



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/48933/2014

THE IMMIGRATION ACTS

Heard at Manchester
On 14 March 2016

Decision Promulgated
On 15 April 2016

Before

Upper Tribunal Judge Southern

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

NOUMAN ARIF

Respondent

Representation:

For the Appellant: Mr A. McVeety, Senior Home Office Presenting Officer
For the Respondent: Ms N. Bull of counsel, instructed by Whitefield, solicitors

DETERMINATION AND REASONS

1. Mr Arif, who is a citizen of Pakistan born on 15 May 1989, arrived in the United Kingdom in February 2011 and was admitted as a student with leave to remain that was subsequently extended until 14 August 2014. Shortly before that leave expired, on 23 July 2014, the appellant submitted an application for leave to remain as the spouse of a person present and settled in the United Kingdom. He described in his

application form how he had been married to Ms Amen Javed on 3 July 2014 when an "Asian Wedding" had taken place. It is not in doubt that this is a genuine and subsisting relationship. Ms Javed was herself born in Pakistan, but moved to the United Kingdom 14 years ago. It appears that she has dual British / Pakistani nationality and is fluent in both English and Urdu.

2. By a decision dated 21 November 2014 the application was refused. That was because it was not accepted that Mr Arif had met the financial requirements of the rules. Although Ms Javed was, at the date of the application, employed with an income payable at a rate in excess of the annual income requirement of £18,600, as that employment commenced as recently as 1 July 2014, shortly before the application was made, it had not been demonstrated that the annual income requirement had been met. Indeed, the respondent pointed out that, for the purpose of the immigration rules, her income for the previous 12 months was only £999.99, that being the amount paid into her bank account, although gross earnings were said to be £1,080.
3. By a decision of First-tier Tribunal Judge McGinty promulgated on 16 March 2015 Mr Arif's appeal to the First-tier Tribunal was allowed. The key facts were as set out above. The judge understood it to be common ground and agreed between the parties that because Ms Javed had not worked for her employer for at least six months therefore, the financial requirements of the rules were met by her producing the payslips and other evidence of her recently obtained employment that she was in fact able to demonstrate because it was thereby established that, at the date of the application, she was in salaried employment in respect of which her gross annual income was in excess of the £18,600 demanded by the immigration rules. Indeed, he recorded in his determination, at paragraph 9, that "a concession" to that effect had been made by the SSHD. Because the judge thought that there was no dispute between the parties, despite the reasons that had been given for refusing the application, his decision is a short one. It concludes by saying, although it should be noted that the reference to the appellant's income is in error because the judge was concerned with the income of his spouse:

"The fact that the appellant had not in fact earned in that year a total of £18,600 in her new job by the date of her application is not relevant. What is required is simply that she has a job with an annual income of £18,600 gross as at the date of application, and has supplied the requisite evidence in respect thereof. That she had done. The decision made was therefore not in accordance with the Immigration Rules. I therefore allow the appeal."

4. The SSHD has been granted permission to appeal on the basis that the judge had clearly misunderstood the requirements of the rules. Whilst it is, of course, correct to say that the sponsor could not produce evidence of at least six months pay slips if she had not held the employment for that period of time, the Secretary of State says the judge needed to go on to make findings of fact on any previous earnings, in order to arrive at a figure for her earnings for the 12 months prior to the date of the application.

5. For the reasons that follow, it is unambiguously clear that the judge was wrong to allow the appeal on the basis that he did.
6. The requirements to be met by a person seeking leave to remain as the partner of a person present and settled in the United Kingdom are set out in Appendix FM and Appendix FM-SE of the Immigration Rules. As is frequently found to be the case when navigating through the immigration rules, the journey is a somewhat convoluted one but must be completed if the correct destination is to be reached.
7. Appendix FM R-LTRP 1.1 requires that the applicant must meet all of the requirements of Section E-LTRP: Eligibility for leave to remain as a partner. One of those requirements, in E-LTRP 3.1 is that the applicant must provide specified evidence of a gross annual income of at least £18,600.
8. Appendix FM-SE sets out the specified evidence that must be provided at the date of the application to establish that which is required by Appendix FM. Appendix FM-SE opens with this statement:

“This Appendix sets out the specified evidence applicants need to provide to meet the requirements of rules contained in Appendix FM....”

9. It will be seen that the immigration rules distinguish between those who can provide specified evidence of having been in the same employment for at least 6 months with a gross annual income of at least £18,600 and those who, although earning an income at that level, have been in the same employment for less than 6 months. This distinction first emerges at paragraph 2 of FM-SE which having provided that the applicant must meet:

- (a) The level of financial requirement applicable to the application under Appendix FM; and
- (b) The requirements specified in Appendix FM and this Appendix as to:
 - (i) The permitted sources of income and savings;
 - (ii) The time periods and permitted combinations of sources applicable to each permitted source relied upon; and
 - (iii) The evidence required for each permitted source relied upon.

...

Continues:

2. In respect of salaried employment in the UK (except where paragraph 9 applies), all of the following evidence must be provided:

(a) Payslips covering:

(i) a period of 6 months prior to the date of application if the person has been employed by their current employer for at least 6 months (and where paragraph 13(b) of this Appendix does not apply); or

(ii) any period of salaried employment in the period of 12 months prior to the date of application if the person has been employed by their current employer for less than 6 months (or at least 6 months but the person does

not rely on paragraph 13(a) of this Appendix), or in the financial year(s) relied upon by a self-employed person.

10. This is reinforced at paragraph 13:

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-LTRC.2.1. will be calculated in the following ways:

(a) Where the person is in salaried employment in the UK at the date of application, has been employed by their current employer for at least 6 months and has been paid throughout the period of 6 months prior to the date of application at a level of gross annual salary which equals or exceeds the level relied upon in paragraph 13(a)(i), their gross annual income will be (where paragraph 13(b) does not apply) the total of:

(i) The level of gross annual salary relied upon in the application;

(ii) The gross amount of any specified non-employment income (other than pension income) received by them or their partner in the 12 months prior to the date of application; and

(iii) The gross annual income from a UK or foreign State pension or a private pension received by them or their partner.

(b) Where the person is in salaried employment in the UK at the date of application and has been employed by their current employer for less than 6 months (or at least 6 months but the person does not rely on paragraph 13(a)), their gross annual income will be the total of:

(i) The gross annual salary from employment as it was at the date of application;

(ii) The gross amount of any specified non-employment income (other than pension income) received by them or their partner in the 12 months prior to the date of application; and

(iii) The gross annual income from a UK or foreign State pension or a private pension received by them or their partner. In addition, the requirements of paragraph 15 must be met.

11. For the appellant, Ms Bull submits that the effect of these provisions is that all that is required of the appellant is that his spouse demonstrates that at the date of the application she was in employment in respect of which she was being paid at a level equivalent to an annual gross income of at least £18,600. If that is all that the immigration rules required then she would be correct. The requirement of this provision is that the person concerned is in salaried employment at the required annual level of remuneration, as evidenced by such payslips as she is able to produce. Similarly, a person who has been in employment for more than 6 months

does not need to produce payslips for the whole year and nor does such a person have to demonstrate receipt of at least £18,600 in the last 12 months. Thus, what is required is that the person concerned is being paid at a level equivalent to an annual gross income of £18,600, not that he or she had actually received such an annual income in any 12 month period.

12. However, that is not all that is required in respect of a person who has been in the employment relied upon for less than six months. In respect of such a person there is an additional requirement that does not need to be met by applicants who have been in the same employment for at least six months at the required income level. This additional requirement is found at paragraph 15 of FM-SE:

15. In respect of paragraph 13(b) and paragraph 13(d), the provisions in this paragraph also apply:

(a) In order to evidence the level of gross annual income required by Appendix FM, the person must meet the requirements in paragraph 13(b) or paragraph 13(d)(i); and

(b) The person must also meet the level of gross annual income required by Appendix FM on the basis that their income is the total of:

(i) The gross income from salaried employment in the UK or overseas earned by the person in the 12 months prior to the date of application;

(ii) The gross amount of any specified non-employment income (other than pension income) received by the person or their partner in the 12 months prior to the date of application;

(iii) The gross amount received from a UK or foreign State pension or a private pension by the person or their partner in the 12 months prior to the date of application; and

(iv) The person cannot combine the gross annual income at paragraph 15(b)(i)-(iii) with specified savings in order to meet the level of income required.

13. This echoes the approach set out in the relevant IDI which explains, at paragraph 5.3.3 that for a person who has been in the qualifying employment for less than 6 months:

“... the financial requirement must be met and evidenced in **two parts**.”

The first “part” is the level of gross annual salary as at the date of the application, but:

“Second, the person must in addition have received in the 12 months prior to the date of application the level of income required to meet the financial requirements....”

14. It can be seen from this that a person who cannot demonstrate qualifying employment for at least six months with the same employer must demonstrate that the required sum has been “earned” during the preceding twelve months. The rationale for the distinction drawn between those who have and have not held a single qualifying employment for at least six months is not hard to understand. The respondent is prepared to accept that a person who has held the same employment for at least six months at a gross annual income at a qualifying level has demonstrated that the employment is sustainable such that no more than that is required to be demonstrated in order to satisfy a minimum annual income requirement. However, where a person has been employed for a shorter period the employment cannot be assumed to be sustainable and so, in order to meet the same minimum income requirement it is necessary to demonstrate that by pointing to earnings actually received in the preceding twelve months.
15. It follows from this that the judge fell into legal error in allowing the appeal for the reasons he did. That error is material because, in the absence of findings of fact concerning any earnings in the preceding twelve months I cannot be sure that the outcome would have been the same but for that error. The appellant had raised also grounds founded upon rights protected by article 8 of the ECHR and paragraph 276ADE which the judge did not consider. Therefore, the appeal must be determined afresh.

Summary of decision:

16. First-tier Tribunal Judge McGinty made a material error of law and his decision to allow the appeal is set aside.
17. The Secretary of State’s appeal to the Upper Tribunal is allowed to the extent that the appeal is remitted to the First-tier Tribunal to be determined afresh on all grounds raised.

Signed



Date: 8 April 2016

Upper Tribunal Judge Southern