



IAC-FH-AR-V1

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

Appeal Number: IA/49293/2014

THE IMMIGRATION ACTS

Heard at Field House
On 26 October 2015

Decision & Reasons Promulgated
On 4 December 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR SAROJ KUMAR SHRESHTHA
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr T Melvin, Home Office Presenting Officer

For the Respondent: Mr S Khan, Paul John & Co, Solicitors

DECISION AND REASONS

The Appellant

1. The application for permission to appeal was made by the Secretary of State but nonetheless for the purposes of this appeal I shall refer to the parties as they were described before the First-tier Tribunal, that is Mr Shreshtha as the appellant and the Secretary of State as the respondent.

2. On 30 August 2014 the appellant submitted an application for leave to remain in the United Kingdom as the spouse of a settled person. His application was considered under Appendix FM and paragraph 276ADE of the Immigration Rules. It was decided that the appellant had previously obtained a test from ETS on 6 February 2013 to support his application dated 30 April 2013. This test was subsequently cancelled as deception had taken place and the validity of the test result could not be authenticated. He therefore did not meet the suitability requirements under S-LTR2.2(a).
3. In order to qualify for limited leave to remain as a partner under Appendix FM the requirements are – LTRP1.1 must be met and, in addition, to qualifying under suitability the applicant must
 - i. Meet all the eligibility requirements of Appendix FM E-LTRP or
 - ii. Meet the eligibility requirements of Appendix FM E-LTRP1.2 to 1.12 and 2.1 and in addition the applicant meets the requirements of Appendix FM EX.1.
4. With reference to R-LTRP1.1(ii) it was considered that the appellant did not meet the requirements because there were no insurmountable obstacles to family life with the client's partner continuing from outside the UK and therefore he failed to meet EX.1.
5. Further the appellant did not meet the requirements under paragraph 276ADE.
6. The matter came before Judge of the First-tier Tribunal K.St.J. Wiseman. He found that there was no supporting documentation or witness statement provided with respect to the allegation that deception had been made in relation to the previous application (paragraphs 22 and 23).
7. The judge then found that the appellant's partner and sponsor did *now* (my italics) earn sufficient money and there were appropriate payslips showing earnings of £506 per month gross her employer for the last five months (with a further one to come in the end of this month”.

“26. She does now earn sufficient; there are appropriate payslips showing earnings of £608 per month gross from Monty’s for the last five months (with a further one to come in the end of this month); there are payslips from Sodexo covering a very much longer period but certainly for in excess of six months showing gross pay in there region of £1,190 per month; there are her Metro bank statements clearly showing the relevant net figures going in each month; there is a contract of employment from Sodexo and a letter of employment from Monty’s. There is more than enough evidence in accordance with the Rules to prove the sums paid. The regular sums in question reflect a total gross salary of close to £20,000 per annum, and certainly significantly more than the Immigration Rules require. In addition, it is not disputed that this is a genuine and subsisting marriage and the couple have rent free accommodation with the wife’s parents on an open ended basis. All figures up to the date of this appeal hearing can be taken into account as it is an in-country appeal.”

8. An application for permission to appeal was made on the basis that the judge had made a material misdirection in the law because in respect of the evidence to be produced regarding salaried employment under Appendix FM-SE.
9. Paragraph 2 of FM-SE states:
 - “2. In respect of salaried employment in the UK (except where paragraph 9 applies), all of the following evidence must be provided:
 - (a) Payslips covering:
 - (i) a period of 6 months prior to the date of application if the person has been employed by their current employer for at least 6 months (and where paragraph 13(b) of this Appendix does not apply); or
 - (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), or in the financial year(s) relied upon by a self-employed person.
 - (b) A letter from the employer(s) who issued the payslips at paragraph 2(a) confirming:
 - (i) the person’s employment and gross annual salary;
 - (ii) the length of their employment;
 - (iii) the period over which they have been or were paid the level of salary relied upon in the application; and
 - (iv) the type of employment (permanent, fixed-term contract or agency).
 - (c) Personal bank statements corresponding to the same period(s) as the payslips at paragraph 2(a), 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.
 - (d) Where the person is a director of a limited company based in the UK, evidence that the company is not of a type specified in paragraph 9(a). This can include the latest Annual Return filed at Companies House.
 - (e) Where a person appointed as a non-executive director of a limited company based in the UK, which is not a company of the type specified in paragraph 9(a), is paid a fee instead of a salary, this income may be treated and evidenced as though it were income received for employment in that capacity.”
10. The respondent asserted that the judge was not entitled to find that the full Rule R-LTRP1.1(c) was met in the circumstances where the sponsor was relying on income

that had only arisen since the date of application. The judge should have considered whether R-T-LTRP1.1(d) was met which would entail consideration of EX.1.

11. Permission to appeal was granted by First-tier Tribunal Judge Lever who noted that the judge had noted at paragraph 5 that the appellant's representatives conceded that the appellant did not meet the income threshold at the date of the application and that the judge had arguably erred in considering post-application income with some documentation not available.

The Hearing

12. At the hearing Mr Melvin relied on the written application for permission to appeal and stated that the judge had taken into account evidence which he was not entitled to do so.
13. Mr Khan acknowledged that at the time of the application the sponsor could not meet the threshold but this was an in-country appeal and the appellant was entitled to adduce post-decision evidence further to Section 85A of the Immigration and Asylum Act.
14. Mr Melvin submitted that the Rules in **MM (Lebanon)** [2014] EWCA 985 clearly indicated that that was not the case.

Conclusions

15. I find in conclusion that it is clear from paragraph 26 of the judge's determination that he took into account payslips showing earnings for the "last five months". This is evidence which post dates the application. Evidence must be submitted with the application. The income from Sodexo does not reach the £18,600 threshold and the judge took into account that there was going to be "a further one to come in the end of this month" in relation to the income from Monty's.
16. It is clear from Appendix FM-SE D(a) that

"In deciding an application in relation to which this appendix states that specified documents must be provided the Entry Clearance Officer or the Secretary of State 'the decision maker' will consider documents that have been **submitted with the application** and will only consider documents submitted after the application where subparagraph (b) or (e) applies."
17. Subsections (b) and (e) do not apply in the case of the appellant. It is further stated at Appendix FM -SE paragraph 2 that the following evidence must be provided:
 - (a) payslips covering
 - (i) a period of six months prior to the date of application if the person has been employed by their current employer for at least six months (and where at paragraph 30(b) of this appendix does not apply); or
 - (ii) any period of salaried employment in the period of twelve months prior to the date of application if the person has been employed by

their current employer for less than six months (or at least six months but the person does not rely on paragraph 13(a) of this appendix.”

18. The appellant could not show, as at the date of the application, payslips covering the relevant periods and therefore the decision, which took into account later evidence was in legal error to a material degree.
19. That said, there was no decision in relation to paragraph EX.1 and Article 8 was not addressed. At the hearing Mr Melvin sought permission to submit further evidence in relation to the appellant's previous deception in relation to ETS. As the decision has been set aside and in view of the findings to be made in relation to EX1 and Article 8, I would have allowed Mr Melvin's application to submit further evidence but in the event this would not be necessary as both parties agreed that the matter should be remitted in these circumstances to the First-tier Tribunal because the nature and extent of the findings to be made. Both parties are on notice to submit any further evidence as least 28 days prior to the substantive hearing on both the opposing party and the Tribunal.

Notice of Decision

The Judge erred materially for the reasons identified. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007). Bearing in mind the nature and extent of the findings to be made the matter should be remitted to the First-tier Tribunal under section 12(2) (b) (i) of the TCE 2007 and further to 7.2 (b) of the Presidential Practice Statement.

Signed

Date 27th November 2015

Deputy Upper Tribunal Judge Rimington