



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/12578/2013

THE IMMIGRATION ACTS

Heard at Field House, London
On 25 September 2014

Determination Promulgated
On 14 November 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

FOUZIA AZAM

and

ENTRY CLEARANCE OFFICER - ISLAMABAD

Appellant

Respondent

Representation:

For the Appellant: Mr R Skyner, instructed by Middlesex Law Chambers
For the Respondent: Mr Shilliday, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, a national of Pakistan, appealed to the First-tier Tribunal against the decision of the Secretary of State to refuse her application for entry clearance to join her husband, Khalid Mahmood (the sponsor), in the UK. The Entry Clearance Officer (ECO) refused the application under EC-P 1.1 (d) – Section E-ECP of Appendix FM of the Immigration Rules. These provisions cover the financial requirements applicable in an application for entry clearance as a partner under Appendix FM. First-tier Tribunal Judge Hussain

dismissed the appeal and the appellant now appeals with permission to this Tribunal.

2. The basis of the application was that the sponsor is self-employed in the UK and that in the previous full financial year he had a gross income (before tax) of £18,810 per annum. It is not in dispute that he needed to demonstrate that his income for the relevant period was more than £18,600. The ECO refused the application because the appellant had not provided all of the documents specified in Appendix FM-SE to demonstrate his self-employment. The ECO listed the nine sets of documents required and identified that the appellant had failed to produce five of them.
3. The sponsor submitted a number of the absent documents at the hearing. The Judge found that four of the five omissions had been made good by those documents. The Judge found that the sponsor had failed to provide a full set of bank statements covering the same period as the tax returns. The Judge also found that the appellant had not demonstrated that the sponsor had an annual income of at least £18,600 because, although the accounts prepared by the sponsor's accountant showed a net profit of £18,810 for the year ending 31 March 2012, the actual income declared to HMRC was a lesser figure of £16,330. In the absence of objective evidence the Judge did not accept counsel's submission that the taxable income was less than the actual income because of his capital allowance of £2480.
4. The grounds of appeal to the Upper Tribunal contend that the Judge erred procedurally in not taking the sponsor's oral evidence on the issue of the capital allowance. It is further contended that the Judge erred in not making a finding that the net profit was £18,810. The grounds of appeal contend in the alternative that the Judge erred in failing to have regard to the decision in MM & Others v Secretary of State for the Home Department [2013] EWHC 1900 (Admin) which proposed that the correct minimum income requirement should be £13,400 per annum.
5. In granting permission to appeal First-tier Tribunal Judge De Haney decided that the first ground is misconceived as Judge Hussain noted in the determination that both representatives agreed that the sponsor's oral evidence would not make any difference to the outcome of the appeal. However he considered that the second ground is arguable in that the Judge took account of the sponsor's taxable income rather than his gross income.
6. Of course the decision of the High Court in MM & Others was overturned by the Court of Appeal in MM (Lebanon) & Ors, R (on the application of) v Secretary of State for the Home Department [2014] EWCA Civ 985. In these circumstances there is no merit in the final alternative ground of appeal.
7. The issue is therefore whether the Judge erred in his consideration of the sponsor's income.
8. Mr Skyner submitted that E-ECP 3.1 provides that the appellant must demonstrate that there is a 'specified gross annual income of at least...' (in this

case) £18,600. Mr Shilliday submitted that the Judge was entitled to reach the conclusion he did on the basis of the evidence before him as he is not an accountant. However I am satisfied that the wording of E-ECP 3.1 is clear, it refers to gross annual income and this must mean the ordinary meaning of the phrase which is the annual sum earned before tax and deductions. I am therefore satisfied that the Judge erred in considering the taxable income as the gross annual income.

9. However I must also determine whether this was a material error. In this appeal the Judge was also not satisfied that the appellant had provided the specified bank statements. Appendix FM-SE requires the submission of business bank statements for the same 12 month period as the tax returns. In his determination the Judge said that the sponsor had submitted bank statements covering the period from 12 September 2011 to 5 February 2013. The Judge found that these did not meet the requirements as statements should have covered the period from 5 April 2011 until 4 April 2012. Mr Skyner submitted that he was instructed that the correct bank statements were submitted at the hearing.
10. The First-tier Tribunal Judge's determination states that the appellant's bundle submitted in advance of the hearing had not reached the Tribunal on time and that he proceeded without it and admitted further documents which the sponsor brought to the hearing. The bundle, which arrived after the hearing, does not include any bank statements despite the index stating that they are included. Mr Skyner submitted that he was instructed that this bundle did include the relevant statements. He did not explain how the statements were not in the bundle despite being referred to in the index.
11. There is on file a bundle of Business Current Account Bank statements issued by Barclays Bank covering the period from 12 September 2011 until 5 February 2013. Mr Skyner submitted that these were the statements submitted by the sponsor at the hearing. These were clearly the bank statements relied on by the Judge.
12. Two of those bank statements were also submitted with the notice of appeal covering the period from 7 September 2012 until 7 January 2013. There are no other bank statements in the file. There is no explanation why the relevant bank statements were not submitted and no evidence to support Mr Skyner's submission that they were in fact submitted.
13. In these circumstances I accept Mr Shilliday's submission that the lack of the relevant bank statements is fatal to this appeal. The Judge did err in relation to the gross annual income but the appeal was bound to be dismissed in any event because the appellant did not provide the specified business bank statements. In these circumstances I am satisfied that the Judge made no material error of law.

Conclusion:

The making of the decision of the First-tier Tribunal did not involve the making of a material error on point of law.

Signed

Date: 13 November 2014

A Grimes
Deputy Judge of the Upper Tribunal