



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: OA/14092/2013

**THE IMMIGRATION ACTS**

Heard at Field House  
On 30 July 2014

Determination Promulgated  
On 11 August 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

MS GOFFRAN ZALZALE  
(ANONYMITY ORDER NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER - BEIRUT (AMMAN)

Respondent

**Representation:**

For the Appellant: Mr R Roberts, legal representative, Cromwell Wilkes (a firm authorised by OISC to provide legal advice and services)  
For the Respondent: Mr S Walker, Specialist Appeals Team

**DETERMINATION AND REASONS**

1. The appellant appeals to the Upper Tribunal from the decision of the First-tier Tribunal dismissing her appeal against the decision by an Entry Clearance Officer to

refuse to grant her entry clearance as the spouse of a person present and settled here. The First-tier Tribunal did not make an anonymity order, and I do not consider that such an order is warranted for these proceedings in the Upper Tribunal.

2. On 9 May 2013 the appellant's then legal representatives, Landmark Legal LLP, submitted an application on her behalf to the Entry Clearance Officer in Beirut. The covering letter, invited him to note that the sponsor had two permanent part-time jobs and that evidence of income and employment had been provided in relation to both jobs. This evidence included six months' bank statements for the sponsor, six months' wage slips of the sponsor for both of his jobs, letters from both his sponsor's employers, an employment contract and (although not referred to in the covering letter) P60s for both jobs issued by the respective employers for the tax year ended 5 April 2013. These showed that the sponsor's gross earnings for his employment with Accountancy Managers Ltd was £5,470.58 and he had gross earnings of £4,000 from his employment with Gold Wheel Auto Centre Ltd. Both employments had commenced in November 2012, according to the information provided in the respective employers' letters.
3. The appellant's solicitors also provided evidence of the sponsor's cash savings with Barclays Bank going back more than six months, and evidence of the appellant's savings in a US dollar account which she held with a branch of Faransabank in Beirut.
4. On 9 June 2013 an Entry Clearance Officer in Beirut gave his reasons for refusing the application. In order to meet the financial grounds of the Rules, her sponsor needed a gross income of at least £18,600 per annum. She had failed to provide all of the specified original documents as evidence of her sponsor's employment and income. The application was therefore refused under paragraph EC-P.1.1(d) of Appendix M of the Immigration Rules. The Entry Clearance Officer was also not satisfied that the relationship with her sponsor was genuine and subsisting.
5. In the grounds of appeal to the First-tier Tribunal, the appellant's solicitors argued that the documentation provided with the application complied with Appendix FM-SE. The sponsor had a total annual gross salary of £19,740 per annum from his two employments, and in addition to that he had savings. The ECO failed to consider carefully the documents submitted in support of the application.
6. On 7 May 2014 Mr Husain, Entry Clearance Manager, gave his reasons for maintaining the decision to refuse entry clearance. He was satisfied that the genuineness of the relationship had been evidenced, and therefore that objection fell away. With regard to the financial requirement, the "principal and reliable source of evidence" had not been provided, namely a HMRC P60 certificate. The one which had been provided did not confirm that the appellant was earning on or above the income threshold.

### **The Hearing Before, the Decision of, the First-tier Tribunal**

7. The appeal was listed for hearing in the First-tier Tribunal on 19 May 2014. The respondent failed to comply in a timely manner with a Rule 13 notice that was sent by airmail on 13 January 2014. Thus there was no ECO bundle before the Tribunal. What appears to have happened is that the ECO bundle was prepared shortly before the hearing, but it did not reach the judge.
8. The appeal was heard by Judge Seelhoff sitting in the First-tier Tribunal at Richmond Magistrates' Court. Mr Ahmed of Counsel instructed by Landmark Legal LLP appeared on behalf of the appellant, and Mr Macrae, Home Office Presenting Officer, appeared on behalf of the respondent.
9. In his subsequent determination, the judge noted that the appellant had provided a large bundle of documents which represented copies of everything that was submitted with the original application. But unfortunately it did not include a copy of a cover letter or a formal listing of the documents submitted at that time. He also said in paragraph 8 of his determination that he has not had the benefit of seeing a review of the original decision.
10. The judge received oral evidence from the sponsor. He set out his employment history and explained that he had calculated his salary based on letters from his employers which set out what his total salary for each year would be. The sponsor gave detailed evidence about how his daughter had been hospitalised for three months after being born prematurely and then been given an overdose of calcium which had caused burns to her hands. He explained that his daughter had already had a number of operations as she could not move her hands, and he anticipated she would need further surgery in order to have the prospect of being able to use them in the future. He was keen to bring his daughter to the UK to have the last operations here. It was not possible for the family to settle in Lebanon because it was very dangerous and insecure.
11. During the course of submissions, the sponsor interjected to point out that he had considerable savings at the date of application. His personal savings were about £16,000, and his wife also had savings of approximately US\$14,000. The judge noted there was evidence of this in the appellant's bundle, and that the sponsor asserted that the original items had been submitted with the application but had not been returned by the embassy.
12. The judge's findings are set out in paragraph 17 onwards of his subsequent determination. He referred to paragraph 13 of Appendix FM-SE (in the form in which it appears in Phelan, which states the law as of September 2012) and held that, applying paragraph 13(a), the appellant's income for the past six months was equivalent to £18,180 per year:

Therefore even if that income was acceptable it falls short of the amount required under the Rules.

13. The judge went on to find that there had also not been compliance with paragraph 2 of Appendix FM-SE. Although the sponsor's income from Accountancy Managers Ltd could be seen on his bank statements, the papers that he had before him did not include copies of the pay slips for March and April 2013. For that reason, the judge held, the appellant was not entitled to rely on those wages as a consequence of having failed to provide mandatory evidence. Furthermore, it was implicit from the requirement in paragraph 2(c) that for a salaried income to be admissible, that income must be paid into a bank account. The sponsor's wages from Golden Wheel were paid in cash for the first four months, and thus did not show up on the bank statements. Therefore, the judge held, the sponsor was entitled to rely on such income for the purposes of the Rules.
14. At paragraph 23, he also noted that although the appellant had provided employers' letters, the letter from Golden Wheel did not meet the requirements of paragraph 2(b) of Appendix FM-SE as it did not state the total income received and so "the income would need to be disregarded for that reason".
15. The judge went on to address the topic of savings available to the sponsor and the appellant. At paragraph 24 he said he was reluctant to find the sponsor did not provide documents when the respondent had not formally provided any summary of what they did provide. Equally however it appeared that the sponsor and his representatives had not kept an accurate record of what was submitted, as he had not been provided with anything that shows that they did. Usually the burden of proof was on the appellant in a case like this, and where documents were unavailable, it seemed to him that the party who bears the burden of proof was the party that ought to be penalised.
16. The judge went on to find in paragraph 25 that in any event the evidence of savings only related to the position as it stood in February 2013. The applicant was obliged to show that the balance relied on be maintained for six months prior to the date of application. The saving statements that he had before him were all dated three months before the date of application. He was in difficulties as more recent evidence may have been included with the original application, but he simply could not see that from the papers that he had in front of him on the appeal file.
17. The judge concluded at paragraph 26 that the appeal could not succeed under the Rules. The highest income that could be said to be demonstrated by adding all the pay slips that he had was approximately £8,580 which was well short of the amount required. The evidence of savings that he had were three months out of date at the date of application, and did not show him the situation at the relevant date.
18. At paragraph 27 he acknowledged that this was an extremely difficult situation that the child had been born prematurely and had severe health problems. But this was an entry clearance matter, and therefore he was required to consider the circumstances at the date of application and the child had not yet been born.

19. In the course of his discussion of the alternative claim under Article 8, the judge noted at paragraph 30 there was nothing illegal in somebody being paid in cash for their work, provided their employer properly accounted for tax and issued pay slips. He further observed as follows:
  31. Taking into account the cash in hand income from Golden Wheel which was not questioned by the respondent this applicant is close to meeting the requirements of the Rules.
  32. The respondent's case would be that the evidential requirements are as they are so that they can be certain of the income at the date of application is exactly what it is claimed to be and that it is reliable...
  37. I find that the specific evidence requirements are proportionate and therefore even those applicants who do not meet the formal income level can reasonably be asked to provide comparable amounts of evidence that the respondent and the Tribunal can be certain that they are considering a true picture of the circumstances at the date of application. The *missing evidence* (my emphasis) in this case means the appellant has not proved on a balance of probability that the circumstances at the date of application were as it has been asserted. I find that the requirement to produce specified evidence is proportionate and therefore the interference created in this case is proportionate.

### **The Missing Evidence**

20. The determination was promulgated on 30 May 2014. In the meantime, on 20 May 2014 the appellant's solicitors had sent an urgent fax to Judge Seelhoff at Richmond Magistrates' Court. The fax was received at Richmond Magistrates' Court on 21 May 2014, and was received at Hatton Cross on the following day.
21. The solicitors understood from Counsel representing their client that since the Presenting Officers' Unit had failed to file and serve a bundle of documents enclosing the application and documents submitted in support of the same, the court was unable to determine whether their client had submitted in support of her application documentation confirming her and her sponsor's savings. In the light of the above, their client's sponsor had managed to retrieve the following documents which confirmed that he had declared his savings at the time.
22. The solicitors went on to list the documents which they were enclosing. These included the visa application submission receipt dated 23 May 2013, setting out all the documents submitted in support of the application; a letter from the solicitors to the British High Commission dated 8 May 2013, a copy of a letter from Barclays Bank dated 2 May 2013 with the sponsor's ISA statements from 1 June 2012 to 31 May 2013 confirming the amount of savings held.
23. Therefore, the solicitors continued, on 9 May 2013 the sponsor in fact had total savings of £17,575.76, and furthermore the appellant had savings of just under US\$15,000 in Lebanon.

24. The solicitors asked that the letter with the attached enclosures be urgently forwarded to the judge, as the appellant wished this evidence to be considered before the judge made his determination.

### **The Application for Permission to Appeal**

25. The sponsor applied on the appellant's behalf for permission to appeal to the Upper Tribunal. He argued that the judge had made an error of law when assessing his level of income. He referred to the documents submitted the day after the hearing, and submitted it was clear that all the mandatory evidence was submitted with the application on 9 May 2013. When he worked for Golden Wheel Auto Centre, he received cash payments for the first three months. The Immigration Rules at the time of the application did not rule out cash payments as long as the applicant provided a letter from the employer confirming cash payments and the correct tax had been paid. In this case, this was confirmed by his P60.
26. The judge claimed his income was short of the threshold by about £400. The payment by Accountancy Managers Ltd in December 2012 was short by £50 because he took one day sick leave. This was deducted from his gross salary. That did not mean that his salary was short. His salary was still £10,140 per annum. Everyone took sick leave which was deducted from gross salary, but this did not mean his level of earnings had changed.
27. Even if his income was short by £400, he showed personal savings in excess of £16,000, and these could count towards the financial requirement. The judge had not taken this evidence into account. His personal savings put him well above the financial threshold.
28. The judge wrongly claimed that the March and April 2013 pay slips were missing. He brought all the original documents with him to court, and when he had offered to show them to the judge, the judge had said that the pay slips were in his bundle.

### **The Grant of Permission to Appeal**

29. On 23 June 2014 First-tier Tribunal Judge Jill Grimmett granted the appellant permission to appeal. It was clear that the bundle of documents had arrived before the determination was promulgated, but was only linked to the file on 20 June 2014. She was therefore satisfied there was arguably procedural unfairness in the way in which the Tribunal acted.

### **The Hearing in the Upper Tribunal**

30. At the hearing before me, I reviewed with the parties the documents which had been provided after the hearing, but which were not taken into account by the judge. Mr Roberts also developed the argument raised by the sponsor that the judge had miscalculated his gross earnings. Mr Walker conceded that the decision of the First-tier Tribunal was vitiated by a material error of law, such that it should be set aside

and remade, and I formally ruled to this effect. My reasons for finding an error of law are set out below.

### **Reasons for Finding an Error of Law**

31. The version of paragraph 13(a) relied on by the judge provides as follows:
- (a) where the person is in salaried employment in the UK at the date of application and has been employed by their current employer for at least six months, their gross annual income will be (where paragraph 13(b) does not apply) the total of:
    - (i) the gross annual salary from their employment as it was at its lowest level in the six months prior to the date of application...
32. The judge interpreted paragraph 13(a) as meaning that he should pick out the month in which the appellant's gross salary was at its lowest level, and then multiply the figure by twelve. Mr Roberts said he had been unable to find anything which supported this approach (taking the lowest month of earnings and grossing up) and Mr Walker was similarly perplexed. However, having reviewed the current version of paragraph 13(a) of Appendix FM-SE, I am satisfied that the judge's approach was correct. What is envisaged in paragraph 13(a) is that in the period of six months prior to the date of application the applicant's level of gross salary shall at least equal the level relied upon in paragraph 13(a)(i), namely the level of gross annual salary relied upon in the application.
- Mistake of Fact*
33. The judge's error lies in his assessment of what the appellant's gross annual salary was in December 2012. As acknowledged by Mr Roberts, the error was not the judge's fault. The judge worked from the pay slip issued by Accountancy Managers Ltd on 30 December 2012, which referred to the appellant as having received gross pay in that month of £715.28. It should have said that the appellant's basic pay was £780.30, as in the previous month.
34. In a letter dated 14 July 2014 his employer confirms that his gross salary for the month of December 2012 was £780.30, but he took one day off for sick leave, and therefore a deduction was processed in his December payroll.
35. The way in which this should have been reflected in the pay slip is not by reducing the figure given for basic pay, but by listing the day off as a deduction in the deductions column, and thereby reducing the amount of net pay. This was how it is done in the pay slip issued by Accountancy Managers Ltd for 30 March 2013, where the basic (gross) pay is given as £1,350, and in the deductions column the amount of £75 is deducted for one day off, so as to bring the figure for net pay down to £1,078.28.
36. But for the error in the December 2012 pay slip, the judge would have calculated that the appellant's gross salary exceeded £18,600. As it is common ground that the judge

made a material mistake of fact for which neither the appellant nor his legal representatives was responsible, an error of law is made out.

*Procedural Unfairness*

37. The judge went on to exclude other portions of the sponsor's asserted income from consideration. In short, the judge took the line that not only had the appellant not shown that his calculated income met the required threshold of £18,600, but he had not satisfactorily demonstrated through the provision of specified documents an actual gross income greater than about £8,000.
38. The judge's findings in this regard also disclosed errors of law, partly on procedural fairness grounds. The judge excluded the sponsor's income from Accountancy Managers Ltd in March and April 2013 although his net income from this employment could be seen from the bank statements. His reason for exclusion was that the papers he had did not include copies of the pay slips for March and April 2013. But the pay slips were available for inspection, as they were included in the bundle documents served immediately after the hearing. So there was procedural unfairness in these pay slips being excluded from consideration.
39. The judge also excluded from consideration the sponsor's employment with Golden Wheel on the grounds that the letter from the employer did not meet the requirements of paragraph 2(d) of Appendix FM-SE in that it did not state the total income received. But this paragraph does not in terms require the employer to state the total income received. What it requires the employer to do is, among other things, to confirm the person's employment and gross annual salary, and the period over which they have been or were paid the level of salary relied upon in the application. The employer's letter provided with the application discharged this function.
40. Finally, the judge held that the sponsor's wages from Golden Wheel for the first four (he should have said "three") months should be excluded as they were paid in cash, and thus did not show up on the bank statements.
41. The appellant's non-compliance with paragraph 2(f) (monthly personal bank statements showing that the salary has been paid into an account in the name of the person) was not fatal to the application, for the reasons later canvassed by the judge in his discussion of an alternative claim under Article 8. Paragraph 1(l) of Appendix FM-SE provides as follows:

If the applicant does not submit the documents as requested, the caseworker may refuse the application. Where the specified documents cannot be supplied (e.g. because they are not available in a particular country or have been permanently lost), the caseworker has a discretion not to apply the requirements of the specified documents, or to request alternative or additional information or documents be submitted by the applicant.



42. Golden Wheel flagged up to the Entry Clearance Officer that the appellant could not meet the requirements of paragraph 2(f) for the months of November 2012, December 2012 and January 2013 as he was paid cash in hand for those months, and his salary was only paid through BACS from 1 February 2013 to date. As the respondent had failed to comply with directions, the judge did not have the benefit of seeing the approach taken by the Entry Clearance Manager in his review statement. If he had seen this, he would have recognised that the Entry Clearance Manager was exercising evidential flexibility. He was recognising that P60s were an alternative, and indeed the most reliable, source of information about the sponsor's gross annual salary from his two employments. In short, it was implicit in the Entry Clearance Manager's approach that he was exercising discretion not to insist on compliance with the requirement in paragraph 2(f), which was practically impossible, but to uphold the refusal of the application on the grounds that the appellant had not provided a P60 for the sponsor which showed that he had earned at least £18,600 in the previous tax year. While this was of course true, the sponsor could not provide P60s covering twelve months employment as he had only begun working for the two respective employers about half way through the tax year. Nonetheless the P60s which he could and did produce had clear probative value, as a reliable calculation of what the sponsor would have earned over twelve months could be made from what he had earned thus far, as evidenced by the P60s.
43. Finally, there was procedural unfairness in the judge's findings on the savings of the appellant and the sponsor. The judge excluded these savings from consideration under paragraph E-ECP.3.1(b) primarily because it appeared to him that the evidence only showed the amount of savings held up to February 2013. But in fact the appellant had provided up-to-date evidence with her application, as shown by the documents in the bundle served after the hearing.
44. In conclusion, the decision of the First-tier Tribunal is vitiated by a material error of law, such that it should be set aside and remade.

### **The Remaking of the Decision**

45. I find that the decision should be remade in the appellant's favour. The appellant has provided the specified documents to show that the sponsor had a specified gross annual income of at least £18,600 at all material times. Alternatively, the small shortfall of £400 calculated by Judge Seelhoff on the basis of the incorrect gross salary figure in the December 2012 pay slip (see above) is more than compensated for by the savings of the appellant and the sponsor.
46. Mr Walker accepted Mr Roberts' calculations that the total savings of the sponsor and the appellant were £27,316. This produces a target figure for the sponsor's income of £14,058. In other words, the sponsor only needs to show that he was earning a gross annual salary at this level or above. The shortfall of £4,542 between this figure and the required income threshold of £18,600 is compensated for by the savings of £27,316 which the appellant and the sponsor held for at least six months prior to the date of the application.

**Conclusion**

47. The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside and following decision is substituted: the appellant's appeal against the refusal of entry clearance as a spouse is allowed.

Signed

Date

Deputy Upper Tribunal Judge Monson