



Upper Tier Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: OA/11343/2013

**THE IMMIGRATION ACTS**

Heard at Field House  
On 6 January 2015

Determination Promulgated  
On 8 January 2015

Before

Deputy Upper Tribunal Judge Pickup

Between

Entry Clearance Officer - Islamabad

Appellant

and

Sweeta Yousafzai  
[No anonymity direction made]

Claimant

**Representation:**

For the claimant: Ms R Dassa, instructed by Wai Leung Solicitors  
For the respondent: Mr P Duffy, Senior Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. The claimant, Sweeta Yousafzai, date of birth 1.4.81, is a citizen of Afghanistan.
2. This is the appeal of the Entry Clearance Officer against the determination of First-tier Tribunal Judge McIntosh promulgated 16.9.14, allowing the claimant's appeal against the decision of the Entry Clearance Officer to refuse her application for entry clearance to the United Kingdom as a partner under Appendix FM of the Immigration Rules. The Judge heard the appeal on 13.6.14.

3. First-tier Tribunal Judge Lambert granted permission to appeal (on a date that is not decipherable from the decision).
4. Thus the matter came before me on 6.1.15 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 McIntosh should be set aside.
6. The application for entry clearance was made on the basis of the claimant's marriage to Amin Ahmady, who has indefinite leave to remain and is present and settled in the UK.
7. The issue in the appeal was the financial requirements of Appendix FM. The refusal decision makes clear that the Entry Clearance Officer was not satisfied that the sponsor is employed and receives the salary claimed from either of his two employments. Reliance was placed on the specified documentary evidence requirements of Appendix FM-SE.
8. In allowing the appeal, at §21 to §22 professed to be satisfied that that the sponsor had a combined salary exceeding the £18,600 threshold. However, the judge made no reference whatsoever to the specified evidence requirements of Appendix FM-SE that the wages, even though paid in cash, have to be demonstrated to have been deposited in a bank account matching the same period as the wage slips.
9. The facts set out in the letters from the two employers did not meet the requirements of FM-SE. However, the letters were amended and signed to include the specified evidence requirements, as explained at §14 of the decision. Mr Duffy took no further issue on that aspect.
10. In her skeleton argument, Ms Dassa accepted that the claimant was unable to meet the requirements of FM-SE 2(c), as the wages were not paid into a bank account. It was also accepted that this is a mandatory requirement that was not complied with.
11. Ms Dassa was submitted that the judge had the power to use his discretion to apply the evidential flexibility provisions of paragraph D of Appendix FM-SE. However, in Ukus (discretion: when reviewable) [2012] UKUT 00307 (IAC), the Upper Tribunal held that where the decision maker has failed to exercise a discretion vested in him, the Tribunal's jurisdiction on appeal is limited to a decision that the failure renders the decision 'not in accordance with the law (s86(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 paragraph D that the discretion in this case rests with the decision maker and not the Tribunal. There was no power of the Tribunal judge to exercise the discretion to apply evidential flexibility provisions under paragraph D in place of the Secretary of State.

12. 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. 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 Secretary of State to even begin to consider exercising a discretion to either ask for more information or alternative verification.
13. 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 Secretary of State 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.
14. In her skeleton argument Ms Dassa submitted that as the Secretary of State had requested an adjournment in order to obtain evidence as to income from the HMRC, the discretion was being exercised under paragraph D(e). Her argument was that once the discretion had been exercised, it becomes open to the First-tier Tribunal to determine whether a valid reason exists to prevent the sponsor meeting the FM-SE requirements.
15. Whilst accepting, as I must, the finding in Sultana that a refusal to exercise a discretionary power may render a decision not in accordance with the law, I do not accept Ms Dassa’s argument that exercising a discretion to obtain further information, even if it can be characterised as such, opens the door to the Tribunal to review other aspects of the application of paragraph D and to exercise the discretion on behalf of the Secretary of State in respect of an issue not the subject of an exercise of discretion. For the reasons set out above, the Tribunal has no power to exercise such a discretion in relation to paragraph D. The most that could be done would be to allow the appeal on the limited basis that it remains for a decision to be made that is in accordance with the law. However, I find that there was no basis for that course of action as there was no reason why the Secretary of State should have accepted the explanation for the failure to bank the wages paid in cash into the bank account. It was not something which was impossible for the claimant to do; she failed to do so, perhaps because she was ignorant of the requirements of Appendix FM-SE.

16. The fact remains that the appellant could not comply with the requirement and nothing in that which has been advanced provides any reason to justify the exercise of discretion to disapply this strict requirement. Neither can the application of the requirements of Appendix FM-SE be unfair to the claimant. The requirements are clear and could have been complied with. There is nothing unfair in this case.
17. Article 8 was not raised in the grounds of appeal to the First-tier Tribunal or the Upper Tribunal and not addressed in any submissions before me. In the circumstances I do not address this issue.

**Conclusions:**

18. For the reasons set out above, 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.

I set aside the decision.

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



Signed:

Date: 6 January 2015

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.

A handwritten signature in black ink, appearing to read 'Pickup', written in a cursive style.

Signed:

Date: 6 January 2015

Deputy Upper Tribunal Judge Pickup