



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: OA/12087/2013

THE IMMIGRATION ACTS

Heard at Field House  
On 9 January 2015

Determination Promulgated  
On 19 January 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

MRS TANJINA AFRIN  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER - DHAKA

Respondent

Representation:

For the Appellant: Mr M B Hussain, Solicitor, Zahra & Co Solicitors  
For the Respondent: Mr P Nath, Specialist Appeals Team

DECISION AND REASONS

1. The appellant appeals to the Upper Tribunal from the decision of the First-tier Tribunal dismissing her appeal against the decision by the Entry Clearance Officer to refuse her entry clearance as the spouse of a person present and settled here. The

First-tier Tribunal did not make an anonymity direction, and I do not consider that such a direction is warranted for these proceedings in the Upper Tribunal.

2. The application was made on 4 February 2013, and it was refused on 29 April 2013. The application was refused on the ground that the appellant had not shown that she met the financial requirements. From the evidence provided, her sponsor's gross income from his employment with Hillside Tandoori was £18,720 per annum. But his bank statements until 3 September 2012 showed deposits of £360 per week whereas his pay slip showed (net) earnings of £293.46. The ECO was therefore not satisfied as to the veracity of the sponsor's claimed employment. Furthermore, the appellant had not included a contract of employment between the sponsor and Hillside Tandoori. This document was specified in Appendix FM-SE, and had to be provided.
3. In the grounds of appeal, the appellant's solicitors noted that it was accepted by the respondent that the sponsor's annual income of £18,720 exceeded the required £18,600 threshold. The explanation for the deposit of £360 into the sponsor's account up until 3 September 2012 was that the sponsor had assumed that this was what he needed to do. He had personal savings, and he had deposited the exact amount of his gross earnings each week. This was an honest mistake on the advice of third parties. When he realised it was not the correct advice, he had stopped depositing £360 each week (and had started depositing only the net amount that he received each week).
4. The sponsor was now providing two P60s. One P60 represented his salary from Hillside Tandoori for the period 2 July 2012 to 16 January 2013, and the other represented his salary from 16 January 2013 to the year end. If the respondent had any doubts, he should check the information with HMRC. His contract of employment had not been included as it was not a requirement under the Rules.
5. On 9 July 2014 an Entry Clearance Manager gave his reasons for upholding the refusal decision despite the grounds of appeal, and the additional evidence which had been served by way of appeal. While a contract of employment was not required under the Rules, the ECO was not satisfied with the overall veracity of the sponsor's claimed employment. Following further research and information available in the public domain, he agreed with the ECO that a clear and cogent picture of the sponsor's employment and income from Hillside Tandoori had not been provided. There was no record of the business on the Companies UK website. There was also no up-to-date independent evidence from HMRC in support of the sponsor's employment or of the existence of his claimed employer.
6. He noted that two P60s had been provided for the tax year ending 2013. But it was not clear why if the sponsor was employed by Hillside Tandoori as claimed, he had two P60s, both of which had different employer names. Nor was it clear why if the sponsor had been employed since April 2008 as claimed earning the stated salary, the P60s would show in combination an annual income which was well below the income threshold. In the absence of further evidence to support the sponsor's

claimed income, he was not satisfied the documentation provided was reliable evidence of the sponsor's employment and income.

### **The Hearing Before, and the Decision of, the First-tier Tribunal**

7. For the purposes of the hearing in the First-tier Tribunal, the appellant's solicitors compiled an appellant's bundle containing a detailed witness statement from the sponsor in which he sought to address the concerns and apparent anomalies raised both by the Entry Clearance Officer and the Entry Clearance Manager. He explained his employment history with Hillside Tandoori. He started working for them in April 2008, as evidenced by the accountant's letter in the respondent's bundle. On 1 April 2012 he had left this employment (as evidenced by the P45 in the respondent's bundle), and had returned to Bangladesh to marry his wife. He had come back from Bangladesh on 30 June 2012, and had resumed employment with Hillside Tandoori. At that time, the owner of the restaurant was Mr Mannan. On 17 January 2013 Hillside Tandoori came under new ownership and management of Mr Aziz. This explained why he had been issued with two P60s for the tax year ended April 2013. What he said was confirmed by an HMRC letter dated 20 January 2014 at page 1 of the appellant's bundle. He continued to work for Mr Aziz at Hillside Tandoori. As evidence of this, he referred the Tribunal to the employer's accountant's letter at page 7 of the appellant's bundle, and to the P60 for the tax year ended April 2014 at page 8. The genuineness of the P60, if there was any doubt, was confirmed by HMRC in its letter dated 15 May 2014 at page 2 of the appellant's bundle.
8. In his subsequent determination, Designated Judge Shaerf held that the sponsor had not shown any source of income for the twelve months preceding the appellant's application or the decision under appeal to show that his earnings were in excess of those referred to in the letter of 20 January 2014 from HMRC. The letter gave a figure of £11,880 for the year ending 5 April 2013. The decision was made less than four weeks after the end of the tax year so that even taking into account the increased salary said to have been paid for the tax year ending 5 April 2014 and the letter of 15 May 2014, the appellant had not shown the sponsor met the relevant income requirements imposed by the Rules. The judge went on to observe that there was no explanation of the source of the funds for the weekly payments of £360 shown in the sponsor's bank statements during 2012. The judge concluded that the evidence did not show that before the application the sponsor was earning not less than the minimum of £18,600 per annum.

### **The Application for Permission to Appeal**

9. The appellant's solicitors applied for permission to appeal, arguing that the judge had misdirected himself in law or had ignored the evidence that the appellant had not worked continuously throughout the tax year ending 5 April 2013. The judge was also wrong to say that no explanation had been provided as to why the bank statements in 2012 showed a weekly deposit of £360.

### **The Grant of Permission to Appeal**

10. On 24 November 2014 Designated First-tier Tribunal Judge Macdonald granted permission to appeal, holding that the grounds disclosed an arguable error of law.

### **The Rule 24 Response**

11. On 5 December 2014 John Parkinson of the Specialist Appeals Team settled a Rule 24 response on behalf of the respondent. The evidence was clearly inadequate to establish the level of the claimed employment and remuneration. The bank statements did not demonstrate payment of the claimed income.

### **The Hearing in the Upper Tribunal**

12. After reviewing the documents in the respondent's bundle and appellant's bundle with the parties, I was satisfied that an error of law was made out such that the decision should be set aside and remade. I gave my reasons for so finding in short form, and my extended reasons are set out below. I received further submissions from the parties on the topic of how the decision should be remade, and I reserved on this issue.

### **Reasons for Finding an Error of law**

13. Judge Shaerf proceeded on the premise that the sponsor needed to show that his earnings for the tax year ending 5 April 2013 were at least £18,600, whereas the letter from HMRC dated 20 January 2014 confirmed net earnings for the tax year of £11,880 (£13,226.40 gross).
14. The premise upon which the judge proceeded was wrong for two reasons. Firstly, the earnings in question did not relate to a twelve month period, but only to the sponsor's earnings from 1/2 July 2012 (the first payslip is dated 8 July, week 14). Nowhere in the judge's findings is there an acknowledgement in the evidence that the sponsor had ceased working for Hillside Tandoori on 1 April 2012, as evidenced by the P45, and had purportedly resumed his employment with the same restaurant on 1 July 2012.
15. Secondly, in order to prove the sponsor's level of salaried employment in the UK, an applicant only has to provide pay slips and bank statements covering a six month period prior to the date of application *where the sponsor has been employed by their current employer for at least six months* (see paragraph 2 of Appendix FM-SE).
16. Although there had been a change of ownership of the restaurant in January 2013, the trading name, the terms and conditions of the appellant's employment, and his place of work remained the same. So the sponsor fell to be treated as a person who had been employed by his current employer for at least six months as at the date of application.

17. Also, contrary to the judge's finding, it was not the case that no explanation had been advanced for the deposits of £360 per week in the bank statements between July and September 2012. The sponsor had given an explanation in his witness statement.
18. As is apparent from the contents of the refusal notice and the subsequent ECM review, the core issue in the appeal was not whether the sponsor *appeared* from the specified documents to be earning in excess of £18,600 gross per annum as at the date of application/decision (the ECO answered this question in the affirmative, save for the identified anomaly over the deposit of £360 not £293.46 each week) but whether the documents truly reflected the underlying reality. It was precisely because this was the core issue (genuine or fictitious employment at a gross salary per annum of £18,720) that the ECM invited the sponsor to provide *additional evidence* by way of appeal to establish the truth of the claimed employment. So procedural fairness required an adequate engagement with the additional evidence which the sponsor had provided.

### **The Remaking of the Decision**

19. Mr Nath did not seek to cross-examine the sponsor on his evidence, and he was content that I should remake the decision on the documents.
20. I find that the sponsor has addressed most of the credibility concerns raised by the Entry Clearance Officer and the Entry Clearance Manager, but not all of them. There is a disparity between the information given in the payslips and the earnings confirmed by HMRC. If the gross earnings figure for the tax year to April 2013 is divided by 360, the result is that the sponsor worked for 36.74 weeks in the tax year. But according to the payslips he started working in week 14, and so the total number of weeks worked in the tax year was 39 (52 weeks minus 13 weeks). If so, his total earnings by the end of the tax year should have been higher. Alternatively, dividing the HMRC figures by 39 produces a weekly wage which is lower than £360 gross, and lower than an annual gross salary of £18,600.
21. Neither the ECO nor the ECM took the point that the employer's letter submitted with the application did not include all the specified information. But in the light of the above anomaly it becomes highly significant that the employer's letter does not specify the date on which the sponsor resumed employment in 2012. The accompanying accountant's letter merely says he resumed employment in July, without saying when in July.
22. The issue raised in the Rule 24 response with regard to the appellant's compliance with the requirement to produce the specified documents referred to in paragraph 2 of Appendix FM-SE is whether the appellant has complied with sub-paragraph (c), which required her to provide personal bank statements corresponding to the same periods as the pay slips, "showing that the salary has been paid into an account in the name of the person". It is argued in the Rule 24 response that the appellant's appeal fell to be refused in any event as the personal bank statements up to 17 September 2012 did not show the sponsor's salary being paid into his account. I am constrained to agree. Although the sponsor has provided an explanation for paying

in an amount which corresponds to his gross weekly wage, the bank statements up to 17 September 2012 do not show his salary, which was paid net of tax, being paid into his bank account. So the appellant has failed to comply with a mandatory requirement.

**Notice of Decision**

The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside and the following decision is substituted: this appeal against refusal of entry clearance is dismissed under the Rules.

No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge Monson

Signed

Date

Deputy Upper Tribunal Judge Monson