Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/17174/2013

THE IMMIGRATION ACTS

Heard at Stoke on Trent	**Determination Promulgated**
On 21 October 2014	**On 19 November 2014**

Before

Deputy Upper Tribunal Judge Pickup

Between

Secretary of State for the Home Department

Appellant

and

Fahimeh Hakimi Pirouj
[No anonymity direction made]

Claimant

Representation:
For the claimant: Mr M Bradshaw, instructed by Cartwright King Solicitors
For the respondent: Ms C Johnstone, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The claimant, Fahimeh Hakimi Pirouj, date of birth 28.5.85, is a citizen of Iran.

2. This is the appeal of the Secretary of State against the determination of First-tier Tribunal Judge Moore promulgated 9.7.14, allowing the claimant's appeal on immigration grounds against the decision of the respondent, dated 4.7.13, to refuse her application made on 16.4.13 for leave to enter the UK as a partner under Appendix FM of the Immigration Rules. The Judge heard the appeal on 19.6.14.

3. First-tier Tribunal Judge Cruthers granted permission to appeal on 3.9.14.

4. Thus the matter came before me on 21.10.14 as an appeal in the Upper Tribunal.

Error of Law

5. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Moore should be set aside.

6. In summary, the grounds complain that the First-tier Tribunal Judge failed to take proper account of the mandatory documents specified under Appendix FM-SE, which were not submitted with the application; failed to properly take into account what the sponsor's actual earnings were at the date of the application and failed to take into account that if the income requirements are now met, the appellant could make a fresh application. See Hameed (Appendix FM – financial year) [2014] UKUT 00266 (IAC), promulgated on 11.6.14.

7. In granting permission to appeal, Judge Cruthers found the grounds arguable.

8. The sponsor accepted that he did not meet the £18,600 requirement at the date of application, but contended that he did so at the date of the appeal hearing. Having regard to the decision of the First-tier Tribunal, it is clear that the judge made the error of extrapolating from the documentary evidence a finding that at the time of the appeal hearing the claimant's gross annual income was in excess of £18,600. The judge considered that there was unfairness in taking such a strict and inflexible view of the sponsor's employment, which showed an income of some £14,246 at the time of the application.

9. Mr Bradshaw contended that as the application was made on 16.4.13, the decision should have been made with regard to the Rules in force at that date and not the date of decision of 4.7.13, purportedly relying on Kaur (entry clearance – date of application) [2013] UKUT 381 (IAC). I do not accept that case provides authority for the point made. There the Upper Tribunal said, "It is established law that an application is to be decided in accordance with the Rules in force at the date of decision. An exception to that is where there are transitional provisions." There were no transitional provisions for Appendix FM-SE and thus the correct date for consideration of the Rules was the date of decision. The statement of changes of 14.3.13 provided that the modifications to FM-SE applied to all applications decided on or after 6.4.13. The statement of changes of 1.7.13 provided that modifications to FM-SE took effect on 1.7.13 and made no provision for savings for applications made prior to that date. In the circumstances, Mr Bradshaw's submission is something of a red herring.

10. Further, he relied on a difference between FM-SE 1(m) & (n) as "currently in force" and that at the date of decision, 4.7.13 which provided that "cash income on which the correct tax has been paid may be counted as income under this Appendix, subject to the relevant evidential requirements of this Appendix." The current rule now

allows the net cash deposited to be counted as the gross sum for the purpose of income calculation, but at the date of decision, only the actual cash received and banked could be counted, provided the correct tax has been paid. Cash in hand payments with no taxation is not to be counted. However, the evidence still has to show the salary corresponding to the wage slips being paid into an account in the applicant's name. Mr Bradshaw seeks to take a technical point. The point, it is suggested, is that because of the way FM-SE 2 is worded the claimant does not have to show that the monies in the bank is the same as the wage slips. I do not see that this assists the claimant in any way. It is clear that at the date of the application, he did not meet the necessary income threshold.

11. The decision of the First-tier Tribunal failed to comply with or apply the requirements of the Immigration Rules. Regardless as to which set of Rules apply, it is clear that the relevant date for the production of evidence is the date of application and the financial evidence has to be provided for the period prior to and leading up to that date. The requirement is the same at the date of application as it was at the date of decision. The income has to be evidenced by wage slips covering a 6 month period prior to the date of application and bank statements show that the salary has been paid into an account in the applicant's name, etc. Thus the £18,600 threshold has to be demonstrated by acceptable evidence under Appendix FM-SE for the period prior to the application in April 2013.

12. There is no discretion in the First-tier Tribunal Judge to waive these requirements. Case authority has held that there is nothing unfair about the Secretary of State's application of the Immigration Rules, as for example, is the effect of Hameed (Appendix FM – financial year), where the Upper Tribunal also held that the remedy for the appellant was to make a fresh application if and when the requirements of the Rules can be met and that there was nothing disproportionate about that. Further in R(MM (Lebanon)) v SSHD [2014] EWCA Civ 985, promulgated 11.7.14 after the promulgation of Judge Moore's decision and thus could not be taken into consideration, the Court of Appeal upheld, inter alia, the proportionality of the income threshold requirement of Appendix FM.

13. In the circumstances, I set the decision aside and proceeded to rehear the appeal.

14. I heard oral evidence from the sponsor, relying on his witness statement of 22.8.13. When asked why his wife simply didn't make a fresh application with the correct evidence, he said he thought the appeal to the Upper Tribunal would be shorter in time. He had not spoken to her about making a new application. However, he confirmed that if he had to, he would. He apparently was still not paying his salary into the bank account and thus may have some difficulty meeting the requirements of Appendix FM.

15. I find it very clear that the claimant does not meet the requirements of the Immigration Rules under Appendix FM, and 2(c) of FM-SE. The bank statements do not show the salary paid into the account and the sponsor did not meet the financial threshold at the relevant time.

16. I have referred above to Hameed, and MM (Lebanon). There is nothing disproportionate about requiring the claimant to meet the Immigration Rules and the financial requirements. Given that the sponsor now claims to be able to meet the financial threshold, he should make a fresh application. Requiring him to do so cannot be regarded as disproportionate. Given that he can do so and said he will do so, I fail to see how, applying the Razgar steps to the proportionality balancing exercise between on the one hand the rights of the claimant to have family life with the sponsor and on the other the legitimate and necessary aim of the state to protect the economic well-being of the UK through immigration controls, the decision can be regarded as disproportionate or otherwise unduly harsh.

17. In reaching that conclusion I take into account all that has been urged upon me about the claimant and the sponsor. However, I am required to take account of section 117B(3) that It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons— (a) are not a burden on taxpayers, and (b) are better able to integrate into society. I take the point that the sponsor claims that he can meet the financial threshold, but in fact has not yet demonstrated that he can evidence that fact.

18. I further take into account that the sponsor is not a British citizen, though he has ILR here. There is no reason why he cannot relocate to live with the claimant in India in order to pursue family life. There is no legitimate entitlement to be able to settle in the UK and no reason why he should be able to do so under article 8 ECHR as a shortcut to compliance with the Rules when they cannot meet the requirements of those Rules.

19. In the circumstances the appeal must fail.

Conclusions:

20. For the reasons set out above, I find that the making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I re-make the decision in the appeal by dismissing it.

Signed: Date: 6 March 2015

Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The appeal has been dismissed and thus there can be no fee award.

Signed:  Date: 6 March 2015

Deputy Upper Tribunal Judge Pickup