Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/01453/2013

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination promulgated**
on 19th September 2013	**on 23rd September 2013**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

MOHAMED FADHEL OTHMAN

Appellant

and

ENTRY CLEARANCE OFFICER, TUNISIA

Respondent

For the Appellant: Mr D Duheric, Solicitor
For the Respondent: Mrs M O'Brien, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant appeals against a determination by First-tier Tribunal Judge McGavin, promulgated on 28th May 2013, dismissing his appeal against refusal of entry clearance as the husband of a UK citizen ("the Sponsor").

2. The two issues now raised are (a) whether the judge was correct that provision of the Sponsor's self-assessment tax return for the year ended 5th April 2011 did not meet

the requirements of the Immigration Rules HC 395 at Appendix FM-SE paragraph 7 because that was not "the latest annual self-assessment tax return to HMRC"; and (b) whether the judge was correct to find that bank statements provided did not meet the requirements of the Appendix for specified evidence because most of the Sponsor's business takings were not paid into the account concerned.

3. The visa application giving rise to these proceedings was made in September 2012. The Sponsor's accountancy and tax years are the same. The tax return produced was for the year to 5 April 2011. Mr Duheric said that the tax return for 2011 - 12 did not fall due until 31st January 2013. He argued that the requirement for the latest return should be construed so as to mean the last return which had been due, or the last one which had been made. To require the return for the tax year last ended was unrealistic. Tax returns are not made immediately upon completion of the tax year but between then and the due date. The interpretation proposed by the Respondent would make it a practical impossibility to apply from completion of the tax year until accounts were completed and the return was prepared, which commonly took several months.

4. The Presenting Officer referred to the Respondent's departmental instructions (IDI's) at paragraph 9.3.3: "The evidence submitted must cover the relevant financial year(s) most recently ended". She submitted that the terms of the Rules were correctly construed in the IDI.

5. Both interpretations of this requirement are arguable, I prefer the one which makes more practical sense, and does not make life unnecessarily difficult for applicants. I would resolve issue (a) in favour of the Appellant.

6. On issue (b), Mrs O'Brien referred to the Rules. These require production of:

> (e) Where the person holds or held a separate business bank account(s), monthly bank statements for the same twelve month period as the tax return(s).
>
> (f) Monthly personal bank statements for the same twelve month period as the tax return(s) showing that the income from self-employment has been paid into an account in the name of the person or in the name of the person and their partner jointly.

7. In this case the Sponsor used the same account for business and personal purposes, so (e) did not apply. Requirement (f) did apply. Monthly bank statements were produced in the First-tier Tribunal, but unfortunately they did not show all the income from self-employment being paid in. The Presenting Officer submitted that deposits into the bank account could not be shown to correspond with the business takings, or with net income.

8. The Sponsor is a hairdresser, operating a cash business. It was accepted that she does not deposit all her takings. So long as she records them, I do not think there can be anything wrong with that for accountancy or tax purposes. However, that practice does not enable the Appellant's application to meet the requirements of the Rules. I see no way in which issue (b) might be resolved in his favour.

9. The background to this case seems very unfortunate. The Appellant, acting properly and on good legal advice, returned from the UK to Tunisia with a view to making an entry clearance application as a spouse. It took time to meet the English language requirement. In the meantime, the Immigration Rules changed radically and to his disadvantage.

10. The Appellant and his wife could not have foreseen the book-keeping and banking requirements with which they would have to comply over the period of a financial year in advance of submitting a visa application. They appear to have done their best to supply the evidence available to them, but it simply is not capable of meeting the legal requirements which have come into force.

11. Departure from the Immigration Rules is up to the discretion of the ECO (or the SSHD). It is not a matter over which the First-tier Tribunal or the Upper Tribunal has any power – 2002 Act, section 86(6). The practice some years ago of judges making "recommendations" to the Respondent in apparently sympathetic cases has been frowned upon. It is not for a tribunal to trespass upon the province of the executive, except where that is in its statutory jurisdiction. All I can say is that from what is known of the case history and relevant circumstances here, this seems to be a case where consideration might yet be given to exercising discretion.

12. The determination of the First-tier Tribunal shall stand.

13. No anonymity order applies.

23 September 2013
Upper Tribunal Judge Macleman