



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: OA/15179/2014

**THE IMMIGRATION ACTS**

Heard at Field House  
On 6<sup>th</sup> November 2015

Decision & Reasons Promulgated  
On 11<sup>th</sup> December 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR NAEEM ASLAM RAJA  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

**Representation:**

For the Appellant: No representation  
For the Respondent: Mr Kandola (HOPO)

**DETERMINATION AND REASONS**

1. This is an appeal against the determination of First-tier Tribunal Judge Ferguson, promulgated on 17<sup>th</sup> June 2015, following a hearing at Birmingham on 29<sup>th</sup> May 2015. In the determination, the judge allowed the appeal of Naeem Aslam Raja. The Respondent subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

## **The Appellant**

2. The Appellant is a male, a citizen of Pakistan, who was born on 25<sup>th</sup> January 1983. He appeals against the refusal of a spouse's visa to join his wife, Mrs Nisa, who is also his first cousin, and who is a British citizen, who had herself entered the UK in 2005 as a spouse of a man from whom she is now divorced. Mr Raja's application was refused by the Entry Clearance Officer on the basis of his inability to meet the income threshold requirements with respect to his sponsoring wife, as set out in Appendix FM. His sponsoring wife, Mrs Nisa, worked for three different employers, Mitie, Abacus Cleaning and for a Mrs Farzana Sakanda. The Entry Clearance Officer accepted that pay slips for all three employments had been submitted but that the total average annual gross income is only £17,058 which is insufficient to meet the financial requirements under the Immigration Rules.

## **The Judge's Findings**

3. The judge observed that the majority of the income that the sponsoring wife relies upon to meet the £18,600 financial threshold requirement is her work as a carer for Mrs Sakander. The HMRC letter confirms that she declared her income from this work since 2013 and it was £3,659 for the tax year to 5<sup>th</sup> April 2015. The figure provided is only for four months of employment. But if one added to the income from the cleaning jobs, at the date of the application, Mrs Nisa demonstrated an income of £18,274, which was just £300 short of the total annual income she was required to establish (see paragraph 13). The judge held that if one adds her cleaning work income for 2013/2014 to the other income, then this "gives a figure of £19,279", and that "at the date of decision" her income was above the £18,600 required by Appendix FM. The appeal was allowed.

## **Grounds of Application**

4. The grounds of application state that the judge materially misdirected himself by law by ignoring the requirements set out in the Immigration Rules regarding the supporting documentary evidence by disregarding the fact that the Sponsor's evidence of income postdated the decision and the judge made a mistake as to a material factor in calculating the Sponsor's annual income. He took into account postdecision documentary evidence.
5. On 26<sup>th</sup> August 2015, permission to appeal was granted.

## **Submissions**

6. At the hearing before me on 6<sup>th</sup> November 2015, the Appellant was unrepresented, but a Mr Khawar Fayyaz, the nephew of Mrs Nisa, the sponsoring wife, attended court as a McKenzie friend, an interpreter Mr Syed Hussain, was present to interpret in Punjabi.
7. Since it was the Respondent's appeal, Mr Kandola began by stating that there were at least three major errors in the determination of the judge. First, the judge was wrong to take into account the date of the decision as a benchmark. The relevant date was

the date of the application. However, he states that “the earned income at the date of the decision is above the £18,600 required by Appendix FM” (see paragraph 15). This was important because if one looks at page 1176 of Phelan, the Rules are stated quite clearly to imply that evidence of income six months prior to the date of the application is needed to meet the financial threshold requirement. However, what the judge does (at paragraph 14) is to shift the goalposts by considering evidence that postdates the decision. He considers the income from May 2014 to October 2014, but this is after the date of the application. In so doing, the judge took the wrong tax year into account as a result of this error.

8. Second, the judge’s taking into account of the wrong tax year was clearly a material error of law. Third, the judge did not deal with the refusal letter. This confirmed that the Appellant was £300 short of meeting the Immigration Rules. That was the end of the matter. The judge could not have gone on to consider postdecision evidence that showed the shortfall being made up subsequently. If those funds now exist, the only proper course of action is for the Appellant to reapply again in a fresh application. Finally, as far as Article 8 was concerned, the “near miss” principle did not apply and, given that the higher courts had upheld the application of the financial requirements test, freestanding Article 8 jurisprudence could not assist the Appellant.
9. For her part, the Sponsor explained through her nephew that when the application was submitted there was a P60 and that she started her job in November, but there were no wage slips and for this reason letters from the three employers were submitted to show the income earned. The tax letter from HMRC confirms earnings of £18,600.

### **Error of Law**

10. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision. My reasons are as follows.
11. First, the Appellant had to show six months period of earnings prior to the date of the application, but the judge had found at paragraph 13 of the determination that this income threshold could not be demonstrated.
12. Second, where the judge allowed the appeal, he did not do so on the basis of bank statements having been produced to demonstrate the receipt of the salary claimed as a mandatory requirement under the Rules.
13. Third, paragraph 2 of Appendix FM makes it clear that, where there is salaried employment, evidence of (a) wage slips covering a period of six months prior to the date of the application must be produced; and (b) personal bank statements corresponding to the same period as the wage slips have to show that the salary has been paid into the account of the name of the person whose income is in issue. Unfortunately none of this was demonstrated before the judge. The Appellant today has not appeared with her best foot forward as she has not been represented by a legal representative, but has sought the assistance of a nephew, who has not been

able to help in putting matters across as clearly as should be the case. The burden of proof is upon the Appellant. It was not discharged before the First-tier Tribunal and nothing has been said today to show that the decision arrived at by the judge was one that was open to him.

**Remaking the Decision**

14. I have remade the decision on the basis of the findings of the original judge, the evidence before him, and the submissions that I have heard today. I am dismissing this appeal for the reasons that I have already given. The Appellant cannot succeed under the Rules because the relevant wage slips and the relevant bank statements have not been produced for a period of six months prior to the date of the application and regard to postdecision evidence is not open to be taken into account. The only course of action for this Appellant is to apply again in a fresh application.

**Notice of Decision**

The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is dismissed.

No anonymity order is made.

Signed

Date

Deputy Upper Tribunal Judge Juss

3<sup>rd</sup> December 2015