



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/01696/2013

THE IMMIGRATION ACTS

Heard at Field House
On 3rd March 2014

Determination Promulgated
On 22nd April 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

MS TUYET MAI PHAM

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr O Lot, Victory Law Solicitors
For the Respondent: Mrs Vidyadharan, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The application for permission to appeal was made by the Secretary of State but nonetheless I will refer to the parties as they were described before the First-tier

Tribunal that is Ms Pham as the appellant and the Secretary of State as the respondent.

2. The appellant was born on 22nd June 1983 and is a citizen of Vietnam. On 20th September 2012 she made an application for entry clearance to join her husband Mr Lokman Maroof Zadeh. Her application was refused on 6th December 2012 and she brought an appeal against that decision.
3. The respondent in the refusal notice noted that the appellant married her husband who is a UK national on 18th November 2011 and appeared to be in a genuine relationship but in view of her character and her conduct in her complete disregard for the UK immigration law it was considered undesirable to issue an appellant with entry clearance. Records held at the office showed that the appellant travelled to the UK on 12th May 2003 from France with no visa or valid leave to enter and immediately sought leave to remain for an indefinite period. She was granted temporary admission while her application was considered and placed on reporting restrictions and a decision was made in the UK to refuse her application on 10th November 2004. Records held that the respondent's office showed that the appellant subsequently failed to report to the Home Office and was registered as an absconder on 17th May 2005. She then stayed illegally in the UK until 2009 and was next encountered boarding a flight to Vietnam on 28th May 2009.
4. Her application was therefore refused under paragraph EC-P.1.1(c) of Appendix FM on the Immigration Rules S-EC.1.5.
5. It was further noted that the appellant's sponsor was not exempt from the financial requirements and therefore must provide documents specified in the Immigration Rules and it was noted that a P60 and 26 pay slips were received. Also received was a contract of employment with Harringay Meat Traders and a letter from the employer. Bank statements were also received.
6. However, the respondent found that the total income represented in the pay slips amounted to an annual income of £18,560 which was below the £18,600 set by the Immigration Rules.
7. The judge of the First-tier Tribunal Hussain allowed the appeal on the basis that first it was for the respondent to prove the allegation of fact with regard to her immigration history and admission after the respondent had raised the fact which showed that the refusal of the appellant was conducive to the public good. At paragraph 12 the judge stated that the records had not been produced in the respondent's bundle and at paragraph 13 in the absence of evidence or an admission from the appellant found that the respondent had not proven the allegation. He also found there was a high threshold in relation to paragraph S-EC1.5 in terms of conduct amounting not to being conducive to the public good and was not satisfied that the appellant fell for exclusion under S-EC1.5.

8. At paragraphs 16 to 19 the judge found that with regards to the second grounds of refusal the ECO calculated that the sponsor's gross income came to £18,560 rather than £19,200 claimed by the sponsor.
9. The judge noted at paragraph 17 that the respondent erred in assuming that by the date of the application the sponsor should *already* have earned the equivalent of £18,600 per year. His reading was that at the date of application it must be demonstrated that the sponsor was *on* an annual income of at least £18,600 and this income was proved in a number of ways. First from a letter from the employer dated 27th November 2012 stated that from 2nd July 2012 the sponsor had been on a gross annual income of £19,240 and that was consistent with the pay slips issued post 2nd July 2012. There were deposits entering the sponsor's account that corresponded with the net amount shown on his pay slips.
10. At the sponsor's bundle at page 21 there was a P60 for the year ending 5th April 2013 that showed a gross earning of £19,290.
11. The judge concluded that at the date of the appellant the sponsor was on an annual salary of over £18,600.

Application for Permission to Appeal

12. An application for permission to appeal was made by the respondent stating that the Rules for the requirement of the specified evidence were comprehensively set out in Appendix FM and FM-SE to the Immigration Rules. These set out what types of evidence were required, the periods they covered and the format they should be in.
13. It was submitted that the Tribunal had not at paragraph 17 to 20 of the determination had full regard to these requirements. In this case the Tribunal has made findings on evidence from July 2012. However, given that the requirements were that the evidence needed to be from six months *prior* to the date of application the evidence considered should have been from April 2012 Appendix FM-SE made it clear that this requirement was mandatory.
14. It was respectfully submitted that the evidence was either incomplete of the findings or insufficient to mean that this appeal should have been allowed.

The Hearing

15. At the hearing before me Mrs Vidyadharan confirmed that the application was made on 20th September 2012 but the decision made on 6th December 2012. The Rules clearly stated what documents needed to be submitted and that included pay slips six months prior to the date of application. The judge had not referred to this in the paragraph 17 to 20. He needed to look at pay slips and further a letter from the employer. The judge was relying on evidence that should not comply with the Rules and was a clear error.

16. Mr Lot submitted that it was unfortunate that the judge did not refer to all the evidence but it was clear that documentation *had been submitted* from 6th April 2012 and this was the basis of thirteen weeks' pay slips of £350 gross and after 13th July 2012 to 28 September 2012 there was an increase in salary and this increase was to £370 and the gross for this period of thirteen weeks was £4,810 and there were payslips for this period.
17. There was an email from the Entry Clearance Officer dated 26th November 2012 requesting further information and this prompted a letter from the employer dated 27th November 2012. This letter was written in response to the email and was taken into account as part of the application.
18. The letter from the employer and the pay slips both complied with the evidence.
19. Mrs Vidyadharan submitted that the letter should have confirmed income at a higher level from the original period.
20. Mr Lot stated that the covering letter of the application dated 28th September 2012 listed all the documentation that went with the application and the Entry Clearance Officer had referred to the pay slips. Furthermore there were bank statements which were submitted and these showed the income.
21. The Entry Clearance Officer and the Entry Clearance Manager had made errors in their calculation and had not returned the documentation or submitted the bundle.
22. Mr Lot produced the pay slips which had been produced at the First-tier Tribunal which indicated a weekly salary *prior* to 2nd July and *post* 2nd July. Prior to 2nd July it was £350 and post 2nd July was £370 per week.
23. Mrs Vidyadharan agreed that the Entry Clearance Officer appeared to dispute one particular aspect of the evidence produced by the appellant and this was in relation to the gross income although she submitted that I had to be satisfied that all the Immigration Rules had been satisfied.
24. Mr Lot took the Home Office Presenting Officer and me through all the payments identified on the appellant's bank statements which were before the Entry Clearance Officer up to 7th September 2012.

Conclusions

25. No challenge was made in the permission to appeal with regard the suitability requirements. The issue in dispute was that of the income of the sponsor and the evidence provided. An email was sent to the appellant requesting further information on 26th November 2012 and thus although the application was made on 20th September 2012 the ECO clearly took into account further evidence as at 26th November 2012.

26. With regard eligibility for entry clearance as a partner the rule at E-ECP.3.1. stated that the applicant must provide specified evidence from the sources listed in paragraph E-ECP 3.2. of

(a) a specified gross annual income of at least

(i) £18,600

27. I note from the Entry Clearance Officer's decision that the appellant was not exempt from the financial requirements as defined by paragraph E-ECP.3.3. and that she must provide the documents as specified in the Immigration Rules at Appendix FM-SE.

28. The Home Office Presenting Officer Mrs Vidyadharan supplied me with a copy of the Immigration Rules which were in force currently. The rules as at the date of the decision varied slightly and these stated at FM-SE2 the following:

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

(b) *The P60 for the relevant period or period of employment relied on (if issued)*

(c) *Pay slips covering:*

(i) *a period of 6 months prior to the date of application if the person has been employed by their current employer for at least 6 months (and where paragraph 13(b) of this appendix does not apply); or*

(ii) *any period of salaried employment in the period of 12 months prior to the date of application if the person has been employed by their current employer for less than 6 months*

(d) *A letter from the employer(s) who issued the pay slips at paragraph 2(a) confirming:*

(i) *the person's employment and gross annual salary;*

(ii) *the length of their employment;*

(iii) *the period over which they have been or were paid the level of salary relied on in the application; and*

(iv) *the type of employment (permanent, fixed-term contract or agency).*

(f) *Monthly Personal bank statements corresponding to the same period as the pay slips at paragraph 2(a), showing that the salary has been paid into an account in the name of the person or the name of the person and their partner jointly".*

29. The Entry Clearance Officer went through the documents provided and stated that the sponsor had submitted a P60.

30. The Entry Clearance Officer also stated *'your sponsor has submitted 26 pay slips dated from 6th April 2012 to 28th September 2012 to evidence his employment with Harringay Meat Traders Limited. The total gross salary demonstrated by these pay slips amounted to £9,820 (equivalent to £18,560 per annum)'. This was, in fact, an incorrect calculation as pointed out by the Entry Clearance Manager.*
31. There was an email from the Entry Clearance Officer dated 26th November 2012 requesting further information and this prompted a letter from the employer dated 27th November 2012. This letter was written in response to the email and was taken into account as part of the application. The Entry Clearance Officer then referred to the requirements with regards to the letter from the sponsor at paragraph 2(b) (i) to (iv) and stated:
- "Your sponsor has submitted a letter from Harringay Meat Traders Limited dated 27th November 2012 signed by Christiana Demetrou stating that your sponsor has been employed as a permanent driver since 26th August 2008 with a current salary of £19,240 per annum since 2nd July 2012".*
32. The Entry Clearance Officer also stated that *'an employment contract had been submitted by your spouse with Harringay Meat Traders Limited dated 26th August 2008 signed ...'*
33. The Entry Clearance Officer also stated *'your sponsor has submitted a Barclays Bank statement Account No XXXX9583 for the period 24th March 2012 to 11th September 2012. Net pay on weekly wage slips correspond to salary deposits seen on bank statements'.*
34. The Entry Clearance Officer went on to state *'your sponsor has declared a gross income from his employment as a driver is £19,200 per annum. Although he had stated his sponsor's total income amounted to £19,200 he relied on the income based on the evidence submitted and this evidence showed that the gross income his sponsor received in the six months prior to the date of application of £18,560 was insufficient to meet the financial requirements and the application was refused under paragraph EC-P.1.1(d) of Appendix FM of the Immigration Rules'.*
35. It is clear that the point taken by the Entry Clearance Officer was in relation to the gross income. The Entry Clearance Officer miscalculated the figures and an Entry Clearance Manager stated in a review that the actual total was £9,280 which doubled was £18,560. This was £40 short of the requirement. It was on this point that the appellant demonstrated that his application met the requirement of the Rules.
36. Before me Mr Lot carefully trawled through the bank statements produced to the Entry Clearance Officer and before the judge. (Pausing there, I note that the ECO took into account into the application evidence provided as at 26th November 2012 and this dates the application). Thirteen payments at £350 equated to £4,550 between 10th April 2012 and 29th June 2012 and there were the equivalent of thirteen payments between 6th July 2012 and 28th September 2012 at the rate of £370 per week which equated to £4,810. This amounts to £18,720 which is £120 over the required level. The Entry Clearance Officer specifically referred to the payment of 28th September in the notice of decision and which equated in the bank statement to three payments

from Harringay Meat Traders. All of the transfers to the sponsor's bank statement were identified as being from Harringay Meat Traders. Thus to the period of the application the sum of £9,360 was demonstrated in evidence or could be deduced in evidence by the judge.

37. As pointed out the Entry Clearance Officer stated in his notice of refusal that 26 pay slips had been produced. He made no query about the remainder of the documentation produced. Despite a direction to produce evidence on which it was relied the Entry Clearance Officer clearly accepted that 26 pay slips had been provided albeit that there was an error made by the judge in that he did not note within paragraph 17 that those pay slips had indeed been provided. Not only were pay slips provided but also bank statements were provided with corresponding entries from the pay slips.
38. Mr Lot produced a pay slip from prior to 2nd July 2012 and a pay slip post 2nd July 2012 when the appellant would be paid £350 per week and a pay slip post 2012 when the appellant would be paid £370 per week.
39. It was unfortunate that the Entry Clearance Officer made an error in his calculations and failed to return the pay slips in the Entry Clearance Officer's bundle. It would appear that the sponsor submitted a Barclays Bank statement for the period 24th March 2012 to 11th September 2012. In fact the statement was to 27th September 2012. Thus there was one bank statement missing from the series to show the payment on the 28th September 2012. No issue was taken with respect to the bank statements and indeed this is precisely the area covered by the rules in force at the time. As further information was requested by an email which is to the credit of the ECO. Indeed the ECO took into account evidence of the payslip of 28th September 2012. No issue was taken at the First-Tier Tribunal about the bank statements covering the relative period but even if this were wrong I find that the Entry Clearance Officer should have requested one missing bank statement in the series. He had referred to a payslip at the end of the series. Thus one payslip outside the bank statement period could have easily been rectified by requesting the missing bank statement and indeed was not the focus of the challenge. There was no issue with regards the authenticity of the documents.
40. The Entry Clearance Officer had clearly miscalculated the amount with respect to the payslips. The payslips originals were according to the sponsor were in Vietnam. There was no challenge to their authenticity in the decision notice. The Entry Clearance Officer had not sent them in the bundle and thus the best evidence of payslips from March to 28th September were in fact the bank statements and these showed an amount which exceeded the amount required and were clearly entries from Horsemeat Trading.
41. The appellant had produced *bank statements* to the ECO (24th March 2012 to 11th September 2012) to show and substantiate the pay slips which had been submitted to the Entry Clearance Officer and these showed thirteen payments at the equivalent of gross £350 per week between 10th April and 29th June and thirteen payments at £370 per week between 6th July and 28th September 2012.

42. The judge should not have referred to evidence which post-dated the decision because this was irrelevant and does not comply with the rules. However on the basis of the evidence which was before the judge and before the ECO I find that the appellant could comply with the rules and therefore the error by the judge was not material.

43. As this was the point that was taken by the Entry Clearance Officer and bearing in mind the confusion raised by the Entry Clearance Officer's notice and the subsequent review I conclude that although the judge might have been more expansive in his reasoning with regards the evidence submitted by the appellant overall with the application, at the date the appellant had, on balance, produce evidence to show he was in receipt of £18,600 per annum. I find that the appellant must show that he has been in receipt of the equivalent of £18,600 per annum for at least six months prior to the application but the appellant could in fact show this and had produced the evidence. There was an error in the judge's failure to consider evidence which postdate the decision but on a complete reading of the determination and further to my reasoning above, I find no material error in his decision and find that the determination shall stand.

Signed

Date

Judge Rimington

Deputy Upper Tribunal Judge