Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/09205/2013
OA/09210/2013
OA/09214/2013
OA/09215/2013
OA/09222/2013

THE IMMIGRATION ACTS

Heard at Field House
On 31 July 2014
Prepared 31 July 2014

Determination Promulgated
On 18 August 2014

Before

UPPER TRIBUNAL JUDGE MCGEACHY

Between

NA
IB
NB
SB
UB

Appellants

and

ENTRY CLEARANCE OFFICER - ISLAMABAD

Respondent

Representation:

For the Appellants: Mr A Mills, of Counsel instructed by Messrs Indus Solicitors
For the Respondent: Mr I Jarvis, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellants, a mother born on 16 September 1966 and her children born on 18 January 1995, 23 October 1996, 2 February 1998 and 10 July 1999 appeal, with permission, against a decision of Judge of the First-tier Tribunal Broe who in a determination promulgated on 25 April 2014 dismissed their appeals against a decision of the Entry Clearance Officer, Islamabad, to refuse them entry clearance to come to Britain as the wife and children of MI, a British citizen.

2. The notice of refusal was on the basis that the appellants had not shown that the sponsor met the income requirements in the rules of £29,600. The documentary evidence provided by the appellants had shown that the sponsor had been in each of two employments for less than six months and the refusal stated that the income from the two employments was £11,341 per annum. The respondent therefore refused the applications under the provisions of paragraph EC.B.1.1(d) of Appendix FM. The respondent stated that the appellants had not provided specified documents to support the application.

3. With the notice of appeal a letter from Dawn Cardington, the sponsor's first employer was produced which gave his gross wages and bonus. Also produced was a contract of employment dated 21 December 2012. Payslips for Dawn Cardington for 15 December 2012 to 23 March 2013 were also produced. Payslips from A & S (the appellant's second employer) between 13 January 2013 and 5 April 2013 were produced as well as bank statements from 30 November 2012 to 27 February 2013. It was claimed that the sponsor worked as a meat cutter with Dawn Cardington in Bedfordshire with an annual income of £19.744.40 and also as a butcher/meat cutter at A & S Food Store in Luton for which he earned £10,296. He also had savings of £5,182.11.

4. At the hearing before the First-tier Tribunal it was accepted by the Presenting Officer that the income from the two employments of £11,341.30 on which the respondent relied was a figure for which no basis could be found.

5. The sponsor stated that he had submitted the application on 9 January 2013 by which time he had been in both his jobs for over six months and therefore argued that it was wrong to refuse the applications on the basis that he had not been in the jobs for a six month period. He accepted that the letters put forward had not given his gross salaries but said that these could be calculated from his payslips. He said that his gross earnings from Dawn Cardington for the period 6 June 2012 to 6 June 2013 were £20,351 and from 2 July 2012 to 2 July 2013 he had earned £11,799 from A & S, giving total earnings of £32,150. He had produced from P60s from both employers. It appears to have been argued before the First-tier Judge that relevant documentation had been produced but, if it had not, then evidential flexibility should have applied.

6. In paragraphs 16 onwards of the determination the judge set out his findings of fact. He stated, in paragraph 17 that, on the face of it the evidence before him showed that the sponsor's income exceeded the figure required for entry clearance. However, the judge found that the evidence had not been provided in the relevant form. He referred to the requirements of Appendix FM-SE of the Rules which set out the number of payslips required stating that they were required for a period of six months prior to the date of application if the person had been employed by their current employer for at least six months and that a letter from the employer who issued the payslips should be produced confirming the person's employment and gross annual salary, the length of their employment, the period over which they were being or were paid the level of salary relied upon in the application and the type of employment. Moreover personal bank statements corresponding to the same period as the payslips showing that the salary had been paid into an account in the name of the person or in the name of the person and their partner jointly should be produced.

7. The judge considered the evidence relating to the sponsor's employment with Dawn Cardington with A & S Food Store. He stated that neither letter confirmed the gross annual salary and that the Dawn Cardington letter also failed to state the period during which the appellant had received the salary relied on. The documentary evidence required by Appendix FMSE had therefore not been produced and the appeals could not therefore succeed under the Rules.

8. The judge then turned to the issue of the Article 8 rights of the appellants and in particular noted the approach set out in the determination of the Tribunal in **Gulshan (Article 8 – new rules – correct approach) [2013] UKUT 00640 (IAC)**. He referred to the structured approach set out by Lord Bingham in **Razgar [2004] UKHL 27** and, having placed weight on the fact that the sponsor had lived apart from his family for many years, and although he accepted that family life existed between them, he stated that that was the life that the sponsor had chosen and that life would continue and he was not persuaded that there was any interference with the right to enjoy it and therefore Article 8 was not engaged. The appeal was therefore dismissed on both immigration and human rights grounds.

9. Grounds of appeal were submitted which argued that the judge had found that the evidence was such that "on the face of it" the sponsor's income exceeded the figure required for the family and therefore stated that the appellants' case was made out and therefore there was a material error of law. The grounds went on to say at the time of the preparation of the case in October 2012 the sponsor had only been employed by Dawn Cardington for four months and therefore it had not been possible for the employer to provide any gross figures for his annual earnings. The employer had further clarified his position in a letter of 16 May 2014 which was attached to the grounds. Moreover, the sponsor's second employer had been in a similar situation and that was now clarified in a further enclosed letter. It was claimed that the Entry Clearance Officer should have applied paragraph D(b)(i)(dd)

and D(e) and ought to have asked for up-to-date information and continuation of the payslips were already available to him.

10. It was claimed that additional documents had been submitted which showed the appellant's earnings and it was further claimed that there had been no Entry Clearance Manager's review and that had that happened the matter could have been resolved without an appeal hearing.

11. Permission to appeal was granted by Judge of the First-tier Tribunal Chambers who considered that the grounds were arguable. A Rule 24 statement from the respondent stated that the appellant had not provided the relevant proof of income.

12. At the hearing of the appeal before me Mr Mills emphasised that the judge had found that the sponsor met the relevant income requirements and stated that the judge had taken no issue with the adequacy of the payslips supplied but further went on to argue that the decision to find that the interference with the appellants' rights under Article 8 was proportionate was wrong.

13. It was argued that both Dawn Cardington and A & S Food had provided letters saying it was not possible to provide the sponsor with the gross annual earnings as he had only been employed on 6 June 2012 and A & S Food had stated that the appellant had only been employed for five months and therefore they could not provide the relevant evidence.

14. The skeleton argument went on to set out the terms of Appendix FM-SE, part D of the Rules, regarding specified documents before stating that evidential flexibility should have applied and referring to the judgment of the House of Lords in **Chikwamba [2008] 1 WLR 1420** in which Lord Scott had stated that:

> "Policies that involve people cannot be, and should not be allowed to become, rigid and flexible rules. The bureaucracy of which Kafka wrote cannot be allowed to take root in this country and the courts must see that it does not."

15. It was stated that it was in the best interests of the children to be raised by both parents.

16. It was also argued that there was "procedural legitimate expectation" – the expectation of the sponsor that having obtained British nationality he would be able to bring his wife and children to Britain to live with him here.

17. Mr Mills, in his oral submissions emphasised that rules should not be raised to the point of dogma and referred to the arguments before the Judge of the First-tier Tribunal that evidential flexibility was relevant. He referred to the evidence including a letter of 27 December 2012 which he stated had been sent with the grounds of appeal in April 2013 but additionally had been in the bundle before the

judge dated 9 December 2013. That letter dated from before the date of decision in March 2013 and was therefore relevant and should have been taken into consideration. He stated it was an error of the First-tier Judge not to consider that letter which was relevant, which set out the gross wages of the sponsor and his weekly bonus and which read with the other documentary evidence showed the length and duration of employment. While he conceded that payslips were missing, when read together he stated that it was evident the financial requirements were met. He accepted however that the bank statements did not always show the amounts of pay received – these were only relevant after 30 November.

18. He accepted that the payslips from A & S were not reflected in the bank accounts and stated that was because the sponsor had been paid in cash. He went on to argue that when interpreting the requirements of the Rules it was important to take into account the practicability of providing relevant documentation when payments and cash were made. It would be almost impossible to track payments directly into the account and it was not reasonable to expect that the sponsor would always have paid in the exact amount. Therefore the Rules would be interpreted some flexibility.

19. He went on to state that there were, moreover, two principal errors of law in the determination firstly with regard to the approach of the judge to the issue of Article 8 where he had not properly placed weight on the best interests of the children and although he accepted that Section 55 of the 2009 Borders Act did not apply, it was, he argued relevant to place particular weight on that factor. He stated that the sponsor had had indefinite leave to remain under the legacy programme and had spent many years away from the children having come to Britain in November 1999. He asked me to find that the decision to refuse entry clearance to the children was not in accordance with the law.

20. He went on to argue the issue of legitimate expectation that there would have been a review of the decision and another chance for the appellant to put his case. He finally emphasised that the P60 forms had been before the First-tier Judge and stated that that was sufficient evidence for the judge to have found that the terms of the Rules were met. The reality was that the sponsor's income was, on a pro rata basis, £31,500 as at the date of decision.

21. Mr Jarvis started by stating that he accepted that at the date of the application the sponsor had been employed by both Dawn Cardington and A & S for six months as he had started at Dawn Cardington on 6 June 2012 and at A & S on 2 July 2012. It was therefore acceptable to look at the six months of income for the period up to the date of decision. He stated, however, that the requirements of the Rules – the specified documents required included both wage slips and, at requirement A1(2)(a)(1) as well as a letter from the employer at requirement 2(b) (i), (ii), (iii) and (iv). He stated that there was no letter from Dawn Cardington which met the requirements of the Rules at (2)(b)(ii). Moreover the requirement that the payments be shown in the sponsor's bank account at requirement 2(c) had not been met. He

stated that the Rules were logical and sensible. It was important that the actual earnings of a sponsor were corroborated in the way that the Rules set out to ensure that the sponsor had been paid and had received the money which would bring the appellants within the financial requirements of the Rules.

22. He went on to say that the determination in **Mundeba** and the arguments relating to Section 55 of the Borders Act 2009 were not in the written grounds and he asked me to find that it was too late for Mr Mills to ask that the grounds be amended. What was relevant was the decision of the First-tier Judge and the arguments before him. I any event he stated that the exceptional provisions of Appendix FM were framed with Section 55 in mind. With regard to the issue of legitimate fairness there was nothing that required a review. There was no public policy that was infringed by the fact that the decision had not been reviewed. He argued that there was no issue of evidential flexibility with regard to the financial requirements of the Rules. The reality was that the terms of the Rules were not met and that the decision was in accordance with the Rules and in accordance with the law.

23. The further letter from Dawn Cardington was not evidence before the First-tier Judge nor before the respondent. The reality was that on the evidence before the judge was that the requirements of the Rules were not met.

24. In reply Mr Mills referred to the issue of evidential flexibility and stated that that should have been applied to the decision and asked me therefore to find there were material errors of law in the determination of the First-tier Tribunal.

Discussion

25. The grounds of appeal raise a number of matters which can be dealt with in short form. The reality is that there is no obligation on an Entry Clearance Manager to review a decision when the grounds of appeal are received and that the public policy to ensure that there is an independent challenge to the conclusions of the Entry Clearance Officer is the appeals system of which those appellants took advantage.

26. Moreover, with regard to the requirements of the Rules, these were not points-based systems and therefore the provisions to which the determination of the Tribunal and indeed the later judgment of the Court of Appeal in **Rodriguez** do not apply. The Rules are drafted in strict form requiring evidence and there is a clear rationale for the terms of the Rules where an individual has not worked in a job for twelve months – it is important that there is corroboration of money that is paid particularly when money is paid in cash. It is of assistance when assessing the ability of a sponsor to support his dependants that the sums claimed to have been paid have actually been received by the sponsor. The judge found that the relevant documentation had not been provided and that finding has not been challenged. The appellants could not succeed under the Rules.

27. I note the terms of Appendix FM-SE – which relates to specified evidence where at D(ii)(e) it states:-

> "Where the decision maker is satisfied that there is a valid reason why specified document(s) cannot be supplied, e.g. because it is not issued in the 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."

That rule, which sets out the basis on which the issue of evidential flexibility can be applied, simply does not cover the situation this appeal where the evidence has not been provided but could have been available.

28. Turning to the issue of the Article 8 rights of the appellant I accept Mr Jarvis's submission that it was not argued in the grounds of appeal that the judge had erred in his approach because he had not applied the ratio of the determination in **Mundeba**. The reality is that, in any event, while it is the case that in general terms it is best for the four children to be brought up by two parents this sponsor made the decision that he was going to leave Pakistan, leaving his children with his wife and that she was to bring them up. That she did. Their life is in Pakistan, they do not speak English and it is clearly arguable that the best interests of the children are to remain in Pakistan. If the sponsor wishes to live with the children then of course he can do so there. Following the ratio of the determination in **Gulshan** the reality is that it is only in exceptional circumstances that it would be appropriate to go behind the terms of the Rules and I do not consider that such exceptional circumstances exist given, as I have said, that the children have been brought up by their mother and have lived in Pakistan all their lives.

29. I therefore find that the judge was entitled not only to find that the terms of the Rules had not been met and that the appeal should be dismissed under the Rules but also that the refusal of the applications was not a disproportionate breach of the rights of the appellants under Article 8 of the ECHR.

30. I therefore find that the decision of the First-tier Judge dismissing this appeal on both immigration and human rights grounds shall stand.

Signed Date

Upper Tribunal Judge McGeachy