Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/19375/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination & Reasons Promulgated**
On 22 April 2015	**On 30 April 2015**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

ENTRY CLEARANCE OFFICER - THAKA

Appellant

and

SURAIYA SULTANA RUHI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr J Parkinson, Senior Home Office Presenting Officer
For the Respondent: Mr N K Mustafa, Legal Representative from Kalem Solicitors

DETERMINATION AND REASONS

1. I see no need for and do not make an order restricting reporting in this case.

2. The respondent to this appeal, hereinafter "the claimant", is a citizen of Bangladesh who was born in 1989. She appealed successfully to the First-tier Tribunal a decision of the present appellant, hereinafter "the Entry Clearance Officer" refusing her entry clearance for the purpose of settlement in the United Kingdom as a wife. There are two decisions that I have to consider. The first is dated 16 September 2013 and a copy was handed to the claimant on 23 September 2013. According to that decision the application was refused under EC-P.1.1(d) of Appendix FM of HC 395. This is because the Entry Clearance Officer was not satisfied that she had proved her competence in the English language in the required way.

3. The decision also raised concerns about the sponsor's means but said:

> "However, no final determination has been made at this stage as to whether you meet the income threshold and/or related evidential requirements. This is because the courts have not yet decided the outcome of the Secretary of State's appeal in a legal challenge to the income threshold requirement. More information about this is set out on the Home Office website."

4. This was clearly a reference to the anticipated decision of the Court of Appeal in **MM (Lebanon) and Others, R (on the application of) v SSHD [2014] EWCA Civ 985** which ruled against a challenge to the lawfulness of a minimum income threshold of £18,600.

5. Judgment in that case was given on 11 July 2014 and on 22 September 2014 the Entry Clearance Officer made a further decision. It is made quite plain in the preamble to that decision that the refusal notice issued on 16 September 2013 had reached no conclusion on the claimant's ability to satisfy the requirements of the Immigration Rules. It also made it plain that the decision of 22 September 2014 was the anticipated final determination of the point.

6. Although the "Refusal of Entry Clearance" explains the nature of the Entry Clearance Officer's concerns it does not state expressly what part of which Rules the claimant failed to satisfy.

7. The appeal came before the First-tier Tribunal where many of the points were resolved in the claimant's favour. When the appeal was heard in October 2014 the Entry Clearance Officer was represented by a particularly experienced Presenting Officer. At paragraph 17 of its determination the First-tier Tribunal said:

> "During this appeal the Home Office Presenting Officer raised an additional issue (not previously raised by the ECO and/or Entry Clearance Manager in terms of the requirements under subparagraph (n) of evidence relating to Financial Requirements under Appendix FM-SE; this states that –
>
> *'the gross amount of any cash income may be counted where the person's bank statement show the net amount which relates to the gross amount shown on their payslips (or in the relevant specified provision in relation 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'.*
>
> Having raised this issue, the Home Office Presenting Officer was not however in a position to establish that this was a requirement applicable at the date of the Appellant's application and/or the ECO's decision. Further and in any event, in my judgment, considering the whole of the documentary evidence placed before me in the round, I am satisfied that the Sponsor earned in excess of the £18,600.00 gross minimum threshold – especially in view of the fact that the Appellant's Representative was able to provide a Schedule of Total Net Pay from both employments (on the basis of payslips covering the period December 2012 to May 2013 – i.e. a period of six months) amounting to £8,758.70. ..."

8. The First-tier Tribunal then allowed the appeal.

9. The Rule relied on by the Entry Clearance Officer is correctly cited (I think) as FM-SE A1.1.(n). This was added to the Rules by HC1138 on 6 April 2014. The wording of the new paragraph (n) is set out at paragraph 204 of HC1138 with the instruction that it is inserted after paragraph 1(m). It is plain from paragraph (b) under the heading "Implementation" of HC1138" that paragraphs 198 to 223

(which necessarily includes paragraph 204) shall apply to all applications decided on or after 6 April 2014".

10. Put simply Appendix FM-SE(1)(n) applies in this case.

11. When the First-tier Tribunal Judge gave permission to appeal she said:

> "Given that the sponsor was paid in cash at the material time and did not deposit his wages from the Bikash Tandoori Restaurant into his bank account in their entirety each week, it is arguable that the [claimant] was not able to meet the evidential requirements of Appendix FM-SE in relation to the submission of corroborating bank statements. However, at any future hearing the respondent must provide evidence to show that this requirement under Appendix FM-SE was in force at the date of the ECO's decision and if so, to provide evidence as to what transitional provisions might have applied and from when.

12. Before me Mr Parkinson was not able to comply with that direction. His researches had shown that the relevant Rule was in force at the time but he could not give me chapter and verse on the point.

13. Judicial harrumphing is more likely to be self-indulgent than helpful but I feel I must add my modest voice to the chorus of judges complaining about the complexity of the Immigration Rules. The Presenting Officer in the First-tier Tribunal and the Presenting Officer before me have each presented cases before me on many occasions and I regard them as experienced and conscientious but they could not say when the relevant rule came into force. The First-tier Tribunal Judge clearly did not feel able to address the point at all and although I have been able to resolve it, I have had the considerable benefit of a consolidated version of the Rules prepared painstakingly by the Legal Research Unit. Even so it has taken at least an hour of my time to check and explain the point. I understand that the Secretary of State has improved the Home Office website but if that is right the news has not broken through.

14. That said, it is now quite clear to me that the relevant requirement of the Rule was in force and the claimant failed to satisfy it.

15. Mr Mustafa made a spirited attempt to justify the First-tier Tribunal's decision.

16. He contended that there were in fact two decisions and the notice of appeal was only against the first decision made in September 2013. He had not settled the grounds of appeal. He does not seem to have made any point about this before the First-tier Tribunal and I do wonder if it had occurred to him when he first argued the case. Be that as it may, it is a point that does not assist the claimant. It is quite plain from the transitional provisions set out in HC1138 that sub-paragraph "n" was in force then the decision was made and so the claimant has to satisfy it.

17. I do not think there is anything in Mr Mustafa's point. As Mr Parkinson emphasised the Entry Clearance Officer never decided the financial issue and was conspicuously careful to make it plain that the point had not been decided in September 2013 and was decided later in September 2014. It is a little odd for the Entry Clearance Officer to decline to decide all the points that are necessary but the Entry Clearance Officer was operating in unusual circumstances and I know of no provision that says that all points must be decided or how it would be of any assistance to the claimant in this appeal if such a provision operated. The

fact is that the Rules in force and the House of Commons paper bringing it into force made it plain that it applied to decisions made after the particular date and this application was decided after the date.

18. Mr Mustafa also suggested that there was a legitimate expectation that the case would be decided in accordance with the Rules in force when the application was made. I appreciate he is taking every point that he feels he properly can on behalf of the claimant but this point is misconceived. The only legitimate expectation in immigration law is that the application will be decided in accordance with the law in force at the relevant time and that, absent special provisions, is not at the date of application but the date of decision.

19. Mr Mustafa referred me to guidance issued in April 2015 headed "Immigration Directorate Instruction Family Migration". At paragraph 3.4.2 it says that "decision makers are also able to grant an application despite minor evidential problems (but not where specified evidence is missing entirely)". It is not clear that this gives any power at all to a Tribunal Judge. Judges have no power to grant entry clearance applications. Mr Mustafa said there was a 7% deficiency in approved funds and this was a minor evidential problem. I do not agree. It is a failure to satisfy the Rules.

20. He then referred me to a document headed "Immigration Rules Appendix FM-SE D(d)(iii) which provides if the applicant has submitted "a document that does not contain all of the specified information that the missing information is verifiable from [other sources] the application may be granted exceptionally, ...".

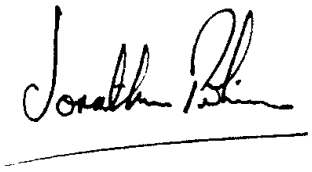
21. Again I read this as an enabling provision which means that the Entry Clearance Officer can make exceptional decisions without acting unlawfully. It is not a power given to the Tribunal. However, even if that is wrong, this is not something that would help this claimant. If Parliament had intended form P60 or other evidence of income from a tax document, for example, to be sufficient, then that is what Parliament would have said. Parliament has set out a procedure that must be followed where payment is made in cash and this claimant did not follow it. I see no basis for saying that the claimant satisfied the requirements of the Rules.

22. Mr Mustafa sensibly did not contend that the appeal ought to be allowed on human rights grounds. Such an argument had been misconceived and I appreciate his professionalism in not running a point that could not possibly bring the result his client wanted.

23. There are slightly concerning elements in this case. It does seem on the evidence that the claimant is in a genuine relationship with a husband who is trying extremely hard to provide for her properly in the United Kingdom. It may well be that he is earning sufficient money but he has not complied with the Rules. The First-tier Tribunal should not have said that he did.

Notice of Decision

I set aside the decision of the First-tier Tribunal and I substitute a decision dismissing the claimant's appeal against the Entry Clearance Officer's decision.

Signed
Jonathan Perkins
Judge of the Upper Tribunal  Dated 24 April 2015