



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/10949/2014
OA/10948/2014

THE IMMIGRATION ACTS

Heard at Field House
On 13th July 2016

Decision & Reasons Promulgated
On 28th July 2016

Before

UPPER TRIBUNAL JUDGE FRANCES

Between:

MS NENGYING YU
MISS XINGTONG YU
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellants: Mr H Kannangara, instructed by Anglo Chinese Law Firm Ltd
For the Respondent: Ms Z Ahmad, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellants are citizens of China born on 29th March 1976 and 24th December 1996. Their appeals against the refusal of entry clearance as the spouse and daughter of a person settled in the UK were dismissed by First-tier Tribunal Judge G Clarke in a decision promulgated on 27th October 2015.

2. The Appellants appealed on the grounds that the judge had erred in law in his interpretation of Appendix FM and Appendix FM-SE in that there was a conflict between paragraph E-ECP 3.1(b) and paragraphs 13 and 15 of Appendix FM-SE.
3. Appendix FM sets out the requirements to be met and Appendix FM-SE listed the specified documents that needed to be submitted. The Appellants could satisfy Appendix FM paragraph E-ECP 3.1 by combining the Sponsor's salary with the First Appellant's savings. Therefore, the judge had erred in law in dismissing the appeal under the Immigration Rules. There was no challenge to his finding on Article 8 grounds.
4. Further, it was submitted that the Respondent should have considered the duration of the Sponsor's employment at the time the decision was made rather than at the date of application because, in the particular circumstances of this case, the Respondent had put the Appellants' application on hold pending the outcome of the case of MM and Others.
5. Accordingly, the Respondent should have given the Appellants the opportunity to rely on the Sponsor's employment and income at the date when the application was reconsidered in August 2014. Had the Respondent done so the Sponsor would have passed the six months duration and the Appellants could easily have combined the income and savings under the Immigration Rules.
6. The Respondent cross-appealed on the ground that the notice of decision indicated that the appeal was allowed, but it was clear from the body of the decision and the preceding paragraph that it had been dismissed. The Respondent invited the Tribunal to correct this obvious typographical error under Rule 31 of the Procedure Rules.
7. Permission to appeal was granted by First-tier Tribunal Judge Robertson on the basis that it was arguable that Appendix FM did not exclude the combination of savings and salaried income where a Sponsor had been employed for less than six months in the current employment and was in fact able to provide evidence of his gross income over twelve months.
8. Further, the Respondent had applied for a correction under Rule 31 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 for the simple reason that the judge found against the Appellants and dismissed the appeal but under the heading 'Decision' stated that the appeals were allowed. Since permission to appeal had been granted to the Appellants, it was a matter for the judge whether the mistake could be rectified under Rule 31.

Submissions

9. Mr Kannangara submitted that there was a conflict in the Immigration Rules. Appendix FM-SE should only be interpreted to refer to specified evidence necessary to meet Appendix FM. Paragraph A of Appendix FM-SE states:

“This Appendix sets out specified evidence applicants need to provide to meet the requirements of the 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 the applicant needs to provide to meet the requirements of those rules.

10. Mr Kannangara submitted that the sources listed at paragraph E-ECP 3.2 did not prevent the combination of savings and income. However paragraph 15 of Appendix FM-SE introduced an extra requirement. Paragraph E-ECP 3.1 of Appendix FM states:

“The applicant must provide specified evidence from the sources listed in paragraph E-ECP 3.2 of

- (a) a specified gross annual income of at least
 - (i) £18,600;
 - (ii) an additional £3,800 for each child; and
 - (iii) an additional £2,400 for each additional child alone or in combination with
- (b) specified savings of
 - (i) £16,000; and
 - (ii) additional savings of an amount equivalent to 2.5 times the amount which is the difference between the gross annual income from the sources listed in paragraph E-ECP 3.2 (a)-(d) and the total amount required under E-ECP 3.1(a).

11. Paragraph 15 of Appendix FM-SE states:

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 the gross

- (i) The gross income from salaried employment in the UK or overseas earned by the person in the twelve months prior to the application;
- (ii) The gross amount of any specified non-employment income other than pension income received by the person or their partner in the twelve months prior to the date of application;
- (iii) The gross amount received from the UK or a foreign State pension or a private paid pension by the person or their partner in the twelve months prior to the date of application; and
- (iv) The person cannot combine the gross annual income at paragraph 15(b)(i) to (iii) with specified savings in order to meet the level of income.

12. Paragraph 13 of Appendix FM-SE states:

Based on the 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, ELTRP 3.1, E-ECP 2.1 will be calculated in the following ways:

- (a) Where the person is in salaried employment at the date of application, has been employed by their current employer for at least six months and has been paid throughout the period of six months prior to the date of application at the 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 on 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 twelve months prior to the date of application; and
 - (iii) The gross annual income from the 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 six months (or at least six months where the person does not rely on 13(a)) their gross annual income will be the total of:
 - (i) The gross annual salary in the employment as it was at the date of application;
 - (ii) The gross amount of any specified non-employment income other than pension related income received by them or their partner in the twelve months prior to the date of application; and
 - (iii) The gross annual income from a UK or a foreign State pension received by them or their partner.

In addition, the requirements of paragraph 15 must be met.

13. Mr Kannangara submitted that there was an extra requirement in paragraph 15 of Appendix FM-SE which meant that the Appellants' in this case were unable to combine income and savings. There was a conflict in the Immigration Rules and Appendix FM-SE should not be used to limit the scope of Appendix FM. Appendix FM-SE, in essence, was guidance as to what evidence should be supplied to satisfy Appendix FM. Therefore, Appendix FM-SE could not introduce a further condition.
14. Secondly, the Respondent put the Appellants' application on hold because of the case of MM. Therefore, the Respondent should have looked at the situation at the time of the decision not at the date of application. Paragraph 2A of Appendix FM-SE gave the Respondent the power to grant the application if the applicant did not submit a P60 or to enable the Respondent to ask for it. Since the Respondent had delayed the decision the Respondent should have known that the situation had changed and should have decided it on the basis of facts existing at the time of this decision.
15. Paragraph 2A of Appendix FM-SE states, inter alia: The applicant may in addition to the payslips and personal bank statements required under that paragraph submit the P60 for the relevant periods of employment relied upon if issued. If they do not the Entry Clearance Officer or Secretary of State may grant the application if otherwise satisfied that the requirements of the Appendix relating to that employment are met. The Entry Clearance Officer or Secretary of State may request that the applicant submit the documents in accordance with paragraph D of this Appendix.
16. Paragraph D(f) states: Before making the decision under Appendix FM or this Appendix the decision maker may contact the applicant or their representative in writing or otherwise to request further information or documents.
17. Mr Kannangara submitted that it was incumbent on the Respondent to make enquiries of the Appellants because at the date of decision it would be obvious that the Sponsor had been in his current employment for more than six months.
18. Ms Ahmad submitted that there was no conflict between Appendix FM and Appendix FM-SE. There was no authority that Appendix FM-SE was 'less' of an Immigration Rule and that Appendix FM should take precedence in some way. She relied on paragraph 51 of SS (Congo) [2015] EWCA Civ 387 which states:

"In our judgment, the approached Article 8 in the light of the Rules in Appendix FM-SE should be the same as in respect of the substantive LTE and LTR Rules in Appendix FM. In other words the same general position applies, that compelling circumstances would have to apply to justify a grant of LTE or LTR where the evidence Rules are not complied with."

19. Accordingly, Appendix FM had the same status as Appendix FM-SE. The relevant date, in this case, was the date of application and the Appellants had chosen to make the application on that date. The delay in deciding the application was immaterial because the Respondent had to apply the Immigration Rules. It was quite clear that the relevant date in those Rules was the date of application. The grounds do not identify any error of law on the judge's part in his interpretation of paragraph 13 or paragraph 15.
20. In response, Mr Kannangara stated that there was no definition of annual gross income in the Rules in Appendix FM and the Appellants were able to meet all the requirements of Appendix FM and therefore the judge had erred in law in dismissing the appeal under the Immigration Rules.

Discussion and Conclusion

21. I find that, although Appendix FM-SE states, at the outset, that this Appendix sets out the specified evidence applicants will need to provide to meet the requirements of the Rules contained in Appendix FM, it did, in fact, not only mention the types of evidence to be submitted, but defined how certain parts of Appendix FM should be interpreted and calculated. Paragraphs 13 and 15, in particular, deal with how to calculate gross annual income under Appendix FM and they set out conditions that have to be met.
22. Further paragraph B of Appendix FM-SE states "Where evidence is not specified by Appendix FM, but is of a type covered by this Appendix, the requirements of this Appendix shall apply."
23. I am not persuaded that there is any difference between Appendix FM and Appendix FM-SE in the sense that they are both parts of the Immigration Rules and it is not the case that Appendix FM should take precedence over Appendix FM-SE. Nor am I persuaded that there is any conflict between Appendix FM and Appendix FM-SE, although I appreciate that paragraph 15 qualifies how gross annual income is to be calculated under Appendix FM and there is a distinction made between a person who has been employed for twelve months and a person who has been employed for less than six months. This distinction also applies to cases where the applicant's partner has been in salaried employment outside the UK, but that was not relevant in this case.
24. I have some sympathy with Mr Kannangara's argument, but I have no jurisdiction to consider whether the Rules are *ultra vires*. It is quite clear that paragraph 15 of Appendix FM-SE specifically prohibits the combination of gross annual income and savings where the current employment is for a period of less than six months.

25. The judge accepted that the Sponsor could satisfy the financial requirements of Appendix FM, if he was allowed to combine his annual income with savings. The judge specifically considered paragraphs 13 and 15 which he set out in full in the decision and found that on a strict interpretation of the Immigration Rules, which had been set down by Parliament, the Sponsor would be unable to combine income and savings. Accordingly, the appeal was dismissed under the Immigration Rules.
26. I find that there was no arguable error of law in the judge's conclusion because paragraph 15 of Appendix FM-SE was in clear terms and prevented the combination of savings and income. I am not persuaded by Mr Kannangara's argument that there is a conflict between Appendix FM and Appendix FM-SE and, notwithstanding the additional requirement in paragraph 15, the judge's decision was not erroneous given that he properly interpreted the relevant Immigration Rule.
27. The appeal also fails on the second ground because it is quite clear that the gross annual income is that earned by the person in the twelve months prior to the date of application and therefore the application is the relevant date. Delay on the part of the Respondent was therefore irrelevant to the consideration in an application of the Immigration Rules in this case. There was nothing in the Rules that allowed the Respondent to look at the earnings at the date of decision when the Rules specifically state that it must be the twelve months preceding the application. Accordingly, there was no error of law in the judge's conclusion that the relevant date was the date of application.
28. Lastly, the point made is that the Respondent has some residual discretion to request further information from the Appellants and that on the facts of this case, where the delay was caused by the Respondent, the ECO should have made enquiries about whether the Sponsor was still employed with his current employer. Again this argument cannot succeed because the date of application is the relevant date for consideration in the Appellants' case and the judge and the ECO can only look at the facts existing at the date of application.
29. Accordingly, whilst I have sympathy for the Appellants, in that the Sponsor meets the financial requirements save that the application was made two months short of the six month period of employment, the appeal before the First-tier Tribunal could not succeed under the Immigration Rules.
30. Mr Kannangara suggested that a further application could not be made because one of the Appellants had attained the age of 18. It was open to the Appellants to have made a fresh application when the Sponsor had been in employment for more than six months, namely in June 2014 when the Second Appellant was still under the age of 18. There was no challenge to the judge's Article 8 findings in the grounds and Mr Kannangara did not rely on it at the appeal.

Summary

31. I conclude that there was no arguable error of law in the judge's interpretation of the Immigration Rules and his decision to dismiss the appeal under the Immigration Rules was one which was properly open to him. The Appellants could not satisfy Appendix FM-SE and therefore they could not satisfy the Immigration Rules. I dismiss the appeal.
32. I amend the First-tier Tribunal's decision under Rule 42 of the Tribunal Procedure (Upper Tribunal) Rules 2008. There was clearly a clerical mistake in the 'Notice of Decision' which should read 'Appeal dismissed.'

Notice of Decision

Appeal dismissed.

No anonymity direction is made.

J Frances

Signed

Date: 27th July 2016

Upper Tribunal Judge Frances

TO THE RESPONDENT FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

J Frances

Signed

Date: 27th July 2016

Upper Tribunal Judge Frances