



The Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal number: OA/19048/2013

THE IMMIGRATION ACTS

Heard at Field House  
On February 26, 2015

Determination Promulgated  
On March 4, 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

THE ENTRY CLEARANCE OFFICER

Appellant

and

MRS NUTTHAKARN KUMPANANONT MAYER  
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Ms Pal (Home Office Presenting Officer)

For the Respondent: No attendance or representation.

DETERMINATION AND REASONS

1. Whereas the original respondent is the appealing party, I shall, in the interests of convenience and consistency, replicate the nomenclature of the decision at first instance.
2. The appellant is a citizen of Thailand. The appellant applied for entry clearance to come to the United Kingdom as a partner on July 26, 2013. The application was originally refused on October 14, 2013 but following the decision of MM (Lebanon) [2014] EWCA Civ 985 the respondent reviewed the financial element of the application and a fresh refusal notice was issued dated September 11, 2014.

3. The appellant appealed that decision on October 30, 2014 under section 82(1) of the Nationality, Immigration and Asylum Act 2002.
4. The matter came before Judge of the First-tier Tribunal Pacey (hereinafter referred to as the "FtTJ") on November 5, 2014 and in a decision promulgated on November 18, 2014 he allowed the appellant's appeal under the Immigration Rules.
5. The respondent lodged grounds of appeal on December 1, 2014. She submitted the FtTJ had erred by failing to consider the requirements of Appendix FM-SE in circumstances where the appellant could not properly demonstrate that she would satisfy the financial requirements of the Rules.
6. Judge of the First-tier Tribunal Grant granted permission to appeal on January 15, 2015 stating there was an arguable error in law based on the grounds.
7. The appellant did not attend either the original hearing or the hearing listed before me. She had sent a letter explaining she was unable to attend for "contractual reasons" and because she was out of the country.

#### **ERROR OF LAW SUBMISSIONS**

8. Ms Pal relied on the grounds of appeal and argued the FtTJ had erred because he had failed to consider Appendix FM-SE and in particular sections 2 and 13. The sponsor, Luke Blake, had provided evidence of two employments but the evidence submitted did not meet the Rules. In the case of Better Healthcare he was employed on a zero hours contract but had not worked for them between April 6 and July 12, 2013 as evidence by his payslip dated July 19, 2013 that demonstrated his first week's work with them was week ending July 19, 2013. His other employment with Epic International only commenced, according to his contract of employment, on April 16, 2013. He had worked in April and May 2013 and had earned £10,500 but since the end of May he had not worked until at least September 2013. She submitted the FtTJ erred in paragraph [19] as he assumed the appellant could earn a certain level of salary. The FtTJ also erred by taking into account bank statements that were submitted after the date of application because Appendix FM -SE Section D confirms that compliance with Appendix FM-SE should be considered at the date of application. I was invited to find an error in law and to dismiss the appeal.
9. Having heard Ms Pal's representations I reserved my decision.

#### **ERROR OF LAW ASSESSMENT AND DISCUSSION**

10. This is an appeal against the FtTJ's decision to allow the appellant's entry clearance. Permission to appeal was given on all grounds and I heard legal submissions from Ms Pal only because the appellant was neither represented by the sponsor nor a legal advisor.
11. The appellant applied in July 2013 for entry clearance but by the time this appeal was listed for an appeal it was November 2014. This delay was partially caused due to the

confusion generated in the case of MM prior to the Court of Appeal passing judgement on it.

12. In September 2014 the respondent reviewed the application and refused it because she submitted the Rules were not met. The FtTJ correctly reminded himself that this was an out of country application and consequently he was constrained by Section 85(5) of the 2002 Act. However, the FtTJ was also constrained by the provisions of Appendix FM and in particular Section D that states-

“D. (a) In deciding an application in relation to which this Appendix states that specified documents must be provided, the Entry Clearance Officer or Secretary of State ("the decision-maker") will consider documents that have been submitted with the application, and will only consider documents submitted after the application where sub-paragraph (b) or (e) applies.

(b) If the applicant:

(i) Has submitted:

(aa) A sequence of documents and some of the documents in the sequence have been omitted (e.g. if one bank statement from a series is missing);

(bb) A document in the wrong format (for example, if a letter is not on letterhead paper as specified); or

(cc) A document that is a copy and not an original document; or

(dd) A document which does not contain all of the specified information; or

(ii) Has not submitted a specified document, the decision-maker may contact the applicant or his representative in writing or otherwise, and request the document(s) or the correct version(s). The material requested must be received at the address specified in the request within a reasonable timescale specified in the request.

(c) 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.

(d) If the applicant has submitted:

(i) A document in the wrong format; or

(ii) A document that is a copy and not an original document, or

(iii) A document that does not contain all of the specified information, but the missing information is verifiable from:

- (1) other documents submitted with the application,
- (2) the website of the organisation which issued the document, or
- (3) the website of the appropriate regulatory body,

the application may be granted exceptionally, providing the decision-maker is satisfied that the document(s) is genuine and that the applicant meets the requirement to which the document relates. The decision-maker reserves the right to request the specified original document(s) in the correct format in all cases where sub-paragraph (b) applies, and to refuse applications if this material is not provided as set out in sub-paragraph (b).

(e) Where the decision-maker is satisfied that there is a valid reason why a specified document(s) cannot be supplied, e.g. because it is not issued in a particular country or has been permanently lost, he or she may exercise discretion not to apply the requirement for the document(s) or to request alternative or additional information or document(s) be submitted by the applicant.

(f) Before making a decision under Appendix FM or this Appendix, the decision-maker may contact the applicant or their representative in writing or otherwise to request further information or documents. The material requested must be received at the address specified in the request within a reasonable timescale specified in the request."

13. The FtTJ in considering the application should also have had regard to Appendix FM-SE Section 2

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

- (a) Payslips covering:
  - (i) a period of 6 months prior to the date of application if the person has been employed by their current employer for at least 6 months (and where paragraph 13(b) of this Appendix does not apply); or
  - (ii) any period of salaried employment in the period of 12 months prior to the date of application if the person has been employed by their current employer for less than 6 months (or at least 6 months but the person does not rely on paragraph 13(a) of this Appendix), or in the financial year(s) relied upon by a self-employed person.

(b) A letter from the employer(s) who issued the payslips at paragraph 2(a) confirming:

(i) the person's employment and gross annual salary; (ii) the length of their employment; (iii) the period over which they have been or were paid the level of salary relied upon in the application; and (iv) the type of employment (permanent, fixed-term contract or agency).

(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.”

14. At the date of application the sponsor appeared to be only working for Epic International. As his employment was for a period of less than 6 months the appellant would be required to provide evidence of the sponsor's employment over a 12 month period. All she provided from Epic International were payslips that he worked in April and May 2013 despite the suggestion in his employer's letter that he worked shift work of either 14 days on and 14 days off or 28 days on and 28 days off. His income whilst sizeable for two months ceased at the end of May and he had only received tax refunds after that date.
15. The FtTJ may have considered his employment with Better Healthcare as demonstrating he had been employed for longer than six months but the wage slips show he did not work between April 6, 2013 and the date of application.
16. Appendix FM-SE Section 13 sets out how the respondent and Tribunal should calculate gross income. This can be summarised as follows:

Based on evidence that meets the requirements of this Appendix, and can be taken into account with reference to the applicable provisions of Appendix FM, gross annual income under paragraphs E-ECP.3.1., E-LTRP.3.1., E-ECC.2.1. and E-LTRC.2.1. will be calculated in the following ways:

(a) Where the person is in salaried employment in the UK at the date of application, has been employed by their current employer for at least 6 months and has been paid throughout the period of 6 months prior to the date of application at a level of gross annual salary which equals or exceeds the level relied upon in paragraph 13(a)(i), their gross annual income will be (where paragraph 13(b) does not apply) the total of:

(i) The level of gross annual salary relied upon in the application;

(ii) The gross amount of any specified non-employment income (other than pension income) received by them or their partner in the 12 months prior to the date of application; and

(iii) The gross annual income from a UK or foreign State pension or a private pension received by them or their partner.

(b) Where the person is in salaried employment in the UK at the date of application and has been employed by their current employer for less than 6 months (or at least 6 months but the person does not rely on paragraph 13(a)), their gross annual income will be the total of:

(i) The gross annual salary from employment as it was at the date of application;

(ii) The gross amount of any specified non-employment income (other than pension income) received by them or their partner in the 12 months prior to the date of application; and

(iii) The gross annual income from a UK or foreign State pension or a private pension received by them or their partner. In addition, the requirements of paragraph 15 must be met.

17. I am satisfied the FtTJ has erred in his assessment of the financial requirements. The relevant dates are a minimum the 6 months prior to the date of application (July 26, 2013) or up to 12 months prior to that date.
18. The evidence before the FtTJ relating to the sponsor's employment with Epic International can be found in the appellant's bundle. A letter dated July 25, 2013 referred to his employment commencing in March 2013 albeit this contradicts the contract that clearly stated his employment began on April 16, 2013. However, that letter referred to shift working on a rotation basis. The payslips submitted do not support rotation working. His payslip dated May 1, 2013 shows a gross salary of £4,550 for that month's pay. His payslip dated May 30, 2013 shows a gross pay £6,012. Between May 30, 2013 and the date of application he did not work for this company.
19. This employment was for less than 6 months so the FtTJ must consider a 12 month earning period.
20. Although he was employed by Better Healthcare since October 2012 it seems he only worked for them until April 5, 2013 and earned £6,398 during that period. These earnings would not meet the £18,600 threshold in any event. However, he did not work for this company until week 15 of 2013 which is pay date of July 19, 2013. He therefore could not provide evidence of income that would satisfy the minimum income requirement because the evidence of employment does not demonstrate employment that would generate the required minimum level of income.
21. However, more importantly, he was unable to produce evidence that satisfied Appendix FM-SE as set out above.
22. It may well be that since the date of application and perhaps around the time of the hearing the sponsor's income was increased but this is irrelevant because the appeal

is governed by Section 85(5) of the 2002 Act. I am also mindful of the fact the FtTJ allowed this appeal based on evidence not before the respondent and this evidence should have been ignored under Appendix FM-SE Section D unless the appellant could demonstrate an exception applied. This was not done.

23. The Rules are clear and the appellant must demonstrate the sponsor meets the required income threshold. I am satisfied the FtTJ erred in paragraph [19] because he assumed he would earn the type of income set out in his contract whereas the reality is he was not earning such wages. In fact, when he could have been earning such wages he appeared to have been doing no work at all be that for Epic International or Better Healthcare.
24. I therefore allow the respondent's appeal and set aside the FtTJ's decision.

### DECISION

25. The decision of the First-tier Tribunal did disclose an error in law. I set aside the original decision and I remake the decision and dismiss the appeal under the Immigration Rules.
26. Under Rule 14(1) The Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended) an appellant can be granted anonymity throughout these proceedings, unless and until a tribunal or court directs otherwise. An order was not made in the First-tier and I see no reason to make such an order here.

Signed:

Dated: **March 4, 2015**

Deputy Upper Tribunal Judge Alis

### TO THE RESPONDENT

I uphold the original decision on fees.

Signed:

Dated: **March 4, 2015**

Deputy Upper Tribunal Judge Alis