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**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: OA/04231/2013

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Determination Promulgated** |
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| **On 24th July 2014** | **On 6th August 2014** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE HARRIES**

**Between**

**ENTRY CLEARANCE OFFICER**

Appellant

**And**

**MRS KOLI BEGUM**
**(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Miss A Everett, Home Office Presenting Officer
For the Respondent: Mr I Khan, Counsel

**DETERMINATION AND REASONS**

The Parties and Proceedings

1. The appellant in this appeal is the entry clearance officer (ECO). The respondent, Mrs Koli Begum, is referred to hereafter as the claimant. She was born on 20th November 1989 and is a national of Bangladesh. She appealed to the First-tier Tribunal against the decision of the ECO, made on 6th January 2013, to refuse her application for entry clearance as a spouse to join the sponsor, Mr Muzibur Rahman, under the provisions of EC-P.1.1 (d) and E-ECP.3.1 of Appendix FM of the Immigration Rules.

2. In a determination promulgated on 28th March 2014 First-tier Tribunal Judge Fletcher-Hill (the Judge) allowed the appeal under the eligibility requirements of the Immigration Rules at EC-P.1.1 (d) and the financial requirements at E-ECP.3.1. of Appendix FM. Permission to appeal to Upper Tribunal Upper was initially refused to the ECO but was subsequently granted by Upper Tribunal Judge Southern on 9th June 2014 for the reason that each of the grounds arguably identifies errors of law in the determination.

3. The matter accordingly came before me for an initial hearing to determine whether the making of the decision in the First-tier Tribunal involved the making of an error on a point of law.

Consideration of Issues and Submissions

4. The claimant made this application on 18th October 2012. The ECO considered the requirement for her sponsor to show a gross income of at least £18,600 per annum in order to meet the necessary financial requirements of the Immigration Rules. He found that a P60, payslips for a 6-month period in relation to employment with Do and Co Event and Airline Catering and a contract of employment had not been provided; there was no explanation for the absence of these specified documents. However, the ECO accepted from checks with HMRC that the sponsor's income for 2011/2012 was £18,586.

5. The claimant indicated that the sponsor had secondary employment with Shahid Limited but the only supporting evidence consisted of 4 payslips. There was no contract of employment and no evidence that the funds of £58.56 per week claimed to be from this employment had been received. The ECO found a lack of the necessary evidence to show the sponsor's income in accordance with Appendix FM-SE; his bank account did not show regular deposits matching the claimed income from Shahid Limited. The application was refused and was upheld on review by an entry clearance manager (ECM) on 4th July 3013. The ECM found a continuing lack of supporting evidence to comply with Appendix FM-SE.

6. At the hearing on 10th January 2014 the Judge heard evidence from the sponsor whom she found to be a credible witness. She allowed the appeal in relation to the financial requirements having found that the sponsor's income of £18,586 for the year ending 5th April 2012 from his main employment came to £14 less that the required annual gross income. For the tax year ending 5th April 2013 the sponsor's P60 from his main employment showed a sum of £18,364.58 and the P45 from his secondary employment, which was dated 13th December 2012, showed an additional £1,034.64 earned from September - December 2012.

7. The Judge found that one payslip for May 2012 was still missing but she found the bank statements now submitted for the 6-month period before the application,

which was made on 18th October 2012, showed the sponsor's income for that month. The Judge found that at the date of decision, on 6th January 2013, the sponsor was earning £19,000 per annum taking account of a salary increase from his main employer from 1st January 2013, as confirmed at page 37 of the appellant's bundle of documents, and therefore 5 days before the date of decision.

8. In submissions before me Miss Everett relied upon the grounds of appeal for the ECO stating that the Judge had materially erred in law because the relevant date for Appendix FM is that of application and the specified evidence is required for the period before that date. The Judge had, however, not limited his considerations to the evidence prior to the date of application but had taken account of evidence the sponsor's increase in salary after the date of application, namely 5 days before the date of decision. The Judge is submitted to have paid insufficient regard to the requirements of FM-SE, to the type and format of evidence required and the period for which that evidence is required.

9. The findings of the Judge were accordingly submitted by Miss Everett to be unsustainable because of the lack of specified evidence at the date of decision for the relevant period; there is a timeline which is the date of application. The Judge should not have considered the secondary employment with Shahid Limited which lasted for less than 6 months prior to the application; it started in September 2012 and finished in December 2012. The Judge was obviously sympathetic to the appellant and sponsor, but if the sponsor's income subsequently exceeded the necessary threshold the appropriate course of action was submitted to be for the claimant to make a fresh application.

10. In reply to these submissions Mr Khan for the claimant relied on his submitted Rule 24 response opposing the appeal in the Upper Tribunal. He argued that section 85A of the Nationality, Immigration and Asylum Act 2002 gives power to the Tribunal to use its discretion to consider in entry clearance matters the circumstances appertaining at the time of decision. He submitted that even if the Judge considered the relevant date to be that of the decision, that power or discretion was given to the Tribunal by Parliament. He submitted that the Rules of Appendix FM contradict substantive law on entry clearance matters.

11. Mr Khan submitted that it was open to the Judge to consider all the evidence before her; she was entitled to find the decision of the ECO, as she did, to be not in accordance with the law or the Immigration Rules because flexibility and discretion should have been applied to the application so that the claimant should have been given an opportunity to supply the missing information. The sponsor's May 2012 payslip was one of a missing sequence which should have been requested before the application was refused. The Judge was entitled to take account of the HMRC evidence of the sponsor's second income as a circumstance appertaining at the time of the decision or in any event at the time of the application date.

12. I announced my decision to the representatives that I found that the Judge had materially erred in law such that the decision of the First–tier Tribunal should be set aside. I set aside the decision and invited submissions in relation to the remaking of the decision. Mr Khan's view that the matter should be remitted to the First-tier Tribunal was not disputed by Miss Everett but I stated that it was my intention to remake the decision in the Upper Tribunal without the need for further evidence.

13. I was not satisfied that remittal was necessary in accordance with paragraph 7.2 the Practice Statements made by the Senior President of Tribunals; the effect of the error has not been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; nor does the nature or extent of any judicial fact finding necessary to remake the decision warrant remittal. I accordingly heard further submissions from the parties as to the remaking of the decision which essentially echoed those put forward in relation to the error of law arguments. I reserved my full reasoning and final decision which are as follows.

14. I find that the Judge appropriately directed herself at paragraph 13 of the determination that that she should consider the circumstances at the date of decision, but she erred by failing to take account of the requirements of Appendix FM-SE setting out the specified evidence to show those circumstances. There is no inherent conflict between these requirements. The wage slips had to cover a period of 6 months prior to the date of application but they did not. The Judge allowed the appeal notwithstanding the continuing absence of the May 2012 wage slip for the sponsor's primary employment; the period of secondary employment was for less than that period of 6 months and should not have been taken into account.

15. I find that the judge erred in taking account of evidence other than the specified evidence. I find that the Judge further erred by taking account of evidence of the sponsor's pay rise after the date of application. The case of Raju and others v Secretary of State for the Home Department [2013] EWCA Civ 754 is authority for the proposition that there is no concept of a continuing application which starts when it is first submitted and concludes at the date of the decision, either of the Secretary of State or, on appeal, of a tribunal. I accept the submission from Miss Everett that there is a timeline for this application and that is the date of application.

16. I do not accept that the Judge was, as submitted by Mr Khan, entitled to find the ECO's decision other than in accordance with the law for failure to apply an evidential flexibility policy. The Judge makes no mention of a failure to apply such a policy or to request under the Rules one of a missing sequence of documents; this was no part of her reasoning. Any duty to apply evidential flexibility is discretionary and not mandatory and there was considerably more than one missing document or payslip before the ECO at the date of decision; there was no P60 for the primary employment no contract of employment had

been provided; there was no explanation for the absence of these specified documents and the sponsor's income for 2011/2012 was £18,586 and therefore below the threshold.

17. Carrying forward my findings in relation to the error of law I find that the claimant on the date of decision failed to show with specified evidence that the sponsor's income reached the necessary threshold. The evidence which the Judge was entitled to take into account before her in the First-tier Tribunal did not, and does not, show the financial requirements of the Immigration Rules to be met and I accordingly remake the decision by dismissing the appeal under the Immigration Rules.

18. There was apparently no Article 8 submission before the Judge in the First-tier Tribunal and there were no such submissions to me for the purposes of remaking the decision. The claimant's grounds of appeal in the First-tier Tribunal do, however, contain a general ground that the decision is a breach of the claimant's ECHR human rights without further detail. I have dismissed the appeal under the Immigration Rules and I find that the appeal cannot succeed alternatively under Article 8 of the ECHR, or otherwise on any human rights grounds.

19. It is not submitted that the appellant comes within Article 8 under the Immigration Rules. The case of Gulshan 2013] UKUT 00640 (IAC) decided that a consideration of the nature and extent of the failure to meet the Rules must be a precursor to consideration of Article 8 within the Rules and under the ECHR and only if there are "arguably good grounds" for granting leave to remain outside the Rules was it necessary for the Tribunal for Article 8 purposes to go on to consider whether there are "compelling circumstances not sufficiently recognised by the Rules".

20. I find no arguably good grounds for granting leave outside the Rules. No such grounds are identified and nor do I find any compelling circumstances not sufficiently recognised by the Rules to warrant any further Article 8 ECHR consideration. The option remains open to the claimant to make a renewed application under the Immigration Rules with the appropriate, specified, evidence. The appeal is dismissed under Article 8 of the ECHR.

Summary of Decisions

21. The making of the First-tier Tribunal decision involved the making of an error on a point of law.

22. The decision is set aside and is remade as follows.

23. The appeal is dismissed under the Immigration Rules.

24. The appeal is dismissed under Article 8 of the ECHR.

25. The ECO's appeal to the Upper Tribunal succeeds.

Anonymity

I find no reason to change the decision of the First-tier Tribunal not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Signed:

J Harries

Deputy Upper Tribunal Judge
Dated: 6th August 2014

Fee Award

No fee award was made in the First-tier Tribunal. That position remains unchanged in the light of the dismissal of the claimant's appeal by the Upper Tribunal.

Signed:

J Harries

Deputy Upper Tribunal Judge
Dated: 6th August 2014