Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/12574/2013
OA/12575/2013
OA/12576/2013

THE IMMIGRATION ACTS

Heard at Manchester	**Determination Promulgated**
On 14 May 2014	**On 21 August 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MRS SEEMA MAHBOOB WASSAN, FIRST APPELLANT
MISS ALINA WASSAN, SECOND APPELLANT
MISS AIZA WASSAN, THIRD APPELLANT
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr C Bloomer, Counsel
For the Respondent: Mr A McVeety, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The first Appellant is a citizen of Pakistan born on 8th July 1984. The second and third Appellants are her infant children born respectively on 29th March 2010 and 29th June 2011. All references within this determination unless specified to the contrary

are to the first Appellant. The appeal of the second and third Appellants are directly linked to that of the first Appellant and rise and fall on the outcome of her appeal.

2. The Appellant had applied for entry clearance for settlement as a partner under Appendix FM of the Immigration Rules. Her application was considered under paragraph EC-P.1.1 of Appendix FM and was refused by Notice of Refusal dated 29th May 2013 on the basis that the Appellant had failed to submit the specified evidence for the specified period as stated in Appendix FM-SE of the Immigration Rules and as a result the Entry Clearance Officer was not satisfied that the Appellant's Sponsor was employed with the employer stated for the period stated and the pay level as stated as claimed in the Appellant's application.

3. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal Edwards sitting at Manchester on 28th January 2014. In a determination promulgated on the same day the Appellant's appeal was dismissed under the Immigration Rules and pursuant to Article 8 of the European Convention on Human Rights.

4. On 6th March 2014 the Appellant lodged Grounds of Appeal to the Upper Tribunal. Those grounds contended that the judge erred in relation to the payslips describing them as "fictitious" notwithstanding supporting documentary evidence and the Sponsor's explanation that the actual sums paid to him were only received in some of the months shown, at a later date. It was further contended within the grounds that the judge had misunderstood parts of the evidence finding against the Appellant that he did not mention in his witness statement that he had been suffering from stress and had started to work part-time. In fact, the Appellant's clear oral evidence was that the reduction in working hours due to stress occurred only after the adverse immigration decisions were made and so there was no material inconsistency. It was also contended that the judge erred in relation to the Sponsor's employer, wrongly finding that the company was established some six years ago whereas it was incorporated in March 2012 and in overlooking the explanation given by the Appellant for the withdrawal of funds in November 2012.

5. Further it was contended that the judge had erred in relation to human rights and that contrary to paragraph 26 of the determination the Notice of Appeal did include as a ground that the adverse decisions were unlawful as incompatible with the Appellant's human rights and the family life ties relied upon emerged clearly in any event from the witness statements made by the first Appellant and her husband.

6. On 18th March 2014 First-tier Tribunal Judge Campbell granted permission to appeal. Judge Campbell noted that the assessment of the evidence appeared in four paragraphs (paragraphs 21 to 24 of the determination) and appeared to be based on a summary which appeared earlier (at paragraphs 15 to 18). He considered that the assessment of the payslips appeared to take no account of the supporting documentary evidence which included a letter from the Sponsor's employer and a tax calculation. Further he considered that the other reasons given by the judge for not accepting the Sponsor's evidence may, arguably, have been based on a misunderstanding of when it was that the Sponsor began working part-time and

regarding the date of incorporation of his employer. Judge Campbell further considered that the First-tier Tribunal Judge had erred at paragraph 26 in stating that no human rights point was raised in the Notice of Appeal as human rights are expressly relied upon (albeit briefly) in the second of the grounds appearing on page 7 of form IATF-2.

7. On 31st March 2014 the Secretary of State filed and served a response to the Grounds of Appeal under Rule 24. Those grounds opposed the Appellant's appeal and at paragraphs 3 to 6 the Rule 24 response set out factual challenges to the Grounds of Appeal.

8. It is on that basis that the appeal comes before me initially to determine whether or not there is a material error of law in the decision of the First-tier Tribunal. The Appellant appears by his instructed Counsel Mr Bloomer. The Secretary of State appears by her Home Office Presenting Officer Mr A McVeety.

Submissions/Discussion

9. Mr Bloomer takes me to paragraph 5 of the Grounds of Appeal pointing out that the Grounds of Appeal clearly stated the decision of the Entry Clearance Officer was unlawful because it was incompatible with the Appellant's rights under the European Convention on Human Rights and that the issue was addressed by the Appellant and the Sponsor in their witness statements. He submits that the judge materially erred in law in that he did not identify Article 8 as an issue and then does not apply the right test. He has made no reference therein to the authority of *Gulshan* and that the appeal is fatally flawed in that the judge has failed to apply basic principles under the test set out in *Razgar.* He submits on that point alone there must be an error of law.

10. He then set out to analyse the grounds and the documents that were available and considered by the First-tier Tribunal Judge. He points out that the entirety of the judge's decision is to be found in three paragraphs, paragraphs 22 to 24 of the determination. Paragraph 22 states *"Putting the evidence of the Sponsor at its highest, is that he did submit six months' payslips albeit that for three of those months he do not receive the money represented by them until some months later. Such payslips are therefore fictitious..."*

11. Mr Bloomer submits that this paragraph is demonstrably wrong. He takes me to the document being the Halifax plc statement of 26th November 2012 pointing out that this document shows what the wage slips specify but shows that there was a delay in some payments and that the pay of August 2012 by Scorp was delayed and that the payment made in October was in fact late but only seven days late. He therefore submits that for the judge to conclude that such payslips are therefore fictitious is, to use Mr Bloomer's words, palpably untrue.

12. Mr McVeety responds by stating that at the hearing the Sponsor gave his evidence and therefore contends the judge had good grounds for drawing his conclusions in that two different explanations were given for the delay in payment namely cash

flow and that the Sponsor was on sick leave and that this contradicts the evidence that was in the Sponsor's witness statement.

13. Mr Bloomer points out that the Appellant's bundle shows that he was suffering from stress and that the judge has fundamentally failed to address that issue. The fact remains that the Appellant was paid and therefore the payslips cannot be fictitious. Even if payment was delayed he still earned the money and the wage slips show his entitlement to the money even if the money was not paid immediately.

14. Mr McVeety takes me to the Rule and refers me to Phelan page 1065 13th edition of the means by which gross annual income is calculated under Appendix FM.

> *"13. Based on evidence that meets the requirements of this Appendix, and can be taken into account with reference to the applicable provisions of Appendix FM, gross annual income under paragraphs E-ECP.3.1., E-LTRP.3.1., E-ECC.2.1. and E-LTRC.2.1. will be calculated in the following ways:*
>
> *(a) Where the person is in salaried employment in the UK at the date of application, has been employed by their current employer for at least 6 months and has been paid throughout the period of 6 months prior to the date of application at a level of gross annual salary which equals or exceeds the level relied upon in paragraph 13(a)(i), their gross annual income will be (where paragraph 13(b) does not apply) the total of:*
>
> *(i) The level of gross annual salary relied upon in the application;*
>
> *(ii) The gross amount of any specified non-employment income (other than pension income) received by them or their partner in the 12 months prior to the date of application; and*
>
> *(iii) The gross annual income from a UK or foreign State pension or a private pension received by them or their partner."*

15. Mr McVeety submits that following the Rule the Sponsor is working part-time and cannot meet the requirements anyway and that the Notice of Refusal states that the Sponsor says he was paid by BACS which he was not and therefore there is an issue of credibility over the money that he received. He submits that if the Appellant was not working for three months in any event he is not able to meet the requirements of the Rules.

16. Mr McVeety indicates it is necessary to look at the total wage slips throughout the six month period and that the Sponsor was paid a total of £12,600 and quite simply by being paid those amounts he satisfies the Rule and that this is an issue of fact rather than what was or was not said at the hearing. Mr McVeety did not concede that point and relies on the Rule 24 response.

17. Turning to the issue of stress Mr Bloomer points out that it was not raised until after the immigration decision and that there was no significant reduction in the Sponsor's

wage which is shown on the wage slips that he received which are over the requisite limit and therefore in fact it does not matter whether or not the Appellant was, or was not, off work through stress. Further so far as ground 3 is concerned the document referred to Scorp Legal Services not Scorp Limited and that there has been a misunderstanding as to the two companies. Scorp Limited was not incorporated until 27th March 2012 and therefore is referred to as a new company although Scorp Legal Services had been trading since 2006. He submits the judge has made a fundamental error in misunderstanding the position regarding the two companies. Further he challenges the Immigration Judge's comment that the Sponsor had failed to provide an explanation for the withdrawal of £2,700 from his account. He states that it was abundantly clear from evidence provided that the Sponsor had explained that he had withdrawn the money for personal expenses (including car maintenance) and to send the Appellant some money via a friend. He points out that it is inevitable that the Sponsor would have had to have withdrawn some of his savings bearing in mind the delay in receiving his income and that the bank statements show quite clearly the Appellant's account was down to the sum of £150 when the three payments were made. Mr McVeety acknowledges that on careful analysis the documents provided have come from Scorp and shows that the company was the same company albeit that the company may have changed its name. He acknowledges that he is hampered by a lack of Record of Proceedings but is generous enough to indicate that he understands the detailed explanation that has been provided by Mr Bloomer and the logic and reason why Mr Bloomer has followed a detailed paper trail to provide an explanation.

The Law

18. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial consideration, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

19. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings on Error of Law

20. I am satisfied that there are three material errors of law. Firstly there are a number of factual errors in the findings of the First-tier Tribunal Judge at paragraphs 22 and 23. Secondly he has failed to do anymore than give the most brief analysis of his interpretation of the evidence and in such circumstances I set aside those findings of fact. Thirdly the judge has failed in any event to address the issues under Article 8. There is a requirement if an Appellant's appeal is dismissed under the Rules to consider it outside the Rules. That is the case providing this is raised in the Grounds of Appeal and it is clear that those grounds have been raised. I thus find that there are material errors of law in the decision of the First-tier Tribunal Judge and I set them aside.

Remaking of Decision

21. The burden of proof is on the Appellant on the balance of probabilities. The submissions in this matter have been very largely of a factual basis particularly once it was immediately established (and accepted by Mr McVeety) the First-tier Tribunal Judge had erred in his failing to consider Article 8 outside the Rules once he had made a finding that the case could not succeed under the Immigration Rules.

22. However the explanation has concentrated on whether or not the Appellant does or does not meet the Rules. The Rule is set out at paragraph 13 of Appendix FM-SE insofar as it works out as to how a Sponsor's gross annual income is calculated. The difficulty the Sponsor has had has been based on a number of factors.

    (i) The cash flow of his employers.

    (ii) The time that he had to have off for stress but for which he was paid.

    (iii) The element of confusion as to the exact legal entity that was paying him.

    (iv) The Sponsor has provided a detailed explanation as to his income and has also provided a detailed paper trail setting out income that he received for the six month period showing the payments made and the deferred payments and has supported this paper trail with documents from his bank, his wage slips and his employers.

    I acknowledge that the issues are complex and that could well have led to the First-tier Tribunal Judge being misled on his analysis but having considered the documentation and the very thorough explanation that is provided to me by the Appellant's Counsel I am satisfied that evidence has been produced to show that the Sponsor over the relevant period had the requisite income to meet the financial requirements of Appendix FM and consequently I am satisfied that the Appellant's appeal succeeds under the Immigration Rules.

23. Both legal representatives indicate that they do not require me in the event that I am satisfied to go on further to consider the appeal under Article 8.

Decision

(1) The decision of the First-tier Tribunal Judge contained a material error of law and is set aside.

(2) The Appellant's appeal is allowed under the Immigration Rules.

(3) The First-tier Tribunal Judge did not make an order pursuant to Rule 45(4)(i) of The Asylum and Immigration Tribunal (Procedure) Rules 2005. No application is made to vary that order and none is made.

Signed Date

Deputy Upper Tribunal Judge D N Harris