



IAC-BH-PMP-V1

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

Appeal Number: OA/03696/2014

THE IMMIGRATION ACTS

**Heard at Bennett House, Stoke
On 30th June 2015**

**Decision & Reasons Promulgated
13th July 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE GARRATT

Between

**SHAMAILA ALI
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No appearance

For the Respondent: Mr A McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Before the Upper Tribunal the Secretary of State now becomes the appellant. However, for the avoidance of confusion, I shall continue to refer to the parties as they were before the First-tier Tribunal.
2. At the hearing before me there was no appearance by or on behalf of the appellant. Notice of the hearing had been sent on 9th June 2015 to the appellant and the sponsor at their recorded addresses on file. The notices were not returned in the post. Having satisfied myself that notice of the hearing had been given to the relevant parties and that it was in the interests of justice to proceed with the hearing, I

did so in the absence of the appellant and sponsor or representation on their behalf having regard to the provisions of paragraph 38 of the 2008 Procedure Rules.

Background

3. On 7th May 2015 Judge of the First-tier Tribunal Fisher gave permission to the respondent to appeal against the decision of Judge of the First-tier Tribunal P J M Hollingworth in which he allowed the appeal against the decision of the respondent to refuse entry clearance to the appellant as a partner under Appendix FM of the Immigration Rules.

Error on a point of law

4. In granting permission Judge Fisher noted that the grounds of application by the respondent asserted that the judge erred in law by finding that the financial requirements of Appendix FM were met even though, as the sponsor had commenced employment in July 2013 and the application was made on 14th October 2013, he had been in employment for less than six months before the date of application. Although the judge had decided that financial sufficiency had been shown at the date of refusal he had not explained how the requirements of Appendix FM-SE, particularly those set out in paragraphs 2(a)(ii) and (13)(b) had been met. Under those provisions the appellant had to show twelve months' salaried employment for the sponsor if employed by his current employer for less than six months and the calculation of annual income had to be the total of the gross annual salary from employment at the date of application plus any non-employment income received in the twelve month period to the date of application and any state or private pension received by that person or his partner.
5. At the hearing Mr McVeety confirmed that the respondent relied upon the grounds. He emphasised that six months of employment with a current employer had not been shown under the provisions of Appendix FM-SE from 1st July 2013 when the sponsor commenced his employment to the date of application on 10th October 2013 nor had 12 months of employment to that date been shown. The appellant could not, therefore, succeed under the Rules although she had the option to make a fresh application bearing in mind that, according to the decision, the sponsor was still in the employment taken up on 1st July 2013.
6. Having considered the matter for a few moments I announced that I was satisfied that the decision showed an error on a point of law and now give my reasons for that conclusion.
7. The decision shows that, although the judge calculated that the sponsor's pay at the date of hearing on 24th February 2015 was greater than the annual income requirements set out in paragraph E-ECP.3.1 of £18,600, that income had not been proved in accordance with the evidential requirements set out in Appendix FM-SE particularly as, at the date of application, the sponsor had not been employed by his current employer for more than six months.
8. Although the terms of the respondent's refusal makes specific reference to the need to comply with Appendix FM-SE in addition to Appendix FM, the decision does not show that the judge gave consideration to those evidential requirements. He

erroneously made his calculation of adequacy of income based upon employment to the date of hearing and did not take account of either the 6 month or 12 month employment alternatives. Further, Appendix FM-SE makes the clear requirement that the relevant date for calculation of income is the date of application not the date of hearing or decision. The judge therefore made an error such that the decision cannot stand and should be re-made.

Re-making the Decision

9. Mr McVeety argued that the appeal had to be dismissed because of the inability of the appellant to meet the requirements of the Rules in relation to income. Although human rights issues did not appear to have been put to the judge at the hearing they were certainly not examined by him because of his decision under the Rules, Mr McVeety argued that the human rights claim had to be dismissed.

Conclusions

10. In immigration appeals the burden of proof is on the appellant and the standard of proof is a balance of probabilities. In this appeal the relevant date for consideration of financial information is that set out in Appendix FM-SE of the Rules and is the date of application.
11. It is evident that, at the date of application, the sponsor had not been in employment with his current employer for six months. The refusal decision of 16th October 2014 makes the relevant point clear indicating that the sponsor had only produced payslips for July, August and September 2013 because he had been employed for less than six months with his current employer. The documents provided also did not reflect twelve months of earnings to the date of application.
12. The subsequent documentation produced by the appellant could not overcome the difficulty highlighted by the decision. The documentation provided at the hearing along with the oral evidence of the sponsor may well have shown income which, at the date of the hearing, amounted to more than the required amount in a twelve month period such evidence could not be taken into consideration because of the provisions of Appendix FM-SE. Thus, the appeal cannot be allowed on immigration grounds.
13. Human rights issues were not raised in the grounds of appeal before the First Tier Tribunal nor have the appellant or sponsor submitted further information which might relate to a human rights claim, with the exception of information showing that the parties were in a subsisting relationship. The latter being a matter which was decided in favour of the appellant and has not been questioned by the respondent.
14. On the basis that the parties have not pursued a human rights claim and taking into consideration that a further application can now be made which may meet the income threshold requirements of the Rules, I do not deal with that matter.

Notice of Decision

The decision of the First-tier Tribunal shows an error on a point of law. I set aside the decision and re-make it by dismissing the appeal.

Anonymity

Anonymity was not requested in this appeal nor do I consider it appropriate.

Signed

Date

Deputy Upper Tribunal Judge Garratt

TO THE RESPONDENT
FEE AWARD

As I have dismissed this appeal I cannot make a fees award.

Signed

Date

Deputy Upper Tribunal Judge Garratt