Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/11113/2014

THE IMMIGRATION ACTS

Heard at North Shields	**Decision and Reasons Promulgated**
On 21 October 2015	**On 24 November 2015**
Prepared on 22 October 2015	

Before

DEPUTY UPPER TRIBUNAL JUDGE JM HOLMES

Between

MUHAMMAD SHIPU
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr Marfat, Solicitor Newcastle Legal Centre
For the Respondent: Mr Mangion, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Bangladesh. He applied for entry clearance as the spouse of the sponsor on 14 July 2014, and his application was refused on 29 August 2014 by reference to the requirements of Appendix FM to the Immigration Rules.
2. The Appellant duly appealed against that immigration decision and his appeal was heard on 30 April 2015, when it was dismissed under the Immigration Rules and on Article 8

grounds in a Decision promulgated on 12 May 2015 by First Tier Tribunal Judge Hands.

3. The Appellant's out of time application to the First Tier Tribunal for permission to appeal was admitted, and granted, by the First Tier Tribunal Judge Landes on 7 September 2015. Whilst the grounds were described as convoluted, they were taken to be intended to raise the complaint that the Judge had in the course of writing her decision taken a new point against the Appellant, with the consequence that he had been deprived of the opportunity of dealing with that point during the course of the appeal hearing, thereby rendering the appeal process unfair. Whilst this was said to be arguable the Appellant was expressly warned that it was far from clear from the papers on the Tribunal file whether in the event that this argument were made out it would establish any material error of law, since no calculation had been performed by the Appellant of the net deposits to the sponsor's bank account in the relevant period, which were evidenced as required by the payslips and bank statements that were in evidence. Thus the Appellant might fail to demonstrate that he met the requirements of the Immigration Rules at the date of decision in any event.
4. The Respondent filed a Rule 24 response dated 11 September 2015 in which it was argued the Appellant had failed to explain why the claims made for the sponsor's net wages in her payslips did not tally with the sums deposited into her bank account, and had failed to demonstrate by way of the evidence required in Appendix FM-SE that the sums deposited into her bank account met the income threshold set out in Appendix FM.
5. Thus the matter comes before me.

<u>The decision under appeal</u>

6. The Appellant's application for leave was made on the basis that he met the requirements of Appendix FM to the Immigration Rules for a grant of entry clearance as the spouse of the sponsor. As part of that application he had relied upon what he had declared to be the sponsor's true income of £18,943.60. If that declaration was correct, and the sponsor's income was evidenced in the way required by Appendix FM and FM-SE then her income would indeed exceed the minimum income threshold requirements of £18,600. The total income relied upon was said to be derived from two concurrent employments held with different employers; AR trading as AHC, and, RCL.
7. The application was refused by the Respondent on 29 August 2014 by reference to paragraphs EC-P.1.1(c), S-EC.2.2(a), EC-P.1.1(d) and E-ECP.3.1. This was because upon an analysis of the available evidence, and the checks that had been undertaken with HMRC, the Respondent was satisfied that the Appellant

had made false declarations as to the sponsor's true income, having concluded that the sponsor's income from each of the two employments relied upon had been artificially inflated for the purpose of the application beyond the rates of pay that had been paid to her by each of those two employers during the preceding tax year of 2013/4, when on the face of the evidence she had performed the same role, and neither of those employers was in a financial position to be generous to its employees.

The Respondent's case before the First Tier Tribunal

8. It is plain from the decision, and it is not in dispute before me, that the sponsor was the subject of an extensive cross-examination designed primarily to demonstrate that if there were indeed two genuine employments, the work she had performed for the two employers in the six months prior to the date of application, was exactly the same as that which she had performed for them in the 2013/4 tax year. Thus the Respondent sought to demonstrate that there was no legitimate commercial reason for the increase in wages that was relied upon, and that those wages had been artificially inflated for the purpose of supporting the entry clearance application.

9. The Judge also recorded the Respondent's argument that (although they were based locally to the hearing centre) neither of the two employers relied upon had offered any explanation for their failure to attend the hearing in order either to speak to the documents that were relied upon by the Appellant and thus confirm the true rates of pay, or, to explain why they had increased the sponsor's weekly wage so significantly from the sums that had been paid to her by them during the preceding tax year. Whilst the minimum wage had increased during this time period, that increase would not account for the difference, and thus the increase in wages paid for doing the same job called for a credible explanation from those employers. In the circumstances it is plain that the Respondent argued before the Judge that very little weight could be attached to the sponsor's evidence concerning her true earnings, and that there was no reliable evidence to explain why they had increased in advance of the Appellant's application for entry clearance, with the result that the Judge should conclude that these earnings had been artificially inflated.

10. Equally it is plain that the cross-examination of the sponsor was not solely directed to the issue of whether her earnings had been artificially inflated, but it also went to the question of whether a number of the sums deposited into the sponsor's bank account failed to tally with the sums recorded in the documents that were said to be her genuine payslips.

11. The Judge also recorded that at the hearing the argument of the Respondent's representative that even if the two employments were genuine, the weekly income that was relied upon at the date of the application was only £345.55, which meant at best an annual income of £17,968.60, which did not meet the £18,600 threshold required by Appendix FM [6]. That was a different stance to that which the ECO had taken in reliance upon the "real time earnings" information that had been provided by HMRC of £189.30 pw from AR trading as AHC, and £175 pw from RCL. There is no suggestion in the decision or the record of proceedings that Mr Marfat, who also appeared for the Appellant below, objected to this argument as in any way taking the Appellant by surprise, or as one that was not open to the Respondent.

The Appellant's complaint

12. I asked Mr Marfat to try to summarise the grounds that he had drafted, which Judge Landes had not unkindly described as "convoluted". He told me that Judge Landes had correctly identified the only point that he sought to make in drafting the grounds, and that this was the only complaint that he wished to advance of the Judge's decision.
13. Mr Marfat accepted that it was a fair summary of his argument, that in circumstances such as these, where the ECO had challenged an application on the basis of fraud, the ECO was obliged to set out expressly any alternative fall back argument that he sought to advance, failing which he would be prevented from doing so. Thus he argued that if the Tribunal were not satisfied that the sponsor's earnings had been artificially inflated, it was not open to the Tribunal to go on to consider whether the evidence relied upon met the requirements of Appendix FM-SE, and Appendix FM. In this case, since there was no such point expressly taken in the alternative, once the Judge had concluded that she was not satisfied that the ECO had made out his case on fraud, he argued that she was obliged to allow the appeal.
14. Mr Marfat accepted that he had paid no heed to the warning set out in the grant of permission. Thus he had made no attempt to calculate the net deposits to the sponsor's bank account in the relevant period, which were evidenced by, and were referable to the entries in the bank statements relied upon, and the payslips that had been placed in evidence. He had no explanation for that failure.
15. Mr Marfat argued that it was for the Tribunal to perform all of the necessary calculations to determine whether the Appellant had met the requirements of Appendix FM and FM-SE. (It was not at all clear why, or how, any such obligation would arise if

his argument about the limited scope of the appeal was correct.) He accepted that in doing so, the Tribunal could refer to only those deposits into the sponsor's bank account that were made in the relevant period, were recorded in the bank statements in evidence, and which were referable to the sums recorded upon the payslips that were said to have been issued to her by the two employers. I asked him what the arithmetic result of such a calculation would be, and he accepted that he did not know.

Conclusion

16. It is not in my judgement clear from the decision that the Judge properly engaged with the Respondent's case, which was never to allege simply that the sponsor was not genuinely employed by the two employers, but rather to allege that if she was genuinely employed by them, that the sums paid to her by those two employers (and declared by them to HMRC as having been paid by way of earned income) had been dishonestly inflated for the purpose of supporting the Appellant's application for entry clearance. Mr Marfat expressly conceded to me that he had always understood the Respondent's case to cover both.

17. Arguably there is no analysis of the relevant burden and standard of proof, and no clear identification that the Judge understood this to be the true nature of the refusal decision, and no clear finding of fact upon whether the sponsor's wages had been dishonestly inflated. In my judgement the reader is left with the distinct impression that the Judge mistakenly understood the disputed issue to be simply whether the sponsor was actually employed by the two employers during the relevant periods, and that she failed to make any analysis of the evidence concerning why two small employers would increase the sponsor's wages in the way that the Appellant and the sponsor had claimed they had done, when she did not claim in he course of her evidence that her role had materially altered.

18. It is however abundantly clear from the decision that the Judge did understand the appeal to be argued by the Respondent upon the alternative basis that even if the sponsor were genuinely employed by both employers, that the Appellant had nevertheless failed to demonstrate that the evidence he relied upon met the requirements of Appendix FM and FM-SE, and thus he met the minimum income threshold [16-19]. It is also in my judgement clear that the Appellant's representative raised no objection to that approach at the time. It is extremely difficult to see how the Appellant's representative could have failed to appreciate that this was the Respondent's alternate case. In consequence it is extremely difficult to see how it could be said that any issue of unfairness arose from the Respondent pursuing such an argument. Either the evidence supplied with the

application met the evidential requirements, or it did not. This was not a case in which the Appellant has been able to argue that the hearing was rendered unfair because he was denied the opportunity to place additional evidence before the Tribunal upon a new issue – it is not suggested that there was any additional evidence available to him that was relevant to the question of whether the evidence supplied with the application met the evidential requirements.

19. I reject as without proper foundation the argument that the terms of the Respondent's refusal did not permit the alternative argument that was pursued. I am satisfied that they did, and that both parties proceeded before the Tribunal on that basis, as indeed the Judge's record of Mr Marfat's submissions to her makes clear. Moreover, it is plain that the grant of permission expressly recognised that even if the Appellant could establish that the hearing before the Judge had been rendered unfair this was a hurdle the Appellant would now have to cross, before the Upper Tribunal would be prepared to remake the decision in his favour.

20. It follows that, despite the concern expressed in the grant of permission to appeal, I am not satisfied that the Judge did take for herself a new point in the course of writing her decision, that was not open to her to take, and that had not been the subject of argument before her.

21. In any event, if the failure of some of the deposits to the bank account to correspond to the sums recorded in the payslips relied upon as the sponsor's net pay, had genuinely taken the sponsor and the Appellant's representative by surprise I would have expected that to have been remarked upon at the time, and if necessary, for an adjournment to have been sought in order to consider the position, even if only for half an hour. That was not done.

22. In the circumstances I am not satisfied that the hearing of the Appellant's appeal was in any way rendered unfair. The facts of this case did not raise an obligation upon the Tribunal to adjourn the hearing of the appeal of its own motion.

23. That finding disposes of the appeal. It is however appropriate given the Appellant's argument before me to deal with a further matter. It is quite clear that the Judge received very little assistance from the Appellant's representative by way of an attempt to schedule, or to calculate, the sums relied upon as having been deposited into the sponsor's bank account, which were said to be referable to the payslips relied upon. That remains the position before me, despite the clear warning set out in the grant of permission. Indeed Mr Marfat accepts before me that he has paid no heed to that warning, and that he offers no explanation for that failure. He made no application to me

for an adjournment, or even for the appeal to be stood down the list temporarily, in order to allow him to perform the necessary calculation. I was left with the distinct impression that he did not believe that the performance of such an exercise would advance the Appellant's case.

24. I deplore Mr Marfat's suggestion that it is for the Judge to sift through the evidence provided, to try to identify the relevant entries in bank statements and payslips, and then to perform the necessary calculation to determine whether the Appellant has met the requirements of Appendix FM and FM-SE, without any assistance from the parties. Such an approach is redolent of the worst type of litigation practice, and an unwarranted assumption that the resources of the Tribunal are unlimited. Both parties are under an obligation to assist the Tribunal, although in a situation such as this, the primary obligation would rest, as would the evidential burden of proof, upon the Appellant.

25. In all the circumstances of this case I reject the Appellant's argument that the Judge made any material error of law that requires her decision to be set aside and remade.

DECISION

The Determination of the First Tier Tribunal which was promulgated on 12 May 2015 did not involve the making of an error of law in the decision to dismiss the appeal that requires that decision to be set aside and remade. The decision to dismiss the appeal is accordingly confirmed.

Direction regarding anonymity – Rule 14 Tribunal Procedure (Upper Tribunal) Rules 2008

The Appellant did not seek anonymity before the First Tier Tribunal, and no request for anonymity is made to me. There does not appear to me to be a proper basis for the Upper Tribunal to make such a direction of its own motion.

Deputy Upper Tribunal Judge JM Holmes
Dated: 23 October 2015