Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/07799/2014
OA/07803/2014
OA/13038/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 15 September 2015	**On 6 October 2015**

Before

Deputy Upper Tribunal Judge MANUELL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

(1) Miss MONA FAIKH
(2) Miss RIM FAIKH
(3) Mrs LAYAL FAIKH
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:

For the Appellant: Mr E Tufan, Home Office Presenting Officer
For the Respondents: Ms C Simpson, Counsel (instructed by Auleys Solicitors)

DETERMINATION AND REASONS

Introduction

1. The Appellant (the Secretary of State) appealed with permission granted by First-tier Tribunal Judge Parkes on 18 May 2015 against the decision and reasons of First-tier Tribunal Judge O'Garro who had allowed the Respondents' appeals against the Entry Clearance Officer's decisions dated 4 May 2013, 17 May 2013 and 17 May 2013 to refuse to grant the Respondents leave to enter the United Kingdom for settlement as a spouse and dependant children under Appendix FM of the Immigration Rules. The decision and reasons was promulgated on 18 March 2015.

2. The Respondents are nationals of Lebanon and their appeals are linked. Their relationship to their sponsor was accepted. On review by the Entry Clearance Manager on 25 April 2014, following service of the Notices of Appeal, the availability of suitable accommodation was conceded on the basis of the further evidence provided. The refusal as to the financial requirements was, however, maintained. The Entry Clearance Officer had noted that the sponsor had to prove a gross income of at least £24,800 per annum, but had not provided the specified documents set out in Appendix FM-SE. The application was refused under paragraph EC-P.1.1(d) of the Immigration Rules. No additional evidence had been provided and the Entry Clearance Manager, having considered evidential flexibility, decided it was not appropriate to exercise his discretion. The inconsistency in how the sponsor was paid cast doubt on his actual earnings. The end of year certificate from HMRC with the Notices of Appeal did not confirm that the income threshold had been reached and there was no confirmation from the employer of the sponsor's employment or earnings.

3. Judge O'Garro allowed the linked appeals under the Immigration Rules, finding that there was no real discrepancy in the sponsor's income and that the sponsor had met Appendix FM. The judge did not address Appendix FM-SE in specific terms and its requirements that the specified documents must be produced with the application(s). At [26] of her determination the judge stated that she found that the employer's letter, although not produced with the application(s), was evidence appertaining to the date of the decision(s) and was admissible under section 85(5) of the Nationality, Immigration and Asylum Act 2002. The judge also

found that the Entry Clearance Manager should have used his discretion differently: see [29] of the determination.

4. Permission to appeal to the Upper Tribunal as sought by the Appellant was granted by Judge Parkes because he considered that it was arguable that the judge had failed to address the requirements of Appendix FM-SE as the cash payments were not reflected separately in the wage slips and that the judge had been mistaken with regard to the employment letter.

5. Standard directions were made by the Upper Tribunal.

Submissions – error of law

6. Mr Tufan for the Secretary of State submitted that this was a clear case of legal error, as the grant of permission to appeal by the First-tier Tribunal indicated. The judge had evidently misconstrued Appendix FM-SE and was wrong to have interpreted section 85(5) in the way she had. The decision should be set aside and remade, dismissing the appeals.

7. Ms Simpson for the Respondents submitted that the section 85(5) point was only a part of the appeals and that the judge had in any event been right in finding that the discretion in Appendix FM-SE should have been exercised in the Respondents' favour. It had been unreasonable of the Entry Clearance Manager not to have asked for further information, especially as the evidence pointed to the sponsor's ability to meet the threshold of £24,800. In fact the evidence as a whole showed that the sponsor's income was closer to £30,000 and so even if the cash payments of wages were entirely discounted there was enough to exceed the threshold. This was the substance of the judge's determination, which should be upheld.

8. In reply, Mr Tufan pointed out that the employer's letter was not produced until the hearing. Significantly, it had not been produced with the Notice of Appeal, unlike the additional material on accommodation which the Entry Clearance Manager had accepted and thus conceded was now met. The Entry Clearance Manager's exercise of discretion was reasonable and the judge had been wrong to find otherwise. The Respondents had been on clear notice from the Entry Clearance Officer's decisions what they needed to address.

The error of law finding

9. At the conclusion of submissions, the tribunal reserved its determination which now follows. The tribunal should never hurry to interfere with the decision of an experienced judge and it is with reluctance that the tribunal finds that the judge materially erred on this occasion. The determination was carefully prepared and the judge quite understandably considered the merits were in the Respondents' favour. Nevertheless, such appeals are not determined on their broader merits but rather on compliance with the strict provisions of the Immigration Rules. These are not once for all decisions as the prospect of a fresh application is nearly always available. There were in the tribunal's view two material errors of law, the first leading to the second.

10. The judge's construction of section 85(5) of the Nationality, Immigration and Asylum Act 2002 so far as that section was in force as at the date of decision (a new version applies for decisions taken after 20 October 2014, subject to transitional provisions) was unfortunately mistaken when considered against the mandatory requirements of Appendix FM-SE. Appendix FM-SE.D. (which the judge helpfully set out at [27] of her determination) states in express terms that the decision maker will consider documents that have been submitted with the application, and will only consider post application documents under specified circumstances. Thus post application evidence could only be considered on a discretionary basis if the conditions laid down in subparagraphs D.(b) or D.(e) were met, i.e., a document was missing from a sequence, was in the wrong format, was a copy not an original or did not contain all of the specified information, or there was a valid reason why the document could not be supplied, e.g., was never issued or was permanently lost.

11. That was plainly not the case with the employer's letter. As the judge noted, it was not produced until the hearing. Had it been produced with the notice(s) of appeal, then (as Mr Tufan submitted), the Entry Clearance Manager might well have had good reason to exercise discretion in the Respondents' favour. That he was open-minded and conscious of the fair performance of his responsibilities was amply demonstrated by his willingness to concede the accommodation point in the face of the fresh evidence provided.

12. Ms Simpson with her customary skill sought to persuade the tribunal that the Entry Clearance Manager had missed the point, accepted by the judge, that the required figure of £24,800 had been met in any event. But that was the second material error of law the judge made. The employer's letter was a mandatory requirement of Appendix FM-SE, and had to be provided with the application, for the obvious reason that its veracity could be checked if needed. The Notice of Appeal was the last practical opportunity for that to happen. The process of refusal overseas requires that the Entry Clearance Manager reviews an Entry Clearance Officer's refusal decision before a final decision either way is made. That process is mandatory.

13. In the tribunal's view, the Entry Clearance Manager's decision not to use his discretion in the Respondents' favour was a perfectly reasonable one on the applications as they stood in the light of service of the Notices of Appeal and the additional evidence then produced. The Respondents had had the opportunity to comply with the requirements of Appendix FM-SE, belatedly. They were on the clearest notice of their omissions. The discrepancies identified by the Entry Clearance Officer and Entry Clearance Manager called into question the actual earnings of the sponsor. It was not for the Entry Clearance Officer or Entry Clearance Manager to discount elements of the evidence provided, because the burden of proof of compliance was on the Respondents. The P60 produced with the Notices of Appeal did not resolve the discrepancies. In the tribunal's view the judge was wrong to have considered that the discretion provided under Appendix FM-SE even arose on the facts found, because the necessary conditions had not been met. No valid reason was given for the failure to produce the sponsor's employer's letter with the entry clearance applications.

14. It follows that the tribunal upholds the Secretary of State's appeal. The tribunal accordingly sets aside the judge's determination.

The fresh decision

15. For clarity the tribunal will now refer to the parties by their designations in the First-tier Tribunal. No further evidence was required as the Appellants had to have submitted the specified evidence at the time of their entry clearance applications. The

tribunal finds that the specified evidence was incomplete. As noted already, the tribunal finds that no valid reason was given for the failure to produce the sponsor's employer's letter with the entry clearance applications or indeed with the Notices of Appeal at latest. The Entry Clearance Manager was aware of the Secretary of State's discretion effectively vested in him and gave proper reasons for not exercising that discretion, above all for the practical reason that no such document had been produced to him. He thus had no reason to suspect that it existed or could be obtained.

16. There was no suggestion that the Appellants are not in a position to submit fresh and compliant entry clearance applications. No evidence of exceptional circumstances was shown. The Appellants and their sponsor failed to show that they are unable to live as a family in other places apart from the United Kingdom. Thus, however the Appellants' appeals are analysed, they must fail.

17. There was no application for an anonymity direction and the tribunal sees no need for one.

DECISION

The making of the previous decision involved the making of an error on a point of law. The tribunal allows the onwards appeals to the Upper Tribunal, sets aside the original decisions and remakes the original decisions as follows:

The appeals are dismissed

Signed **Dated**

Deputy Upper Tribunal Judge Manuell

TO THE RESPONDENT
FEE AWARD

As the appeals were dismissed, there can be no fee awards

Signed **Dated**

Deputy Upper Tribunal Judge Manuell