IAC-AH-CJ-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/19927/2013

THE IMMIGRATION ACTS

Heard at Centre City Tower, Birmingham
On 23rd October 2015

Decision & Reasons Promulgated
On 4th November 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MD ABDUR MOHON
(ANONYMITY ORDER NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER - DHAKA

Respondent

Representation:
For the Appellant: Mr M Hasan (LR)
For the Respondent: Mr D Mills (Senior HOPO)

DECISION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge Widdup, promulgated on 14th November 2014, following a hearing at Hatton Cross on 3rd November 2014. In the determination, the judge dismissed the appeal of Md Abdur Mohon. The Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

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The Appellant

2. The Appellant is a male, a citizen of Bangladesh, who was born on 5th January 1982. He appeals against the decision of the Respondent Entry Clearance Officer dated 26th September 2013, refusing his application to join his wife, Mrs Lutfa Begum, whom he married in Bangladesh on 12th April 2012, and who is a British citizen, the refusal being on the basis that the marriage was not genuine and subsisting and that Mrs Begum could not show that she earned at least £18,600 per annum as required by the Immigration Rules.

The Appellant's Claim

3. The Appellant's claim is that his wife, Mrs Lutfa Begum, earned the requisite amount because she worked at the Sonali Supermarket and provided her pay slips.

The Judge's Findings

4. The judge took the view that the Appellant and the Sponsor were genuinely married in a subsisting relationship, on a balance of probabilities, (see paragraph 39), but there was an issue about the Appellant being able to satisfy the financial requirement test, because of the manner in which his sponsoring wife had been working in the UK.

5. The Appellant's wife was not being provided with holiday pay, and the judge held that, "I find the employer is, or may be, acting unlawfully so far as this employment is concerned" (see paragraph 26) given that the Sponsor's evidence was that she worked several days each month on an overtime basis but did not get paid for it.

6. The judge went on to hold that,

> "The best evidence of the annual wage is, I find, to be found in the P60 for the year ending April 5th 2014. That shows that in 2013/14 the Sponsor earned £17,280. The P60 for the previous year was also disclosed. This showed gross earnings of £4,680 …" (see paragraph 30).

7. The judge went on to hold that, although the submissions made on behalf of the Appellant was that the judge should "assess the Sponsor's earnings for the previous six months and then gross them up to arrive at an annualised figure" (paragraph 32), the judge's view was that there had been created ,

> "….an artificial figure for annual income in that it disregards the realities of the Sponsor's gross earnings. In contrast the 2014 P60 figure shows earnings which appear to take account of holiday. Putting it another way, the Appellant earned £17,280 for all 52 weeks during which time she had four weeks' holiday in order to visit Bangladesh" (paragraph 33).

8. The judge reasoned that given that the Appellant's wife, Mrs Lutfa Begum, had gone to Bangladesh for a four week period during that year of 52 weeks in 2014, the failure of the employer to pay her holiday wages, meant that she could not show that she

was earning the requisite £18,600, but could only show that she was earning £17,280 over the 52 weeks.

9. The appeal was dismissed on the basis that the financial test could not be satisfied.

Grounds of Application

10. The grounds of application state that the judge materially misdirected himself in law in that he took Mrs Begum's period of gross income from 1st March to 13th April 2014, when the requirement of Appendix FM-SE is that the level of income shown in the pay slips that had to be submitted was for a period of six months prior to the date of the application. During those six months, the Sponsor had not been to Bangladesh. She had not taken unpaid leave of four months. She could show that that figure earned during that six month period, if multiplied in the appropriate manner, could lead to the £18,600 threshold being crossed.

11. Permission to appeal was granted on 21st May 2014 on the basis that this was arguable and that it was also arguable that it was open to the employer and employee to agree a level of income that was just in excess of the requisite £18,600, and this does not in itself mean that the employment or payments are contrived.

Submissions

12. At the hearing before me on 23rd October 2015, Mr Hasan submitted that the judge ought to have taken the six month period of earnings into account. He submitted that no issue was taken in the refusal letter with the bank statement, or with the wage slips, or with any other evidence that related to the six month period. It was wrong for the judge to simply look at the P60, which after all related to a full year's annual salary, and to deduce from that that the Appellant was only earning £17,280, and not the requisite £18,600. This was wrong as a matter of law because Appendix FM-SE only required a six months' period to be taken into account. After all, the judge accepted that the Sponsor was genuinely employed.

13. For his part, Mr Mills submitted that this was not the reason why the judge had dismissed the appeal because he had other concerns about the terms of the employment because he held that, "this employment, while genuine in the sense that the Sponsor does work at Sonali, is contrived so that her annual income appears to exceed the minimum income threshold" (paragraph 35).

14. In reply, Mr Hasan submitted that the judge may well have been entirely sympathetic to the plight of the sponsoring wife having to work long hours only so as to be able to show that she earned £18,600, but if a criticism was to be made of unlawful employment, it was a criticism to be made of the employer, and not the employee working in that capacity, because she had, after all, to work in order to show that she earned the requisite £18,600, in order to be able to sponsor her husband from Bangladesh. This was why the judge granted permission and said that it was open for the parties to reach an arrangement to enable a sponsoring wife or

spouse to demonstrate that, in a genuine employment, she was indeed earning the requisite amount needed for the Immigration Rules.

Error of Law

15. I am satisfied that the making of the decision by the judge did involve 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. Plainly, the judge was wrong to have regard to the twelve month period for the purposes of the Rules at Appendix FM-SE. The judge in terms states that, "the best evidence of the annual wage is, I find, to be found in the P60 for the year ending April 5th 2014" (paragraph 30).

16. In point of fact, as Mr Hasan pointed out, Appendix FM does not require submission of a P60, which plainly relates to a year's earnings. That must be for good reason. What is required, is evidence of six months' earnings prior to the date of the application.

17. During this six month period, the Appellant was able to show, on the basis of wage slips, (and if necessary on the basis of HMRC records) that his sponsoring wife did earn an amount, six months prior to the date of the application, which when grossed up would lead to an annualised figure of £18,600.

Remaking the Decision

18. I have remade the decision on the basis of the findings of the Immigration Judge, the evidence before him, and the submissions that I have heard today. For the reasons I have already given above, I am allowing this appeal. The Appellant took a four weeks' unpaid holiday during the twelve month period prior to the date of the application, but did not do so during the six month period prior to the date of the application, which if properly considered, showed that her earnings did reach the requisite threshold as stipulated by Appendix FM-SE, and recourse to the P60 was unnecessary in circumstances where other evidence was plainly telling.

19. It is entirely irrelevant to say that the employment "is contrived so that her annual income appears to exceed the minimum income threshold" (paragraph 35) because in the nature of things, people during a lifetime of working, may work less or more depending on their needs and circumstances (such as to buy a house or a car) and if for the purposes of showing an income threshold of £18,600 having been reached, a sponsoring spouse in the UK can show a period of genuine employment for a six months' duration prior to the date of the application, then that meets with the requirements of the Immigration Rules. There is nothing further to be said.

20. Insofar as there is illegality, which has not been proven on the facts of this case, that is a matter between the state authorities and the employer himself. Its consequences are not to be visited upon a sponsoring spouse, such as in the circumstances of this case. For all these reasons, this appeal succeeds.

Notice of Decision

21. 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 allowed.

22. No anonymity order is made.

Signed | Date
Deputy Upper Tribunal Judge Juss | 2nd November 2015