



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: OA004582015

THE IMMIGRATION ACTS

**Heard at Field House
On 9 May 2016**

**Decision &
Promulgated
On 25 May 2016**

Reasons

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

ENTRY CLEARANCE OFFICER - BANGKOK

Appellant

and

**TRAN MACH, THI DOAN
(ANONYMITY ORDER NOT MADE)**

Respondent

Representation:

For the Appellant: Mr T Melvin of the Specialist Appeals Team
For the Respondent: Mr S Salam, solicitor of Salam & Co.

DECISION AND REASONS

The Respondent

1. The Respondent, Tran Mach, Thi Doan to whom I shall refer as “the Applicant”, is a citizen of Vietnam born on 6 January 1963. She has two children (both adult at the date of the application leading to the decision under appeal) by her first marriage which ended in divorce by consent registered in the courts of Vietnam on 31 December 2004.
2. On 12th September 2014 in the United Kingdom she married her Sponsor Stephen Brisco, a British citizen born on 5 January 1959.
3. The Applicant’s passport shows she arrived in the United Kingdom as a visitor on 3 June 2013 and 26 March 2014 and on 2 August 2014 as a visitor for the purposes of marriage. Subsequently, she returned to Vietnam.

The Decision

4. She applied for entry clearance as the wife of the Sponsor a person present and settled in the United Kingdom. On 30 December 2014 the Appellant (the ECO), refused her application on grounds that she through her Sponsor who is her husband did not meet the financial requirements of Appendix FM and had failed to supply all the specified documents to meet the evidential requirements of Appendix FM-SE of the Immigration Rules.
5. The ECO also noted that there was no documentary evidence to corroborate the Applicant’s claim that she spent time together with her husband in Vietnam because he had not provided evidence to show he had travelled to see her in Vietnam. His previous wife was deceased. This all led the ECO to conclude there was no genuine and subsisting relationship between the Applicant and her husband.
6. The Applicant lodged notice of appeal under Section 82 of the Nationality, Immigration and Asylum Act 2002 as amended (the 2002 Act). The grounds refer to the fact of her husband’s marriage to the Applicant, his employment and financial circumstances and that although he had given the ECO his contact details he had not been contacted by the ECO for any further information. The grounds add that he suffers from a mild form of dyslexia.

The Hearing in the First-tier Tribunal

7. By a decision promulgated on 30 September 2015 Judge of the First-tier Tribunal Barker allowed the appeal under the Immigration Rules.
8. The ECO sought permission to appeal on the grounds that the Judge had mis-directed himself in relation to the evidential requirements of Appendix FM-SE because the Applicant had failed to supply a letter from her husband’s employer in compliance with the requirements of paragraph 2(b) of Appendix FM-SE confirming his employment and gross salary, the length of his employment, the period over which he had been paid at the level of salary relied upon for the Applicant’s application and whether his employment was permanent, fixed term contract or agency.

9. The husband said his employer had refused to issue such a letter and the ECO submitted that the Judge had erred in finding that the husband's income could be verified from other sources.
10. The ECO submitted that the correct course of action was for the Judge to have remitted the appeal for reconsideration referring to paragraph 2 of the determination in *Ukus (discretion: when reviewable) [2012] UKUT 00307 (IAC)*.
11. On 12 April 2016 Judge of the First-tier Tribunal J M Holmes granted permission to the ECO to appeal on the ground that it was arguable it was not open to the Judge to determine the appeal as he did. Either he had to follow the guidance in *Ukus* or deal with the Article 8 appeal.

The Hearing in the Upper Tribunal

12. The husband attended the hearing and I explained the purpose and procedure for an error of law hearing. The representatives for both parties agreed the sole issue was whether the Judge had made a material error of law in his application of the provisions in Appendix FM-SE relating to the evidence of the husband's income.

Submissions for the ECO

13. Mr Melvin relied on the grounds for appeal. The employer's letter had not been submitted with the application and so the Judge had mis-directed himself in considering later documentation. The proper course would have been for the Applicant to have made a fresh application.
14. The Judge should not have placed weight on documents submitted after the date of the Applicant's application. The Applicant had accepted that not all the required documents had been served. The consequence was she had not shown she met the requirements of the Immigration Rules in relation to the specified documents to be submitted and that the document in question, the husband's employer's letter was mandatorily required.

Submissions for the Applicant

15. Mr Salam submitted that the husband had shown that he had sufficient earnings and funds to meet the requirements of the Immigration Rules and Appendix FM and that there was no issue in that regard. If the ECO's argument was correct about the failure to submit documents with the application then if the decision were remitted to the ECO the position would remain unchanged and the application would again be refused.
16. The husband had now supplied the Tribunal with an employer's letter providing more information which met the requirements of Appendix FM-SE but which the husband did not have available at the time the appeal was considered in the First-tier Tribunal.

17. There was no reason why the Tribunal should not consider evidence submitted after the application for entry clearance had been made. This was a spouse settlement case and not a Points-Based System appeal to which Section 85A of the 2002 Act applied.
18. The only issue in the appeal was whether the Applicant had produced sufficient evidence to show she or her husband met the requirements of Appendix FM and this fell well within the scope of the Judge's discretion. It did not relate to a complex or complicated issue. The Judge had used such of the evidence required by Appendix FM-SE as had been provided independently to establish the facts which would have been shown by a letter from the husband's employers referred to in paragraph 2(b) of Appendix FM-SE. If there was any issue, the ECO could have requested more documents but he had not made any such request. Mr Salam submitted this was because the ECO had the information available from the documents which the Applicant had already submitted.
19. Before the Judge the missing documentary evidence had been supplied. The Judge was entitled to entertain the new evidence and to reach his conclusions.

Response for the ECO

20. Mr Melvin reminded me that the requirements of Appendix FM-SE could not be ignored and so the decision should be set aside.

Findings and Consideration

21. I accept that at the hearing before the Judge the husband had supplied further evidence but it was not until 10 November 2015 that his employers produced a letter which purported to but in fact did not meet the requirements of paragraph 2(b) of Appendix FM-SE. Indeed it was not until 6 May 2016 that the employer produced a letter which does comply.
22. At paragraph 27 of his decision, the Judge explained how he came to the conclusion that the other documents which had already been supplied, showed all the information which would have been contained in an employer's letter complying with paragraph 2(b) of Appendix FM-SE. As already noted this is not an appeal under Part 6A: Points-Based System of the Immigration Rules and so the principles for consideration of evidence outlined in *DR (ECO: post-decision evidence) Morocco* [2005] UKIAT 00038* will apply. It is to be noted that Section 85A of the 2002 Act remained in force at the hearing before the Judge.
23. The employer's letter of 6 May 2016 was not challenged at the hearing. Indeed, the earlier letter of 10 November 2015 from the employers was also not challenged as not complying with the requirements of Appendix FM-SE although as a matter of fact I find that it cannot be said to comply. The narrow ground for appeal left to the ECO is whether the Judge made a

material error of law in dealing with the application of paragraph D of Appendix FM-SE which states:-

- (a) In deciding an application in relation to which this Appendix states that specified documents must be provided, the Entry Clearance Officer or Secretary of State (“the decision-maker”) will consider documents that have been submitted with the application, and will only consider documents submitted after the application where sub-paragraph (b) or (e) applies.
- (b) If the applicant:
 - (i) Has submitted:
 - (aa) A sequence of documents and some of the documents in the sequence have been omitted (e.g. if one bank statement from a series is missing);
 - (bb) A document in the wrong format (for example, if a letter is not on letterhead paper as specified); or
 - (cc) A document that is a copy and not an original document; or
 - (dd) A document which does not contain all of the specified information; or
 - (ii) Has not submitted a specified document, the decision-maker may contact the applicant or his representative in writing or otherwise, and request the document(s) or the correct version(s). The material requested must be received at the address specified in the request within a reasonable timescale specified in the request.
- (c) The decision-maker will not request documents where he or she does not anticipate that addressing the error or omission referred to in sub-paragraph (b) will lead to a grant because the application will be refused for other reasons.
- (d) If the applicant has submitted:
 - (i) A document in the wrong format; or
 - (ii) A document that is a copy and not an original document, or
 - (iii) A document that does not contain all of the specified information, but the missing information is verifiable from:
 - (1) other documents submitted with the application,
 - (2) the website of the organisation which issued the document, or

- (3) the website of the appropriate regulatory body, the application may be granted exceptionally, providing the decision-maker is satisfied that the document(s) is genuine and that the applicant meets the requirement to which the document relates. The decision-maker reserves the right to request the specified original document(s) in the correct format in all cases where sub-paragraph (b) applies, and to refuse applications if this material is not provided as set out in sub-paragraph (b).
 - (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) be submitted by the applicant.
 - (f) Before making a decision under Appendix FM or this Appendix, the decision-maker may contact the applicant or their representative in writing or otherwise to request further information or documents. The material requested must be received at the address specified in the request within a reasonable timescale specified in the request.
- 24. Sub-paragraph (a) provides that the documents to be considered by the ECO or the Secretary of State (but not any other decision maker) must be limited to those submitted with the application. Sub-paragraph (a) deals with a defective sequence of documents or a defective document.
- 25. Sub-paragraph (b)(ii) sets out conditions when the ECO may request further documentation but sub-paragraph (c) provides that additional documentation will not be requested when the ECO does not anticipate that addressing the error or omission will lead to a grant because the application will be refused for other reasons. In this case the application was refused for other reasons, namely issues as to the amount of the husband's earnings and on grounds of the subsistence of the relationship between the applicant and her husband.
- 26. I turn to sub-paragraph (d) which deals with the grant of an application if the ECO is satisfied the documents are genuine and the applicant meets the requirements to which the document relates. The ECO had sight of the husband's contract of employment, payslips and bank statements. He had before him Appendix FM-SE and it is clear that the ECO having considered the documents found in error they did not show that the applicant's husband employment met the relevant requirements. In the absence of any express comment it is to be inferred that the ECO found that a letter from the husband's employers the nature referred to in paragraph 2(b) of Appendix FM-SE would disclose further information. Even if the documents before the ECO gave and evidenced all the information which a letter satisfying paragraph 2(b) would have contained,

there was no obligation on the ECO under sub-paragraphs (d) and (e) because in this case, the ECO considered the applicant did not meet all the requisite requirements and in particular had not shown her husband earned sufficient and the continuing subsistence of their relationship and the effect of sub-paragraph (c) is that in such circumstances there is no discretion for the ECO to request additional documentation.

27. Looking at all these matters in the round, I find that it cannot be said the ECO failed to comply with paragraph D of Appendix FM-SE.
28. The next question is, given the other findings about the sufficiency of the husband's earnings and the subsistence of the marriage, whether the Judge was entitled to exercise a discretion similar to that provided for in sub-paragraph D(d) of Appendix FM-SE.
29. The Judge at paragraph 27 found that the documentation before him showed the Applicant's husband met the relevant requirements. The Judge was entitled to take into account evidence produced subsequent to the decision under appeal by reason of Section 85A of the 2002 Act. It cannot be argued that the scope of the ECO's power to consider evidence referred to in the Immigration Rules can limit the scope of evidence given by statute which the Tribunal may consider.
30. Before the Judge the subsistence of the marriage and the amount of the husband's earnings ceased to be issues. Thus the sole remaining issue was the failure to produce the employer's letter. In these circumstances the Judge was entitled to exercise discretion as to the absence of the employer's letter required under paragraph 2(b) of Appendix FM-SE.
31. The representatives referred generically to the determination in *Ukus (discretion: when reviewable) [2012] UKUT 00307(IAC)*. No specific reference to any part of the determination was made. I have looked in particular the four situations described when the Tribunal considered an appeal might arise from the exercise of or a refusal to exercise a discretionary power identified in paragraph 22, I find that the present case is the first situation where the ECO has failed to make a lawful decision in the purported exercise of the discretionary power vested in him and a lawful decision is required.
32. The Judge referred at paragraphs 20-23 and 27 of his decision to the financial information before him and at paragraphs 26 and 29 took into account, as he was entitled under *DR (Morocco)*, the evidence submitted to the Tribunal after the date of the decision but relating back to matters at the date of the decision and on the evidence and for the reasons already rehearsed I find he was entitled to exercise his discretion to re-make the decision.
33. In these circumstances I do not find that there is any error of law sufficiently material to the outcome of the appeal to warrant the setting aside of the Judge's decision in whole or in part. Indeed, now that a letter

satisfying the requirements of paragraph 2(b) of Appendix FM-SE has been produced, albeit at a very late stage, I find that no other Tribunal would be likely to reach a different decision. The First-tier Tribunal's decision shall therefore stand.

Anonymity

34. There was no request for an anonymity order and having considered the appeal I find none is warranted.

SUMMARY OF DECISION

The decision of the First-tier Tribunal did not contain a material error of law such that it should be set aside and therefore it shall stand.

The effect is that the ECO's appeal is dismissed.

No anonymity order is made.

Signed/Official Crest
24.v.2016

Date

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal