



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: OA/02484/2014

**THE IMMIGRATION ACTS**

Heard at Field House Oral determination  
given following hearing  
On 20 August 2015

Decision and Reasons Promulgated  
On 22 September 2015

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

THE ENTRY CLEARANCE OFFICER

Appellant

and

MR MD. AHSANUL HAQUE  
(ANONYMITY DIRECTION NOT MADE)

Respondent

**Representation:**

For the Appellant: Mr T Wilding, Home Office Presenting Officer  
For the Respondent: Mr P Saini, Counsel instructed by Universal Solicitors

**DETERMINATION AND REASONS**

1. This is the Entry Clearance Officer's appeal against a decision of First-tier Tribunal Judge Colvin, who had allowed Mr Haque's appeal against her decision refusing him leave to enter. For ease of reference, throughout this determination I shall refer to the

Entry Clearance Officer, who was the original respondent, as “the Entry Clearance Officer” and to Mr Haque, who was the original appellant, as “the claimant”.

2. The claimant married the sponsor, Ms Chowdhury, in April 2008 and they have a child who is now aged 6. Ms Chowdhury is a British citizen and has been so since birth. The claimant is a national of Bangladesh. They married in Bangladesh and it is not clear from the papers why it was that when the sponsor returned to this country she did not bring her son with her but as a result the present situation is that while the sponsor, who as I have said is a British citizen, is living and working in this country, her husband and her son, who is a British citizen, remain in Bangladesh. There is insufficient evidence before the Tribunal on which any finding could be made at this stage on Article 8 grounds although it may be that at a future date an Article 8 claim could be made.
3. The sponsor has had a number of jobs and one of them is with a firm called Panache Outerwear where she has been employed since April 2013 and from which she receives an income of around £15,000 per year. She also has worked for the Tilbury Post Office from May to September 2013 and since October 2013 she has worked for McDonald's. It appears from the evidence before me quite clear that as at the present time her income is certainly above the threshold necessary to allow the claimant entry clearance because the threshold is and has been at all material times £18,600 and her combined earnings from Panache Outerwear and McDonald's is a little over £20,000.
4. On 15 October 2013 the claimant submitted an application for entry clearance relying on the evidence that the sponsor was working as an assistant quality controller with Panache Outerwear in support of which various payslips were submitted. The claimant also relied on income which the sponsor was said to be earning from the Tilbury Post Office amounting to a little under £3,600 per year. It appears that the income which it was said in that application the sponsor was earning totalled £18,588 which itself is slightly below the necessary threshold.
5. The application was refused by the Entry Clearance Officer for two reasons. The first reason given was that apparently the Entry Clearance Officer had received information suggesting that the sponsor was no longer employed by Panache Outerwear and if this was correct as the Entry Clearance Officer believed it followed that the payslips showing that she was still employed must have been false; the application was accordingly refused because it was said that false documents had been submitted for the purpose of the application. I deal with this briefly below.
6. The other reason why the application was refused was because not only was the income claimed to be that of the sponsor below the necessary threshold but also the evidential requirements under Appendix FM-SE had not been satisfied. The relevant requirements are that the sponsor in this case would have been required to demonstrate that prior to the date of application she could show six months of payslips in respect of each employment relied upon. Not only did the evidence from the Tilbury Post Office not satisfy this requirement but it did not even set out what

her income actually was. It is not suggested that the evidential requirements under Appendix FM-SE were actually satisfied.

7. In the course of the refusal letter, however, although the Entry Clearance Officer did state that the evidential requirements had not been satisfied the following was also contained:

“However, no final determination has been made at this stage as to whether you meet the income threshold and/or related evidential requirements. This is because the courts have not yet decided the outcome of the Secretary of State’s appeal in a legal challenge to the income threshold requirement. More information about this is set out on the Home Office website”.

This is a reference to a challenge by the Secretary of State, which ultimately succeeded, to a decision of the former President of this Tribunal, Mr Justice Blake, in *MM (Lebanon)*. The letter then continues as follows:

“If you appeal against this refusal decision, a final determination as to whether you meet the income threshold and/or related evidential requirements under the Rules may be made at a later stage. In making any such determination account would be taken of any further information or document(s) regarding the income threshold and/or related evidential requirements which you enclosed with your appeal”.

8. No further determination was in fact made and it appears from the papers within the file that although there was what is described as “a cursory review” by an Entry Clearance Manager the Entry Clearance Officer was not prepared to concede the appeal and the decision to refuse entry clearance was maintained.
9. The claimant appealed against the decision refusing him entry clearance and his appeal was heard before First-tier Tribunal Judge Colvin sitting at Taylor House on 11 March 2015. In a decision dated 1 April 2015 and promulgated shortly thereafter, Judge Colvin allowed the appeal. Her reasons for allowing the appeal included relying on the Entry Clearance Officer’s statements within the refusal letter set out above, to the effect that a final determination as to whether the claimant met the income threshold and/or evidential requirements under the Rules may be made at a later stage and that in making any such determination further account would be taken of any further information or documents enclosed with his appeal.
10. The Entry Clearance Officer now appeals against this decision, permission to do so having been granted by First-tier Tribunal Judge Brunnen on 3 June 2015.
11. Before me on behalf of the Entry Clearance Officer, Mr Wilding submitted that the judge was not entitled to disregard the evidential requirements under Appendix FM-SE. Although Section 85 of the Immigration and Asylum Act 2002 allowed a court to take account of evidence submitted after the decision which related back to the decision in question this had no bearing on the evidential requirements under Appendix FM-SE which were mandatory. Before an application could be granted

there was a requirement to provide the evidence in the form specified and in this case what was required was evidence that the sponsor had had income from the particular employments for a period of six months prior to the date of the application.

12. I should state at this point that Judge Colvin had found as a fact (and the evidence in support of this finding is very clear indeed on the papers) that the suggestion that the sponsor may have ceased her employment with Panache Outerwear was unfounded. There was evidence before the judge which is before this Tribunal also which makes it quite clear that the employment of the sponsor with this company has been a continuous one since 2013 and on behalf of the Entry Clearance Officer Mr Wilding did not seek to suggest otherwise. It would appear from the evidence contained within the file that on this point the Entry Clearance Officer simply made a mistake.
13. However, even though the Entry Clearance Officer did not in fact reconsider the decision that had been made, as Mr Wilding pointed out the basis on which the paragraphs had been added to the refusal letter was that this would bite if and to the extent that the Higher Courts upheld the decision which had been made in *MM (Lebanon)* which if correct would mean that in certain circumstances an income lower than that specified in Appendix FM-SE might be sufficient. In the event the Court of Appeal allowed the Secretary of State's appeal and so this point did not arise.
14. On behalf of the claimant Mr Saini's primary submission was that as the Entry Clearance Officer had indicated that he may reconsider he should have done so and that this indication effectively meant that he has agreed to waive the specific requirements of Appendix FM-SE. Regrettably I am unable to accept this submission. While it is right that the Entry Clearance Officer certainly has a discretion in certain circumstances to grant entry clearance outside the Rules it is clear from the refusal letter that the Entry Clearance Officer was not saying that he would dispense with the requirements under the Rules. Indeed it is stated specifically within the letter that the point was being taken that "you have failed to provide the specified documents of your sponsor's employment ... [which] documents are specified ... in Appendix FM-SE and must be provided".
15. Accordingly in my judgment and as I say regrettably on the facts of this case, there was no proper basis upon which Judge Colvin could have allowed the claimant's appeal. The fact is that the claimant did not satisfy the requirements under the Rules on any basis, these requirements are mandatory, and they had not been specifically waived. As I have already said, there was no evidential basis upon which an Article 8 claim could have succeeded, although I do not doubt that had Mr Saini, who appeared before me, been instructed at a much earlier stage an Article 8 claim may very well have been pursued and evidence might have been obtainable for this purpose.
16. It follows that the decision of the First-tier Tribunal must be set aside and this Tribunal must remake the decision dismissing the appeal. Before formally making this decision, however, I should add that on the evidence which has been considered

by this Tribunal it does appear that a further application if made now ought to succeed. It is clear from the evidence that the sponsor has now been working for Panache Outerwear for considerably longer than six months (around two years) and that she has also now been working for McDonald's for considerably longer than the six month period required under the Rules. As I have already noted, her combined income from these employments is now over £20,000 and indeed from the evidence which is before me it appears that her income in the period before the application was made (even though not evidenced in a way which satisfied the evidential requirements under the Rules) was even then above the level required. In these circumstances, especially bearing in mind that the couple have a young son, who is a British citizen, and who ideally ought to be brought up in a family where both his parents are present, I would hope that if a further application is now made in which the evidential requirements are satisfied, this application will be considered very speedily indeed as any further delay should be kept to a minimum.

**Notice of Decision**

**I set aside the decision of First-tier Tribunal Judge Colvin as containing a material error of law.**

**I remake the decision, dismissing the claimant's appeal.**

No anonymity direction is made.

Signed:

A handwritten signature in black ink, appearing to read 'Ken Craig', written over a light blue rectangular background.

Upper Tribunal Judge Craig

Date: 18 September 2015