Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/10883/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 27 August 2014	**On 3 October 2014**

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

ENTRY CLEARANCE OFFICER - CHENNAI

Appellant

and

PAPITHA SIVAKOKILAN

Respondent

Representation:

For the Appellant: Ms J Isherwood, Senior Home Office Presenting Officer
For the Respondent: Mr S Chelvan, instructed by KTS Legal Solicitors

DETERMINATION AND REASONS

1. Although the appellant and the respondent are as set out above before me, it will be convenient to refer to them as they were before the First-tier Tribunal Judge so I shall

hereafter refer to Mrs Sivakokilan as the appellant and the Entry Clearance Officer as the respondent.

2. The appellant sought entry clearance to settle in the United Kingdom with her husband, the sponsor, as his wife. As regards the sponsor's ability to maintain the appellant, the respondent noted that he needed a gross income of at least £18,600 per annum. He had provided a letter from Tesco Stores Limited where he worked as a customer assistant, and the respondent had a concern that this letter from Tesco did not confirm his gross annual salary, type and length of employment or the period over which he had been paid the level of salary relied upon in the application.

3. The respondent also noted the claim that the sponsor was self-employed, running a newspaper and a magazine delivery service. The relevant provisions of paragraph 7 of FM-SE were noted, and it was commented that contracts with 2TheDoor and S Rajkumar were not consistent with the payment breakdown provided by the sponsor's accountant or his accounts and as a consequence the respondent was not satisfied that the accounts provided were accurate representations of the sponsor's earnings from this employment. Also, he had not provided an annual self-assessment tax return or statement of account as required in the Immigration Rules. Bank statements from NatWest Bank provided were not accepted as evidence of the sponsor's ability to support her within the terms of FM-SE in the absence of the sponsor's annual tax return. In the absence of specified documents of his employment or self-employment the respondent was unable to calculate his income within the terms of paragraph of FM-SE and was therefore not satisfied that either the appellant or the sponsor had demonstrated that they held sufficient funds to meet the requirements of the Immigration Rules.

4. As regards accommodation, it was considered that the evidence provided was not satisfactory to establish the current occupancy or confirmation that the property was sufficiently spacious to accommodate the appellant and the sponsor within the terms of UK housing legislation.

5. Consideration was given to Article 8 of the European Convention on Human Rights, and it was concluded, in effect, that its requirements were not met in this case.

6. The judge considered first the issue of accommodation which I can deal with in short order since her findings in that regard were not the subject of later challenge. She had seen relevant documentation including mortgage documentation, utility bills, an insurance policy and sale particulars of the property when purchased by the sponsor and were satisfied that the accommodation was adequate for the purposes of the Rules.

7. As regards the issue of maintenance, the judge was satisfied that the sponsor had provided sufficient documentation to establish both employments. The contract of employment with Tesco showed that he had been working for them since 22 October 2011, his contracted hours were 22.50 per week and his rate of pay was £159.15 per

week according to his payslips and he had also done overtime. The contract of employment was in the respondent's bundle. The judge commented that the respondent would appear to have missed that document and had reached an adverse conclusion about the Tesco employment without considering it.

8. As regards the self-employment, the judge again considered the documentation provided was sufficient to establish it. The sponsor had paid his Class 2 NIC (payment receipts seen). He had a UTR number given by HMRC. HMRCs' tax calculations showed that he had declared his earnings to them and was paying his income tax. The judge saw nothing untoward in the profit and loss accounts and balance sheets prepared by the sponsor's accountants and they had been accepted by HMRC. On the basis of the evidence including witness statements and letters from the sponsor's clients, she was satisfied that the sponsor was trading and that the business was profitable.

9. She went on to note the evidence from HMRC which showed his earnings from the two forms of employment including showing that in 2012/2013 his earnings from paid employment of £12,123 and the profit from self-employment was £17,866. For 2013/2014 his gross employment from Tesco amounted to £12,678 and the profit from self-employment was £15,834. Accordingly she was satisfied that the requirements of the Rules were met.

10. As regards Article 8, in the circumstances she saw no need to deal with it and in any event Counsel for the appellant had made no submissions on Article 8 and accordingly she assumed that it was therefore decided not to pursue that issue.

11. The respondent sought and was granted permission to appeal on the basis that the judge had not had regard to the Rules of specified evidence set out in Appendix FM-SE and the decision failed to comply with the Immigration Rules. The point was taken that the Tesco letter did not confirm the sponsor's gross annual salary type and length of employment or the period over which he had been paid the level of salary relied upon in the application. Some of these issues had been addressed in the contract of employment but the judge had not dealt with all of them in coming to her findings.

12. The inconsistency referred by the Entry Clearance Officer in the evidence from the contracts and the accounts provided had not been engaged with fully by the judge. The sponsor had not provided annual self-assessment tax returns or statement of account and these were documents which were specified in the Immigration Rules and required to be provided. It was also unclear whether the Tribunal had had appropriate regard to the relevant date. For Appendix FM the significant date was the date of application, and the significant evidence was from the specified period before that date. It was therefore not clear what the sponsor's actual gross income was at the date of application.

13. Permission to appeal was granted on the basis that it was argued in the grounds that the judge had erred in her approach to Article 8 and her assessment of whether the appellant and the sponsor met Appendix FM. It was said that it was not clear what factors weighed in the judge's mind when she decided there were exceptional features of the case which justified allowing the appeal and the lack of reasoning was an arguable error of law. It was said that given the Tribunal decision in Gulshan [2013] UKUT 00640, it was arguable that the judge had misdirected herself as to the law on Article 8.

14. In her submissions Ms Isherwood argued that the determination contained material errors of law. It was clear from the Entry Clearance Manager's review that the Tesco contact had been considered, at paragraph 6. It was argued that Mr Chelvan's response did not address the grounds. There were points in the ECO's refusal which the judge had not addressed. It was not enough just to argue that that was not a PBS case. Appendix FM was relevant with regard to the evidence required prior to the application. The judge had not dealt with these points. Paragraph 15 of the determination was insufficient. Paragraph 16 likewise. The further evidence from the accountants was not enough.

15. In his submissions Mr Chelvan said that as there was no note from the Presenting Officer or Counsel who had appeared on behalf of the Entry Clearance Officer. He had obtained the statement which was attached to his response, from Counsel, Mr Davison, at the hearing before the First-tier Judge. Ms Isherwood now disagreed as to how the hearing had been conducted before the judge. The points she raised were not dealt with because the Entry Clearance Officer's Counsel and the appellant's Counsel and the judge had narrowed the issues. Ms Isherwood was seeking to have a second bite at the cherry. There had been a change in the Entry Clearance Officer's strategy before the Tribunal.

16. Miss Isherwood said she had not realised there would be a statement from Counsel, Mr Davison.

17. Mr Chelvan referred to paragraph 5 of his skeleton. This was not a section 85A appeal. Counsel had conceded that, and that key document was now before the Tribunal. Sufficient funds were the only issue.

18. There was a procedural point. There was reference to Article 8 in the grant. It was the case that the documents had been provided in effect. The Gulshan point was odd. There was a need to take care when granting permission as there was no Article 8 issue in fact in the case at that stage. The case had shifted, as could be seen from Mr Davison's note, from the Entry Clearance Officer's decision to the simple issue of whether the sponsor could show £18,600. the case had changed and there had been a concession. The date of decision was 20 April 2014. Thus it could be seen from page 66 of the bundle that the tax calculation for 2012/2013 was a total of just under £30,000. The appeal did not consider the concession made by Counsel on behalf of the Entry Clearance Officer.

19. If the matter was split between the Immigration Rules and primary legislation then clearly the latter won and page 5 note 5 of the skeleton referred to this. The Secretary of State accepted that the legislation would win the day. The judge had accepted that the issue was that of the facts at the date of decision or appertaining to it. It was a standard entry clearance appeal and it was not a PBS case, as Counsel had accepted.

20. The documents which proved the income threshold were provided to the judge. They were there in compliance with Appendix FM-SE. The question was whether one needed to be fixiated on the approach to say the appellant could not attend the hearing and provide a document missing at the date of application to show the rule was met and that was the issue. The Presenting Officer sought to strike out Exception 1 as referred to in the grounds, and that could not be done.

21. In the response it was argued that this was a section 82(2)(b) case and concerned the circumstances at the time of decision. This was in contrast to Exception 2 which referred to documents at the time of the application. The Presenting Officer had properly conceded it was not a PBS case so it must be Exception 1 and therefore the relevant date was the date of decision, in April 2013. The documents at pages 85 and 86 proved the case. It was surprising that the Tribunal was asked to dismiss the appeal when the requirements of the rule had been met. Ms Isherwood was seeking a complete restructuring of the appeal and said it was not possible to bring documents to the hearing. There was no authority for this.

22. There was no challenge to the accommodation point and whether the judge had found the threshold was met. It could not be disputed that it was met at the date of decision and the Presenting Officer did not argue that it had not been. The Tribunal had the two tax returns which clearly set out the documents the appellant relied on. Paragraph 19 of the response set out the relevant legal provisions. The legislation had priority and it was a question of the facts at the date of decision. Section 85A was pending amendment but as it stood it must be considered. A purposive approach to the Rule was to be adopted. Ms Isherwood did not say that Appendix FM was not satisfied but Appendix FM–SE was not, she said. According to section 12 of the 2007 Act the challenge could only succeed if there were an error of law at the time of the hearing. In light of the concession it had come down to the two documents.

23. By way of reply Ms Isherwood argued that Mr Chelvan had misinterpreted her. She did not say that PBS trapped this. She was aware of what was said at paragraph 5 in Mr Chelvan's skeleton, but it was not so clear about the key documents. Ms Isherwood argued that the judge had not dealt with the precise point of the conflict in the evidence referred to by the Entry Clearance Officer and that had never been addressed. Even in the grounds at paragraph 7 one could make a fresh application and Appendix FM set out what the required evidence and periods were. Account had been taken of the accountant's report up to March 2014 but it was irrelevant to the applications.

24. Mr Chelvan made the point that the appellant relied on the HMRC documents, not the accountant's letter. January 2013 was the date of application and that could be found at page 66 of the bundle. The HMRC documentation was dispositive, as the Presenting Officer at the hearing had agreed.

25. Ms Isherwood made the final point that the date of application was 29 January 2013 so it was in relation to evidence up to then.

26. I reserved my determination.

27. I have set out above in some detail the basis upon which the refusal was made by the Entry Clearance Officer. It is necessary to examine these concerns point by point. The first point is that the letter from Tesco did not confirm the sponsor's gross annual salary, title and length of employment nor the period over which he had been paid the level of salary relied upon in the application. The letter from Tesco dated 10 January 2013 confirms that the sponsor has been employed by them since 22 October 2011, describes the nature of his work and the fact that he is a permanent employee of Tesco. There is no reference to his gross annual salary nor indeed to his wages at all. There is also provided a contact from Tesco which set out his core contracted hours of 22.50 a week and his total rate of pay as £159.15 per week. However the mandatory requirement of Appendix FM–SE at paragraph 2(b)(i) is not met since the gross annual salary is not set out there. Otherwise the requirements of the Rules concerning what such a letter should contain appear to be present.

28. The next issue that concerned the respondent was with regard to the sponsor's self-employment. This self-employment, it seems, is concerned with work he does as a subcontractor for a Mr S Rajkumar and also a Mr T Ganeshapillai who both have contracts with the organisation known as 2TheDoor to deliver newspapers from their Barking premises. There is a letter from Mr Rajkumar confirming that the sponsor has been working for the Morning Courier which is a company under which name he trades, since 24 March 2012, and there is a fairly similar letter from Mr Ganeshapillai confirming that the sponsor has been working as a subcontractor for 2TheDoor since 2 June 2012.

29. Of course it matters little that the starting dates for these two subcontractors are different. The matter that troubled the Entry Clearance Officer was that the payments in the sponsor's accountant's accounts show that payments began on 20 January 2012. Those payments, however, were part of his salary, and there no indication in the breakdown for earnings in Suryia and Co's letter of 10 January 2013 as to the dates on which the particular earnings of self employment were obtained, although it is said to be from a period of 15 April 2012 to 31 December 2012, which in my view essentially conforms to what is said in the subcontracts as to the start date of these contracts. The fact that one of those subcontracts began in March and the other in June does not preclude payments coming in as from 15 April.

30. Otherwise the main concern of the Entry Clearance Officer was that the appellant had not provided annual self-assessment tax returns or statements for account and that matter was rectified at the hearing.

31. I think it is uncontroversial that, as contended for in Mr Chelvan's skeleton, this an Exception 1 rather than an Exception 2 case, since it is not a PBS case, and therefore the issue is as to the circumstances appertaining at the time for decision. The only point missing from the documentation is an explicit statement of the sponsor's gross annual salary, but that can readily be gleaned from the employment contract which sets out his weekly rate of pay and I consider it would be taking the requirements to conform to specific Rules excessively to require the sum multiplying that by 52 to have been set out in the letter.

32. Accordingly, although the judge did not address matters in the kind of detail with which I think she should have done, the conclusion that she came to was one which was properly open to her in light of the evidence and accordingly her decision allowing this appeal is maintained.

Signed Date

Upper Tribunal Judge Allen