Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/20601/2013

THE IMMIGRATION ACTS

Heard at Bradford	**Decision and Reasons**
On 2nd December 2014	**Promulgated On 18th December 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

BALA LOKESH REDDY YETI
(ANONYMITY NOT DIRECTED)

Appellant

and

THE ENTRY CLEARANCE OFFICER - CHENNAI

Respondent

Representation:
For the Appellant: Mr J Jamil, Solicitor
For the Respondent: Mrs V Pettersen, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a citizen of India who was born on the 30th December 1983. He appeals to the Upper Tribunal (with permission) against the decision of First-tier Tribunal Saffer who, in a determination promulgated on the 15th July 2014, dismissed his appeal against the respondent's decision to refuse his application for entry clearance (hereafter, "the decision") in order to

join his spouse, Mrs Asritha Adusumalli (hereafter, "the sponsor") in the United Kingdom.

2. As anonymity was not directed by the First-tier Tribunal, I consider that little purpose would be served by ordering now.

Background to the proceedings

3. For the purposes of this appeal, the relevant part of the respondent's Notice of Immigration Decision reads as follows:

> Your application also falls to be refused because you do not meet the income threshold requirement under Appendix FM and/or the related evidential requirements under Appendix FM-SE. You have filed to submit payslips from Ritu Fashions Limited the most recent of which his dated less than 28 days before you submitted your application, as the most recent payslip from there is dated the 31/5/13, you have failed to submit an employer's letter from Ritu Fashions Limited, you have failed to submit an employer's letter from Capita containing all the required information, notably the nature of your sponsor's employment and confirmation of how long they have been paid at the rate quoted; bank statements showing salary deposits consistent with the payslips submitted in support of your application, as the sum deposited to your sponsor's account on 1 March 2013 does not correspond to the net pay detailed on the payslip dated 28 February 2013. I further note that the tax codes on her payslips suggest your sponsor appears to be enjoying her full income tax allowance from both employers – you have provided no evidence that she is entitled to this allowance from both employers, nor evidence that she has taken steps to rectify this.

4. The respondent was also not satisfied that the appellant was in a genuine and subsisting relationship with the sponsor and that he had met the English language requirement. However, Judge Saffer resolved these issues in the appellant's favour [paragraphs 9 and 10 of his determination] and his findings in this regard are not challenged in the present proceedings.

5. The matter was reviewed by an Entry Clearance Manager (ECM) on the 2nd April 2014 in light of the grounds of appeal submitted to the First-tier Tribunal. The ECM began by noting that grounds made reference to paragraph 281 in Part 8 of the Immigration Rules. This reference also appears in the grounds of appeal to the Upper Tribunal. However, as the ECM correctly observed, the timing of the instant application meant that Part 8 did not apply and it was instead governed exclusively by Appendix FM and Appendix FM-SE of the Immigration Rules. The ECM thereafter repeated each of the respondent's original concerns, above, noting that no attempt had been made to address them in the grounds of appeal.

6. The original grounds of appeal to the First-tier Tribunal effectively raised two grounds of appeal, namely, that the decision was "not in accordance with immigration rules" and was incompatible with the appellant's right to respect for private and family life as guaranteed by Article 8 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms.

7. Judge Saffer dealt with the first of these grounds at paragraph 11:

> With the application pay slips should have been submitted that covered the period until 10/5/2013. The rules in Appendix FM-SE-A1-(1) are clear in that regard. The pay slips do not cover that period. The most recent is 31/5/13. This is not a matter of evidential flexibility whereby time a request for the missing document should have been made as it is not a document from the middles of a series missing, but the payslip from the end of the series that is within the actual time frame required by the rules. I therefore dismiss the appeal under the rules.

The reference to the "matter of evidential flexibility" is no doubt made to paragraph D of Appendix FM of the Immigration Rules. This allows a decision-maker, in certain limited circumstances which are far removed from those of the instant appeal, a margin of discretion by allowing an applicant to correct minor omissions in the documentation submitted with an application.

8. Judge Saffer dealt with the issues arising under Article 8, at paragraphs 13 to 18 of his determination:

> 13. There is nothing compelling or exceptional in this case that requires consideration of article 8 outside the rules. The appellant need simply reapply with all the relevant documents for consideration by the respondent of the current position within the rules. Having a child is not compelling or exceptional as that is the usual result of marital relations between spouses. The fact they may succeed under the rules if now assessed is not exceptional or compelling as they had failed to establish that they did so at the date of the application or decision, and human rights legislation is not a back door for people who do not send in relevant documents.
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> 14. Even if I am wrong in that, there would be no breach in their family life. That must be promoted. It will continue in the way that they chose for themselves namely one that was to be limited by living in different countries. She has failed to establish that she cannot return to India, where she is a national and has been recently, to be reunited with her Indian husband if they wish while he applies for entry clearance. There is no cogent or independent evidence they are from different castes or that they would have any problems as a result of that and he makes no such claim that this would be a problem.
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> 15. In addition it has not been established that consequences of gravity may flow from the decision, even given the low threshold, as Ms Adusumall can return to her home in India with her daughter who she would inevitably wish to introduce to her extensive family there in the interim, or remain here for the relatively short time it will take to submit a fresh application, and as the family can afford the fee given her income and claimed level of savings.
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> 16. It is lawful and in pursuit of the legitimate aim of retaining the integrity of immigration control to only allow those to come here who fulfil the rules.
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> 17. In relation to proportionality, I must first consider the best interest of the appellant's daughter. Her nationality is not a trump card. There is no evidence she is not an Indian national in addition to being a British national. She was not born at the date of decision and the respondent cannot be faulted for not considering it then. It is in her best interest to be with both of her parents where they can both lawfully and safely live. That is India which forms the

entirety of her cultural and family heritage. Having her live here may be denying her access to that heritage and may deny her access to being able to enjoy the benefits of Indian nationality. Given her tender age she has developed no ties at all here save with her mother. She has extensive family in India. They would have family support as I reject the suggestion that she does not. She is not at school. There is no evidence she has any ailments. She can return here whenever her mother wishes and, when he has established that he fulfils the rules, her father.

18. It would also be proportionate to require the adults to submit the relevant documents for consideration by the respondent as human rights legislation is not a back door for people who do not send in relevant documents. The continued separation, which itself is entirely unnecessary as Ms Adusumall can easily and safely return to India either permanently or temporarily, is one of choice by the adults and not of necessity.

Analysis

19. I deal firstly with Mr Jamil's submissions relating to the judge's assessment of the appeal under the Immigration Rules. It will be noted that the judge considered only one aspect of the concerns that had been raised by the respondent; namely, that the payslips issued by Ritu Fashions Limited did not cover a period of 6 months ending not more than 28 days prior to the date of the application. The relevant provision are to be found in paragraphs 2 and 13 of A1 of Appendix FM-SE –

> 2. In respect of salaried employment in the UK …, all of the following evidence must be provided:
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> (a) Payslips covering:
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> (i) a period of 6 months to the date of the application if the person has been employed by their current employer for at least 6 months … or
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> (ii) any period of salaried employment in the period of 12 months prior to the date of application if the person has been employed by their current employer for less than 6 months (or at least 6 months but the person does not rely on paragraph 13(a) of this Appendix)

The relevant part of paragraph 13 reads as follows –

> 13. Based on evidence that meets the requirements of this Appendix, and can be taken into account with reference to the applicable provisions of Appendix FM, gross annual income under paragraphs E-ECP.31., E-LTRP.3.1, E-ECC.2.1 AND E-LTRC.2.1 will be calculated in the following ways:
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> (a) Where the person is in salaried in employment in the UK at the date of application, has been employed by their current employer for at least 6 months and has been paid throughout the period of 6 months prior to the date of application at a level of gross annual salary which equals or exceeds the level relied upon in paragraph 13(a)(i), their gross annual income will be … the total of:
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> (i) The level of gross annual salary relied upon in the application;

> (ii) The gross amount of any specified non-employment income … received by them or their partner in the 12 months prior to the date of application; and
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> (iii) The gross annul income from a UK or foreign State pension or a private pension received by them or their partner.

20. It will be seen from the above that the only exception to the requirement to provide payslips for the six-month period that immediately precedes the date of the application is in circumstances where either, (i) the applicant has been in their current employment for a period of less than six months, or (ii) where the applicant has worked for their current employer for at least 6 months but is not relying upon salary from that employment in combination with income from other sources.

21. In order to meet the income threshold in this case, the appellant relied upon a combination of the sponsor's income from Capita Customer Management Limited (for whom she continued to work at the date of the application), Ritu Fashions Limited (for whom she had ceased to work on the 31st May 2013), 'OneStop', and a rental income from real property. It was the fact that the appellant had ceased her employment with Ritu Fashions that meant that she was unable to provide recent wage slips from this employment. It was not however the case that the sponsor had moved from her employment with Ritu Fashions in order to work for Capita. The position was that she had worked for both these employers simultaneously until the time when she ceased to work for the former, on the 31st May 2013. Thus, whatever the position may have been with regard to compliance with paragraph 2 of Appendix FM-SE, it was extremely doubtful that sponsor's income from this employment could be taken into account for the purpose of calculating the sponsor's gross income under paragraph 13 of the Appendix FM-SE.

22. However, even if it was permissible to include the income from Ritu Fashions within the calculation of the sponsor's gross annual income and Judge Saffer was thus wrong to consider that the payslips from that employment failed to meet the requirements of paragraph 2 of Appendix FM-SE, the fact remains that the appellant's documents were deficient in other respects, as was highlighted by the respondent in the Notice of Immigration Decision. Thus, the letter from Capita did not specify the nature of the sponsor's employment or the period for which she had been employed at her current rate of pay. Moreover, at least one of the deposits in her bank account did not correspond with the amount of the payment shown on the payslips. Thus, even if it were the case that Judge Saffer was wrong to conclude that the appeal could not succeed by reason of the failure to achieve the impossible by providing a payslip from Ritu Fashion Limited immediately preceding the application, he would nevertheless have been bound to conclude the appeal failed under the Immigration Rules for the other reasons that had been raised by the respondent in the Notice of Immigration Decision. Any error of law was thus immaterial to the outcome of the appeal in this regard.

23. The grounds of appeal relating to the First-tier Tribunal's treatment of the appellant's case under Article 8 are not easy to follows –

> It will be argued that the Appellant's sponsor and child can be regarded as victims of the FTTJ's determination under Article 8 of the ECHR.

This appears to be a reference to Lady Hale's observation in ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4 that it is not right to visit the sins of a parent upon a child. However, that is not what either the respondent or the Tribunal did in this case. If it is the case (as Judge Saffer suggested) that the appellant's daughter is a British citizen, then she will not need to obtain entry clearance in order to be able to exercise her right of residence with her father in the United Kingdom. In any event, and as Judge Saffer also pointed out, the appellant's daughter was not born at the date of the decision. She did not therefore form a part of the "circumstances that were appertaining at the date of the decision" [Section 85 of the Nationality, Immigration and Asylum Act 2002] and was thus irrelevant for the purposes of an assessment of an appeal against an out-of-country Immigration Decision. As no other potential error of law has been identified in Judge Saffer's analysis of the case under Article 8, it follows that this ground of appeal must also fail.

Notice of Decision

24. The appeal is dismissed.

Signed Date **2nd December 2014**

Judge of the First-tier Tribunal