



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/11257/2013

THE IMMIGRATION ACTS

Heard at Field House
On 25 June 2014

Determination Promulgated
On 14 July 2014

Before

UPPER TRIBUNAL JUDGE ESHUN

Between

BAL BAHADUR PAIJA

Appellant

and

ENTRY CLEARANCE OFFICER - NEW DELHI

Respondent

Representation:

For the Appellant: Ms R Stickler, Counsel

For the Respondent: Ms J Isherwood, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The respondent has been granted permission to appeal the determination of First-tier Tribunal Judge Maciel allowing the appeal of the appellant against the ECO's decision made on 18 April 2013 to refuse entry clearance to come to the UK as the spouse of a person present and settled in the UK. The respondent was not satisfied that the appellant could meet the financial requirements of Appendix FM of the Immigration Rules.

2. The sponsor at the hearing adopted her statement and confirmed that she had two jobs at the relevant time and pay slips had been provided. She confirmed she received rental income for the property. She provided a rental agreement which evidenced that she was earning £300 per month from letting the property.
3. The issues before the judge were that the appellant had failed to provide bank statements covering the period January 2012 and June 2012 and the title deeds for the property that has a tenant. The judge noted that the bank statements do not evidence the rental income that was paid in cash because the cash was used to pay bills by the sponsor. From June 2012 rental payments were paid by BACS to the sponsor's account.
4. The judge found as follows:

"18. I find that the Sponsor has been in receipt of rental income. This is apparent from the tenancy agreement and her oral evidence which, as I have said, I accept.

19. I find that the Respondent has refused to exercise a discretion in the Appellant's favour. I find that this refusal to be unreasonable in all the circumstances and I find that given that there is no challenge that the rental income has been paid for that period of time, the discretion ought properly to have been exercised in favour of the Appellant.

20. I find that the Appellant fulfils the requirements of the Immigration Rules and I allow the appeal."

5. First-tier Tribunal Judge Ievins granted permission.

"2. The application was made by a form signed on 29 January 2013. It was refused by a notice of refusal of entry clearance on 18 April 2013 because the respondent Entry Clearance Officer considered that the sponsor (the wife in this country) had not shown that she earned enough money to satisfy the requirements of paragraph EC-P.1.1(d) of Appendix FM and that the specified documents had not been submitted.

3. This is an out of country appeal, so it is for the appellant to show that he meets the requirements of the Immigration Rules at the date of decision, 18 April 2013. The Immigration Rules require him to produce evidence governing the period of six months before the date of application.

4. Judge Maciel heard oral evidence on 20 March 2014. She correctly identified that Section 85(5) of the Nationality, Immigration and Asylum Act 2002 required her to consider only the circumstances obtaining at the date of decision. She found that, on the evidence before her, the sponsor had two jobs and had a rental income and taken together those three sources of income did satisfy the Immigration Rules. The respondent conceded that there was adequate evidence of the two jobs. It was also accepted, according to the judge's determination, that the evidence of

the rental income for the six month period was adequate. However, the sponsor had not been able to provide bank statements to show the rental income between January and June 2012 because the rent was paid in cash. That evidence was accepted. From June 2012 rent was paid by BACS into the sponsor's account. The judge does not say where in the sponsor's bank statements the rental payments received are shown but I accept, as her paragraph 12 appears to suggest, that such payments can be identified. Before then rent was paid by cash.

5. *Judge Maciel notes (paragraph 10) that the respondent's representative had conceded that if the appellant provided the title deeds and bank statements then the appeal should be allowed. The judge did receive bank statements and title deeds, after the hearing but relating to the period before the date of decision, which caused her to conclude that the requirements of the Immigration Rules were satisfied.*
6. *Permission to appeal is now sought by the respondent on the basis that the rental income being paid in cash did not fulfil the requirements of Appendix FM (FM-SE). The relevant date was the date of application, 4 February 2013 and the specified period before that date. The respondent observes that as the sponsor's current income did now exceed the income threshold, there was no reason to prevent the appellant making a fresh application based on the sponsor's income at that time.*
7. *The respondent now accepts the documentary evidence submitted by the appellant in respect of his wife's two jobs. However, what she earned from those two jobs was not, at the time of the application, enough to show a gross income of at least £18,600 per annum. At the time of the application the appellant must rely upon his wife's rental income. Therefore it must be considered what documentary evidence of rental income Appendix FM requires. Appendix FM, paragraph E-ECP.3.2(d) allows "other specified income of the applicant and partner to be taken into account in determining whether the financial requirement of paragraph E-ECP.3.1 is met." The specified documents required to evidence property rental income are set out in Appendix FM-SE paragraph 1. The title deeds must be (and have now been) produced as well as twelve personal bank statements for the twelve month period prior to the date of application showing the rental income being paid into an account in the name of the person concerned or their partner. These cannot be provided. As I understand the evidence, rent only began to be paid into the bank after June 2012. As the date of decision is 18 April 2013 and the application was made before then twelve months' bank statements simply cannot be provided. It follows that the appellant simply cannot produce the specified documents, even though the judge accepted that the rent was in fact being received, in cash. Harsh though the effect of this may seem upon the appellant, in his circumstances he cannot satisfy the requirements of the Immigration Rules as at the date of decision. In finding that he did satisfy those Rules it is arguable that Judge Maciel fell into material error of law. Accordingly permission to appeal is granted. I observe, as the respondent concedes in the grounds seeking permission to appeal, that*

'if the sponsor's current income does now exceed the income threshold, there is no reason to prevent the appellant making a fresh application based on the sponsor's income at this time.'

There is no reason why an anonymity direction might be appropriate."

6. At the hearing Ms Stickler provided a skeleton argument. She said it was conceded at the First-tier hearing and not challenged before the Upper Tribunal that the sponsor had produced the specified evidence to demonstrate her income from the two jobs namely income from employment with Haydens Bakery of £14,174 and income from employment with Dominoes of £2,325.59.
7. In relation to the rental income Counsel argued that it was accepted that the appellant had produced bank statements showing receipt of rental income between July 2012 and January 2013 (six months prior to the application). The ECO contends that the judge erred in law in taking into account the rental income as the sponsor and appellant had failed to provide twelve months' bank statements with each statement showing the rental income being deposited. However on a careful analysis of the judge's determination, it is clear that she applied a discretion found within Appendix FM-SE in favour of the appellant allowing the appeal under Immigration Rules (paragraph [19]).
8. She argued that paragraph 10(a)(ii) of Appendix FM-SE which states

Personal bank statements for the twelve month period prior to the date of application showing the rental income was paid into an account in the name of the person or the person and their partner jointly - - -

does not require bank statements to show the rental income being paid into the account for each and every month supplied. It merely requires "*evidence that the rental income was paid into the account*". She argued that the ECO's position that the rental income must be paid into the account for the entire twelve month period cannot be sensibly maintained as such conclusion would mean that an appellant relying on rental income which had been received in cash for the last ten years, would have to wait an additional twelve months before any application could be made. Such an interpretation is not Article 8 compliant and has a disproportionate effect.

9. Alternatively she argued that if the Upper Tribunal is of the view that the Rules do require each of the twelve months' bank statements to show the rental income being received, there clearly must be discretion within the Rules to disapply such requirement and permit an ECO and judge to consider rental income when the bank statements provided show sustained deposits at the time of the application, in addition to credible evidence from the sponsor as to how the previous rental payments were made.

10. Counsel argued that such discretion is found within paragraph D(e) of Appendix FM-SE which states
 - (e) where the decision maker is satisfied that there is a valid reason why a specified document(s) cannot be supplied, e.g. because it is not issued in a particular country or has been permanently lost, he or she may exercise discretion not to apply the requirement for the document(s) or to request alternative or additional information or document(s) to be submitted by the applicant.
11. Counsel argued that if it is the case that the specified evidence, requires twelve months' bank statements with each statement showing a rental deposit, this evidence could not be supplied and there was a valid reason as to why this was the case, namely that the rental income was paid in cash for half of the set period. The judge accepted the sponsor's evidence that the rental income had been received for the entire twelve months by a combination of cash and BACS payments. Further, the HOPO below did not submit that the sponsor was an incredible witness. The judge accordingly applied the above discretion and given that there was no challenge that the rental income had been paid for that period of time, she exercised such discretion as she was entitled to under Section 86(3)(b) of the Nationality, Immigration and Asylum Act 2002 in favour of the appellant. Therefore the judge did not make an error of law.
12. Ms Isherwood submitted that at question 3.6.1 the sponsor did not provide any information about non-employment income. The information about the rental income was contained in a letter she sent to the ECO with the application form on 15 January 2013. There was no explanation by the sponsor as to why not all the rental payments appeared in the bank statement.
13. The ECO considered the appellant's statement that his sponsor received £300 a month in rent but was not satisfied that even when including this source of income, it was sufficient to meet the required financial threshold. In light of this the ECO was not satisfied that the sponsor was employed as claimed, that her income was as claimed and that the appellant was able to meet the minimum financial threshold for his maintenance in the UK. The ECO also said that the sponsor had not submitted the specified documents and therefore had not demonstrated an income of £18,600 per annum.
14. Ms Isherwood submitted that the discretion identified by Counsel is the decision maker which in this instance is the ECO. The judge was only reviewing the ECO's decision and has no discretion in this case.
15. I find that Counsel was wrong in her understanding or interpretation of Appendix FM-SE paragraph 10(a)(ii). I find, as stated by First-tier Tribunal Judge Ievins, that the specified documents that had to be produced were twelve personal bank statements for the twelve month period prior to the date of application showing the

rental income being paid into an account in the name of the person concerned or their partner. This evidence could not be produced because the rental income only began to be paid into the bank account after June 2012. It follows that the appellant simply cannot produce the specified documents, even though the judge accepted that the rent was in fact being received, in cash. This is a mandatory requirement which the appellant could not meet. Consequently Judge Maciel fell into material error and her decision cannot stand.

16. The discretion relied on by Counsel is a discretion to be exercised by the “decision maker”. In this instance it is the Entry Clearance Officer. The appellant did not provide an explanation to the ECO as to why he could not submit the specified document. The ECO’s decision was in accordance with the law and the Immigration Rules as he not being aware of any explanation for the failure to submit the specified documents
17. Counsel relied on section 86(3) of the Immigration and Asylum Act 2002 which states
 - (3) the [Tribunal] must allow the appeal insofar [it] thinks that –
 - (a) a decision against which the appeal is brought or is treated as being brought was not in accordance with the law (including Immigration Rules), or
 - (b) a discretion exercised in making a decision against which the appeal is brought or is treated as being brought should have been exercised differently.
18. For the reasons given at paragraph 16 above, I cannot exercise a discretion in place of the ECO under Section 86(3) as suggested by Counsel.
19. In light of the appellant’s failure to submit the specified documents showing that he could meet the financial requirements of the Immigration Rules at the date of the respondent’s decision, I find that his appeal must be dismissed.

Signed

Date

Upper Tribunal Judge Eshun