Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/15182/2013

THE IMMIGRATION ACTS

Heard at Field House
On 16 June 2015
Prepared 17 June 2015

Decision & Reasons Promulgated
On 26 June 2015

Before

UPPER TRIBUNAL JUDGE MCGEACHY

Between

ENTRY CLEARANCE OFFICER - DHAKA

Appellant

and

MISS JESMIN AKTHER

Respondent

Representation:

For the Appellant: Mr S Whitwell, Senior Home Office Presenting Officer
For the Respondent: Mr R Abdar of Messrs Kesar & Co Solicitors

DECISION AND DIRECTIONS

1. The Entry clearance Officer appeals, with permission, against a decision of Judge of the First-tier Tribunal Blake who, in a determination promulgated on 4 February 2015, allowed the appeal of Miss Jesmin Akther against a decision of the Entry Clearance Officer Dhaka made on 11 June 2013 to refuse her entry clearance to come

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to Britain as a spouse under the provisions of paragraph EC-P.1.1 of Appendix FM of the Immigration Rules.

2. Although the Entry Clearance Officer is the appellant before me I will for ease of reference refer to him as the respondent as he was the respondent in the First-tier. Similarly I will refer to Miss Jesmin Akther as the appellant as she was the appellant in the First-tier.

3. The appellant is married to Mr Muhammed Rahman who is settled in Britain. The reasons for refusal were that the English language certificates in speaking and reading writing and listening provided by the appellant were not accepted and secondly, that it was not accepted that the appellant met the financial requirements of the Rules.

4. At the hearing of the appeal before Judge Blake it was accepted that the appellant's language certificates were adequate and therefore that the only issue before him was that of whether or not the appellant met the financial requirements of the Rules.

5. The decision had been reviewed by the Entry Clearance Manager on 7 July 2014. In his decision the Entry Clearance Officer wrote:-

> "The appellant stated that the sponsor was employed by Acha Hai Ltd since 01/08/2012 earning £13,000 per annum. She stated that the sponsor was also self-employed at the date of application (which was 19/02/13) as a taxi driver earning £9,962 per annun.
>
> What the Entry Clearance Officer did not make clear however was that for self-employment, the appellant is required to show that the sponsor was self-employed at the point of application and in the last full financial year received self-employment and other income sufficient to meet the financial requirement applicable to the application. In the appellant's case therefore, she was required to show documents pertaining to 2011/2012 tax year, as well as evidence of continuing self-employment.
>
> In addition income from self-employment (Category F or Category G) can be combined with income from salaried and non salaried employment (category A) in order to meet the financial requirement. However, unlike other categories, these sources of income must fall with the same financial year(s) in order to be included. The appellant has combined income from Category F for tax year 2011/2012 with income under Category A and she is therefore required or show the combined income from 2011/29012. The appellant started her salaried income in August 2012 and this does not therefore fall within the relevant tax year. The Entry Clearance Officer was only therefore able to consider the self-employment for 2011/2012 tax year, and therefore only specified in the bank statement evidencing this self-employment was missing.
>
> Whilst the appellant has now provided bank statements for the relevant time period, this does not demonstrate an income from self-employment of £1,8000 per annum or more for the relevant tax year. The decision to refuse under paragraph EC.1.(d) was therefore correct."

6. In the determination Judge Blake set out his findings in paragraphs 48 onwards. He wrote:

> "50. I took into account paragraph E-ECP.1. I noted that it was submitted that the appellant had failed to provide specified documents in the form of a contract of employment from Acha Hai Ltd and personal bank statement for the same twelve month periods as the tax returns.
>
> 51. I took account of the fact that the sponsor had been self-employed working as a minicab driver since May 2008. I further noted that in addition to his self-employment he had taken a second salaried employment with Acha Hai Ltd from 1 August 2012.
>
> 52. I note at the time of the application on 19 February 2013 the sponsor had been in that employment for six months as was required by the Immigration Rules.
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> 53. I further took into account that he had submitted documents attesting his self-employment as well payslips in respect of this salaried employment. I found that the combined earnings from the two employments totalled in the region of £22,900.
>
> 54. I found that with an income of £22,962 per annum the appellant would meet the requirements of Appendix FM as it exceeded threshold of £18,600 required under E-ECP.3.1(a)(i) of Appendix FM.
>
> 55. I noted that this evidence had been acknowledged in the refusal.
>
> 56. I considered the appellant's representative's submissions that the ECM had considered the wrong subparagraphs under the Rule. I noted that paragraph 13(f) prohibited the combination of self-employment income with specified savings and paragraph 13(g) applied to those relying on income other than from employment or self-employment.
>
> 57. I noted that the appellant was not relying on either risk of these subparagraphs. I considered that the correct reference to the Rules had to be a reference to paragraph 13(e) under Appendix FM-SE.
>
> 58. I found the ECM had erred in his understanding of subparagraph 13(e). I accepted the submission that unlike other subparagraphs under paragraph 13, paragraph 13(e) was freestanding, without reference to the other subparagraph.
>
> 59. I noted from the Rules attached to the appellant's bundle, paragraph 13 was considered. This stated in part as follows:
>
> "**Calculating gross annual income under Appendix FM**
>
> 13. Based on evidence that meets the requirements of this Appendix, and can be taken into account with reference to the applicable provisions of Appendix FM, gross annual income under paragraphs E-ECP.3.1., E-

LTRP.3.1, E-ECC.2.1. and E-LTR.C.1 will be calculated in the following ways:

(e) Where a person is self-employed their gross annual income will be the total of their gross income from their self-employment, from any salaried or non-salaried employment they have had or their partner as had (if their partner is in the with permission to work), from specified non-employment income received by them or their partner, and from income from a UK or foreign State pension or a private pension received by them or their partner, in the last full financial years. The requirements of this appendix for specified evidence relating to these forms of income shall apply as if reference s to the date of application were references to the end of the relevant financial year(s). The relevant financial year(s) cannot be combined with any financial year(s) to which paragraph 9 applies and vice versa. ..."

60. I accepted in those circumstances that paragraph 13(e) provided for a combination of self-employment and salaried income along with other combinations in order to meet the requirements of the threshold of £18,600 with reference to other subparagraphs.

61. I accepted the submission that for those in self-employment paragraph 13(e) allowed the option of relying on one year's accounts, with evidence of continuation of self-employment such as bank statements or relying on average earnings with reliance on two year's accounts. I found that the Rules did not require any other permitted income provided for under the same Rule to be of the same preceding financial year.

62. In the circumstances I concluded the ECM had erred in his interpretation and application of the Rules."

7. The judge, having allowed the appeal the Entry Clearance Officer appealed to the Upper Tribunal. The grounds of appeal stated that the judge had erred in taking into account earnings and employment from different periods and that paragraph 13(e) of Appendix FM-SE clearly stated:

"Where a person is self-employed, their gross annual income will be the total of their gross annual income from their self-employment, from any salaried or non-salaried employment they have had (...) in the last full financial year or has an average of the last two financial years."

8. It was pointed out that as the appellant was relying on employment and self-employment the evidence must be from the 2011/2012 tax year and demonstrate continuing self-employment at the date of application. The grounds went on to state:-

"5. This point is fully made out in the Entry Clearance Manager's review, as it ..... the requirement [sic] for the bank statements to demonstrate the income from self employment relevant (the last four financial) year. However it is submitted that

the judge has erred in finding that this was not required by the Immigration Rules. "

9. At the hearing of the appeal before Mr Whitwell relied on the grounds of appeal. He pointed out that the last full financial year before the date of application was that of April 2011 – March 2012. He emphasised that the sponsor's contract for salaried employment had begun on 1 August 2012 and that there was no salaried employment prior to that date. The earnings for self-employment was determined to be only £9,962 for the period up to 5 April 2012. He referred to paragraph 13 of FM-SE which had been reproduced by the judge in the determination. He argued that the judge had widened the scope of the Rules by interpreting that paragraph beyond what the Rules said. In support of that contention he referred to the Immigration Directorate Instructions at Section 4 which referred to how income from both salaried employment and self-employed employment could be combined to meet the financial requirements of the Rules.

10. In the Immigration Directorate Instructions, at paragraph 4.12 a table sets out how the different sources of income could be combined. He stated that it was made clear that the sponsor's sources of income could be combined but "only for the period of the relevant financial years". He stated that the judge had conflated the guidance of the ways to satisfy the Rules and had not properly considered the exact terms of the IDIs. While it was permissible to combine the two sources of income they had to be combined for the relevant period which was the financial year 2011/2012. There was also the additional requirement that for self-employed earnings it had to be shown that these were being continued until the date of application. This was necessary because self-employed earnings required greater scrutiny. He pointed out that the sponsor's earnings from employment had begun shortly before the date of application in circumstances where at that stage the sponsor's bank account was overdrawn. He argued that in paragraph 61 the judge had clearly erred when he stated:-

> "I found that the Rules did not require any further permitted income provided for under the same rule to be of the same preceding financial year."

11. He referred further to the IDIs at Section 9 which related to self-employed had stated that an average of income received from the last two financial years could be used to fulfil the financial requirements but pointed out that term related to income from self- employment. The relevant section was Section 9.3.6 which stated that income under category FF (relating to self-employment) all sources of income must fall within the financial years relied on and must still be a source of income at the time of application.

12. Moreover he quoted from paragraph 9.3.9 which stated:-

> "Where a person in self-employment, or who is the director of a specified limited company in the UK, also relies on income from other employment (salaried or non-

salaried) during the relevant financial year(s), he must also provided evidence of ongoing employment (salaried or non-salaried) at the date of application."

13. Finally he referred to paragraph 9.5.3 of the Rules which also set out guidance for calculating self-employment which emphasised that there should be evidence of ongoing self-employment.

14. In reply Mr Abdar relied on the Rule 24 response in which he had argued that the judge had not made any material error of law in the determination. He stated in his response that at the time of the application the sponsor had been in employment for over six months which was required by the Rules and that the submitted documents showed the sponsor's self-employment and also payslips for salaried employment being combined earnings of £22,962. The judge had been correct to accept that therefore the appellant met the requirements of the Rules.

15. He stated that the judge had found that the Entry Clearance Officer had erred in his application of the wrong paragraphs and in his application of paragraph 13(e) and that that paragraph provided the combination of self-employment and salaried income. Again he referred to the income of the sponsor as at the date of application.

16. It was his further argument that as it was only evidence of self-employment continuing that had to be shown, this would throw up an anomaly in circumstances where evidence of self-employment required to be shown but in fact an applicant had no salaried employment. It was his view that therefore the Rules could not have envisaged such a scenario and therefore that the interpretation placed by Judge Blake on the evidence before him was valid.

17. In his skeleton argument he also argued that should an error of law be found there would require to be further evidence before the Tribunal and therefore an adjournment would be required.

18. In his oral submissions he amplified the arguments which he had put forward in the Rule 24 notice and again emphasised what he indicated was the absurdity of the interpretation of the Rules put forward in the Entry Clearance Manager's decision to maintain the refusal and in the grounds of appeal to the Upper Tribunal. He argued that there was potential unfairness in the interpretation that was now being put forward and with that in mind I should endorse the judge's interpretation of the Rules.

19. In response, Mr Whitwell referred to the relevant evidential requirements in the Rules.

Discussion

20. I consider that there is a material error of law in the determination of the judge. There is, I consider, a clear reason for the requirement to show the continuing income

from self-employed, beyond the relevant tax year because of the vagaries of such income.

21. The reality is that by relying on the income from employment and indeed for self-employment during the tax year, it is far easier for the respondent to be sure that the income is actually available for the support of the spouse.

22. I find that in paragraph 61 of the determination the judge, when he stated that the Rules do not require any other permitted income provided for under the Rules to be of the same preceding financial year was actually doing a violence to the terms of paragraph 13(e) of Appendix FM-SE which dealt with the issue of self-employment. I am fortified by that decision when I consider the terms of the IDIs and in particular Section 9 which deals with the issue of self-employment.

23. Having found that there is a material error of law in the determination of the judge I set aside his determination. I direct that the appeal proceed to a hearing afresh in the First-tier as I consider that the terms of the Senior President of Tribunals Directions are met as further evidence would be required. Mr Abdar will no doubt wish to consider with his client whether or not it would be more efficacious for him to make a fresh application relying on evidence which can now be produced for the relevant financial years.

Notice of Decision

The decision of the First-tier Judge is set aside.

Direction.

The appeal will proceed to a hearing afresh in the First-tier at Taylor House. Time estimate 2 hours, no interpreter

Signed Date

Upper Tribunal Judge McGeachy