



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/11514/2014

THE IMMIGRATION ACTS

Heard at Field House
On 30 September 2015

Decision & Reasons Promulgated
On 12 October 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE RAMSHAW

Between

ENTRY CLEARANCE OFFICER
(LAGOS)

Appellant

and

MRS HAPPY HENRIETTA IGBINEWEKA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr S Walker, a Home Office Presenting Officer
For the Respondent: Mr T Airuouo of Church Street Solicitors

DETERMINATION AND REASONS

Introduction

1. In this appeal, the Entry Clearance Officer appeals against a decision of the First-tier Tribunal allowing the appeal of Mrs Igbineweka ('the claimant') who appealed against a decision taken on 1 September 2014 to refuse her entry clearance as a spouse under appendix FM.

Background Facts

2. The claimant is a citizen of Nigeria who was born on 10 November 1985. She applied for entry clearance as a spouse under appendix FM of the Immigration Rules HC395 (as amended). That application was refused because the Entry Clearance Officer was not satisfied that she met the income threshold or the related evidential requirements under appendix FM-SE.

The Appeal

3. The claimant appealed to the First-tier Tribunal. In a determination promulgated on 14 May 2015 Judge Plumptre allowed the claimant's appeal. The First-tier Tribunal found that the Entry Clearance manager had overlooked a third P60 which was submitted with the grounds of appeal. She found that the claimant had established that the financial requirements had been met.

The Appeal to the Upper Tribunal

4. The Entry Clearance Officer sought permission to appeal to the Upper Tribunal. On 20 July 2015 First-tier Tribunal Judge McDade granted the Entry Clearance Officer permission to appeal. Thus, the appeal came before me.

Preliminary Issue

5. Mr Walker raised as a preliminary issue that the P60 from Not Just Cleaning that the claimant relied on ('the third P60') had the tax year date missing as a result of being poorly photocopied. Mr Airuouo was unable to assist with a complete copy as his copy also had the date missing. I drew attention to the date at the bottom of the P60 which suggested that the P60 was for the 2013-2014 period although this was not confirmation of the tax year. I indicated that my preliminary view was that the P60 was not evidence of the level of earnings in the relevant period so that this point may not be material. Mr Walker was content for his observation to be noted.

Summary of the Submissions

6. The grounds of appeal assert that the judge erred in law in finding that the Sponsor's earnings were in excess of £18,600 based on the Sponsor's P60 in the absence of the other evidence specified in appendix FM-SE. It was submitted that the P60 may indicate that the income is above the threshold but this was not borne out by the bank statements, payslips and employers' letters which are either missing or which do not add up to the figure stated on the P60. The further evidence was not corroboration of earnings that the sponsor was earning at the date of the decision. It is not open to the judge to make the findings in the absence of the specified evidence.
7. With regards to the evidence that the Sponsor's child has now been issued with a British passport Mr Walker acknowledged that this would be a contributing factor in an assessment under Article 8 of the European Convention on Human Rights and that it was a strong factor.

8. Mr Airuouo relied on his skeleton argument. He submitted that the Entry Clearance Officer's powers were discretionary. He referred to paragraph D of Appendix FM-SE where it states that the Entry Clearance Officer may request evidence if there are documents missing from a sequence of documents. He explained that there were two sets of bank statements from 2 different accounts. He submitted that the purpose of the 6 months' payslips was to project earnings but the P60 is a Government document which states the total earned and the tax paid. If employment remains the same there is no reason to doubt that earnings will change. The Sponsor remained in all 3 employments. The third P60 was the most significant and was omitted from the review. None of the missing documents were requested and the claimant had in addition submitted the P60. If the law is to emphatically establish that the Sponsor meets the income threshold the claimant has more than demonstrated that. The skeleton argument makes reference to Appendix FM-SE 2A (i) which refers to an applicant being permitted to submit P60s for the relevant period of employment relied on.
9. With regard to Article 8 Mr Airuouo submitted that the judge considered all the evidence in the round to allow the appeal.
10. The Sponsor, who was present at the hearing (Mr Ewere), asked if he could clarify a couple of matters. This was in response to queries that I put to his representative regarding the fact that the pay from Not Just Cleaning at the date of the decision was significantly less than the amount earned according to the P60 over the 12 month period. The Sponsor explained that in January 2014 Not Just Cleaning split into two different contracts so he began doing two jobs for both Not Just Cleaning and Property Support Services that is why his income appeared to drop with Not Just cleaning after January. He was still doing the same work but now for two employers. He clarified that his earnings from Property Support Services were weekly payments. He also referred to the bank statements and explained that only one set of statements had been taken into account by the Entry Clearance Manager which is why the total earning were said to be below the threshold.
11. Mr Walker checked that the bank statements that the representative handed up for consideration were the same statements that had been received by the Entry Clearance Officer. He indicated that the clarification from the sponsor was helpful and that it did appear that the confusion regarding the two bank statements led to a lower salary being found when it was all totalled up.
12. The claimant claimed costs in the event that the First-tier Tribunal appeal was upheld

Discussion

13. The jurisdiction of this tribunal on an appeal from the First-tier Tribunal is limited to points of law (s 11 of the Tribunals, Courts and Enforcement Act 2007).
14. The claimant relies on Appendix FM-SE A(i) which provides:

'In respect of salaried employment in the UK (paragraph 2 of this appendix) ... the applicant may, in addition to the payslips and personal bank statements required under that paragraph, submit the P60 for the relevant period(s) of employment relied upon ...'

15. It is quite clear from the above paragraph that submission of a P60 is **in addition** to the payslips and bank statements not as an alternative to the specified evidence. A P60 is not a Government issued document, it is issued by an employer. The third P60 relied on in this case was, in any event, of limited evidential value. It did not provide evidence of the level of earnings during the relevant period as it covered periods prior to the dates in question. It cannot be ascertained from the P60 what the level of earnings were, and were projected to be, at the date of the decision. For example a person might work 40 hours per week at the beginning of the year but have a change in contract and work only 20 hours per week from mid-year with the commensurate reduction in salary. The P60 merely records the total earnings from that employer over the 12 month period. In fact in this case that is precisely what happened hence Mr Walker's submission that the level of earnings on the P60 from Not Just Cleaning were not borne out by the payslips and bank statements.
16. I find that the judge erred in relying on the P60 as evidence that the sponsor was earning in excess of £18,600 in the absence of the other specified evidence required in Appendix FM-SE.
17. I set-aside the decision pursuant to paragraph 12(2)(a) of the Tribunals Courts and Enforcement Act 2007

Re-Making the decision

18. As a result of the sponsor's clarification it became clear at the hearing that the reason that the Entry Clearance Manager only found that the total of salary payments supported by the bank statements were £5,502.28 is that only one set of bank statement appears to have been taken into account. Salaries were paid into two different bank accounts and both sets of bank statements had been submitted to the Entry Clearance Officer. If both sets of bank statements had been considered the net pay amounted to £10,597.31 for the relevant 6 month period i.e. December 2013 to May 2014.
19. In this case it is clear that the specified evidence required had not all been provided – some payslips were missing and the employer's letters did not contain all the relevant information. The discretion in Appendix FM-SE D to consider other documents submitted with the application is that of the decision maker not the First-tier Tribunal or this Tribunal. In Sultana and Others (rules: waiver/further enquiry; discretion) [2014] UKUT 00540 (IAC) at paragraph 18 the Upper Tribunal when considering the 'evidential flexibility' in Paragraph D of Appendix FM-SE held:

'18. ... It is appropriate to add that the discretion in question is conferred exclusively on the ECO and is not exercisable by either the FtT or this Tribunal on appeal.'

20. However, in this case the Entry Clearance Manager, when maintaining the Entry Clearance Officer's decision, was prepared to and did consider whether or not the threshold requirement of a minimum gross income of £18,600 was met by evidence from the bank statements confirming the salary payments in the absence of the other specified corroborating evidence in the form of payslips and employer's letters setting out all the required information. There appears to have been an error in that only one set of bank statements were taken into account by the Entry Clearance manager. It is evident that, had both sets of statements been considered, even on a net amount of salary payments during the six month period the threshold of £18,600 gross annual salary was demonstrated as met as £10,597.31 was paid into the bank accounts by the claimant's employers over the six month period.
21. There was sufficient evidence before the Entry Clearance Officer in the form of the bank statements for the income to be verified as being in excess of £18,600.
22. The claimant's appeal against the Entry Clearance Officer's decision is allowed.
23. No order as to costs is made. The decision of the First-tier Tribunal contained an error of law. The Entry Clearance Officer did not act unreasonably in bringing these proceedings.
24. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

Decision

25. The decision of the First-tier Tribunal involved the making of an error of law. I set aside that decision. I re-make the decision allowing the claimant's appeal against the Entry Clearance Officer's decision.
26. No order as to costs is made.

Signed P M Ramshaw

Date 9 October 2015

Deputy Upper Tribunal Judge Ramshaw