Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/04194/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 24th April 2017 and further written submissions from the parties	**On 14th June 2017**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

AMNAH IMRAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Jasiri, Counsel instructed on behalf of the Appellant
For the Respondent: Miss Fijiwala, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant appeals with permission against the decision of the First-tier Tribunal (Judge Robertson) who, in a determination promulgated on 24th May 2016 dismissed the Appellant's application for entry clearance as the spouse of her Sponsor and husband pursuant to the provisions of Appendix FM to the Immigration Rules.

2. The background is set out in the determination. The Appellant is a citizen of Pakistan born on 23rd July 1993. On 23rd February 2012 the Appellant married her husband, a British citizen. The Appellant then applied for entry clearance as the spouse of her husband, the Sponsor, under the provisions of Appendix FM to the Immigration Rules. In a notice of a decision made on 12th January 2015, that application for entry clearance was refused under paragraph EC-P.1.1 of Appendix FM of the Immigration Rules. The reasons for refusing the application can be summarised as follows. The Entry Clearance Officer was not satisfied that the Appellant had provided the specified evidence to establish that the Appellant met the financial provisions of Appendix FM, paragraph E-ECP.3.1 because she did not supply the evidence required by the provisions of Appendix FM-SE, paragraph 7, sub-paragraphs (e) and (f). Those paragraphs read as follows:-

> "(e) where the person holds or held a separate business bank account, bank statements for the same twelve month period as the tax return
>
> (f) personal bank statements for the same twelve month period as the tax return showing that the income from self-employment has been paid into an account in the name of the person or in the name of the person and their partner jointly."

In the reasons given the Entry Clearance Officer stated as follows:-

> "You have submitted business bank statements from your Sponsor but these do not cover a full period of financial year 2013/2014 as required by the Rules (Appendix FM-SE). You have submitted business bank statements from your Sponsor but these do not cover the full period of financial year 2013/2014 and do not show your Sponsor's claimed income being paid into his account over this period, as required by the Rules."

3. The refusal also considered Article 8 including the best interests of any child affected by the decision. The Entry Clearance Officer did not consider that there were any exceptional circumstances which might warrant a grant of entry clearance outside of the Immigration Rules. Thus the application was refused under paragraph EC-P.1.1(d) of Appendix FM of the Immigration Rules (E-ECP.3.1).

4. The Appellant submitted Grounds of Appeal on 18th February 2015. Those grounds asserted the following:-

(i) That the Entry Clearance Officer had failed to interpret the purpose and policy behind the new Immigration Rules and Appendix FM-SE. The Respondent failed to apply flexibility in determining the facts and evidence in support of the application and the Rules had been interpreted "very strictly" when there was evidence that further investigation could determine that the Sponsor had adequate income to support the Appellant.

(ii) The Entry Clearance Officer was wrong to state that he was a self-employed cab driver when he was trading as a supermarket and the business bank statements have been provided to confirm this along with the application. The Entry

Clearance Officer was mistaken and incorrect to state that the full bank statements were not provided as they were provided with the application.

(iii) The Entry Clearance Officer was wrong to state that the Sponsor had not provided business bank statements for the full financial year of 2013 and 2014 those were provided with the application.

(iv) The Entry Clearance Officer had a duty to make further enquiries of the Sponsor with regards to his gross income. It was unreasonable to refuse the application on the basis that the gross turnover is not reflected in the Sponsor's bank statement. The Entry Clearance Officer failed to take into account the nature and type of the Sponsor's self-employment which by nature was a "cash business" and not one that would necessarily reflect directly in the bank statements.

5. The appeal came before the First-tier Tribunal (Judge Robertson) on 10th May 2016. In a decision promulgated on 24th May 2016, the judge dismissed the appeal under the Immigration Rules and on human rights grounds. The judge at paragraph [9] of the determination, made reference to the issue relating to what documentary evidence had been provided before the Entry Clearance Officer, as the bundle did not contain the usual list of documents setting out those which were submitted with the application. It is recorded that the Presenting Officer was not taking issue as to whether they were provided but relied upon the documents that were within the Appellant's bundle. The judge recorded the submission made by the Presenting Officer that the bank statements did not meet the evidential requirements of Appendix FM because they did not support the claim that the Sponsor earned a gross annual income of £18,600 because this sum was not paid into his personal bank account from his business.

6. Thus the judge heard evidence from the Sponsor and took into account the documents that were set out in the Appellant's bundle along with the submissions made by each of the advocates.

7. The judge's analysis of the evidence and his decision and reasons are set out at paragraphs [12] to [21] relating to the Immigration Rules and paragraphs [20] to [26] relating to Article 8. The judge accepted the Sponsor's evidence that his earnings were from self-employment as a sole trader of a supermarket (The 24/7 Convenience Store) rather than as a cab driver as set out in the original decision. It was further accepted by the Sponsor that his personal bank account did not reflect all the income from his business. As the judge set out paragraph [14], the Sponsor's evidence was that his business was run on a cash basis, that he had takings during the day, mainly cash which would be used to pay for goods bought to sell in the business when he went to the cash and carry. He paid for goods in cash. The judge also recorded his evidence that he would use some of the cash generated by the business to discharge his own expenses and then deposit any amount that was left over into his business or personal account. He said that he did not always deposit takings into his business

account because it was not always possible to do this when the business was a 24/7 convenience store run on a cash basis.

8. At paragraph [15] the judge dealt with the issue as to whether or not the documentary evidence adduced established that the Sponsor earned the claimed £20,000 per annum for the tax year 2013/2014. When considering this issue, the judge observed that this was a "technical one" based on the interpretation of the provisions of Appendix FM-SE in relation to self-employed Sponsors.

9. To answer this question, the judge considered the submissions made by each of the advocates. On behalf of the Appellant it was submitted that there was no requirement in paragraph 7 of Appendix FM-SE for the Appellant's gross income to be paid into his personal bank account because the provisions of paragraph 7(f) did not require all of the Sponsor's income to be paid into his account. It was submitted that it would be expected that the Sponsor would pay his expenses from the cash received before he paid any balance into his personal account. It was further submitted that the purpose of SA303 and SA302, was to ensure that the Sponsor was paying tax on the amount that he claimed to be earning. It was further submitted that the provisions of paragraph 1(n) of Appendix FM-SE did not apply to self-employed income; they only applied to employment income. It was also submitted that in interpreting the provisions of paragraph 7(f) the plain wording of the Rules must be sensibly applied (applying **Odelola [2009] UKHL 25** and **Mahad [2009] UKSC 16**.

10. The submissions made by the Presenting Officer were to the contrary. It was submitted that the provisions of paragraph 1 of Appendix FM-SE were general provisions, applicable to all income. Whilst the Presenting Officer accepted that it was not stated within paragraph 7(f) that all the Sponsor's income must to be paid into his personal bank account, it was submitted that the specified evidence requirements were there to ensure that the threshold income in E-ECP.3.1 was corroborated from a number of sources. In the Appellant's case, the most that was deposited into the Sponsor's personal account was £9,740.

11. The judge's conclusion on this issue is set out at paragraphs [20] to [21] of the determination. The judge said this:-

> "[20] It was stated by Lord Brown in Mahad that -
>
> > 'the Rules are not to be construed with all the strictness applicable to the construction of a statute or a statutory instrument but, instead, sensibly according to the natural and ordinary meaning of the words used, recognising that they are statements of the Secretary of State administrative policy ... the court's task is to discover from the words used in the Rules what the Secretary of State must be taken to have intended.'
>
> [21] I accept the submissions made by Miss Mepsted as to the provisions of paragraph 7(f) of Appendix FM-SE. The provisions of paragraph 1(n) are clearly general provisions, as stated at paragraph 1, and whilst it is clear that the provisions of paragraph 7(f) do not refer to all of the Sponsor's income being

> paid into his personal account, by analogy neither do the provisions of paragraph 6(a) of Appendix FM-SE (which relate to salaried employment) required that all the salary of a Sponsor in salaried employment be paid into a personal bank account. In each case, it is only by reference to the overall need to establish from various sources that the income is as claimed that it can be said that all the Sponsor's income must be paid into his account. The forms SA302 and SA303 are simply self declarations of income and neither is an independent source for the purposes of establishing that the Sponsor's income is as claimed. On the evidence before me, it is not established that the Sponsor's income meets the threshold requirements of Appendix FM. The Appellant's appeal must therefore be dismissed under the Immigration Rules."

12. At paragraphs [22] to [26] the judge considered the Article 8 issues. In this context, he considered the submission made on behalf of the Appellant that the decision to refuse entry on Article 8 grounds was one that "offends against **Zambrano**". However, the judge found that the Appellant's British national child was not prevented from entering the UK as her father was resident there, it was accepted that he had been to visit her and her mother three times in Pakistan and during that time he was able to leave his business in the care of employees. Thus, the judge found there was no reason why the child's father could not care for her in the UK if she were to enter without her mother and therefore, the decision did not result in the "denial of the genuine enjoyment of the substance of rights conferred by the virtue of her status as a citizen of the Union". The judge accepted there was a positive duty to promote family life and that family life was enjoyed by the Appellant, the Sponsor and their child. As for the best interests, it was generally accepted that it was in the best interests of the child to be with both her parents. As to the evidence, the judge found that the child had lived with her mother since birth but there was no evidence presented of any difficulties of attachment to her father or that he would not be able to care for her emotional physical needs if she came to the UK without her mother, other than his assertion that he could not care for the child because he had a business to run. The judge found that he had employees who had run the business in his absence and no evidence was presented to support his claim that the business was not as well run when he was away. The judge found that if his daughter was in the UK he would still be able to oversee the running of his business.

13. The judge applied the public interest provisions under Section 117 of the 2002 Act and found that under Section 117B the legitimate public aims are immigration control and the economic wellbeing of the country. Whilst the Appellant provided an English language test certificate, it had not been established that the Sponsor earned the threshold income set out in Appendix FM. The judge went on to state that even if he were to find that the Appellant was self-sufficient applying the decision in **AM (Section 117B) Malawi [2015] UKUT 260**, the Appellant can gain no positive right to a grant of leave from either Section 117B(ii) or (iii) whatever the degree of fluency in English or the strength of his financial resources. The judge also found that the Appellant had a genuine and subsisting relationship with a qualifying child but, it was not established that it was unreasonable for the child to continue to live with her in Pakistan until such time as an appropriate application was made with the required supporting evidence. The judge found that they had not resided

together since the birth of the child who was now 3 and was not yet of school age. The judge did accept that there may be a temporary separation between the Appellant and her child if the child came to the UK before she did but, there was nothing before the judge to establish that there would be a permanent breakdown in the relationship between the Appellant and her daughter. Furthermore, there was no evidence to establish that the Appellant could not put in another application with the correct supporting evidence. In terms of proportionality, taking into account the above circumstances, weighing in the balance the British nationality of the Sponsor and his young child, the judge found that the interference was proportionate when balanced against the legitimate public aims. The judge found that the Sponsor was aware when he married the Appellant that she would have to satisfy the Immigration Rules for a grant of entry clearance and his contention was that he did in fact earn the required income. Thus, their separation was only likely to be for a period of time it takes to submit a fresh application with the required supporting evidence and for the ECO to make a decision. Thus the judge found there were no compelling circumstances for a grant of leave outside of the Immigration Rules (applying **SS (Congo) EWCA Civ 387**).

14. The Appellant sought permission to appeal that decision on five separate grounds. Those grounds are as follows:-

(a) The judge made a material misdirection in law. At paragraph [21] the judge erred in reading the word "all" into paragraph 7(f) of Appendix FM-SE. The judge has "done violence to the plain meaning of the Immigration Rules" and imposed a requirement which was not in the Rules themselves.

(b) The judge made a material misdirection in law at paragraph [21] in applying paragraph 1(n) of Appendix FM-SE to a self-employed case. Paragraph 1(n) appears from its plain wording to apply to employed income and not to self-employment. The judge erred in finding it applicable in the Appellant's case.

(c) The judge made a material misdirection in law at paragraph [25(b)] by erroneously conflating financial independence under Section 117B(3) of the financial requirements of Appendix FM. Even if the Appellant could not satisfy Appendix FM that does not mean that she was not financially independent.

(d) The judge made an irrational and unlawful finding at paragraph [22] when he found that the Appellant's 3 year old British daughter could come to the United Kingdom without the Appellant and be cared for by the Sponsor. That is irrational and fails to consider the welfare of the child.

(e) The judge made a material misdirection of law at paragraph [25(d)] the judge found that it was not unreasonable for the Appellant's British child to continue to live with her in Pakistan. This is erroneous in law. The judge failed to properly consider the rights of the Appellant's child and when referring to the temporary separation failed to take into account that the Appellant could not

apply again until the Sponsor put all his takings into the bank for a full financial year. Thus the separation is likely to be significant.

15. Permission to appeal was granted by a Judge of the First-tier Tribunal (Judge Dineen) on the following grounds:-

> "Grounds (a)-(c) complain that the judge made errors of law contrary to the proper interpretation of the requirements of Appendix FM-SE. I have considerable doubts as to whether such complaints are well grounded but they are not on their face and without more, plainly wrong. At the stage of permission to appeal it is necessary only to show that they are arguable, whether or not likely to succeed. I find they are arguable.
>
> Grounds (d)-(e) complain of a reasonableness of the judge's findings. They do not show that such findings were arguably perverse or otherwise errors of law, and do not give rise to permission to appeal.
>
> Permission to appeal is granted as to the grounds (a)-(c) only."

16. Before the Upper Tribunal Mr Jasiri appeared on behalf of the Appellant and Miss Fijiwala, Senior Presenting Officer appeared on behalf of the Respondent. Neither party had provided skeleton arguments, despite the issue being clearly identified as the interpretation of specific provisions of Appendix FM-SE. At the hearing Miss Fijiwala also produced a copy of the relevant IDIs which Mr Jasiri had not seen or considered and neither representative provided copies of the relevant Rule as at the relevant date. Time was given for the advocates to read the additional documentation.

17. I heard submissions from each of the advocates but it became plain that in order to decide the issue of construction in the context of the Appellant's appeal that both parties required further time to provide their submissions as to the construction of this particular Rule. After hearing short submissions, I made directions for each of the parties to file written submissions.

18. In accordance with those directions each party provide their written submissions and copies of the relevant Rules and guidance in force at the relevant time. I shall make reference to those submissions when reaching a conclusion on the issues raised.

Decision on error of law:

19. I therefore set out the relevant provisions as identified by the parties:

7(f) of Appendix FM SE states as follows:

> *In respect of self-employment in the UK as a partner, as a sole trader or in a franchise all of the following must be provided:*
> *personal bank statements for the same 12-month period as the tax return(s) showing that the income from self-employment has been paid into an account in the name of the person or in the name of the person and their partner jointly.*

1(n) of Appendix FM SE states as follows:

> *The gross amount of any cash income may be counted where the person's specified bank statements show the net amount which relates to the gross amount shown on their payslips (or in the relevant specified evidence provided in addition to the specified bank statements in relation to non-employment income). Otherwise, only the net amount shown on the specified bank statements may be counted.*

Paragraph 9.3.8 of the guidance states as follows:

> *Self-employed income can be cash-in-hand if the correct tax is paid. In line with paragraph 3.1.5 of this guidance, it would generally be expected that the person's business or personal bank statements would fully reflect all gross (pre-tax) cash income. Flexibility may only be applied where the decision-maker is satisfied that the cash income relied upon is fully evidenced by the relevant tax return(s) and the accounts information.*

Paragraph 3.1.5 of the 2014 guidance states as follows:

> *Under paragraph 1(n) of Appendix FM-SE the gross amount of any cash income may be counted where the person's specified bank statements show the deposit of the full net amount which relates to the gross amount shown on their payslips (or in the relevant specified evidence provided in addition to the specified bank statements in relation to non-employment income). Otherwise, only the net amount shown on the specified bank statements may be counted.*

20. There is no dispute between the parties that the appellant's sponsor carries out self-employment as a sole trader and that for the purposes of Appendix FM the appellant is required to demonstrate that the sponsor could meet the income threshold of £18,600.

21. It is further not disputed that the sponsor provided his personal and business bank statements before the first-tier Tribunal in accordance with paragraph 7 (f) as set out above. However, as the appellant's submissions set out at paragraph 17, those bank statements did not fully reflect all gross (pre—tax) income.

22. It is against this background that I consider the submissions of the parties. It also appears to be common ground that paragraph 7 (f) does not refer to <u>all</u> of the sponsor's income being paid into his personal account. This was accepted by the presenting officer before the first-tier Tribunal and by the judge at paragraph [21]. However as identified by both parties, the issue relates to whether, from various sources of specified evidence that the sponsor's income is as claimed.

23. Having considered the relevant paragraphs, it can be said that in accordance with the requirements of paragraph 7 (f) of Appendix FM the sponsor's bank statements should fully reflect the gross cash income. Both parties refer to this as the "general expectation" (see paragraph 15 of the appellant's skeleton argument and paragraph 9 of the respondent's skeleton argument). That does not require all the monies to be

paid into an account but can be demonstrated from either personal or business bank statements. This is reflected in the guidance at paragraph 9.3.8 which makes onward reference to paragraph 3.1.5 of the guidance. This sets out that paragraph 1 (n) applies where the gross amount of any cash income may be counted where the specified bank statement shows the deposit of the full net amount which relates to the gross amount. Otherwise only the net amount shown on the specified bank statement may be counted.

24. Having considered the respective submissions of the parties, I do not identify any disagreement with that interpretation of the rules. As identified in the appellant's submissions as it is accepted that the appellant could not satisfy the "general expectation" in the rules for the reasons set out at paragraph 17; namely that the bank statements did not fully reflect all gross (pre-tax) profit, but that in accordance with the guidance at 9.3.8 the issue is whether the entry clearance officer and the judge exercised the flexibility contained therein (see paragraph 18 of the appellant submissions and paragraph 12 of the respondents submissions).

25. I therefore consider that issue which both parties now agree is the relevant issue. As the respondent submissions set out the guidance at paragraph 9.3.8 states that flexibility may only be applied where the decision-maker is satisfied that the cash income relied upon is fully evidenced by the tax return and accounts information.

26. In this case, the respondent submits that the judge did consider this and applied flexibility at paragraph 21 of the determination when he made reference to the documents entitled "SA 302 and SA 303" whereby the judge found that they were self declarations of income and that neither were independent sources establishing the sponsor's income. Therefore, as the income could not be established from all the sources, flexibility should not be applied.

27. By way of response, it is submitted on behalf of the appellant that there were documents before the entry clearance officer which, when taken together, were sufficient to demonstrate his income for all sources met the required income threshold of £18,600 and relies upon the relevant tax return and letter from the sponsor's accountants.

28. At paragraph 9 of the determination the judge identifies a difficulty which arises in a number of cases before the first-tier Tribunal and this tribunal; namely what documents were put before the entry clearance officer for the purposes of the application made. In this case the respondent's bundle did not contain the usual list of documents detailing the evidence submitted with the application. The judge recorded that the presenting officer did not take issue as to whether the documents were provided but invited the judge to consider the documents in the appellant's bundle. Those documents included at pages 6 and 7 the SA302 and SA 303 which the judge made reference to. It is now agreed by the respondent that the accounts information relating to the sponsor (including copies of his accounts for two financial years) had been submitted with the application and thus were before the entry

clearance officer. Whilst the respondent submissions state that it is not clear whether those documents were before the first-tier Tribunal, it is plain from the agreed position now that those documents were before the entry clearance officer when the decision was made. I cannot be clear whether those documents were in fact before the first-tier Tribunal as separate documents or not.

29. A Respondent's bundle should provide a full copy of all documentation sent with the application to provide a full background to the decision under challenge. Furthermore if this is not done, the appellant's representatives should identify and provide confirmation of the documents that were sent. As I have set out in the preceding paragraph, it is not clear whether the accounts information which was clearly before the entry clearance officer found its way to the judge. I therefore proceed on the basis that it was before the entry clearance officer who did not apply the rules in accordance with the stated guidance to which there was no reference or any application of flexibility when considering the documentation. This resulted in a flawed approach before the first-tier Tribunal who did not consider the issues on the basis that both parties have now proceeded. In those circumstances I am satisfied that there is a material error of law and set aside the decision and proceed to remake it is invited by both parties on the evidence that is before the tribunal.

30. The respondents submission at paragraph 15 is that even on the basis of the account information, flexibility should not be exercised in the appellant's favour on the basis that it is not clear upon what documents the accountant has noted the accounts for the years ending in 2013 and 2014. It is submitted that if it is on the basis of the SA 302 and 303, those documents have already been rejected as not being an "independent reflection". Therefore the appellant has not demonstrated that he can meet the financial requirements.

31. Both parties identify that the issue is whether the documents, when taken together as evidence from all sources, demonstrate that flexibility should have been exercised in the appellant's favour. The personal bank statements reflected a sum of £9740 but the sponsor's account as to his method of trading set out at paragraph 14 of the determination appears to have been accepted by the judge. What he did not accept was that the SA 302 and SA 303 was "independent evidence". However when seen alongside and in conjunction with the letter from the accountant and the accompanying accounts, in my judgement those documents can be viewed together as evidence of the sponsor's profit from his self employment. The "account information" is not prescribed and the appellant provided information from his accountants relating to the trading profit and loss accounts for the relevant periods along with the application. Those accounts show net profit from self-employment in excess of the required income threshold of £18,600 and in accordance with the information the sponsor had provided along with the application.

32. For those reasons, I have reached the conclusion that I prefer the submissions of the appellant and that on the documentation provided the appellant has demonstrated

that her sponsor can meet the income threshold of £18,600 as a self- employed sole trader.

Notice of Decision

The decision of the FTT involved the making of an error on appoint of law; it is set aside and is remade as follows; the appeal is allowed under the Immigration Rules.

No anonymity direction is made.

Signed SM Reeds Date: 10/6/2017

Upper Tribunal Judge Reeds

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a whole fee award as the appellant has succeeded in her application.

Signed SM Reeds Date 10/6/2017

Upper Tribunal Judge Reeds