



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/03033/2013

THE IMMIGRATION ACTS

Heard at Field House
On 1 July 2014

Determination Promulgated
On 8 July 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

ENTRY CLEARANCE OFFICER

Appellant

and

MR YAVUZ EREL

Respondent/Claimant

Representation:

For the Appellant:

Mr P Nath, Specialist Appeals Team

For the Respondent/Claimant: Mr A Alexander, Counsel instructed on Direct Access

DETERMINATION AND REASONS

1. The Specialist Appeals Team appeals on behalf of an Entry Clearance Officer from the decision of the First-Tier Tribunal allowing the claimant's appeal against the decision to refuse him entry clearance as the spouse of a person present and settled here. The First-tier Tribunal did not make an anonymity order, and I do not consider that such an order is required for these proceedings in the Upper Tribunal.

2. The appellant is a national of Turkey. His application for entry clearance as a partner under Appendix FM of the Immigration Rules was refused on two grounds by an Entry Clearance Officer (post reference 965737) on 18 December 2012.
3. The first ground was that he was not satisfied that the claimant's relationship with his sponsor was genuine and subsisting or that they intended to live together permanently in the UK. He stated he had met his sponsor in May 2011, and that the relationship had started the same day. He noted they had married on 3 September 2012. He had stated they stayed in touch over the telephone, but the information provided did not demonstrate communication between two parties in a relationship akin to marriage.
4. The second ground was that the sponsor was not exempt from the financial requirements as defined in paragraph E-ECP.3.3. The claimant had not provided a copy of the sponsor's employment contract or bank statements corresponding to the same six month period as wage slips demonstrating payment of wages as evidence of his sponsor's gross income from her employment. These documents were specified in the guidance, and had to be provided. So his application was refused under paragraph EC-P.1.1(d) of Appendix FM of the Rules.

The Hearing Before, and the Decision of, the First-tier Tribunal

5. The claimant's appeal came before Judge Mackintosh sitting at Taylor House in the First-tier Tribunal on 31 March 2014. Mr Alexander of Counsel appeared on behalf of the claimant, and the Entry Clearance Officer was represented by a Home Office Presenting Officer.
6. In his subsequent determination, the judge found that the claimant was in a genuine and subsisting marriage. On the question of the financial requirements, he found that the sponsor, Ms Diyenli, was in full-time employment at the date of decision, receiving a monthly income of £1,300. So he found on the balance of probabilities that the claimant had established that he met requirements of the Rules, and he therefore allowed the appeal under the Rules.

The Grant of Permission to Appeal

7. On 20 May 2014 First-tier Tribunal Judge Reed granted the Entry Clearance Officer permission to appeal for the following reasons:

The grounds do disclose an arguable error of law, as it is unclear from the determination whether or not the [claimant] had provided all the required documentary evidence with regard to maintenance specified in Appendix FM-SE of the Immigration Rules. The judge has not clearly explained how the [claimant] met the requirements of the Rules before allowing the appeal. Indeed, in paragraph 17 the determination refers to the sponsor receiving a monthly income of £1,300 (it is unclear whether this is gross or net), if it is a net sum, this income would fall well below the required figure of £18,600 per annum. In any event, the documentary requirements of the Rules had to be met before any finding upon an appellant meeting the required income level can be made.

The Hearing in the Upper Tribunal

8. At the hearing before me, I received submissions from Mr Alexander and Mr Nath on whether the decision of the First-tier Tribunal did, or did not, contain a material error of law. Having ruled in the Entry Clearance Officer's favour on this question (for the reasons which I give below) I heard submissions from both of them as to how the decision should be remade.

Reasons for Finding an Error of Law

9. The decision of the First-tier Tribunal discloses a material error of law because the judge has failed to give adequate reasons for finding that the sponsor had an annual gross income of at least £18,600 at the date of application (5 October 2012) or indeed at the date of decision.
10. I note that earlier in his decision he records that the Presenting Officer conceded that the net income shown in the sponsor's wage slips matched the recorded credits in her bank statements. Upon a review of these documents, it is apparent that the figure of £1,300 referred to later by the judge is a net income figure per month. The evidence of the payslips is that the gross amount that the sponsor was receiving each month was in excess of £1,600, and this corresponds to an annual gross salary in excess of £18,600.
11. However, one of the evidential deficiencies identified in the refusal of entry clearance was a failure to provide a copy of the relevant employment contract; and in his ECM review, the Entry Clearance Manager highlighted the absence of a letter from the sponsor's employer "stating the required information".
12. At paragraph 9 of his determination, the judge addressed this aspect of the evidence. At the hearing, the sponsor submitted a letter from Well Food and Drink Limited dated 7 January 2013, which simply repeated the fact that she worked for the company on a full-time basis. But, as the judge noted, the letter did not provide details of the sponsor's rate of pay or her hours of work. Similarly, Koza International Food and Wine confirmed that the sponsor had commenced employment with them on 1 February 2012 and outlined her duties. But the letter did not give details of her hours of work or her rate of pay.
13. Under Appendix FM-SE, the provision of such information in a specified document or documents is a mandatory requirement. Although it was reasonable for the judge on a holistic assessment of the evidence to reach the conclusion that the sponsor had in fact been earning at least £18,600 gross per annum at the date of application/decision, it was not open to the judge to allow the appeal under the Rules as there had been non-compliance with a mandatory requirement of Appendix FM-SE.
14. Accordingly, the decision of the First-tier Tribunal contained an error of law such that the decision allowing the claimant's appeal outright has to be set aside and remade.

The Remaking of the Decision

15. Mr Alexander argued in the alternative before the First-tier Tribunal that the appeal should be allowed under Article 8 ECHR. The judge below did not address Article 8, as he allowed the appeal under the Rules. Mr Alexander submitted to me that the appeal should be allowed under Article 8 as it was harsh that the claimant did not succeed under the Rules in circumstances where the sponsor was in fact earning at least £18,600 gross per annum, and the claimant had in effect lost out on a technicality.
16. But as stated by the Specialist Appeals Team when seeking permission to appeal, if the sponsor's current income does exceed the income threshold, there is nothing to prevent the claimant from making a fresh application based on the sponsor's income at this time. The sponsor, who was present in court, confirmed to me that she continued to earn a gross income of around £1,600 each month, albeit with a different employer.
17. Some eighteen months have elapsed since the application for entry clearance was refused. But the appeal process has not been a waste of time or money, as the claimant has obtained from the First-tier Tribunal a crucial finding in his favour which will assist him in a fresh application for entry clearance: the finding that his marriage to the sponsor is genuine and subsisting. This is not a finding which the Entry Clearance Officer has sought to challenge by way of appeal to the Upper Tribunal, so the First-tier Tribunal's finding of fact on this essential question stands.
18. In all the circumstances, I do not consider it can be said to be harsh, still less unjustifiably harsh, to require the claimant to make a fresh application which is compliant with Appendix FM-SE. It does not appear that the claimant will have any difficulty in complying with the requirements of Appendix FM-SE, and there is no reason to suppose that there will be any undue delay in the Entry Clearance Officer making a decision on a fresh application. The decision on the original application was made rapidly, within a matter of weeks.

Decision

The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside and the following decision is substituted: the claimant's appeal against refusal of entry clearance as a partner is dismissed under the Rules and under Article 8 ECHR.

Signed

Date

Deputy Upper Tribunal Judge Monson