Upper Tribunal

(Immigration and Asylum Chamber) **Appeal Number: OA/14054/2013**

THE IMMIGRATION ACTS

Heard at Manchester Piccadilly	**Determination Promulgated**
On 24 July 2014	**On 12 August 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE BIRRELL

Between

LUFANT ANYANGO DULO

(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: not represented

For the Respondent: Ms C Johnstone Senior Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not deem it necessary to make an anonymity direction.
2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Devlin after a hearing on 12 March 2014 which dismissed the Appellant's appeal on all grounds.

Background

3. The Appellant was born on 5 May 1982 and is a citizen of Kenya.
4. On 30 April 2013 the Appellant applied for leave to enter the United Kingdom as a partner under Appendix FM of the Immigration Rules
5. On 7 May 2013 an Entry Clearance Officer refused the Appellant's application. The refusal letter gave a number of reasons: The Appellant's sponsor was required to show an average gross annual income over the last 2 years of £18,600; the Appellant claimed her sponsor earned an annual income of £56,050 from self employment but failed to provide the specified evidence as set out in Appendix FM-SE to show that he earned that income.

The Judge's Decision

6. The Appellant appealed to the First-tier Tribunal and First-tier Tribunal Judge Devlin (hereinafter called "the Judge") dismissed the appeal against the Respondent's decision. The Judge set out the requirements of the Rules relating to the evidence of self employment and found that the Appellant had failed to provide the required evidence of self employment through the payment of Class 2 NI contributions; he rejected the assertion that the Appellant's tax return could meet this evidential requirement as he did not accept that the figure for tax payable included national insurance contributions; he rejected the suggestion that the Respondent should have made further enquiries requesting this evidence as there was no evidence to suggest that he had paid NI contributions in any other document; in relation to the claimed income of £55,050 the Judge found that this figure represented the turnover of the business whereas his net profit before tax was £16,727; he rejected the submission that gross annual income was turnover; the Judge considered whether he should look at Article 8 outside the rules and did so; he found the decision was not disproportionate.
7. Grounds of appeal were lodged and on 29 May 2014 Designated Judge of the First-tier Tribunal J M Lewis gave permission to appeal stating that the grounds were arguable.

8. At the hearing I heard submissions from the Appellant that :

   (a) He wished to rely on the grounds of appeal drafted by his previous representatives.

(b) He said that the Judge failed to take into account that he additionally received an income of £2500 per annum from a pension which was shown on his Santander bank statements. That if this sum was added to the net profit of his business he met the requirements of the Rules.

9. On behalf of the Respondent Ms Johnstone submitted that :

(a) There was no evidence that the further income of £2500 relied on by the Appellant was placed before the ECO. In the visa application at page 151 of the bundle the Appellant asked only to be considered on the basis of the sponsor's income from self employment.

(b) The tax return completed by the sponsor at page 87 made no reference to any other source of income other than that from self employment.

(c) Even had the Appellant asked for the sponsors additional pension income to be taken into account the specified documents required under Appendix FM-SE had not been provided.

(d) In relation to the income from self employment the Appellant had not provided the specified evidence in relation to the payment of Class 2 NIC.

(e) The Appellant therefore could not meet the requirements of the Rules.

(f) The Judge found that the decision was not disproportionate relying on MM and others v Secretary of State for the home Department [2013] EWHC 1900 (Admin)

10. In reply Mr Lamptey stated that although he only referred to the income of £55,000 in the visa application he should have been allowed to demonstrate that he had other income. He accepted that he had not provided proof he had paid Class 2 NIC as in fact when he contacted HMRC it appeared that they had not collected those payments since 1986-1987.

The Law

11. Errors of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on facts or

evaluation or giving legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

12. 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 under argument. Disagreement with an Immigrations Judge's factual conclusions, 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 that 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 told 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.

Finding on Material Error

13. Having heard those submissions I reached the conclusion that the Tribunal made no material errors of law.

14. The Appellant made an application for entry clearance as a spouse and the application was refused on the basis that the Appellant could not meet the financial requirements of Appendix FM as she had not provided the specified evidence of the income from self employment that was claimed for the sponsor.

15. In a detailed and thorough determination the Judge in this appeal set out the evidence and law that was relevant to the application.

16. I am satisfied that as the Appellant and sponsor completed the visa application on the basis only of income from self employment the Judge was entitled to consider evidence relating to only that source of income. If the Appellant wished to rely on another source of income in order to meet the financial threshold a fresh application should have been made.

17. The grounds argue that the Judge should have accepted that the Appellant's income was £56,050 rather than the figure of £16,727 and that his interpretation of what constituted income was unduly restrictive. The Judge sets out in detail his findings in relation to what he believed the sponsor's income was for the purpose of the Rules at paragraph 87 to 104. I am satisfied that it was open to him to conclude as he did at paragraph 100:

"*It is perfectly clear that the phrase 'gross annual income' in section E-ECP.3.1(a) of Appendix FM, refers to annual income gross of tax, and not turnover, or takings, sales and money taken, gross of business expenses and tax."*

18. I am therefore satisfied that the Judge was entitled to conclude that the Appellant's gross annual income from self employment was £16,727 and therefore he could not meet the requirements of the Rules.

19. In relation to income from self employment the Judge also set out at paragraph 37 the mandatory requirements of Appendix FM-SE in relation to documentary evidence which included at A1(7)(g) '*evidence of ongoing self-employment through payment of Class 2 National Insurance contributions*.' The grounds argue that no specified document was required simply evidence that Class 2 NIC had been paid a fact that is accepted by the Judge at paragraph 57 of his findings. It was argued before the Judge that the figure for tax payable in the sponsor's tax return included NI contributions. The Judge found that this was not stated in the tax return nor could it be inferred. This was a finding that was open to the Judge. Given the Sponsors concession before me that in fact he has never paid Class 2 NIC the Judge's conclusions were sound and the appeal was doomed to fail.

20. The grounds also argue that the Judge's Article 8 assessment was flawed. This was set out at paragraphs 106-130 and the findings are detailed, well reasoned and refer to the relevant and appropriate legal guidance. The Judge therefore considered firstly whether, the appeal having failed under the Rules in relation to family and private life, there were arguably good grounds for granting leave outside the Rules in accordance with Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC) and accepted that there were. He structured his assessment in a logical manner based on the 5 questions set out in Razgar . There is, I accept, a factual error in relation to whether the parties could enjoy

family life together in Kenya as the Judge states that the sponsor is retired which is clearly not the case. Although he therefore suggests there is no apparent reason why the parties could not enjoy life together in Kenya he also considers the case on the basis that they could not. He took into account that the Appellant could not meet the financial requirements of the Rules and concludes that the refusal was not disproportionate. He made reference MM and stated that he did not feel this compelled him to a different conclusion: given that MM was overturned on appeal his conclusions that the income threshold were proportionate were open to him.

21. Having made very clear in the body of what is a very detailed determination that the appeal was dismissed under the Rules and on Human Rights grounds there is one other error in that under the heading 'Decision' the Judge stated that he dismissed the case on asylum grounds. I am satisfied that when read as a whole the determination is clear that the basis of the decision was that the Judge dismissed the appeal under the Rules and that this was a typing error not picked up in proof reading.

22. I am therefore satisfied that the Judge's determination when read as a whole set out findings that were sustainable and sufficiently detailed and based on cogent reasoning.

CONCLUSION

23. **I therefore found that no errors of law have been established and that the Judge's determination should stand.**

DECISION

24. **The appeal is dismissed.**

Signed Date 9.8.2014

Deputy Upper Tribunal Judge Birrell