Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/16823/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 19 July 2013	**On 12 August 2013**

Before

UPPER TRIBUNAL JUDGE LATTER

Between

ENTRY CLEARANCE OFFICER, NEW YORK

Appellant

And

JOHN PAUL SALAS RANGEL

Respondent

Representation:

For the Appellant: Mr S Walker, Home Office Presenting Officer
For the Respondent: The Sponsor, Mr J Mankin

DETERMINATION AND REASONS

1. This is an appeal by the Entry Clearance Officer, New York against a decision of the First-tier Tribunal allowing an appeal by Mr Rangel against the decision made on 22 August 2012 refusing him entry clearance as a partner. In this determination I will

refer to the parties as they were before the First-tier Tribunal, Mr Rangel as the appellant and the Entry Clearance Officer as the respondent.

Background

2. The appellant is a citizen of the Philippines, born on 17 February 1981. It was his case that he met Mr Mankin, the sponsor, in New York where they were both working and a relationship formed between them. When they first met they both had their own separate apartments subject to separate leases and because of their commitment to their respective landlords, it was not possible to provide evidence of a joint tenancy but they regularly visited each other at their respective accommodation. After the appellant's US visa expired he went to Canada where he and the sponsor married under Canadian law on 7 December 2011. When his leave in Canada expired, the appellant returned to Singapore where he found employment. The sponsor returned to the UK in early 2012 but did not secure employment until April 2012. In July 2012 the appellant applied for entry clearance.

3. His application was refused because the respondent was not satisfied that the appellant and the sponsor were in a relationship, there being no adequate evidence to show that they had maintained contact, that their relationship was genuine and subsisting or that the appellant was unable to meet the financial requirements of the rules, failing to show the sponsor had a gross income of at least £18,600 a year in accordance with the evidence specified in the rules.

4. In the grounds of appeal to the First-tier Tribunal it was argued that their relationship was real and that sufficient evidence had been supplied to show that there was a subsisting relationship and that the financial requirements of the rules could be met.

The Hearing in Front of the First-tier Tribunal

5. At the hearing before the First-tier Tribunal the sponsor gave oral evidence. He confirmed the fact of the relationship. He said that since his return to the UK he had managed to secure employment with POWA Technology Limited (POWA). His evidence was confirmed by payslips and a letter from his employers. The judge commented that the sponsor produced in support of the appeal copies of itemised telephone bills, voluminous pages of emails and texts, copies of his tax returns from the USA, his payslips and bank statements.

6. The judge was satisfied that the sponsor's evidence was consistent and credible and found that there was evidence of continued contact between him and the appellant over a substantial period of time. She accepted in the light of the volume of evidence presented that their relationship was genuine and subsisting.

7. She then went on to deal with the issue of the financial requirements of the rules as follows:

> "13. With regard to the financial requirements of the Immigration Rules under paragraph E-ECP3.1 the appellant must provide evidence that he or his sponsor has an annual income of at least £18,600. Mr Mankin has provided oral evidence and documentary evidence of his annual income which exceeds the requirement of £18,600 per annum. In these circumstances I find that the appellant meets the requirements of the Immigration Rules and I therefore allow this appeal".

The Grounds and Submissions

8. In the respondent's grounds it is argued that the judge erred in law by failing to give adequate reasons for her decision that the financial requirements of the rules were met.

9. Permission to appeal was granted on the basis that the grounds were arguable, firstly in light of the documentary evidence specified in Appendix FM and secondly, that it was apparent from [13] of the determination that the judge had failed to identify the documents and give adequate reasons why she concluded that the requirements were met.

10. At the hearing before me Mr Walker adopted the grounds and submitted that the judge had not adequately reasoned her findings. It was not clear on what basis she had reached her decision. The sponsor explained that when the application had been made, they had submitted such evidence as was available but he accepted that his payslips for his employment in the UK did not cover a six month period. He explained that he had moved back to the UK in January 2012 having previously lived in the USA. When the application was made he was earning a salary of £24,000 which had now increased to £36,000 per year.

The Error of Law

11. I am satisfied that the judge erred in law by failing to give adequate reasons for her findings and conclusions on the issue of the financial requirements of the rules. Although she has referred in general terms to the evidence submitted in support of the application and appeal, she has not dealt with the concerns that at the date of application and decision the sponsor had been unable to show employment for a period of six months as required by the rules. I am satisfied that the decision should be set aside. Both Mr Walker and the sponsor were content that I should re-make the decision on the basis of the evidence before me.

Re-making the Decision

12. The sponsor confirmed that he has dual nationality for the USA and the UK. He had moved to the USA in 1995 and had subsequently obtained employment with IBM where his last gross salary was in the region of £60,000 in 2007-08. At that stage he was able to give up that employment because he received a legacy from an aunt

leaving him half of her pension. He was able to live off his inheritance supplemented by income from freelance work.

13. In order to obtain entry clearance on the basis of family life with a partner the appellant has to meet the requirements of EC-P which require him to meet all the requirements of E-ECP. No issue arises under S-EC on suitability and the judge accepted that the appellant could meet the relationship requirements in E-ECP2 and there has been no challenge to that decision. The issue for me is whether the appellant is able to meet the financial requirements in E-ECP3.1.

14. The relevant requirements are as follows:

> "E-ECP.3.1 The applicant must provide specified evidence, from the sources listed in paragraph E-ECP.3.2, of –
> (a) a specified gross annual income of at least –
> (i) £18,600; …"

The specified evidence is set out in Schedule FM-SE which at the date of decision in this appeal required in respect of salaried employment in the UK that the following evidence must be provided: a P60 for the relevant period of all periods of employment relied on, wage slips covering a period of six months prior to the application if the applicant has been employed by their current employer for at least six months or any period of salaried employment in the period of twelve months prior to the date of application if the applicant has been employed by their current employer for less than six months and a letter from the employer who issued the wage slips confirming full details of the employment.

15. The schedule also sets out the requirements for proving other sources of income such as those in respect of an overseas pension at para 10(e) requiring official documentation from an overseas pension authority and one monthly bank statement showing payment of the pension. It is also provided that in respect of salaried employment outside the UK, evidence should be a reasonable equivalent to that set out for UK income.

16. I must look at the position as at the date of decision but by the provisions of s.85(5) and s85A(2) of the Nationality, Immigration and Asylum Act 2002, I may only consider the circumstances appertaining at that time. However, this is not a case where I am restricted to considering only the evidence adduced in support of and at the time of making the application to which the decision relates as exception 2 set out in s85A(3) does not apply.

17. The sponsor accepts that he was unable to submit six months' UK payslips with the application as he had only been employed for three months at that time. But his payslips from May to July 2012 do show that he was in receipt of a gross income of £24,000 a year. A letter dated 1 September 2012 from POWA was produced confirming that he started employment on 30 April 2012 on a salary of £24,000 a year as an IOS software engineer.

18. However, evidence was also produced of the sponsor's previous tax returns to the US authorities. The tax return for 2011 for tax year 1 Jan – 31 Dec 2011 confirms that the income received from his aunt's legacy was taxable in the sum of $130,485. On this basis I am satisfied that there is evidence of sufficient income in the US before the appellant returned to this country and that he is able to show that he has had a gross income of at least £18,600 for a period exceeding twelve months prior to the date of application. I am satisfied accordingly that he is able to meet the substantive requirements of the rules.

19. I would in any event have found in the light of the judgement of Blake J in MM and others [2013] EWHC 1900 (Admin) that a refusal on the basis of a failure to meet the strict requirements of the rules as to the specific evidence to be produced in respect of his income and pension in circumstances where the evidence is clear that the sponsor had more than sufficient income to meet the substantive requirements of the rules would have led to a disproportionate interference with the right of the appellant and sponsor to respect for their private and family life and I would have allowed the appeal on article 8 grounds.

Decision

20. The First-tier Tribunal erred in law. I set aside the decision. I re-make the decision allowing the appeal against refusal of entry clearance as a partner. The costs decision made by the First-tier Tribunal stands.

Signed Dated: 9 August 2013

Upper Tribunal Judge Latter