First-tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/10518/2013

THE IMMIGRATION ACTS

Heard at Bradford
On 10th July 2014

Determination Promulgated
On 11th July 2014

Before

UPPER TRIBUNAL JUDGE KELLY

Between

THE ENTRY CLEARANCE OFFICER - ISLAMABAD

Appellant

and

MR AHMAD BILAL
(ANONYMITY NOT DIRECTED)

Respondent

Representation:

For the Appellant: Mr M Diwnycz, Home Office Presenting Officer
For the Respondent: Mr S Saleem, Legal Representative

DETERMINATION AND REASONS

1. This is an appeal by the Entry Clearance Officer (ECO) in Islamabad against the decision of the First-tier Tribunal (Judge Hillis) to allow the respondent's appeal from the refusal of his application for entry clearance as the spouse of a person who is settled in the United Kingdom.

2. The ECO refused the application on the ground that the respondent had not met the financial requirements of Appendix FM of the Immigration Rules; namely, that the annual gross income of the respondent's wife should equal at least £18,600, either alone or in combination with savings of £16,000 plus a sum that is equal to 2.5 times any shortfall that may exist in her ability to meet the income threshold. Further or alternatively, the ECO refused the application on the ground that the respondent had

not met all the requirements to submit specified evidence under appendix FM-SE of the Immigration Rules. I shall return to this aspect of the ECO's decision at a later stage of this determination.

3. The respondent had submitted payslips as evidence of his wife's earnings with two different employers in the United Kingdom; namely, 'PMP' and 'Harehills DIY' [paragraph 14 of the judge's determination]. There was evidence that his wife's employment with PMP had commenced on the 28th October 2011 [paragraph 17]. However, she only submitted payslips from the 6th July 2012 [paragraph 16]. There was also evidence that she had begun her employment with Harehills DIY on the 10th September 2012 [paragraph 18]. She had accordingly submitted payslips in connection with that employment from the 14th September 2012 [paragraph 19]. The application was made on the 6th February 2013 [paragraph 15]. It followed from this that the respondent had submitted evidence of his wife's income over a period of only 7 months immediately preceding the date of application. The judge sought to overcome this evidential difficulty by grossing up the income from the two employments to produce an average for a period of 12 months. He then added those sums together in order to produce a total sum, which he calculated to be £19,006. He therefore allowed the appeal on the ground that the decision was not in accordance with Immigration Rules, because the annual income of the respondent's wife was "clearly in excess of £18,600"

4. Mr Diwnycz sought to persuade me that the judge's arithmetic was incorrect. He was not however able to substantiate that claim because he had not brought his notes with him. This is not in any event the basis upon which permission to appeal was granted. The real point of the appeal (and that for which permission has been granted) lies in the fact that the judge appears wholly to have overlooked the evidential requirements of Appendix FM-SE.

5. The relevant part of Appendix FM-SE reads as follows:

> 2. In respect of salaried employment in the UK (except where paragraph 9 applies), all of the following evidence must be provided:
>
> (a) Payslips covering:
>
> (i) a period of 6 months prior to the date of application if the person has been employed by their current employer for at least 6 months (and where paragraph
> 13(b) of this Appendix does not apply); or
> (ii) any period of salaried employment in the period of 12 months prior to the date
> of application if the person has been employed by their current employer for less
> than 6 months (or at least 6 months but the person does not rely on paragraph 13(a) of this Appendix), or in the financial year(s) relied upon by aself-employed person.

(b) A letter from the employer(s) who issued the payslips at paragraph 2(a) confirming:

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

6. The point that had originally been taken by the ECO was that the letter from PMP did not contain any of the required information and, moreover, the letter from Harehills DIY did not specify the gross annual income that was payable to the respondent's wife under her contract of employment. It is fair to say that these matters were simply not addressed by the judge.

7. However, it will also be seen (and this is the real point of the present appeal) that it was not open to the judge to remedy the deficiency in the appellant's documentary evidence by calculating the average annual salary of his wife on the basis of documentary evidence that covered a period of only 7 months. As his wife had only been employed by Harehills DIY for a period of five months prior to the date of application, it followed that the provisions of Appendix FM-SE required the respondent to produce payslips covering a full 12-month period immediately preceding the date of application. It necessarily follows this that, had the judge applied the provisions of Appendix FM-SE to the facts of this appeal, he would have been bound to conclude that the ECO's decision was in accordance with immigration rules.

8. However, the judge also found (presumably, in the alternative) that the appeal should be allowed on the ground that the decision to refuse entry clearance was incompatible with the respondent's right to respect to private and family life under Article 8 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms. The rationale of that decision is contained in paragraph 25:

> As I have found all the requirements of paragraph 3-ECP.1.1 of appendix FM to the relevant standard of proof I find that any interference with the Appellant's right to family life would not be proportionate and that the Appellant's rights to a private life with his spouse would be breached if this appeal was refused. In my judgement, it would not be proportionate to the UK Government's legitimate aims of proper immigration control to require the Sponsor to leave her job, family members and life in the UK to go to Afghanistan to maintain her family life.

9. That analysis is in my view flawed in three particular respects.

10. Firstly, the fact that the appellant had been found to meet the substance (if not the form) of the financial requirements of Appendix FM was of extremely limited relevance to the assessment under Article 8. As was said in Nasim and others (Article 8) [2014] UKUT 00025 (IAC):

> A person's human rights are not enhanced by not committing criminal offences or not relying on public funds. The only significance of such matters in cases concerning

proposed or hypothetical removal from the United Kingdom is to preclude the Secretary of State from pointing to any public interest justifying removal over and above the basic importance of maintaining a firm and coherent system of immigration control.

11. Secondly, the judge's analysis overlooks the fact that a State has the right to control the entry of non-nationals into its territory, and the duty imposed by Article 8 cannot therefore be considered as extending to a general obligation on the part of a Contracting State to respect the choice by married couples of the country of their matrimonial residence and to accept non-national spouses for settlement in that county (see Abdulaziz, Cabales and Balkandali v United Kingdom [1985] ECHR 7, at paragraph 67).

12. Thirdly, and in any event, the question was not whether it was disproportionate to require the respondent's wife to move to Pakistan. Indeed, neither the ECO nor the UK Government has any power to impose such a requirement upon her. Rather, the appropriate question was whether it is disproportionate to require an applicant to submit the documents that are required by the United Kingdom's immigration policy as a pre-condition to settlement within its territory.

13. I have therefore concluded that the judge's incorrect application of the Immigration Rules and Article 8 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms was such that his decision cannot stand and must be set aside. Both representatives agreed that in the event of me reaching this conclusion, it would be appropriate to remake the decision without receiving further evidence. As it seems to me, there was only ever one appropriate outcome to the appeal that was before the First-tier Tribunal, and that was to dismiss it. The respondent (to this appeal) did not meet the Immigration Rules, for the reasons that I have already stated. Moreover, I can see nothing that is either unjustifiably harsh or disproportionate about requiring him to meet the requirements of the Immigration Rules – if necessary, by making a fresh application - as a pre-condition to being permitted to settle in the United Kingdom.

Decision

14. The appeal of the Entry Clearance Officer is allowed.

15. The decision of the First-tier Tribunal to allow the appeal against refusal of the respondent's application for entry clearance is set aside, and it is substituted by a decision to dismiss that appeal.

Anonymity is not directed

Signed Date

David Kelly

Deputy Judge of the Upper Tribunal