



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

Appeal Numbers: OA/01926/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 21 June 2016**

**Decision & Reasons Promulgated
On 12 July 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE A M BLACK

Between

**S B
(ANONYMITY DIRECTION MADE)**

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr Nasim, counsel
For the Respondent: Mr Avery, Home Office Presenting Officer

DECISION AND REASONS

1. This matter comes before me for consideration as to whether or not there is a material error of law in the decision and reasons of First-tier Tribunal Judge Stott (“the FTTJ”) promulgated on 9 November 2015, in which he refused the appellant’s appeal against the refusal of her application for entry clearance to settle in the UK as a spouse under Appendix FM of the Immigration Rules.
2. No anonymity direction was made in the First-tier Tribunal but, given my references to the personal circumstances of the appellant and her spouse an anonymity order is appropriate.

Background

3. The appellant is a Pakistani citizen who sought entry clearance to join her husband in the UK. This was refused under Appendix FM because the appellant had not met the financial and English language requirements. The respondent accepted the appellant had submitted an HMRC tax return, HMRC receipt for National Insurance contributions paid, financial statements for the tax year ending 2014 and personal bank statements. The respondent had noted that the tax documents showed net profit from self-employment of £19,027 and bank statements showed cash deposits but there was “no origin to the cash deposits”. It was stated that no ELT certificate had been provided. On review, the Entry Clearance Manager (ECM) conceded the appellant fulfilled the requirements with regard to her English language skills. However, he noted that bank statements for April and May 2013 were missing and that the combined total of credits to the sponsor’s bank statements was £22,976, not £29,978 as in the sponsor’s financial statements. He also noted there was no evidence of the sponsor having been issued with a Unique Tax Reference (UTR) number by HMRC.
4. The FTTJ found that the bank statements for April and May 2013, produced by the appellant at the hearing, were not admissible. He found the appellant had not complied with the requirements of Appendix FM-SE by producing 12 months’ bank statements. He also found there was no evidence to confirm the “precise amount of the Sponsor’s annual earnings”. In addition, he found, there was no HMRC documentation providing evidence of the sponsor’s UTR. He dismissed the appeal under the Immigration Rules and on Article 8 grounds.
5. The appellant sought permission to appeal on various grounds and this was granted in the following terms:

“The First-tier Judge would have been entitled to reject documentary evidence sought to be lodged at the hearing but he went on to give reasons in paragraph 11 of his decision for disallowing the material with which issue is taken in the grounds. The grounds do appear to raise points that are arguable although I note in relation to the complaint that the judge did not consider Article 8 what appears in paragraph 21 of the determination [sic]. Although I give permission to argue all the grounds, it may be the Article 8 point is not susceptible to much development.”
6. Hence the matter comes before me.

Submissions

7. At the outset of the hearing before me, Mr Avery accepted that the electronic bank statements for April and May 2013, produced by the appellant at the hearing before the FTTJ, complied with the provisions in Appendix FM-SE. He conceded they complied with Appendix FM-SE.
8. Mr Nasim, for the appellant, submitted that the evidence before the FTTJ was that these two bank statements had been submitted with the application, having been sent by the sponsor to the appellant for that purpose. Had that not been the case, the respondent would have identified it as a reason for refusal (albeit the ECM subsequently identified it as an issue in his review). They were in the appropriate format and should have been admitted by the FTTJ.
9. Mr Nasim said the principal issue was the level and source of the sponsor’s takings. The respondent had been satisfied that the credits to the sponsor’s bank account exceeded the financial threshold of £18,600; this was reiterated on review albeit the ECM had come up

with a different total. It was submitted that there was no need for the total income to go through the sponsor's account. He referred me to the respondent's guidance, paragraph 9.3.8, which provided that cash could be in hand and that the bank statements should reflect all cash income. He cited the guidance at May 2016 that "self-employed income can be cash in hand if the correct tax is paid. In line with paragraph 3.1.5 of this guidance, it would generally be expected that the person's business or personal bank statements would fully reflect all gross (pre-tax) cash income. Flexibility may only be applied where the decision-maker is satisfied that the cash income relied upon is fully evidenced by the relevant tax return(s) and the accounts information". He referred me to the sponsor's documentary evidence of income, citing his net income as £19,027; he also referred me to the sponsor's tax returns which include his UTR. He submitted that the FTTJ's finding, that the appellant had to demonstrate the sponsor had put all his income into his bank account, was erroneous; the sponsor need only show that a sum in excess of the threshold of £18,600 had been credited to his account. The FTTJ had confused the sponsor's gross income with his net income, as identified in the financial statements of account.

10. The appellant's fallback position was that the FTTJ had failed to apply the guidance in paragraph D of Appendix FM-SE and **Sultana and Others (rules: waiver/further enquiry; discretion) [2014] UKUT 00540 (IAC)**.
11. For the respondent, Mr Avery accepted that the HMRC documents submitted by the appellant with her application included the sponsor's UTR number. He observed that Appendix FM-SE set out the requirements with regard to bank statements and accepted that the bank statements for April and May 2013 were in the appropriate format. He made no further submissions.

Discussion

12. In view of Mr Avery's concession, I find the FTTJ erred in finding the appellant had not produced her sponsor's UTR (paragraph 17 of the decision).
13. The FTTJ made a further error in failing to identify the two statements for April and May 2013 as complying with the provisions of Appendix FM-SE (as is now conceded by Mr Avery). Given this, he should have made a finding as to whether the appellant had submitted the two bank statements with her application. He assumed that not to be the case, apparently adopting the conclusion of the ECM and, by inference, finding that they had not been submitted, whereas this was not the appellant's case. If the FTTJ had found, as he should have (given the concession before me), that these two statements were in the appropriate format, he might have made a different decision as to whether the appellant had demonstrated that the sponsor's income was in excess of the required threshold. As it is, the FTTJ found that the appellant had failed to satisfy the provisions of Appendix FM-SE.
14. For these reasons, I find that the decision of the FTTJ contains material errors of law.
15. It was agreed by the representatives that I should proceed to make a fresh decision.
16. I am satisfied that the appellant had submitted with her application the two bank statements for April and May 2013. Had the appellant not submitted all the required bank statements, I am in no doubt this would have been raised by the respondent at the outset in the reasons for refusal.

17. The ECM's review of the sponsor's earnings is undermined by the failure to take into account, in his calculations, the missing two bank statements. He notes total deposits of £22,976 which is "substantially below the figure of £29,978 quoted in the sponsor's financial statements". However, this does not take into account the deposits reflected in the bank statements for April and May 2013.
18. Appendix FM-SE.1(m) provides that cash income may be taken into account:
- “(m) Cash income on which the correct tax has been paid may be counted as income under this Appendix, subject to the relevant evidential requirements of this Appendix. “
19. The sponsor receives in cash his income for self-employment as a taxi driver. His total takings for the year ended 5 April 2014 were £29,978, with a net income of £19,027. The cash deposits into the sponsor's current account are consistent with this level of takings in the year to 5 April 2014. Thus, even though the respondent challenged the "origin to the cash deposits", these were compliant with the requirements of FM-SE.1(m).
20. I take into account the appellant's bank statements, his accountant's statement of his income and expenditure and the HMRC documents, including his UTR, to find that the sponsor's net income was £19,027 for the year to 4 April 2014. This, being in excess of £18,600, means that the appellant has demonstrated that she fulfils the financial requirements in the Immigration Rules. The decision of the respondent is therefore in breach of those Rules. There being no other challenges to the appellant's ability to meet the financial or other requirements of the Immigration Rules, I find that she has demonstrated to the required standard that she does so.

Decision

21. The decision of the First-tier Tribunal did involve material errors of law, as set out above.
22. I set aside the FTTJ's decision.
23. I re-make the FTTJ's decision by allowing the appeal under the Immigration Rules.

A M Black

Dated 11 July 2016

Deputy Upper Tribunal Judge A M Black

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Fee Award

The FTTJ made no fee award. The appellant is entitled to a whole fee award, her appeal having been successful on the grounds claimed.

A M Black

Dated 11 July 2016

Deputy Upper Tribunal Judge A M Black