Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/15666/2013

THE IMMIGRATION ACTS

Heard at Stoke	**Decisions and Reasons Promulgated**
On 22nd December 2014	**On 22nd December 2014**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

ENTRY CLEARANCE OFFICER – NEW DELHI

Appellant

and

GURJIT KAUR
(Anonymity direction not made)

Respondent

Representation:
For the Appellant: Miss Johnstone – Senior Home Office Presenting Officer.
For the Respondent: No appearance.

DETERMINATION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge Raikes, promulgated on 4th August 2014, in which the Judge allowed the appeal against the refusal of an Entry Clearance Officer (ECO) dated 27 June 2013 to grant Ms Kaur leave to enter the United Kingdom for the purposes of settlement with her husband and sponsor. The application was refused as the mandatory requirements of the Immigration Rules had not been shown to be met.

2. The sponsor is said to have failed to provide a letter of employment from the company he works for with the relevant information required by the Rules in it. Dates in relation to cash deposits made did not support those on payslips making it difficult for the ECO to establish if the cash deposits had originated from the sponsor's employment. The requirement is to demonstrate an income of £18,600 per annum and specified documents had not been provided in respect of employment leading to the refusal under paragraph EC-P.1.1 (d) of Appendix FM.

3. The Judge considered the evidence made available and noted that the employment relied upon by the sponsor with IDTEL commenced in September 2012 but ended in April 2013. The Judge, however, also found that the sponsor had started work with another employer thereafter and that at the date of decision he was working for this employer. The Judge found that the sponsor also received rental income and whilst accepting that a lot of the evidence was post-decision concluded that it related to a situation appertaining at the date of decision and that it had been proved that the level of income met the minimum requirements of the Rules. The Judge also states in paragraph 22 that the terms of paragraph 281 of the Immigration Rules are met even though this is an application made under Appendix FM.

4. The Secretary of State challenges the findings of the Judge allowing the appeal under the Rules on the basis of a material misdirection of law as the Appellant failed to provide mandatory documents as set out by the ECO.

Discussion

5. Appendix FM introduced a prescriptive set of requirements that need to be satisfied by individuals wishing to succeed in applications for leave under these provisions. In relation to the maintenance requirement it is necessary for individual such as this Appellant to prove they have a minimum gross income available of £18,600. This requirement has been found to be lawful by the Court of Appeal and is the level at which the Secretary of State believes a burden on the public purse by those entering the country is mitigated.

6. The Rules contain specified methods by which the availability of such funds can be established. These are set out in Appendix FM-SE and related guidance. The requirement to provide specified documents is a mandatory requirement. The ECO found that the sponsor had failed to provide a letter of employment from the company he worked for containing the information required by the Rules which includes: (i) the persons employment and gross annual salary; (ii) the length of their employment; (iii) the period over which they have been or were paid for the level of salary relied upon in the application; and (iv) the type of employment (permanent, fixed term contract or agency).

7. In relation to cash deposits it was found these did not match the alleged sums paid on the payslips. The requirement of the Rules is that personal bank statements corresponding to the same periods as the wage slips must be provided showing that the salary has been paid into an account in the name of the person or in the name of the person and their partner jointly.

8. The reason for such requirements is that it enables a decision maker not only to ascertain whether the claimed income has been substantiated on the documents but also to enable further checks to be made of those issuing the documents if questions arise. It is not enough for an individual to claim they earn the relevant income as this in itself is open to abuse. They have to prove this claim.

9. The Judge makes no findings regarding whether an employer letter was provided with the application in the required terms. The grounds of appeal and evidence suggest that such a letter may have been provided by the sponsor to his solicitor but there is no evidence that that information was passed to the decision maker as part of the application process. As there is no evidence this mandatory document was provided the requirements of the Immigration Rules could not be found to have been met.

10. Similarly, in relation to the cash deposits, the Judge fails to make an adequately reasoned analysis of this ground of refusal especially in light of the fact that the cash deposits do not demonstrate the sponsor's claimed income. As such the requirements of Appendix FM-SE cannot be met.

11. The Judge was looking at a decision made on 27 June 2013 on the basis of the documentation provided with the application and the question whether that material satisfied the requirements of the Rules. Consideration of all the available information clearly shows that that information did not meet the mandatory requirements and on this basis the appeal should have been dismissed. The Judge, in fact, went on to consider evidence of a further period of employment which would not be known by the decision maker and applying the 'situation appertaining' test appears to have decided that that permitted her to allow the appeal. The requirements of the Immigration Rules are set out in the Rules and whatever may have happened subsequently does not enable a Judge to find those requirements could be ignored. There is no judicial discretion within the Rules or Guidance permitting such a finding to be made.

12. Article 8 ECHR was also pleaded in the grounds and if the Judge considered that the Rules could not be met but that the available income was such that there would be no burden to the public purse, it was always open to her to consider whether the appeal should have been allowed under Article 8; but only when considering relevant factors and undertaking a proper proportionality exercise as this is an element that would need to be considered outside the Rules. The Judge did not do so however as it was stated that the Appellant had not sought to adduce any evidence in respect of Article 8 and as the appeal had been allowed

under the Rules. It may be an error not to consider matters raised in the grounds of appeal although as the Judge allowed the appeal under the Rules there was no obvious need for her to go further in her mind.

13. As stated, I find the Judge has materially erred in law in relation to the Immigration Rules such that that element of her decision must be set aside. There is no attendance by the Appellant or sponsor today but the tribunal did receive a letter from the Appellant acknowledging receipt of the notice of hearing and referring to the appeal being allowed but thereafter the Secretary of State being granted permission to appeal. The letter is dated 25 October 2014 in which the Appellant also states "I do not want to contest my appeal application any further".

14. In terms of substituting a decision I substitute a decision in relation to the Rules to dismiss the appeal as the mandatory requirements of the Rules were not met by the material supplied. In relation to the Article 8 claim, as nobody has attended to pursue this matter further, I find the Secretary of State has discharged the burden of proof upon her to the required standard to show that the decision is proportionate to the legitimate aim relied upon and dismiss this element too.

15. The Appellant asks in her letter that if the appeal is dismissed she is advised how she can have a visa to join her husband in the United Kingdom. It is not appropriate for the tribunal to give advice but it is always open to the Appellant to make a fresh application for entry clearance. If she does, she must ensure that it is accompanied by the required information to show she is able to satisfy the requirements of the Rules, including those set out in Appendix FM-SE. If she does, there is a strong possibility her application will succeed.

Decision

16. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remake the decision as follows. This appeal is dismissed.**

Anonymity.

17. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed…….

Upper Tribunal Judge Hanson
Dated the 22nd December 2014