



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/13873/2013

THE IMMIGRATION ACTS

Heard at Field House
On 29 July 2014
Delivered Orally

Determination Promulgated
On 06th Aug 2014

Before

THE HONOURABLE MR JUSTICE LEWIS
UPPER TRIBUNAL JUDGE GOLDSTEIN

Between

THE ENTRY CLEARANCE OFFICER- New Delhi

Appellant

and

MRS SHARANJIT KAUR

Respondent

Representation:

For the Appellant: Mr T Wilding, Home Office Presenting Officer
For the Respondent: Mr S Bellara, Counsel instructed by S & S Immigration Law

DETERMINATION AND REASONS

1. This is an appeal by the Appellant, hereinafter called the Entry Clearance Officer (ECO), against the decision of the First-tier Judge who sitting at Richmond on 16 May 2014 and in a determination promulgated on 23 May 2014 allowed the appeal of the Respondent (hereinafter called the claimant), a citizen of India born on 1 September

1984, against the decision of the ECO dated 31 May 2013 to refuse to her an entry clearance to the United Kingdom as the spouse of a British citizen under paragraph EC-P.1.1(c) and (d) of Appendix FM with reference to paragraph S-EC.2.2(a) and E-ECP.3.1 of the Immigration Rules.

2. The grounds in support of the ECO's successful application for permission to appeal stated as follows:

"The Rules of specified evidence are comprehensively set out in Appendix FM-SE to the Immigration Rules. These set out what types of evidence are required, the periods they cover and the format that they should be in. The Tribunal has had no regard to this at paragraph 8 of the determination where it sets out its findings on this issue. It is respectfully submitted that the Tribunal has failed to comply with the Immigration Rules and that its findings are therefore unsustainable.

The Sponsor's P60 for 2012 showed an annual income of £12,000 and the P60 provided for 2013 reflected an annual income of £15,055. The earnings the Appellant relied upon therefore fell below the required financial threshold requirement.

In addition the bank statements submitted did not contain parallel deposits for the amounts claimed to have been paid to the Appellant's Sponsor. Furthermore, it was noted that the payslips provided by the Appellant for her Sponsor stated that he was paid by cheque yet the deposits into his bank account did not match the amount claimed to have been earned on his payslips. Whilst the Tribunal appears to accept that the Appellant's Sponsor was sometimes paid in cash this did not satisfactorily address the fact that his bank account did not mirror what he earned. As such having being unsure and found that it would have been helpful to see the company accounts to see whether the Sponsor was indeed receiving such sums to go on and find that he was in the absence of specified evidence the Tribunal erred in law.

It follows from this that it is not clear what the Sponsor's actual gross annual income was at the date of application. It also follows that the appeal can therefore not be made out. However, it is also worth noting that if the Sponsor's current income does exceed the income threshold, there is no reason to prevent the Appellant making a fresh application based on the Sponsor's income at this time."

3. As noted by First-tier Tribunal Judge Heynes in granting permission, the grounds of appeal in summary complained that the Judge erred in the consideration of the Sponsor's salary and arguably failed to give adequate reasons for finding that she met the financial requirements of Appendix FM.
4. Having considered the Sponsor's evidence and the documentation before her the First-tier Judge found that the Sponsor's evidence was consistent with the documents and at paragraph 7 of her determination she proceeded to make the following findings:

"7. The Appellant claims that she meets the requirements laid down in the Rules. I heard the Sponsor give evidence. What he told me was consistent with the documents before me, and I make the following findings:

1. The Sponsor works for a company owned by his brother, Unic Construction Limited ('Unic').
2. Unic has only two employees, the Sponsor and his brother.
3. The Sponsor does not have a contract of employment.
4. In the tax year ending April 2012 the Appellant earned £12,000 gross for a four month period from December 2011 to March 2012. This is confirmed by his P60 and the accountant's letter of 19 June 2013 (AB-89) as well as an HMRC filing (AB-101).
5. In the tax year ending April 2013 the Appellant earned £15,055.20 gross for a seven month period from June to December 2012 when he went to India. This is confirmed by his P60 and the accountant's letter of 19 June 2013 (AB-89), as well as correspondence with HMRC (AB-80).
6. The Sponsor pays tax and national insurance.
7. The Sponsor's salary is sometimes paid to him by cheque and sometimes in cash. It depends how Unic is paid. Further some of Unic's clients pay the Appellant direct. This means that the deposits to his account do not mirror precisely the amounts in his payslips. The Sponsor does not bank all the cash amounts he receives.
8. The Sponsor occasionally makes purchases with his own money for Unic. The Appellant told me that these sums are repaid to him.
9. The Sponsor has no income other than what he receives from Unic. The deposits to his bank account are as a result of his work for Unic."

5. At paragraphs 8 and 9 of her determination the Judge concluded as follows:

"8. Because the entries into the Sponsor's bank account did not mirror what he earned it would have been helpful to have sight of Unic's accounts to see that the Sponsor was indeed receiving the sums on which he was paying tax and national insurance and that he was being repaid for expenditure which he was making on behalf of Unic. Nevertheless as the Sponsor's oral evidence was supported by the P60, payslips and accountant's letters before me I find that it is more likely than not that he was earning from Unic a gross annual income of over £18,600 at the date of decision.

9. Accordingly I find that at the date of decision the Appellant and the Sponsor met the requirements of paragraph EC-P.1.1 of Appendix FM including E-ECP.3.1."

6. Thus the appeal came before us on 29 July 2014 when our first task was to decide whether the determination of the First-tier Judge disclosed an error or errors on a point of law such as may have materially affected the outcome of the appeal.

7. Mr Wilding in his submissions relied upon the grounds. He pointed out that the First-tier Judge failed to give any reason in which to find that the £18,600 threshold was met in accordance with the Rules. Paragraph 8 of the Judge's determination whilst on the face of it providing reasons for allowing the appeal, in effect demonstrated to the contrary, and in that regard he referred us to the relevant Immigration Rules.
8. In summary, he in particular drew our attention to the provisions of Appendix FM-SE(2) which clearly states that in respect of salaried employment in the UK "all of the following evidence must be provided". There then follows a list of all of the documentation that should be provided, and indeed he pointed out that notwithstanding the fact that the Presenting Officer before the Judge had acknowledged that an error had been made on the part of the Entry Clearance Officer in relation to the genuineness of the P60 documents, the fact was that in any event, provision 2(e) required "a signed contract of employment" and no such contract of employment was provided by the Appellant, and on that basis alone, the claimant would in any event have failed to meet the requirements of the Rules.
9. More particularly, the requirements at paragraphs (c)(i) and (d) were not met. (c) required wage slips covering a period of six months prior to the date of application if the applicant had been employed by their current employer for at least six months and the requirement of (d) was for a letter from the employer on the employer's headed paper that the payslips at paragraph 2(c) met a series of requirements.
10. The point, however, was that whilst arguably as far as the Judge was concerned, some of those requirements were met, not all of them were so met. Indeed the requirements of paragraph 2(f), namely a reference to monthly personal bank statements corresponding to the same periods as the wage slips at paragraph 2(c) showing that the salary had been paid into an account in the name of the person or in the name of the person and their partner jointly, was clearly a requirement that on the evidence was not met. Mr Wilding submitted that it was apparent on the face of the evidence, that the wage slips and the bank statements simply did not correspond with each other.
11. Mr Bellara for the claimant, opened his remarks by stressing that a particular feature of the appeal was that the basis which appeared to underpin the Entry Clearance Officer's refusal, namely that the documents supplied were not genuine, was in fact an unfounded conclusion, a matter that was conceded by the Presenting Officer before the First-tier Judge and that in consequence she had been left in the unfortunate position and, no doubt unwelcome one, of becoming a primary decision-maker, and it was on that basis that she therefore had to proceed to consider all the documentary evidence before her as well as the oral evidence of the Sponsor in reaching her conclusion.

Assessment

12. We have had no difficulty in concluding that the First-tier Judge did indeed materially err in law for the reasons set out in the Secretary of State's grounds and supported by the subsequent submissions of Mr Wilding.
13. The requirements of the relevant Immigration Rules were absolutely clear and included the requirement that the applicant "must meet all of the requirements of Section E-ECP: Eligibility to entry clearance as a partner". Paragraph E-ECP.3.1 states that in terms of the necessary financial requirements the applicant "must provide specified evidence from the sources listed in E-ECP.3.2." That included (a)(ii), the requirement of a specified gross annual income of at least £18,600.
14. The evidence before the First-tier Judge in the form of the Sponsor's P60s for 2012 and 2013 showed a respective annual income of £12,000 and £15,055. Mr Bellara at first blush considered upon a reading of the accountant's letters that they may well have shown that the gross income earned by the Sponsor did indeed meet the requirements of the Rules but in fairness to him and indeed to his credit, he subsequently recognised that it did not alter the situation in any material way because even on the basis of the accountant's letter, they showed clear breaks in the periods of the Sponsor's employment.
15. We find that it should have been self-evident to the First-tier Judge that the evidence before her demonstrated that the claimant fell below the required financial thresholds.
16. The Judge concluded that there was other evidence that included the accountant's letters that were before her that led her to be satisfied that it was "more likely than not" that the Sponsor was earning a gross annual income of over £18,600 at the date of decision. With great respect to the Judge, this is not a finding that could possibly be supported by that evidence. We have considered the accountant's letter from which it is apparent that they have failed to establish simply by reference to specified periods of four months and seven months respectively, that this amounted to a satisfactory piece of evidence that the Sponsor's income over the years 2012 and 2013 equated to an income of £18,600 if calculated over a twelve month period.
17. Prior to the hearing of the appeal before us, the Tribunal received a letter from the claimant's representatives dated 22 July 2014 to which was attached a bundle of documents that was referred to as "fresh evidence that was not before the First-tier Tribunal" with the request that it be considered as part of this appeal. It was to Mr Bellara's credit, that this was not a matter that he relied upon and of course he was quite right not to do so, as we are solely concerned with the evidence that was before the First-tier Judge. If, however, as contended by the claimant, there is fresh evidence, then this should be the subject of an application to the ECO as indeed the Secretary of State on behalf of the ECO, made clear in her grounds of appeal.

Conclusion

18. For the above reasons we find that the determination of the First-tier Tribunal must be set aside. We remake the decision as follows. We allow the Entry Clearance Officer's appeal. The appeal against the ECO's refusal to grant the claimant an entry clearance to the United Kingdom is dismissed.

Signed

Date

Upper Tribunal Judge Goldstein