



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/05963/2014

THE IMMIGRATION ACTS

Heard at Field House
On 2 November 2015

Decision & Reasons Promulgated
On 12 November 2015

Before

UPPER TRIBUNAL JUDGE WARR

Between

ENTRY CLEARANCE OFFICE - DHAKA

Appellant

and

MRS RUNA AKHTER
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr P J White of Counsel, instructed by Farani Javid Taylor Solicitors LLB
For the Respondent: Mr S Kandola

DECISION AND REASONS

1. This is the appeal of the Entry Clearance Officer but I will refer to the original appellant, a national of Bangladesh born on 28 December 1992, as the appellant herein.
2. The sponsor in this case is the appellant's husband. On 6 April 2014 a decision was made by the Entry Clearance Officer to refuse the appellant an entry clearance to join the sponsor as a spouse. Refusal was on the basis that false information had been relied upon relating to the sponsor's employment with Linkway Cars Ltd in that checks by the Inland Revenue showed no PAYE employment details in respect of that employment. The respondent did accept that the appellant had been employed with another employer but the earnings at £18,252.86 fell short of the sum required

under the Rules of £18,600 per annum. The respondent was also not satisfied that the appellant's marriage to the sponsor was genuine or subsisting.

3. The appellant appealed the respondent's decision and her appeal came before a First-tier Judge on 14 April 2015. The appellant was represented on that occasion but not by Mr White. However there was no appearance on behalf of the Entry Clearance Officer and the judge records that there was no explanation for the absence of representation and there was no application by the Entry Clearance Officer to adjourn the matter. The judge was satisfied that the Entry Clearance Officer had been informed of the hearing and she decided to proceed with the appeal under the Rules.
4. The judge heard oral evidence from the sponsor. The judge noted that the burden fell on the respondent to show that the sponsor's employment record with Linkway Cars was false especially as the sponsor had provided supporting documents with regard to this employment. While the Entry Clearance Officer had referred to a verification report in the notice of the immigration decision none was available to the judge. The judge did not find that the Entry Clearance Officer had failed to discharge the evidential burden that fell upon him in respect of the allegation.
5. The judge records that she was satisfied that the sponsor's monthly income from Linkway Cars was reflected in the bank statements which she had examined. She was also satisfied that the sponsor had provided further letters from Linkway Cars to confirm his employment with them and also to clarify that they did not register the sponsor's employment with HMRC "because his part-time income was below the income tax threshold." The judge found that the respondent had misinterpreted the sponsor's income from Linkway Cars and accepted that the sponsor earned an annual gross figure of £6,000 from his part-time job. Accordingly taking the two employments together the appellant met the threshold of £18,600.
6. The judge found that the appellant's marriage was a genuine and subsisting one and accepted the sponsor was a credible witness. She also found that there was sufficient documentary evidence to show that there was suitable accommodation for the parties. Accordingly the judge allowed the appeal.
7. It is to be noted that while the appellant had lodged a bundle before the First-tier Judge no respondent's bundle had been lodged.
8. The Entry Clearance Officer appealed and made reference to a decision notice dated 21 October 2014 which it was submitted the judge had not taken into account. The decision before the judge was dated 6 April 2014. While it was not in dispute that the sponsor earned approximately £18,000 per annum from his primary employment there was a failure to comply with the requirements of Appendix FM-SE. While the respondent could not challenge the claim that there had been false representations in respect of Linkway Cars in the light of the findings of the First-tier Judge it was argued in ground 7 that the employment was still required to meet the requirements of the Immigration Rules under Appendix FM-SE. The judge had apparently had no

concerns about relying on the secondary employment where it appeared that the sponsor had failed to declare such income for the purposes of income tax.

9. Permission to appeal was granted by First-tier Tribunal Judge Mark Davies on the following point:

“It is arguable that the judge was wrong to take into account the sponsor’s part-time employment when it was clear from the findings of the judge that that employment was paid without the deduction of tax and national insurance and therefore in breach of United Kingdom law. It is clear, on the basis of the sponsor’s other employment, that his part-time employment should have attracted the payment of both tax and national insurance. The judge should have had regard to this fact.”

10. In fixing a date for the hearing the Tribunal had issued directions requiring any material on which the Entry Clearance Officer relied to be made available to the Tribunal and the appellant no less than five working days before the hearing.
11. In the event this material was not lodged until the hearing and Mr White had had no opportunity to consider it.
12. Mr Kandola submitted that in fact nothing turned on the subsequent decision of 21 October 2014.
13. Mr Kandola said that having inspected the documentary evidence himself he was satisfied that in respect of the appellant’s main employment the requirements of the Rules were satisfied. The only challenge was in respect of Linkway Cars.
14. The claim of false representations was not maintained. There was no issue about the bank statements submitted. A letter was required confirming the appellant’s employment with Linkway Cars. The remaining issue was paragraph 7 of the grounds and I was referred to particular sub-paragraphs of Appendix FM-SE set out at page 1175 of Phelan’s Immigration Law Handbook Ninth Edition. Mr Kandola referred in particular to the requirement that all income and savings must be lawfully derived, that savings must be held in cash and that “cash income on which the correct tax has been paid may be counted as income under this appendix, subject to the relevant evidential requirements of this appendix.” The appellant’s main employment predated the appellant’s employment with Linkway Cars and tax should have been paid.
15. Mr White submitted that the question of an employer’s letter had not been taken below or in the decision and in fact letters had been provided by Linkway Cars.
16. Mr White relied on his skeleton argument. It was clear that the judge had had relevant pay slips as she had said at paragraph 16 and she had addressed the allegation about bank statements. In respect of both employments the specified

evidence had been provided. The evidence submitted showed clearly that the requirements of Appendix FM-SE had been satisfied.

17. The only arguable point was the issue about tax being paid. This matter had been dealt with by the employer's letter before the judge. The primary obligation to pay tax had been on the employer who had had to operate the PAYE system. Linkway Cars Ltd had acknowledged that the error was theirs. The situation was not caught by the requirements of Appendix FM-SE. The Rules were concerned with the sponsor's gross income and that it was lawfully derived which it was. The sponsor had not been working illegally. The sponsor had been entitled to hold his job and earn his gross income and any issue with tax could be dealt with by payment of arrears and proper registration.
18. The Secretary of State's position had been that the appellant's income with Linkway Cars did not exist and that false documents had been produced. No point had been taken that if the income did exist it could not be taken into account. No such point had been taken at the hearing which the Secretary of State did not attend. A wholly new case was being raised at the appeal stage. Mr Kandola accepted that there was no issue about the point raised in paragraph 6 of the skeleton argument in relation to the sponsor's main employment.
19. At the conclusion of the submissions I reserved my decision. I can only interfere with the decision of the First-tier Judge if there was a material error of law in it.
20. The judge undoubtedly had a difficult task because the Entry Clearance Officer not only had failed to file a bundle but had failed to instruct a representative. The absence of a representative was unexplained and there was no application for an adjournment. The judge lists the material lodged on behalf of the appellant. Among the material lodged was a letter from Linkway Cars dated 1 April 2015. In that letter Linkway Cars state that they were not aware that the appellant's employment had to be registered with HMRC "as he was a part-time employee receiving income that was below the taxable threshold. It was our administrative error as we otherwise registered employees receiving taxable income."
21. I accept Counsel's submission that there is nothing in Appendix FM-SE that catches the appellant in such a situation. It has to be borne in mind that it was open to the Entry Clearance Officer to instruct a representative to appear at the hearing to take issue with the position and challenge what was said by Linkway Cars Ltd. I also accept Counsel's proposition that the way in which the respondent was putting the case on appeal was not the way that the case had been put initially. It was open to the judge for a variety of reasons to accept that the sponsor did earn a gross figure of £6,000 from Linkway Cars Ltd and that the two figures together met the relevant threshold and to allow the appeal on that basis.
22. The conduct of this appeal throughout has been unfortunate to say the least. The Upper Tribunal gave clear directions in this matter. The material was not lodged in accordance with those directions and by the time it was lodged it was too late to be of

any assistance to Counsel or indeed to the Tribunal. In the event no reference was made to this material as Mr Kandola submitted that the original decision was not materially altered by the second decision.

23. In the premises I am not satisfied that it has been established that the decision of the First-tier Judge was materially flawed in law. It is in fact clear from the letter from Linkway Cars that Linkway Cars accepted responsibility for the mistake but this does not affect the judge's conclusion that the sponsor earned the required sum from Linkway Cars in addition to his main employment and therefore complied with the relevant requirements of the Rules.
24. I accordingly dismiss the appeal of the Entry Clearance Officer and the decision of the First-tier Judge stands.
25. The judge made no anonymity direction and I make none.

FEE AWARD

The judge made a fee award of £150 in favour of the appellant and that fee award stands.

Signed

Date 11 November 2015

Upper Tribunal Judge Warr