



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/04167/2013

THE IMMIGRATION ACTS

Heard at Birmingham
On 26 August 2014

Determination Promulgated
On 2 October 2014

Before

UPPER TRIBUNAL JUDGE KING TD

Between

WASIM AHMED

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Khan, Counsel instructed by Khirri Solicitors
For the Respondent: Mr M Hussain, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant was born on 15 October 1988 and is a citizen of Pakistan. He applied for entry clearance to the United Kingdom which was refused by the Entry Clearance Officer on 28 November 2012.

2. The essential issue is whether or not the sponsor could satisfy the financial requirements under ECP1.1(d) namely to earn a gross income of at least £18,600 as required by the Rules.
3. Significantly there is no issue taken that the sponsor does not in fact earn that amount. Indeed the financial documents, which were submitted to the Entry Clearance Officer and which are before me, indicate that her income is significantly in excess of that amount.
4. The issue which was taken against the appellant by the Entry Clearance Officer is that the documentation which was submitted was not in the correct form as required by the Rules.
5. The decision of 28 November 2012 is essentially in these terms:

“Your sponsor is not exempt from the financial requirements as defined by paragraph E-ECP.3.3. I am not able to take into account any potential employment you have available to you in the UK or any offers of financial support from third parties. In order to meet the financial requirements of the Rules your sponsor needs a gross income of at least £18,500 per annum.

You state on your Appendix 2 that your sponsor is employed by Home Image and receives an annual gross income of £19,032.

In respect of salary and employment in the UK, all of the following evidence (original documents) must be provided:

The P60 for the relevant period or periods (if issued)

Wage slips covering:

- (i) A period of six months prior to the date of application if the applicant has been employed by their current employer for at least six months or
- (ii) A 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

A letter from the employer confirming:-

- (i) The person's employment and gross annual salary;
- (ii) Length of their employment;
- (iii) The period over which they have been paid or were paid the level of salary relied upon in the application, and
- (iv) The type of employment (permanent, fixed term contract or agency)
- (v) a signed contract of employment

- (vi) monthly personal bank statements corresponding to the same period as the wage slips, showing that the salary has been paid into an account in the name of the person or in the name of a person and their partner jointly.

These documents are specified in the Immigration Rules in Appendix FM-SE and must be provided. You have not provided all the required documentation to demonstrate your sponsor's income is as claimed. I therefore refuse your application under paragraph EC-P.1.1(d) of Appendix FM of the Immigration Rules (E-ECP.3.1)."

6. The appellant sought to appeal against that decision, which appeal came before First-tier Tribunal Judge Parker on 12 February 2014. On that occasion the sponsor gave evidence and adopted her witness statement of 12 February 2014.
7. It was noted that there was a requirement for a contract of employment and that as none was available as at the date of the application, that could not satisfy the Rules.
8. It was accepted that almost all the wage slips were produced save for one that was missing. It was said that although there were P60s there was no evidence that the salary is paid into the bank account until the end of July as prior to that the sponsor was paid in cash.
9. Accordingly the Judge found that the Rules were not satisfied and upheld the decision of the Entry Clearance Officer.
10. Grounds of appeal were submitted. Permission to appeal was granted by Judge Bartlett on 20 May 2014. It was considered that the Judge had materially erred in law by failing to apply the evidential flexibility principles set out in paragraph D of Appendix FM-SE. In particular it was considered that the evidential problems faced by the appellant could have been cured by paragraph D(d)(iii)(i), paragraph D(d)(iiii) and paragraph D(e) of Appendix FM-SE.
11. I turn therefore to consider the principles as set out in paragraph D of Appendix FM-SE which provide as follows:

"D(a) in deciding an application in relation to which this appendix states that specified documents must be provided, the Entry Clearance Officer or the Secretary of State (the decision maker) will consider documents that have been submitted with the application, and will only consider documents submitted after the application where subparagraph (b) or (e) applies.

- (b) If the appellant:
 - (i) has submitted:

- (aa) a sequence of documents and some of the documents in the sequence have been submitted (e.g. if one bank statement from the series is missing):
 - (bb) a document in the wrong format (for example, if a letter is not on letterhead paper as specified; or
 - (cc) a document that is a copy and not an original document, or
 - (dd) a document which does not contain all the specified information; or
- (ii) has not submitted a specified document.

The decision maker may contact the appellant or his representatives in writing or otherwise request the document(s) or the correct version(s). The material requested must be received at the address specified in the request within a reasonable time scale specified in the request.

- (c) The decision maker will not request documents where he or she does not anticipate that addressing the error or omission referred to in subparagraph (b) will lead to a grant because the application will be refused for other reasons.
- (d) If the appellant has submitted:
 - (i) a document in the wrong format; or
 - (ii) a document that is a copy not the original document, or
 - (iii) a document that does not contain all the specified information, but the missing information is verifiable from:
 - (1) other documents submitted with the application, when
 - (2) the website of the organisation which issued the document, or
 - (3) the website of the appropriate regulatory body,

The application may be granted exceptionality providing the decision maker is satisfied that the documents(s) so genuine and that the application meets all the requirements to which the document relates. The decision maker reserves the right to request the specific original document(s) in the correct format in all cases where subparagraph (b)

applies, and or refuse applications if this material is not provided as set out in subparagraph (b).

(e) Where the decision maker is satisfied that there is a valid reason why a specified document (s) cannot be supplied e.g. because it is not issued in a particular country or has been permanently lost, he or she may exercise discretion not to apply the requirement for the document(s) or to request alternative or additional information or document(s) be submitted by the applicant.

(f) Before making a decision under Appendix FM or this appendix, the decision maker may contact the applicant or their representative in writing or otherwise to request further information or documents. The material requested must be received at the address specified in the request within a reasonable timescale specified in the request."

12. It is also relevant to bear in mind that in terms of the flexibility paragraph 334 of the Rules.
13. In terms of the wage slips there was but one missing and it was in sequence. As Mr Khan made clear, it was entirely possible from reading the payslips to see which one was missing because there is a cumulative total that was running at the same time. Thus he submits that the flexibility policy should have covered that matter.
14. So far as the income that is to be paid in the bank the purpose of that clearly is to ensure that the money claimed is in fact money received by the sponsor. No issue has been taken that that is not the case and indeed the nature of her earnings are adequately dealt with in the documentation that has been provided, particularly the cumulative nature of the P60s as well as the cumulative nature of the wage slips themselves.
15. The major matter of concern both to the Judge to the ECO was the absence of a contract of employment. The flexibility policy as has been set out allows for documents to be received after the application, particularly the documents which complete all the specified information.
16. In that connection there was a letter from Home Image dated 7 February 2014, which sets out fully the terms of the contract with the sponsor, namely the company that she is employed with; that she is employed on a full-time basis working 40 hours every week through the 2012-13 tax year. Her remuneration rate is set out as is her gross earnings. There is confirmation that her net salary up to the week 15 date 13 July 2012 was paid to her as cash thereafter her salary was paid into a nominated account. Full details are given as to her earnings and as to her salary and how it is paid to her.
17. Mr Hussain, who represents the respondent, most fairly agreed that the Rules do not specify the format of a contract of employment but rather accepts that such a contract

will contain terms and conditions of employment, salary and all relevant matters relating to it. He fairly concedes that the letter of 7 February does precisely that and that he has no objection to treating that in all respects as a contract of employment for the purposes of satisfying the Rules.

18. It is perhaps unnecessary to go into any great detail as to the documentation which has been submitted. Mr Hussain agrees that the nature of the flexibility policy as set out under Appendix FM are such that the errors which the documentation highlighted by the Entry Clearance Officer could have been rectified without difficulty had a reasonable request to do so have been made.
19. There is no issue taken as to the earnings of the sponsor at the material time of the application. Mr Hussain fairly agrees that within the terms of the flexibility arrangements as set out in Appendix FM-SE the deficiencies which were highlighted by the Judge were in fact not matters that presented an obstacle to the grant of leave and to the finding that in effect it was open to the appellant to produce the missing documents and that in all the circumstances the Rules were satisfied.
20. In those circumstances I find that the Judge was in error in the approach that was taken, particularly failing to bear in mind the flexibility provisions. Thus the decision is set aside to be remade having regard to all the documentation that has been submitted and to the submissions made and to the details as set out in Appendix FM-SE. I find that this appellant does satisfy all the requirements of the relevant Immigration Rule.
21. In those circumstances I find that proper documentation has been submitted to satisfy the requirements of the Immigration Rules. I find therefore that the appellant satisfies those Rules such as to allow the appeal.
22. In the circumstances therefore the appeal before the Upper Tribunal succeeds to the extent that the decision of the First-tier Tribunal Judge is set aside. It is to be remade. The appeal in respect of the Immigration Rules is allowed. That in respect of Article 8 is also allowed in line with those findings.

Signed

Date

Upper Tribunal Judge King TD