



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Numbers: OA/09435/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 21 June 2016**

**Decision & Reasons Promulgated
On 13 July 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE A M BLACK

Between

**F B
(ANONYMITY DIRECTION MADE)**

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Ms Akhter, counsel
For the Respondent: Mr Avery, Home Office Presenting Officer

DECISION AND REASONS

1. This matter comes before me for consideration as to whether or not there is a material error of law in the determination of First-tier Tribunal Judge Beg (“the FTTJ”) promulgated on 23 October 2015, in which she refused the appellant’s appeal against the refusal of her application for entry clearance to settle in the UK as a partner under Appendix FM of the Immigration Rules.
2. No anonymity direction was made in the First-tier Tribunal but, given my references to the personal circumstances of the appellant and sponsor an anonymity order is now appropriate.

Background

3. The appellant is a Bangladeshi citizen who sought entry clearance to join her husband in the UK. This was refused because the appellant had not provided her original marriage certificate and the appellant had not complied with the evidential requirements of Appendix FM-SE to demonstrate her husband met the income threshold.
4. The FTTJ found, on appeal, that the appellant's marriage certificate was being held by the British High Commission at the date of decision (albeit not by the respondent); the specified documentary evidence relating to the sponsor's earnings had not been provided to the respondent; there was no unfairness in the respondent's not requesting missing documents and that any interference with the appellant's family and private life was proportionate under Article 8.
5. Permission to appeal was sought and granted in the following terms:

“...Having had sight of the Judge's Record of Proceedings it is clear that the Appellant [sic] gave oral evidence and it is thus not arguable that the Appellant did not have a fair hearing.

4. However, it is arguable that the Judge erred in dismissing the appeal on a basis not raised in the refusal without asking the Sponsor for an explanation or submissions. It is also unclear whether the Judge found the bank statement, referred to in the Refusal to have been before the Entry Clearance Officer or not and if not it was arguably one (the latest) in a series that had been supplied such that the Entry Clearance Officer ought to have requested it.”

6. Hence the matter comes before me.

Submissions

7. Ms Akhter accepted, for the appellant, that the missing bank statement showing the sponsor's receipt of salary at the end of May 2013 was not before the respondent at the date of decision and had been provided only at the appeal hearing (contrary to the grounds of appeal before the FTT). However, it was, she said, a document which the respondent could have requested pursuant to Rule 245AA [sic] because it was one of a series in sequential order.
8. Secondly, Ms Akhter submitted the FTTJ had erred in finding copy documents were not legible (paragraph 9] when the respondent had raised no issue about this in the refusal decision. Finally, the FTTJ's proportionality assessment under Article 8 was erroneous.
9. For the respondent, Mr Avery submitted there had been a responsibility on the appellant to ensure that legible documents were provided to the FTTJ, albeit the respondent had not identified this as an issue in the refusal. It was not procedurally unfair for the FTTJ to take a fresh point which had not been in issue between the parties. He considered the principal issue to be the evidential flexibility requirements: paragraph 245AA [sic] could not apply because the application had been refused for other reasons, namely the lack of an original marriage certificate which, although with the British High Commission at the time, was not before the decision-maker. He acknowledged the FTTJ had been given the HSBC statement for May 2013 showing a credit for the sponsor's salary on 31 May 2013 and that this corresponded with the sponsor's payslip which had been produced with the application. He considered the

reasoning in paragraph 9 to be questionable: he could not understand it. There was no error in the Article 8 assessment.

Discussion

10. The only specific reason identified by the respondent for refusing the application under FM-SE was the failure of the appellant to produce an HSBC bank statement showing the sponsor's claimed May salary (the latest statement supplied being one dated 18 May 2013). It is not clear why the FTTJ found it necessary to consider the remaining evidence and make a finding that the bank statements for September to December 2012 were "not fully legible" and did not "appear to show corresponding salary payments ...". It was implicit from the content of the refusal (albeit somewhat poorly phrased) that the respondent considered the appellant had produced sufficient evidence of the sponsor's financial status, apart from one bank statement: that post-dating 18 May 2013. Thus the FTTJ made an adverse finding on an issue which was not between the parties and on which she had not given the appellant an opportunity to make submissions. This is a procedural irregularity and an error of law. It is material because the FTTJ then relies on her erroneous finding to determine that specified documentary evidence relating to the sponsor's earnings was not provided with the application (irrespective of her findings with regard to the missing May 2013 statement).
11. I agree with Mr Avery that paragraph 9 of the decision is unclear. The FTTJ states that "the appellant's [sic] HSBC account for May 2013 shows that he received on 31 May 2013 £1,341.39 from Bestway Cash and Carry. However the payslip [sic] which is dated for the period 31 May 2013 is not shown in the HSBC Bank statements." On the face of it, this does not make sense.
12. It is agreed by the parties that the missing bank statement covering the end of May 2013 is the last in a series submitted by the appellant in support of her application. I find therefore that the FTTJ's findings with regard to evidential flexibility are unsustainable. Not only did she apply the wrong paragraph of the Immigration Rules (paragraph 245AA instead of FM-SE.D) but she took into account her erroneous findings with regard to illegible documents in finding the evidential flexibility requirements had no application. This was against the backdrop of her finding that the appellant had demonstrated compliance with the Immigration Rules insofar as her marriage was concerned (paragraph 8). These are errors of law which were material to the outcome.
13. The parties' representatives agreed that, in the event of my finding one or more material errors of law, I should set aside the FTTJ's decision and remake it. Both agreed that the decision with regard to the validity of the appellant's marriage should remain undisturbed. I therefore preserve the finding at paragraph 8 and set aside the remaining findings of the FTTJ.
14. I am unable to accept Mr Avery's submission that the absence of the marriage certificate precluded the exercise of discretion under the evidential flexibility provisions. It was agreed by the parties before me that the FTTJ's findings with regard to the validity of the marriage and production of the marriage certificate should remain undisturbed, being unchallenged. It follows therefore that the only issue precluding the grant of entry clearance was the missing bank statement reflecting the sponsor's May 2013 salary.
15. I am satisfied that the respondent should have considered exercising his discretion pursuant to paragraph D(aa) of FM-SE because the appellant had submitted "a sequence of documents and some of the documents in the sequence have been omitted (e.g. if one bank statement

from a series is missing)”. The respondent had received a series of bank statements showing credits which matched those in the sponsor’s payslips. It would have been clear to him that a further such statement, immediately post-dating those before him, was likely to exist. The sole basis for refusal was that the appellant had failed to provide the last statement in the series, one which covered a ten day period to the end of May 2013, the date on which his salary was due to be credited to his account. This has the hallmark of a simple mistake by the appellant and is covered by paragraph D(aa) of FM-SE.

16. Mr Avery has referred me to sub-paragraph (c) of D, to the effect that “The decision-maker will not request documents where he or she does not anticipate that addressing the error or omission referred to in sub-paragraph (b) will lead to a grant because the application will be refused for other reasons.”. However, the respondent has not challenged the FTTJ’s finding that the appellant had complied with the requirements of E-ECP.2.7 with regard to provision of her valid marriage certificate. Therefore sub-paragraph (c) has no application here: the only reason for the refusal was the missing May 2013 bank statement.
17. The discretion in Appendix FM-SE D is that of the decision maker not the First-tier Tribunal or this Tribunal (**Sultana and Others (rules: waiver/further enquiry; discretion) [2014] UKUT 00540 (IAC), paragraph 18**).
18. In summary, I am satisfied the respondent should have considered exercising his discretion pursuant to paragraph D(aa) of FM-SE and that, in the absence of any suggestion that he did so, the respondent’s decision is not in accordance with the law (**UKUS (Discretion: When Reviewable) [2012] UKUT 00307 (IAC)**). The appellant’s application remains outstanding for a lawful decision.

Decision

19. The making of the decision of the First-tier Tribunal did involve material errors of law, as set out above.
20. I preserve the findings of the FTTJ in paragraph 8 of her decision. I set aside the remaining findings.
21. I re-make the FTTJ’s decision by allowing it to the extent that the decision is not in accordance with the law and the application remains outstanding for the respondent to make a lawful decision.

A M Black

Signed
Deputy Upper Tribunal Judge A M Black

Date 13 July 2016

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Fee Award

The FTTJ made no fee award. I now make a half fee award of any fee which has been paid or may be payable because the decision of the FTTJ has been partially set aside and remade to the extent that the application remains outstanding for a lawful decision to be made.

A M Black

Signed
Deputy Upper Tribunal Judge A M Black

Date 13 July 2016