



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: OA095612014

**THE IMMIGRATION ACTS**

Heard at Field House  
On 3<sup>rd</sup> May 2016

Decision & Reasons Promulgated  
On 8<sup>th</sup> June 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

MRS POPY BEGUM

Appellant

and

ENTRY CLEARANCE OFFICER, BANGLADESH

Respondent

**Representation:**

For the Appellant: Mr A Islam, Counsel

For the Respondent: Ms A Fijiwala, Home Office Presenting Officer

**DECISION AND REASONS**

1. For ease of comprehension, the parties are referred to by their status before the First-tier Tribunal.

2. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge Khawar allowing the Appellant's appeal against the Entry Clearance Officer's decision dated 6 August 2014 notifying the Appellant of the refusal of her application for leave to enter as the spouse of a settled partner under Appendix FM of the immigration rules. That decision was appealed by way of section 82 of the Nationality, Immigration and Asylum Act 2002.
3. The First-tier Tribunal promulgated its decision allowing the Appellant's appeal against the Respondent's decision on 12 August 2015.
4. The Respondent appealed against that decision and was granted permission to appeal by First-tier Tribunal Judge Simpson. The grounds upon which permission to appeal was granted may be summarised as follows:
  - (a) It is arguable that the judge should not have considered the Appellant's oral evidence that he receives wages from his second job in cash as only wages paid into a bank account and appearing on the bank statements may be counted towards his gross income, whereas the P60s and the summary of the sponsor's annual tax return had not been submitted with the application and were not before the decision maker.
5. It is of note that both parties were represented before the First-tier Tribunal, and neither party, particularly the Respondent raised this issue prior to these grounds of appeal.

### **Error of Law**

6. At the end of the hearing I reserved my decision. My decision is that there is no error of law in the First-tier Judge's determination. My reasons for so finding are as follows.
7. The Respondent argues in her sole ground of appeal that the Appellant may only rely on the Sponsor's income which is demonstrated by specified evidence contained in Appendix FM-SE. At paragraph 14 the judge is complained to have had regard to the Sponsor's evidence that he receives his wages from his second job with Deshi Catering in cash *but that this is not paid into his bank account*. The Respondent submitted that only wages paid into a bank account and which also appear on the statement may be counted towards the Sponsor's gross income and as specified documentary evidence. The key to this appeal, as Ms Fijiwala made clear, is whether bank statements are not specified evidence because if they show one form of employed income paid via bank transfer (i.e. BACS), but cease to be specified evidence because they do not show entries for income paid in cash, because the cash income was not deposited.

8. Based upon that premise, the Respondent also complained that at paragraph 18 of the determination the judge had regard to P60s and a computation summary of the Appellant's annual tax return for the year ended 2013 to 2014 but that it was not open to the judge to make a finding that the income threshold requirement was met based on those documents or the credibility of the Sponsor because neither of those could make up for the fact that the Appellant had not submitted specified documentary evidence.
9. In reply to my questions Ms Fijiwala accepted that but for the lack of a bank statement showing the cash income being paid into that account the consideration of other documents such as a P60 as well as the Sponsor's evidence regarding his gross income could in fact be taken into account given that it pertained to the date of the application and/or the date of the decision.
10. Mr Islam in reply relied upon Appendix FM-SE 1(k) and 1(m) but Ms Fijiwala maintained that this could not assist the Appellant.
11. Appendix FM-SE 1(k) states as follows:

Where the gross (pre-tax) amount of any income cannot be properly evidenced, the net (post-tax) amount will be counted, including towards a gross income requirement.
12. Subparagraph 1(m) of Appendix FM-SE reads as follows:

Cash income on which the correct tax has been paid may be counted as income under this Appendix, subject to the relevant evidential requirements of this Appendix.
13. Mr Islam further relied upon an alternate paragraph of Appendix FM-SE which he submitted evidenced the ability to exercise discretion which the Entry Clearance Officer had failed to do and which supported the judge's decision. That is to be found at paragraph D(e) of Appendix FM-SE which states as follows:

Where the decision maker is satisfied that there is a valid reason why a specified document(s) cannot be supplied, e.g. because it is not issued in a particular country or has been permanently lost, he or she may exercise discretion not to apply the requirement for the document(s) or to request alternative or additional information or document(s) be submitted by the applicant.
14. Dealing with those rules in turn, in respect of paragraph 1(k) Mr Islam was unable to provide exact figures as to the net post-tax amount that could be counted towards a gross income requirement and consequently that submission can go no further.

15. In relation to paragraph 1(m) and the cash income on which correct tax has been paid, in that regard I note in particular that at paragraphs 18 and 19 of the determination the judge did consider that the Appellant's computation/summary of his annual tax return for the year ended 2013-14 shows that his gross income for that year was £19,770.48. The judge also noted in particular that there was no challenge to the information contained in those documents by the Home Office Presenting Officer. The judge went on to also note that the Presenting Officer did not seek to challenge the submission that the Sponsor had paid his tax in accordance with the aforesaid tax summary for 2013-14. In that regard cash income as is stated in paragraph 1(m) on which tax has been paid may be counted as income under this Appendix. Consequently the cash income contributing towards the gross figure of £19,770.48 could have been counted towards this income but only subject to the relevant evidential requirements of this Appendix.
16. That brings me back to Ms Fijiwala's submission that the evidence contained in the bank statement, solely for want of entries showing deposits of cash income (notwithstanding that it contained entries for alternate employment), was *for that reason alone* not a specified document.
17. In my view this submission is wholly misguided. That is because a document is specified by virtue of the fact that it appears in the list of documents that is to be submitted. Appendix FM-SE in this regard at paragraph 2C refers to personal bank statements, correspondence for the same periods as the payslips at paragraph 2A (which Ms Fijiwala accepts were submitted) showing that the salary had been paid into an account in the name of the person or the name of the person and their partner jointly. Whilst the salary paid in the account is shown only for *one* employment, the personal bank statement does not cease to be a specified document merely because it does not show salary being paid into the account for the *second* employment. That would result in a confused and discrepant scenario whereby the document could be specified for *one* income but not specified for the *other* income. This would have the unattractive effect of convoluting the Immigration Rules and distorting the simple concept of a specified document by reference to what it contained as opposed to what it actually is. It has been oft complained by the Court of Appeal that the Rules do not require such assistance given that they are already "byzantine" (see *Pokhriyal v Secretary of State for the Home Department* [2013] EWCA Civ 1568 per Jackson, LJ at [4]) and "rebarbative" in nature (see *Singh v Secretary of State for the Home Department* [2015] EWCA Civ 74 per Underhill LJ at [59]).
18. Consequently, in light of my view that the specified documents were not missing as the Entry Clearance Officer believed, the decision is free from material error and should stand.

19. Even if I am wrong in that regard and a document is specified only when it is in a form showing that a bank statement containing audited financial entries for a second form of salaried income was not provided (even though it was specified for the first form of income where it did contain evidence of deposits from that salaried employment), paragraph D(e) of Appendix FM-SE, which Mr Islam relies upon, makes clear that if there is a valid reason why a specified document cannot be supplied; and in this case I find in the alternative that a valid reason would clearly be that the document is *not* specified purely for want of showing entries for cash deposits given that the sponsor did not deposit his income into the account, can and clearly should be taken into account by an Entry Clearance Officer given that they can exercise a discretion not to apply the requirement for such a document.
20. If the requirement is of such a specific nature and more convoluted than the Rules appear to suggest at FM-SE 2(c) then I am fortified further in this decision.
21. I also add that the entire basis for the document not being specified according to Ms Fijiwala was that there is a need which the rule provides for, according to the Immigration Directorate Instruction Appendix FM Section 1.7 at paragraph 3.1.5 which states as follows:

“...those wishing to rely on cash income to sponsor an application subject to the financial requirement may need to change the way they manage their money and bank the full net amount so that they can then rely on the gross amount of that income in sponsoring the application”.
22. If, as the paragraph indicates, there is a need to maintain the integrity of the system for all genuine Applicants and Sponsors that their cash income from employment be corroborated, this in my view will not apply to paragraph 1(m) of Appendix FM-SE (as opposed to 1(n) of FM-SE) for the reason that 1(m) makes clear that it applies to cash income on which the correct tax has been paid. That is why cash income *upon which tax has been paid* may nonetheless be counted as income under this Appendix despite this need. This must follow given that the payment of tax upon the cash income (which was not deposited into a bank account) has nonetheless been verified by HMRC and tax was paid upon the gross income, which addresses the need that Ms Fijiwala submits implicitly exists at paragraph 1(n).
23. Given my references to the judge’s determination concerning the acceptance of correct payment of tax, which was not challenged by the Respondent, this reinforces the fact that cash income was rightly taken into account by the First-tier Judge under the Rules.
24. As noted above, Ms Fijiwala on behalf of the Respondent submitted that the sole issue was the lack of a specified document and that the Appellant could submit a

further application now that the sponsor has begun depositing his cash income. However, given that the Sponsor has changed his way of banking and deposited his cash income, Ms Fijiwala's submission belies the fact that the sponsor and Appellant's family life will undoubtedly be interrupted were there to be a further application and a further delay which does not sit well with the fact that the Entry Clearance Officer can and ought to have exercised discretion under Appendix FM-SE D(e).

**Decision**

25. The decision of the First-tier shall stand and is hereby affirmed.
  
26. The First-tier Tribunal did not make a fee award and I have not been asked to depart from that decision.

Signed

Date 1<sup>st</sup> June 2016

Deputy Upper Tribunal Judge Saini