



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: OA/10085/2014

**THE IMMIGRATION ACTS**

Heard at Field House  
On 11<sup>th</sup> December 2015

Decision & Reasons Promulgated  
On 14<sup>th</sup> April 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE MANDALIA

Between

ENTRY CLEARANCE OFFICER – MUMBAI

and

TARNNUM SABERBHAI MOMLA

Appellant

Respondent

**Representation:**

For the Appellant: Mr Tarlow, Home Office Presenting Officer

For the Respondent: Mrs Price of Counsel instructed by Addison & Khan Solicitors

**DECISION AND REASONS**

1. This is an appeal against a decision by First-tier Tribunal Judge McCartney promulgated on 25<sup>th</sup> June 2015, in which she allowed an appeal against the decision of the respondent of 29<sup>th</sup> July 2014 to refuse an application for leave to enter the UK as a partner under Appendix FM of the Immigration Rules.

2. The appellant is the Entry Clearance Officer (Mumbai) and the Respondent to this appeal, is Mrs. Tarnnum Saberbhai Momla. However for ease of reference, in the course of this decision I shall adopt the parties' status as it was before the First-tier Tribunal. I shall in this determination, refer to Mrs. Tarnnum Saberbhai Momla as the Appellant and the Entry Clearance Officer (Mumbai) as the Respondent.
3. Permission to appeal was granted by First-tier Tribunal Judge Davies on 15<sup>th</sup> September 2015. The matter comes before me to consider whether or not the decision of First-tier Tribunal Judge McCartney involved the making of a material error of law, and if so, to remake the decision.

### **Background**

4. On 6<sup>th</sup> January 2014, the appellant applied for entry clearance as the partner of a British Citizen to settle in the UK with her husband, Shahid Juber Datta, whom she married on 30<sup>th</sup> March 2013. The application was refused on the basis that the sponsor did not meet the income requirement under Appendix FM-SE of £18,600.00. It appears that a holding response may have been sent by the respondent on 19<sup>th</sup> February 2014, explaining that the income threshold requirement was not met, but the application would not be determined until the outcome of the **MM and Others** appeal that was then before the Court of Appeal.
5. In the Appendix 2 'Financial Requirement Form' submitted by the appellant at the time of the application for Entry Clearance, it is said that the sponsor has been employed as a Sales Assistant by Canvasbay Ltd since 2<sup>nd</sup> September 2012 and his annual pre tax income from that employment is £13,011. It is also said that Majorledge Ltd employed the sponsor as a Sales Assistant since 10<sup>th</sup> January 2013. His annual pre tax income from that employment is £6,552.00. Those earnings are confirmed in the sponsor declaration dated 22<sup>nd</sup> November 2013 signed by the sponsor who states that his earnings are £19,563.22.
6. The Refusal of Entry Clearance dated 29<sup>th</sup> July 2014 deals with the sponsors earnings in the following way:

*“... On your application form (Appendix 2 Financial Requirement Form) your sponsor has stated that he meets[sic] the financial requirements through salaried employment only. Your sponsor claims to have 2 forms of employment: CanvasBay Ltd since Sep 2012 as a Sales Assistant and Majorledge Leatherwear as a Sales Assistant since January 2013. Both are paid cash in hand and the only deposits seen entering the account are either bigger than the income derived from second job, and a lot smaller than monthly pay from main job. The 6 month period of consideration for assessment of your application is- June to December- total pay = £8917.74 (x 2 = £17835.48). Your sponsor does not have savings to cover the shortfall. The documents submitted do not show that your sponsor has been paid throughout the period of 6 months prior to the date of application at a level of gross annual salary which equals or exceeds the level relied upon in the application ...”*

### **The appeal before the First-tier Tribunal**

7. The respondent was not represented at the hearing before the First-tier Tribunal. At paragraphs [5] to [7] of her decision, the Judge sets out the documents that were before the Tribunal. At paragraphs [8] to [17] of her decision, the Judge sets out the evidence that she heard from the appellant’s sponsor. It serves no purpose to repeat what is set out in those paragraphs in this decision.
8. At paragraphs [18] to [26], the Judge sets out her decision. It is clear that the Judge had very careful regard to the evidence before her, and that she carried out a careful analysis of the income of the sponsor insofar as she could from the evidence before her. The Judge considered the evidence in relation to the earnings from the two jobs that the sponsor has, and found:

*“24. On the face of it the tribunal is satisfied that the pay meets the required thresholds. Whilst both the grounds of appeal and the submission from the Respondent calculated different figures from the figures given above, the tribunal is satisfied that the income threshold is met [sic] and vouched for on paper, particularly given the production of the P60s for April 2014. The tribunal is satisfied that the P60s can be taken into account notwithstanding that they were not produced at the time of the application, given the P60s show the circumstances of the sponsor’s pay at the time of the application in January 2014. The Respondent’s calculation of the sponsor’s pay is only set out briefly in the Respondent’s written submissions, and*

*the calculations are not clear. In the absence of a Presenting Officer to explain the calculations, the tribunal has done its own calculations and is satisfied on the balance of probabilities that the position is vouched on paper. However, the Respondents also appear to say that they do not accept that this was genuine information, as the bank statements showing monies paid in, does not add up to the monies which the sponsor claimed to earn.*

25. *The sponsor was a genuine and credible witness. He gave oral evidence, and provided an adequate explanation for the wages payments being given to him in cash and why this was not all paid into the bank. He readily accepted that it was now unusual to be paid in cash by one employer, and that it was a very unusual coincidence to be paid in cash by both of his employers. His evidence that he had asked his employers to pay him directly into his bank account. For whatever reason, his employers were not willing to do so. He gave explanations for what he uses some of his wages to pay directly out, in cash, without going through his bank account. It would be plausible that he pays his rent in cash. It would also be plausible that, given that his wife has not entered the UK, he spends a number of evenings a week at his mother's house and will give her money for food. There was therefore an explanation given orally by the sponsor as to why the cash going into the bank does not match up to the cash he is paid. Whilst he has received pay rises in both his positions, from looking at the P60s between 2013 and 2014 in particular, his explanation was that he was on unpaid leave in March 2013 whilst in India, and this affected his overall pay for 2013.*
26. *The tribunal is satisfied that the sponsor does earn more than £18,600 per year. This was vouched on paper to the Respondent at the time, although the tribunal can see why the Respondent may have had questions about the payments being paid in cash not matching up to the monies going through the sponsor's account, and the differences between P60s for 2013 and the payslips for 2014. There are no other issues for the tribunal to determine. Accordingly the appeal is granted."*

### **The hearing before me**

9. The grounds of appeal are succinct. The respondent refers to the need to demonstrate a gross income of at least £18,600 per annum and submits that "The Appellant may only rely on the Sponsor's income which is demonstrated by

specified evidence, contained in Appendix FM-SE". The respondent submits that only wages paid into a bank account and appearing on the statements may be counted towards the Sponsor's gross income in accordance with A1 1(n) of Appendix FM-SE. It is said that it is not open to the Judge to draw her own conclusions, based on the credibility of the Sponsor or other documents in the absence of those specified.

10. At the hearing before me, Mr Tarlow relied upon the Grounds of Appeal. He submits that there was plainly evidence before the Judge that the sponsor received payments in cash, and that he did not put all of his earnings into his bank account. He submits that the Judge therefore erred in taking into account the gross earnings of the sponsor, based upon calculations performed by the Judge herself.
11. In reply, Mrs Price submits that the decision of the Judge discloses no error of law, and if it does, any such error is not material to the outcome of the decision. She submits that paragraph A1, 2(c) of Appendix FM-SE is satisfied. She submits that the Judge accepted that the sponsor was paid in cash, and that not all of the cash receipts were paid into the sponsor's bank account. The Judge has given adequate reasons for making that finding. She submits that after a careful examination of all of the evidence, it was open to the Judge to conclude that the maintenance requirements of the rules, are met. She submits that the approach adopted by the respondent in this appeal is pedantic. She referred me to the decision of the Upper Tribunal in **Thakur (PBS decision - common law fairness) Bangladesh [2011] UKUT 00151** and submits that the Judge considered the relevant factors and it was open to the Judge to find that the substantive requirements of the immigration rules have been met. She submits that the Judge properly applied the requirements of the rules, to the facts of the appeal before her.

## **DECISION AS TO ERROR OF LAW**

12. It is useful to begin by setting out the relevant requirements of Appendix FM-SE:

### **Evidence of Financial Requirements under Appendix FM**

A1. To meet the financial requirement under paragraphs E-ECP.3.1., E-LTRP.3.1., E-ECC.2.1. and E-LTRC.2.1. of Appendix FM, the applicant must meet:

(a) The level of financial requirement applicable to the application under Appendix FM; and

(b) The requirements specified in Appendix FM and this Appendix as to:

(i) The permitted sources of income and savings;

(ii) The time periods and permitted combinations of sources applicable to each permitted source relied upon; and

(iii) The evidence required for each permitted source relied upon.

1. In relation to evidencing the financial requirements in Appendix FM the following general provisions shall apply:

...

(k) Where the gross (pre-tax) amount of any income cannot be properly evidenced, the net (post-tax) amount will be counted, including towards a gross income requirement.

...

(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.

(n) The gross amount of any cash income may be counted where the person's specified bank statements show the net amount which relates to the gross amount shown on their payslips (or in the relevant specified evidence provided in addition to the specified bank statements in relation to non-employment income). Otherwise, only the net amount shown on the specified bank statements may be counted.

....

2. In respect of salaried employment in the UK (except where paragraph 9 applies), all of the following evidence must be provided:

...

(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.

...

13. In order to meet the financial requirement, the appellant must meet the requirements of Appendix FM-SE as to the evidence required for each permitted source of income. In this case, that is the sponsor's income from his employment. Paragraph A1 2(c) of Appendix FM-SE requires the appellant to provide personal bank statements corresponding to the same periods as the payslips showing that the salary has been paid into an account in the name of the sponsor or in the name of the sponsor and the appellant jointly. His employers did not pay the sponsor's earnings into a bank account.

14. Paragraph A1 1(m) permits cash income on which the correct tax has been paid, to be counted as income under Appendix FM-SE subject to the relevant evidential requirements being met. Paragraph A1 1(n) operates such that the gross amount of any cash income may be counted where the person's specified bank statements

show the net amount which relates to the gross amount shown on their payslips but otherwise, only the net amount shown on the specified bank statements may be counted.

15. At paragraph 24 of her decision, the Judge noted that the respondent was concerned that the bank statements showing monies paid in, did not add up to the monies that the sponsor claimed to earn. Beyond the requirement to establish a gross annual income of at least £18,600, the Judge makes no reference in her decision to the requirements of Appendix FM-SE, and in particular to the requirements set out at paragraphs A1 1(m) and (n). The Judge has plainly carried out a careful analysis of the sponsor's income by reference to the wage slips and P60's that were available to her in reaching her overall conclusion that the sponsor does earn more than £18,600 per year. The Judge appears to have done so, in ignorance of the requirements of paragraph A1 1(n) of Appendix FM. Had the sponsor's bank statements shown the net amount which related to the gross amount shown on his payslips, the approach adopted by the Judge would have been permissible. However that was not the case here and thus only the net amount shown on the specified bank statements could be counted. The Judge did not carry out the same careful analysis of the net amount shown on the bank statements and in failing to do so, in my judgment the decision discloses an error of law.
16. I reject the submission made by Mrs. Price that the error of law is not a material one. Whether one proceeds upon the gross income of the sponsor or the net income of the sponsor is plainly material in an appeal of this kind. The appellant was only just able to meet the substantive requirement to establish a gross annual income of at least £18,600, but if one were to proceed, as required by Appendix FM-SE upon the basis that only the net amount shown on the specified bank statements may be counted, the substantive requirement could not be met.
17. I also reject the submission made by Mrs. Price that there has been unfairness in the decision by the respondent, that is perpetuated by the decision to refuse the



appellant entry clearance. **Thakur (PBS Decision - Common Law Fairness) Bangladesh [2011] UKUT 00151 (IAC)** relates to a Tier 4 application, and establishes that even where events have conspired to undermine the appellant's application, there is no burden on the respondent to seek out documentation. The evidential requirements here, were clearly set out in Appendix FM-SE and it was in the hands of the appellant to comply with those requirements, when she applied.

18. The First-tier Tribunal Judge erred by not adequately analysing the evidential requirements of Appendix FM-SE and erred in allowing the appeal having concluded that the substantive maintenance requirement was met simply by reference to her analysis of the evidence before her as to the appellant's income. In those circumstances, in my judgement there is a material error of law in the decision of the First-tier Tribunal and the decision is set aside.

### **Re-Making the Decision**

19. I was invited by the parties to remake the decision. Mr Tarlow adopted the matters set out in the Refusal of Entry Clearance.
20. Mrs Price referred me to the evidence that had been before the First-tier Tribunal as to the sponsor's income including the payslips, and P60's. She submits that the sponsor's income plainly exceeds £19,000 and thus the maintenance requirement of £18,600 is met. I asked her during the hearing of the appeal whether any schedule had been prepared of the appellant's income as disclosed by his wage slips, and by reference to the monies credited to his bank account. No such information had been prepared in readiness for the hearing of the appeal, and Mrs Price simply drew my attention to the bank statements that were before the First-tier Tribunal from which one could establish the net amount credited and shown on the specified bank statements.
21. I have taken into account all the evidence that was before the First-tier Tribunal and the submissions made by the parties. Because this is an appeal against refusal

of entry clearance, I may only consider the circumstances appertaining at the date of refusal, which was 29<sup>th</sup> July 2014. I can however take into account evidence arising after the date of refusal, if it is relevant to the circumstances appertaining at the date of refusal. The burden of proof is on the appellant to establish that the requirements of the immigration rules are met, and the standard is a balance of probabilities.

22. I remind myself that the appellant made the application for entry clearance on 6<sup>th</sup> January 2014. Before the First-tier Tribunal, Mrs. Price had submitted that the relevant period for the assessment of documents was from July 2013 to January 2014. Mr. Tarlow did not submit before me that any other period was appropriate.
23. For the reasons that I have already set out in my error of law decision, little is to be gained by a further analysis of the appellant's wage slips and P60's. There was no attempt to challenge the analysis of those documents as set out in the decision of First-tier Tribunal Judge McCartney, before me.
24. There are a number of bank statements in the papers before me. The bank statements establish the following cash credits to the sponsors HSBC bank account between 1<sup>st</sup> July 2013 and 23<sup>rd</sup> December 2013.

Date	Amount	Evidence
01.07.13	200.00	[Appellant/92]
11.07.13	300.00	[Appellant/92]
23.07.13	230.00	[Appellant/92]
31.07.13	190.00	[Appellant/93]
07.08.13	100.00	[Appellant/93]
16.08.13	300.00	[Appellant/93]

27.08.13	160.00	[Appellant/94]
16.03.13	200.00	[Appellant/94]
24.09.13	150.00	[Appellant/95]
03.10.13	200.00	[Appellant/95]
18.10.13	200.00	[Appellant/95]
22.10.13	150.00	[Appellant/95]
28.10.13	200.00	[Appellant/96]
18.11.13	200.00	[Appellant/96]
04.12.13	100.00	[Appellant/97]
09.12.13	20.00	[Appellant/97]
16.12.13	200.00	[Appellant/97]
23.12.13	200.00	[Appellant/97]

25. The net amount shown on the specified bank statements establish an income of £3300 during that 6-month period. On any view, the net credits to the bank account would not establish that the maintenance requirement is met, and the appeal therefore fails under the immigration rules.
26. Mrs Price also submitted that the refusal of entry clearance is in breach of Article 8 ECHR. She submits that the appellant and the sponsor have been married for a long time and that there are no other public interest considerations that apply.
27. In **SSHD v SS (Congo) & Ors [2015] EWCA Civ 387** the Court of Appeal considered the proper approach to applications for leave to enter the United Kingdom outside the Immigration Rules on the basis of Article 8 of the ECHR following the decision in R (on the application of MM (Lebanon)) v SSHD [2014] EWCA Civ 985. Richards LJ said that what was in issue in relation to an

application for leave to enter is more in the nature of an appeal to the State's positive obligations under Article 8 (as referred to in Huang) rather than enforcement of its negative duty, which is at the fore in leave to remain cases. Accordingly, the requirements upon the State under Article 8 are less stringent in the leave to enter context, than in that of leave to remain.

28. The reason that the appellant does not fulfill the requirements of the Immigration Rules is because the evidential requirements set out in Appendix FM-SE are not met sufficiently to establish that the substantive maintenance requirement is met. All of the other requirements of the Immigration Rules are met. It is not disputed that the appellant is married to a British citizen.
29. Looking at the matter through the five Razgar questions, I would answer them therefore as follows. (1) There is no question of a proposed removal in this case, but only of whether the appellant is to be given leave to enter. Plainly refusal of such leave is an interference with the exercise of the right to respect for the appellant and her sponsor's family life. (2) The interference will have consequences of such gravity as potentially to engage the operation of article 8. (3) Such interference would be in accordance with law, namely pursuant to the applicable immigration rules (subject of course to the ultimate outcome of the article 8 issue). (4) and (5) These questions of justification and proportionality are, as has been said, often taken together. As Strasbourg and domestic jurisprudence has consistently emphasised, states are entitled to have regard to their system of immigration control and its generally consistent application, and a requirement that an entrant should meet the maintenance requirement is an ultimately fair and necessary limitation on what would otherwise become a possibly overwhelming burden on all of its citizens.
30. **s117 Nationality Immigration and Asylum Act 2002** is a factor to be taken into account in determining proportionality. **s117A(2)** requires me to have regard to the considerations listed in sections 117B and 117C. I am conscious of my statutory duty to take these factors into account when coming to my conclusions.

Maintenance of fair and effective immigration control is in the public interest. Similarly, it is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons are not a burden on taxpayers, and are better able to integrate into society.

31. The requirements of the Immigration rules, require an applicant to establish that the maintenance requirement is met by reference to the specified evidence. The specified evidence provides an audit trail to establish that the income requirements are properly met. In a case such as this where the sponsor receives payments in cash, in the absence of the specified evidence it is difficult to establish the provenance of the income claimed, and whether the income requirement is properly met. It is for that reason that Appendix FM-SE makes express provision that the gross amount of any cash income may be counted where the person's specified bank statements show the net amount which relates to the gross amount shown on their pay-slips, but otherwise, only the net amount shown on the specified bank statements may be counted.
32. In my judgement, the reasons that the appellant is unable to satisfy the requirement of the immigration rules is relevant to the public interest matters that I am required to take into account in an assessment of proportionality. In the absence of any countervailing factors weighing in favour of the appellant beyond the length of time that her marriage has endured, in my Judgement the refusal of entry clearance does not result in a disproportionate interference with the applicant and her sponsor's right to a family life.
33. The appeal is therefore dismissed.

### **Notice of Decision**

34. The decision of the First-tier Tribunal is set aside. I remake the decision and the appeal is dismissed.

35. No anonymity direction is applied for and none is made.

Signed

Date

Deputy Upper Tribunal Judge Mandalia

**FEE AWARD**

36. As I have set aside the decision of the First-tier Tribunal and dismissed the appeal there can be no fee award.

Signed

Date

Deputy Upper Tribunal Judge Mandalia