



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number OA/06533/2015

**THE IMMIGRATION ACTS**

Heard at Field House  
On 24 November 2017

Decision & Reasons promulgated  
On 5 March 2018

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL BAGRAL

Between

ENTRY CLEARANCE OFFICER,  
NEW DELHI

Appellant

and

HERPREET SINGH  
(ANONYMITY ORDER NOT MADE)

Respondent

**Representation**

For the Appellant: Mr S Walker, Senior Home Office Presenting Officer

For the Respondent: Mr E Anyene, of Counsel, instructed by Malik Law Chambers

**DECISION AND REASONS**

**Introduction**

1. The Entry Clearance Officer (ECO) appeals against the decision of First-tier Tribunal Judge J Bartlett, promulgated on 20 February 2017 allowing the appeal of Mr Herpreet Singh against the decision of the ECO to refuse entry clearance as a spouse pursuant to section EC-P of Appendix FM of the Immigration Rules (the Rules). Hereinafter, I shall refer to the parties as they were before the First-tier Tribunal.

## **Background**

2. The Appellant is a national of India born on 25 November 1989. On 13 January 2015 he was married to Ms Charnjit Kaur Singh, – hereafter ‘the sponsor’ - in India. On 3 February 2015 the Appellant applied for entry clearance with a view to settlement as the spouse of the sponsor. The application was refused for reasons set out in a Notice of Immigration Decision dated 17 March 2015, with particular reference to paragraphs EC-P.1.1(d) and E-ECP.3.1 of Appendix FM of the Rules. Essentially the Respondent was not satisfied that: (i) the couple were in a genuine and subsisting relationship; and (ii) that the financial requirements of the Rules were met by reference to the sponsor’s income, and in particular that there had been a failure to provide specified documents in accordance with the requirements of Appendix FM-SE.
3. The Appellant appealed to the IAC.
4. The judge noted there were two issues before her in the appeal. The first concerned the genuineness and subsistence of the relationship between the Appellant and sponsor. The judge found that the relationship was subsisting and that the Appellant intended to live permanently with the sponsor. The second issue concerned the financial requirements of Appendix FM-SE.
5. The judge observed at [15] that:
 

“it is not disputed that at the time of the application the appellant did not submit bank statements covering the full six-month period or the letter from the employer setting out all the information required by appendix FM-SE. However I consider that I am entitled to take into account evidence submitted after the application so far as it pertains to the situation as it was at the date of application.”

“I also considered that the letter from the employer which has been provided for the purposes of this appeal, complies with appendix FM-SE. In addition I find that Ms Singh has provided bank statements covering the entire six month period an issue (sic). Therefore I conclude that the appellant has satisfied the financial requirement in appendix FM and the requirements of appendix FM-SE.”
6. The judge proceeded to consider the claim outside of the Rules on Article 8 grounds and reached a somewhat odd conclusion that: as there was no gap between the Immigration Rules and Article 8, as the former had been met, the Article 8 claim fails [19].
7. The Respondent sought permission to appeal which was granted by First-tier Tribunal Judge McGinty on 4 September 2017.
8. The grounds of appeal assert that the judge erred in taking into account documents that were not submitted with the application, when considering whether or not the requirements of Appendix FM-SE had been met, in respect of specified documents necessary to prove the financial requirements of the Rules.

## **Submissions**

9. Mr Walker in amplifying the grounds submitted that the judge should not have considered documents at the date of hearing that were not before the ECO at the date

of decision. As the specified documents were not submitted to the ECO the judge should have dismissed the appeal under the Rules.

10. Mr Anyene submitted that all the specified documents were submitted with the appeal but were not considered by the Entry Clearance Manager (ECM). He submitted that the refusal decision acknowledged that the documents were submitted. He referred to the bank statements and submitted that they were deficient of the requisite six month period by "eleven days at the beginning of the sequence". Mr Anyene submitted that that was sufficient to apply the "evidential flexibility policy". He invited the tribunal to find that there was no material error of law in light of the documents that were before the ECO whose main concern was the genuine nature of the relationship.

### Consideration

11. I consider that the central submissions advanced on behalf of the Respondent by Mr Walker are correct.
12. Under Appendix FM the Appellant must prove that the sponsor's income meets the minimum income threshold of £18,600 as specified within that appendix and is to be proved by the provision of specified documents as set out in Appendix FM-SE. That Appendix states at paragraph D(a):

"In deciding an application in relation to which this Appendix states that specified documents must be provided, the Entry Clearance Officer or Secretary of State ("the decision-maker") will consider documents that have been submitted with the application, and will only consider documents submitted after the application where sub-paragraph (b), (e) or (f) applies."

And at paragraph 2:

"In respect of salaried employment in the UK (except where paragraph 9 applies), all of the following evidence must be provided"

13. The Rules therefore required the Appellant to provide all the specified documents to the ECO. The judge records at [15] that there was no dispute at the time of the application the Appellant did not submit bank statements covering the full six-month period or a letter from the employer setting out all the information required by Appendix FM-SE. That seems to me to be a fairly clear record of an admission on the part of the Appellant that the required documents were not submitted with the application.
14. While before me it is asserted that the missing documents were provided to the ECO when the appeal was lodged but not considered by the ECM, I have not been directed to any evidence that shows the documents were so submitted. I note in particular that the missing documents are not specifically referred to in the Appellant's representatives covering letter attached to the grounds of appeal to the First-tier Tribunal or in the grounds themselves, and the ECM noted that the Appellant had "*not provided us with the documents that were clearly mentioned in the refusal.*" Further, the Appellant's skeleton argument before the judge does not state that the documents were submitted to the ECO on appeal. Further still, the judge

records at [15]; *"I also considered that the letter from the employer which has been provided for the purposes of this appeal, complies with appendix FM-SE. In addition, I find that Ms Singh has provided bank statements covering the entire six-month period an issue"* (sic), which strongly supports the view that the documents were not submitted to the ECO either at the time of application or appeal. I therefore proceed on the basis that the Appellant has not established that the missing documents were submitted to the ECO at all.

15. While I acknowledge that the Rule anticipates the submission of additional evidence after an application has been filed with the ECO; it does not, in my opinion, cover the present circumstance where the Appellant has not supplied the documents with the application and has then, in effect, kept it back for use in appeal proceedings.
16. In this context I consider that the judge erred in finding that post-decision evidence was not to be excluded if it shed light on the circumstances appertaining at the time of the Respondent's decision (section 85A(2) of the Nationality, Immigration and Asylum Act 2002 – see also DR (ECO: post-decision evidence) Morocco \* [2005] UKIAT 00038).
17. In order to succeed in his application for entry clearance the Appellant had to meet the requirements of the Rules at the date of the Respondent's decision. In respect of the financial requirements he was, pursuant to the Rules, required: (a) to demonstrate the sponsor had a level of income in accordance with that specified under paragraph E-ECP.3.1 of Appendix FM; (b) to demonstrate that the income was from specified sources (E-ECP 3.2); and (c) to establish (a) and (b) by the production of specified evidence pursuant to Appendix FM-SE.
18. The circumstances appertaining at the date of the Respondent's decision included that the Appellant had failed to produce the specified evidence. The availability of such evidence now, does not alter the circumstances appertaining at the date of the Respondent's decision. The post-decision production of the omitted documents cannot alter the fact that at the date of the Respondent's decision the Appellant did not satisfy the requirements of the Rules because he had not complied with those requirements in respect of specified evidence.
19. As the Appellant has not, therefore, submitted the missing documents at all to the ECO, I do not see that Appendix FM-SE paragraph D applies. Furthermore, subparagraph (f) provides that a decision maker *may* contact the applicant or their representative in writing or otherwise to request further information or documents. It was not necessary, in my opinion, for the ECO or ECM to exercise a discretion in favour of the Appellant where the missing documents were not provided.
20. In so far as it is argued that the judge erred in failing to apply the "evidential flexibility policy" I find there is no merit in the Appellant's submissions. The missing bank statements did not constitute documents omitted from a sequence of documents that were submitted with the application. This was not a situation of gaps within the documents submitted that might have been filled; the missing documents essentially were in respect of a period prior to and after the sequence of

documents that were submitted with the application. The application failed in this regard because the Appellant had failed to submit documents covering the whole six-month period; it did not fail because there were documents missing in the sequence of documents actually submitted.

21. Given the rejection of the above aspect of the challenge, I find that the Appellant cannot meet the requirements of the Rules and the appeal thereunder falls to be dismissed.
22. The representatives agreed that, in the event I should reach this conclusion, the fairest course would be to rehear the appeal on Article 8 grounds outside of the Rules as this was not properly considered by the First-tier Tribunal and was predicated upon the judge's conclusion in respect of the Rules. An Article 8 claim outside of the Rules may well prove to be a difficult hurdle for the Appellant to cross in the circumstances, but I make no affirmative comment either way as the parties were not able to deal the claim and I have not heard any evidence or submissions on it. The appropriate forum in the circumstances in which to do so is the First-tier Tribunal.
23. I add one further comment. That is, as the Appellant is in possession of the requisite specified documents, he may deem it appropriate to make another application to the ECO under the Rules.

### **Notice of Decision**

The decision of the First-tier Tribunal contained a material error of law and is set aside. I remake the decision dismissing the appeal under the Rules.

The appeal is remitted to the First-tier Tribunal to determine the Appellant's Article 8 claim. The judge's finding that the relationship requirements of the Rules is met is preserved.

The appeal is to be heard by any judge apart from Judge J Bartlett.

No anonymity order is sought or made.

Deputy Judge of the Upper Tribunal Bagral

18 January 2018