on which the appeal could be allowed under the Rules.
16. The Judge states in the determination that the Appellant provided specified evidence. When Mr Khan was asked which evidence the Judge was referring to he stated it was to the wage slips, employer's letter, and bank statements. Whilst this description indicates the type of documents required by the Rules were provided such a finding does not show that the requirements of the Rules are met. It is not a requirement to provide bank statements but to provide bank statements corresponding to the relevant period showing the alleged net income being paid into that account. There is no flexibility within the Rules allowing that requirement to be met by a part payment of alleged income having been made or to state that as the amount paid in is near to but not quite the same as that reflected in the bank statements, that it could be taken that the requirements of the Rules have been met. To do so would import into an assessment of the ability to meet the Rules a near miss principle which case law has established does not exist.
17. The determination shall therefore be set aside. In remaking the decision Mr Khan was asked how he believed his client was able to satisfy the requirements of the Rules to which his response was to assert that the HMRC document which was not available to the ECO but which had come into existence prior to the hearing before the First-tier Tribunal confirmed the gross income received by the sponsor reflected in his wage statements. Such a submission raises an interesting point which is whether an individual unable to satisfy the requirements of the Rules relating to the proof of the minimum available income by mandatory means is still able to succeed if they are able to establish by other documentary evidence that the required minimum level of income is being earned. Mr Khan submitted that a later amendment to the Rules allows such an approach to be adopted but it is settled law that it is the Rules in force at the date of decision that are applicable to any appeal and no such flexibility has been shown to exist in the Rules being considered in relation to this appeal.
18. Appendix FM sets out in some detail requirements that needs to be met by applicants, a number of which are mandatory. These are prescriptive rules approved by Parliament designed to ensure that those not entitled to enter the United Kingdom are prevented from doing so. The Rules also reflect the Secretary of State's view of the minimum requirements an individual must meet to avoid being a burden upon society and the public purse in the United Kingdom, as evidenced by the minimum required income levels. It is also a sad reality in relation to immigration and asylum matters that although the vast number of applicants are genuine individuals who would not think of, let alone attempt, to use fraud and deception in relation to applications, there are a

number who do. As a result the requirements contain a number of checks and balances to ensure that if a statement is made supported by documentary evidence from source A, such as wage statements, the fact such employment or remuneration is genuine and not contrived for the purposes of an application can be checked by the provision of the mandatory information from source B, such as evidence of the actual sums received being paid into a bank account. The Rules make separate provision for those who are self-employed or who may not have wage statements and provide the required degree of evidential flexibility for individuals unable to provide the mandatory information for justified reasons.

19. Mr Smart in his submissions also commented upon the relationship between the payments made and alleged net income received by the sponsor, differences in the amounts, and the general pattern of the sponsor's income which was clearly of concern to the ECO. The fact the sponsor appears to have paid a sum into his account less than that he states he received on his wage slips as a result he claims of his retaining the difference in cash, with such sum deposited being withdraw shortly thereafter. Such withdrawal is not a matter prohibited by the Rules but does appear to be a pattern prevalent in this case.
20. Having considered the matter further I make a finding of fact that the Appellant has failed to discharge the burden of proof upon her to the required standard to show that she is able to satisfy the mandatory requirements of the Immigration Rules, with specific reference to paragraph 2 (c) of Appendix FM-SE. Her inability to satisfy such a mandatory requirement is fatal to the appeal.

### **Decision**

21. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remake the decision as follows. This appeal is dismissed.**

Anonymity.

22. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Fee Award.

Note: this is **not** part of the determination.

23. In the light of my decision to re-make the decision in the appeal by dismissing it, I have considered whether to make a fee award (rule 23A (costs) of the Asylum

and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The appeal has been dismissed.

Signed.....  
Upper Tribunal Judge Hanson

Dated the 7<sup>th</sup> November 2014

Anonymity.

24. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....  
Upper Tribunal Judge Hanson

Dated the 6<sup>th</sup> November 2014