



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/19730/2013

THE IMMIGRATION ACTS

Heard at Field House
On 11 February 2015

Determination Promulgated
On 3 March 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE MCWILLIAM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS NAJMIN BEGUM
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr P Nath, Home Office Presenting Officer
For the Respondent: Mr M Haque, Kalam Solicitors

DECISION AND REASONS

1. The respondent is a citizen of Bangladesh and her date of birth is 5 March 1991. I shall refer to the respondent as the appellant as she was before the First-tier Tribunal.
2. The appellant made an application in July 2013 for entry clearance as the partner of Mr Minaj Uddin, the sponsor. Her application was refused by the ECO Dhaka in a decision of 24 September 2013 on the basis that the appellant is unable to satisfy the substantive and evidential requirements of Appendix FM. The appellant has to provide specific evidence in accordance with FM-SE to establish that the sponsor

earns at least £18,600 per annum. The appellant's case is that the sponsor has two jobs. He is employed as a support worker for Susan Bush and his salary for the year ending April 2013 was £16,672. He is also employed by Boxmore Catering Limited on a part-time basis and from this employment he earns £50 per week which he receives in cash.

3. According to the ECO the sponsor submitted his P60 for 2012/2013 but the information contained therein did not correspond with the records held by HMRC. In addition the sponsor did not provide a letter from Boxmore Catering Services confirming his salary and other information required under the Rules. In addition the bank statements that he submitted with his application do not correspond with the sponsor's stated salary during the relevant period.
4. The appellant appealed against the decision of the ECO and her appeal was allowed by Judge of the First-tier Tribunal Metzger in a decision of 12 November 2014 following a hearing at Taylor House on 30 October 2014. Permission to appeal against the decision of Judge Metzger was granted to the Secretary of State by First-tier Tribunal Judge Robertson in a decision of 7 January 2015.

The Decision of the First-tier Tribunal

5. The Judge made the following findings:-

“14. I was impressed by the sponsor who I found to be a credible witness. I accept that the appellant and the sponsor are in a genuine and subsisting relationship. That is evidenced by the documentary evidence of their relationship as well as the fact that he visited her in 2014. I also accept that the appellant delayed making the application until the sponsor could meet the criteria in terms of the financial requirement.

15. In respect of the financial evidence, the P60s from the appellant, including from his second employment at Boxmore Catering demonstrate clearly that the sponsor has the relevant income for the relevant six month period prior to the application and in all the circumstances, I find the appellant has had no difficulty in establishing to the relevant standard that all of the requirements under Appendix FM are satisfied”.

The Grounds of Appeal

6. The grounds of appeal argue that the appellant was not able to satisfy the mandatory requirements of Appendix FM-SE. The bank statements that had been submitted did not show payments from Boxmore Catering Limited going into the account and the income from Susan Bush was not sufficient to meet the requirement of the Rules. All money received from employment must be paid directly into the bank and this is a mandatory requirement.

7. I heard oral submissions from both parties. It was very disappointing that neither party seemed to have an adequate understanding of what evidence was before the ECO or the FtT. In any event Mr Nath's submissions were in the context of the grounds of appeal and Mr Haque's submissions were made in the context of a skeleton argument submitted with the covering letter from the solicitors of 29 January 2015.

The Relevant Rules

8. The relevant parts of Appendix FM-SE read as follows

"Evidence of Financial Requirements under Appendix FM

A1. ...

- (m) Cash income on which the correct tax has been paid may be counted as income under this Appendix, subject to the relevant evidential requirements of this Appendix."

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

(a) [Pay slips] covering:

- (i) a period of six months prior to the date of application if the (person) has been employed by their current employer for at least six months (and where paragraph 13(b) of this Appendix does not apply); or
- (ii) any period of salaried employment in the period of twelve months prior to the date of application if the [person] has been employed by their current employer for less than six months (or at least six 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 [pay slips] 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.

...

Family Members - Specified Evidence

...

- 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 date of application where sub-paragraph (b) or (e) applies.
- (b) If the applicant:
- (i) Has submitted:
 - (aa) a sequence of bank statements 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 letter-headed 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."

Error of Law

9. The appellant could not meet the requirement of the rules for a number of reasons. The most obvious reason is that the bank statements produced by the appellant did not show his salary from Boxmore Catering Limited going into his account. He submitted payslips and his evidence is that he is paid in cash. He referred to cash deposits into the account which reflected this income, but it was conceded by Mr Haque at the hearing before me that the deposits do not reflect the information on the payslips. Thus for this reason only the appellant cannot meet the requirement of the rules. In addition there was a letter from Boxmore Catering Limited before the FtT but it does not comply with the requirement of the rules. It does not appear that the appellant has ever produced a letter in relation to Susan Bush which satisfies the requirements of the rules. There was additional evidence before the FtT which was not before the ECO (wage slips from Boxmore Catering Limited and bank statement which showed some deposits corresponding to the payslips in relation to Susan Bush). The application had been improved upon but still fell short of meeting the requirement of the rules.
10. The Judge made a material error of law. It was not open to him to allow the appeal under the Rules. I set aside the decision to allow the appeal under the Rules. I remake the decision and dismiss the appeal under the Rules.
11. Mr Haque in submissions advanced an argument that was not before the First-tier Tribunal. He drew my attention to Appendix FM-SE A1 (m) (above). This does not assist the appellant because she is not able to meet the relevant evidential requirement of the rules for the reasons identified.
12. Mr Haque also relied on evidential flexibility contained in Appendix FM-SE at D. However he was not able to explain to me how this could assist the appellant. It was not explained to me how the appellant could have rectified the problem in relation to his employment with Boxmore Catering Limited. In addition there were other reasons why the application failed to meet the rules and therefore the application would have been refused for other reasons even if the appellant had been able to rectify the problem in relation to Boxmore Catering Limited.
13. Finally Mr Haque submitted that the Secretary of State should have invoked discretion under Appendix FM-SE. However, the request had been made with the application by the appellant for the decision maker to invoke any discretion (**Sultana and Others** (rules: waiver/further inquiry; discretion) [2014] UKUT 00540).
14. The sponsor was found by the FtT to be a credible witness and the relationship was found to be genuine and subsisting. These findings were not challenged by the secretary of state. The appellant is not able to meet the requirements of the Immigration Rules and for this reason her appeal must be dismissed under the rules.

15. Article 8 was not raised by Mr Haque; however, it was raised in the original grounds of appeal. It does not appear that it was expanded upon before the FtT or UT and as such it would be appropriate for me to consider that the ground has been abandoned. Nevertheless in the hope of bringing finality to these proceedings I will go onto to consider Article 8. There is family life between the appellant and the sponsor. In my view the issue is one of proportionality and I must consider the circumstances at the date of the decision. There is no witness statement from the appellant and the evidence of the sponsor, contained in his witness statement of 23 October 2014, is that he and his wife are distressed and anxious as a result of the refusal for entry clearance. The evidence in relation to Article 8 is lacking. I understand that this decision will cause the appellant and the sponsor more anxiety and uncertainty and this is unfortunate. However, the appellant submitted an application, through her solicitors, that did not meet the requirement of the rules and it was decided to appeal against this decision, when the requirements of the rules could still not be satisfied, instead of submitting another application. It may be that the appellant has been poorly advised. A state does not have a general obligation to respect an immigrant's choice of country of residence. I must consider Article 8 through the prism of section 117B of the 2002 Act. The decision is in the public interest. There was no evidence before me that that sponsor could not relocate to Pakistan. The interference with the appellant's private life is justified
16. I remake the decision and dismiss the appeal under the Rules and under Article 8 of the 1950 Convention on Human Rights.
17. No anonymity direction is made.

Signed

Joanna McWilliam

Date 2 March 2015

Deputy Upper Tribunal Judge McWilliam

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed

Joanna McWilliam

Date 2 March 2015

Deputy Upper Tribunal Judge McWilliam