



**UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER**

Appeal No. OA/12835/2013

THE IMMIGRATION ACTS

Heard at: Field House
On: 7 September 2015

Decision Promulgated
On: 29 December 2015

Before

Deputy Upper Tribunal Judge O’Ryan

Between

**Suvejini Surenthiran
(Anonymity Order Not Made)**

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Mr Turner, instructed by Greater London Solicitors

For the Respondent: Ms Fijiwala, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

- 1 The Appellant appeals against the decision of Judge of the First tier Tribunal Monson dated 24 March 2015 dismissing the Appellant’s appeal against a decision of an Entry Clearance Officer dated 13 May 2013 refusing her entry clearance under Appendix FM EC-P.1.1(d) of the Immigration Rules, as the spouse of Somasuntharam Surenthiran, a British national (‘the Sponsor’).
- 2 The couple were married in Sri Lanka on 18 January 2012 and the Appellant had originally applied for entry clearance in 2012, resulting in a

decision of an Entry Clearance Officer dated 9 November 2012, refusing entry clearance on the grounds, *inter alia*, that the Appellant had not submitted bank statements of the Sponsor showing salary deposits consistent with the payslips that had been provided in support of the application.

- 3 A second application was made on or around 12 February 2013. This was accompanied by a sponsorship declaration from the Sponsor stating, *inter alia* [14] that in respect of one of his two jobs, he was paid cash, and that his income would not reflect in his bank statements.
- 4 In the decision of 13 May 2013, the Respondent refused the application on the grounds that the evidence submitted in support of the application did not meet the relevant requirements in the rules as to specified evidence in the following respects:
 - (i) the letter from the sponsor's employer Bawa Forecourts did not confirm his gross annual salary for the period over which he had been paid the level of salary relied upon in the application;
 - (ii) the letter from the sponsor's other employer Shell Hove did not confirm his gross annual salary for the period over which he had been paid the level of salary relied upon in the application;
 - (iii) there were no signed contracts from either employer;
 - (iv) the payslips from Bawa Forecourts did not cover a 6 month period;
 - (v) the payslips from Shell Hove did not cover a 6 month period;
 - (vi) although the Appellant had provided the Sponsor's bank statements for a period exceeding 6 months, the bank statements did not correspond to the same period(s) as the wage slips at paragraph 2(c), showing that the salary had been paid into an account in the Sponsor's name (or a joint account).
- 5 A notice of appeal to the First tier Tribunal dated 10 June 2013 asserted (incorrectly, given that the Appellant accepts that further documentation was provided to the Entry Clearance Manager (ECM) and to the First tier Tribunal subsequently) that all relevant documents were submitted with the application and the Appellant invited the ECM to reconsider the ECO's decision.
- 6 The ECM reviewed the Appellant's application on 5 December 2013, and noted that the Appellant had provided further evidence. The ECM noted:

"The Appellant has produced further evidence in respect of her sponsor (*sic*) ability to meet the income threshold. Having looked again at the ECO's decision to refuse the appellant on the grounds there was missing specified documents to support the application I note, however, these documents do not address the concerns in their entirety and I am not prepared to overlook these concerns for the following reasons.

The appellant is required to provide evidence of her sponsor (*sic*) employment by the means of six months payslips dated within 28 days of

the application being submitted. With the grounds of appeal there are a number of payslips provided for his employment with Bawa Forecourts Ltd - however there are still payslips missing which would render them not consecutive; namely week 21, 30, 31, 35, and 42. In addition for his employment with Shell Hove, December 2012 payslips is missing.

I also note that whilst the appellant has again provided bank statements - I note October 2012 and November 2012 is missing and as such the appellant has not met the requirements under Appendix FM-SE paragraph 2(c).

In the light of the missing specified evidence I maintain the decision to refuse entry clearance."

- 7 The Appellant appealed to the First tier Tribunal. The appeal was originally listed for hearing on 18 July 2014 before Judge Grant, but this hearing was adjourned at the Appellant's request to obtain further evidence of the Sponsor's employment from HMRC. By the time the appeal came before Judge Monson on 9 March 2015, the Appellant had been able to provide further evidence from HMRC as to the Sponsor's income, and photocopies of missing payslips, save for a payslip from December 2012 from Shell Hove, which could not be obtained.
- 8 The position of the Respondent, represented by Home Office Presenting Officer Ms Deshraj was recorded by the Judge as follows:

"20. Having checked all the documentary evidence, Ms Deshraj accepted that all the documents identified as missing by the Entry Clearance Manager had now been provided except for the December 2012 payslip. But the refusal had been lawful, on the evidence as it stood at the date of the refusal decision. The maintenance of the refusal by the Entry Clearance manager had also been lawful at the time, bearing in mind the continuing absence of some of the documents. The effect was draconian, but the Rules had to be applied."
- 9 The Judge noted that there were two respects in which the mandatory requirements of Appendix FM-SE were not met. The first was that the bank statements did not show payment of the sponsor's wages from one of his employment into his bank. The other was that there had not been complete compliance with App FM-SE due to the failure to produce a payslip for December 2012.
- 10 The Judge stated at [24]:

"Since the Entry Clearance manager did not maintain the refusal of the ground that there had be non-compliance with paragraph 2(c) of Appendix FM-SE, I find that he waived compliance with his particular provision, as he was entitled to do under the evidential flexibility provisions at the beginning of Appendix FM-SE."
- 11 However the Judge thereafter at [25-28] held that he could not allow the appeal on the basis of the documentation that was before him and held at [28] that his jurisdiction was limited to the circumstances actually appertaining at the date of the refusal decision, and he was constrained to find that the decision appealed against was in accordance with the Rules

or otherwise in accordance with the law.

- 12 The Appellant's grounds of appeal to the Upper Tribunal argue, in summary, that the Judge misdirected himself in law in finding that he was prohibited from considering evidence that was submitted to the FtT after the date of the ECO's decision, on the grounds that s.85(4) Nationality Immigration and Asylum Act 2002 ('NIAA 2002') provided that:

"On an appeal under section 82(1) against a decision the Tribunal may consider any matter which it thinks relevant to the substance of the decision, including a matter arising after the date of the decision".

- 13 Permission to appeal was given by Judge of the First tier Tribunal Levin on 18 May 2015.

- 14 In the hearing, I heard submission from Mr Turner for the Ms Fijiwala for the Respondent.

- 15 I indicated to the parties my preliminary view that the FtT was entitled to take into account evidence submitted to it which had not been submitted with an application. Whereas Appendix FM-SE para D specifies that evidence submitted to the Respondent after the date of application will only be considered *by the Respondent* in the limited circumstances set out in the sub-paragraphs that follow (D(a)-(f)), s.85(4) NIAA 2002 places no similar constraint on the FtT.

- 16 However, I raised a concern with the parties that, contrary to the Judge's apparent suggestion that the ECM had waived the requirements of Appendix FM-SE 2(c) (the requirement for salary to be paid into a sponsor's bank account), the ECM had made no such concession.

- 17 To re-iterate the observations made by the ECM:

"I also note that whilst the appellant has again provided bank statements - I note October 2012 and November 2012 is missing and as such the appellant has not met the requirements under Appendix FM-SE paragraph 2(c)."

- 18 Paragraph 2(c) of Appendix FM-SE provides:

"2. In respect of salaried employment in the UK (except where paragraph 9 applies¹), all of the following evidence must be provided:

...

(c) Personal bank statements corresponding to the same period(s) as the payslips at paragraph 2(a), showing that the salary has been paid into an account in the name of the person or in the name of the person and their partner jointly."

- 19 Having highlighted my concerns regarding the Appellant's non-satisfaction of App FM-SE 2(c), I stood the matter down for Mr Turner to consider the

¹ paragraph 9 relates to a director's income from employment and/or shares in a limited company based in the UK, which does not apply here.

point. When the matter was later resumed, Mr Turner submitted that the ECM makes reference to the fact that statements for the months of October and November 2012 were said to be missing, and that the later provision of those statements therefore cured the issue relied upon by the ECM. Mr Turner submitted that the ECO, the ECM and the HOPO before the Judge had all waived the requirement to satisfy App FM-SE 2(c).

- 20 I do not find that to be a sustainable submission. The ECO specifically raised the non-satisfaction of App FM-SE 2(c) as an issue in the refusal; the Sponsor's income from one of his jobs was not paid into his bank account. App FM-SE para 2(c) is, as the Judge observed, a mandatory requirement that such income should be paid into a sponsor's bank account. It is not possible to submit that the ECO did not raise that point; he did. Indeed, the same point had been raised in the previous refusal.
- 21 Further, it is similarly not sustainable to submit that the ECM had waived the requirement under App FM-SE 2(c). Although the ECM makes reference to two particular months bank statements being missing, there is specific reference to non-compliance with App FM-SE 2(c). The later provision of statements for the months referred to would not, without more, establish that the requirements of App FM-SE 2(c) were met, and the language used by the ECM does not indicate that mere provision of the missing documents would result in App FM-SE being satisfied. The missing months might have shown that the Sponsor's income had been paid into his bank account. It would have taken much more specific language for the ECM to be treated as having made some sort of concession that mere provision of the missing documents would result in satisfaction of App FM-SE 2(c). The whole purpose of the provision is to require that income be paid into the account.
- 22 Further, even if Ms Deshraj, appearing for the Respondent before the Judge, accepted that all the documents identified as missing by the Entry Clearance Manager had now been provided except for the December 2012 payslip, this says nothing as to whether the provision of the documents resulted in the relevant rule being satisfied. Indeed, she proceeded to resist the appeal being allowed. Before me, Ms Fijiwala resisted the Appellant's appeal to this Tribunal on the basis that I had identified, ie that App FM-SE 2(c) had not been satisfied.
- 23 Although considerable time and effort was taken on behalf of the Appellant to locate and submit to the FtT documentation which was not submitted to the ECO in the application, it seems to me that this effort was misguided. Absent a clear and unequivocal indication from the Respondent that it did not intend to rely on the requirement under App FM-SE 2(c) that the Sponsor's income be paid into his bank account (and for the avoidance of doubt I find that there was no such concession) then the Appellant's application for entry clearance was doomed to fail from the outset. The requirement of paying cash earnings into a bank account is manifestly clear from App FM-SE 2(c) itself, and the relevant IDI guidance: Immigration Directorate Instruction Family Migration: Appendix FM Section

1.7 Appendix Armed Forces Financial Requirement:

“Under paragraph 1(n) of Appendix FM-SE the gross amount of any cash income may be counted where the person’s specified bank statements show the deposit of the full net amount which relates to the gross amount shown on their payslips (or in the relevant specified evidence provided in addition to the specified bank statements in relation to non-employment income). Otherwise, only the net amount shown on the specified bank statements may be counted. Those wishing to rely on cash income to sponsor an application subject to the financial requirement may need to change the way they manage their money and bank the full net amount so that they can then rely on the gross amount of that income in sponsoring the application. Like the other evidential requirements of Appendix FM-SE which seek to maintain the integrity of the system for all genuine applicants and sponsors, it is important that those wishing to rely on the gross amount of their cash income from employment corroborate this income through their bank statements, as well as the required payslips and employer’s letter.

Example

The prospective sponsor of an application for entry clearance as a partner is in nonsalaried employment with a construction firm in the UK. He is paid weekly in cash and receives payslips showing this net income, together with the gross amount and the correct deductions for tax and National Insurance. He currently deposits around half of his net income in his bank account each week and uses the remainder of the cash to pay his rent and some of his living expenses. He will need instead to bank all of his net income each week so that this income is reflected in his bank statements for a period of at least 6 months prior to the date of application in order to be able to rely on the gross amount of this employment income in sponsoring his partner’s application. Failure to do this would mean that the unbanked cash income could not be counted towards meeting the financial requirement.”

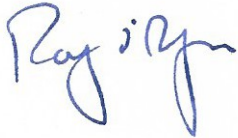
- 24 The Appellant and Sponsor, and those who have advised them, have been aware since even prior to the present application of the requirement that the Sponsor’s wages be paid into his bank account. The sponsor was aware of the problem, as indicated by his sponsorship declaration made at the time of the present application. The Appellant would have better advised to ensure that the sponsor paid his income into the bank for 6 months prior to making a fresh application.
- 25 Even if the Respondent’s response in this matter under Rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008 did not seek to rely on the point I raised at the hearing regarding the Appellant’s non-satisfaction of App FM-SE 2(c), I find that the point is an obvious point of law which it was appropriate for the Tribunal to raise of its own motion.

- 26 The Appellant's appeal was also dismissed by the Judge on human rights grounds and there is no challenge to that part of his decision by the Appellant before this Tribunal.

Decision

- 27 I find that the Judge's decision dismissing the Appellant's appeal involved the making of an error of law, the Judge having erroneously directed himself in law that the FtT could not take into account evidence in an appeal such as the present that had not been submitted with the application to the ECO. However, that error was not material to the outcome of the appeal. The Judge also erred in law in appearing to find, in the absence of a clear and unequivocal evidence, that the Respondent had waived the requirements of App FM-SE 2(c). That error was also not material, given that the appeal was dismissed.
- 28 I do not set aside the Judge's decision, although I uphold it for reasons different to those advanced by the Judge; ie that the Appellant's appeal stood to be dismissed on the grounds that the Appellant had not satisfied the requirements of App FM-SE 2(c) and therefore the application stood to be refused under EC-P.1.1(d) and E-ECP.3.1.

Signed:



Deputy Upper Tribunal Judge O'Ryan
Date: 15.12.15