



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/16868/2018

THE IMMIGRATION ACTS

Heard at Field House  
On Tuesday 10 March 2020

Decision & Reasons Promulgated  
On 19 March 2020

Before

UPPER TRIBUNAL JUDGE SMITH

Between

ENTRY CLEARANCE OFFICER, SHEFFIELD

Appellant

and

MRS PARVIN MANI

Respondent

**Representation:**

For the Appellant: Mr S Whitwell, Senior Home Office Presenting Officer

For the Respondent: Mr R Alavi (Appellant's husband and sponsor)

DECISION AND REASONS

**BACKGROUND**

1. This is an appeal by the Entry Clearance Officer. For ease of reference, I refer to the parties as they were before the First-tier Tribunal. The Respondent appeals against a decision of First-Tier Tribunal Judge C H Bennett promulgated on 22 July 2019 ("the Decision") allowing the Appellant's appeal against the Respondent's decision dated 16 July 2018 refusing her entry for settlement as the wife of a British citizen. The Appellant is a national of Iran. She is married to Mr Alavi, who attended the appeal on her behalf. I refer to him hereafter as the Sponsor.

2. The Appellant and the Sponsor lived together in Northern Cyprus for about seventeen months prior to the application for entry clearance. The Sponsor has returned to the UK. The Appellant currently lives in Iran.
3. The Respondent refused the Appellant's application on the basis that she could not meet the financial requirements of the Immigration Rules ("the Rules"). The couple are required to show that they meet the Minimum Income Threshold ("the MIR"). The Respondent was not satisfied that there were "exceptional circumstances" justifying the grant of entry outside the Rules.
4. The Appellant and the Sponsor are both retired. Both are in receipt of pension. The Respondent accepted that the Sponsor received £14,072.42 per annum by way of pension but made no reference to the Appellant's pension income when refusing entry. The couple also receive rental income from a property in Iran. The Respondent took that into account but was not satisfied that the documents demonstrating that income met the requirements of Appendix FM-SE to the Rules. That appendix contains stringent requirements as to the documentation to show that the relevant paragraph of the Rules is met. In any event, the Respondent calculated the rental income as £3,577.08 which was insufficient to meet the MIR which is in this case £18,600.
5. Based on his assessment of the evidence, both documentary and oral (given by the Sponsor), the Judge expressed himself to be satisfied that this showed that the couple do meet the MIR. Accordingly, he found that the Appellant met the financial requirements of the Rules and, since that was the only reason for refusal within the Rules, he allowed the appeal on that basis and within the Rules.
6. The Respondent appeals on the basis that the Judge has materially misdirected himself in law. It is contended that the Judge failed to consider paragraph 10 of Appendix FM-SE concerning the documents required to evidence the Appellant's own pension income. Although the Judge refers to paragraph 10 at [10] of the Decision, it is asserted that the reasoning which follows as to how those provisions are met is inconsistent with the nature of the specified evidence regime and accordingly has led to an error of law. The argument is neatly encapsulated in the renewed application to this Tribunal as follows:

"... the grounds argue that the First Tier Tribunal Judge has overlooked the requirement for the appellant to produce financial information in a format that meets the specified evidence requirements of paragraph 10 of Appendix FM SE of the Immigration rules. It is argued that by accepting oral evidence as a way of circumventing these requirements, the First Tier Tribunal Judge has materially erred in law ..."
7. Permission to appeal was refused by Resident Judge J F W Phillips on 4 October 2019 in the following terms (so far as relevant):

“... 3. There is no arguable error of law. The grounds quote selectively from the very detailed decision. The Judge details very clearly (at para 20) the Appellant’s evidence of the source of the payments into his bank account. He explains at para 23 why he accepts this evidence. The Judge was entitled to come to his own conclusion on the evidence and has explained clearly how he reached that conclusion.”

8. Permission to appeal was granted following renewed application by Upper Tribunal Judge Kekic on 24 January 2020 in the following terms (so far as relevant):

“... The respondent argues that the judge erred in finding that the requirements of paragraph 10 of Appendix FM SE had been met despite his acknowledgement that the bank statements did not evidence the pension payments as required (at 22). It is argued that his acceptance of the sponsor’s oral evidence in lieu of the specified documentary evidence (at 23) was a misdirection in law.

It is arguable that the judge sought to circumvent the rules by accepting oral evidence in place of documentary evidence in a specified format and permission is, therefore, granted.”

9. The matter comes before me to decide whether there is a material error of law in the Decision and, if I so find, to either remit the appeal to the First-tier Tribunal or re-make the Decision in this Tribunal.

### **ERROR OF LAW**

10. Mr Whitwell relied on the grounds. He referred me to paragraph 10 of Appendix FM-SE and in particular paragraph 10(e) which relates to the evidence required to show income from a pension received from abroad (as is the position with the Appellant’s own pension). That paragraph reads as follows:

“(e) To evidence a pension:

(i) Official documentation from:

(1) ...;

(2) An overseas pension authority; or ...

confirming pension entitlement and amount (and, where applicable, reflecting any funds withdrawn from the pension account or fund).

(ii) At least one personal bank statement in the 12-month period prior to the date of application showing payment of the pension into the person’s account.”

11. That paragraph is cited at [10(e)] of the Decision. Thereafter, in relation to the Appellant’s pension, the Judge recorded the following evidence:

“17. No statements of any account which Mrs M held with any bankers, and into which either the pension payments from the Retirement Fund Institute of the Iran National Copper Industries Company or the rent from Mrs M’s flat had been paid

were submitted in support of the appeal before the hearing on 21 June 2019. Mr A did not, at the hearing, produce any statements of Mrs M's accounts with her bankers. Mr Pareek obtained from the entry clearance officer's (on line) file details of the documents which the entry clearance officer had recorded that he had been seen, and which he had returned to Mr A. That file showed (16 July 2018 at 1140:02) that

'Income from other non-employment sources (rental income). Title Deed for property owned in Iran by the applicant, along with lease agreement and bank statements showing 6 month rent payment. Specified docs not provided. Income from property is £3,577.08. Income from pension & permitted benefits TFL Pension £14,072.42. Capital Combined Income: £17,649.50. Maintenance not met'...

The entry clearance officer's record shows that *the supporting documents had been returned to Mr A on 17 July 2018*. The documents recorded as having been returned do not include any document from the Retirement Fund Institute of the Iran National Copper Industries Company.

18. Over and above the fact that the entry clearance officer's record (above) makes no reference to his having seen any document from the Retirement Fund Institute of the Iran National Copper Industries Company, it is apparent that he recorded having seen bank statements showing *only* 6 months payment of rent.

19. Mr A told me that

- (a) Mrs M had submitted statements of her account with Tejarat Bank (in Iran) covering a period of 6 months (implicitly, to vouch her pension and rental income), and
- (b) he had been informed in an e-mail from UK Visas and Immigration (27 July 2018) [footnote omitted]

'In response to your query, your bank statements must show evidence from the last 6 months for the correct amount of the finances you have been receiving',

- (c) it was not possible for the statements of Mrs M's account to be printed out in western script - and that, if they were to be printed out, they would have to be printed out in Iranians script, and
- (d) it would not be easy to obtain statements (in western script) covering the 12 month period, but he would do his best to obtain them and bring them to Taylor House by 1630 hours on Friday 28 June 2019.

I informed Mr A that,

[A] if he provided statements of Mrs M's account with Tejarat Bank covering the 12 month period prior to the date of the application (11 May 2018) printed in western script and/or with necessary translations and showing credit entries in respect of Mrs M's rental and pension income, I would consider them, provided that

- (1) they were received at Taylor House no later than 1630 hrs on Friday 28 June 2019,
- (2) copies of any such statements were sent to Mr Pareek, to arrive no later than the above time and date, and

[B] if he experienced significant difficulties in obtaining the statements covering the 12 month period (and any necessary translations) within the above timescale, he should explain the difficulties.

20. Following the hearing, Mr A sent me the following documents.

- (a) His e-mail to UK Visas and Immigration sent on 26 July 2018...

- (b) A printout of the statement of Mrs M's account with the Tejerat Bank (vouched by the stamp of the Kerman Bahonar University Branch) covering the period 16 March 2017 until 29 April 2018. The statement shows the following credit entries. The sources of those credit entries are not themselves identified in the text of the statement. But Mr A marked the statement to identify the sources as shown below..."

There then follows a tabulated analysis of the credit entries in the statements with a column recording "Mr A's explanation". Mr Whitwell confirmed that the Respondent does not take issue with the substance of the evidence there recorded. Her point is rather that the bank statement does not speak for itself; the source of the credit entries can only be established when read with the Sponsor's explanation. That is inconsistent with the requirement for specified evidence.

12. The Judge goes on to make the following findings based on that evidence:

"21. There is no difficulty in identifying the rental payments from the credit entries in the statement of Mrs M's account with the Tejerat Bank - since the payments made accord (broadly, although that on the 24 March 2018 is Rls 2,000,000 short of the Rls 19,000,000 required under the agreement extending the term) with those provided for under the Lease Contract (see above, paragraph 15(c)). I am therefore satisfied that, although the statement of the account does not specifically identify the source of the payments, those credit entries which I have listed in the 2<sup>nd</sup> column of the above table are payments in respect of rent. I am also satisfied that, in the 12 month period immediately prior to the date on which Mrs M applied for entry clearance, 11 May 2018, the total rental income which she received, as vouched by the above credit entries was Rls 230,400,000.

22. The credit entries relating to the sums stated by Mr A to be payments in respect of Mrs M's pension are less easily identifiable as such, because (as above) the statement of the account does not specifically identify the source of each credit entry. Additionally, it is apparent from the above table that, although there are monthly payments, the sums paid each month are not the same, and the payments were not, in each month, made on the same day. Nor was the same amount paid each month. The sum of the 3 credit entries on 22 August 2017, Rls 25,300,000, is approximately the sum stated as being the monthly amount payable, Rls 25,392,444. But it is difficult to see that any other sum paid in any particular month after August 2017 is or approximates to Rls 25,392,444. The position is complicated by this further point, namely that the stated increase in the pension of Rls 203,040 to Rls 25,392,244 per month was plainly not (as stated in the letter), an increase of 12%. If the monthly pension of Rls 25,392,244 represented a 12% increase, the monthly pension before the increase would have been  $Rls\ 25,392,244 \div 1.12 = Rls\ 22,671,646$  and the increase would have been  $Rls\ 25,392,244 - Rls\ 22,671,646 = Rls\ 2,720,598$ . By contrast, if the increase in pension had been (merely) Rls 203,040 per month, the monthly pension payable before the increase took effect would have been Rls 25,189,204 and the percentage increase would have been (only) 0.806%.

23. On the basis that the increase took effect on 11 June 2017 and that there were credit entries on the 12 and 15 June 2017 (Rls 2,200,000 and 10,671,000), those credit entries are, I conclude payments at the increased rate. I therefore conclude that, during the 12 month period, there were 11 months in which payments at the increased rate were made and 1 (16 May 2017) at the lower (pre-increase) rate.

Taking the figures which I have calculated in paragraph 22, the total payable over the 12 month period from 11 May 2017 would therefore have been as follows.

1 x Rls 22,671,646	Rls 22,671,646
11 x Rls 25,392,244	<u>Rls 279,314,684</u>
Total	Rls 301,986,330

By contrast, if the position was that the increase which took effect on the 11 June 2017 was of Rls 203,040 (and not 12%), the total for the 12 month period would have been

12 x Rls 25,392,244	Rls 304,706,928
Less 1 x Rls 203,040	<u>Rls 203,040</u>
Total	Rls 304,503,888

Whether the true position is that the increase was of Rls 203,040 or 12%, the total of the actual receipts, Rls 298,469,000 is approximately equal to, but slightly less than, the sum to be expected on the basis of the document to which I have referred in paragraph 15(a). The evidence relating to the pension payments is significantly less than satisfactory. But, as against that,

- (a) The document to which I have referred in paragraph 15(a) indicates clearly, and I am satisfied, that Mrs M was entitled to a monthly pension, which, from 11 June 2017, was to be increased to Rls 25,392,444,
- (b) The statement of the account with Tejarat Bank shows the above credit entries (albeit that the statement does not identify the source of the credit entries), and
- (c) The total amount paid to Mrs M's account (as identified by Mr A) amounts approximately to, but is slightly less than, the sum which, whether the increase which took effect in July 2017 was either Rls 203,040 or the 12%, as stated in the above document, she should have received by way of pension.

**Paragraph 10(e) does not specifically require that the credit entries in the relevant bank statement identify the source of the relevant payment. Although I accept that permitting the source of the relevant credit entries vouching receipt of the pension payments to be established by oral evidence (and *a fortiori* oral evidence from either an appellant or a sponsor does not appear to be consistent with the general 'regime' of Appendix FM-SE (which, in general terms, requires that receipts be vouched by independent documentary evidence), I do not accept that the Appendix prohibits the establishment of the source of the credit entries in the above manner (even though that is, to a degree, dependent on Mr A's identification of the relevant credit entries). It is unclear how he was able to identify the particular credit entries as being payments of Mrs M's pension. It is to be expected that there are other documents which would have identified the source (if only because it is to be expected that, on making any payment to Mrs M, the Retirement Fund Institute would have notified her in writing that the payment either had been made or was about to be made and of its amount. I am not satisfied that there are no other such documents which could have been produced and which would have identified the source of each of the credit entries identified by Mr A as being the pension payments. There is no apparent good reason (and Mr A did not place any such reason before me) why any such other documents (with appropriate translations) could not have been placed before me. There is no evidential basis for concluding, and I am not satisfied, that that would have involved undue difficulty or expense. But despite my doubts (as above), in the light of what I have said in sub-paragraphs (a), (b) and**

(c) above, and because there is no specific requirement in Appendix FM-SE that the *bank statements* should identify the source of the relevant credit entries and no specific provision prohibiting the sources from being identified by oral or written evidence from a sponsor, I conclude that the pension receipts have been established in the manner provided for by paragraph 10(e)(ii), i.e. by the provision of

‘at least one personal bank statement in the 12-month period prior to the date of application showing payment of the pension into [Mrs M’s account’.

Since, consistently with paragraph 13(g)(ii) of Appendix FM-SE, the gross annual income from a foreign pension is the gross annual pension income received, my concern is with *the actual sum received*, in the circumstances of this appeal, the Rls 298,469,000. I am therefore satisfied that the pension income during the relevant 12 month period was Rls 298,469,000.”

[my emphasis]

13. Having made those findings, the Judge applied the exchange rate to the foreign pension and rental to reach figures of £4,045.11 for the rental receipts (Rls 230,400) and £5,240.20 for the pension (Rls 298,469,000). Added to the Sponsor’s pension that gave a total joint annual gross income of £23,357.73. Based on those findings, the Judge concluded at [25] of the Decision that the Appellant met the Rules in relation to the MIR by providing “specified evidence” that the Appellant and Sponsor were in receipt of the requisite level of funds. The appeal was therefore allowed within the Rules.
14. Mr Whitwell’s submission was a short one. In essence, he says that paragraph 10 of Appendix FM-SE is clear – on a plain reading, it requires that the bank statement itself shows the source of the credit entry. As the Judge himself observed, the specified evidence regime is a strict one. True it is that there is provision for some evidential flexibility. In particular in this context paragraph D(e) allows for discretion to be exercised to allow an evidential requirement to be waived or for alternative evidence to be provided where a requirement cannot be met due to different regimes in other countries – the Sponsor says that bank statements in Iran do not show source of credit as a matter of course. The difficulty for the Appellant in this regard, though, is what the Judge says at [23] as recorded above about other possible documentary sources.
15. As the Judge also observes, the general tenor of the specified evidence regime is to require independent documentary evidence. Whether oral evidence is permitted is something which has to be considered in context. It might be so if, for example, an entry clearance officer conducted an interview with an applicant to establish the content of documentary evidence which, taken together, was capable of showing that the requirement was met. However, even on the Judge’s own findings, in this case, the evidence was not that of the Appellant but of the Sponsor. As the Judge himself found, it was not clear how the Sponsor came to know the information which he provided. There is no formal witness statement from the Appellant. Her own evidence could not be tested. The Judge also noted some discrepancies between the documents and the explanation given.

16. Mr Whitwell fairly conceded the Rules are intended to provide guidance to caseworkers. However, the Tribunal is bound to apply the requirements in order to establish whether the Rules are met and therefore whether an appellant qualifies in a certain category within the Rules. Paragraph E-ECP.3.1 of Appendix FM clearly requires the “specified income” to be demonstrated by “specified evidence”. If paragraph E-ECP.3.1 is not met, then the requirements of E-ECP.1.1 cannot be met either as that provides that all the requirements of E-ECP.2.1 to E-ECP.4.2 must be met.
17. Whilst I accept therefore that there is no express provision excluding oral evidence, in circumstances where the general tenor is to require independent documentary evidence and where the Judge was not satisfied that such evidence could not be provided (even if not strictly in accordance with paragraph 10 of Appendix FM-SE), I conclude that the Judge has materially misdirected himself by allowing the appeal under the Rules on the basis that specified evidence had been provided.
18. For those reasons, I set aside the Decision. Mr Whitwell accepted however that the Respondent did not take issue with the Judge’s findings as to the substance of the evidence considered. Nor did she challenge the Judge’s findings as to other income, including the rental income from Iran. I therefore preserve paragraphs [15] to [23] of the Decision with the exception of the part of paragraph [23] which I have emboldened in the citation at [12] above and which includes the Judge’s conclusions which were under challenge.

### **RE-MAKING OF DECISION**

19. The effect of my conclusions as to error of law is that the Appellant is unable to show by specified evidence that she meets the financial requirements of the Rules for entry clearance and as such her appeal cannot succeed within the Rules. No further documents have been provided to clarify the source of the credits as to pension income. Paragraph EX.1 of Appendix FM has no purchase in an entry clearance case (in comparison with the position where an applicant seeks to remain). That is though not the end of the matter. I still have to consider the appeal outside the Rules based on Article 8 ECHR.
20. I canvassed with Mr Whitwell the position as to outcome if, as I have done, I were to adopt the Judge’s findings as to what the evidence shows (when the documents are taken with the oral explanation). He did not disagree that the effect of those findings is that the spirit although not the substance of the Rules as to financial requirements is met. That he also accepted is pertinent to the public interest when I turn then to the only issue for me to decide, namely whether the decision to refuse the Appellant’s claim is unlawful under the Human Rights Act 1998 as contrary to Article 8 ECHR.



21. As I explained to the Sponsor, if I were to allow the appeal outside the Rules, the Appellant would be granted the same period of leave to remain but on the “10-year route” to settlement rather than the “5-year route” which applies if an appeal is allowed under the Rules. In other words, it would take her ten years to qualify for settlement. The Sponsor was not unduly concerned about this. Both he and Mr Whitwell were therefore content for me to proceed to consider the Article 8 case on the evidence before me and without further submissions.
22. I begin by noting that there is no dispute concerning the genuineness of the relationship between the Appellant and the Sponsor. The only basis for the refusal of entry clearance was that the financial requirements were not met. As such, I am satisfied that there is family life between the Applicant and the Sponsor notwithstanding that they have been kept apart by the refusal of entry clearance and subsequent appeal. They lived together in Northern Cyprus for about seventeen months (from November 2016) before marrying in March 2018 and making the application which led to the refusal under appeal.
23. I am also satisfied therefore that the refusal of entry clearance which has maintained the separation of the couple is sufficient interference to require justification. I was told by the Sponsor that the Appellant is living in difficult circumstances in Iran, in particular due to her age coupled with the Corona virus problems. Although I have no evidence as to this, I do not consider that I require it. The Appellant may not be elderly (she is aged 53 years). However, media coverage suggests that Corona virus is prevalent in Iran. The Sponsor also told me that he has health problems as is confirmed by some of the documents and he is living alone as his adult children live abroad. He is aged 66 years.
24. The main issue is therefore one of proportionality. In considering that issue, I take into account as I am bound to do Section 117B Nationality, Immigration and Asylum Act 2002 (“Section 117B”). Certain of the provisions of Section 117B have no relevance in this case – the Appellant is not in the UK and so there is no need to give any reduced weight due to her status here. Nor are there any minor children involved. In relation to the Appellant’s ability to speak English, that is not disputed. It is though a neutral factor. Similarly, the fact that the couple can, on Judge Bennett’s findings, maintain and accommodate themselves without recourse to public funds is also neutral.
25. In this case, the public interest is the maintenance of effective immigration control. I take into account of course that the Appellant is unable to meet the Rules to qualify for entry as a spouse. She is unable to show by specified evidence that she meets the financial requirements. However, as I have already recorded, Mr Whitwell accepted that Judge Bennett’s findings are that the spirit if not the substance of that particular sub-rule is met. Moreover, the Appellant meets all the other requirements. Accordingly, the question is whether I am still required to give significant weight to the public interest due to the Appellant’s inability to meet the Rules. I have concluded that I am not. I accept that it is

relevant that the Appellant cannot meet the substance of the Rules. However, it is also relevant that, apart from the form of the evidence which she has produced to show that she meets the Rules, she is able to demonstrate that she does meet the financial requirements which is the only issue between the parties. The joint earnings of the Appellant and the Sponsor, as a matter of fact, based on the Judge's findings which I have preserved and on the balance of probabilities, exceed the MIR by some margin.

26. Balancing the interference with the family lives of the Appellant and the Sponsor against that level of public interest, therefore, I conclude that the decision to refuse entry clearance is disproportionate. It therefore breaches the Appellant's Article 8 rights and is for that reason unlawful under the Human Rights Act 1998.

### DECISION

**I am satisfied that the Decision contains a material error of law. I set aside the decision of First-tier Tribunal Judge C H Bennett promulgated on 22 July 2019. I preserve paragraphs [15] to [23] of the Decision save for the findings under challenge by the Respondent (as emboldened at [12] above).**

**I allow the Appellant's appeal on the basis that removal of the Appellant would breach the Appellant's Article 8 rights. The Respondent's decision is for that reason unlawful under the Human Rights Act 1998.**

**The appeal is allowed on human rights grounds (Article 8 ECHR).**

Signed  
Upper Tribunal Judge Smith



Dated: 13 March 2020