Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/01623/2015

THE IMMIGRATION ACTS

Heard at : Field House	**Decision & Reasons Promulgated**
On : 21 July 2016	**On: 25 July 2016**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS NASRIN
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr T Melvin, Senior Home Office Presenting Officer
For the Respondent: Mr M Aslam instructed by Malik Law Chambers Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department (SSHD). However, for the purposes of this decision, I shall refer to the SSHD as the respondent and Mrs Nasrin as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

2. The appellant is a citizen of Pakistan, born on 1 April 1961. She applied for entry clearance to the United Kingdom as a partner under paragraph EC-P.1.1

of Appendix FM of the immigration rules. Her application was refused on 18 December 2014 on the grounds that she could not meet the financial requirements in paragraph E-ECP.3.3 since she had not provided the specified evidence required under Appendix FM-SE of the immigration rules to demonstrate that her sponsor's gross annual income met the level required under the rules.

3. There were three main bases upon which the respondent reached that conclusion: firstly that the wage slips produced for the sponsor for his employment at Thai Express Restaurant Ltd did not cover the six month period prior to the application as required and that the most recent salary slip for August 2014 was a photocopy rather than an original; secondly that the letter from the sponsor's employer did not contain all the specified information and was dated more than 28 days before the application; and thirdly that the wage slips produced for the sponsor's employment were not reflected in the bank statements submitted. The respondent was accordingly not satisfied that the sponsor was employed as claimed. The respondent did not consider that the decision was in breach of the appellant's Article 8 rights.

4. The appellant lodged an appeal against that decision. Her appeal came before the First-tier Tribunal on 22 October 2015 and was allowed by Judge A W Khan in a decision promulgated on 13 November 2015. The judge heard from the sponsor. He found that the appellant had not complied with the strict evidential requirements as set out under Appendix FM-SE but he noted that the requirements had been met post-decision at the appeal hearing in relation to the original August 2014 wage slip and the employer's letter and that the sponsor's annual gross income exceeded the threshold under the rules. The judge relied upon the evidential flexibility requirements in Appendix FM-SE D and considered that the respondent could easily have contacted the appellant to request further information or documents under Appendix FM-SE D(f). He considered that evidential flexibility could and should have been exercised in the appellant's favour and he allowed the appeal under the immigration rules.

5. Permission to appeal to the Upper Tribunal was sought by the respondent on the basis that the judge had erred by going on to exercise discretion and apply some form of evidential flexibility to post application evidence which he was not entitled to do.

6. Permission to appeal was granted on 25 May 2016.

Appeal hearing and submissions

7. At the hearing Mr Melvin relied on the grounds of appeal.

8. Mr Aslam relied on Appendix FM-SE D(f) in submitting that the respondent ought, under the evidential flexibility provisions, to have requested the correct version of the documents from the appellant. Under Appendix FM-SE D(b)(1)(aa) and (cc) the respondent ought to have requested from the appellant the original August 2014 payslip which was the only one missing. There was no

requirement in the immigration rules for the employer's letter to be dated within 28 days of the application and, with regard to the two points upon which it was accepted that the letter was deficient, the relevant specified information was verifiable from the other documentary evidence, for the purposes of Appendix FM-SE D(d)(iii)(1). With regard to the third basis of refusal, the sponsor's income was not all reflected in his bank statements because he was paid in cash and only paid part of his earnings into his account. Mr Aslam submitted that Appendix FM-SE A1.1(m) allowed for cash income to be counted as income under Appendix FM-SE and Appendix FM-SE 2(c) did not require that all the salary be paid into the bank. It was sufficient for the appellant to demonstrate only some of the money going into a bank account. Finally, Mr Aslam relied on the decision in Ukus (discretion: when reviewable) Nigeria [2012] UKUT 307 in submitting that it was open to the judge to exercise discretion and allow the appeal outright under the immigration rules.

Consideration and findings

Error of Law

9. As I advised the parties, the judge had, in my view, clearly erred in law in his decision under the immigration rules and in relation to the evidential flexibility provisions. He had plainly treated the requirements of Appendix FM-SE as little more than a technicality and had in effect considered the fact that the appellant was able to meet the substantive financial requirements in Appendix FM as sufficient to justify the conclusion he reached.

10. There was no dispute that the appellant could not meet the evidential requirements of the immigration rules under Appendix FM-SE on the three bases relied upon by the respondent and that was accepted by the judge at [8] and [9] of his decision. As the respondent's grounds assert, that ought to have been the end of the matter as far as the decision under the immigration rules was concerned and the appeal ought to have been dismissed on that basis. The judge was not entitled to allow the appeal on the basis of a discretion under the evidential flexibility provisions. Any discretion to be exercised in that regard was the respondent's. If the judge concluded that the evidential flexibility provisions ought to have been, but had not been, exercised properly by the respondent, the only outcome for the appeal in such circumstances was to allow the appeal to the extent that respondent's decision was not in accordance with the law and to remit the matter to the respondent. It was not open to the judge to allow the appeal outright on that basis.

11. In any event the judge was wrong to find that the evidential flexibility provisions in Appendix FM-SE D assisted the appellant in this case. Whilst the provisions may have applied if there had been only one of the various problems with the evidence, such as the missing original payslip, the fact was that there were several other bases upon which the evidence did not meet the requirements of the rules, including the defective employer's letter and the sponsor's income not being reflected in his bank statements. Accordingly, Appendix FM-SE D(c) applied, so that the respondent was not expected to

request the relevant documents from the appellant to rectify the various omissions.

12. Furthermore, with regard to the latter defect, namely the fact that the sponsor's salary slips were not reflected in the bank statements, that was not a matter falling under the evidential flexibility provisions. I do not accept Mr Aslam's submission that the rules did not require that all of the salary be paid into the bank account. On the contrary, it is clear that that was precisely what was required under Appendix FM-SE 2(c). The appellant simply could not meet the requirements of the immigration rules in that regard and it was not a defect that could have been rectified by further enquiries or requests for further documentation by the respondent. Neither was the respondent expected to consider that further evidence was available to rectify the defect.

13. Accordingly, the judge erred in law, not only by allowing the appeal outright under the immigration rules by exercising discretion himself under the evidential flexibility provisions in Appendix FM-SE D, but also by finding that the evidential flexibility provisions applied in the appellant's circumstances. Since the appellant could not meet the requirements of the immigration rules in Appendix FM-SE, and since there had been no error on the respondent's part in relation to the evidential flexibility provisions, the appellant's appeal ought to have been dismissed. I therefore set aside the judge's decision.

Re-making the Decision

14. Having set aside the appellant's appeal on that basis I turned to the grounds of appeal in relation to Article 8 which Judge Khan had not considered, clearly because he had otherwise allowed the appeal under the immigration rules.

15. Mr Aslam made submissions in regard to Article 8 and relied upon the evidence which was before Judge Khan and which included statements from the appellant's husband, the sponsor, and their two children, all of whom were British citizens and resided together in the UK. He submitted that although the sponsor had lived in the UK for 25 years his marriage to the appellant had subsisted for many years and they had two children together who had been living in the UK for the past ten years. It was not possible for the appellant to make a fresh application for entry clearance at the moment, because the sponsor had changed his employment and was now self-employed as a taxi driver. It would take at least a year for him to accumulate the necessary evidence of tax returns and earnings for the purposes of the immigration rules. The sponsor could not afford to keep traveling to Pakistan to be with the appellant. The respondent's decision was in breach of the appellant's human rights.

16. Mr Melvin submitted that the decision simply maintained the status quo and family life would continue as previously. There were no exceptional circumstances.

17. I advised the parties that I would dismiss the appeal on Article 8 grounds. My reasons are as follows.

18. The appellant, at the time of the respondent's decision, could not meet the requirements of the immigration rules. She therefore has to show that there was something compelling about her circumstances to justify a grant of entry clearance outside the rules. However I do not consider that she has been able to do so. Whilst she and the sponsor had been married for over 26 years at the date of the decision, since 1988, the sponsor had been living in the UK for 24 of those years, having left the appellant behind in Pakistan after only two years of marriage. Their children, born in 1990 and 1995, and at the time of the decision adults of 24 and 19 years of age, also remained in the UK without the appellant from 2006. As adults who had lived apart from their mother for almost a decade, it cannot be said that family life still existed between them, but even if it did it was the choice of the appellant and sponsor to conduct their family life in the manner that they did. Whilst I accept that family life existed between the appellant and the sponsor and Article 8 was thus engaged, there was clearly nothing disproportionate about the respondent's decision to refuse entry clearance. The weight of the public interest is not in the appellant's favour.

19. There was no evidence before the ECO, and neither is there any evidence before me, to show that the sponsor's and appellant's circumstances were, or are, such as to justify a departure from the requirement that the sponsor be able to support the appellant financially to the level required under the rules. No satisfactory reason has been given as to why the appellant could not simply have made a fresh application with the specified evidence after the refusal of her application, or why she cannot now do so once the sponsor is settled in his self-employment and producing sufficient income to support them.

20. Accordingly I find that the appellant has failed to show that the respondent's decision was in any way disproportionate or that it amounted to a breach of her right to respect for her family life under Article 8 of the ECHR. In re-making the decision, I therefore dismiss the appeal on human rights grounds as well as under the immigration rules.

DECISION

21. The making of the decision by the First-tier Tribunal involved the making of an error on a point of law. The decision has been set aside and the SSHD's appeal is allowed. I re-make the decision and substitute a decision dismissing Mrs Nasrin's appeal on all grounds.

Signed

Upper Tribunal Judge Kebede
25 July 2016