Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/14075/2014
OA/14077/2014
OA/14079/2014

THE IMMIGRATION ACTS

Heard at Field House
On 4 May 2016
Prepared 4 May 2016

Decision & Reasons Promulgated
On 31 May 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

ENTRY CLEARANCE OFFICER - BEIJING

Appellant

And

M Y
Y H
P H
(ANONYMITY DIRECTION MADE)

Respondents

Representation:

For the Appellant: Ms A Brocklesby-Weller, Senior Presenting Officer
For the Respondents: Mr Adophy, Solicitor Advocate

DECISION AND REASONS

1. In this decision the Appellant is referred to as the ECO and the Respondents are referred to as the Claimants.

2. The Claimants, dates of birth respectively 5 June 1970, 21 September 2000 and 17 August 1996, nationals of the People's Republic of China, appealed against decisions

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of the ECO refusing leave to enter for settlement as the spouse and two daughters of the Sponsor Mr M L (the Sponsor). Their applications came before the ECO who on 10 October 2014 refused them, amongst other reasons, on the basis that the specified evidence required to demonstrate the necessary financial requirements of the Rules had not been provided.

3. In particular reliance had been placed upon the fact that deposited amounts into the Sponsor's bank account with the TSB in the required period were less than the required gross annual income for the Sponsor in order to maintain the Claimants. In particular reliance was put upon the fact that the payslips provided, it seems with possibly one missing wage slip for 3 March 2014, showed the gross pay and net pay to the Sponsor but in a number of examples they did not tally with the credits in the bank statements.

4. Their appeals came before First-tier Tribunal Khawar (the judge) who, on 2 October 2015, allowed them under the immigration rules.

5. Permission to appeal those decisions was given First-tier Tribunal Judge PJM Hollingsworth on 24 February 2016.

6. At the hearing on 4 May 2016 the exercise had been conducted, by the Senior Presenting Officer, which indicated that the bank account credit entries of 21 March, 11 April, 18 April, 25 April, 2 May, 16 May, 30 May, 13 June, and 27 June 2014 did not directly match the net pay received. Accordingly it was said was that irrespective of other evidence the required evidence of maintenance did not meet the specific requirements of the Rules for the given period prescribed. Also, the evidence did not when correlated show those totals amounted on an annualised basis to the required level of maintenance.

7. The form of Appendix FM-SE in the context of Appendix FM is intended to be a specific and clear recital of the requirements which, if met, go to show that permission for leave to enter should be granted.

8. It is clear from the case of SS (Congo) [2015] EWCA Civ 387 that the position is unchanged, as referred to in earlier case law, that a near miss in terms of not meeting the requirements of specific rules is not a basis for the exercise of any discretion by the Tribunal to avoid the requirements of the Rules. If there is a discretion it is one for the ECO to exercise outside of the Rules. Given the absence of any exercise of discretion it is clear as a matter of law that the ECO's decision not to exercise a discretion is not justiciable.

9. Mr Adophy argued, with a certain tenacity, that if you look at the evidence in the round including for example the relevant P60 or other evidence the fact that you may not have met the specific evidential requirements does not stand against the full consideration of such an application by the ECO.

10. Mr Adophy relied upon the wording of Appendix FM-SE. Paragraph A1.1(aa)(iii)(n) which allows the gross amount of any cash income may be counted where the person's specified bank statement shows the net amount; which relates to the gross amount shown on their payslips. The problem with Mr Adophy's argument is that the net amount of pay did not, in most cases, reflect the amounts paid in to the Sponsor's account. Thus as the paragraph provides,"…otherwise, only the net amount shown on the specified on the bank statements may be counted."

11. I concluded the error of law the judge made, for understandable reasons but nevertheless remained an error, was to assume that it was acceptable to avoid the evidential shortcomings in the specified evidence required by reference to (a) a credibility finding in favour of the Sponsor; and (b) an acceptance that other evidence in effect mirrored the gross amount, banked as a net amount, less unexplained deductions.

12. It is a surprising feature of the appeal in which Mr Adophy did not appear, that no-one sat down and did the calculations of total of pay and bank account statements and/or cross-reference the documents to see whether the ECO's basis for refusal was correct as a fact. Ultimately it seemed to have been accepted, although I have not done the calculations, that the differences between the amounts banked and the net pay after deductions are material but there was no explanation given as to why they are different.

13. There is no obvious reason, for example the sum of £383 was paid as wages but a sum of £380.68 was banked on for example 30 May 2014. Helpfully Mr Adophy has drawn to my attention or read to me that part of the Sponsor's statement about these matters but that has ultimately not shed any light on why the sums were different. Why the marginal reductions were made, not so much in pennies but in very few pounds, and why, when confronted by the refusal if the Sponsor could clearly meet the financial requirements, he made no further application to address the identified shortfall in the evidence was unexplained.

14. It seemed to me barely conceivable, whatever else the ECO may be capable of doing, if there had not been an appropriate explanation, given as to the realities of the position and connected with other supporting documentation why the ECO could not have been asked to exercise a discretion outside the Rules. The significance of the shortfall did not fundamentally undermine the sufficiency of funding to maintain the Appellants. However, that may be simply the benefit of hindsight but it does go to show why, when the Rules are so specific as to the requirements, the greatest care needs to be paid to making sure that those requirements are met.

15. I do not criticise those acting for the Claimants but it seemed to me that a little more thought needed to be given to this matter rather than perhaps, if this was the case, taking a broad view that it could all come alright in the end. Accordingly I was satisfied that the judge did make an error of law when he allowed the appeals under the Immigration Rules.

16. The further point is taken against the judge by the Claimants is that the judge did not address Article 8 ECHR. It seemed to me that the judge's approach to Article 8 as contained within the decision at paragraph 31 where he allowed the appeal under the Immigration Rules was probably, as Mr Adophy, says because the appeal in his judgment had succeeded under the Rules there was no need to look at Article 8 ECHR. Such explanation may be right but it is extremely hard to see in the light of the case of SS (Congo)[2015] EWCA Civ 387 how it can be thought that where someone for practical reasons cannot meet a specific evidence requirement the case falls to be considered under Article 8. Amongst other things there is no need to have recourse to Article 8 because there is the clear remedy of making a further application.

17. Whilst, as a matter of approach, seeking to reunite a family and to restore family life may well engage Article 8(1) rights, it does not get round the consideration of the ECO's decision being lawful or meeting the requirements of Article 8(2) nor does it avoid the consequence, where the Rules do make provision to enable family life to be re-established. It is hard to see how it is then disproportionate to apply those Rules. If there was something in the Claimants' situation which was outside of the Rules and was exceptional, that was not apparent in the judge's decision nor on the evidence and submissions made to me. Whilst it is possible to assert that it would not be disproportionate to have allowed the appeal under Article 8, the fact is to follow that course is simply to try and avoid the guidance given in SS (Congo) and other case law.

18. For these reasons I am satisfied that the ECO's decision was on the face of it correct but more importantly that the Original Tribunal's decision on the matter erred in law. The question therefore is what is to be done with the appeal. Is it worthwhile going through trying to remake this decision when the answer may be that it fails but more importantly the time lost and costs will be better used in making an up-to-date application.

19. Accordingly I was satisfied the Original Tribunal's decision cannot stand and the matter will have to be remade. Having heard the parties' submissions I am satisfied that it can properly be made by me on the documentary evidence which was provided and in relation to the application under Appendix FM.

20. In the light of the evidence and facts which the judge found about the Sponsor's bank statement and in the light of the submissions that have been made to me concerning the relationship to the payslips I find that there is no purpose served in having a resumed hearing of the evidence. I put this point to the parties: It was appropriate to remake the case on the basis of the evidence provided to the ECO.

21. It is most unfortunate that this matter has taken so long to be resolved because it has been clear that the requirements of Appendix FM-SE in relation to specified evidence could not be met as required under the Rules. Had a different application been made, submitting other evidence and making submissions on the absence of the specified evidence there would at least have been a chance at that date of the matter receiving a positive However that was not done and the ECO did not exercise any discretion. It is extremely unfortunate that this should have been the outcome but it is a consequence of the intentions of the Rules and in particular Appendix FM-SE as drafted.

DECISION

22. Accordingly, I find the only outcome is that the following decision is substituted the decision of the Original Tribunal can not stand.

23 The appeals of the Claimants are dismissed.

24. An anonymity order was previously made and should be continued.

DIRECTION REGARDING ANONYMITY – RULE 14 OF THE TRIBUNAL PROCEDURE (UPPER TRIBUNAL) RULES 2008

Unless and until a Tribunal or court directs otherwise, the Claimants are 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 Claimants and to the ECO. Failure to comply with this direction could lead to contempt of court proceedings

Signed Date 22 May 2016

Deputy Upper Tribunal Judge Davey

TO THE RESPONDENT

FEE AWARD

The appeals of the Claimants having failed I am satisfied that there could be no fee order made.

Signed Date 22 May 2016

Deputy Upper Tribunal Judge Davey