



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: OA/10805/2014

**THE IMMIGRATION ACTS**

Heard at Bradford  
On 3<sup>rd</sup> September 2015

Decision and Reasons Promulgated  
On 8<sup>th</sup> October 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

THE ENTRY CLEARANCE OFFICER (ISLAMABAD)

Appellant

and

MRS TAYYABA NASEER  
(ANONYMITY NOT DIRECTED)

Respondent

**Representation:**

For the Appellant: Miss L Mair, Counsel instructed by Prolegis Solicitors

For the Respondent: Mrs R Pettersen, Senior Home Office Presenting Officer

**DECISION AND REASONS**

*Introduction*

1. This is an appeal by the Entry Clearance Officer in Islamabad against the decision of First-tier Tribunal Judge Hillis to allow the appeal against the refusal of Mrs Tayyaba Naseer's application for entry clearance as the spouse of Mr Mohammad Ramzan. For ease of exposition, I shall hereafter refer to the parties in accordance with their status in the First-tier Tribunal; that is to say, I shall refer to Mrs Naseer as 'the appellant' and to the Entry Clearance Officer as 'the respondent'.

*Background*

2. The appellant made her application on the 17<sup>th</sup> September 2013. She relied upon her husband's income as a self-employed restaurateur as evidence of her fulfilment of the financial requirements of Appendix FM of the Immigration Rules. The respondent refused the application, in part, because the appellant had failed to submit all the documents required by Appendix FM-SE of the Rules. That deficiency appears to have been rectified by the time of the hearing of the appeal. The other reason why the respondent refused the application was that the appellant's gross income in the tax year preceding the date of application (i.e. between the 5<sup>th</sup> April 2012 and 4<sup>th</sup> April 2013) was £15,670, whereas the required threshold under Appendix FM is £18,600.

*The question of law raised by this appeal*

3. The question that I have to determine is this: what is the correct accounting period for assessment of the annual gross income of a self-employed person under Appendix FM-SE of the Rules?
4. At paragraph 15 of his decision, Judge Hillis recorded that the representatives at the hearing before him had agreed that, "the period of 18<sup>th</sup> August 2012 to 17<sup>th</sup> August 2013 is a permissible period for the calculation of the Sponsor's income before tax". Ms Mair helpfully explained to me of the basis upon which she had agreed with Mr Smith (the respondent's Presenting Officer) that this was an appropriate accounting period under the Immigration Rules. The correctness or otherwise of adopting that accounting period as the basis for assessment is considered at paragraph 6 (below). However, it will suffice for now to say that the judge accepted (as do I) that Mr Ramzan's gross annual income during that accounting period was £18,893. That amount exceeds the minimum threshold that is required under Appendix FM as a pre-requisite for the granting of entry clearance.
5. However, as I have previously noted, the accounting period adopted by the respondent was that of the tax year immediately preceding the date of the application. This appeal therefore turns upon the question of whether the judge erred in law by adopting a different accounting period and, if so, whether that error was material to the outcome of the appeal.

*Discussion*

6. Ms Mair informed me that the basis of assessment that she had agreed with Mr Smith in the First-tier Tribunal was founded upon the following sub-paragraph of paragraph A.1 of Appendix FM-SE -

Where this Appendix requires the applicant to provide specified evidence relating to a period which ends with the date of application, that evidence ... must be dated no earlier than 28 days before the date of application.

However, that sub-paragraph is not concerned with defining the relevant accounting period. Rather, it is concerned with the permissible limits of the dating of a specified

document in circumstances where there is a requirement to provide evidence “relating to a period which ends with the date of application”. As we shall see, that was not a requirement that was engaged by the facts of this appeal.

7. Ms Mair nevertheless sought to persuade me that it was not open to the respondent to complain that the judge had erred by adopting an accounting period which had been agreed as appropriate in the First-tier Tribunal. I disagree. Whilst fairness undoubtedly dictates that a reasonable period of notice must be given before factual concessions are withdrawn, the respondent cannot in my view be bound by a concession of law that was wrongly made. It is the overriding duty of the First-tier Tribunal to apply the law correctly and if, for whatever reason, it fails to do so, then either party is entitled to have the matter put right by the Upper Tribunal.
8. Thus, whilst he appears to have been led into it by the misguided efforts of the representatives to assist him, I am driven to conclude that the judge erred in law by taking a 12-month period that ended no more than 28 days before the date of the application as the basis for his assessment of the sponsor’s gross income. The remaining question is whether that error was material to the outcome of the appeal
9. Although it was not cited to me, the respondent’s argument is supported by the decision of the Upper Tribunal in **Hameed (Appendix FM - financial year)** [2014 UKUT 266 (IAC)]. The question of law in that case was identical to that which is raised in the instant appeal. Thus, the headnote to the decision reads -
  - The financial year for purposes of Appendix FM is the tax year, not the year selected for accounting purposes.
10. However, the Tribunal did not provide any analysis or reasons for holding that this was the legal position. Moreover, as with the accounting period that was adopted by the FtT judge in this case, the Tribunal in **Hameed** appears to have based its decision upon a paragraph of Appendix FM-SE that is concerned only with the nature of specified documents that must be submitted with the application as proof of the sponsor’s gross income rather than upon the paragraph that defines the basis of calculation. Thus, the Tribunal referred to the following words that appear in paragraph 7 of Appendix FM-SE -

The following documents for the last full financial year, or for the last two such years (where those documents show the necessary level of gross income as an average of those two years):

- a. annual self-assessment tax return to HMRC (a copy or print-out); and
- b. Statement of Account (SA 300 or SA302).

It did not however refer to paragraph 13(e) of Appendix FM-SE, which in fact sets out the basis upon which the sponsor’s gross annual income is to be calculated. This reads as follows:

Where the person is self-employed, their gross annual income will be the total of their gross income from their self-employment ... in the last full financial year or an average of the last two full financial years.

11. Ms Mair submitted two dictionary definitions (from 'Business Directory.com' and the Macmillan Dictionary') of the term 'financial year'. The essence of each of them is that 'financial year' means a period of 52 consecutive weeks - which may begin on any day of the calendar year - at the end of which account books are closed, profit and loss is computed, and financial reports are prepared for filing. The Collin's Dictionary definition of the term notes, as is in any event clear from the above definition, that the so-called 'tax year' is in reality nothing more than the 'financial year' adopted by Her Majesty's Government. Other businesses and organisations - as well as the governments of other nations - can and do choose quite different dates for the commencement of their respective financial years.
12. The above proposition is illustrated by the printed page from the UK Government's website, entitled "Accounting periods for Corporation Tax", which Ms Mair provided in support of her submission that Her Majesty's Revenue and Customs [HMRC] treats 'financial year' as that selected by the taxpayer rather than that of the Government. This advises the taxpayer that "your financial year is the time covered by your annual accounts". It is thus clear that, at least for the purposes of corporation tax, HMRC are concerned with the taxpayer's own financial year rather than that of the Government.
13. It is however unnecessary to refer to external sources in order to conclude that paragraph 13(e) of the Appendix FM-SE is concerned with the sponsor's financial year rather than that of the Government. In my view, the construction contended for by Ms Mairs is one that accords with the ordinary and natural meaning of the words that are employed. Thus, the subjects of the sentence are the "self-employed person" and the "gross income from their self-employment". It seems to me to follow from this that the reference to 'financial year' must be to that of the self-employed person rather than to that of the Government. Moreover, there is considerable force in Ms Mairs' submission that if the draftsman had intended that the tax year should form the basis of assessment for the purpose of the Immigration Rules, then there is no reason why this could not have been stated in clear and unambiguous terms. I also accept Ms Mair's submission that there is no obvious reason of public policy for the applicant to submit evidence of the sponsor's gross profits from self-employment over the course of anything other than his own financial year. After all, the basis for assessment of profits in any tax year is that of the taxpayer's own financial year, and it is not immediately apparent to me why it should be any different for immigration purposes.
14. I therefore hold that for the purposes of Appendix FM-SE, the 'financial year' is the period selected by the taxpayer for accounting purposes and not the tax year. As it is not disputed that the sponsor's gross annual income during the financial year ending on the 30<sup>th</sup> June 2013 (the sponsor's last full financial year preceding the date of

application) also exceeded the threshold of £18,600, it follows that the judge's error in selecting a different period was not material to the outcome of the appeal.

**Notice of Decision**

15. The appeal is dismissed.

Anonymity is not directed.

Signed

Date

Judge Kelly  
Deputy Judge of the Upper Tribunal