Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: OA/08675/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On Wednesday 22 November 2017	**On Friday 24 November 2017**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

ENTRY CLEARANCE OFFICER, NEW DELHI

Appellant

and

MRS AMINA MOMTAJ MONI

Respondent

Representation:

For the Appellant: Mr T Wilding, Senior Home Office Presenting Officer
For the Respondent: Mr T Shah, solicitor, Taj solicitors

DECISION AND REASONS

Background

1. This is an appeal by the Respondent Entry Clearance Officer ("ECO"). For ease of reference I refer to the parties as they were in the First-tier Tribunal even though strictly the ECO is the Appellant in this Tribunal.

2. The Respondent appeals against a decision of First-Tier Tribunal Judge I Ross promulgated on 24 February 2017 ("the Decision") allowing the Appellant's appeal against the Respondent's decision dated 1 May 2015 refusing her entry clearance as the spouse of a person settled in the UK.

3. The Appellant is a Bangladeshi national. She applies to join her husband, Mr Saleh Ahmed ("the Sponsor") who is settled in the UK. She made an application on 18 February 2015 refused by the Respondent's decision under appeal.

4. The Respondent refused the Appellant's application for two reasons, both connected with the Sponsor's income. The Respondent was not satisfied that the Sponsor was earning the income stated in the application. It was also noted that the information provided regarding the Sponsor's earnings conflicted with information received from HMRC.

5. The Respondent's decision was maintained by the Entry Clearance Manager ("ECM") on 10 September 2015. He placed emphasis on the second of the reasons given. He indicated that further verification checks were made to HMRC following receipt of the appeal bundle and that as a result of that information he was "satisfied that employment has been contrived for the purposes of this visa application".

6. The Judge allowed the appeal on the basis that the Respondent had incorrectly calculated the Sponsor's income. On that basis and because he thought that there was no issue as to the Sponsor's income, he concluded that the Appellant met the provisions of the Immigration Rules and accordingly, found that the decision to refuse entry was a disproportionate interference with the couple's human rights.

7. The Respondent appeals on two grounds. The first relates to the allegation of dishonesty made by reference to the HMRC information. It is said that the Judge gave no reasons for preferring the evidence of the Appellant over that of the Respondent. The second relates to the assertion that there was no issue as to the Sponsor's income. It was pointed out that the reasons for refusal included that the Appellant could not meet the minimum income requirement.

8. Permission was granted by First-tier Tribunal Judge M Robertson in the following terms (so far as relevant):-

> "2. It is arguable, as submitted in the grounds, that the Judge has not given adequate reasons, by reference to the evidence before him, for accepting the Appellant's evidence as to his gross annual income in preference to the enquiries made by the Respondent from HMRC. It is not clear from [4], and [7] the periods of time during which the Appellant was employed at Wild Mango (which changed its name to Tiger Coast) and Spice Curry. It is therefore arguable that it is not clear from the decision how the Judge reached his decision."

9. The matter comes before me to decide whether the Decision contains a material error of law and, if so, to re-make the decision or remit the appeal for rehearing to the First-Tier Tribunal.

Submissions

10. Mr Wilding focussed his submissions on the second of the grounds. He was right to do so. The Respondent's decision and particularly the review decision of the ECM, in relation to the deception allegation, focusses on changes of employment

which it is said that the Appellant and Sponsor had failed to declare as a change of circumstances. However, as the Judge pointed out at [7] of the Decision, this arose from confusion caused by the change of name of one of the restaurants at which the Sponsor was working.

11. The second ground turns on whether the Appellant is able to meet the minimum income requirements of Appendix FM. It is common ground that the income which she is required to show is £18,600.

12. Mr Jarvis did not take issue with what the Judge said at [7] of the Decision concerning the wrong calculation made by the ECO based on the HMRC evidence. However, he submitted that the Appellant's own calculations are also wrong and do not permit her to succeed under Appendix FM applying Appendix FM-SE.

13. The Appellant relied in her application on the Sponsor's income being £20,150. That is based on a calculation carried out by her solicitors in a letter dated 18 February 2015 which states so far as relevant:-

> "FINANCIAL REQUIREMENT AND MAINTENANCE
> The Sponsor is at present working for Wild Mango Limited. His position is a Second Chef.
> The Sponsor is also working part-time as a Second Chef for Spicy Curry Inn trading as Curry Inn.
> Please consider his both [sic] employer letters, pay slips, confirming his employment with them and that his last 6 months wages were deposited to bank account which satisfy the Immigration Rules
> **Wild Mango Limited**:-
> Sponsor is getting salary every 4 weeks. We have calculated from the Sponsor's lowest gross (before tax) salary of the last 6 months of:
> £950.00 monthly payslip ÷4 weeks x 52 weeks a year =
> **£12,350** annual gross income
> **Spicy Curry Inn trading as Curry Inn**:-
> We have calculated from the Sponsor's lowest gross (before tax) salary of the last 6 months of:
> £600 monthly payslip ÷4 weeks x 52 weeks a year =
> **£7800** annual gross income
> Therefore the <u>combined salary</u> a total of
> (£12,350.00 + £7,800)"

14. As Mr Wilding points out, there are not four weeks in every month. As such, he submitted that the calculation wrongly inflates the figure for earnings. He also pointed out how Appendix FM-SE requires the calculation to be made. The Sponsor has been in employment for over six months and is therefore entitled to rely on six months' pay slips. Paragraph 13 of Appendix FM-SE requires the calculation to be made as follows:-

> …..

Calculating Gross Annual Income under Appendix FM

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 ….. 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 six months and has been paid throughout the period of six 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..[my emphasis]

(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; [my emphasis]"

15. Mr Wilding pointed out that the Appellant having been employed for more than six months and relying on what is said to be six months of payslips must be applying under paragraph 13(a) of Appendix FM-SE and not paragraph 13(b). Mr Shah did not dissent. Mr Wilding pointed out the distinction (as I have emphasised) in the two provisions. One is to support a calculation of the figure relied upon in the application. The other is to support a calculation of the figure at date of application. Reliance on paragraph 13(a) has the effect, Mr Wilding submitted, of requiring the Appellant to show that the Sponsor earns at least £20,150. It is not enough he says for the Appellant to show that the Sponsor earns £18,600 by way of the payslips as she has relied in her application on a figure of £20,150.

16. Mr Wilding did accept though that since the Appellant has to show under Appendix FM that the Sponsor earns at least £18,600, if he does in fact earn that amount, that is relevant to whether the Appellant should succeed applying Article 8 ECHR.

17. Mr Shah in reply did not accept that the Sponsor's income was wrongly calculated and drew my attention to the payslips which are appended to a letter dated 15 February 2017 addressed to Judge Ross although unfortunately not copied to the Respondent. He did not though take me to what those payslips show or the detail of the calculation. Since that letter was not copied to the Respondent, Mr Wilding did not have a copy of these documents on file although he had been shown them immediately before the hearing. Since the detail of those documents is not referred to in the Decision (which is perhaps why the Respondent has appealed as she has on the basis that she does not understand the

Judge's reasoning) I will need to deal with that detail when I come to consider the documents below.

18. Mr Shah submitted that in any event the issue is whether the Appellant meets the minimum income requirement in Appendix FM which is accepted to be £18,600. He did not accept that the Appellant could not meet Appendix FM-SE if the documents show an income of less than £20,150 although he did not offer any alternative interpretation of paragraph 13(a) to that put forward by Mr Wilding.

19. Mr Shah also directed my attention to the Supreme Court's judgment in MM (Lebanon) and others v Secretary of State for the Home Department [2017] UKSC 10 and the Immigration Directorate Instructions revised in October 2017 as a result of that judgment. He submitted that, based on those documents, the essential issue is whether refusal of entry clearance breaches the Appellant's (and the Sponsor's) Article 8 rights. He pointed out that the Respondent has not raised any ground of challenge in relation to the allowing of the appeal under Article 8 ECHR. It is though of course the case (as Mr Wilding pointed out) that the Judge depends in his Article 8 analysis on the Appellant meeting the Immigration Rules. If in fact the Judge has materially erred in his analysis of the financial requirements, then the balance in Article 8 would need to be revisited.

20. It is of course the case that if I find a material error of law in the Decision, I would then consider whether it should be set aside and, if I set it aside, it would follow that the Article 8 assessment would have to be re-made. The Respondent has not challenged the Judge's findings which are relevant to Article 8 other than whether the Appellant meets the financial requirements. That is a matter which I may need to take into account when considering the materiality of any error and when reassessing the Article 8 balance if I do find a material error of law.

Error of law discussion and decision

21. With that summary of submissions, I now turn to what the Decision and the documents show. The documents appended to the 15 February 2017 letter are:-
    (1) A letter dated 26 February 2015 from Wild Mango Ltd;
    (2) Payslips from Wild Mango Ltd from 14 September 2014 to 1 February 2015
    (3) A letter dated 27 February 2015 from Spicy Curry Inn Ltd
    (4) Payslips from that employer dated 14 September 2014 to 1 February 2015

22. No issue was taken by the ECO or ECM in their decisions as to the compliance of the employers' letters with Appendix FM-SE. The only issue which is taken relates to the genuineness of employment in light of the HMRC documents which, as I have already noted at [10] above and as the Judge found arose from a confusion about the change of name of the company. For the sake of completeness, though, I note that Wild Mango Ltd confirms that the Sponsor has worked for that company since 23 June 2014 as a second chef. He works permanently for 25 hours a week and his yearly gross salary is £12,350 which is

paid every four weeks in the sum of £950 gross by cheque. That is confirmed by the six payslips which follow.

23. The letter from Spicy Curry Inn Ltd (trading as Curry Inn) confirms that the Sponsor has been employed by Spicy Curry Inn Ltd since 23 June 2014 as an assistant chef. He works part-time on a permanent basis. His annual gross salary is £7,800 paid by cheque every four weeks. That too is confirmed by the six payslips which follow (which each show a gross payment of £600).

24. A point which was not evident from the submissions at the hearing is that the payslips and letters confirm that the Sponsor is paid four-weekly and not monthly. The dates of the payslips are 14 September 2014, 12 October 2014, 9 November 2014, 7 December 2014, 4 January 2015 and 1 February 2015. That is no doubt the reason why the Appellant's solicitors carried out the calculation which they did. There is no error in that calculation.

25. I do not attach any blame to Mr Wilding for his submission that the calculation was in error since he did not have the payslips or letters before him. One might have expected that Mr Shah would have picked up the point since his firm provided the documents. However, as a matter of fact the calculation carried out is correct and the point about compliance with paragraph 13(a)(i) falls away insofar as that requires the Appellant to show the amount relied upon in the application. The payslips when extrapolated to a gross annual figure do show a figure of £20,150.

26. However, this evidence then raises a different issue of non-compliance with Appendix FM-SE. As the evidence now shows, the Appellant has not in fact produced six months of payslips. There are six payslips each relating to a different month but they do not in fact cover a period of six months prior to the application (because they relate to payments every four weeks and not every month). The application was made on 18 February 2015. A period of six months dating back from that date would be 18 August 2014. The earliest payslip is dated 14 September 2014.

27. Paragraph 2(a) of Appendix FM-SE requires the provision of "Payslips covering (i) a period of 6 months prior to the date of the application if the person has been employed by their current employer for at least 6 months". As such, on a strict interpretation of Appendix FM-SE, the Appellant has not complied with that requirement. She would have to provide the payslip before the earliest payslip which was provided.

28. That though is not the end of the matter. Appendix FM-SE contains its own evidential flexibility requirements. Of course, in this case the ECO and ECM did not consider whether it was necessary to exercise discretion to request missing documents because they were of the view that the employment was not in any event genuine based on the information from HMRC. The application would therefore have failed for that reason. However, now that this point has fallen

away, the question arises whether the evidential flexibility discretion might have fallen to be applied in this case.

29. Paragraph D(b)(i)(aa) permits the decision-maker to request documents if one in a sequence is missing. I recognise that the situation here is slightly different; the Appellant has failed to provide one payslip at the start of the sequence and not within a sequence. However, read with the employer's letters which confirm that the Sponsor had been employed since June 2014, it would have been evident that there should be a payslip in existence prior to the September payslip and the ECO/ECM might therefore have requested the Appellant/Sponsor to provide that, particularly since (as appears to be the case) confusion was caused by the payments being made four-weekly rather than monthly.

30. I am at this stage considering whether the Decision contains an error of law. I accept the Respondent's ground two that the Judge has erred in finding at [8] of the Decision that no issue was taken with the sponsor's income. In light of my conclusions about what the documents show though, there is a question mark over the materiality of that error.

31. The Judge was entitled to find that the ECO had wrongly calculated the income by reference to the HMRC information rather than the payslips which (according to the letter dated 18 February 2015) were indeed produced. For the reasons stated at [27] above, the Judge was wrong to find that the Appellant satisfied the requirements of the Immigration Rules. However, as I also point out at [29] above, this is a case where evidential flexibility might have been appropriate if the ECO/ECM had correctly understood the content of the letter and documents submitted with the application as to the Sponsor's income rather than relying on the HMRC information.

32. This is an appeal which post-dates the coming into force of the Immigration Act 2014. Although the entry clearance application was made before 6 April 2015 and was pending at that date, the application includes a human rights claim. The transitional provisions do not therefore apply. Since the Respondent's decision was made after 6 April 2015, the appeal provisions amended by the Immigration Act 2014 apply. Accordingly, what the Judge had to decide was whether the appeal should succeed under Article 8 ECHR.

33. There is no challenge to the genuineness of the relationship between the Appellant and her daughter (who is a British citizen) and the Sponsor. As I have noted above, the Appellant's solicitor's calculation of the Sponsor's income was in fact correct. The documents show that the Appellant meets the minimum income requirement although not in strict compliance with Appendix FM-SE.

34. This appeal concerns a request for entry clearance from a spouse and child who, as the Judge notes at [5] of the Decision "are prevented from living together by the refusal decision". Even though the Judge was wrong to say at [8] of the Decision that the Appellant satisfied the (strict) requirements of the Rules, the

evidence shows that her spouse is earning the requisite level of income and indeed the level of income claimed in the application. The non-compliance is very minor and, as I have noted, might have been overcome by the exercise of evidential flexibility.

35. For those reasons, I am satisfied that, although the Judge did fall into error at [8] of the Decision, the error is not material and does not impact on his conclusion that the Appellant is entitled to succeed under Article 8 ECHR on the basis that the Respondent's decision is a disproportionate interference with her family and private life.

DECISION

I am satisfied that the Decision contains errors of law. However, those errors are not material. For that reason, I decline to set aside the decision of First-tier Tribunal Judge Ross promulgated on 24 February 2017. The consequence is that the Appellant's appeal is allowed on human rights grounds on the basis that removal of the Appellant would breach Article 8 ECHR.

Signed Dated: 23 November 2017

Upper Tribunal Judge Smith