



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal Number: OA/10893/2014

THE IMMIGRATION ACTS

Heard at Field House, London

Decision & Reasons Promulgated

On the 21st April 2016

On the 4th May 2016

Before:

DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between:

MRS TANJINA SULTANA BASITH

Claimant

And

ENTRY CLEARANCE OFFICER

Appellant in the Upper Tribunal

Representation:

For the Claimant: No attendance

For the Entry Clearance Officer: Mr Duffy (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the Entry Clearance Officer's appeal against the decision of First-tier Tribunal Judge Wyman dated the 2nd October 2015, in which he allowed the Claimant's appeal under the Immigration Rules.

Background

2. The Claimant is a citizen of Bangladesh who was born on the 2nd January 1990. She is married to Mr Muhammed Basith, a British citizen, having married him on the 20th January 2011 in Bangladesh. The Claimant had applied for entry clearance as a partner under Appendix FM of the Immigration Rules and that application had been refused by the Entry Clearance Officer on the 10th August 2014. The Claimant sought to appeal that decision to the First-tier Tribunal and that appeal was heard by First-tier Tribunal Judge Wyman at Hatton Cross on the 16th September 2015.

The Decision of First-tier Tribunal Judge Wyman

3. First-tier Tribunal Judge Wyman found that the Claimant's husband, her Sponsor was paid in cash on a weekly basis and that the payslip confirmed that his pay was £299.08 on each occasion. However he found that on 10 occasions the amount paid into the Sponsor's bank account did not reflect the wage slip and that the difference in every case was less than £1 and on some occasions no more than 20 pence. On some occasions the difference was a credit to the Sponsor's account and on others the amount paid in was less than the actual payslip amount. The Judge found that the evidence of financial requirements was set out under Appendix FM-SE(k) of the Immigration Rules and that the Claimant had provided a number of sources of evidence of her Sponsor's income including his wage slips, bank statements, a letter from his employer and from his accountant and P60s for the years ending April 2013, April 2014 and April 2015 and that the P60s for the years ending 2014 and 2015 showed that the Sponsor earned more than the minimum income threshold which was £18,600. The Judge went on to find that this was confirmed by a letter from Samee Frozen Foods Limited and a letter from the Sponsor's accountant A.K & Co. The First-tier Tribunal Judge went on at [32] to find that the explanation given as to why the payslips did not correlate exactly with the amounts paid into the bank account was credible and that he accepted that Mr Basith's father may have simply made a mistake in paying over the exact amount of the wages into the bank account and that sometimes he paid too much money in and sometimes he

deposited too little. However the Judge found that the gross amount of income could properly be evidenced by the wage slips, the P60s and the letter from the employers and that the relevant income threshold was met and he therefore allowed the appeal under the Immigration Rules.

4. The Entry Clearance Officer has now sought to appeal that decision to the Upper Tribunal.

The Grounds of Appeal

5. Within the Grounds of Appeal it is argued, inter alia, that the specified evidence requirements are comprehensively set out within Appendix FM-SE of the Immigration Rules and that the Claimant's Sponsor needed to demonstrate a gross income of at least £18,600 per annum. It is argued that only wages paid into a bank account and appearing on the statements may be counted towards the Sponsor's gross income in accordance with the evidence of financial requirements under paragraph 1(n) of Appendix FM-SE. It is argued that it is not open to the Judge to draw his own conclusions based on the credibility of the Sponsor or other documents in the absence of the requisite specified documents and that the Sponsor is now paid directly into his bank account, such that it is open to the Claimant to make a fresh application based upon the correct specified evidence. It is argued that the Judge materially erred in law and that the decision should be set aside.

The Grant of Permission to Appeal

6. Permission to appeal in this case had been granted by First-tier Tribunal Judge Hollingworth, in which he found that an arguable error of law had arisen in relation to the construction placed by the Judge on the available evidence in relation to the question of whether the Immigration Rules had been fulfilled in the context of the provision of specified evidence. Permission was granted on the 25th February 2016. It is on that basis that the case comes before me in the Upper Tribunal.

Oral Submissions

7. Despite the appeal having been listed for 10.00am at Field House, 15 Breems Buildings, London, EC4A 1DZ, and Notice of Hearing having been sent out to the Claimant and Sponsor and their then legal representatives Messrs Ashfield Solicitors on the 31st March 2016, by 12:45pm no-one had attended at the Upper Tribunal on behalf of the Claimant. A letter had been sent to the Tribunal dated the 14th April 2016 from Ashfield Solicitors, indicating that “as a matter of courtesy, we will wish to inform the Court that we will not be in attendance at the respective hearing listed above” and referring specifically to the case of Mrs Basith and the hearing on the 21st April 2016. However, I wanted to ensure that time was given for the Sponsor himself or other representatives to attend at the appeal hearing on behalf of the Claimant, should he wish to do so. However, in light of the non-attendance and the letter from the solicitors, I determined that it was in the interest of justice to proceed in the absence of the Claimant’s Sponsor or representative, the Claimant herself being in Bangladesh. I therefore heard submissions from Mr Duffy on behalf of the Entry Clearance Officer.
8. Mr Duffy handed up to me a copy of the Rules as set out within Appendix FM-SE, as at the date of the original decision, the Immigration Directorate’s instruction as at that date, together with a written analysis of the payslips for the Sponsor and payments into the bank account. He argued that the payslips for the 1st June 2013, the 8th June 2013 and the 15th June 2013, all did not reflect payments into the bank account, but that only the last two of those would have been counted under the Rules, but that therefore two payslips were not reflected by means of payments into the bank account. He pointed out that in respect of seven other payments into the bank account, the amounts paid into the bank account did not accurately reflect the net wages set out on the Sponsor’s payslips. Mr Duffy argued that the requirements of Appendix FM-SE were mandatory requirements and that the Judge was not able to forgive the deficiencies in respect of the specified evidence or take account of other evidence in order to get around such deficiencies. He asked me to

allow the appeal.

My Findings on Error of Law and Materiality

9. Paragraph A of Appendix FM-SE states specifically that “This Appendix sets out the specified evidence applicants need to provide to meet the requirements of Rules contained in Appendix FM and, where those requirements are also contained in other Rules including Appendix Armed Forces, and unless otherwise stated, the specified evidence applicants need to provide to meet the requirements of those Rules”. The provision of the requisite specified evidence is therefore a mandatory requirement if an Appellant is going to be able to persuade the Tribunal that the provisions of the Immigration Rules are met in respect of their Sponsor’s income, and the other elements of the Rules that need to be proved by means of specified evidence.
10. Pursuant to paragraph 2(c) of Appendix FM-SE, in addition to the actual payslips having been provided together with a letter from the employer under (a) and (b), under paragraph 2(c) “personal bank statements corresponding to the same period(s) as the payslips at paragraph 2(a), showing that the salary has been paid into an account in the name of the person or in the name of the person and their partner jointly” must be submitted with the application.
11. Therefore, where a person has been employed by their employers at least six months, for the period of six months prior to the date of application, not only must the payslips for that period be provided, but the bank statements must show that the salary has been paid into the bank account. That is a mandatory requirement under the specified evidence provisions.
12. In this case, although the wage slips for the 8th June 2013 and the 15th June 2013 have been provided, those wage slips did not correlate with payments into the Sponsor’s bank account, and further, on the 13th June 2013, the 3rd August 2013, the 31st August 2013, the 21st September 2013, the 19th October 2013, the 2nd November

2013 and the 16th November 2013, the payments into the Sponsor's bank account differed from the net salary seen on his wage slip. Although those differences were less than £1 either way, the figures still did not correlate and on some occasions less than the net wage was paid into the bank account and on other occasions more than the net wage was paid into the bank account.

13. Although under paragraph 1(n) "the gross amount of any cash income may be countered where the person's specified bank statements show the net amount which relates to the gross amount shown on their payslips (or in the relevant specified evidence provided in addition to the specified bank statements in relation to non-employment income). Otherwise, only the net amount shown on the specified bank statements may be counted". Here, the bank statements did not always show the net amount correlating to the gross amount shown on the payslips, and therefore the Claimant was not able to take advantage of that subparagraph.
14. Further, although the Judge relied upon paragraph 1(k) that "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," this is not a case in fact where it would have been impossible for the Sponsor and Claimant to properly evidence the gross amount of income, it is simply the fact that neither the net or the gross amount of income was properly evidenced as a result of not all of the Sponsor's income being paid into the bank account. In such circumstances, the Claimant was not entitled to take advantage of paragraph 1(k) of the Immigration Rules, as that paragraph is not designed simply to circumvent the specified evidence requirements, and does not allow a Judge, as regrettably First-tier Tribunal Judge Wyman sought to do, to take account of other evidence in this case in terms of the wage slips, the P60s, and letters from the employers, to confirm the gross amount of income. If, the requisite specified evidence was not provided, then the appeal should have been dismissed under the Immigration Rules. It was not open to the Judge to take account of other evidence to prove the level of the

Sponsor's income, where the specified evidence requirements were not satisfied. The decision of First-tier Tribunal Judge Wyman therefore does reveal a material error in law in this regard and his decision is set aside.

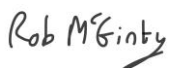
15. I move on to re-make the decision, and in light of the fact that the Sponsor's income for the 8th June 2013 and the 15th June 2013 wage slips were not paid into the bank account, and that in respect of seven other wage slips the exact net amount was not paid into the bank account, and does not correlate with the figures shown therefore between the bank statements and the payslips, the requisite specified evidence under paragraph 2(c) of Appendix FM had not been provided. In such circumstances, the Claimant is not able to prove that the financial requirements under the Immigration Rules are met. I do consider that the Claimant's human rights claim has been fully dealt with under the Immigration Rules, and does not need a separate Article 8 consideration outside of the Immigration Rules. The Claimant's appeal against the decision of the Entry Clearance Officer is thereby dismissed.

Notice of Decision

The decision of First-tier Tribunal Judge Wyman does contain a material error of law and is set aside.

I re-make the decision dismissing the Claimant's appeal against the Entry Clearance Officer's decision to refuse her entry clearance as a partner under Appendix FM of the Immigration Rules.

Signed



Deputy Judge of the Upper Tribunal McGinty

Dated 23rd April 2016