



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: OA/16236/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 10th November 2014**

**Decision & Reasons Promulgated
On 23rd December 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR ENUWOKO MOFE TONWEH
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Ms J Isherwood, Home Office Presenting Officer

For the Respondent: Mr M Iqbal, Counsel instructed by Augustine Clement

DECISION AND REASONS

1. The application for permission to appeal was made by the Secretary of State but nonetheless I shall refer to the parties as they were termed before the First-tier Tribunal, that is Mr Tonweh as the appellant and the Secretary of State as the respondent.
2. The appellant is a citizen of Nigeria born on 1st August 1979 and the husband of Ms Temituokpe Tonweh, a British citizen born on 6th February 1983, and he applied for

entry clearance to come to the United Kingdom for settlement as the spouse of the sponsor.

3. The application was made on 7th May 2013 and the respondent refused the appellant's application on 14th August 2013.
4. The issue of the relationship was conceded by the Home Office Presenting Officer at the hearing on 11th August 2014 before Judge of the First-tier Tribunal Aujla. He allowed the appeal finding that the sponsor had shown sufficient income to meet the financial requirements in paragraphs E-ECP.3.2. to E-ECP.3.4. of Appendix FM which requires an income threshold of £18,600 for a partner to be met.

"E-ECP.3.1. The applicant must provide specified evidence, from the sources listed in paragraph E-ECP.3.2., of -

(a) a specified gross annual income of at least -

(i) £18,600;

(ii) an additional £3,800 for the first child; and

(iii) an additional £2,400 for each additional child; alone or in combination with

(b) specified savings of -

(i) £16,000; and

(ii) additional savings of an amount equivalent to 2.5 times the amount which is the difference between the gross annual income from the sources listed in paragraph E-ECP.3.2.(a)-(d) and the total amount required under paragraph E-ECP.3.1.(a); or

(c) the requirements in paragraph E-ECP.3.3.being met.

In this paragraph 'child' means a dependent child of the applicant who is -

(a) under the age of 18 years, or who was under the age of 18 years when they were first granted entry under this route;

(b) applying for entry clearance as a dependant of the applicant, or has limited leave to enter or remain in the UK;

(c) not a British Citizen or settled in the UK; and

(d) not an EEA national with a right to be admitted under the Immigration (EEA) Regulations 2006.

E-ECP.3.2. When determining whether the financial requirement in paragraph EEC.3.1. is met only the following sources will be taken into account -

- (a) income of the partner from specified employment or self-employment, which, in respect of a partner returning to the UK with the applicant, can include specified employment or self-employment overseas and in the UK;*
- (b) specified pension income of the applicant and partner;*
- (c) any specified maternity allowance or bereavement benefit received by the partner in the UK or any specified payment relating to service in HM Forces received by the applicant or partner;*
- (d) other specified income of the applicant and partner; and*
- (e) specified savings of the applicant and partner."*

5. The appellant's application to the respondent was made on 7th May 2013. At paragraph 22 of the determination the judge found that the sponsor worked for an annual salary of £12,619.20 (amounting to £1,051.60 gross a month) as a teaching assistant with Enfield Heights Academy from September 2012 until March 2013. She left the employment at the end of March 2013. Her wage slips were provided together with her contract of employment. There was also a P60 which showed that her gross income from that employment was £5,937.36 and that she earned that salary for a period of seven months.

6. The sponsor also registered a company on 31st January 2012 and entered into a contract to work for the company as a director of consultancy from 1st November 2012. However, there was a contract signed between the company and the sponsor and she (the company) paid herself on a PAYE basis as an employee. The wage slips showed she was paying income tax and national insurance. She provided payslips of that employment which were also in the bundle. She was paid £9.46 per hour and earned £5,200 from that employment for the period of six months from November until the end of April 2013 (23).

7. The appellant made his application on 7th May 2013 and the judge stated as follows:

"24. The Appellant made his application on 07 May 2013. The six months prior to the application would be from the beginning of November 2012 to the end of April 2013. During that period, the sponsor had income from teaching for 5 months at the rate of £848.19 per month which for five months amounted to £4240.95 and £10,178.28 per annum. In addition, the sponsor had income from the company of £866.66 per month and the yearly equivalent being £10,399.99. The sponsor's total gross yearly income therefore was £20,578.27. That was in excess of the amount of £18,600 that the sponsor was required to show."

8. He therefore considered on the evidence presented to him that there was an excess of the amount of £18,600 and that the sponsor had demonstrated a gross income of this relevant amount during the “relevant period” (paragraph 26).
9. The application for permission to appeal was made on the basis that the sponsor’s salary as a director of consultancy was £10,399.99 per annum based on her income from current employment for more than six months and that “**only this would be taken into account**”. As such it was submitted that the sponsor’s income was significantly below the requisite income threshold.
10. Ms Isherwood presented me with the Immigration Rules in relation to Appendix FM-SE. She submitted that paragraph 13(b) of Appendix FM-SE could not apply as the sponsor had been in her current employment for more than six months and further that paragraph 13(j) did not apply because it was stated that this was not self-employment.
11. Mr Iqbal submitted that the appellant fell under Rule 13(a) and that the Secretary of State had misinterpreted the construction of the Rules. If the drafter wished to exclude income from the second employment it was open to her to do so but nowhere in the Rules in the context of paragraph 13(b) did it state that her income could not be topped up by another employment which finished before the date of the application. I was referred to paragraph 2 of Appendix FM which referred to employers in the plural. Thus, he submitted, it was obvious that there could be income from more than one source. Upon that basis, as long as the sponsor met the requirements of 13(a) and was in her current employment for more than six months there was no prohibition on her relying on another source of income and which employment had finished shortly before the application. On consideration of the grounds of application for permission to appeal there was no explanation as to why only the current employment of more than six months would be taken into account. This was not expressed in the Rule in such a way and the case was not made out.
12. Ms Isherwood submitted that it was accepted that 13(b) and 13(j) did not apply. The judge did not explain how he came to the conclusion that 13(a) applied in this instant.
13. I put to Mr Iqbal that the Rules refer to a current employer.
14. Mr Iqbal submitted that there was no need to explain why the judge could consider income from two sources.
15. The difficulty with Mr Iqbal’s submissions is that the Immigration Rules at paragraph 13(a) refer to employment by a

*“**current** employer for at least six months and has been paid **throughout** the period of six months prior to the date of application at a level of gross annual salary which equals or exceeds a gross annual salary relied on in the application and any non-employment income and gross annual income from the UK or foreign state pension or a private pension.”*

16. This does not preclude more than one employer but is specific that the calculation must stem from the income received from the current employer as at the date of application.
17. Indeed, in relation to paragraph 13(b) where the person in salaried employment has been employed by the current employer for less than six months once again the gross annual income will be the total of "the gross annual salary from employment as it was at the date of application".
18. Both of these provisions run the calculation of the gross annual income backwards from the income as at the date of the application and in both instances it is necessary to show a relevant and sufficient income which is connected to an income received as at the date of application. I can accept that more than one employer can be used but it must be from a current employer. The Rule does not preclude more than one employer but does not permit in effect a dramatic drop in income.
19. The difficulty with the calculation by Judge Aujla and for this appellant is that the judge used the yearly equivalent of the sponsor's income from her current employer as at £10,399.99 but also extrapolated the income from the teaching which he was not permitted to do. He assessed the teaching job on the basis of five months at the rate of £848.19 per month. The actual gross income from the teaching job was £4,440.95 and cannot be extrapolated or expanded. Thus the gross income for the sponsor for the year leading up to the date of the application was in fact £14,640.94. To put it another way, the judge should have assessed the income from the teaching post at £353.41 per month rather than £848.19 per month because that is what she actually earned in the year to March 2013.
20. I therefore find that there was an error of law and that I set aside and remake the determination and for the reasons given above I dismiss the appeal in relation to the Immigration rules.
21. However the judge made no findings with regards Article 8 and the matter still needs to be considered.

Notice of Decision

The appellant's appeal is dismissed with respect to the Immigration rules.

The matter is to be determined on the Article 8 issue alone. In the absence of any objection to making written submissions only in relation to Article 8, I shall determine the matter on the papers. The parties are to make any written submissions on Article 8 within 28 days of the date of this decision.

Signed

Date 22nd December 2014

Deputy Upper Tribunal Judge Rimington