Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/07985/2015

THE IMMIGRATION ACTS

Heard at Field House	**Determination& Reasons Promulgated**
On 15th June 2017	**On 27th June 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

SAMREEN ADIL
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: No legal representation
For the Respondent: Mr P Singh (Senior HOPO)

DETERMINATION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge V Jones, promulgated on 15th November 2016, following a hearing at Birmingham Sheldon Court on 20th October 2016. In the determination, the judge allowed the appeal of the

Appellant, whereupon the Respondent subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a female, a citizen of Pakistan, who was born on 14th December 1994. She appealed against the decision of the Respondent dated 27th August 2015, refusing her application for entry clearance to join her partner, Mr Adil Hussain, the Sponsor, who is a British citizen settled in the UK. The applicable Immigration Rules are paragraph EC-P.1.1(d) with reference to E-ECP.3.1, of Appendix FM.

3. The basis of the Appellant's claim is that she had to comply with the £18,600 income requirement for her sponsoring husband, but the difficulty in relation to providing proof of this arose from the fact that the Sponsor had two employments. His principal employment was with CPB UK Ltd, a small marketing company. His second employment was with AZB Castle Cars Ltd. The Appellant had submitted payslips from the Sponsor for both employments covering the six month period prior to the application (January 2015 to June 2015). The personal bank statements for this period showed in each case that salary was being paid into the Sponsor's account. He had also submitted P60s. The Sponsor had then asked both his employers to provide him with a letter which was required by Appendix FM-SE. AZB Castle Cars Ltd were happy to oblige. However, the director of CPB UK Ltd refused saying that all the information that was needed was contained in the Sponsor's payslips, and his contract of employment, and he did not wish to get involved in the Sponsor's personal affairs. This resulted in the initial application before the ECO being refused, and when that happened, the Sponsor went back to the director of AZB Castle Cars Ltd again, and this time showed him the refusal letter and implored him to provide the letter in the terms required, which the director then agreed to do. However, the information in some respects was still incomplete in this letter. He had simply stated that the Sponsor was being paid "£18,500 plus commission". He did not state whether this was gross or net or the period on which the salary was being paid. When the matter went to the ECM the refusal was upheld.

The Judge's Findings

4. The judge allowed the appeal. She did so on the following grounds. First, she had found the Sponsor to "be a credible witness" and accept his evidence as to the reasons he was unable to provide a letter with the requisite information" (paragraph 20).

5. Second, the ECO did not exercise discretion under paragraph D of Appendix FM-SE, when this could have been done, and in this respect the judge held that it was not correct for the ECO not to exercise discretion in the Appellant's favour. This is because, as the judge explained,

> "There was only one difference: the missing letter from CPB UK Ltd. However, the Appellant did not make it clear in her application why she had been unable

to obtain a letter from CPB or invite the ECO to exercise discretion to waive the requirement for the letter" (paragraph 21).

6. Third, in coming to this conclusion, the judge had regard to the "maintenance of fair and effective immigration control" and acknowledged that the case of **SS (Congo) [2015] EWCA Civ 387** had emphasised the importance of both substantive and evidential Rules. The judge noted that there are bound to be unreasonable employers who will not assist their employees and the lack of the specified letter should not in these circumstances weigh heavily in the proportionality exercise (see paragraph 24). It was noted by the judge that this was not a case where the Appellant was in a position to reapply for entry clearance and produce all the specified evidence. She recognised the Sponsor's evidence having some force, "that he will have considerable difficulty obtaining the specified letter from CPB UK Ltd and there is a real possibility that such a request will damage his relationship with his employer" (paragraph 28).

7. Ultimately, what the judge placed her decision upon was that, "if that is the case, and the ECO is not prepared to exercise discretion under paragraph D(b) in the Appellant's failure, her application will again fall to be refused" (paragraph 28).

8. The judge went on to note that, "the only alternative will be for him to give up his secure employment, try to find a new job with a more cooperative employer in the UK or go to live with the Appellant in Pakistan where he would need to find new employment. His wife lives with her parents and does not work".

9. The judge went on to say that "the effects of maintaining this decision would amount to a disproportionate interference with the Sponsor's private life" (paragraph 30).

Grounds of Application

10. The grounds of application state that the judge erred in allowing the appeal in finding that there were compelling circumstances not sufficient to be recognised by the Immigration Rules. The judge had found that the required income was present at the date of the application but one of the Sponsor's employers was unwilling to provide a letter which complies with the requirements of Appendix FM-SE. The judge was wrong to conclude that this was an exceptional case where there were compelling circumstances to allow the appeal outside the Rules.

11. On 19th April 2017, permission to appeal was granted by the Tribunal.

Submissions

12. At the hearing before me on 15th June 2017 the Sponsor, Mr Adil Hussain, attended court, but was unrepresented. When the court clerk telephoned the solicitors, she was told that they were not sent the notice of hearing. Upon checking the court clerk was able to confirm to me that this was not the case and that a notice of hearing had been sent to the solicitors. Mr Adil Hussain himself, upon arriving at court explained

that his solicitors were fully aware that there was a hearing today but had chosen not to attend.

13. I regard the explanation given by those representing the Appellant to be unsatisfactory when it is simply not the case that no notice of hearing was overlooked by the Tribunal Service and they were put on notice of this hearing.

14. Given that this was the Respondent's appeal, Mr Singh submitted that the judge below had accepted that the employer's letter was not provided by the director of AZB Castle Cars Ltd. This meant that the Rules in Appendix FM-SE could not be complied with. The fact that there was a difficult employer who was unwilling to assist the employee did not mean that this was a "compelling circumstance". This is clear in the way that the judge who granted permission to appeal had expressed his concerns over the decision. It is also incorrect to say that, "the Sponsor explained that they had not realised the letter was mandatory" (paragraph 21), given that it is well-known that the disclosure of such a letter is indeed mandatory. In these circumstances, it was not open to the judge to go ahead and conduct an assessment of Article 8 outside the Immigration Rules and to allow the appeal on that basis.

15. The Sponsor, Mr Adil, submitted that he had already explained to the judge below that the director of AZB Castle Cars Ltd was not willing to assist and was not willing to provide another letter, given that he had already provided one, even though this letter was deficient in terms of details required for Appendix FM. He said that initially his employer was absolutely intransigent and would not provide any further letter. When the ECO refused the application, he then took that refusal to the director and at that point the director relented somewhat and issued him with a letter, but this was done in a perfunctory manner, and the proper details were not put in that letter, resulting in the ECM issuing another refusal after that. He went on to explain that, "it has been really difficult for me to get a letter from my director". He said that AZB Castle Cars Ltd did not have a HR department. They had no administrative staff. They only had a PA who worked for the director and it was well outside their means to be able to assist any further than they had done. He was in a predicament and had done all that he could.

16. In reply, Mr Singh submitted that the Rules have simply not been complied with and the only decision that the judge could have arrived at was that of a refusal.

No Error of Law

17. I am satisfied that the making of the decision by the judge does not involve the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision. My reasons are as follows.

18. First, in what is a sensitive, comprehensive, and thorough determination, the judge considers all the issues that were relevant in this case. She did not overlook the importance of compliance with the Immigration Rules. In fact, she referred to the case of **SS (Congo)** and emphasised how the importance of substantive and evidential Rules in Appendix FM and Appendix FM-SE could not be overlooked and

had to be placed equal weight (see paragraph 22). As she did not accept any suggestion that compliance was not mandatory so as to require a letter being produced from the employer in the terms necessary (see paragraph 21).

19. Second, and in any event, what the judge did was to allow the appeal outside the Rules, recognising that it was a compelling circumstance that the Appellant was not in a position to reapply for entry clearance and produce all the specified evidence (see paragraph 28).

20. Third, as against this, full consideration was given to the application of Section 117B NIAA and the maintenance of fair and effective immigration control (paragraph 29). It was only after this that the conclusion was reached that "this is an exceptional case where there are compelling circumstances sufficient to outweigh the public interest of maintaining the decision".

21. Fourth, this was because the Appellant met the other requirements of Appendix FM "and has satisfied the other additional requirements of Appendix FM-SE" and that "it will be difficult if not impossible for him to obtain a further letter from his employer which meets the evidential requirements" (paragraph 30).

22. This Tribunal, having a supervisory jurisdiction can only interfere with the finding of fact such as this, if it is in all the circumstances of the case "perverse" or "irrational".

23. I cannot find any basis for so concluding, given that the judge does not err in any way, either factually in having regard to every aspect of the facts presented before her, or indeed in terms of law, given the attention given to the applicable immigration authorities in this kind of situation. Accordingly, the decision stands.

Notice of Decision

There is no material error of law in the original judge's decision. The determination shall stand.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Juss 26th June 2017