Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: OA/00708/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3 September 2015	**On 16 September 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE RAMSHAW

Between

Entry Clearance Officer
(DHAKA)

Appellant

and

MS SHAKERA SULTANA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr S Walker, a Home Office Presenting Officer
For the Respondent: Mr A Miah, of counsel instructed by M A Consultants

DETERMINATION AND REASONS

Introduction

1. In this appeal, the Entry Clearance Officer appeals against a decision of the First-tier Tribunal allowing the appeal of Mrs Sultana ('the claimant') who appealed against a decision taken on 19 November 2013 to refuse her entry clearance on the basis that i) false representations had been made, ii) information was missing from employers' letters, iii) that there was no corresponding monthly credits in the

sponsor's personal bank statements relating to employment with Daawat (which the Entry Clearance Officer asserted ceased on 5 April 2013), iv) that the income from this employment could not be taken into consideration and therefore v) the sponsor's income was below the threshold of £18,600.

Background Facts

2. The claimant is a citizen of Bangladesh who was born on 31 March 1981. She applied for entry clearance (settlement as a partner) to join her husband, Mr Aketer Uddin Ferdous, in the United kingdom under Appendix FM of the Immigration Rules HC395 (as amended) ('the Immigration Rules'). That application was refused for the reasons set out above.

Appeal to the First-tier Tribunal

3. The appellant appealed to the First-tier Tribunal. In a determination promulgated on 24 February 2015, the First-tier Tribunal (Judge Coll) allowed the claimant's appeal. The only issue in dispute by the time of the hearing was whether or not the claimant could demonstrate that she met the financial requirements under the Immigration Rules. The First-tier Tribunal found that the sponsor's earnings were in excess of £18,600 and therefore the claimant met the financial requirements. The judge took into consideration a number of documents not submitted to the Entry Clearance Officer and the witness evidence of the sponsor in reaching her conclusion.

Appeal to the Upper Tribunal

4. The Entry Clearance Officer sought permission to appeal to the Upper Tribunal. On 28 April 2015 First-tier Tribunal Judge Brunnen granted the Entry Clearance Officer permission to appeal. Thus, the appeal came before me.

Summary of the Submissions

5. The grounds of appeal assert that the First-tier Tribunal judge erred in law by failing to have regard to Appendix FM-SE paragraph 1(n) which requires that only the specified evidence set out therein can be relied on to determine the sponsor's gross income where payment is received in cash. It is asserted that it is not open to the judge to draw his own conclusions based on the credibility of the sponsor or other documents in the absence of those specified in the Immigration Rules. It is also asserted that it was not open to the judge to waive the requirements of Appendix FM-SE with regard to the contents of the employers' letters. Mr Walker relied on the grounds of appeal and drew attention to the amount of cash deposited amounting to £5,840. Paragraph 1(n) is prescriptive. If the cash deposited does not directly match the net amount shown on payslips then only the net cash deposited can be taken into consideration in calculating income. With regard to waiving the documentary requirements, at paragraph 34 of the First-tier Tribunal decision, Mr Walker submitted that it was not open to the judge to waive those requirements.

6. At the hearing Mr Miah handed up an annual tax summary from Her Majesty's Revenue and Customs ('HMRC') for the tax year 2013-2014. This evidence was not admitted – no application had been made pursuant to Rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008. In any event it was not evidence that could verify the sponsor's earnings during the relevant period because it included income from periods and from other employers post the date of the decision. He submitted that the claimant earned in excess of £18,600 in the relevant period as confirmed by the documents from HMRC (that were before the First-tier Tribunal judge). I referred Mr Miah to Paragraph 1(n) of Appendix FM-SE and the specific wording contained therein. He acknowledged that he was in some difficulty as the Rule is, on the face of it, very prescriptive. However, he submitted that the documents submitted by the sponsor demonstrate his earnings and whilst there may be a good reason for the Rules being prescriptive in this case the claimant does now have the evidence to support the sponsor's earnings as at the date of the decision.

7. In relation to Article 8 Mr Miah submitted that if the judge believed the income was over £18,600, even though not in specified form, then it can be considered that whilst on a strict technical basis the claimant has not met the rules, nevertheless under Article 8 the appeal can be allowed. Mr Miah was not asserting that this was a near miss case, the point was that that claimant had met the requirements but just not the technical evidential requirements – this was made good by the subsequent evidence. Mr Miah did not make any submissions as to additional or compelling circumstances as to why the appeal should be allowed outside of the Immigration Rules.

Discussion

8. The First-tier Tribunal allowed the appeal on the basis that the claimant earned in excess of £18,600. Appendix FM-SE of the Immigration Rules - Paragraph E-ECP.3.1 sets out the financial requirements that the claimant is required to satisfy in this case:

> 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;…

9. In order to reach the conclusion that the sponsor earned in excess of £18,600 the judge considered several documents that were not submitted to the Entry Clearance Officer, took into account the witness evidence of the sponsor and also waived various requirements of the Immigration Rules.

Appendix FM-SE paragraph 1(n)

10. The judge recorded that the Tribunal was referred to personal bank statements of the sponsor showing deposits totalling £5,840 of his net income from Daawat (para

17). The judge also recorded that the Entry Clearance Officer had refused the application because the sponsor's personal bank statements did not show that salary from Daawat corresponding to the same period and amount as the wage slips had been paid into the sponsor's bank account in spite of the mode of payment being listed as BACS on the payslips (paragraphs 25 and 26). The judge set out the relevant applicable Immigration Rules referring to Appendix FM-SE Paragraph 2 (b) summarising as follows:

> 'The applicant must provide a letter from the employer who issued [the payslips] confirming (i) the person's employment and gross annual salary, (ii) length of their employment, (iii) the period over which they have been paid or were paid the level of salary relied upon in the application **and** personal bank statements corresponding to the same period and amount as the wage slips showing that the salary has been paid into an account in the name of the sponsor.'

11. The judge accepted that the sponsor was paid in cash by Daawat and that the payslips mistakenly recorded he was paid by BACS. She accepted that the deposits of £5,840 were his net income (after expenditure) from Daawat for a six month period and made a finding that he was paid £14,000 gross per annum from Daawat (para 31)

12. It is worth setting out the provisions referred to by the judge in full. Appendix FM-SE at paragraph 2:

> '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 …
>
> (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'

13. All of the requirements in Paragraph 2 must be met. To make sense of the requirement for personal bank statements corresponding to the payslips sub-paragraph 2(c) must, in my view, be read as requiring that the exact amounts shown on the payslips are paid into the bank account and that the salary has been paid into the bank account by the employer. If the payments are made by someone other than the employer such payments are not corroborative of the salary claimed. Support for this position is to be gained from the provision of paragraph 1(n) which provides that where an employee is paid in cash an alternative to payment directly into a bank account by the employer is permissible. This provides:

> '(n) The gross amount of any cash income may be counted where the person's specified bank statements show the net amount which relates to the gross amount shown on their payslips (or in the relevant specified evidence provided in addition to the specified bank statements in relation to non-employment income). Otherwise, only the net amount shown on the specified bank statements may be counted.'

14. It was not open to the judge to find from the evidence that the gross salary from Daawat was £14,000. The bank statements did not show that the salary had been paid into the sponsor's account by Daawat. As the income was paid into the sponsor's account in cash the provisions of paragraph 1(n) apply. The judge does not appear to have considered this provision. The Immigration Rule is prescriptive for obvious reasons. The reason for the specified evidence is to verify or corroborate precisely how much is earned by the sponsor. Where cash is involved this is much more difficult to verify. The Rule permits the gross amount shown on a payslip to be counted but only if the cash deposits relate directly to the gross amounts shown on their payslips. In the instant case the sponsor paid amounts of cash that did not correspond to the gross amounts on his payslips. Whilst I have some sympathy with the sponsor's position the rule is clear and is rational for the reasons I have given. The only amount that can be counted is the net cash paid into the account found to be £5,480.

15. I have considered the relevant Immigration Directorate Instruction (Family Migration: Appendix FM Section 1.73.1.5.). The relevant section supports the interpretation above:

> 'Under paragraph 1(n) of Appendix FM-SE the gross amount of any cash income may be counted where the person's specified bank statements show the deposit of the full net amount which relates to the gross amount shown on their payslips (or in the relevant specified evidence provided in addition to the specified bank statements in relation to non-employment income). Otherwise, only the net amount shown on the specified bank statements may be counted. Those wishing to rely on cash income to sponsor an application subject to the financial requirement may need to change the way they manage their money and bank the full net amount so that they can then rely on the gross amount of that income in sponsoring the application. Like the other evidential requirements of Appendix FM-SE which seek to maintain the integrity of the

system for all genuine applicants and sponsors, it is important that those wishing to rely on the gross amount of their cash income from employment corroborate this income through their bank statements, as well as the required payslips and employer's letter.'

16. The judge erred in law in arriving at the conclusion that the sponsor earned in excess of £18,600. Only £5,480 could be counted as income from Daawat. Together with the £6,346 earnings from Tesco the total income that the sponsor could rely on in accordance with the Immigration Rules is £11,826.

Waiver of the requirements for documentary evidence in specified form

17. The judge found that the letters from the employers did not satisfy the documentary requirements but found that she could waive these requirements under Appendix FM-SE D considering that the length of employment with Tesco and Daawat and gross annual salary with Tesco was '*verifiable from other documents'*(para 34).

18. It is not clear precisely which part of paragraph D the judge considered provided her with the power to waive the requirements but presumably she relied on sub-paragraph (d) which provides:

'(d) If the applicant has submitted:

…

(iii) A document that does not contain all of the specified information, but the missing information is verifiable from:

(1) other documents submitted with the application, …

the application may be granted exceptionally, providing the decision-maker is satisfied that the document(s) is genuine and that the applicant meets the requirement to which the document relates.'

19. The first point to make is that the documents that the judge considered which verified the missing information were not all submitted **with** the application to the Entry Clearance Officer. The second point is that the discretion in Appendix FM-SE D is that of the decision maker not the First-tier Tribunal or this Tribunal. In Sultana and Others (rules: waiver/further enquiry; discretion) [2014] UKUT 00540 (IAC) at paragraph 18 the Upper Tribunal when considering the 'evidential flexibility' in Paragraph D of Appendix FM-SE held:

"18. … Thus there is no basis for concluding that the ECO's failure to exercise the discretion available to him was not in accordance with the law. It is appropriate to add that the discretion in question is conferred exclusively on the ECO and is not exercisable by either the FtT or this Tribunal on appeal."

20. The judge erred in law. The requirements of the Immigration Rules cannot be waived by the First-tier Tribunal.

21. For completeness I note that in the grounds of appeal to the First-tier Tribunal the claimant asserted that 'evidential flexibility should be applied for (sic) a decision is made if further docs are needed'. Although not clear that this was what the judge was considering she made further findings in relation to the Entry Clearance Officer's failure to exercise the discretion available to request additional information. She found that:

> "... had the ECO not incorrectly concluded that the application failed on grounds of making false representation, under Appendix FM-SE D (b) it is more likely than not that he would have written to the appellant to ask her to obtain fuller letters from Tesco and Daawat or in their absence, other documents which could have verified the missing information. I find that because the entry clearance officer made a charge of false representation, he applied instead Appendix FM-SE D(c) whereby he did not request the omissions to be rectified."

22. There was no specific conclusion reached by the judge as to the effect of those findings, for example there was no specific finding that the Entry Clearance Officer's decision was not in accordance with the law. It appears that the judge has sought to rely on her findings and inferences to support her in waiving the rules herself. This is not a case of a minor defect or omission that can be easily remedied that requires the blunt instrument of immediate, outright refusal to be softened. There was a substantive failure to meet the requirements for evidence in a specified form to have been provided.

Article 8 of the Convention on Human rights

23. The judge did not consider Article 8 having concluded the claimant satisfied the Immigration Rules.

24. Mr Miah did not make any substantive submissions that there were any compelling circumstances outside the Immigration Rules that render the Entry Clearance Officer's decision disproportionate. It was accepted that family life existed and that Article 8 was engaged. There is no 'exceptionality test' but there is a requirement to carry out a balancing exercise where an individual cannot meet the requirements of the Immigration Rules. The public interest will generally only be outweighed if an applicant can show that 'compelling circumstances' exist – see paragraphs 40 to 42 of SS (Congo) [2015] EWCA Civ 387.

25. In the case of Sunassee, R (on the application of) v Upper Tribunal (Immigration and Asylum Chamber) & Anor [2015] EWHC 1604 (Admin), the court held:

> "33. The decision of Sales J in Nagre therefore, as explained, received the endorsement of the Court of Appeal and represents the law. It has not been "overruled". It had received an endorsement already in MM (Lebanon). The law is that there is always a second stage, but where all relevant considerations have been weighed under the Rules and there are no compelling circumstances not sufficiently recognised under the Rules it will be enough for the decision maker simply to say that."

26. In R (on the application of Mahmood) v Secretary of State for the Home Department [2001] INLR the court held:

> "The state has a right under international law to control the entry of non-nationals into its territory subject always to its treaty obligations. Article 8 does not impose on the state any general obligation to respect the choice of residence of a married couple."

27. There are no compelling circumstances in this case. In carrying out the balancing exercise I have considered section 117 of the Nationality and Immigration Act 2002. Sufficient weight must be accorded to the public interest in the maintenance of effective immigration controls. Further, sufficient weight must be accorded to the interests of the economic well-being of the United Kingdom, in that persons who seek to enter or remain in the United Kingdom must be financially independent. I find that the public interest in this weighs against the claimant and consider that on the facts of this case, and in the absence of any compelling circumstances, the balance falls in favour of refusal of entry clearance.

Decision

28. Giving effect to the above analysis and conclusions the First-tier Tribunal decision contains material errors of law. I set aside that decision pursuant to section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007.

29. I re-make the decision by dismissing the claimant's appeal against the Entry Clearance Officer's decision. The claimant does not meet the requirements of the Immigration Rules. Refusal of entry clearance is not disproportionate to the legitimate aims pursued. The decision of the Entry Clearance Officer is affirmed.

30. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

Signed P M Ramshaw Date 15 September 2015

Deputy Upper Tribunal Judge Ramshaw