



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: OA/18614/2013

**THE IMMIGRATION ACTS**

Heard at North Shields  
on 14<sup>th</sup> August 2014

Determination Promulgated  
On 2<sup>nd</sup> October 2014

Before

UPPER TRIBUNAL JUDGE HANSON

Between

ENTRY CLEARANCE OFFICER - (Istanbul)

Appellant

and

SEMRA YAVUZ  
(Anonymity direction not made)

Respondent

**Representation:**

For the Appellant: Mrs Rackstraw - Senior Home Office Presenting Officer.  
For the Respondent: Mr Latif of Latif Solicitors.

**DETERMINATION AND REASONS**

1. This is an appeal by the Secretary of State against a determination of First-tier Tribunal Judge Cope, promulgated on 16<sup>th</sup> May 2014, in which he allowed the appeal against the refusal of an Entry Clearance Officer (ECO) to grant the above Respondent entry to the United Kingdom for the purposes of settlement as a spouse.

2. The date of the decision is the 3<sup>rd</sup> September 2013. The only live issue before the First-tier Tribunal was whether the financial requirements of the Rules were met.
3. In paragraph 31 of his determination the Judge records that the Presenting Officer, whilst not conceding the point, implicitly accepted that the appropriate documentation required under Appendix FM-SE had been produced in relation to employment with Genting Casino from which the sponsor earns £10,206. The Presenting Officer did, however, take issue as to whether claimed self-employed earnings of £9,053 for the tax year 2012-2013 were reflected in the personal bank statements of the accounts held by the sponsor with Barclay's Bank PLC and whether there was corroboration in the form of the necessary income tax returns.
4. The sponsor's evidence was that his earnings as a driver and in relation to the rent he received from allowing three other drivers to use his taxi, was largely paid in cash although one driver paid the money directly into his bank account. Some of the cash was used to buy petrol rather than paying the money into his bank account which was found to be plausible by the Judge, as was the fact that income can vary enormously on a weekly or daily basis depending on the hours worked. The Judge found that having examined the bank account of the sponsor, whilst the deposits were variable, they did not "seem to be out of line" with the level of income the sponsor has claimed [38].
5. In relation to the income tax returns the Judge questioned the extent to which these can be expected to corroborate claimed levels of income in these circumstances [39] and found that what the sponsor has to show is that it is more likely than not that his documents such as the tax returns accurately reflect his gross earnings from self-employment for the tax year 2012-13 [40]. In paragraph 41 the Judge sets out his key finding which is:
  41. Taking in account into account all the documentary evidence, together with the oral evidence of the sponsor, and applying the standard of proof, I am satisfied then that he had shown that it is more likely than not that he meets the requirements of Appendix FM in the sense of having provided the necessary documentary evidence specified in Appendix FM-SE to show that he had earned £9,053 in 2012-13, thus taking his total earnings from employment with Genting Casinos and his taxi business to over £18,600 for that financial year.
6. The Judge concluded that the requirements of paragraph E-ECP-3.1 of Appendix FM were met and on this basis allowed the appeal.
7. The Judge also went onto comment on the decision of Mr Justice Blake in R (on the application of MM) [2013] EWHC 1900 and to the fact an appeal against this

decision was pending before the Court of Appeal. The Judge criticised the approach of the ECO in relation to this judgment which has now been overturned by the Court of Appeal in any event.

8. Permission to appeal was sought by the ECO on the basis that the Rules of specified evidence are comprehensively set out in Appendix FM-SE. The Tribunal, whilst acknowledging this, have had no regard to this in the determination where it sets out its findings on this issue, especially in regard to the evidence of income from the sponsor's self-employment. It is also asserted the Tribunal failed to address the relevant evidence required in the form of bank statements demonstrating deposits which corroborate the second income the sponsor claimed to earn and that the Tribunal proceeded to speculate about the nature of the taxi business and the fact that most in this field of work dealt exclusively in cash payments, which meant it was still unclear as to what the actual level of income was that the sponsor received from his self-employment. It is asserted that it is not clear what the sponsor's actual gross income was at the date of application and therefore the requirements of the Rules could not be found to be met.

### **Error of law**

9. Appendix FM of the Immigration Rules sets out the way in which the Secretary of State believes specified applications have to be assessed and, in relation to the financial criteria, the mandatory specified documents that must be produced to prove such income.
10. The income earned by the sponsor from the casino appears to have been accepted on the basis it was evidenced by specified documents. The income from the taxi business was not proved by the production of specified documents as the Judge relied upon the oral evidence of sums received together with his own personal knowledge from dealing with cases involving taxi drivers to support the incomplete documentation. In Secretary of State for the Home Department v Abdi [1994] Imm AR 402 Steyn LJ at page 420 accepted that an Adjudicator was entitled to rely on matters within his own knowledge, provided such matters were disclosed to the parties so as to afford them a fair opportunity to deal with them. That was also the view in HA and TD v SSHD (2010) CSIH 28.
11. No procedural error is asserted in relation to this case as it is accepted that the Judge did put the parties to notice and therefore provide them with the ability to comment upon this element of the case.
12. The relevant section of Appendix FM is E-ECP, which in relation to the financial requirements states:

### **Financial requirements**

E-ECP.3.1. The applicant must provide specified evidence, from the sources listed in paragraph E-ECP.3.2., of-

(a) a specified gross annual income of at least-

- (i) £18,600;
- (ii) an additional £3,800 for the first child; and
- (iii) an additional £2,400 for each additional child; alone or in combination with

(b) specified savings of-

- (i) £16,000; and
- (ii) additional savings of an amount equivalent to 2.5 times the amount which is the difference between the gross annual income from the sources listed in paragraph E-ECP.3.2.(a)-(d) and the total amount required under paragraph E-ECP.3.1.(a); or

(c) the requirements in paragraph E-ECP.3.3.being met.

In this paragraph "child" means a dependent child of the applicant who is-

- (a) under the age of 18 years, or who was under the age of 18 years when they were first granted entry under this route;
- (b) applying for entry clearance as a dependant of the applicant, or has limited leave to enter or remain in the UK;
- (c) not a British Citizen or settled in the UK; and
- (d) not an EEA national with a right to be admitted under the Immigration (EEA) Regulations 2006.

E-ECP.3.2. When determining whether the financial requirement in paragraph E-ECP.

3.1. is met only the following sources will be taken into account-

- (a) income of the partner from specified employment or self-employment, which, in respect of a partner returning to the UK with the applicant, can include specified employment or self-employment overseas and in the UK;
- (b) specified pension income of the applicant and partner;
- (c) any specified maternity allowance or bereavement benefit received by the partner in the UK;
- (d) other specified income of the applicant and partner; and

(e) specified savings of the applicant and partner.

E-ECP.3.3. The requirements to be met under this paragraph are-

(a) the applicant's partner must be receiving one or more of the following -

- (i) disability living allowance;
- (ii) severe disablement allowance;
- (iii) industrial injury disablement benefit;
- (iv) attendance allowance;
- (v) carer's allowance; or
- (vi) personal independence payment; and

(b) the applicant must provide evidence that their partner is able to maintain and accommodate themselves, the applicant and any dependants adequately in the UK without recourse to public funds.

E-ECP.3.4. The applicant must provide evidence that there will be adequate accommodation, without recourse to public funds, for the family, including other family members who are not included in the application but who live in the same household, which the family own or occupy exclusively: accommodation will not be regarded as adequate if-

- (a) it is, or will be, overcrowded; or
- (b) it contravenes public health regulations.

13. The provisions within the Appendix relating to the nature of the documentary evidence required to prove the alleged income are to be found that Appendix FM-SE which state:

**Appendix FM-SE - Family members - specified evidence**

**Family Members - Specified Evidence**

A. This Appendix sets out the specified evidence applicants need to provide to meet the requirements of rules contained in Appendix FM and, where those requirements are also contained in other rules and unless otherwise stated, the specified evidence applicants need to provide to meet the requirements of those rules.

B. Where evidence is not specified by Appendix FM, but is of a type covered by this Appendix, the requirements of this Appendix shall apply.

C. In this Appendix references to paragraphs are to paragraphs of this Appendix unless the context otherwise requires.

D. (a) In deciding an application in relation to which this Appendix states that 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 sub-paragraph (b) or (e) applies.

(b) If the applicant:

(i) Has submitted:

(aa) A sequence of documents and some of the documents in the sequence have been omitted (e.g. if one bank statement from a series is missing);

(bb) A document in the wrong format; or

(cc) A document that is a copy and not an original document; or

(ii) Has not submitted a specified document,

the decision-maker may contact the applicant or his representative in writing or otherwise, and request the document(s) or the correct version(s). The material requested must be received by the UK Border Agency or Border Force at the address specified in the request within a reasonable timescale specified in the request.

(c) The decision-maker will not request documents where he or she does not anticipate that addressing the error or omission referred to in sub-paragraph (b) will lead to a grant because the application will be refused for other reasons.

(d) If the applicant has submitted:

(i) A document in the wrong format; or

(ii) A document that is a copy and not an original document,

the application may be granted exceptionally, providing the decision-maker is satisfied that the document(s) is genuine and that the applicant meets the requirement to which the document relates. The decision-maker reserves the right to request the specified original document(s) in the correct format in all cases where sub-paragraph (b) applies, and to refuse applications if this material is not provided as set out in sub-paragraph (b).

(e) Where the decision-maker is satisfied that there is a valid reason why a specified document(s) 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(s) or to request alternative or additional information or document(s) be submitted by the applicant.

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

14. Paragraph 7 of Appendix FM-SE is also relevant which states:

7. In respect of self-employment in the UK as a partner, as a sole trader or in a franchise all of the following must be provided:

(a) Evidence of the amount of tax payable, paid and unpaid for the last financial year.

(b) The latest:

(i) annual self-assessment tax return to HMRC (a copy or print-out);

(ii) Statement of Account (SA300 or SA302); and,

(iii) the same for the previous financial year if the latest return does not show the necessary level of gross income, but the average of the last 2 financial years does.

(c) Proof of registration with HMRC as self-employed if available.

(d) Each partner's Unique Tax Reference Number (UTR) and/or the UTR of the partnership or business.

(e) Where the person holds or held a separate business bank account(s), bank statements for the same 12-month period as the tax return(s).

(f) personal bank statements for the same 12-month period as the tax return(s) showing that the income from self-employment has been paid into an account in the name of the person or in the name of the person and their partner jointly.

(g) Evidence of ongoing self-employment through evidence of payment of Class 2 National Insurance contributions.

(h) One of the following documents must also be submitted:

(i) (aa) If the business is required to produce annual audited accounts, the latest such accounts; or

- (bb) If the business is not required to produce annual audited accounts, the latest unaudited accounts and an accountant's certificate of confirmation, from an accountant who is a member of a UK Recognised Supervisory Body (as defined in the Companies Act 2006);
- (ii) A certificate of VAT registration and the latest VAT return (a copy or print-out) confirming the VAT registration number, if turnover is in excess of £73,000;
- (iii) Evidence to show appropriate planning permission or local planning authority consent is held to operate the type/class of business at the trading address (where this is a local authority requirement); or
- (iv) A franchise agreement signed by both parties.

(i) The document referred to in paragraph 7(h)(iv) must be provided if the organisation is a franchise.

15. This is the framework of the Rules against which the Judge was required to assess the merits of the appeal and it is clear from the Judge's findings that the mandatory evidence required by the Rules was not provided.
16. Mr Latif argued that this appeal turned upon the interpretation of the wording of the section as all the relevant documents were provided and, in any event, paragraph 7 (f) is discretionary. I find no merit in this submission as subject to the provisions of any guidance to the contrary it appears the provisions of Appendix FM-SE are mandatory. Mr Latif relies upon the Immigration Directorate Instructions (IDI) for July 2014, notwithstanding this is an appeal against a decision of an ECO, although it was not suggested the guidance did not reflect the position appertaining at the date of decision. Paragraph 9.3.7 of the IDI states:

Self-employed income can be cash in hand if the correct tax is paid. In line with paragraph 3.1.5 of this guidance, it would generally be expected that the person's business or personal bank statements would fully reflect all gross (pre-tax) cash income. Flexibility may only be applied where the decision maker is satisfied that the cash income relied upon is fully evidence to by the relevant tax return(s) and the accounts information.

17. Paragraph 3.1.5 of the IDI states:

Under paragraph 1 (n) of Appendix FM-SE the gross amount of any cash income may be counted where the person's specified bank statements show the net amount which relates to the gross amount shown on their payslips (or in the relevant specified evidence provided in addition to the specified bank statements in relation to non-employment income).



Otherwise, only the net amount shown on the specified bank statements may be counted.

18. The same guidance makes clear that there is no discretion or flexibility regarding the level of the financial requirement that must be met as it is a matter of public policy to operate a financial requirement based on minimum income thresholds for sponsorship of partners and children which must be clearly and consistently applied in all cases, and that an applicant has to demonstrate and evidence the income/savings required to meet the level of financial requirement relevant to the application.
19. It was conceded by Mr Latif that the bank statements provided did not reflect all the monies allegedly received by the sponsor but it was also submitted that most of those paid in were reflected; although he had not examined the deposits and nor had he worked out the mathematical realities so as to support this statement either now or before Judge Cope.
20. It was accepted that the casino income was as claimed as evidence was provided in relation to the same that met the requirements of Appendix FM-SE. The further submission from Mr Latif that as paragraph 7 (f) did not define 'income' and that if it was required that an individual should show all the monies they received the rule should say so, is noted but does not assist his client. The wording of this provision is clear, namely that the personal bank statements for the same 12 month period as the tax returns must show that the income from self-employment is paid into an account indicating that it is intended that all income earned is required, otherwise how can a decision maker be satisfied that the relevant tax return and account information fully evidence the claimed cash income. Had the intention of the author of the provision intended only part income could be declared the wording of the rule would not doubt have said so. All the income is required to be reflected in the account and it is not. The use of cash to pay for fuel rather than banking it would be reflected in the accounts where the total income and expenditure would be declared and verifiable, but that is not the case on the basis of the information made available in this appeal. In such a case paragraph 9.3.7 of the IDI may be relevant. The burden in a cash business case is for the appellant to prove that the correct level of tax has been paid which, in turn, requires accurate evidence relating to the total gross income received and tax computation.
21. The admission by Mr Latif that he did not know the exact cash figure or the total income received from the self-employment is a fair summary of the evidence that was before the Judge. If the total cash figure is not known one questions how the Judge could have found that this figure combined with the casino income enabled the sponsor to demonstrate that the required minimum level had been shown to exist. The Rules do not permit such a leeway on the available evidence.

- 22. I find the Judge erred in failing to adopt a proper structured approach to this issue, even though he was clearly aware of the legal requirements. The Judge's finding in paragraph 41 that it was "more likely than not" that the sponsor met the requirements of the Rules appears to be a finding based upon the Judges overall personal impression of the evidence as to the level of available income, including oral evidence, rather than assessing that level of evidence by reference to the mandatory required documentation. The discretion set out in the IDI in paragraph 9.3.7 allows the degree of flexibility in relation to cash in hand business but only if the correct level of income tax has been paid and the income upon which such tax is being assessed is fully declared in relevant tax returns and the accounts information. This evidence was not before Judge Cope and was not in existence at the date of decision.
- 23. I therefore find that the Judge has materially erred and set the determination aside. The situation before the Upper Tribunal remains as it was before Judge Cope and accordingly I find the Appellant has failed to discharge the burden of proof upon her, to the required standard, to show she is able to satisfy the requirements of Appendix FM based upon a failure to adduce specified evidence to prove that the level of available income is sufficient to meet the mandatory minimum requirement contained within the Rules.
- 24. I note with interest the conclusions in relation to the fee award, in which Judge Cope made no such award on the basis it appeared the sponsor failed to provide with the application for entry clearance all the specified documentation required by Appendix FM-SE to establish that he met the necessary minimum financial requirements, which remained the position before the Judge at the hearing.
- 25. If the mandatory information is now available a fresh application can be made.

**Decision**

- 26. **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.

- 27. 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 2<sup>nd</sup> October 2014