Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/22210/2013

THE IMMIGRATION ACTS

Heard at Phoenix House	**Decision and Reasons Promulgated**
On 12 May 2015	**On 8 June 2015**

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL CHANA

Between

MR QAMAR FAROOQ ALI
(no anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr C Harris of Counsel
For the respondent: Mr M Diwnycz, Senior Presenting Officer

DETERMINATION AND REASONS

1. The appellant is the Secretary of State for the Home Department and the respondent is a national of Pakistan born on 3 March 1989. I shall however for the sake of convenience, refer to the Secretary of State as the appellant and Mr Ali as the appellant which are the designations that the parties had in the First-tier Tribunal.

2. The appellant appeals to the Upper Tribunal against the determination of the First-tier Tribunal Judge Ince dated 28 January 2015 allowing the appellant's appeal

pursuant to paragraph ECP 1.1 (d) of Appendix FM of the Immigration Rules. (E - ECP 2.6 and 2.10)

3. Permission to appeal was granted by the First-Tier Judge M Robinson dated 11 March 2015 stating that it was arguable that the Judge failed to give adequate reasons for finding that the appellant met the specified document requirements of Appendix FM at paragraph 7 (a) (i).

First-tier Tribunal's findings

4. The First-tier Tribunal made the following findings in his determination which I summarise.

   i. Paragraph 30 "I was satisfied that the sponsor told me the truth when she appeared before me. She gave her evidence in a straightforward manner, was not evasive or inventive, being quite prepared to admit to not knowing an answer to a particular question. Her evidence was consistent with what the appellant had stated and backed up by unchallenged documentation. She was not shaken in cross-examination and appeared to be totally at ease with her testimony. In addition, she volunteered potentially damaging information, such as conforming that accountant had not seen or read her books which I doubt she would have done if she was trying to hide something".

   ii. Paragraph 32 "I will be allowing the appeal on the basis that I consider that is nothing other than the genuine marriage, that the marriage is subsisting and that each of the couple has the intention to live permanently with each other. I therefore allow the appeal under paragraph EC-P. 1.1 (d) with reference to paragraph E ECP. 2.6 and 2.10"

   iii. Paragraph 41 "in relation to the financial aspect of the matter, I accept that the sponsor is self-employed as she states, that she earns the money she says she earns and that such is more than sufficient to maintain a couple and their daughter in accordance with the rules. I see no reason not to accept that, as she runs an exclusively cash business, she does not bank all her takings but keeps some cash for business and personal expenditure. This would make sense and it is not out of the ordinary for cash businesses. It therefore follows that there is a reasonable explanation for the bank statements not tallying with the stated takings. I take account of Mr Sobowale's submissions but agree with Mr Hotes's submissions about relying upon the figures disclosed to HMRC-I doubt that many people would deliberately overstate their income to achieve the advantage that Mr Sobowale suggests, especially as nobody likes paying more tax than they should. I see no reason, therefore, not to place reliance upon the tax returns as an accurate quantification of her income. I allow the appeal under paragraph E ECP. 3. 3".

The grounds of appeal

5. The grounds of appeal state the following which I summarise. The Judge has assumed the role of primary decision maker in relation to the income threshold point. He states that all specified documents have been submitted however this is far from clear from the determination because it is unclear whether the sponsor is self-employed, or whether she operates a business as a company. The sponsor's business or self-employment commenced on 1 August 2012, which was only three months

prior to the date of decision. Therefore the required full tax year of evidence could not be assessed, this evidence is required by appendix FM 7(a)(i). Furthermore the appellant asserts that the sponsor tax year ends on 31 July each year. If this is the case she must be running a company, rather than being self-employed. In which case her CT 600 form (company tax return) should have been submitted. The end of the tax year for those who are self-employed is 5 April. The Judge has not adequately resolve this issue and has not given adequate reasons for his findings.

6. At the hearing it was accepted by the Senior Presenting Officer that the respondent does not wish to pursue her appeal in relation to the fraud aspect of the case. I will therefore not set out the grounds of appeal in relation to this ground.

The hearing

7. The Senior Presenting Officer stated that he relies on his grounds of appeal other than that of fraud and said that only three months finances were available and there is no evidential flexibility in such an appeal.

8. Mr Harris submitted that at page 57 of the bundle of the appellant's documents, contains all the evidence that the Judge took into account in reaching his decision. These are the HMRC documents where the sponsors stated income is £23,668+ £16,446 for two years and therefore averages to £20,057 which is over the income threshold. The appellant's child is a British citizen and therefore the relevant threshold is £18,000 as British citizen children do not have to be considered for financial requirements.

Decision on the error of law

9. The respondent withdrew the grounds of appeal in respect of fraud and therefore I will not consider this ground of appeal. I like the permission Judge do not find that the Judge misdirected himself as to the law and facts for the reasons he set out at paragraph 33-36. He also set out the reasons why he accepted the evidence for reasons set out in paragraph 37-40 of the determination.

10. The only issue in the appeal therefore is whether the First-Tier Tribunal Judge materially erred when he found that the appellant had satisfied the requirements of s7 of Appendix FM- SE for entry clearance to the United Kingdom as the spouse of a British citizen.

11. The Judge in a very careful determination analysed the evidence and found that the appellant does meet the requirement. He referred to the sponsor's cogent evidence to demonstrate that she has the relevant level of earnings to sponsor the appellant.

12. The appellant sponsor stated that she has been self employed as a tailor since 1 August 2012. The appellant made her application on 23 August 2013 which is more than one year after she started her tailoring business. The respondent's refusal letter states that the decision was made on 22 November 2012. Senior presenting officer accepted that there was a typographical error in the ECO's letter and refusal was on

"23 April 2013." Therefore there is obviously a mistake when the respondent states in her grounds of appeal that "the sponsor's business or self-employment commenced on 1 August 2012, which was only three months prior to the date of decision on 22 November 2012." It is clear from the evidence that the appellant made an application more than one year after she started her business. At the hearing Mr Harris explained that the appellant waited for a full year after she started her business before she made her application to enable her to meet the requirements of the Immigration Rules.

13. The evidence of earnings before the Judge was from 1 August 2012-23 August 2013. The relevant tax year taken into account therefore was April 2013 /2014. In that event that would only leave five months and this is covered by the previous tax year and taking the average of the two years income was taken into account by the Judge. I accept Mr Harris's submissions that Appendix FM 13 (e) states that for self-employment the total gross of income should be taken as the average of the last two years. He took into account the sponsors bank statements, tax return, tax due and the Inland Revenue reference number together with the sponsor's accountant's letter and interim accounts.

14. The sponsor's accounts dated 24 December 2013 included her accounts for the period 1 August 2012 to 31 March 2013 showed her net earnings of £16,446. The Judge considered that the accounts for the full year of trading from 1 August 2012 to 31 July 2013 showed taxable income of £24,516 which was evidenced by a 2013 tax return document. The Judge further took into account further documents such as, a statement of account of tax due and paid dated 24 September 2014, a letter dated 11 August 2014 from the sponsor's former accountants, a letter dated 22 September 2014 from her current accountants which confirm that the net income for the period 1 April 2013 to 31 March 2014 was £23 668.

15. The Judge found that the appellant is required to demonstrate that the sponsor earns £22,400 such as to include £3800 for the first child on top of the £18,600 and that both the first full trading year produced earnings of £24,516 and the full tax year figure of £23,668 exceeds this amount although I accept Mr Harris's submissions £3800 should not have been taken into account because the child is a British citizen. This would place the appellant sponsor's income well above that required.

16. It is clear from the determination that the Judge found that the appellant started her business on 1 August 2012. He found that she has earned in the last two tax years, from her business more than £18,600 as required for the maintenance requirement of the Immigration Rules. These are sustainable findings on the evidence.

17. The Judge placed reliance on the figures disclosed by the sponsor to the HMRC and stated that nobody likes paying more tax than they should and therefore the figures stated are true. The Judge found the appellant credible and therefore placed reliance upon the sponsor's tax returns as an accurate quantification of the appellant sponsor's income which he found to be proved. He did not accept the Home Office presenting Officer's speculation that the sponsor has deliberately inflated her income

and was prepared to pay the extra income tax, to gain the advantage of sponsoring her husband. The Judge was so entitled to so find.

18. The Judge at paragraph 41 found that the sponsor runs a cash business and does not bank all her takings but keeps up cash for business and personal expenditure. He found this to be reasonable explanation for why the statements do not tally with the stated takings and this cannot be considered as a perverse conclusion on the evidence.

19. I find that a material error of law has not been established in the determination. In the circumstances the respondent's appeal must fail.

DECISION

The Secretary of State's appeal is dismissed

Dated this 5th day of June 2015

Signed by

Ms S Chana
A Deputy Judge of the Upper Tribunal