Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/14851/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 2 October 2014	**On 23 October 2014**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

ENTRY CLEARANCE OFFICER - DHAKA

Appellant

and

SHARMIN AKTER SUMI

Respondent

Representation:
For the Appellant: Mr P Nath, Senior Home Office Presenting Officer
For the Respondent: Mr T Gaisford, Counsel instructed by Charles Simmons Immigration Solicitors

DETERMINATION AND REASONS

1. This is an appeal by the Entry Clearance Officer against the decision of the First-tier Tribunal allowing the appeal of the respondent, hereinafter "the claimant", against a decision of the Entry Clearance Officer on 5 June 2013 refusing her entry clearance as a partner under Appendix FM of the Immigration Rules.

2. There were two points taken against the claimant. It was thought that she did not satisfy the English language requirements but that point has since been resolved in her favour. More significantly the Entry Clearance Officer was not satisfied that the claimant satisfied the maintenance requirements of the Rules. In simple terms the sponsor had not shown the Entry Clearance Officer that he earned sufficient money. The Entry Clearance Officer said:

> "Your sponsor is not exempt from the financial requirements as defined at paragraph E-ECP.3.3. I am not able to take into account any potential

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> employment you have available to you in the UK or any offers of financial support from third parties. In order to meet the financial requirements of the Rules your sponsor needs a gross income of at least £18,600 per annum (or if applying with one child £22,400 and an additional £2,400 for each additional child).
>
> For tax year 20/11/12 you declared income of £9,252 before tax deductions. The latest annual self-assessment tax return to HMRC does not show the necessary level of gross income. For this reason I refuse your application under paragraph EC–P.1.1(d) of Appendix FM of the Immigration Rules. (E–ECP.3.1)
>
> You have elected to have your financial requirement considered under income from self-employment but you have not specified whether you wish for your circumstances to be considered under category F or G. You have not provided the following documents as evidence of your sponsor's gross income:
>
> - *Where the person holds or held separate business bank account(s), bank statements for the same twelve month period as the tax return(s).*
> - *Personal bank statements for the same twelve month period as the tax return(s) showing that the income from self-employment has been paid into an account in the name of the person or in the name of the person and their partner jointly.*
>
> You have failed to provide the specified documents of your sponsor's employment, as listed above. These documents are specified in Immigration Rules in Appendix FM–SE and must be provided. I therefore refuse your application under paragraph EC–P.1.1(d) of Appendix FM of the Immigration Rules. (E– ECP.3.1)"

3. As far as I can see no one has criticised the Entry Clearance Officer for the findings he made or the decision he reached on the evidence that was presented to him. However the sponsor was able to improve his financial circumstances and significantly increase his income from his work as a minicab driver. This was explained to the Entry Clearance Manager in an appeal review. In the response dated 4 June 2014 the Entry Clearance Manager said:

> "The [claimant] has now provided documents that postdate the date of application and pertain to the 2012/2013 tax year and states that these show that the Rules have been met. However, the [claimant] has shifted the operative date from the date of application to the date of decision or to some other date. The Immigration Rules have not been met, because the Rules include requirements, including as to time periods, to be met at the **date of application**. For specified documents, the Immigration Rules specifically states the time periods that any evidence must cover, and specifically states throughout the Immigration Rules that all such documents are assessed pertaining to the date of application. If the Rules have been subsequently met then the Appellant is required to reapply. The documents provided in relation to the financial year 2012/2013 should therefore form the basis of a new application."

4. That explanation, if I may say so, is commendable for its clarity. The First-tier Tribunal decided that it was clearly wrong.

5. The First-tier Tribunal Judge explained his decision in the following way:

> "21. I find that by the date of the ECM review on 4 June 2014, the ECM had before him additional documents relating to the date of decision under appeal. I find that these comprised of all the specified documents in relation to the sponsor's self-employment for the preceding tax year 2012-2013 including evidence of tax

> payable, his self-assessment return, his unique tax reference number, evidence that he is registered as self-employed, bank statements for the twelve month period from April 2012 until April 2013 and evidence of national insurance contributions.
>
> 22. Having had regard to the entry clearance instructions, I find that the Entry Clearance Manager has the power to review the decision and concede it where additional evidence is submitted which appertains to the date of the decision under appeal. The guidance states that the ECM must look at the circumstances leading up to the date of refusal and where the appellant successfully addresses all the points of refusal the decision should be overturned. I find that the ECM in this appeal has applied the incorrect test when he refers to the relevant date being the date of application."

6. The First-tier Tribunal then allowed the appeal. The Entry Clearance Officer was given permission to challenge this decision. Point 10 of the grounds is particularly apposite. It says:

> "For the purpose of the appeal the [claimant] provided documents which postdate the application and pertain to the 2012–2013 tax year. These documents do not assist the [claimant] in meeting the requirements of the Immigration Rules as the Rules stipulate time periods that the evidence must cover."

7. With respect to Mr Nath he was not able to answer the obvious enquiry about which Rules the Entry Clearance Officer had in mind and where I could find them. I can find no such requirement in the Rules and I am confident that Mr Gaisford would have looked and would have drawn them to my attention if he had known that they were there.

8. It is instructive to remember that by reason of Section 85(4) of the Nationality, Immigration and Asylum Act 2002 the default position is that when a Tribunal is considering an appeal it:

> "may consider evidence about any matter which it thinks relevant to the substance of the decision, including evidence which concerns a matter arising after the date of the decision."

9. However this default position is subject to two important exceptions which are set out in paragraph 85A of the 2002 Act. Section 85A(2) provides:

> "Exception 1 is that in reference to an appeal under Section 82(1) against an immigration decision of a kind specified in Section 82(2)(b) or (c) the Tribunal may consider only the circumstances appertaining at the date of decision."

10. The specified appeals are appeals against immigration decisions refusing entry clearance (such as the instant decision) or refusing a Certificate of Entitlement. Mr Gaisford argued that exception 1 clearly applies here and the First-tier Tribunal rightly considered evidence appertaining at the time of decision.

11. Exception 2 provides that the Tribunal may consider evidence adduced by the appellant only if it was submitted at the time of making the application. However exception 2 does not apply to all cases but to appeals against refusal of leave to enter the United Kingdom, refuse to vary a person's leave to enter or remain in the United Kingdom or applications made under the points-based system.

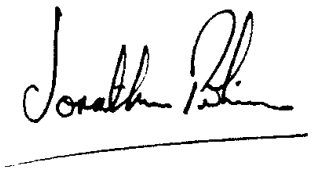
12. In short no-one has been able to refer me to anything that supports the Entry Clearance Officer's understanding of the law and statute appears to be completely against the Entry Clearance Officer's understanding.

13. I can see no error on the part of the First-tier Tribunal and I uphold the decision of the First-tier Tribunal and dismiss the Entry Clearance Officer's appeal.

14. Although this was not specifically argued before me I am aware of the requirements of Appendix FM-SE. Paragraph D provides that where the Appendix states that specified documents must be provided the Entry Clearance Officer or Secretary of State will only consider documents submitted after the application where certain conditions identified in sub-paragraph (b) or (e) apply. I have not decided if the Entry Clearance Officer was prohibited by this Rule from looking at further documents. It is quite clear that the Tribunal had a statutory obligation to consider them and did.

15. It follows therefore that I dismiss the Entry Clearance Officer's appeal.

Signed
Jonathan Perkins
Judge of the Upper Tribunal



Dated 21 October 2014