Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/09359/2015**

THE IMMIGRATION ACTS

Heard at Field House
On 14 November 2017

Decision & Reasons Promulgated
On 15 December 2017

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

HINA RAHIB
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr T Wilding, a Senior Home Office Presenting Officer
For the Respondent: Mr E K Mahmoud, Nationwide Law Associates

DECISION AND REASONS

1. The Entry Clearance Officer appeals with permission against the decision of First-tier Tribunal Judge Herbert, sitting at Taylor House, who allowed the claimant's appeal against a refusal to grant her entry clearance on an application for settlement based on her marriage to Rahib Siddiq a United Kingdom citizen, the sponsor in this appeal.

2. The couple have a son, born to the claimant in Pakistan, who is said at the date of application to be 5 months old. No birth certificate for this child appears in the documents before me.

3. The claimant explains that 'since marriage, [the sponsor] has come to Pakistan four times, stayed with me 4 months each time'. The sponsor is described as working for

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Alpha Security Solutions Limited ('Alpha') in the United Kingdom. That is said to be his only source of income.

Immigration Rules – sponsor's income

4. The relevant Immigration Rules in Appendix FM-SE as they stood at the date of decision required the claimant to produce, on the date of application, payslips covering a period of 6 months, showing, pro rata, the minimum income level of £18600 per annum. The evidence of financial requirements, where the sponsor is in salaried employment but not a director or shareholder of a limited company based in the United Kingdom, must include:

> "2. In respect of salaried employment in the United Kingdom…all of the following evidence must be provided:
>
> (a) Payslips covering:
> (i) a period of 6 months *prior to the date of application* if the person has been employed by their *current* employer for at least 6 months (and where paragraph 13(b) of this Appendix does not apply); or
> (ii) *any period of salaried employment in the period of 12 months prior to the date of application* if the person has been employed by their current employer for less than 6 months (or at least 6 months but the person does not rely on paragraph 13(a) of this Appendix), or in the financial years relied upon by a self-employed person … " [*Emphasis added*]

For clarity, I shall refer in this decision to the rule at paragraph 2(a)(i) as the 6-month rule, and that at paragraph 2(a)(ii) as the 12-month rule.

5. At paragraph 13 of Appendix FM-SE, as it then stood, the calculation of gross annual income under Appendix FM was to be approached thus:

> "13. Based on evidence that meets the requirements of this Appendix, and can be taken into account with reference to the applicable provisions of Appendix FM, gross annual income under paragraphs E-ECP.3.1, E-LTRP.3.1, E-ECC.2.1 and E-LTRP.2.1 will be calculated in the following ways:
>
> (a) Where the person is in salaried employment in the UK at the date of application, has been employed by their current employer for at least 6 months and has been paid throughout the period of 6 months prior to the date of application at a level of gross annual salary which equals or exceeds the level relied upon in paragraph 13(a)(i), their gross annual income will be where paragraph 13(b) does not apply the total of:
>
> (i) the level of gross annual salary relied upon in the application;
> (ii) the gross amount of any specified non-employment income other than pension income received by them or their partner in the 12-months prior to the date of application; and
> (iii) the gross annual income from a UK or foreign state pension or a private pension received by them or their partner.

(b) Where the person is in salaried employment in the UK at the date of application and has been employed by their current employer for less than 6 months or at least 6 months but the person does not rely on paragraph 13(a) their gross annual income will be the total of:

(i) the gross annual salary from employment as it was at the date of application;
(ii) the gross amount of any specified non-employment income other than pension income received by them or their partner in the 12-months prior to the date of application; and
(iii) the gross annual income from a UK or foreign state pension or a private pension received by them or their partner.

In addition, the requirements of paragraph 15 must be met."

Evidence before the Entry Clearance Officer

6. The claimant's application for entry clearance was made on 27 April 2015. That is the date on which the supporting evidence must be assessed. The claimant produced their marriage certificate dated 26 January 2012, the marriage having been celebrated in Pakistan. The couple's child, born at the end of 2014, is now about 3 years old.

7. A sponsorship declaration of 10 April 2015 states that the sponsor has sufficient accommodation available at his parents' home for himself and the claimant, and that he earns £24,000 plus commission and benefits, working as a Business Development Manager for Alpha.

8. The sponsor produced a copy of his terms and conditions of employment with Alpha, showing an incorrect registered address. The contract, dated 26 May 2014, stated that the sponsor would be employed for 3 years, and would receive commission plus benefits. The annual package is stated to be £24,000 paid monthly in arrears, plus overtime. There would be an annual salary review, in March of each year, which would not necessarily result in an increase in salary.

9. A letter, with the same date of 26 May 2014, states that the sponsor's employment runs from September 2014, that his annual package was £24000 plus commission and benefits, and that the sponsor is 'punctual, trust worthy and hardworking', which is high praise for a new employee whose employment has not yet begun.

10. The sponsor's payslip evidence showed that he worked for Alpha in the tax year 2014/2015, and that in that year, he earned £15,310.15 from Alpha and a further £1,097.94 from Xpress Supersave Ltd ('Xpress') which appears to be a grocery store), making a total income of £15,462.

11. The income evidence for the tax year 2015/2016, from 5 April 2015 to 4 April 2016, is that Alpha paid no money at all to the sponsor during that tax year. It is the sponsor's evidence that he established his own company and that from 1 May 2015 he was self-employed.

12. There is no evidence at all to suggest that the claimant herself works or has an income, or any prospect of one in the United Kingdom. There was no evidence of savings.

13. The sponsor has supplied post-decision documents concerning his new company, which began trading after the date of application.

Document Verification Report (DVR)

14. On 31 July 2015, the Entry Clearance Officer sent to the Verification Plus Team of the Home Office a request for checks regarding the financial information in the claimant's application. The DVR sent in reply to that enquiry noted that:

    - in 2012/2013, there were no earnings declared to HMRC;

    - in 2013/2014, the applicant earned a total of £7348.91, being £548.92 from Xpress and £6800 from The Protectors Security Cons;

    - in 2014/2015, he earned a total of £16,559, being £15,310 from Alpha Security Solutions Limited, paid monthly, with the last payslip of £0 on 24 April 2015, plus an additional £152 which was paid by Alpha for employment between 7 April 2011 and 27 August 2014; and a further £1097.94 from Xpress; and

    - In 2015/2016, the sponsor earned a total of £2370.23, being £812.25 from Regency Security Services (UK) Ltd, which started trading on 11 May 2015 and continued to be in business; nothing at all from Alpha, and £13,512 from Forsec Facilities Services Limited, which began to trade on 6 April 2015.

    The DVR assessed the sponsor's earnings as 'not as claimed'.

Refusal letter

15. On 15 September 2015, the Entry Clearance Officer refused the claimant entry clearance to join the sponsor in the United Kingdom. He said this:

> "You have provided a letter from Alpha Security Solutions Ltd. dated 26 May 2014 which states that your sponsor has worked there since May 2014 as a Business Development Manager and since September 2014 his gross annual salary has been £24,000. ...
>
> [HMRC] checks show that your sponsor's income from this employment in the tax year 2013 to 2014 was £15,310.15. However, they also show that your sponsor received no payment for April 2015. Therefore I am not satisfied that your sponsor is employed and paid as stated. I note that you made this application on 27 April 2015 and I am satisfied that your sponsor was no longer employed by this company at that time.
>
> Given all of the above I am satisfied, on the balance of probabilities, that you have made false representations with regard to your sponsor's income."

16. The Entry Clearance Officer concluded that:

> "You have submitted employment documents for Alpha Security Solutions Ltd. and given the above I am not satisfied that these represent a true reflection of your sponsor's employment circumstances in the UK. These documents were presented as evidence of you and your sponsor's ability to meet the financial requirement of the Immigration Rules and as a result I am not satisfied that you and your sponsor have demonstrated that you can meet the financial requirements of the Immigration Rules. I therefore refuse your application under paragraph EX-P.1.1(d) of Appendix FM of the Immigration Rules. You have not provided an original employment letter as evidence of your sponsor's gross income from their employment. This document is specified in the guidance and must be provided."

First-tier Tribunal decision

17. The First-tier Judge correctly directed himself with reference to *MM (Lebanon) v Secretary of State for the Home Department* [2017] UKSC 10 that the minimum income requirements whilst they might sometimes result in hardship were lawful. He reminded himself that the relevant date was the date of decision, although he was able to take into account matters which shed light on that, and were in existence at the relevant time.

18. The First-tier Tribunal Judge found as a fact at [14] that, if the 12-month rule were to be applied, then in the financial year preceding the date of application the sponsor's income did not meet the £18,600 threshold (paragraph 14).

19. The judge approached his decision on the basis that the 6-month rule was applicable because on 27 April 2015 the sponsor had been employed by Alpha Security Solutions Ltd for more than 6 months. At paragraph 15, however, the judge fell into error. He said this:

> "15. The 6 months' requirement is all that is needed and [the sponsor] does not have to show a full 12-month period on the information before me. Given the fact that the contract of employment is shown in the bundle as commencing on 26 May 2014, I am satisfied that he was so employed at the date of application and therefore one needed only to look back 6 months prior to that. Neither the Entry Clearance Officer nor the Manager made any reference to those Rules and to that extent their decision is not in accordance with the Immigration Rules or practices that ought to have been applied."

20. The judge went on to deal with Article 8, which is raised by reason of the sponsor's wife being in Pakistan with their son, who, it is asserted, is a UK citizen. He said this:

> "16. I find that there is clear evidence that [the claimant's] United Kingdom sponsor would face insurmountable obstacles in joining his wife on a permanent basis in Pakistan since he has a UK citizen son, almost 3 years old, and who is a UK citizen, who was born and brought up fully in the UK. He has his family, friends and business interests here, as well as accommodation, and the combination of those factors effectively means he would have to start again from scratch in Pakistan. For all intents and purposes he would have to give up his citizenship, his rights of citizenship, and

those of his United Kingdom child. In my view, that amounts to insurmountable obstacles and is not in accordance with the balancing act to be conducted, bearing in mind the authority of *Huang and Kashmiri v the State Department* 2007 UKHL 11 and with the jurisprudence in *MM (Lebanon).* I therefore find that the [Entry Clearance Officer's] refusal of entry clearance for the [claimant] was not in accordance with Immigration Rules or Practices that ought to be applied and in any event, the decision is not proportionate to the need to maintain immigration control, bearing in mind the grave consequences that will flow for the United Kingdom sponsor if he was forced to join his wife and son in Pakistan. The decision would in any event, be incompatible with the [claimant's] rights under @8 ECHR taking inot accont te 5 stage test set out by Lord Bingham in *R v Secretary of State ex parte Razgar* H.L.27, 2004."

21. That crucial paragraph is somewhat hard to follow, partly because it contains typographical errors, which I have reproduced here. It takes no account of the inclusion of the Article 8 ECHR analysis within the Immigration Rules since 2014, nor of recent case law apprehend that it is the sponsor who is said to be a United Kingdom citizen born and brought up fully here, with family, friends and business interests in the United Kingdom.

22. The First-tier Tribunal Judge allowed the appeal under the Immigration Rules and Article 8 ECHR. The Entry Clearance Officer appealed to the Upper Tribunal.

Permission to appeal

23. First-tier Tribunal Judge Saffer granted permission on the basis of the Entry Clearance Officer's grounds, which argued that the Judge had made contradictory findings, failed to give adequate reasons, and ignored relevant evidence. He contended that the finances of the sponsor did not meet the minimum income requirement threshold, having regard to his two employments, at the date of application and that the Judge's decision did not make it clear how he had calculated the sponsor's income, nor why he had discounted the HMRC evidence.

24. Further, the Entry Clearance Officer argued that in relation to the Article 8 ECHR element of the appeal, the Judge had applied an incorrect test and that it was open to the parties to make a fresh application under the Rules. To allow the appeal under Article 8 ECHR outside the Immigration Rules was to permit the claimant to 'queue jump' and no disproportionate interference with the established private and family life had been shown.

25. There was no Rule 24 Reply to the grant of permission.

26. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

27. For the Entry Clearance Officer, Mr Wilding relied on his grounds of appeal.

28. For the claimant, Mr Mahmoud argued that the Entry Clearance Officer's grounds of appeal indicated a lack of understanding of the Immigration Rules or the Judge's decision. He sought to rely on a later letter from the sponsor's employer, dated 7

April 2017, but that is not evidence which was or could have been before the Entry Clearance Officer, and I can place no weight thereon.

29. Mr Mahmoud complained that the DVR evidence was inadequate as it was not signed and the official's name was not given. He said that none of the original documents were in the claimant's position, all of them having been given to the Entry Clearance Officer. He disputed the assertion by the Entry Clearance Officer in the refusal letter that the documents produced were not originals but he could not produce a receipt, or a covering letter, listing what had been put forward with the application. Mr Mahmoud remarked that this had been an online application and there was no evidence that the documents relied upon had not been original documents. The claimant's sponsor met the £18600 threshold and the appeal should be allowed.

Discussion

30. I consider first the reasoning underlying of the First-tier Tribunal's finding of fact that the sponsor was still working for Alpha when this application was submitted on 27 April 2015. The DVR is indeed both unsigned and anonymous, but the evidence produced by the sponsor (the originals of which are not before me) does not include any payslip after 5 February 2015. That is not evidence that the sponsor's employment continued up to and including 27 April 2015. I consider that the Judge's finding that it did is not supported by the evidence and cannot be sustained.

31. The judge failed to engage with the finding in the refusal decision letter that the sponsor's recorded income for the tax year 2014/2015 of £15,310 fell below the figure of £24,000 given in the contract of employment submitted with his application, nor did he explore whether the Entry Clearance Officer was right to conclude that the sponsor had (whether knowingly or otherwise) deceived the Entry Clearance Officer by saying that his income was £24,000 when in fact, at best, it was something under £16,000, even taking into account the additional income from his second job.

32. The most important point, however, is that the judge failed to consider the effect as regards the application of the 12-month rule or the 6-month rule, having regard to the sponsor not having received any salary payment for April 2015, and confirmed by the enquiries recorded in the Entry Clearance Officer's DVR. From 1 May 2015, the sponsor's case is that he was working for himself, trading as Regency Security Services UK Ltd.

33. The correct analysis is that, having earned no money from any salaried employer in the month ending 24 April 2015, on 27 April 2015 when this application was submitted, the claimant did not have a current employer and could not, therefore, take advantage of the 6-month rule and argue that his earnings from Alpha should be grossed up to an annual figure which exceeded the £18600 threshold.

34. As a person with no current employer on the date of application, the sponsor had to show that his actual earnings from all sources in 2014/2015 exceeded £18600, which they did not. The immigration judge's findings to the contrary are a factual error at the level of an error of law and I do not understand how he reached the conclusion

he did on the law. I set aside the findings of fact and remake the decision, finding that the reality is that the sponsor stopped working for Alpha before the application was made and therefore had to meet the 12-month rule, which he could not do.

35. The next question is Article 8 ECHR. The Judge's decision contains no reference to recent case law. I have had regard to the decisions of the Court of Appeal in *Secretary of State for the Home Department v Onuorah* [2017] EWCA Civ 1757 and in *Secretary of State for the Home Department v Abbas* [2017] EWCA Civ 1393. I remind myself that there is no birth certificate for the child in the bundle, and that Article 8 ECHR is not a general dispensing power. This family has conducted its private and family life remotely now for several years and I do not consider that the putative existence of this child is sufficient to amount to exceptional circumstances or that the First-tier Tribunal's findings as to the difficulty of the sponsor joining the claimant in Pakistan is made out. I note, particularly, that he has travelled to Pakistan for 4 months every year, since the marriage.

36. I therefore set aside the decision of the First-tier Tribunal and I substitute a decision dismissing the appeal.

Conclusions

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision.

I re-make the decision in the appeal by dismissing it.

Signed: *Judith A J C Gleeson* Date: 14 December 2017

Upper Tribunal Judge Gleeson