



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/08655/2013
OA/08658/2013
OA/08653/2013

THE IMMIGRATION ACTS

Heard at Field House
On 21st July 2014

Determination Promulgated
On 26th August 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS EMILY TURTON
MR HENRY TURTON
MR EDWARD TURTON
(Anonymity Directions Not Made)

Respondents

Representation:

For the Appellant: Ms A Holmes, Home Office Presenting Officer
For the Respondents: Mr A Alabi, instructed by Harrison Morgan Solicitors

DETERMINATION AND REASONS

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

Tribunal that is Mrs Turton and Masters Turton as the appellants and the Secretary of State as the respondent.

2. The appellants are citizens of Nigeria born on 1st September 1968, 3rd June 1994 and 31st October 1995 and they had made an application dated 30th January 2013 as the wife and sons of someone present and settled in the UK, for entry clearance to join Mr Charles Ajayi Turton their husband and father.
3. On 26th February 2013 an Entry Clearance Officer rejected their applications with reference to Appendix FM, HC 395 as amended and paragraph 297 of the Immigration Rules.
4. In relation to the first appellant the Entry Clearance Officer was not satisfied that the appellant's relationship with the sponsor was genuine and subsisting (contrary to E-ECP.2.6 and 2.10) and nor was he satisfied that Mr Turton earned the requisite money under Appendix FM E-ECP.3.1, nor that the first appellant met the English language requirement E-ECP.4.1.
5. In relation to the second and third appellants the Entry Clearance Officer rejected the first appellant's application and additionally stated he was not satisfied that Mr Turton had sole responsibility for their upbringing.
6. In relation to the second appellant the Entry Clearance Officer was not satisfied that he was under the age of 18.
7. First-tier Tribunal Judge Russell allowed the first and third appellants' appeals under the Immigration Rules but dismissed the second appellant's appeal under the Immigration Rules. He dismissed the appeals on human rights grounds. No challenge was made by either party to the Judge's determination in relation to the second appellant whose appeal was dismissed.

Application for Permission to Appeal

8. It was contended by the Secretary of State that the First-tier Tribunal Judge erred in law in allowing the appeals under the Immigration Rules. He made a material misdirection in law for allowing the appeal despite the appellants not providing the specified evidence.
9. At paragraph 10 of the determination the appellants' representative accepted that the "evidentiary requirements were an obstacle". From paragraphs 17 to 20 the judge reiterates that the appellants had not provided the necessary evidence and at paragraph 20 the judge exercised a discretion so that the appeal could be allowed. The Rules of specified evidence were comprehensively set out in the Appendix FM-SE to the Immigration Rules. These set out what types of evidence were required and the periods they covered. The Tribunal had failed to comply with the Immigration Rules and its findings were therefore unsustainable.

10. At paragraph 16 the judge set out the financial requirements of the Rules and materially erred by only applying the financial figure as if two appellants were applying for entry clearance. It was submitted that the judge needed to consider the figure for three appellants despite it being dismissed.
11. For these reasons permission to appeal was requested.
12. Permission to appeal was granted by First-tier Tribunal Judge White who stated that the judge acknowledged at paragraph 19 of the determination that the appellant had not produced the documents required under Appendix FM-SE as specified or in accordance with the directions given by the judge at the hearing and the judge nevertheless purported to exercise a discretion in paragraph 20 to allow the appeal.

The Hearing

13. Ms Holmes submitted that the judge had allowed the appeal without seeing the documentary evidence. At paragraph 9 the judge stated that the documents were not there and the judge directed that the P60 and bank statements should be provided. At paragraph 20 he took a discretionary decision, which was not open to him, and it was not open to him just to ignore the Immigration Rules.
14. The second ground was that the financial requirements were such that he needed to take into account two children but he did not.
15. During the course of the hearing Ms Holmes conceded that as the first child made an application when he was over the age of 18 and could not possibly succeed under paragraph 297 he should not have been included in the calculation and the judge's finding with respect to the amount required was correct.
16. At the hearing Ms Holmes helpfully submitted a copy of the relevant Immigration Rules current from 31st January 2013 to 27th February 2013 which was the date of application to date of decision.
17. Mr Alabi submitted that the correct documents had indeed been submitted although initially he stated that he was not sure that the appellant could succeed as at the date of hearing as there was an absence of schedule and absence of P60 and it seems an absence of the itemised bank statement.
18. Appendix FM-SE sets out the specified evidence applicants need to provide to meet the requirements of Rules contained in Appendix FM.
19. Further to Appendix FM
 - 2 In respect of salaried employment in the UK, all of the following evidence must be provided:
 - (a) wage slips covering a period of six months prior to the date of application if the applicant has been employed by their current employer for at least 6 months...;

- (b) a letter from the employers who issued the wage 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 upon in the application and
 - (iv) the type of employment (permanent, fixed-term contract or agency).
- (c) personal bank statements corresponding to the same periods as the wage slips at paragraph 2(a) showing that the salary has been paid into an account in the name of the person or in the name of the person and their partner jointly.

20. The judge determined at paragraph 16 and this appears to have been accepted by Ms Holmes that the appellant needed to show an income of £22,400 as the first appellant needed the sponsor to show an income of £18,600 (E-ECP.3.2) plus an additional £3,800 for the first child.

21. At paragraph 19 the judge stated

"This is a frustrating case of the appellant producing almost all but not all of the documents specified in Appendix FM-SE. It is further frustrating that the appellant did not comply with my directions at the hearing and produced further evidence before the writing of this determination paragraph".

22. The judge made a direction that the appellant should provide

- (a) a schedule of his income and expenditure;
- (b) a P60 from ISS;
- (c) itemised bank statements; and
- (d) a letter from Group Clean conforming to the requirements.

23. The judge continued at paragraph 20

"Nonetheless I am going to apply the discretion to the requirements which the ECO has not applied and accept that the appellant has provided sufficient evidence in the form of contracts of employment of Mr Turton, letters from employers, P60, wage slips and bank statements to show that he is earning in excess of £22,400, the amount specified in Appendix FM as the threshold over which he must be earning as gross annual income... while there is no clear overarching picture of Mr Turton's income as Mr Welling submitted on Mr Welling's calculation Mr Turton is earning somewhere between £21,000 and £22,000 a year."

24. I find that it was not open to the judge merely to depart from the requirements of the Immigration Rules and apply his own discretion and if he did so he needed to give an indication of which particular discretion he was applying and his reasoning.
25. There is provision under FM-SE to provide further information where a document is in the wrong format or is not an original or the appellant has not submitted a specified document and the decision maker may contact the applicant or his representative and request the document. Further if the applicant has submitted a document in the wrong format or a document that is a copy and not an original the application may be granted exceptionally.
26. According to the judge however there was an array of information which was missing and not a specific document in the wrong format or a document missing from a sequence of documents or an original.
27. I therefore find that there was an error of law and I remake the decision. However I preserve the findings of the judge in respect of the relationship between the appellants and the sponsor at paragraph 15 and the finding in relation to the English language test requirement. I also note that no challenge was made to the determination in the application for permission to appeal on this point.
28. I turn to a consideration of the evidence. I have noted the requirements under Appendix FM-SE above and in particular noted that within the entry clearance bundle there was a detailed list of documentation provided to the Entry Clearance Officer and next to payslips and letter from employer both of which had two ticks which would indicate the payslips and the letters from the employers were supplied from both employments that is the Clarendon Hotel and Group Cleaning, and there was a further box ticked which stated bank statements covering the last six months were provided.
29. In addition there was a schedule which appeared to be a caseworker or Entry Clearance Officer calculation giving the financial details summary and this identified that there was an overall total of £13,120.73 as "wages checked" but the corroboration was only £9,357.91. I conclude that the corroboration must have stemmed from the bank statements which were submitted and saw on my trawl through the bank statements that indeed nearly £13,200 from the sponsor's employer was deposited into his bank statements. These were supplied at the hearing before me and which the sponsor confirmed he had submitted to the Entry Clearance Officer.
30. As I note those bank statements are indicated on the ECO bundle. The Entry Clearance Officer had ticked the box which stated last six months' bank statements and the original bank statements were provided to me both which detailed deposits from the Clarendon Hotel and from Group Cleaning, I conclude that this information had indeed been supplied to the Entry Clearance Officer in support of the appellant's work and related to a time prior to the application.
31. The Entry Clearance Officer calculation giving the financial details summary also identified that payslips from both the Clarendon Hotel and Group Clean Services for

the six month period prior to the application were attached. These were also in the bundle before me.

32. I can accept that there was significant scrutiny required to identify and piece together all the evidence but I do conclude that it was an error by the judge to state that there was not a clear overarching picture of the sponsor's income.
33. I turn to the requirement of the letters and consider the letter from the Clarendon Hotel Blackheath Limited of which originals were provided. The letter from the Clarendon Hotel confirmed that the appellant was employed on a permanent contract as a kitchen porter and gave the length of his employment and when reading the letter the period of time which he had earned a gross of £6.45 per hour. He worked 37.5 to 40 hours per week. I find that this letter conforms with the requirements of the Immigration Rules.
34. I turn to the letter of the Group Cleaning and note that this was accompanied with a contract from Group Cleaning. I therefore consider that the letter and contract can be read together as the contract constitutes an attachment. This gives the employment with the hours and salary in effect the gross salary of the appellant. It states the length of time that he has been employed and the dates on which his wage changed. Only part of this contract was enclosed within the entry clearance bundle but I see no reason why the full contract would not have been included within the appellant's application and from this contract it is clear that his type of work is permanent because it states that "the first three months of your employment will be a probationary period". I have concluded it is permanent and indeed this is what the appellant confirmed.
35. I find that the objections raised in the Entry Clearance Officer's notice of refusal have been addressed. The appellant does not need to submit a P60 and indeed the application was submitted in January 2013 and his P60 would not be issued until three months later and yet the requirement was to show financial evidence for the previous six months to the application. Therefore the P60 would not necessarily be relevant.
36. The bank statements clearly demonstrated that the appellant was receiving regular wages from both the Clarendon Hotel and Group Cleaning Services and I find that the evidence requirements were fulfilled. The appellant had been working for the Clarendon Hotel from 2005 and for Group Cleaning from July 2012 but also produced evidence from ISS which predated the July 2012 start date with the Group Cleaning Services but this was not required.
37. The sponsor needed to show an annual income of £22,400. The application was made on 30th January 2013 and the decision was made on 26th February 2013. On a calculation of the income supported by the evidence which was before the ECO for the six months prior to the application there was at least £11,578.32 and this stopped short in January 2013. This equates to approximately £23,156.64 per annum and in excess of the required amount.

38. Bearing in mind that I have preserved the findings in the previous determination and Ms Holmes also conceded that the relevant Rule in relation to the third appellant was paragraph 297C I find that all the requirements to the Immigration Rules have been complied with by the first and third appellant and therefore although I found an error of law in relation to the determination of Judge Russell I find that the requirements have been fulfilled to satisfy the Immigration Rules and I allow the appeals. As the first appellant's appeal is allowed the challenge on sole responsibility falls away. I make it clear there was no challenge by either party to the determination in relation to the second appellant and in that respect the determination of Judge Russell shall stand.

Order

The appeals of Mrs Emily Turton and Mr Edward Turton are allowed.

The appeal of Mr Henry Turton remains dismissed.

The fee award made by Judge Russell is preserved.

Signed

Date 21st August 2014

Deputy Upper Tribunal Judge Rimmington