



**Upper Tribunal
(Immigration and Asylum Chamber)
HU/04202/2017**

Appeal Numbers:

HU/04204/2017

THE IMMIGRATION ACTS

**Heard at Field House
On 19 September 2018**

**Decision & Reasons Promulgated
On 01 October 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

**MRS T B
MISS K B**

(ANONYMITY DIRECTION MADE)

Appellants

and

ENTRY CLEARANCE OFFICER - NEW DELHI

Respondent

Representation:

For the Appellants: Mr H Kannangara, Counsel instructed by Syed Shaheen Solicitors

For the Respondent: Ms N Willocks-Briscoe, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. The appellants are nationals of Bangladesh born on 5 September 1984 and 31 August 2015 respectively. The appellants appealed to the First-tier Tribunal against a decision of the respondent, dated 1 February 2017, to refuse the appellants' entry clearance as the spouse and child of the sponsor on the basis that it was not accepted that the appellant satisfied

the financial requirements of Appendix FM, in accordance with Appendix FM-SE, based upon inconsistencies between the sponsor's bank statements and payslips. In a decision promulgated on 24 January 2018, Judge of the First-tier Tribunal Fox dismissed the appellants' appeal.

2. The appellants appealed on the grounds that:
 - (1) the Judge of the First-tier Tribunal appeared to have applied a higher standard of proof as he did not accept the evidence given by the sponsor and his employer including oral evidence (and the sponsor had now obtained HMRC evidence confirming his income);
 - (2) the Immigration Judge had failed to give appropriate weight to family life and the effect of the decision on the young child's family life.

Discussion on Error of Law

3. Although the Judge of the First-tier Tribunal granting permission raised an entirely new ground in relation to the respondent, which asserted that the respondent ought to have sought clarity from HMRC, both parties before me accepted that it was the grounds of appeal, adopted on behalf of the appellants, that were before me. It was not established that the ground raised by the Immigration Judge had a strong prospect of success (see **AZ (error of law; jurisdiction PTA practice) Iran [2018] UKUT 00245**)
4. The First-tier Tribunal Judge identified that there was no dispute that family life existed and that the issue was confined to the satisfaction of Appendix FM-SE relating to the financial requirement ([28]). It was identified that the only issue was whether the sponsor's financial documents provided a reliable record of his remuneration for the purposes of satisfying the financial requirement. The judge heard from both the sponsor and the sponsor's employer and noted, by the sponsor's own evidence, that the documents had not provided a reliable record of his remuneration and the sponsor agreed with the employer that the credits stated in the payslips were not commensurate with the remuneration actually received and did not represent a reliable chronology of the payment.
5. The judge took into account that the sponsor relied exclusively upon income derived from this employer. The judge took into consideration, at [32], that the employer had provided evidence that there were anomalies in remuneration payments due to administrative issues and that delay had also occurred in payments and that the sponsor had experienced both underpayments and overpayments.
6. The judge concluded therefore at [34], that the documentation was not a reliable reflection of the sponsor's employment, circumstances or his remuneration and that the sponsor had accepted that it was open to the sponsor to approach HMRC to obtain reliable evidence of the remuneration. The judge also noted that it would have been open to the employer to provide reliable evidence of the employer's national insurance

contributions and pension provisions. The judge concluded, in findings that are more than adequate and which were available to the First-tier Tribunal Judge, that it should not be necessary to consider subjective explanations for anomalies when objective documentary evidence is available and that despite the passage of time neither the sponsor nor the sponsor's employer had approached HMRC to obtain reliable evidence of income, notwithstanding their invitation for the respondent to do so and the judge reminded himself that the burden remained with the appellant.

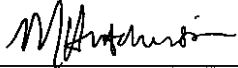
7. Appendix FM-SE sets out the evidence that was required and this includes personal bank statements "corresponding to the same periods as the payslips" and that these should be "showing that the salary has been paid into an account in the name of the person". The respondent concluded that he was not satisfied that the payslips provided an accurate reflection of the claimed income which means that the respondent was not satisfied that all of the specified and required information and documents had been provided.
8. The judge reminded himself that the purpose of Appendix FM-SE is to ensure that reliable evidence is provided to demonstrate employment income and that the sponsor had failed to do so in substance and in form and therefore the appellant could not satisfy the Immigration Rules. It was not suggested that this conclusion was irrational and the judge provided more than adequate reasons for the conclusions he reached. It is patently clear that the standard of proof applied was the balance of probabilities (and the judge had properly directed himself as to the burden and standard of proof at [12] to [17]).
9. In **SS (Congo) and Others [2015] EWCA Civ 387** Richards LJ confirmed that the approach to Article 8 should be the same in Appendix FM-SE as in respect of the substantive rules. In other words, that compelling circumstances would be required to justify a grant of leave where the evidential Rules are not complied with. I have also taken into account what was said by the Supreme Court in **MM (Lebanon) [2017] USKC 10**, at paragraph 76, that the Tribunal is entitled to see a difference in principle between the underlying public interest considerations and the working of the policy through the detailed machinery of the rules and its application to individual cases. The former would include the Secretary of State's assessment of levels of income required to avoid a burden on public resources. By contrast, rules as to the quality of evidence necessary to satisfy that test in a particular case, matters of practicality rather than principle, are matters on which the tribunal 'may more readily draw on its own experience and expertise'. It was precisely that flexible approach which was applied by the judge in this appeal and he was entitled to reach the conclusion he did that the appellant had not discharged the burden on him in the particular circumstances that applied. No error of law has been made out in ground 1.
10. In respect of ground 2, although Mr Kannangara argued that the judge should have given weight to the statement of the employer in respect of

the income being of the required level, given that there was a child in this case, I am not satisfied that this ground is made out. The Judge of the First-tier Tribunal properly directed himself that there was a child affected by the decision ([41]) and reached adequate findings that the sponsor had had an opportunity to register the child as a British citizen but had not done so and there was no reliable evidence to demonstrate why the child's best interests could not be maintained by her remaining in Bangladesh with her mother within her existing established environment and that the decision did not interfere with the current arrangement. The judge was satisfied that Article 8 was engaged but was further satisfied, given the inability to satisfy the Immigration Rules, that any interference was proportionate. The judge was of the view that a fresh entry clearance application with reliable evidence (and as already noted the appellants' representatives indicated that evidence has now been obtained) was an available option.

11. The decision of the First-tier Tribunal does not contain an error of law such that it should be set aside and is maintained. The appellants' appeal is dismissed.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

As the second appellant is a child I make an anonymity direction. Unless and until a Tribunal or court directs otherwise, the appellant is 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 appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

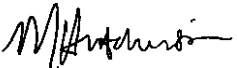
Signed: 

Date: 25 September 2018

Deputy Upper Tribunal Judge Hutchinson

**TO THE RESPONDENT
FEE AWARD**

As the appeal is dismissed, I make no fee award is made.

Signed: 

Date: 25 September 2018

Deputy Upper Tribunal Judge Hutchinson