



Upper Tier Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/08797/2013

THE IMMIGRATION ACTS

Heard at Birmingham
On 19 December 2014

Determination Promulgated
On 6 January 2015

Before

Deputy Upper Tribunal Judge Pickup

Between

The Entry Clearance Officer Islamabad

Appellant

and

Muhammad Amnan
[No anonymity direction made]

Claimant

Representation:

For the claimant: Mr H Sarwar, instructed by MA Consultants

For the appellant: Mr N Smart, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The claimant, Muhammad Amnan, date of birth 8.10.86, is a citizen of Pakistan.
2. This is the appeal of the Entry Clearance Officer against the determination of First-tier Tribunal Judge Cox promulgated 15.7.14, allowing the claimant's appeal against the decision of the respondent, dated 11.3.13, to refuse his application made on 21.12.12 for entry clearance to the United Kingdom as the partner of Qurat Ul-Ain Jamil, a British citizen present in the UK. The Judge heard the appeal on 2.7.14.

3. First-tier Tribunal Judge Saffer granted permission to appeal on 4.8.14.
4. Thus the matter came before me on 19.12.14 as an appeal in the Upper Tribunal.

Error of Law

5. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Cox should be set aside.
6. The relevant background can be briefly summarised as follows. The application was refused because the Entry Clearance Officer was not satisfied that the claimant met the financial requirements and specifically that he failed to provide the specified evidence under Appendix FM-SE.
7. The appeal against the refusal decision was first heard by Judge Sangha on 3.12.13, who found that the sponsor met the £18,600 threshold requirement for a couple. The Entry Clearance Officer sought and was granted permission to appeal that decision on the basis that the appeal had been allowed without demonstrating compliance with the mandatory specified evidence requirements. The matter then came before the Upper Tribunal and Deputy Upper Tribunal Judge Davidge, who found the decision of the First-tier Tribunal in error of law, as no reasons had been given for dispensing with the requirements of Appendix FM-SE by reference to paragraph D. Judge Davidge set the decision aside and remitted it to the First-tier Tribunal, to be decided de novo. It was then listed before Judge Cox on 2.7.14 and it is Judge Cox's decision which is the subject matter of this appeal.
8. In granting permission to appeal, Judge Saffer was "satisfied that it is arguable that there is merit in the grounds for the reasons set out in the application, and in particular the failure to apply Ukus (discretion: when reviewable) [2012] UKUT 00307 (IAC), which says that in such cases it should not be determined substantively but should be remitted back to the respondent for failing to exercise discretion."
9. The missing documentation justifying the Entry Clearance Officer's refusal of the application was: (1) a statement in the letter from the employer confirming the gross annual salary; and (2) a personal bank statement matching the period of the wage slips and showing that the salary was paid into the account. These are mandatory requirements under Appendix FM-SE of the Immigration Rules. Not only must the claimant demonstrate that the financial threshold of £18,600 is met, but it must be proven by specified evidence. In relation to the facts of this case, wage slips and/or a letter from the employer is insufficient. The employer's letter must contain certain specified information and the claimant has to show that corresponding deposits in the bank statement match the wages shown in the wage slips.
10. In summary, Judge Cox considered section D of Appendix FM-SE and acceded to the submission that D(d)(iii) and (e) applied and that it was in the circumstances open to the Tribunal to dispense with the strict requirements of FM-SE. The judge was satisfied that the sponsor's income exceeded £18,600 and that she had satisfactorily explained why she could not produce a bank statement showing the salary, which was paid in cash, paid into the account. The judge also found that the missing

information from the employer's letter was easily identifiable from the wage slips and bank statements.

11. At §15 Judge Cox stated, "I find that the respondent could and should have applied those provisions and exercised his discretion there under to grant the application. Having so found, and the respondent not having considered the exercise of that discretion, I exercise it myself and find that the decision was not in accordance with the law and the Immigration Rules. I find that the appellant and the Sponsor did meet the financial requirements of Appendix FM and that, no other point having been taken against them, the appellant was entitled to the entry clearance he sought. I therefore allow the appeal under the Immigration Rules."
12. The grounds of application for permission to appeal point out, correctly, that if the First-tier Tribunal Judge considered that the decision of the Entry Clearance Officer was not in accordance with the law by failure to exercise discretion, the correct approach is to allow the appeal to the limited extent that it remains for the Entry Clearance Officer to make a decision that is in accordance with the law. It is submitted that such an approach would enable the Entry Clearance Officer the opportunity to request alternative evidence and/or to conduct checks as to the veracity of the limited evidence submitted.
13. The second ground of appeal is that the decision of the First-tier Tribunal is devoid of adequate reason to support the conclusion that the sponsor had provided a valid reason why she could not or did not deposit her cash earnings into the bank account. All the judge said about this matter at §14 of the decision was that it had been explained in the grounds of appeal and the wages had been shown on the wage slips, supported by the employer's letter. With respect to Judge Cox, the grounds of appeal to the First-tier Tribunal stated only that the sponsor was paid in cash and does not deposit money into her account; she contributes the money towards household expenses and the balance is kept at home. That is not a valid reason not to comply with the strict requirement that the bank account must show the wages shown on the wage slips deposited into the account.
14. However, there is a more serious difficulty with the decision of the First-tier Tribunal. That is that Judge Cox purported to exercise a discretion the Tribunal did not have.
15. In Ukus, the Upper Tribunal panel pointed out that where a decision maker has failed to exercise a discretion vested in him, the Tribunal's jurisdiction on an appeal is limited to a decision that the failure renders the decision 'not in accordance with the law', pursuant to section 86(3)(a). "Because the discretion is vested in the Executive, the appropriate course will be for the Tribunal to require the decision maker to complete his task by reaching a lawful decision on the outstanding application." It is clear from D(a) that the discretion is vested entirely in the decision-maker, either the Entry Clearance Officer or the Secretary of State. There is no extension of that discretion to the Tribunal on appeal. In other words, Judge Cox no power or authority or power to exercise the discretion on behalf of the Entry Clearance Officer and in acceding to the submission of the claimant's representative

she misdirected herself. For that reason, quite apart from the other significant failures highlighted above, the decision cannot stand and must be set aside and remade.

16. In remaking the decision in the appeal, I am wholly unpersuaded that there was any failure on the part of the Entry Clearance Officer to exercise a discretion under section D of Appendix FM-SE to disapply the specified evidence requirements. D(a) explains that the Entry Clearance Officer will consider the documents submitted with the application and will only consider documents submitted after the application where sub-paragraph (b) or (e) applies. Those provisions do not apply in this case. There was no further documentation provided. The letter from the employer was deficient in that it failed to state, as required, the sponsor's gross annual salary. D(c) explains that the decision-maker will not request documents where he or she does not anticipate that addressing the error or omission referred to in sub-paragraph (b) will lead to a grant because the application will be refused for other reasons. As the sponsor had not deposited the wages into the bank account, there was no missing documentation that could have been provided to cure the defect to demonstrate that wages were paid into the account. There was no basis for the Entry Clearance Officer to even begin to consider exercising a discretion to either ask for more information or alternative verification.
 17. It is a matter for the Entry Clearance Officer as to whether there is a valid reason as to why a specified document cannot be provided. That there may be an explanation as to why wages were not deposited does not amount to a reason to dispense with the requirement. In Sultana & Others (rules: waiver/further enquiry; discretion) [2014] UKUT 540 (IAC), the panel, including the President, held that where applicants wished to invoke any discretion of the kind covered by section D of Appendix FM-SE, "they should do so when making the relevant application, highlighting the specific provision of the Rules invoked and the grounds upon which the exercise of discretion is requested." There was no such request in this case and no basis for the Entry Clearance Officer to unilaterally exercise discretion. The specified evidence requirement therefore stands. Even if the payment is in cash, the applicant has to show that the salary was paid into the bank account. A letter from the employer and/or wage slips is insufficient to meet the requirement.
 18. In the circumstances, I find that there was no basis for concluding that the Entry Clearance Officer had failed to exercise a discretion. The application did not meet the financial requirements and in particular the specified evidence requirements of Appendix FM-SE. The application as made was doomed to failure and could not have been rescued by the application of section D. It follows that the appeal cannot succeed on the Immigration Rules.
1. No article 8 ECHR issue was raised in the grounds of appeal to the First-tier Tribunal or addressed in submissions at the First-tier Tribunal appeal hearing. Neither was there any such issue raised by the claimant by way of a Rule 24 response or in submissions made before me in the Upper Tribunal. In Sarkar [2014] EWCA Civ 195, the Court of Appeal held that even when Article 8 is in the grounds of appeal, if no evidence is adduced and no submissions made the Appellant can be taken to have abandoned it as a ground of appeal and the Judge does not err in failing to deal with it. In the circumstances, I need not address article 8 at all.

Conclusion & Decision:

19. For the reasons set out herein, I find that the making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside and remade, which I did, by dismissing the appeal.

I set aside the decision.

I re-make the decision in the appeal by dismissing it on all grounds.



Signed:

Date: 31 December 2014

Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award

Note: this is not part of the determination.

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The appeal has been dismissed and thus there can be no fee award.



Signed:

Date: 31 December 2014

Deputy Upper Tribunal Judge Pickup