IAC-TH-CP-V2

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/21397/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 26 February 2015	**On 25 March 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE APPLEYARD

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS PATHMINI PATHMANATHAN
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:
For the Appellant: Miss. Petterson, Home Office Presenting Officer.
For the Respondent: Mr. R. Solomon, Counsel.

DECISION AND REASONS

1. No application has been made previously for an anonymity order in these proceedings and there is no reason why such an order should now be made.

2. The appellant in this case is the Secretary of State for the Home Department. However, for the sake of clarity I shall use the titles by which the parties were known before the First-tier Tribunal, with the Secretary of State referred to as "the respondent" and Mrs Pathmanathan as "the appellant".

3. The appellant was born on 30 November 1983 is a citizen of Sri Lanka. She appealed against a decision of the respondent dated 28 October 2013 to refuse her application for entry clearance as a partner under the provisions of Appendix FM of the Immigration Rules. In giving reasons for his decision the Entry Clearance Officer drew attention to a perceived lack of documentation demonstrating contact between the appellant and her husband and reached the conclusion that he was not satisfied that she and her husband were in a genuine and subsisting relationship. The Entry Clearance Officer therefore refused the appellant's application by reference to paragraph EC-P.1.1(d) of Appendix FM of the Immigration Rules HC 395 (as amended). The respondent went on to consider the appellant's position in relation to the financial requirements of Appendix FM and noted that the sponsor had a full-time job with Silk Motor Fuels and a part-time job with VSR Services. The ECO noted that one payment of salary from Silk Motor Fuels during the relevant period was not evidenced in the sponsor's bank account and that there was no evidence of receipt of salary from VSR Services in the bank statements. The ECO therefore considered that he was unable to take into account the sponsor's second salary toward the income threshold. Nevertheless he made no final determination in that regard pending the Secretary of State's appeal in relation to a legal challenge to the income threshold requirement.

4. The appellant lodged notice of appeal supported by a considerable amount of documentary evidence. There was firstly a substantial volume of evidence with regard to the contact between the parties. As to the financial requirement it was argued that the respondent had failed to consider all the documents that had been submitted and that the sponsor did in fact meet the requirements of the gross income threshold of £18,600.

5. The Entry Clearance Manager reviewed the application in light of the new material. Having regard to the evidence of contact he confirmed that he was prepared to accept that the appellant and her UK sponsor did enter into a genuine marriage and that their relationship was subsisting. As to the financial requirements he confirmed that he had verified that the payment for June 2013 from Silk Motor Fuels had been credited to the sponsor's bank account. Nevertheless he was still not prepared to take into account the earnings from VSR Services because there was an apparent discrepancy between the earnings mentioned in the P60 and none of the payslips prior to May 2013 were reflected in the sponsor's bank statements.

6. The appellant's appeal was heard at Hatton Cross on 23 October 2014 and in a decision promulgated on 7 November 2014 Judge of the First-tier Tribunal Blandy allowed the appellant's appeal under the Immigration Rules.

7. The respondent sought permission to appeal and this was granted by Designated Judge of the First-tier Tribunal Garratt in a decision on 5 January 2015. His reasons for so doing were:

> "1. The respondent applies in time to appeal against the determination of Judge of the First-tier Tribunal Blandy in which he allowed the appeal against the decision

of the respondent to refuse entry clearance as a partner in accordance with the provisions of Appendices FM and FM-SE of the Immigration Rules.

2. The grounds contend that the judge was wrong to conclude that the respondent should have exercised discretion when the specific requirements of Appendix FM and Appendix FM-SE in relation to income for the appellant and sponsor had not been complied with. In particular the appellant had failed to provide payslips covering the six month period required and, in relation to second employment, no bank statements showed income from that source as required by Appendix FM-SE.

3. The grounds are arguable. In circumstances where the appellant and sponsor had failed to meet the specific requirements of the Rules it is arguable that the judge was wrong to allow the appeal despite that failure.

4. Permission is granted."

8. Thus the appeal came before me today.

9. Miss Petterson, in making her submissions, relied on the grounds submitted to the Tribunal. She firstly contended that the Immigration Rules relating to specified evidence are comprehensively set out in Appendix FM and Appendix FM-SE to the Immigration Rules. In dealing with this appeal the judge has wrongly ignored the requirements in coming to the findings that he did. The appellant had failed to provide payslips covering the entire six month period as required under Appendix FM–SE in relation to his second part-time job, with payslips missing. Further prior to May 2013 nothing had been paid into the sponsor's account from this second part-time employment and therefore as six months of income at least could not be shown the appellant could not seek to rely on this employment when attempting to demonstrate the financial requirements were met. For this employment to have been taken into account it had to be demonstrated that it had been ongoing for at least six months and as he had failed to do so it meant that no income from the second part-time job could be taken into account for the purposes of the financial requirements calculation.

10. Where a sponsor is paid in cash for the gross income to be taken into account all of the monies received from employment must be paid directly into the bank. This is a mandatory requirement. Where only part of the money is deposited then only the net amount deposited can be counted when calculating the income for the purposes of meeting the financial requirements. The respondent asserts that the judge failed to properly explore this and that there was a lack of specified evidence submitted to substantiate the claimed income based on the operating principles of Appendix FM-SE. This is an appellant who cannot meet the requirements of Appendix FM-SE for the six month period prior to the date of application. It is a mandatory requirement and therefore the appeal should have been dismissed under the Immigration Rules.

11. Mr Solomon argued that the judge had not erred as asserted by the respondent. The decision date is 28 October 2013 and it was incumbent upon the judge to apply the Immigration Rules as they stood at the date of that decision. In seeking permission

to appeal the respondent has relied on an Immigration Rule that was not inserted until 6 April 2014. The appeal should have been allowed.

12. I likewise find that the judge has not erred in coming to the conclusions that he did. They are cogent and reasoned. He found that the average gross monthly salary from Silk Motor Fuels for the six month period prior to the submission of the application was £1,302.48 resulting in an annual gross income from that company of twelve times that figure, making a total of £15,629.76. The judge acknowledged that that fell short of the requirement of £18,600 and so turned to the issue of the earnings from VSR Services. The judge found that the appellant submitted a document that did not contain all of the specified information, namely the sponsor's bank statements which did not contain corroboration of his earnings from VSR Services for the month of January 2013 to May 2013 inclusive. However that missing information was verifiable from other documents submitted with the application which the judge found to be genuine. The judge also took into account the fact that some of the payments were made in cash and ultimately concluded at paragraph 18 of his decision that this was a case in which the respondent should have exercised discretion in favour of the appellant. It was clear that the great majority of the income requirement of the sponsor was properly documented but only a relatively small proportion of the income required did not have all the proper documentation. It is plain that the more onerous demands of the Immigration Rules were not inserted until 6 April 2014 and therefore contrary to the respondent's arguments did not bite on the individual facts of this appeal. In applying the Immigration Rules as at the date of decision the judge has correctly come to conclusions that were open to be made on the totality of the evidence and allowing the appeal under the Immigration Rules.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

I do not set aside the decision.

The appeal is allowed.

No anonymity direction is made.

Signed Date 25 March 2015

Deputy Upper Tribunal Judge Appleyard