



**The Upper Tribunal
(Immigration and Asylum Chamber)**
OA/08871/2015

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Manchester
On 18th April 2017**

**Decision & Reasons Promulgated
On 10th May 2017**

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL FARRELLY

Between

**MR.MUHAMMAD NABEEL.
(NO ANONYMITY DIRECTION MADE)**

Appellant

And

THE ENTRY CLEARANCE OFFICER FOR PAKISTAN AT ISLAMABAD

Respondent

Representation:

For the Appellant: Whitestone, Solicitors.

For the Respondent: Mr McVeety, Home Office Presenting Officer.

DECISION AND REASONS

Introduction

1. The appellant is a national of Pakistan. He applied for entry clearance as a partner under appendix FM. His application was refused on 30 April 2015 on the basis the income threshold requirement had not been demonstrated by the required proofs. Personal bank statements corresponding to all the wage slips had

not been submitted. There was a payslip dated 5 February 2015 but no corresponding bank statements showing the lodgement.

2. The entry clearance officer considered evidential flexibility but did not exercise this in the appellant's favour as original bank statements had not been produced for the six-month period. Furthermore, the appellant had a previous application refused due to lack of proofs.

The First tier Tribunal

3. His appeal was heard by judge of the First-tier Tribunal Sharkett and was dismissed under the immigration rules and on human rights grounds.
4. The judge recorded that the appellant had enclosed further documentary evidence in the form of stamped and certified bank statements. The application had been reviewed by the entry clearance manager who maintained the refusal. His sponsor stated that when the application was refused she returned to the bank and had the bank statements certified on the 12th May 2015. Subsequent to the application the appellant visited her husband in Pakistan, fell pregnant, and then ceased work. On appeal it was contended that the appellant could submit a fresh application when he can meet the rules.
5. At paragraph 36 the judge referred to the date of application, the 2 March 2015, as being significant as it affected the proofs required. The judge referred to the shortcoming in the proofs in that the money paid on the last payslip dated 5 February 2015 was not evidenced in the bank statement. Furthermore the bank statements submitted were not originals or certified copies at the time of application.
6. Reference was made to the consideration of discretion by the entry clearance officer. It was noted that at the time of the review the financial requirements and the evidential requirements were met. Paragraph 42 referred to the fact that the appellant had been advised what was to be submitted and the previous application had been refused in 2014 for similar reasons. The judge felt that this was an inappropriate fetter on the exercise of discretion by the entry clearance manager. However, at the time of hearing the appellant was no longer in employment. Consequently the financial requirements of appendix FM could no longer be met.

The Upper Tribunal

7. Permission to appeal was granted by an Upper Tribunal judge on the basis the relevant date was not the appeal hearing date but the time of the application, as this was an out of country appeal.
8. At hearing, the appellant's representative said that the relevant dates were from September 2014 to March 2015. The wage slips covered the relevant period and the bank statements had been submitted but one was missing. There is also an employer's letter and a P 60 form.

Conclusion.

9. It is my conclusion that the judge materially erred in law in being influenced by the fact that the appellant's sponsor had subsequently become pregnant and was unemployed. So far as the immigration rules were concerned, in an out of country appeal the relevant date for the proofs was the time of the application.
10. It is correct that at the time the application original bank statements had not been submitted and one of the wage slips was not reflected in the bank statement. The appellant subsequently obtained certification of the bank statements. The judge had concluded that the entry clearance manager had fettered the exercise of their discretion in reviewing the decision.
11. The application as made did not meet the requirements of appendix FM SE. However, the corrected proofs were relevant when the judge was considering article 8 on a freestanding basis. In this regard the judge should have considered the position through the prism of the rules. The relevant date was as at the time of decision but that assessment is one which has to be made in the round, taking account of past, present and likely future circumstances. It is my conclusion that the judge materially erred in law in this regard having regard to the comment that the entry clearance manager had fettered their discretion and the decision reached was unreasonable. I find the outcome is therefore disproportionate. Consequently, I will remake the decision allowing it under article 8. In doing so the primary consideration in section 117 B about the appellant not being a burden upon the taxpayer was satisfied at the relevant time.

Decision.

The decision of First-tier Judge Sharkett dismissing the appellant's appeal materially errs in law. I remake the decision and allow it under article 8.

Deputy Judge Farrelly

6th May 2017