



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/05570/2015

THE IMMIGRATION ACTS

Heard at Field House
On 31 May 2017

Decision & Reasons Promulgated
On 24 July 2017

Before

UPPER TRIBUNAL JUDGE CONWAY

Between

ENTRY CLEARANCE OFFICER - PARIS

Appellant

and

NOUH NAJAT AIT
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr Tarlow
For the Respondent: Mr Victor-Mazeli

DECISION AND REASONS

1. Ms Ait is a citizen of Morocco born in 1974. She appealed against a decision of the ECO, Paris who in a decision dated 29 January 2015 refused her application for entry clearance as a spouse of Hamid Moudjeb under Appendix FM of the Immigration Rules.
2. Although for proceedings in the Upper Tribunal the ECO is the Appellant, for convenience I retain the designations as they were in proceedings before the First-tier Tribunal, thus Ms Ait is the Appellant and the ECO, the Respondent.

Respondent's reasons

3. It was noted in the refusal letter that the Appellant met the suitability, relationship and eligibility requirements, also the English language requirements. However in relation to the financial requirements it was noted that the Sponsor was not exempt

from those defined by E-ECP3.3. The Respondent was not able to take into account any potential employment in the UK or offers of financial support from third parties. The Appellant was therefore required to demonstrate an income of £18,600 and the mandatory documents relating to employment as set out in Appendix FM-SE were required.

4. Although it was noted that she had provided pay slips and bank statements covering six months immediately prior to the application, on self-employment being combined with the employment income all the evidence provided had to be from the same financial year. Thus the only employment that could be taken into account was that which was taken from financial year 2013/2014. The Appellant had not provided any employment evidence from the relevant financial year and therefore this could not be taken into account.
5. In order to demonstrate the Sponsor's self-employment evidence was also required and the only evidence of self-employment provided was an SA 302 and evidence of national insurance payments. The Respondent was not satisfied that they had provided the necessary documentation to demonstrate the Sponsor was earning the required amount of £18,600 per annum.
6. In relation to Article 8 of the ECHR it was noted that there was no reason why the Sponsor was unable to travel to Morocco or another country to be with the Appellant and there were no exceptional circumstances which were raised consistent with a right to respect for private and family life contained in Article 8.
7. In the review dated 12 June 2015 it was noted that the Grounds of Appeal stated that the Sponsor had earned the required amount through a combination of salaried work and self-employment. However, as already noted when self-employment was being combined with employed income all the evidence provided had to be from the same financial year and no evidence of salaried employment for the relevant financial year was provided with the application. Although it was noted that a P60 had been provided with the appeal, none of the required specified evidence had been provided as listed in Appendix FM-SE and as specified in the refusal letter for the relevant financial year.
8. Additionally, in respect of self-employed income it was noted that a tax return, company accounts and evidence of tax paid had now been provided, however this was not all the specified evidence required by Appendix FM-SE. It was noted there were no bank statements provided for the full financial year which showed income from self-employment being received. It was not considered that the evidential balance had been tipped in the Appellant's favour.
9. She appealed.

First tier hearing

10. Following a hearing at Hatton Cross on 22 September 2016 Judge of the First-tier tribunal Iqbal allowed the appeal under the Rules.

11. It was agreed by the parties that the Appellant met the requirements of Appendix FM-SE insofar as employment was concerned. However the Respondent maintained that the bank statements submitted did not show self-employment.
12. The judge's findings are at paragraph 23ff. Having noted documentary evidence provided by the Sponsor she found that they did confirm claimed income from employment of £14,644.
13. Turning to self-employment she noted (at [26]) various documents provided, including the SA 302 which confirmed earnings of £4,306 from self-employment as well as £14,644 from employment.
14. Having set out the other documents provided to the Tribunal which included twelve months' bank statements covering the relevant period she continued:

"... (the) bank statements for the relevant year do not demonstrate the monies received from his self employment given the Sponsor's explanation that he was paid in cash and did not deposit the monies in his account, rather, he used it towards expenses.

The Sponsor confirmed that he ran a small business but that all the evidence surrounding his self employment confirmed his earnings, including that tax was being paid therefore he was running a genuine business".
15. The judge had noted the relevant paragraphs of Appendix FM-SE, including

"7. 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:

...

(f) 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 ...".
16. In noting the concession that the Appellant could not demonstrate that the income from self-employment was contained in the bank statements, given the Sponsor's evidence that money was not deposited in the account, the judge then considered the submission on behalf of the Appellant that the Respondent ought to have exercised discretion under Appendix FM-SE, paragraph D, alternatively, that if evidential discretion had been exercised it has not been exercised correctly.
17. The judge at [30] found that the Respondent had considered the exercise of evidential flexibility and the discretion afforded by it.
18. In going on to consider whether it had been exercised correctly she stated: *"the requirements of the paragraph [D] set out, that where a document does not contain all the specified information, but the missing information is verifiable from other documents submitted with the application then providing the decision maker is satisfied the document is genuine and the applicant meets the requirements to which the document relates, then the application may be granted exceptionally"* [31].

19. The judge concluded (at [32]):

“I find on balance that bank statements are the specified evidence, but from which specified information, that is the Sponsor’s self employment income, is missing. No question is raised as to the genuineness of the bank statements, therefore given I find that the Sponsor has offered a reasonable explanation as to why the bank statements do not contain the information, that is, he is paid cash in hand, I find that the Respondent is exercising his discretion, ought to have allowed the appeal on an exceptional basis. Especially as the Sponsor’s self employment is verifiable from all other specified documents that I have listed above.”

20. The Respondent sought permission to appeal which was granted on 25 April 2017.

Error of law hearing

21. At the error of law hearing before me Mr Tarlow submitted that the judge’s decision to allow the appeal on the basis that the evidential flexibility provisions within Appendix FM-SE should have been exercised differently was contrary to the approach set out in **Sultana and Others (rules: waiver/further enquiry; discretion) [2014] UKUT 00540** which stated that “(2) *where applicants wish to invoke any discretion of this kind, they should do so when making the relevant application, highlighting the specific provisions of the Rules invoked and the grounds upon which the exercise of discretion is requested*”.

22. The Appellant failed to follow that procedure. The First-tier Judge’s decision in failing to apply the law should be set aside and remade by dismissing the appeal. Mr Victor-Mazeli in response submitted that the approach had been appropriate and the decision was sustainable.

Consideration

23. In considering this matter there is no dispute that every applicant must satisfy the applicable requirements of Appendix FM and FM-SE, including those pertaining to the stipulated documentary evidence. In the context of this appeal, as Judge Iqbal noted, the key provision is contained in paragraph [7] of FM-SE:

“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:

- (a) *Evidence of the amount of tax payable, paid or unpaid for the last full financial year...*
- (b) *The following documents for the last full financial year...*
 - (i) *annual self assessment tax return to HMRC (a copy or print out).*
 - (ii) *statement of account (SA 300 or SA 302).*
- (c) *Proof of registration with HMRC as self employed if available.*
- (d) *Each partner’s Unique Tax Reference Number (UTR) and/or the UTR of the partnership or business.*

- (e) *Where the person holds or held a separate business bank account, bank statements for the same 12 month period as the tax return.*
- (f) *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 the account in the name of the person or in the name of the person and their partner jointly.*
- (g) *Evidence of ongoing self employment through ... [one of the specified documentary sources]”.*

24. This appeal centres on the personal bank account evidential requirements in paragraph 7(f) of the Appendix. There is no claim that the Appellant had a business bank account.
25. It is accepted that the bank statements in respect of the Sponsor’s business were non compliant with paragraph 7(f) because, it is claimed, he is paid in cash and did not put the money in the account using it instead for expenses.
26. It is clear that the ECO did not have with the application the required twelve months’ bank statements required for self-employment. Indeed, the only evidence before him was an SA 302, evidence of national insurance payments and six months’ bank statements for the period immediately before the application (the date of which is unclear).
27. It does not appear that the ECO was asked to exercise evidential discretion and he did not do so. As the provisions confer a discretion on the ECO confined to cases where the applicants have submitted a document in the wrong format or a copy document, rather than an original or a document which does not contain all the specified information, in light of the failure to provide several mandatory documents there is no basis for concluding that his failure to exercise discretion was not in accordance with the law.
28. The emphasis appears to be on the ECM’s actions following receipt of the Grounds of Appeal. Several more of the mandatory documents were submitted at that later stage but not the mandatory twelve months’ bank statements covering the last full financial year.
29. The judge found that the ECM had considered the exercise of evidential flexibility and the discretion afforded by it. She concluded that it had not been correctly exercised.
30. The difficulty, in my judgement, is that the judge has proceeded on the erroneous basis that the ECM had before him all the mandatory documents that were put before her at the hearing (and as set out by her at [26]).
31. In respect of the bank statements alone there was no issue of them being in the wrong format or a copy. Nor was it a matter of, e.g. one bank statement from a series being missing or it being a document which did not contain all the specified information. Rather it was the case that at least six months of the required twelve months of statements were missing. In other words specified evidence was missing entirely.

32. The ECM's decision not to exercise discretion in the Appellant's favour was unassailable. The judge has materially erred by misunderstanding that the information before the ECM was not what was before her. The result is in applying paragraph D(d)(iii) of Appendix FM-SE she has exercised the discretion based on all the mandatory documents being provided to her. However the discretion in question is conferred exclusively on the Respondent and is not exercisable by the Tribunal.
33. There is a further difficulty and it is the one on which the Respondent principally relies. In **Sultana** (at [20]) it is stated

"... applicants and their advisers must obviously be alert to the totality of the applicable requirements enshrined in Appendix FM-SE. Alertness to the various obligatory requirements is obviously essential. We would also encourage applicants and their advisers who consider that any of the discretionary powers conferred on the ECO by paragraph [D] should be exercised in their favour to proactively make this case when submitting their applications ... if this Sponsor genuinely cannot provide the necessary records concerning his decorating business, as it is a purely cash enterprise he should in any fresh application, specifically invoke paragraph [D](e) of the Appendix and make his case accordingly, advancing all relevant facts, justifications and explanations. Issues of this kind belong firmly to the primary decision maker and should not be belatedly ventilated at the stage of either first instance or second instance appeal".

34. In failing to apply the guidance contained in **Sultana** the judge also erred.

Notice of Decision

Giving effect to the above analysis and conclusion:

The decision of the First-tier Tribunal contains material error of law. It is set aside. I remake the decision by dismissing the appeal and thereby affirm the decision of the ECO.

No anonymity direction is made.

Signed

Date 24/07/2017

Upper Tribunal Judge Conway