



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/12161/2013
OA/12155/2013

THE IMMIGRATION ACTS

Heard at Manchester
On 17th July 2014

Determination Promulgated
On 04th Aug 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

N S (FIRST APPELLANT)
R L (SECOND APPELLANT)
(ANONYMITY ORDER MADE)

Appellants

and

ENTRY CLEARANCE OFFICER - CHENNAI

Respondent

Representation:

For the Appellants: Mr A Ceesay of the Immigration Advice Service
For the Respondent: Mr G Harrison, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction and Background

1. Although no anonymity direction was made by the First-tier Tribunal, and there was no request for anonymity, I have decided to make an anonymity order pursuant to

rule 14 of The Tribunal Procedure (Upper Tribunal) Rules 2008 because the second Appellant is a minor.

2. The Appellants appeal against a determination of Judge of the First-tier Tribunal Crawford promulgated on 24th April 2014.
3. The Appellants are Indian citizens born 20th August 1980 and 16th May 2012 respectively. They applied for entry clearance to enable them to join the Sponsor L G, who is settled in the United Kingdom, and who is the spouse of the first Appellant and the father of the second Appellant.
4. The applications were refused on 2nd May 2013 on financial grounds. The Respondent pointed out that the Sponsor needed to evidence a gross annual income of at least £22,400 to satisfy financial requirements set out in Appendix FM. The specified documents required by Appendix FM-SE had not been submitted with the application to prove the Sponsor's annual gross income and therefore the applications were refused with reference to E-ECP.3.1 in relation to the first Appellant, and E-ECC.1.6 of Appendix FM in relation to the second Appellant.
5. The Appellants' appeal to the First-tier Tribunal, contended in summary, that the financial requirements of Appendix FM were satisfied, and that the decision to refuse entry clearance breached Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention).
6. The appeals were heard together by Judge Crawford (the judge) on 11th April 2014. It was agreed by the representatives before the First-tier Tribunal, that the only documents that had not been submitted with the applications for entry clearance, were that only six months' bank statements had been produced, rather than twelve months. The requirement in Appendix FM-SE is that in a case such as this, twelve months bank statements covering the same twelve month period as the Sponsor's tax return must be submitted.
7. The judge found that twelve months bank statements for the required period had been submitted, although only six months had been submitted with the application. The judge found at paragraph 7 of the determination, that the Respondent's bundle contained overwhelming evidence that the Sponsor earned well in excess of £22,400, which was the required minimum annual amount. However the judge decided that he could not take into account, the bank statements that had not been submitted with the application, as he could only decide the case on the evidence produced with the application to the Entry Clearance Officer. Therefore for this reason, the appeals were dismissed under the Immigration Rules.
8. The judge considered Article 8 of the 1950 Convention and concluded that because the Immigration Rules could not be satisfied, refusal of entry clearance was proportionate and did not breach Article 8.

9. The Appellants applied for permission to appeal to the Upper Tribunal, contending in brief summary that the judge had erred in his consideration of the financial requirements of Appendix FM and failed to properly consider Article 8.
10. Permission to appeal was granted, and directions issued that there should be an oral hearing before the Upper Tribunal to ascertain whether the First-tier Tribunal determination disclosed an error of law.

The Upper Tribunal Hearing

11. Mr Harrison conceded that the judge was wrong in law in finding, in paragraph 7 of the determination, that he could only decide the case on the evidence before the Entry Clearance Officer. Mr Harrison accepted that the judge could have considered bank statements that were submitted after the application.
12. I therefore did not need to hear from Mr Ceesay in relation to error of law. I decided Mr Harrison was right to concede an error of law, and that the judge could have considered the six months bank statements that were submitted after the application, which meant that the Appellants had then submitted the twelve months bank statements required by Appendix FM-SE.
13. In relation to re-making the decision, Mr Harrison accepted that the only issue which caused the appeals to be dismissed, related to the twelve months bank statements and as it was accepted that the First-tier Tribunal could have taken those into account, and those statements did cover the required period, that being the same period as the Sponsor's tax return, the appeals were not opposed, as the evidence proved that the Sponsor did have annual earnings in excess of the required amount of £22,400.
14. Mr Ceesay submitted that the appeals should be allowed under the Immigration Rules, and that Article 8 need only be considered in the alternative, if the appeal was dismissed under the rules.
15. I reserved my decision.

My Conclusions and Reasons

16. It is clear that it was accepted before the First-tier Tribunal that the Sponsor's annual income was well in excess of the £22,400 required. The judge recorded that the evidence in the Respondent's bundle was overwhelming.
17. The only issue related to the fact that six months bank statements had been submitted with the application rather than twelve months, which were required to cover the same period as the Sponsor's tax return.
18. In my view the judge erred in not taking into account the bank statements that were submitted subsequent to the application. This is not an appeal under the points-based system, therefore section 85A(4) of the Nationality, Immigration and Asylum Act 2002 which restricts the Tribunal to considering evidence adduced by an

Appellant only if it was submitted in support of and at the time of making the application, does not apply.

19. Paragraph D of Appendix FM-SE restricts an Entry Clearance Officer or the Secretary of State to only considering documents that have been submitted with the application, unless certain exceptions apply. However in my view this paragraph does not apply to the Tribunal.
20. This is an appeal against refusal of entry clearance, therefore the Tribunal is restricted by section 85A of the 2002 Act, to considering the circumstances appertaining at the time of the decision to refuse, which was 2nd May 2013. The bank statements in question do not postdate the date of refusal, therefore in my view they are admissible in evidence.
21. I therefore conclude, having set aside the decision of the First-tier Tribunal, that the specified evidence required by Appendix FM-SE, has been submitted and that evidence proves that the financial requirements of Appendix FM are satisfied. Therefore the appeals are allowed under the Immigration Rules. There is therefore no need to go on and consider Article 8.

Decision

The determination of the First-tier Tribunal contained an error of law and was set aside.

I substitute a fresh decision.

The appeals are allowed under the Immigration Rules.

Anonymity

I remind the parties that an anonymity order has been made because the second Appellant is a minor.

Signed

Date: 25th July 2014

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT
FEE AWARD

As the appeals are allowed I have considered whether to make a fee award. I do not consider it appropriate. The Appellants did not provide all of the specified evidence to the Entry Clearance Officer. There is therefore no fee award.

Signed

Date: 25th July 2014

Deputy Upper Tribunal Judge M A Hall