



IAC-FH-NL-V1

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

Appeal Number: OA/01388/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 7 September 2015**

**Decision & Reasons Promulgated
On 17 September 2015**

Before

UPPER TRIBUNAL JUDGE WARR

Between

ENTRY CLEARANCE OFFICER - KINGSTON

Appellant

and

**CONRAD GARFIELD McCALLA
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Ms A Brocklesby-Weller, Home Office Presenting Officer

For the Respondent: Mr M Muirhead, (Obaseki Solicitors)

DECISION AND REASONS

1. This is an appeal by the Entry Clearance Officer but I will refer to the original appellant who is a citizen of Jamaica born on 7 November 1964 as the appellant herein. He was refused an entry clearance on 5 December 2013 as the husband of Veda Margh, a British citizen whom he married on 6 April 2013.

2. The refusal was on the basis that the Entry Clearance Officer was not satisfied that the parties' relationship was genuine or subsisting or that they intended to live together permanently in the United Kingdom. In the premises the Entry Clearance Officer did not consider whether the appellant met the financial requirements of Appendix FM.
3. The appellant appealed and his appeal came before a First-tier Judge on 20 February 2015. The judge resolved the question of the relationship between the parties in their favour and concluded that the marriage was genuine and subsisting and that each party intended to live together permanently with the other. There has been no challenge to that aspect of the decision.
4. The judge noted that there was no issue over accommodation and concluded her determination as follows:

"27. There is evidence of the sponsor's pension benefits at E20 of the respondent's bundle. This equates to £1000 a calendar month. There is evidence that she has a tenant and receives rent however she confirms this is undeclared and her bank statement does not show the amount she claims is paid. The sponsor also receives a single person discount on her Council Tax to which she is not entitled if there is another occupant. While accepting it likely the claim is true, the evidence is not in the format required and so I do not take it into account. This means the appellant must show savings to make up the shortfall from the sum of £18,600 gross per annum set out in the rules.

28. The pension credit was £253.73 a week. This totals £13193.96. The shortfall is therefore £5406.04. The appellant has produced a JNBS bank statements for the sponsor that shows savings at the time of the application of £44289. This is a joint with the sponsor's son however most withdrawals are in sponsor's name. A copy bank statement at E46 of the respondents bundle shows a cheque withdrawal corresponds from the sponsors UK account with credit in the JNBS account at E45. I am satisfied that the funds are under the control of the sponsor.

29. I have regard to the requirements at E-CP.3.2 of the rules.

When determining whether the financial requirement in paragraph EEC.P.

3.1 is met only the following sources will be taken into account –

- (a) *income of the partner from specified employment or self-employment;*
- (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.*

E-ECP.3.3. The requirements to be met under this paragraph are –

- (a) *the applicant's partner must be receiving one or more of the following –*
- (i) *disability living allowance; (ii) severe disablement allowance; (iii) industrial injury disablement benefit; (iv) attendance allowance; (v) carer's allowance; (vi) personal*

independence payment; (vii) Armed Forces Independence Payment or Guaranteed Income Payment under the Armed Forces Compensation Scheme; or (viii) Constant Attendance Allowance, Mobility Supplement or War Disablement Pension under the War Pensions Scheme.

30. It is not clear whether state pension credit is included as income. Section 21 of Appendix FM-SE setting out specified evidence at paragraph 21 references income not counted. This does not include state pension credit. There is also the rent. It is evidence there is, more than sufficient income and savings to avoid the appellant having recourse to public funds. Consequently I find that the appellant has discharged the burden of proof as regards the financial requirements."

5. The Entry Clearance Officer applied for permission to appeal noting that the sponsor relied on cash savings in order to make the financial requirements of Appendix FM but that these savings were held jointly by her son. A point was also taken on the fact that the judge had referred to paragraph 281 of the Immigration Rules in the course of her determination. The grounds (including emphasis added by the Entry Clearance Officer) continue as follows:

"Appendix FM-SE1(a)(iii) lays out the requirements in relation to Bank statements:

1. *In relation to evidencing the financial requirements in Appendix FM the following general provisions shall apply:*

(a) *Bank statements must:*

(i) *be from a financial institution regulated by the appropriate regulatory body for the country in which that institution is operating; (ii) not be from a financial institution on the list of excluded institutions in Appendix P of these rules; (iii) in relation to personal bank statements be only in the name of:*

(1) ***the applicant's partner, the appellant or both as appropriate;*** or (2) *if the applicant is a child the applicant's parent's partner, the applicant's parent or both as appropriate;* or (3) *if the applicant is an adult dependent relative, the applicant's sponsor or the applicant, unless otherwise stated.*

3. The sponsor's savings of £44,000 are held in an account held jointly with her son. It is therefore submitted that the Judge errs in finding that these savings may be accepted, in a partner application the only joint funds which may be accepted are those held by an Appellant and their Sponsor, that is not the case here.

4. Furthermore the requirement of Appendix FM-SE 11 in respect of savings is not met.

11. *In respect of cash savings the following must be provided:*

(a) *personal bank statements showing that at least the level of cash savings relied upon in the application has been held in an account(s) in **the name of the person and their partner jointly** throughout the period of 6 months prior to the date of application.*

5. It is unclear why the Judge refers to paragraph 281 of the Immigration Rules HC395 (as amended) at [16] when the application was made on 24 September 2013 and therefore Appendix FM applies and the relevant findings on eligibility should have been made under E-ECP.2.6 and E-ECP.2.7."

6. Permission to appeal was granted by the First-tier Tribunal on 19 May 2015 and the parties were notified of this on 28 May 2015.
7. Ms Brocklesby-Weller lodged copies of the Rules in force at the relevant date. She confirmed there was no challenge to the judge's findings on the relationship. The challenge was limited to the issue of the financial requirements. The judge had misdirected herself by referring to paragraph 281 of the Immigration Rules in paragraph 16 where she had referred to subparagraph (v) of paragraph 281 which reads as follows: "the parties will be able to maintain themselves and any dependants adequately without recourse to public funds...". This was apparent from what she had said in paragraph 30: "it is evidence there is, more than sufficient income and savings to avoid the appellant having recourse to public funds [sic]".
8. The judge had identified three sources of income – the pension, the bank account and income from a tenant. The latter had been rejected for the reasons given in paragraph 27. However the judge had referred to the savings of £44,289 and had erred in taking them into account given that they were in joint names. It was only permitted under the Rules that the account be in the name of the applicant or the applicant and his or her partner. If a third party was named that party could legally withdraw money and the purpose of the Rules was to limit risks.
9. Mr Muirhead submitted that the Rules were unclear. Normally the spouse and the sponsor would be named jointly and he submitted there were special circumstances in this case. The sponsor's son had made it clear that he had no financial interest in the account although it appeared that he had made two withdrawals from it amounting to some £200 in 2010. The money in the account was the sponsor's money resulting from a property sale. The sponsor was an elderly lady and her son carried out transactions on her behalf. The sponsor was out of the country and it would be preferable if an adjournment was granted. I pointed out that the appellant would have been aware that permission to appeal had been granted in May and there had been no attempt to lodge further evidence or support the judge's decision on other grounds.
10. Ms Brocklesby-Weller referred to **SS (Congo) [2015] EWCA Civ 387** where the court had made clear at paragraph 51 that where the Rules were not complied with compelling circumstances would have to apply to justify a grant of leave to enter. In paragraph 52 of the decision the court had stated that the evidence rules had the same general objective as the substantive rules:

"Namely to limit the risk that someone is admitted into the United Kingdom and then becomes a burden on public resources, and the Secretary of State has the same primary function in relation to them, to assess the risk and put in place measures which are judged suitable to contain it within acceptable bounds. Similar weight should be given to her assessment of what the public interest requires in both context."

There was no reason she submitted for preferential treatment to be given to the parties in this case, referring to paragraph 53 of **SS (Congo)**. The judge had

furthermore taken into account rules that were irrelevant which had affected her conclusions at paragraph 30.

11. Mr Muirhead submitted that the judge had found that the money was under the control of the sponsor in paragraph 28 of the decision.
12. At the conclusion of the hearing I reserved my decision. I remind myself that I can only interfere with the decision if it was flawed in law.
13. There is a single issue in this case which relates to the financial requirements and in particular the fact that the sponsor's account was not in her sole name or in the name of her and her partner jointly. The account was in the joint name of the partner and her son.
14. There appears to be no ambiguity in the Rules whatsoever. In respect of adults the monies must be held and be held only in the name of "the applicant's partner, the applicant or both as appropriate...".
15. It is clear that the son has full authority to draw on the account. He has done so in the past although only for small amounts. The fact is he has authority to sign cheques on the account and the rules are quite clear about this. In the circumstances of this case the account has to be in the sponsor's sole name or in the name of the sponsor and her husband. It is not at all clear on the evidence why steps were not taken to put the savings into her sole name. As I have pointed out there was no updating statement from the sponsor and no attempt to file a respondent's notice despite many months having passed. It would appear that very simple steps need to be taken to make the application rule compliant and such steps have not been taken.
16. I am conscious that the First-tier Judge was labouring under the difficulty that the Entry Clearance Officer had not dealt with the financial issues but nevertheless the determination is materially flawed in law and I have no alternative but to dismiss this appeal on the evidence. It may be that the parties can put their finances on a proper footing and that a further application to the Entry Clearance Officer will meet with more success in the light of the otherwise favourable findings made by the First-tier Judge. However, for the reasons given by Ms Brocklesby-Weller and as mentioned above this appeal by the Entry Clearance Officer is allowed and I reverse the decision of the First-tier Judge allowing the appeal.

Notice of Decision

17. The appeal is dismissed.
18. There was no anonymity direction in this case and I make none. In the particular circumstances of this case I do not interfere with the fee award made by the judge.

Signed

Date 9 September 2015

Upper Tribunal Judge Warr