IAC-AH-DH-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/14921/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 11th December 2014	**On 16th December 2014**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

THE ENTRY CLEARANCE OFFICER (PRETORIA)

Appellant

and

MRS JANET DONGO

Respondent

Representation:
For the Appellant: Ms A Holmes, Senior Presenting Officer
For the Respondent: Mr E Mungoni, the Sponsor, in person

DETERMINATION AND REASONS

1. The appeal comes before the Upper Tribunal following the grant of permission to appeal to the Entry Clearance Officer by the First-tier Tribunal (Judge P J M Hollingworth) on 17th October 2014. For the ease of reference, I shall continue to refer to the Entry Clearance Officer as the Respondent and to Mrs Dongo as the Appellant. No anonymity order was made by the First-tier Tribunal and no request has been made of the Upper Tribunal either at the hearing that took place before the First-tier Tribunal on 24th July 2014 or that of the present appeal on 11th December 2014.

2. The background to the appeal is as follows. On 26th April 2013 an application was made by the Appellant for entry clearance as the spouse of a person present and settled in the United Kingdom. A decision was made on that application on 10th June 2013. The application was refused and the basis of the refusal was that the Respondent did not accept that the Sponsor was exempt from the financial requirements as defined in paragraph E-ECP.3.3. The Entry Clearance Officer went on to state:-

> "You have not provided your Sponsor's payslips for the six months before this application was made and the statements of the bank account that the salary deposits were made into is evidence of your Sponsor's gross income from their employment / you and your Sponsor's savings and other income sources. You have failed to provide the specified documents of your Sponsor's income. These documents are specified in the Immigration Rules in Appendix FM-SE and must be provided. I therefore refuse your application under paragraph EC-P.1.1(d) of Appendix FM of the Immigration Rules. (E-ECP.3.1)."

The documents that the Appellant had provided with the application were set out at Annex D and referred to in the ECM's review namely a document to confirm an annual salary, copy of a P60 for the year 2012, payslips, copy of UK residence permit and an invitation letter. Further documents were sent with the appeal namely copy of marriage certificate, confirmation of annual salary, copy medical certificate, copy P60 tax certificate, Barclays Bank statements, an IELTS report, supporting letters and there was a document verification report.

3. Following the refusal the Appellant sought to appeal that decision and submitted Grounds of Appeal setting out the past history noting that his wife had originally applied for a visa in 2013 but had been refused under the new English language test which was later successfully taken. In the later submissions provided to the Entry Clearance Officer, the grounds noted that the Entry Clearance Officer had not considered the documents (the HMRC P60, letters from employers, bank statements, etc.). It was further noted in the grounds that were submitted at [D18] that the Entry Clearance Officer had noted that he had not submitted six months' payslips under Appendix FM-SE and that he had submitted three months' payslips and bank statements but the reason for not providing the six months' consecutive payslips was due to the "geographical nature of my company I work for. It is foreign based and efforts to generate payslips once issued and distributed is cumbersome and in legal terms tantamount to fraud it is said." The letter went on to say "I therefore feel that the ECO erred by failing to exercise his/her discretion under Appendix FM-SE Family D(e) under the provision."

4. It is plain from reading the Grounds of Appeal that the Appellant was seeking for the Entry Clearance Officer to invoke the discretion under the above provision as there were valid reasons for not submitting the payslips in question.

5. On 20th November 2013 the Entry Clearance Manager appeal review was undertaken, it is stated at Annex D that having reviewed the decision and taking into account the

Grounds of Appeal, including documents "submitted under Section 108 for IJ eyes only not included". The Entry Clearance Manager review made reference to the documents that had not been produced and made reference to additional checks that were carried out in relation to the Appellant's employment on 19th November 2013 which were contained in a document verification report. The Entry Clearance Manager noted that she was satisfied that the Appellant was not receiving the required level of income six months prior to the submission of the application and therefore failed to meet the requirements of family migration EC-P1.1. Thus the decision to refuse entry clearance was maintained.

6. The Appellant exercised her right to appeal and the matter came before the First-tier Tribunal (Judge Wellesley-Cole) sitting at Taylor House on 24th July 2014. At that hearing the Appellant was not legally represented but the judge heard from the Sponsor, Mr Mungoni and the Entry Clearance Officer was represented by a Presenting Officer. In a determination promulgated on 2nd September 2014 Judge Wellesley-Cole allowed the appeal under the Immigration Rules. It is plain from reading the determination that the only issue that had been identified in the refusal letter was that the Sponsor had not submitted payslips for the relevant period which is October 2012 to March 2013. The judge, considered all of the documentary evidence before her including the P60, bank statements, HMRC documents, letters from his employer and also what is referred to as a "restricted email". Having taken into account the documents, the judge found that the evidence of the Sponsor was wholly consistent with the documents and that his credibility had not been undermined in any way. Thus she found that she was satisfied that he was able to satisfy the Rules as she found that he was receiving the requisite funds for the period October-March 2013 on the basis that he earned £4,400 per month. She found at [8] "that discretion should have been exercised accordingly as set out above". Thus she allowed the appeal.

7. The Entry Clearance Officer sought permission to appeal that decision and permission was granted on 17th October 2014.

8. Thus the appeal came before the Upper Tribunal. Mr Mungoni appeared on behalf of the Appellant and the Entry Clearance Officer was represented by Ms A Holmes, Senior Presenting Officer. At the outset of the proceedings I ensured that Mr Mungoni had copies of all the relevant documents and explained to him the issues that were before the Upper Tribunal.

9. Ms Holmes sought to rely on the grounds as drafted. She began her submissions stating that the judge erred in law as a result of her conclusions at [6] and [7] and that the judge found that the Entry Clearance Officer should have exercised a discretion and make further enquiries under "FM-SE D(e)" but went on to find that the Entry Clearance Officer should have exercised a discretion but the judge then went to exercise her discretion by allowing the appeal. Ms Holmes submitted that that was wrong and that even if FM-SE D(e) did apply, the judge failed to make any findings as to whether or not the Entry Clearance Officer had been given a "valid reason" by the Appellant or Sponsor at the date of decision and secondly, the judge made no

findings about the Appellant's actual evidence which was not that payslips could not be produced but that it was cumbersome and therefore on that basis FM-SE D(e) could not apply in any event.

10. By reference to the decision of **Sultana and Others (Rules: waiver/further enquiry; discretion) [2014] UKUT 00540**, she submitted that there had never been any request made by the Sponsor to exercise any discretion in her favour. However, Ms Holmes had not seen the letter at D17 dated 8th July 2013 where it made a clear reference to the difficulties of providing the specified documents due to "operational reasons" and specifically asking for a discretion to be exercised. In the light of that document, Ms Holmes stated that she could not disagree with that document and that there had been evidence before the Entry Clearance Officer that a discretion should be applied. However she submitted that even if the first two grounds were not made out, the third ground was, because she could not allow the appeal under the Rules but could only allow the appeal to the limited extent that there was a discretion to be exercised by the Entry Clearance Officer. Thus she had erred in law in that respect.

11. Mr Mungoni confirmed to the Tribunal what he had told the First-tier Tribunal that there had been what he described as "logistical problems" about being paid and that they were still getting their salaries and disbursements from abroad. He said that three payslips had been provided but that he could not have provided the six payslips due to those logistical problems. He referred to the money that was deposited in the bank accounts which were payments from his employment which were paid into the Barclays account. He confirmed that the letter that he had written to the Entry Clearance Officer was a request for a discretion to be exercised. Mr Mungoni stated that it was open to the judge to use her own discretion. He said that he had failed to produce the payslips due to logistical and geographical problems and that he was still employed by the same company and was still being paid the same salary. He said that he had never worked for another company having come to the UK in 2003 on a work permit visa. His wife originally accompanied him as his dependant. He had always worked as a station manager and that was the basis upon which his work permit had been provided. The original work permit was valid until 2006 and was renewed again for another five years. He obtained a settlement visa in 2008. He said that his wife's visa expired in 2011 and she returned to Zimbabwe in March 2011 as she was looking after her mother. He said that after her mother had passed away she applied for entry clearance. He had no dependent children as they were all over 18 but relied upon the documents that he had provided before the First-tier Tribunal.

12. I reserved my determination.

13. The Entry Clearance Officer relies upon three Grounds of Appeal. Before considering those grounds, and the concession made by Ms Holmes, Senior Presenting Officer it is necessary to consider the findings of fact made by the judge. As set out in the preceding paragraphs the only basis upon which the application was refused related to the Appellant's failure to provide the specified evidence in the

form of the payslips and corresponding bank statements. The relevant period being October 2012 to March 2013.

14. The judge's findings can be summarised as follows. The judge accepted the Sponsor's evidence unreservedly and found that the oral evidence that he had given was wholly consistent with the documentary evidence that had been produced not only by the Sponsor but also by his employer and from the information that was contained in a "restricted email". Thus she accepted and found on the facts that he had earned £52,800 gross as a station manager employed in London and that this had been employment that he had been employed in since 2003 with a monthly salary of £4,400. She further found that owing to "operational challenges" when they stopped flying into the UK, the company last paid staff in February 2013 but had plans to resume payment. The judge placed weight on a letter from his employers dated 6th April 2014 confirming his gross salary, the payroll office number was given, the salary was credited on a monthly basis to a Barclays Bank international account and that confirmation had been produced that PAYE and national insurance contributions had been paid to the HMRC and giving a reference number for such payments. The judge also made reference to a most recent payment of £12,088 and for another payment to be processed in July 2013. The judge also found that the restricted email showed that he had been paid up until February 2013 but taking that evidence in conjunction with the employer's letter confirmed that he continued to be paid through the relevant period.

15. It is plain from reading the determination that in reaching those findings the judge placed weight and credence upon the Sponsor's evidence at [6] and the restricted air mail referred to by the judge at [5]–[6]. The judge noted at [5] that she placed weight on the evidence in the restricted email as she considered it to emanate from an official source and also she had the advantage of the letter dated 6th June 2014 from his employers. It is therefore also plain from the evidence which she wholly accepted, that the Sponsor was one month short (for the specified evidence) but placed weight on the Sponsor's oral testimony that he had been paid throughout the period as this was consistent with the written evidence.

16. It was against that background that the judge considered Appendix FM-SE D(e) which reads as follows:-

> "Where the decision maker is satisfied that there is a valid reason why a specified document 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 or to request alternative or additional information or documents be submitted by the applicant."

17. In this context the judge at [7] considered that the Entry Clearance Officer did require extra information and that had appeared in the form of the email and the document verification report. The judge went on to state at [7] that the evidence before her and acknowledged by her, was that with the bank statements and his assertion that his employment was not undermined during the course of cross-examination, when set against the letters from his employers confirming he had been in continuous

employment in the HMRC documents, that the Appellant had made out her case. At [8] the judge found that she could fulfil the requirements as her husband and Sponsor had been in continuous employment, did have the requisite funds as he earned £4,400 a month and that "discretion should have been exercised accordingly as set out above on that basis" and thus she allowed the appeal.

18. Whilst the drafted grounds at 5(c) submitted that the decision to allow the matter under the Rules was wrong on the basis that even if FM-SE D(e) did apply, the judge had failed to make findings as to whether the ECO had been furnished with a valid reason by the date of decision, this was not relied upon by Ms Holmes. For sake of completeness, even if she had relied upon that, I do not find that that ground is made out when reading the determination as a whole. It is entirely plain that from reading not only the Grounds of Appeal submitted by Mr Mungoni in which he made it plain that it was due to "operational reasons" that he could not provide the specified evidence but that was the thrust of the case put before the First-tier Tribunal. Indeed at [5] she made reference to the "operational changes" that had caused the difficulties with providing the specified evidence due to the way the company was dealing with payments to employees. Whilst there had been a reference made in the original Grounds of Appeal to the provision of payslips as "cumbersome" that did not accurately reflect the evidence that was given before the judge and supported by the documentary evidence. Thus the judge did find that there was a "valid reason" given to the Entry Clearance Officer and indeed that had been made plain within the letter of July 2013 to the Entry Clearance Manager. In my judgment the whole thrust of the determination was that the Sponsor had provided the specified evidence insofar as he was able and that the evidence he had produced was consistent with the evidence contained within the restricted email in conjunction with the letter of June 2014 from his employers. The judge found that the oral testimony given by the Sponsor was wholly consistent with the documentary evidence. As at [8], the judge concluded that "discretion should have been exercised accordingly as set out above" in which the judge was referring to the evidence that had been before her.

19. As Ms Holmes submitted Appendix FM-SE D(e) provides the decision maker with a discretion which is vested in him under the Immigration Rules but that the judge did not assess whether FM-SE D(e) was purported to be applied by the Entry Clearance Officer when the decision was made. If the discretion had not been applied, the First-tier Tribunal Judge could only have allowed the appeal on the basis that the decision was not one that was in accordance with the law for failure to apply the discretion in the Rules.

20. I consider that Ms Holmes is right in this regard. The Appendix FM-SE does make it clear that where the decision maker has a discretion which is vested in him under the Immigration Rules, the exercise of that discretion is appealable before the Tribunal. However, the appeal on this specific ground arises once the decision maker has lawfully exercised his discretion in the making of the decision. If the decision maker fails to exercise his discretion, that failure renders his decision "not in accordance with the law" and, because it is a discretion which is vested in the Entry Clearance Officer, the appropriate course is to require the decision maker to complete his task

by reaching a lawful decision on the outstanding application. Thus where such an issue arises, as it has in this case, it was incumbent upon the First-tier Tribunal to determine whether the Respondent, or in this case the Entry Clearance Officer was required to make a fresh and lawful decision (see the decision of the Tribunal in **Ukus (Discretion: when reviewable) [2012] UKUT 307** at [10]). As the Tribunal noted, it requires the original decision to be examined by the Tribunal, not as to whether the judge agrees or disagrees with the outcome, but to distinguish between those cases where the decision maker has not exercised a discretion at all and those where he has done so but in a manner that permits the discretion to be exercised differently. In this case, and as Ms Holmes accepted the Appellant had asked the Entry Clearance Officer to exercise the discretion contained in Appendix FM-SE D(e) in the letter of 8th July 2013 and made specific reference to it. There had been reference in that letter to the difficulties of providing the specified evidence. The judge also found from the evidence that the Entry Clearance Officer sought to engage part of that paragraph by seeking and requesting further information which was contained in the document verification report. However, the restricted email was also before the Entry Clearance Officer manager before the review was undertaken and despite that material being made available which the judge went on to find demonstrated that the Appellant could meet the Rules in that the documents when taken together demonstrated that he had been paid £4,400 per month and that his salary was £52,800 per annum which was supported by letters from his employer and the HMCS documents. However at the review before the Entry Clearance Manager made no reference to any exercise of discretion. In those circumstances, it was not open to the judge to exercise the discretion herself. Thus what the judge should have done was to find that this was a case in which the discretion should have been exercised and in those circumstances to have allowed the appeal to the limited extent to remit the appeal to the Secretary of State for a lawful decision to be made and to exercise the discretion under Appendix FM-SE D(e).

21. In those circumstances, I find the First-tier Tribunal erred in law. I set aside the decision and substitute a decision allowing the appeal on the basis that the Respondent's decision was not in accordance with the law, it now being for the Respondent to decide whether to exercise the discretion on the basis of the nature of the application made and the evidence that has been given by the Appellant and Sponsor.

Decision

22. The decision of the First-tier Tribunal is set aside; it is remade as follows. The appeal is allowed to the limited extent that the decision was not in accordance with the law as set out at paragraph 20 of this decision.

Signed Date: 15/12/2014

Upper Tribunal Judge Reeds