



UPPER TRIBUNAL  
(IMMIGRATION AND ASYLUM CHAMBER)

APPEAL NUMBER: OA/13452/2013

THE IMMIGRATION ACTS

Heard at: Field House  
On: 9 September 2014  
Prepared: 6 October 2014

Determination Promulgated  
On 13 October 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

ENTRY CLEARANCE OFFICER

and

MRS FATIMA FAKHRUDDIN MAMAJIWALA  
(NO ANONYMITY DIRECTION MADE)

Appellant

Respondent

Representation

For the Appellant: Ms L Kenny, Senior Home Office Presenting Officer  
For the Respondent: Mr Murtaza Kesaria, sponsor

DETERMINATION AND REASONS

1. For the sake of convenience I shall refer to the appellant as the entry clearance officer and the respondent as the claimant.
2. The claimant is an Indian national, born on 20<sup>th</sup> May 1980. Her appeal against the refusal by the entry clearance officer dated 20<sup>th</sup> June 2013 refusing her application for an entry clearance to settle in the UK as a spouse was allowed by First-tier Tribunal Judge Bell in a determination promulgated on 11<sup>th</sup> April 2014.
3. The Judge concluded that there was a valid reason why a specified document could not be supplied. The claimant had not been able to provide payslips for January and February 2013 although still employed. He had a reasonable explanation for

this, namely that he was on holiday and had already been paid holiday pay that was due in advance. He had provided evidence of his income from employment as and from April 2012. The evidence taken as a whole showed an annual income “well in excess of the required threshold.”

4. This was an appropriate case for discretion to be exercised under paragraph D (e) of Appendix FM-SE. 7. The Judge concluded that the entry clearance officer should have exercised the discretion differently and in the claimant's favour.
5. On 11<sup>th</sup> July 2014, Upper Tribunal Judge Peter Lane granted the entry clearance officer permission to appeal on the basis that the Judge had arguably failed to give legally adequate reasons; had misapplied paragraph D (e) and had not had regard to the relevant date.
6. Ms Kenny relied on the grounds of appeal. The claimant had failed to provide the requisite documentation for the relevant period despite being afforded the opportunity to submit such documents.
7. Having noted that there was nothing to show that the claimant's sponsor had taken up any further assignments with his “umbrella company” the Judge still went on to find that he remained employed by them. In the absence of further documentation showing continued employment or evidence of further assignments, those findings were “inadequately reasoned.”
8. With regard to the discretion provided under Appendix FM-SE, paragraph D(e) she submitted that this is not a case that the claimant could not provide the documents because it was not issued or because it was permanently lost, but rather that he was on holiday. He had subsequently failed to produce this documentation even at the appeal hearing. Accordingly, he had simply failed to provide the available documentation and this was not a case where discretion should have been exercised.
9. Nor had the Tribunal had appropriate regard to the relevant date and in particular it has not addressed the evidence from prior to 8<sup>th</sup> March 2013, which was the date of application. Accordingly, it was not clear what the sponsor's actual gross annual income was at the date of application. He needed to show employment for the six months from 7<sup>th</sup> September 2012 until 8<sup>th</sup> March 2013. Under Appendix FM, the claimant must meet all the financial requirements set out in E-ECP.3.1 and provide the relevant specified evidence from the sources listed.
10. The Judge found that the sponsor submitted either with the application or in response to requests for further information from the entry clearance officer, payslips and bank statements from 5<sup>th</sup> October 2012 until 28<sup>th</sup> December 2012 with bank statements going up to 5<sup>th</sup> January 2013. He did not appear to have submitted any bank statements or payslips for the period following this. Accordingly he had

not submitted payslips and bank statements which are dated within 28 days of the date of application.

11. The Judge had regard to the sponsor's application. He was on a seven week holiday at the time that his application was submitted. He claimed to have received holiday pay in advance but did not receive payslips during the seven week period. He contended that he was still employed and relied on an email from Parasol.
12. That email, which Ms Kenny accepted had been properly summarised by the Judge at paragraph 18 of the determination, stated that the claimant was considered to be on holiday for seven weeks from 28<sup>th</sup> January 2013 and, as he had already been paid for the holiday, or it was part of his unpaid entitlement, he would not actually receive any pay whilst away. It goes on to state that if he had decided to leave Parasol he needed to tell them that he wanted to resign and give the relevant notice.
13. It was asserted in his grounds of appeal that based on the payments between 5<sup>th</sup> October 2012 and 28<sup>th</sup> December 2012, including his holiday pay, the sponsor's income amounted to £9414.79, which he asserts was equivalent to a yearly income in excess of £18,939. Moreover, his actual income in the previous 12 months had been far in excess of this.
14. There was also a letter dated 17<sup>th</sup> December 2012 from Parasol setting out his pay from 20<sup>th</sup> April 2012 until 14<sup>th</sup> December 2012 amounting to £28,204.34. He asserted that this was his annual income from this employment for the 12 months leading up to his application.
15. The Judge found that although there was nothing before him to show that he took up any further assignments with Parasol after the seven week holiday, he was nevertheless satisfied from the email from Parasol that he was considered to be on holiday and still employed in the third week in March, and was therefore satisfied that he had remained employed by Parasol at the date of application. His income from that employment covering the six month period prior to the application being made, exceeded the financial threshold required.
16. The Judge, as already indicated, had regard to the fact that the sponsor could not submit payslips for January and February 2013 as he was on holiday and the email from Parasol confirmed that he had already been paid holiday pay due in advance. Although he could have submitted further bank statements, these would not have shown any additional salary deposits.
17. The Judge had regard to Appendix FM-SE D(e) which was in force at the relevant time, namely from 13<sup>th</sup> December 2012. That provides that where the decision maker is satisfied that there is a valid reason why a specified document cannot be supplied, e.g. because it is not issued in a particular country or has been permanently lost, he may exercise discretion not to apply the requirement for the

document or to request alternative or additional information or document(s) be supplied by the applicant – HC760 13.12.2012.

18. The Judge found there was a reasonable explanation, namely that he was on holiday for the seven week period and had been paid his holiday pay due in advance.
19. On behalf of the claimant, the sponsor relied on written submissions that had been prepared for him by counsel, Mr Z Jafferji.
20. The only issue raised by the entry clearance officer in the refusal was that the claimant had not demonstrated that her sponsor had continued to be employed between 28<sup>th</sup> December 2012 and 8<sup>th</sup> March 2013. She had not submitted payslips for the period in question and had failed to provide evidence that her sponsor had been employed as claimed with Parasol for the period requested.
21. It was submitted that the exercise of discretion by the Judge was “impeccable”. She had focused on the shortcomings in the claimant's evidence. She provided reasons why they were not substantially relevant and concluded that the failure was excusable, having regard to the claimant's “reasonable explanation.” Although not making an express finding that the sponsor remained employed by Parasol, she found that he was employed at the date of application as there was evidence from Parasol that he was on leave from employment at that time.
22. Moreover, she focused on the correct date, namely the date of application. That was evident from her reasoning where she found that the sponsor was employed at 8<sup>th</sup> March 2013.

### **Assessment**

23. The entry clearance application was refused on the basis that the sponsor had not shown that he had been in continued employment for the six months prior to the date that the application was submitted, namely 8<sup>th</sup> March 2013. The last date of employment shown by way of documentation was 28<sup>th</sup> December 2012. There were no payslips for the period after this, up to the date of application. He had subsequently failed to provide the necessary documents that he had been employed as claimed with Parasol for the period requested.
24. Accordingly, the issue raised by the entry clearance officer was that the claimant had not demonstrated that her sponsor had continued to be employed between 28<sup>th</sup> December 2012 and 8<sup>th</sup> March 2013. He had failed to submit payslips for the period in question showing that he had been employed as claimed.
25. The First-tier Tribunal Judge had regard to the email submitted by the claimant on 17<sup>th</sup> June 2013 in response to the entry clearance officer's request for further

evidence. That email from her sponsor's employer was dated 25<sup>th</sup> January 2013. It stated that the sponsor would be on holiday from 28<sup>th</sup> January 2013 for seven weeks. It also stated that the sponsor would not receive any pay during this period as he had either already been paid, or the holiday was part of his unpaid employment.

26. The seven week holiday period ended on 17<sup>th</sup> March 2013. That period included the date of the application, namely 8<sup>th</sup> March 2013.
27. Judge Bell accepted the evidence from the claimant that he had been employed on the date of application. The Judge was well aware that there were no missing payslips as the sponsor had not been issued with any payslips for the period that he was on holiday.
28. From the email, the Judge was satisfied that the sponsor was considered to be on holiday and was still employed in the third week in March and was therefore satisfied that he remained employed by Parasol at the date of application.
29. Judge Bell also was alive to the entry clearance officer's assertion that the claimant had not met the evidential requirements under Appendix FM-SE but considered whether the discretion granted in paragraph D(e) of Appendix FM-SE should be exercised in her favour.
30. At paragraph 25 of the determination, she found that this was a case where it was appropriate for the discretion provided in the rules to have been exercised. The claimant had not been able to provide her sponsor's payslips for January and February 2013, although he was still employed. He had provided a reasonable explanation for that, namely that he was on holiday and had been paid holiday pay due, in advance. He had provided evidence of his income from employment going back to April 2012. The evidence taken as a whole showed an annual income well in excess of the required threshold. Accordingly, she concluded that the entry clearance officer should have exercised the discretion contained in the rules differently and in the claimant's favour.
31. In exercising that discretion, Judge Bell focused on the shortcomings in the claimant's evidence. She explained why they were not substantially relevant and why in the circumstances the omission was excusable.
32. In arriving at her conclusions judge Bell has taken into account relevant matters and has not had regard to any irrelevant factors. I accordingly find that her discretion was properly and rationally exercised.
33. Moreover, I find that paragraph D(e) of Appendix FM-SE does not seek to restrict the exercise of discretion to cases where documents have not been issued, or have been permanently lost. These, as submitted on behalf of the claimant, are simply

examples. I accordingly find that ground 3 of the entry clearance officer's challenge amounts to an unwarranted and restrictive application to the rule.

34. I have also had regard to the actual payslips relied on by the claimant and referred to by Judge Bell. The Parasol payslips that were produced before the First-tier Tribunal show that holiday pay was made in advance. This resulted in earnings for the particular month in excess of the number of hours worked. The holiday pay is calculated with regard to the basic pay.
35. I also find that Judge Bell focused on the correct date in finding that the sponsor was employed on 8<sup>th</sup> March 2013. There was accordingly a proper basis for the finding that the claimant's sponsor's gross annual income exceeded the requisite amount of £18,600.

### **Decision**

**The determination of the First-tier Tribunal Judge did not involve the making of any error of law. The determination shall therefore stand.**

Signed

Date 6/10/2014

C R Mailer

Deputy Upper Tribunal Judge