



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/14133/2013

THE IMMIGRATION ACTS

Heard at Glasgow
On 19 December 2014

Determination Promulgated
On 30 April 2015

Before

MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE DEANS

Between

ENTRY CLEARANCE OFFICER - BELGRADE

Appellant

and

MRS JELENA PAVLOVIC

Respondent

Representation:

For the Appellant: Ms R Pettersen, Home Office Presenting Officer
For the Respondent: Mr G Rea, Maguire Solicitors

DETERMINATION AND REASONS

- 1) This is an appeal by the Entry Clearance Officer against a decision by Judge of the First-tier Tribunal Morrison allowing an appeal by Mrs Jelena Pavlovic (hereinafter referred to as "the claimant").
- 2) The underlying facts of this appeal were carefully set out by the Judge of the First-tier Tribunal. The claimant is a citizen of Serbia. In March 2013 she applied for entry clearance as the spouse of Aleksander Pavlovic, who has dual Serbian and British nationality. The application was refused by the Entry Clearance Officer on the basis that the sponsor could not meet the maintenance requirements of Appendix FM of the Immigration Rules.

- 3) On 10 April 2015, following the hearing but before our determination was promulgated, the claimant wrote to the Upper Tribunal stating that she wished to withdraw her appeal. She and her daughter, who is a British citizen, were living in Serbia while her husband was living in the UK. The claimant's daughter is of an age to start school and her parents would like her to start school in the UK in August 2015. Accordingly, the claimant was seeking to withdraw the appeal in order to apply again for a visa as a spouse.
- 4) Under rule 17 of the Tribunal Procedure (Upper Tribunal) Rules 2008 a party may give notice to the Upper Tribunal of withdrawal of his or her case. Notice of withdrawal will not take effect unless the Tribunal consents to the withdrawal.
- 5) In this case the appeal to the Upper Tribunal was made by the Entry Clearance Officer after the claimant was successful in her appeal to the First-tier Tribunal. Accordingly the request by the claimant to withdraw her appeal will not have the effect of halting proceedings before the Upper Tribunal. The only effect that the claimant's withdrawal can have, if the Tribunal consents to withdrawal, is that the claimant no longer seeks to contest the proceedings before the Upper Tribunal. In the circumstances we are satisfied that this was the clear intention of the claimant's letter of withdrawal.
- 6) We therefore consent to the claimant withdrawing her case before the Upper Tribunal. The effect of this will be that the appeal by the Entry Clearance Officer against the decision of the First-tier Tribunal will be unopposed. The decision of the First-tier Tribunal will be set aside and the decision re-made, with the result that the claimant's appeal against the refusal decision made by the Entry Clearance Officer will be dismissed.
- 7) We should at this stage point out that even if the claimant had not withdrawn her case, we would have decided in favour of the Entry Clearance Officer. Our reasons for doing so are set out briefly below. The result of the appeal is absolutely clear, whether reached by considering the claimant's case in detail or by allowing it to be withdrawn.
- 8) The issue in dispute in this appeal was not the amount of the sponsor's earnings but whether the claimant was able to produce documentary evidence in relation to the sponsor's earnings which satisfied the requirements of Appendix FM-SE. Prior to 1 March 2013 the sponsor was employed in an animation studio on a freelance basis by the company which now employs him on a salaried basis. Because of the change in the sponsor's employment status, the claimant applied for entry clearance relying on her and the sponsor's savings, which amounted to £26,000. As the Judge of the First-tier Tribunal recorded at paragraph 18 of his determination, the claimant did not appreciate the total amount which would be required by way of savings to meet the maintenance requirement. The full amount required was £62,500 held for a minimum of 6 months. Because the claimant did not meet this requirement her application was refused.

- 9) With her grounds of appeal to the First-tier Tribunal the claimant stated that in the 12 months prior to the application the sponsor had earned £45,429 as a freelance consultant but it was acknowledged that the relevant documents had not been produced with the application. There was then an Entry Clearance Manager review followed by the hearing before the First-tier Tribunal.
- 10) At this hearing there was a significant amount of documentary evidence before the Tribunal relating to the sponsor's earnings. In particular, documents from HMRC were produced which showed that in the year to 5 April 2013 the sponsor received income from employment totalling £3,333 (his first month's salary) and had an income from self-employment of £39,101, making a total of £42,434, on which tax and national insurance contributions of £9,744 were due. Bank statements were also produced. At paragraph 18 of the determination the judge recorded, however, that one requirement of Appendix FM-SE had not been fulfilled. This was the requirement to produce the latest unaudited accounts for the sponsor's business and an accountant's certificate. The claimant's solicitors submitted before the First-tier Tribunal that there was a schedule from the employer showing the sponsor's income from self employment but there was no accountant's certificate.
- 11) The Judge of the First-tier Tribunal concluded that although there was no accountant's certificate that omission was more than offset by the tax documents produced, which showed an income for the relevant tax year of £42,434. In the view of the judge it would have been perverse to have reached any conclusion other than that the sponsor satisfied the maintenance requirements of Appendix FM-SE and for that reason the appeal was allowed.
- 12) The Entry Clearance Officer appealed on the basis that Appendix FM-SE comprehensively specified the evidence required. The Tribunal had found that not all the specified evidence was produced. The Judge of the First-tier Tribunal based his decision on perversity but the requirements of the Rules were mandatory and the claimant ought not to have succeeded in her appeal. Permission to appeal was granted on this basis.
- 13) At the hearing before us Mr Rea acknowledged that there was no accountant's certificate before the Judge of the First-tier Tribunal. He pointed out, however, that the judge who granted permission to appeal described the point raised by the Entry Clearance Officer in the application as "tendentious". It was being argued for the Entry Clearance Officer that the Judge of the First-tier Tribunal had erred in going beyond the mandatory requirements of Appendix FM-SE and should not have relied upon the tax return. If this was so, the judge should have considered the appeal under Article 8. The judge had made a very detailed decision and to the extent that there was an error of law this did not materially affect the outcome of the appeal. The decision could be re-made and the appeal allowed. There was further evidence which could be admitted under rule 15(2A). The reason this had not been produced before was because the solicitor dealing with the matter had left the firm during the period when a rule 24 notice should have been submitted on behalf of the claimant. An accountant's letter dated 12 December 2014 was now available. Mr Rea further submitted that the

requirement for accounts was satisfied by the schedule of payments supplied by the company for which the sponsor had been doing freelance work.

- 14) Having heard from Mr Rea we did not consider it necessary to hear from Ms Pettersen.
- 15) The Judge of the First-tier Tribunal correctly identified the relevant requirement at paragraph 7(h)(i)(b) of Appendix FM-SE. This states that where a business (such as that carried on by the sponsor when working on a freelance basis) is not required to produce annual audited accounts, then the latest unaudited accounts and an accountant's certificate of confirmation from an accountant who is a member of a UK recognised supervisory body must be submitted. It was not disputed before the First-tier Tribunal that no such certificate was available at that time. The hearing took place on 10 March 2014 (although the determination erroneously gives the date as 10 March 2013.)
- 16) The question for us was whether the Judge of the First-tier Tribunal erred in law by allowing the appeal where an accountant's certificate was not available. The judge thought that to dismiss the appeal would be perverse, given that there was, in his view, satisfactory evidence of the sponsor's earnings. The Entry Clearance Officer took a different view and has pursued the point on appeal before us.
- 17) Having regard to the claimant's letter seeking to withdraw her case, we do not consider it necessary to address in detail the submissions made to us on her behalf by Mr Rea. The position is that the relevant requirements of Appendix FM-SE as to the type of documentary evidence required in order to show that the substantive maintenance requirements were met were not fulfilled in their entirety and accordingly the judge was wrong to allow the appeal. Because of the error of law by the Judge of the First-tier Tribunal, we set aside his decision.
- 18) It is incumbent upon us to re-make the decision. There is only one decision which the Judge of the First-tier Tribunal could have reached on the evidence before him and this was to dismiss the appeal on the basis that the necessary requirements of Appendix FM-SE were not fully satisfied. Accordingly this is the decision we now make.
- 19) Before us Mr Rea suggested that if the documentary requirements of Appendix FM-SE could not be met, then the judge should have considered the appeal under Article 8. While we acknowledge that the claimant and her son, who is a British citizen, are living in Serbia apart from the sponsor, we do not consider that the judge erred in failing to pursue the issue under Article 8. This is because it was open to the claimant to make a further application properly supported by the required documents. This is the course of action which the claimant now intends to follow.

Conclusions

- 20) The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

21) We set aside the decision.

22) We re-make the decision in the appeal by dismissing it.

Anonymity

23) The First-tier Tribunal did not make an order for anonymity. We have not been asked to make such an order and we see no reason in substance for such an order to be made.

Signed

Date

Upper Tribunal Judge Deans