



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/35208/2014

THE IMMIGRATION ACTS

Heard at Field House
On 6th August 2015

Decision and Reasons Promulgated
On 21st August 2015

Before

UPPER TRIBUNAL JUDGE RINTOUL
DEPUTY UPPER TRIBUNAL JUDGE BAGRAL

Between

MR EZEKIEL ONYEDIKA ANEKWE
(ANONYMITY ORDER NOT MADE)

Claimant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr I Jarvis , Senior Home Office Presenting Officer
For the Respondent: Mr Iqbal. A Seelhoff Solicitors

DECISION AND REASONS

1. The First-tier Tribunal (FtT) did not make an anonymity direction. We have not been asked to make one and see no public policy reason for doing so and none is made.
2. This is an appeal by the Secretary of State for the Home Department (hereafter “the respondent”) against the decision of the First-tier Tribunal (FtT) (Judge O’Garro). On 2nd April 2015 the FtT allowed the appeal of Mr Enekwe (hereafter “the claimant”), a citizen of Nigeria, against the decision of the respondent dated 20th August 2014

refusing his application for leave to remain as a partner pursuant to Appendix FM of the Immigration Rules. The respondent refused the application on the basis that the claimant was not able to demonstrate that the financial requirements of the Rules were met on the basis that specified documents had not been produced that met fully with the prescriptive requirements of Appendix FM-SE of the Rules.

3. The FtT noted there was no dispute the claimant had two jobs and that specified documents had been provided in respect of his employment for "Serenity Care Ltd" from January to March 2014. There was no dispute and, it was accepted, that the claimant's earnings from this employment was £953.19. The FtT went on to consider the evidence of the claimant's earnings from his second employment with Marianne Pilkington. The judge referred to the nature of the evidence the claimant was required to submit in order to meet the prescriptive requirements of Appendix FM-SE of the Rules. She observed that the net income shown on the wage slips which covered the period from 27th January 2014 to 2nd June 2014 correlated with payments credited to the claimant's bank account and noted the employer's letter in which it was stated the claimant's gross earnings from this employment totalled £9,120.50.
4. The judge considered and attached weight to a letter issued by HMRC of 17th February 2015 and earlier letters dated 22nd August 2014 and 22nd October 2014 respectively, post the date of application, which confirmed the claimant's gross earnings from January to June 2014 was indeed £9,120.50. In view of that evidence the judge concluded that she had "no option" but to accept the claimant's earnings during his employment with Ms Pilkington was £9,120.50. The judge found that when these earnings were added to the accepted earnings of £953.19, the claimant's total gross earnings amounted to £10,073.69. The judge calculated with reference to paragraphs 13(b) and 15 of Appendix FM-SE that the claimant's gross income was therefore £20,147.38. Thus she found the claimant was able to demonstrate that he met the income threshold under Appendix FM of the Rules. Accordingly, the appeal was allowed under the Immigration Rules.
5. The respondent lodged an application for permission to appeal arguing that the judge erred in law in that her calculation of the claimant's income was based on earnings from employment that had ended prior to the date of application of 19th July 2014 and, there was no evidence of current employment as of that date. Further, it was contended that the wording of paragraph 13 of Appendix FM-SE required the claimant or his partner to be in current employment or otherwise self-employed. Permission to appeal was granted by FtT Judge Brunnen on 4th June 2015 on the basis that it was arguable that earnings from past employment could not satisfy this requirement.
6. We noted the narrow issue raised by this appeal and that our task was to decide whether the FtT erred in its consideration of the requirements of Appendix FM-SE and whether the evidence before the FtT demonstrated the claimant was in employment at the date of application. In this regard we observed that it was not easy for us to discern what evidence was put before the FtT but, the evidence now produced in the form of a letter issued by HMRC of 17th February 2015, we accept,

did show that the claimant had been employed by HRGO Plc since 2013. Nevertheless, we observed that this did not avail the claimant as the absence of evidence of wage slips or an employment letter from HRGO excluded him from meeting the exacting requirements of the Rules.

7. In amplifying the grounds before us Mr Jarvis submitted that the judge's calculation of the claimant's gross annual income was wrong. He referred to paragraph 15(b)(i) of Appendix FM-SE and submitted that the judge was required to consider gross annual earnings over a period of twelve months and not six months. He referred to three entries in the schedule submitted by the claimant's representative which helpfully set out the claimant's income received in the twelve-month period prior to the date of application which indicated his income was over the required threshold. He said however that it was not clear whether gross or net figures had been relied on in respect of three entries and he referred to income received from HRGO Plc on 20th December 2013 and Serenity Health Care on 14th February 2014 and 14th March 2014 respectively. He noted, in any event, that there was an absence of specified evidence in the form payslips and an employment letter in respect of these entries.
8. We acceded at this stage to the request of the representatives for time to consider the schedule in order to ascertain whether the requirements of the Rules were met. Upon resumption of the hearing Mr Jarvis agreed that the evidence established that the claimant was employed at the date of application and the parties agreed that the evidence thus far established in the manner prescribed by the Rules that the claimant's gross annual earnings totalled £18,113.04. Mr Jarvis conceded that the refusal letter had confused matters in that consideration was given to a six month period rather than the applicable twelve month period prior to the date of application. He further acknowledged that the respondent had failed to apply the discretion conferred by Appendix FM-SE in circumstances where a specified document had not been produced. He acknowledged that the claimant's bank statements showed monies being deposited into his account that related to his income, and that the respondent would have due regard to that evidence. Mr Jarvis thus conceded that the judge materially erred in law and invited us to allow the appeal on the basis that the respondent's decision was not in accordance with the law. Ms Iqbal did not dissent from such a course.
9. We announced at the hearing that we were satisfied the FtT erred in law for the reasons given by Mr Jarvis. We accept that the claimant had provided some evidence that he was employed at the date of application but not all of the required specified evidence was provided with that application. Had it been so the schedule of the claimant's income appears to establish that his gross annual income was in excess of the income threshold for a twelve month period prior to the date of application. We agree with Mr Jarvis that in such circumstances the Rules permit the exercise of discretion which in this case was not considered.
10. For the above reasons we conclude that the FtT Judge materially erred in law and her decision is set aside.

11. We remake the decision and find that the respondent's failure to consider her discretion as conferred by the Rules was unlawful. We observe that it is accepted by both parties that the shortfall in income is relatively small, and that, as one of his previous employers, Serenity Care Ltd has been dissolved it may not therefore be possible to obtain documents issued by them.
12. The effect of this decision is that the respondent must now reconsider the claimant's application which remains outstanding on the concessions made before us and our findings. The respondent must take into account the schedule of the claimant's earnings annexed to this decision and is to apply her own guidance as set out in Appendix FM-SE; look at the evidence as a whole and apply the 'evidential flexibility' procedure built in to that appendix at paragraph D in accordance with the Rules applicable at the date of application.

Decision:

13. The making of the decision of the FtT did involve the making of an error on a point of law. We set aside the decision and substitute our decision allowing the appeal to the extent that the respondent's decision is not in accordance with the law. The application thus remains before the respondent awaiting a fresh, lawful decision. This disposes of the proceedings before the Upper Tribunal.



Signed:

Dated: 19th August 2015

Deputy Upper Tribunal Judge Bagral