Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/02672/2013

THE IMMIGRATION ACTS

Heard at Field House
On 14 July 2014

Oral Determination
Promulgated
On 31 July 2014

Before

UPPER TRIBUNAL JUDGE JORDAN

Between

ENTRY CLEARANCE OFFICER, DHAKA

Appellant

and

MRS SAYADA SARMIN BEGUM

Respondent

Representation:

For the Appellant: Mr N Bramble, Home Office Presenting Officer
For the Respondent: Mr M Islam, Immigration Aid, Luton

DETERMINATION AND REASONS

1. The Entry Clearance Officer appeals in the case of Mrs Sayada Sarmin Begum, OA/02672/2013, against the determination of Immigration Judge Cohen promulgated on 17 April 2014 in which he allowed the appeal of Mrs Begum against

the decision of the Entry Clearance Officer at the British High Commission in Dhaka which was made on 2 December 2012 refusing to grant Mrs Begum entry clearance as the spouse of her husband who is settled in the United Kingdom. For the purposes of continuity I shall refer to Mrs Begum as the appellant as she was in the First-tier Tribunal.

2. The application made by Mrs Begum, the appellant, depended entirely on her establishing that her husband, the sponsor, met the financial requirements of the Immigration Rules as they then stood. That required the sponsor to produce evidence of a gross income of at least £18,600 per annum. The sponsor was not able to establish that the earnings as a chef at Buckingham Tandoori for which he was paid £10,399 per annum were adequate. Consequently he began working as a shop assistant with a company called Prithinir Ltd and he had been working there since 6 May 2012 earning £9,100 per annum. He made his application on 5 September 2012, that is less than six months after he commenced work at Prithinir Ltd. It would have been open to him to have waited until 6 November 2012 in order to rely upon his earnings from Prithinir Ltd.

3. The requirements of the Immigration Rules are that the sponsor had to provide to the appellant wage slips covering

> (c)(i) a period of six months prior to the date of application if the applicant had been employed by their current employer for at least six months; or
>
> (c)(ii) 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.

It was therefore the case that at the date of application on 5 September 2012 the sponsor was indeed earning at the rate of £10,399.92 plus £9,100. Accordingly he was earning in excess of £19,000 at the date he made his application.

4. There were therefore two ways in which this application might be made. He was not able to rely upon (i) a period of six months prior to the date of application because he had not been employed by Prithinir Ltd for the minimum period of six months. He could, however have relied upon (ii) a period of salaried employment of twelve months prior to the date of application if the applicant had been employed by the current employer for less than six months. However, if he were to rely on an annual income from Prithinir at the rate of £9,100 he had only been working for five out of twelve months, so he would only be entitled to add to his previous earnings something less than £4,500 per annum, making in total earnings of £15,500. He did not therefore meet the requirements of the Immigration Rules.

5. The judge, however, in paragraph 9 of his determination recited the fact that the respondent was not satisfied that the sponsor earned in excess of £18,600 as required as this could not be shown to have been earned for the six months prior to the date of application. The judge then recited the fact as I have recited that he was able to show

that he was currently earning £19,000 per annum. He also found that the sponsor was a credible witness (and I have no reason to doubt that) and therefore he said:

> "The respondent has refused the application because the sponsor merely provided financial documentation spanning a five month period rather than a six month period. The sponsor indicated that payslips including for the full six month period were submitted together with the grounds of appeal. I find the respondent has taken a prescriptive view of the evidence in respect of this application rather than an enabling view. The respondent has applied the Immigration Rules strictly and without the application of common sense or common law fairness. I find that the evidence submitted to me in support of the sponsor's income pertains to the date of application and date of decision and find that at all relevant times he has earned in excess of £18,600. I find that the respondent's decision is not in accordance with the law and I allow the appeal under the Immigration Rules."

6. I am satisfied that in reaching that conclusion the judge made an error of law. First there is no obligation to adopt an enabling view of the Immigration Rules. They are to be construed as they stand. It is not at all clear what might be meant by the words "enabling view". If that simply means that all applications will be allowed then it must be wrong. If it means that the judge is entitled to enable the Immigration Rules to apply in a case when they do not, then that, too, must be wrong. It was accepted, I think, by the judge that the respondent applied the Immigration Rules strictly as indeed the respondent was required to do. It is wrong to say that the application was decided without reference to common sense or common law fairness. It was construed in accordance with what the requirements of the Rules were and there could be no more sense than that. There is no principle of common law fairness that permits a judge to rewrite the Immigration Rules as **SSHD v Rodriguez** [2014] EWCA Civ 2 in the Court of Appeal makes clear.

7. Accordingly the decision made by the judge that the respondent's decision was not in accordance with the law and sufficient therefore for him to allow the appeal under the Immigration Rules disclosed an error of law. That infected his further consideration because he then went on to deal with the Article 8 claim and said the application was submitted in 2012 and that it had taken two years for the appellant's application to be considered and for the appeal to reach him. It cannot be unlawful on the part of the decision-maker to take two years to decide an application of this type because there is no legal obligation on behalf of the Secretary of State or the Entry Clearance Officer to reach a decision within a specific period of time. The time that it takes for an appeal to reach the First-tier Tribunal is clearly not a matter that one can take into account.

8. The judge went on to say that the appellant met the requirements of the Immigration Rules in all respects but that is, for the reasons that I have given, incorrect. He did not meet the requirements of the Immigration Rules. Accordingly he found that it was disproportionate to make the appellant make a further application under the Immigration Rules. That decision must itself be flawed. If the appellant were now to

make an application and were now to comply with the Immigration Rules that would be a very good reason for making a fresh application rather than pursue this appeal on the basis that the Secretary of State erred in law.

9. Finally the judge appears to have relied on the decision in **MM** in which the lawfulness of the requirement of £18,600 was considered by the Tribunal and held to be unlawful. That decision has recently been reversed by the Court of Appeal in **MM, AM & SJ v Secretary of State for the Home Department [2014] EWCA Civ 985**. In these circumstances the decision of the First-tier Tribunal Judge must be set aside and I remake the decision dismissing the appeal on all the grounds advanced. That of course means it is open now for the appellant to make a fresh application, and if the material meets the requirements of the Rules, that application may well succeed.

DECISION

The Judge made an error on a point of law and I substitute a determination dismissing the appeal on all the grounds advanced.

ANDREW JORDAN
JUDGE OF THE UPPER TRIBUNAL