IAC-FH-NL-VI

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/02306/2014

THE IMMIGRATION ACTS

Heard at Field House

On 1 April 2016

Decision & Reasons Promulgated
On 13 May 2016

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

ENTRY CLEARANCE OFFICER - CHENNAI

Appellant

and

MS SUJEETHA SRIHARAN

Respondent

Representation:

For the Appellant: Mr S Staunton, Home Office Presenting Officer
For the Respondent: Ms A Benfield, Counsel instructed by Links Legal Solicitors

DECISION AND REASONS

1. The appellant in these proceedings is the Entry Clearance Officer ("ECO"). However, I continue to refer to the parties as they were before the First-tier Tribunal ("FtT").

2. This appeal comes before me following the dismissal of the appellant's appeal to the FtT, by First-tier Tribunal Judge Iqbal ("the FtJ") against the respondent's decision dated 31 December 2013 to refuse entry clearance

© CROWN COPYRIGHT 2016

as a partner. That application for entry clearance was refused with reference to Appendix FM of the Immigration Rules.

3. It is not necessary to set out in detail the basis of the refusal by the respondent; suffice it to say that a number of issues were raised in the notice of decision.

4. Having considered those issues, the FtJ resolved various matters in the appellant's favour. He thus allowed the appeal under the Immigration Rules.

5. The Rules that governed the application for entry clearance and thus the appeal, are contained within Appendices FM and FM-SE. So far as Appendix FM is concerned the more specific requirements are contained within Section E-ECP, entitled "Eligibility for entry clearance as a partner". Where specified evidence of financial requirements is required, GEN.1.4. provides that "specified" means specified in Appendix FM-SE, unless otherwise stated.

6. Under that Appendix the appellant was required to provide specified evidence of her husband's employment under paragraph 1(l): that states that where the Appendix requires the applicant to provide specified evidence relating to a period which ends with the date of application, that evidence, or the most recently dated part of it, must be dated no earlier than 28 days before the date of application. Under paragraph 2 of the same Appendix there is a requirement for the provision of payslips, and under paragraph 2(b) there is the requirement of a letter from the employer who issued the payslips (at paragraph 2(a)) confirming the person's employment and gross salary, the length of their employment, the period over which they had been or were paid the level of salary relied upon in the application, and the type of employment, whether permanent, fixed-term contract or agency.

7. In relation to that requirement, the ECO's decision identified the fact that the letter in respect of the appellant's husband's employment from Commercial Wines Ltd did not confirm the period over which the appellant's husband had been paid the level of salary relied on. Furthermore, the letter is dated 1 August 2013 which is not within 28 days of the application.

8. The FtJ at [36] referred to that letter, stating that because of its date it is unable to meet the relevant requirement of the Rules. However, he also referred to a letter dated 31 January 2014. At [38], with reference to that employer's letter dated 31 January 2014, he stated as follows:

> "Whilst the matter can be dealt with by way of sending it back to the respondent, to be dealt with in line with the flexibility under the rules, I find that in considering the totality of the evidence before me, I am not restricted from considering new evidence in relation to circumstances that were appertaining at the date of decision in accordance with Section 85(5) of the Nationality and Immigration Act 2002 [sic]. Therefore I have

considered the letter from Commercial Wines Limited dated the 31st of January 2014 and note it contains all the relevant evidence. Whilst Appendix FM-SE requires it to be dated 28 days before the application [sic], I find that given the letter demonstrates the position that was appertaining on the 1st of August 2013 through to the 31st of January 2014 (the date of the second letter from the employer), it certainly covers the 28 day period before the date of application. Therefore I find I am satisfied on balance that the Appellant has demonstrated that her sponsor satisfied the requirements in relation to the Immigration Rules."

9. It is that finding and conclusion which the respondent challenges. I do however, agree with Ms Benfield who suggested that the grounds of challenge are not entirely clear. The grounds contend that the employer must be the employer who issued the payslips in question, stating that that must in turn imply that the letter must refer to all of the payslips provided, and that where some of the payslips postdate the letter, this cannot be the case.

10. Taken in isolation that aspect of the grounds is confusing, except when one looks at the letter in question, dated 1 August 2013. As to time, it states that the sponsor is employed as a manager at the employer's shop from 1 January 2013. In other words, the argument is presumably, that the letter does not cover the complete period of the payslips. The grounds continue, stating that the defect in that letter was not cured by any further letter dated before the decision. In other words, what the grounds seem to be saying is that the letter dated 1 August 2013 was not in itself sufficient to comply with the Rules in terms of its detail, and there was no other letter provided before the decision which did comply with the Rules.

11. The grounds do at least refer to the requirement for the evidence to be provided within the relevant timeframe, which is the basis on which the FtJ purported to apply s.85(5) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act").

12. Ms Benfield relied on a 'rule 24' response, which itself seeks to summarise the respondent's grounds. The rule 24 response relies on the letter dated 31 January 2014, contending that the FtJ was entitled to consider it under s.85(5) of the 2002 Act.

13. In submissions, Mr Staunton relied on the grounds. So far as evidential flexibility under the Rules is concerned, he accepted that it does not appear that evidential flexibility was applied by the respondent when considering the application.

14. Ms Benfield's submission, essentially, was that the letter dated 31 January 2014, the employer's letter, did not fall foul of the Rules because, so the argument goes, it was not dated no earlier than 28 days before the date of application. It was after the date of application. Thus, it did not fall foul of the "no earlier" requirement. Accordingly, the FtJ was entitled to apply s.85 in the way that he did, considering that the letter was evidence of the circumstances appertaining at the date of the decision, covering as it does

the period from 1 August 2013 to 31 January 2014, the latter date of course being the date of the letter. It is to be noted that this letter, in contrast to the earlier one of August 2013, states the sponsor's employment from 1 January 2013 "to date".

15. Ms Benfield's argument could be said to hold some superficial attraction, until one has regard to other requirements of the relevant Rules. Appendix FM-SE, paragraph D.(a) states as follows:

> "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."

16. There then follows in sub-paragraph (b) what can be described as the evidential flexibility aspect of the Rules in this regard.

17. The flaw in the argument advanced on behalf of the appellant therefore, is the assumption that where post-application or post-decision evidence relates to the relevant period in question, it can be taken into account under s.85. However, that contention fails to have regard to the fact that the Rules require evidence to be submitted with the application, which this letter was not. It post-dated the application and the decision. It is evidence that should have been submitted with the application, and accordingly s.85 cannot be used to permit the evidence to be taken into account on appeal.

18. In the circumstances, I am satisfied that the FtJ erred in law in concluding that the letter dated 31 January 2014 could be taken into account.

19. Ms Benfield did not distinctly rely on evidential flexibility under the Rules, although after I had raised the matter she did refer to it very much as a secondary argument, i.e. the appellant would or should have been entitled to the benefit of evidential flexibility within the Rules.

20. It is to be noted that the FtJ referred to the Entry Clearance Manager's ("ECM") having said that evidential flexibility was employed and that the appellant was informed of the issues with her application and invited to supply the missing documents or provide suitable originals. That is indeed what the ECM's review says. At [37] the FtJ in fact indicated that there was nothing to reveal that evidential flexibility was applied. He set out the relevant Rule. At [38] he said that the matter could be dealt with "by way of sending it back to the respondent, to be dealt with in line with the flexibility under the rules". He then went on however, to deal with the matter with reference to s.85, as has been seen.

21. I do not consider that evidential flexibility has any part to play in the appeal before me, or indeed had any application to the appeal before the FtJ. There is in fact nothing to indicate that the appellant was contacted in relation to any defect or omission in the evidence provided. More to the

point, I am not satisfied that there was any need for the respondent so to do. Apart from anything else, Appendix FM-SE, paragraph D(c) states that the decision-maker will not request documents where he or she 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 it is apparent that the respondent did not anticipate that addressing any error or omission would lead to a grant, given the number of reasons given for refusing the application. That is so, even though the FtJ resolved the matters in the appellant's favour, and one matter was conceded by the ECM in the review.

22. It is to be noted that one of the elements of the evidential flexibility Rule is under D(b)(i)(dd) in relation to a document which does not contain all of the specified information. The employer's letter dated August 2013 does omit reference to the complete period of the sponsor's employment. However, that letter was itself outside the relevant 28 day period, so the omission in it, even if corrected, could not have meant that the letter complied with the requirements of the Rules.

23. For those reasons, I am not satisfied that evidential flexibility could or should have been applied.

24. In the circumstances, I am satisfied that the FtJ erred in law in the respect to which I have referred. His decision is set aside. I re-make the decision dismissing the appeal.

Decision

25. The decision of the FtT involved the making of an error on a point of law. Its decision is set aside and the decision is re-made, dismissing the appeal.

Upper Tribunal Judge Kopieczek 11/05/16