IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/09741/2014

THE IMMIGRATION ACTS

Heard at Field House
On 13 April 2016

Decision & Reasons Promulgated
On 19 April 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE HILL QC

Between

SECTRETAY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

PINALBEN SHAILESHKUMAR PATEL
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr N Bramble, Home Office Presenting Officer
For the Respondent: Mr S Khan, Counsel instructed by Jay Vadher & Co Solicitors

DECISION AND REASONS

1. This is an appeal brought by the Secretary of State with the permission of First-tier Tribunal Judge Nicholson dated 3 March 2016 in respect of a decision of First-tier Tribunal Judge Barker which was promulgated on 1 October 2015. The point raised on the appeal is a short one and I need say little by way of background as it is uncontroversial. The appellant before the First-tier Tribunal was a Mrs Pinalben Patel, who responds to this appeal. Her appeal related to the refusal of an Entry

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Clearance Officer on 29 July 2014 to give her the entry clearance. It had been sought under Appendix FM of the Immigration Rules, as a partner. The reason for the refusal was that the she did not meet the minimum income threshold requirement. There was no dispute on this. It was accepted before the Judge – and affirmed before me – that on the basis of the documentation submitted with the application this financial criterion had not been satisfied.

2. In the course of the hearing before the First-tier Tribunal the then appellant sought to place reliance upon some additional documentation which had been provided by her partner, the sponsor. This is recorded in paragraph 9 of the decision. It refers to two further savings deposits with The Peoples Co-Op Credit Society Limited which were due to mature in May 2014 and had a sterling value in the order of £1,300. It is stated that the partner had not provided receipts for these monies to the Entry Clearance Officer because he had forgotten about them. He had searched his house on returning to India following the refusal of entry clearance.

3. It was argued before the First-tier Tribunal that, taken cumulatively, these monies would have been sufficient to satisfy the income requirement. When that matter was raised the representative for the Secretary of State made clear that documents must be submitted with the application for the purpose of Appendix FM-SE. Regrettably perhaps, the representative then proceeded to condescend into a detailed discussion of the content and effect of those receipts and whether the purported savings would be 'accessible', although this is plainly an alternative and subsidiary argument in the event that the prior and primary submission on admissible were rejected.

4. The judge's assessment of this matter is to be found at paragraphs 22 and 23 of the decision. The judge quite properly recognises that under Appendix FM-SE, the Tribunal must look at the financial circumstances at the date of the application and the six months leading up to that date. The judge quoted verbatim from Appendix FM-SE D(a) 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."

These paragraphs (b) and (e) are commonly referred to as the evidential flexibility criteria, pursuant to which the ECO may (and in some circumstances must) request additional documents. The judge turned his mind to both of them and came to the conclusion that in this instance neither was applicable. He was clearly of the view and it is undisputedly correct that the evidential flexibility criteria were of no application. There is no cross-appeal in relation to this issue.

5. The judge continued at paragraph 23 in the following terms:

> "The documents were not before the Entry Clearance Officer and I do not find that the evidential flexibility rules applied which would oblige the officer to seek further evidence. The question however is whether the Tribunal can consider this evidence. It was argued by the respondent's representative that the Tribunal should not consider this evidence in view of the paragraphs quoted from Appendix FM-SE D. However I consider that this is only binding on the "decision maker" and this is specifically defined by the words of the paragraph as the Entry Clearance Officer and the Secretary of State. I consider that the evidence may be considered and is evidence of the circumstances at the relevant time. I am reinforced in this view because it was necessary to enact in Section 85A an exception to prevent evidence being considered by a Tribunal which had not been submitted with the application in Points Based Cases. The Immigration Rules also had evidential flexibility provisions in paragraph 245AA. There is no such exception for partner cases."

6. Those latter two points have no bearing on the interpretation to be given to Appendix FM-SE D which has been routinely interpreted in such a way that a First-tier Tribunal when hearing an appeal should be limited (save where one of the prescribed exceptions applies) to the evidence which was submitted with the application. Any other conclusion would be wholly inconsistent with the natural meaning of Appendix FM SE and indeed would defeat its very purpose.

5. The appeal has been resisted in commendably brief submissions which recognise the reality that this ground is properly made. The admission into evidence of post-application documents was plainly error of law. In the circumstances this appeal must be allowed.

6. Because it has always been conceded that on the basis of the material presented with the application, the requirements of Appendix FM-SE are not met, the decision of the Entry Clearance Officer must be reinstated. I therefore remake the decision of the First-tier Tribunal by formally dismissing the appeal from the Entry Clearance Officer's determination.

Notice of Decision

The appeal is allowed.

Decision of First-tier Tribunal remade dismissing the original appeal and reinstating the decision of the Entry Clearance Officer.

No anonymity direction is made.

Signed *Mark Hill* Date 17 April 2016

Deputy Upper Tribunal Judge Hill QC