



**First-tier Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: OA/14506/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 9th December 2014**

**Decision & Reasons Promulgated
On 16th December 2014**

Before

DESIGNATED JUDGE OF THE FIRST-TIER TRIBUNAL R C CAMPBELL

Between

**MRS RABIA SULTANA
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Khan (Solicitor)

For the Respondent: Ms L Kenny (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. The appellant's appeal against a decision to refuse her entry clearance under Appendix FM, as the spouse of a British citizen, was allowed by First-tier Tribunal Judge Elliman ("the Judge") in a determination promulgated on 27th June 2014.
2. The Entry Clearance Officer ("ECO") was not satisfied that the appellant met the financial requirements contained in Appendix FM or that she could meet the requirements of the rules in relation to her proficiency in English.

The judge found that the appellant's sponsor fell to be treated as an employee for the purposes of his income, even though he also held office as a director of a company. Appendix FM-SE set out the evidence required in this context. Taking into account P60s, wage slips and other items, the judge found that the sponsor's income amounted to a total of £19,000 per annum and that the financial requirements of the rules were met. So far as the appellant's proficiency in English was concerned, the judge found that those requirements were also met.

3. In an application for permission to appeal, the respondent (it is convenient to refer to the parties as they were before the First-tier Tribunal) contended that the judge erred in failing to have regard to paragraph 9 of Appendix FM-SE, which fell to be applied as the sponsor was a director, albeit a director paid a salary by a company. Specified evidence was required for directors and it was not apparent that the evidence was available. The issue was not considered by the judge. The author of the grounds observed that if the current income did exceed the threshold and the specified evidence were made available, a fresh application could be made (which might succeed). There was no challenge to the judge's finding on the appellant's proficiency in the English language.
4. Permission to appeal was granted on 6th November 2014. The grantor noted that the judge may have failed to deal with the Entry Clearance Manager's review, where it was observed that the correct documents reflecting income as a director were not provided. Paragraph 9 of Appendix FM-SE applied to applications decided on or after 6th April 2013, the date of the ECO's decision being 7th June that year. It applied where sponsors relied on income in a limited company in which they were directors and in which a limited number of people including the sponsor or other close family members held shares. The evidence suggested that this was such a case.
5. In directions made by the Principal Resident Judge, the parties were advised that if the decision were set aside and re-made, any evidence required could be considered at the hearing.

Submissions on Error of Law

6. Mr Khan provided copies of the bundles which were before the First-tier Tribunal Judge, including "bundle 2", dealing with evidence regarding the sponsor's status as a director, and a skeleton argument.
7. Ms Kenny said that the appellant's case was advanced on the basis that the sponsor was an employee. The accountants who provided supporting letters confirmed that the sponsor was indeed an employee. At paragraph 7 of the determination, the judge noted, on the other hand, that the sponsor was also a director. Nonetheless, at paragraph 11, she found that he fell to be treated as an employee. In that paragraph, the judge referred to "the

appellant” but it was apparent this was an error and that she had the sponsor in mind.

8. The difficulty was that the Entry Clearance Manager on review assessed the application as one in which paragraph 9 of Appendix FM-SE fell to be applied. This was because the sponsor held office as a director. So far as the two bundles were concerned, paragraph 8 of the determination showed that the judge had two bundles before her, including bundle 2 containing evidence relevant to paragraph 9 of Appendix FM-SE.
9. The judge did not address the requirements for directors, set out in paragraph 9 of Appendix FM-SE and it was simply not the case that the appellant had an option to put her sponsor forward as an employee on an alternative basis. It followed that the judge erred at paragraph 11 of the determination. Whether or not the sponsor was an employee, if the income threshold was exceeded, and so long as the evidential requirements of Appendix FM-SE were met, a fresh application could be made.
10. Mr Khan said that in the ECO’s notice of decision, the sponsor’s work as a chef and status as a director were noted. HMRC treated the sponsor as an employee between 2009 and 2014. The ECO noted that the sponsor was not recorded as being in self-employment. He treated the sponsor as an employee. The sponsor’s accountant maintained that he was an employee and, also, a director. The letter from the accountants at page 1 of bundle 2 showed that the sponsor was taxed under Schedule E, appropriately. He was given a P60 over the last five years, which he might not expect to receive as a director. The true position appeared to be that he was paid as an employee but was a director of the company.
11. Evidence was put in front of the judge regarding both aspects. In other words, the case was advanced on the basis that the sponsor was an employee and that the income threshold was met and, also, that the evidential requirements of Appendix FM-SE concerning directors were also met. The judge did not look at the second bundle because she found that the sponsor was an employee and that he earned £19,000 per annum. This was unfortunate as the appellant’s case could succeed on the basis that the sponsor was a director, in the light of the evidence showing that the relevant requirements of the rules were met.
12. Even though the judge made no mention of paragraph 9 of Appendix FM-SE, the evidence was there, in bundle 2. Mr Khan said that, on the other hand, it might be argued that the judge did not err as she correctly treated the sponsor as an employee.
13. Ms Kenny said briefly in response that the letter from the accountant dated 25th February 2013, in the evidence, described the sponsor as a 50 percent shareholder and a director. The Entry Clearance Manager was right to say that paragraph 9 of Appendix FM-SE had to be considered.

Conclusion on Error of Law

14. I conclude that the judge did err in law in assessing the case on the basis that the sponsor was an employee. The error appears at paragraph 11 of the determination. There is no inconsistency or tension between the sponsor's status as an employee, receiving a wage from the company, and holding office as a director. The nature of the business and company he was associated with led the Entry Clearance Manager to conclude that paragraph 9 of Appendix FM-SE fell to be applied, regarding the evidence required to accompany the application. Although the judge noted that in the review "the appellant" was a director of a company (she meant here the sponsor, as she did at paragraph 11), there was no engagement with this part of the respondent's case, no doubt because the judge concluded that the sponsor was an employee. As noted above, there is no inconsistency between that status and his status as a director. I conclude that the judge materially erred in law and that the decision must be set aside and remade. Mr Khan said that bundle 2 was available to deal with the sponsor's status as a director. There was nothing in the determination about this bundle, save in paragraph 8, where there is reference to two bundles of documents being before the judge.
15. In the light of the Principal Resident Judge's directions, I asked the two representatives whether the decision, having been set aside, could be remade at the hearing. They agreed that it could.

Remaking the Decision

16. A practical problem then arose. Mr Khan produced from his file evidence that a Bengali (Sylheti) interpreter had been requested. None was available, as became clear once enquiries were made. There was, nonetheless, no application for an adjournment. Mr Khan said that bundle 2 contained the evidence required to show that the requirements of paragraph 9(a) of Appendix FM-SE were met.
17. The rules required specified evidence to accompany the application. Mr Khan said that the appellant's case was that all the relevant documents accompanied the application and so the appellant could show that the requirements of the rules were met.
18. The Entry Clearance Manager set out the required evidence on the second page of the review statement. Turning to that list, Mr Khan said that bundle 2 contained a company tax return (CT600) at pages 8 to 11. This was dated 13th February 2014. There was also evidence of registration with the Registrar of Companies. This document was dated 9th February 2005. The required accounts appeared at pages 21 to 31 of the bundle and the business bank statements at pages 36 to 65. The requirement to show a current appointment report from Companies House was met by the document at pages 2 to 5. This document was dated 15th February 2013.

19. From the second list of documents in the review statement, one of which had to be provided in addition to the documents already identified, the appellant would rely on the VAT registration at page 7 and pages 13 to 14 of the bundle and the wage slips.
20. Ms Kenny at this point raised the question of the bank statements, said to have accompanied the application. Those appearing in bundle 2 covered a far longer period of time than the "same twelve month period as the company tax returns CT600" required by the rules. Mr Khan said that this was so but, nonetheless, the bank statements for the particular twelve months did accompany the application. The appellant would say that the evidence was all there.
21. Ms Kenny responded by drawing attention to "checklist A" which appeared in the respondent's bundle, listing the documents submitted at the Visa Application Centre. There was no mention there of bank statements (save for sponsor's bank statements for the last six months) and in the "Other Documents" part, there was only mention of a TB test. There was nothing concerning documents identified as being required by the Entry Clearance Manager in the review statement. In that statement, mention was also made of "checklist B", which also appeared in the respondent's bundle. Again, this suggested that bank statements were not submitted (there were no "ticks" applied in the relevant parts of the form) although mention was made of an accountant's letter. All of this supported the Entry Clearance Manager's express finding that the relevant documents were not provided.
22. Mr Khan said that in the notice of decision, the ECO had not considered paragraph 9(a) of Appendix FM-SE. In any event, it was not uncommon for documents to be lost. This happened in many cases and the bank statements might have been provided but not recorded as having been received by the overseas post. The ECO was focusing on the wrong case. Moreover, the ECO did refer to a bank account and bank statements, albeit in the context of six months' bank statements and payslips. Mr Khan said that his firm took over the case in February or March 2014, from solicitors who were instructed at an earlier stage.

Findings and Conclusions

23. In this appeal, the appellant must prove the facts and matters she relies upon and the standard of proof is that of a balance of probabilities.
24. Having set aside the decision of the First-tier Tribunal, the issue between the parties in remaking it is a narrow one. Was there evidence showing that the requirements of paragraph 9(a) of Appendix FM-SE of the rules were met? Did the evidence accompany the application, as required?
25. Mr Khan assiduously took the Tribunal through the documents contained in bundle 2, showing that they addressed the requirements of the rules. He

said that this bundle was available to the First-tier Tribunal Judge but, in the light of her finding that the sponsor was an employee, she did not consider it or take it into account. Mr Khan is to be commended for the preparation of the bundle, in which the relevant items appear.

26. The fundamental difficulty, however, is that the appellant has not shown, on a balance of probabilities, that the documents accompanied the application. There is no reason to doubt Mr Khan's submission that it is not uncommon for documents to be lost or to go astray at overseas posts. Nonetheless, the Entry Clearance Manager expressly stated that the relevant documents were not provided and drew attention to two checklists. Checklist A was signed by the appellant herself and checklist B appears to have been signed on her behalf. The first shows the documents which accompanied the application and the second, those which accompanied the appeal. Neither records the submission of bank statements covering the same period of twelve months as the CT600. If the documents were provided in support, with the application, as opposed to appearing in the carefully prepared bundle, that is very surprising.
27. The other fundamental problem is that the CT600, the first document in the list referred to by the Entry Clearance Manager, and required under the rules, is dated 13th February 2014, consistent with the document being obtained in readiness for the appeal but wholly inconsistent with the claim that the document accompanied the application, made in March 2013. The first page of the CT600 return shows that it has been prepared in relation to the year 29th February 2012 to 27th February 2013, and this demonstrates that the year - "2014" - which appears at the end of the document was not the result of an accidental slip. In other words, as the relevant year of assessment ends after 13th February, it is perfectly clear that the author of the document created it in early 2014 and not early 2013.
28. In summary, taking into account the clear statement by the Entry Clearance Manager that the documents were not provided with the application and the content of the two checklists, I find that the appellant has not discharged the burden of proof upon her. Mr Khan's no doubt pertinent observations about lost documents is insufficient to show that the required items accompanied the application and the available evidence strongly suggests that they did not. In addition, one of the documents required to be provided, the CT600 return, only came into being long after the date of application and so could not have accompanied it.
29. For these reasons, I conclude that the requirements of the rules were not met and so the appeal falls to be dismissed. No case was advanced on an Article 8 basis (the grounds of appeal to the First-tier Tribunal contain nothing in this context and no submissions were made regarding the appellant's human rights).

30. The evidence available to the Upper Tribunal, carefully gathered together by Mr Khan, suggests that the requirements of the rules may well now be met, in the light of the sponsor's current circumstances. As noted by the author of the application for permission to appeal and by Ms Kenny in her submissions, there is ample scope for a fresh application which, although entirely a matter for the decision-maker, has every prospect of success.
31. In summary, the decision of the First-tier Tribunal is set aside and re-made as follows: Appeal dismissed.

Notice of Decision

The decision of the First-tier Tribunal having been set aside, it is re-made as follows: Appeal dismissed.

ANONYMITY

There has been no application for anonymity and I make no order on this occasion.

Signed

Date **9th December 2014**

Judge R C Campbell
Designated Judge of the First-tier Tribunal

TO THE RESPONDENT **FEE AWARD**

As I have dismissed the appeal, there can be no fee award.

Signed

Date **9th December 2014**

Judge R C Campbell
Designated Judge of the First-tier Tribunal