



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/51047/2014

THE IMMIGRATION ACTS

Heard at Field House
On 12 January 2016

Decision and Reasons Promulgated
On 16 February 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE L MURRAY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

AHMED SHAMSUL ADEDIN
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr M Biggs, instructed by Universal Solicitors
For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Respondent in this case was the Appellant before the First-tier Tribunal and the Appellant the Respondent. For ease of reference I refer to them as the Claimant and Secretary of State respectively.
2. The Claimant applied on 4 March 2013 for leave to remain in the United Kingdom as the spouse of Aleya Khatun. His appeal against that decision was promulgated on 22 July 2014 and was allowed to the extent that it was remitted to the Secretary of State on the basis that it was not in accordance with the law. The Secretary of State reconsidered the application and re-refused it on 28 November 2014. The Secretary of State concluded that the Claimant did not meet the requirements of the partner route

because the suitability and financial requirements were not met. The Secretary of State also concluded that the Claimant could not meet the requirements of paragraph 276 ADE (1) of the Immigration Rules because he did not meet the requirements with regard to length residence. A decision was made to refuse to vary leave to remain and to remove the Claimant under section 47 of the Immigration, Asylum and Nationality Act 2006.

3. The Claimant appealed against that decision to the First-tier Tribunal. First-tier Tribunal Judge Lawrence allowed his appeal in a decision promulgated on 24 July 2015. He found that the Claimant met the suitability and financial requirements of the Rules and allowed the appeal under Appendix FM.
4. The Respondent sought permission to appeal against the decision of the First-tier Tribunal. The grounds assert firstly that the Judge had erred in finding that the income threshold was met. It is asserted that there was no appraisal of the evidence and the Judge based his findings on the Claimant's application form. It is said that the Judge failed to have regard to the specified evidence requirements of Appendix FM-SE and therefore erred in finding that the financial requirements were met. The grounds also assert that the Judge failed to give adequate reasons for findings on a material matter. The Judge found that the Claimant ought to have informed the Secretary of State that the restaurant which sponsored his Tier 2 Migrant application had closed down and that he was seeking employment elsewhere. The Judge found that he did not enter the UK for the purpose of marriage and that no deception was employed. It is asserted that he did not adequately reason this in the light of his finding regarding the closure of the restaurant and the Claimant's failure to inform the Home Office of his situation. Furthermore he was issued a Tier 2 visa in March 2010 and had not worked and it is asserted that it was not credible that he would have not been able to find alternative employment in time. The Judge is said to have erred in failing to consider this aspect of the Claimant's circumstances in relation to his finding on deception.
5. Permission to appeal was granted by First-tier Tribunal Judge Lambert on 28 October 2015. He concluded that the brief content and absence of reasoning in relation to the financial requirements of the Rule meant that there was an arguable error of law. He also concluded that the findings that the Claimant entered as a work permit holder and knew he had a duty to inform the Secretary of State that the restaurant had closed down was arguably at odds with the finding in paragraph 7 that he had not employed deception as far as his intention to work was concerned.

The Hearing

6. Mr Kotas argued that the reasoning in the determination of the First-tier Tribunal was woefully inadequate. With regard to the suitability requirements, it was not only the fact that he entered in order to get married but he could not conform with his conditions of leave.
7. The second and more troubling point was in relation to the financial requirement. The Claimant was required to demonstrate that he met the requirements of the

Rule by way of specified evidence. The Judge had made no findings whatever. What was even more troubling was that the Judge found that the sponsor was earning as claimed. In the Secretary of State's bundle was evidence from HMRC which was not engaged with. The findings on financial requirement were not sustainable at all.

8. Mr Biggs said that this was a reasons challenge. If those errors were material he was forced to accept that the reasoning was brief if it was there at all. As he understood there were two points; firstly the issue concerning intention and secondly the financial requirement points. The Judge was well-aware of the points with regard to the intention and that was clear from paragraph 1 of the decision. The Judge went on to conclude that the allegation was not sustained. The Secretary of State did not attend the hearing and there was no cross-examination of the Claimant. The Claimant stated in his witness statement that he worked for some three months and then was asked to leave. The evidence was untested and the Judge was entitled to come to the conclusion that he did not come here in order to marry. The Secretary of State had made a positive allegation of deception and that needed to be proved. There was no cross-examination and it was bound to fail. For those reasons there was no material error of law.
9. With regard to the financial requirements he referred me to page 46 of the Respondent's bundle. During the tax year, the Claimant's spouse did meet the threshold and her income took her over the threshold. There were payslips and P60s to address the evidential requirements. There was no letter from the employer. However, even if he failed to go through mechanical requirements, the Claimant met relevant financial threshold. There was no authority to state that First-tier Tribunal should apply the requirements of Appendix FM-SE mechanically. It was open to him to find that the threshold was met. One would expect to see some reasoning. The submission was that there was ample evidence to show the threshold had been crossed and it would be academic to find there was an error of law. The substantive requirements were satisfied and the decision was disproportionate. There was no material error.
10. In reply Mr Kotas referred to **SS Congo** and what was said in that case about the evidential requirements of Appendix FM. If you were granted leave to enter and then did something else you were not in compliance with the conditions of leave. There were no findings on that. Mr Biggs submitted that it was not pleaded in the grounds.
11. I indicated that I considered that the reasoning of the First-tier Tribunal was clearly inadequate in respect of the financial requirements but asked for submissions on whether it was material to the outcome and whether there was sufficient evidence before the First-tier Tribunal to conclude that the Claimant met the requirements of Appendix FM-SE. Mr Biggs said that the only material that was required was a letter from employer and sufficient evidence in terms of payslips. There was the document from page 46 and bank statements from item 13 onwards with regard to the sponsor's earnings. In terms of the requirement of

a letter from the employer there was no letter in the Claimant's bundle. However at item H in the Respondent's bundle there was evidence.

12. Mr Kotas submitted that the evidence had to be compliant with the date of application, namely 6 months back from March 2013. In terms of letters from the employer in relation to H1 and H2 there was no compliance. There were two letters from employer regarding length of employment. Neither of the letters stated what the annual wage was, and the reality was that the sponsor was paid in cash and the payments showing in her bank statements didn't correspond with the pay slips. It had to correspond.
13. Mr Biggs submitted that with regard to materiality, the documents in the Respondent's bundle covered the relevant six month period and were consistent with the document. He didn't accept the criticism. There was a gross salary of £32,000. It was impossible that error of law would have made a difference.
14. In view of the fact that the arguments on the materiality of the error related to documentation before the First-tier Tribunal, I asked for written references to that evidence from both representatives and submissions as to how it met or did not meet the Rules. Mr Biggs said he would be able to do so by way of a computerised schedule but would require time. Both parties agreed that this could be done by way of written evidence and hence I gave directions for the filing of evidence to address the evidential requirements of Appendix FM-SE with regard to the earnings threshold.

Discussion and Findings

15. The grounds assert that the First-tier Tribunal's findings in respect of the suitability requirements of the Rules are inadequately reasoned and unsustainable. The Respondent did not attend the hearing before the First-tier Tribunal. The Respondent's case, as set out in the RFL was that since the Claimant had not worked in the restaurant where he had been granted entry clearance to work he had obtained a Tier 2 visa to facilitate his entry to the UK and switch to into the marriage category.
16. The First-tier Tribunal was clearly aware that of the Respondent's case in this regard as it is set out at paragraph 1 of the decision. He correctly directed himself that he needed to determine the suitability point first. The First-tier Tribunal made the following findings at paragraph 7:

I do not find that the appellant entered the UK for the purpose of marriage and not to work. I do not find he deployed any deception in this regard. I do find, on the evidence before me, that he entered the UK to work. The marriage situation developed whilst he was in the UK.
17. The First-tier Tribunal gave no reasons for these findings. Whilst the burden of proving deception was on the Respondent, there is a long established judicial duty to provide a reasoned decision. The First-tier Tribunal gave no reasons for why he accepted the Claimant's evidence that he did not enter the UK for the

purpose of marriage. The matter was in issue and it was incumbent on him to provide reasons, however brief. He did not do so and that was a material error of law.

18. The First-tier Tribunal found, at paragraph 8 of the decision, that the Claimant met the financial requirements in Appendix FM of the Immigration Rules because the sponsor had two jobs which, when the gross income from both was added together, exceeded the £18,600 required by Appendix FM in spousal applications. In coming to this conclusion, the First-tier Tribunal referred to a schedule which he had asked the Claimant's representative to prepare at the hearing.
19. There is no reference in the decision of the First-tier Tribunal to Appendix FM-SE of the Immigration Rules. The Claimant was required to provide specified evidence of a specified gross annual income of at least £18,600 (section E-LTRP.3.1). According to paragraph A.1 of Appendix FM-SE in order to meet the financial requirements under paragraph E-LTRP.3.1 the applicant must meet the requirements of Appendix FM-SE as to the permitted sources of income and savings; the time periods and permitted combinations applicable to each permitted source relied on and the evidence required for each permitted source relied on.
20. In respect of salaried employment in the UK (except where paragraph 9 applies), all of the following evidence must be provided:
 - (a) Payslips 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 (or at least 6 months but the person does not rely on paragraph 13(a) of this Appendix), or in the financial year(s) relied upon by a self-employed person.
 - (b) A letter from the employer(s) who issued the payslips 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 period(s) as the payslips 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.
21. I have had regard to the submissions/schedules from both representatives for which I am grateful. The Claimant made his application on 4 March 2013 and was therefore required to produce payslips for the preceding 6 months. He relied on two sources of employment. Whilst he produced payslips from both sources from September 2012 to February 2013 and bank statements for the same period, the

receipts in the bank statements do not correspond with the amounts shown on the payslips. The deposits into the account also do not show the salary being paid into the account.

22. Mr Kotas argues in his written submissions that the Claimant has therefore not complied with the requirements of Appendix FM-SE and had the First-tier Tribunal properly considered the application with reference to the specified evidence, he would be bound to find the Claimant failed with regard to the evidential requirements of Appendix FM-SE. It is submitted that for those reasons he did materially error in law.
23. Mr Biggs in his written submissions argues that whilst the Claimant has difficulty in showing that the account statements correspond to the same period as he payslips, it is nonetheless clear that on the basis of the evidence relating to the Claimant's income, no reasonable First-tier Tribunal Judge could conclude that the Claimant was not earning the sums for the required period.
24. Mr Kotas also argues that the First-tier Tribunal failed to take account of evidence from HMRC at 'P' and 'Q' of the Respondent's bundle which showed that for the tax year 2012 to 2013 the Claimant's spouse was paid £5529.20 by Upoher and £7583.38 by One Stop Business Solutions Ltd. This was a matter raised in the Refusal Letter.
25. It is clear that the First-tier Tribunal misdirected itself in failing to apply and make findings on the provisions of Appendix FM-SE. The Rules require that the bank statements show that the salary is paid into the bank account. As the amounts paid into the bank statements in this case do not correlate to the salary on the payslips I find that it cannot be said that the First-Tier tribunal properly directing itself would have therefore found that this requirement had been met. The First-tier Tribunal's error cannot therefore be said not to have made a difference to the outcome of the appeal under the Immigration Rules.
26. Mr Biggs argues that on the basis of the evidence provided by the Claimant it is overwhelmingly clear that the substantive requirements of the Immigration Rules had been met and therefore the Claimant's appeal was bound to succeed with respect to Article 8 ECHR in any event, even if there was some technical failure to satisfy Appendix FM-SE.
27. In **Secretary of State for the Home Department v SS (Congo)** [2015] EWCA Civ 387 at [51 to 53] Richards LJ gave guidance on the proper approach to the evidential requirements of Appendix FM in the context of an Article 8 assessment:
 51. In our judgment, the approach to Article 8 in the light of the Rules in Appendix FM-SE should be the same as in respect of the substantive LTE and LTR Rules in Appendix FM. In other words, the same general position applies, that compelling circumstances would have to apply to justify a grant of LTE or LTR where the evidence Rules are not complied with.

52. This is for two principal reasons. First, the evidence rules have the same general objective as the substantive rules, namely to limit the risk that someone is admitted into the United Kingdom and then becomes a burden on public resources, and the Secretary of State has the same primary function in relation to them, to assess the risk and put in place measures which are judged suitable to contain it within acceptable bounds. Similar weight should be given to her assessment of what the public interest requires in both contexts.

53. Secondly, enforcement of the evidence rules ensures that everyone applying for LTE or LTR is treated equally and fairly in relation to the evidential requirements they must satisfy. As well as keeping the costs of administration within reasonable bounds, application of standard rules is an important means of minimising the risk of arbitrary differences in treatment of cases arising across the wide range of officials, tribunals and courts which administer the system of immigration controls. In this regard, the evidence Rules (like the substantive Rules) serve as a safeguard in relation to rights of applicants and family members under Article 14 to equal treatment within the scope of Article 8: compare *AJ (Angola)*, above, at [40], and *Huang*, above, at [16] (“There will, in almost any case, be certain general considerations to bear in mind: the general administrative desirability of applying known rules if a system of immigration control is to be workable, predictable, consistent and fair as between one applicant and another; the damage to good administration and effective control if a system is perceived by applicants internationally to be unduly porous, unpredictable or perfunctory; ... the need to discourage fraud, deception and deliberate breaches of the law; and so on ...”). Good reason would need to be shown why a particular applicant was entitled to more preferential treatment with respect to evidence than other applicants would expect to receive under the Rules. Moreover, in relation to the proper administration of immigration controls, weight should also be given to the Secretary of State’s assessment of the evidential requirements needed to ensure prompt and fair application of the substantive Rules: compare *Stec v United Kingdom*, cited at para. [15] above. Again, if an applicant says that they should be given more preferential treatment with respect to evidence than the Rules allow for, and more individualised consideration of their case, good reason should be put forward to justify that.

28. Mr Kotas asks me to allow the Secretary of State’s appeal and re-make the decision dismissing the Claimant’s appeal against the refusal of leave to remain. However, the First-tier Tribunal failed to give adequate reasons in relation to the suitability requirement which is a matter which will require oral evidence. The Claimant also raised Article 8 in his grounds of appeal. As the First-tier Tribunal allowed his appeal under the Immigration Rules he made no findings under Article 8. It is clear from the case law cited above that that compelling circumstances would have to apply to justify a grant of leave to remain where the evidence Rules are not complied with.
29. Having regard to Part 7.2 (a) of the Practice Statements for the Immigration and Asylum Chamber of the First-tier Tribunal and Upper-Tier Tribunal, the extent of judicial fact finding is such that this matter should be remitted to the First-tier Tribunal for rehearing.

Conclusions:

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law. I set the decision aside.

I remit the matter to the First-tier Tribunal for rehearing.

Anonymity

The First-tier Tribunal did not make an order for anonymity and no application has been made for such an order.

Signed

Date

Deputy Upper Tribunal Judge L J Murray