Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/04506/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5 June 2017	**On 12 June 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

MS YAO HONG
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER - BEIJING

Respondent

Representation:
For the Appellant: No appearance
For the Respondent: Ms Z Ahmed, Specialist Appeals Team

DECISION AND REASONS

1. The appellant appeals to the Upper Tribunal from the decision of the First-tier Tribunal (Judge Bowler sitting at Hatton Cross on 20 September 2016) dismissing her appeal against the decision of an Entry Clearance Officer to refuse her entry clearance as the spouse of a British national. The sole ground of refusal was asserted non-compliance with the financial requirement of the sponsor having an annual income of at least £18,600 ("the MIR"), and the related evidential requirements contained in Appendix FM-SE. The First-tier Tribunal did not make an anonymity

direction, and I do not consider that the appellant requires anonymity in these proceedings in the Upper Tribunal.

Relevant Background Facts

2. The appellant is a national of China. Her husband and sponsor, Lam Auyong, was born in Vietnam, but came to the UK as a child and has long since acquired British nationality. The sponsor was previously married to someone else, by whom he had two children.

3. The sponsor first met the appellant in China in September 2003, and their relationship began in 2004. They got married in China on 20 February 2008, and the appellant has borne two children by the sponsor. Yong Xi was born in China on 28 November 2005, and Yong Yi was born in China on 9 May 2010. For a long period, family life was carried on at a distance, with the sponsor making visits to China to see his wife and children from time to time. Both the children of the marriage are British citizens by descent from their father.

4. In September 2013 the appellant and the sponsor made the decision that the older child, Yong Xi, should join his father in the UK, while the younger child remained in China with his mother.

5. On 7 November 2013 the appellant applied for entry clearance under Paragraph EC-P.1.1 of Appendix FM of the Rules. On 20 February 2014 a decision on application was placed on hold until the outcome was known of the Secretary of State's appeal in **MM & Others**. On 11 July 2014 the Court of Appeal upheld the Secretary of State's appeal, and on 10 September 2014 the Entry Clearance Officer (Post reference: Beijing\1492585) gave his reasons for refusing the appellant's application.

6. She stated that her sponsor had been employed as a Buyer for Jinkko Products Limited since 1 June 2012 and earned an annual income of £20,000. She had submitted a letter from her sponsor's employer dated 22 October 2013. This letter did not confirm the period over which he had been paid the level of salary relied upon in the application, or the type of employment.

7. She had not provided payslips, covering a period of six months prior to the date of application. The bank statements provided also did not show that the sponsor's salary had been paid over a period of six months prior to the date of application.

8. CompanyCheck.co.uk revealed that the sponsor had ceased to be a director of the Company. He was a director from 19 December 2012 to 20 July 2013.

9. The P60 in her sponsor's name for the tax year ending April 2013 stated that he had only earned £10,000.02. This had been verified by HMRC's checks.

10. Therefore, she had not shown that her sponsor had an annual income of £20,000.

The Hearing Before, and the Decision of, the First-tier Tribunal

11. Both parties were legally represented before Judge Bowler. The sponsor gave oral evidence. His older son was living with his parents because he was travelling so much. His younger son could not join him in the UK because his parents could not

cope with looking after two young children. He had been going to Vietnam and China six or seven times each year for business, although he had reduced that recently. His older son had gone back to China for one month in 2015, and he missed his mother dreadfully. He had not been able to visit his wife in China in 2015. Both his children spoke Mandarin and Cantonese. His son in the UK was attending school, and he also attended Chinese school on Sundays. The longest period of time that he, the sponsor, had spent in China was two months.

12. In his subsequent decision, the Judge found that the sponsor was probably earning a gross income of more than £18,600 per annum when his wife's application was made. However, he was required to apply the Rules in Appendix FM-SE. He was unable to find that the appellant met the requirements of Appendix FM-SE, and so he had to dismiss the appeal under the Rules.

13. The Judge went on to give extensive reasons for finding that the appeal should be dismissed in the alternative on human rights grounds. He observed that the appellant and sponsor had decided to split their children between the UK and China in 2013. He had no reason to conclude that they had acted other than in their children's best interests. The sponsor said that he could not move to China to live there, because his parents, sister and cousins were in the UK. There was no evidence to show that the contact with those members of his family needed to be greater than that permitted through telephone, electronic communication and visits.

14. The sponsor was a British citizen, but he worked and he could take his skills to China, to look for work in China. He often travelled to China and did business there. He was not persuaded that the sponsor faced problems relocating to China to be with the appellant. While he recognised that the older child was a British citizen, and he would be giving up his rights, he had been living in China until 2013 and his British citizenship was not a trump card. He found that it was reasonable to expect the sponsor and the older child to move to China to continue family life with the appellant.

15. The Judge addressed the issue of delay. The appellant had to wait ten months for a decision on her application. However, the appellant and her sponsor had failed to provide the documentary evidence clearly required by the respondent, or an explanation as to why it could not be provided. The fact that there was a delay of nearly three years in getting to the stage of the appeal hearing was due in no small part to the appellant and her sponsor. Accordingly, the decision take by the respondent was necessary and proportionate.

16. The Judge held that the way forward was for the appellant to make a fresh application, now that she was clear that the specified evidence must be provided. To the extent that she could not provide it, she could give an explanation and invite the Entry Clearance Officer to exercise evidential discretion.

The Reasons for the Grant of Permission to Appeal

17. On 16 March 2017 First-tier Tribunal Judge Page granted permission to appeal for the following reasons:

> "The grounds of appeal argue that the Judge acknowledged that refusal of entry clearance had prevented the appellant and her two sons being reunited. It argues that the Judge had not explained how the interference is proportionate. This is a broad complaint. Given the importance of this decision to the appellant and the children and the separation of their mother, I have taken a purposive approach to this application. Paragraph 44 of the Judge's decision suggests that the Judge is considering remitting this case to the respondent for further consideration. If the result under Article 8 was so clear for the Judge to conclude at paragraph 53 of the decision that the decision taken by the respondent was both necessary and proportionate, it begs the question as to why the Judge had considered remitting the matter to the respondent for fresh consideration. The sponsor had demonstrated the pre-requisite income to show that he had a gross income of £20,000.04 as shown by his P60. At paragraph 28 the Judge said on the evidence available to the respondent the Entry Clearance Manager "there was no trigger" for the exercise of discretion under the evidential flexibility provisions as set out in paragraph D of Appendix FM-SE. The Judge has found that it would be in the best interests of the family to avoid any further delay, [and this is] the reason why the Judge decided not to remit the matter to the respondent after all. The Judge has said that this would enable the appellant to obtain the correct evidence so the Entry Clearance Officer could be asked to exercise evidential discretion. The application for permission to appeal on the ground that the Judge has not explained how the interference of family life is proportionate is capable of further argument on these facts, so I grant permission to appeal so these matters can be fully considered."

The Appeal Hearing

18. At the hearing before me to determine whether an error of law was made out, there was no appearance by the appellant's nominated legal representatives. I was satisfied that adequate notice had been given to them of the time, date and place of hearing, and that it was in accordance with the overriding objective to proceed with the hearing of the appeal in their absence.

19. Ms Ahmad submitted that the appeal should be dismissed for the reasons given in the Rule 24 response settled by her colleague.

Discussion

20. There was no error in the Judge finding that the appellant had not shown that she met the MIR. As the Judge explained, the evidential requirements contained in Appendix FM-SE had not been complied with. Counsel, who appeared below on behalf of the appellant, accepted that the employer's letter did not contain the mandatory information. Although the Judge found that the appellant had now provided the requisite run of six months' payslips, the corresponding run of bank statements did not show the payment of employment income to the sponsor in the month of May 2013. The Judge accepted the sponsor's oral evidence that he had been paid in cash in May 2013 as he was travelling to Vietnam that month, and so he had asked for payment in cash. However, notwithstanding the Judge's acceptance of the sponsor's oral evidence on this issue, there had still been non-compliance with the relevant evidential requirement set out in Appendix FM-SE.

21. There was also no error in the Judge finding that the evidential flexibility provisions set out in paragraph D of Appendix FM-SE had not been triggered by way of appeal.

It was open to the Judge to make this finding for the reasons which he gave. Firstly, neither the sponsor nor his advisers had informed the respondent when appealing as to why the bank statement for May 2013 did not show his monthly wage being paid in by BACS. Secondly, no explanation had ever been provided as to why the employer's letter was so defective.

22. With regard to the assessment of a human rights claim outside the Rule, the Judge acknowledged at paragraph [43] that neither the respondent nor the Entry Clearance Manager had made any reference to the children or to section 55, despite the children's details being included in the appellant's application. At paragraph [44], the Judge said he was mindful of the options available to him in such a situation, as set out in **MK (Section 55 - Tribunal options) [2015] UKUT 223**. These were either to remit the case to the ECO for further consideration, or to decide the Article 8 claim himself, taking into account the children's best interests as a primary consideration in the proportionality assessment. The Judge gave adequate reasons for choosing the latter option, rather than the former option.

23. The Judge went on to give adequate reasons as to why it was reasonable to expect the sponsor and the older child to relocate to China to continue family life there with the appellant and the younger child; or, in the alternative, for the appellant to make a fresh application for entry clearance in which she produced the specified evidence under Appendix FM-SE to show that the sponsor was earning over £18,600.

24. The Judge was right not to exercise evidential flexibility himself. The discretion to exercise evidential flexibility is vested in the primary decision-maker, not the judicial decision-maker. Although the Judge was of the view that the sponsor was probably earning over £18,600 per annum, he had to apply the Rules. According to the Rules, the appellant had not provided the specified evidence to show that the sponsor was in fact earning over £18,600 per annum.

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

I make no anonymity direction.

Signed Date 10 June 2017

Judge Monson
Deputy Upper Tribunal Judge