Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/11648/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20 July 2017	**On 02 August 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

MRS CHANIKARN SODA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: In person
For the Respondent: Mr L Tarlow, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, who is a national of Thailand, appeals from the decision made by the First-tier Tribunal to dismiss her appeal against the decision of an Entry Clearance Officer to refuse her entry clearance for the purposes of settlement as the spouse of a British national. The appeal was dismissed for non-compliance with the minimum income requirement ("MIR"). The reason why she was able to attend the hearing before me with her husband was because, following the refusal of her settlement application, she has successfully applied for entry clearance as a visitor for a period of six months. The First-tier Tribunal did not make an anonymity direction, and I do consider that the appellant needs anonymity for these proceedings in the Upper Tribunal.

Relevant Background Facts

2. The appellant applied for entry clearance as a spouse on 17 March 2016. On 30 March 2016 an Entry Clearance Officer in Bangkok (Post reference: BKK/1027917) gave his reasons for refusing her application. She had declared in Appendix 2 of her application, that her sponsor met the financial requirements through cash savings of £28,794.85, but she had not met the evidential requirement of providing personal bank statements showing that cash savings have been held in an account in the name of a persons or of the person and their partner jointly for at least 6 months prior to the date of application.

3. She had submitted a Halifax account ending [ ], which showed a final balance of £23,367. The account indicated that the amount of £25,196.97 was deposited into the account on 1 February 2016 from her sponsor's "Nutmeg" account. She had also submitted an investment report and portfolio from her sponsor's "Nutmeg" account. This report covered the period from April to October 2015 only. Although this demonstrated that the sponsor was in possession of this amount, it did not cover the required 6-month period prior to the date of application.

4. She had also submitted the following bank statements evidencing further funds held by the sponsor:

   a) A TSB account ending [ ] from the period 5 August 2015 to 2 March 2016;

   b) A Halifax ISA Saver account ending [ ] covering the period 9 July 2015 to 1 December 2015; and

   c) A Halifax account ending [ ] from 1 February 2016 to 29 February 2016.

5. These bank statements did not cover the entire period required "*collectively*". Accordingly, she had not submitted all the mandatory documents required under Appendix FM-SE to show the sponsor's cash savings. In addition, the sponsor would appear to have insufficient cash savings available in order to qualify in this capacity, as the minimum amount required was £62,500.

6. She had also declared that the sponsor had an income of £14,244 per year, and so he had considered whether his sponsor was able to meet the minimum income requirement (MIR) through a combination of salaried employment and cash savings.

7. In respect of salaried employment in the UK, all the mandatory evidence had been provided except personal bank statements corresponding to the same period as the payslips, showing that a salary had been paid into an account in the name of the person or the name of the person and their partner jointly. The reason that the requirement was not met was because the TSB statements for the account ending [ ] only covered the period 18 January 2016 to 11 March 2016.

8. He had considered the question of evidential flexibility. This was confined to cases where applicants had submitted a document in the wrong format, a copy document rather than an original, or where one document in a series was missing. While she

had provided some of the necessary specified evidence, the documentation submitted did not show that her sponsor's income was as stated. So he was satisfied that the decision not to allow evidential flexibility in her case was in accordance with the law.

The Grounds of Appeal to the First-tier Tribunal

9. The grounds of appeal to the First-tier Tribunal were settled on the appellant's behalf by Scott Moncrieff Solicitors. They pleaded that the decision to refuse was disproportionate and contrary to Article 8 ECHR. The ECO had failed to fully consider and/or give sufficient weight to the evidence submitted, particularly in respect of the sponsor's earnings. The decision-maker had failed to use evidential flexibility and had neglected to contact the appellant for clarity. Their client (sic) clearly had relevant cash savings in his "Nutmeg" account, which were transferred to his bank. So, taking into reasonable consideration all his financial cash assets, it was reasonable to conclude that he possessed the relevant savings. Evidential flexibility should have been sufficient to draw the appropriate conclusion from the various bank accounts. The fact that he had multiple accounts and savings showed a genuine set of financial circumstances. There was no question of the applicant (sic) having constructed his finances at short notice in order to bolster his application. The refusal decision was irrational and unreasonable. Furthermore, it was not feasible for the sponsor to leave the UK to start life in Thailand, as he had his career and family in the UK.

The Decision of the First-tier Tribunal

10. The appellant asked for her appeal to be determined on the papers. The appeal came before Judge Gurung-Thapa sitting at Stoke on 21 November 2016.

11. In her subsequent decision, the Judge found that the appellant had provided a series of bank statements covering a six month period running from September 2015 through to the end of February 2016 so as to satisfy the requirement which had been put in issue by the Entry Clearance Officer as to proof of earnings from salaried employment. The Judge accepted the evidence of the appellant that the sponsor's income from his salaried employment was initially paid into his Halifax account, but after January 2016 it was paid into his TSB account.

12. With regard to cash savings, the Judge held that she could take into account the funds which the sponsor had held in the "Nutmeg" investment account. With the application, the appellant had provided a valuation report covering the period April to October 2015. For the purposes of the appeal, she had now provided a valuation report covering the next six months up to 5 April 2016. She directed herself that she could not take this into consideration as it was not available at the date of decision.

13. However, she held that was not the end of the matter, as there was the sum of £25,196.87 which was transferred from the "Nutmeg" account on 1 February 2016. She noted that the appellant also relied on cash sums held by the sponsor in three other accounts. But she found that the appellant had not submitted bank statements covering the entire period of six months.

14. On the topic of evidential flexibility, the Judge held that there was no near-miss principle to save a defective application unless the error came within the limited provisions of Appendix FM-SE paragraph D, and in particular sub-paragraph (b).

15. With regard to a claim under Article 8 ECHR, she found that the appellant had not been able to show that she could not satisfy the requirements of the Rules if she was to make a fresh entry clearance application.

The Grant of Permission to Appeal

16. The appellant's legal representatives settled a lengthy application for permission to appeal to the Upper Tribunal, raising a number of distinct grounds. However, in the grant of permission dated 5 June 2017, First-tier Tribunal Judge Grant granted permission on a ground that cannot clearly be cross-referenced to a ground advanced by the appellant's solicitors. The Judge granted the appellant permission to appeal on the ground that the Judge had "*arguably misunderstood the content of the bank statement placed before her and arguably misunderstood that it was supplied with the application*".

The Hearing in the Upper Tribunal

17. At the hearing before me, the appellant was not legally represented. Her husband and sponsor, Mr Hughes, explained that they had decided to dispense with the services of their solicitor on the grounds of cost. I asked him about the bank statement which had been referred to by the Judge granting permission to appeal. He handed up a bundle of documents, on the front page of which was written in manuscript "*Soda Further Evidence UT*". The bundle contained a bank statement in respect of his account with TSB ending [ ], covering the period I September 2015 to 25 November 2015. He said that this bank statement had been accidentally omitted from the bank statements put before the First-tier Tribunal Judge. However, his case was that it did not matter if the funds in this particular account were not brought into the equation when assessing whether he had held savings of £26,890 for the six-month period preceding the date of application. He submitted that, on a proper analysis of the material that was before the First-tier Tribunal Judge, she ought to have found that he had shown that he had held the necessary amount of savings for six months, so as to make up the shortfall between his salaried income and the MIR of £18,600. On behalf of the respondent, Mr Tarlow submitted that no error of law was made out.

Discussion

18. The narrow ground on which permission to appeal was granted is not made out. Mr Hughes has confirmed that the error of law challenge does not hinge on the Judge below having wrongly overlooked the bank statement referred to by the judge granting permission. He accepts that this bank statement was not before the Judge.

19. So I turn to the error of law challenge as it was presented to me by Mr Hughes in his lucid oral submissions. I agree with Mr Hughes' calculation as to the amount of cash savings which he needed to have held for a continuous period of six months in order

to make up the shortfall between his accepted salary income of £14,244 and the MIR of £18,600. His calculated figure of £26,890 corresponds to my calculated figure.

20. As evidence of savings, the appellant has always principally relied upon the funds held by the sponsor in his Nutmeg investment portfolio, which was liquidated at the beginning of February 2016, and the proceeds transferred into his Halifax account ending [ ], which, as noted in the refusal decision, showed a final balance of £23,367. At the time of decision, the Entry Clearance Officer reasonably excluded from consideration the Nutmeg investment portfolio, as the appellant had not satisfied the requirement of showing the cash value of the funds in the form of an investment at or before the beginning of the period of six months prior to the date of application, and the continuing cash value of the funds up until the transfer of the funds to the Halifax account.

21. The First-tier Tribunal Judge was wrong to direct herself that she could not take into account the additional evidence provided by way of appeal. The new evidence showed the valuation of the investment fund in the months leading up to its liquidation, and it was admissible notwithstanding the fact that it was not available at the time of the refusal decision. However the Judge's erroneous self-direction was not material, for reasons which will become apparent.

22. The evidence provided by way of appeal showed that the portfolio had hovered at around £25,000 in value from April 2015 to January 2016. Occasionally, the value of the fund had dropped slightly below this level, but mainly it was higher (A5). The valuation report at A4 for the six-month period from October 2015 gives a more accurate picture. The starting value of the fund on 6 April 2015 was £22,629.76. At the beginning of the relevant period (3 September 2015) the portfolio value was in excess of £25,000 and it remained above that level through to the end of the period. The valuation report for the 6-month period to 5 April 2016 (A6) is less specific, but it is apparent from the bar-chart that the balance is always well in excess of £23,500 and is always close to £25,000. The balance in the Halifax account following transfer does not appear to have fallen below the final balance figure quoted by the respondent in the refusal decision, and accordingly the Judge ought to have found that the appellant had established savings of this amount (£23,367) as being held by the sponsor for a period of six months.

23. But there is still a significant shortfall of about £3,500 in cash savings to reach the target of £26,890, and I am not persuaded that the Judge erred in finding that there was a near miss case. It is not disputed that in one of the other bank accounts sought to be relied upon, the Judge was only provided with bank statements covering a period of three months. This was the TSB account ending [ ] at B4. Confusingly, the sponsor also had a TSB account ending [ ], which is at B5. But this account runs from the period 2 November 2015 to 3 May 2016, and the balances shown are very modest. On 2 November 2015 the balance was £250. As a result of the payment in of £250 each month, the balance was £1,250 on 2 March 2016. At B6, there is a statement in respect of an account ending [ ] held by the sponsor with the Halifax Bank. The statement was printed in Branch on 11 May 2016. The account was apparently opened on 1 December 2015 with the transfer in of the sum of £1,000.

This was not money held in the account for a period of six months leading up to the date of application, and so it cannot be taken into account. The deposit into the account may have originated from another ISA Account ending [ ] held by the sponsor with Halifax, as at B7 there is a transfer out on 1 December 2015 of the sum of £1,000, leaving a balance of £1,022.03. However, it is not possible to discern from the information given at B7 when the account was opened.

24. Moreover, even if it is assumed in the appellant's favour that the sponsor held the sum of just over £2,000 for a continuous period of six months in various ISA accounts with Halifax Bank, the deployment of this sum is not enough to reach the target of £26,980. There is still a shortfall of about £1,500.

25. In conclusion, I do not consider that the Judge erred in law in finding that the appellant has not discharged the evidential requirements of Appendix FM-SE so as to show that the MIR is met. As I explained to the Appellant and the sponsor at the hearing, in a case such as this where the applicant is relying on savings held in a number of different accounts and where the accounts have fluctuating balances (and in the case of an investment portfolio, a fluctuating cash valuation), it is reasonable to expect the applicant to provide a schedule which gives a day-by-day analysis of the total balance in savings held by the sponsor across the various accounts. It is not reasonable to expect the decision-maker to pore over the transactions shown in the various accounts in order to try and work out the minimum total balance in savings that has been held over various accounts for the relevant period of six months. In any event, for the reasons I have given above, I am unable to ascertain that the sponsor held cash savings of £26,890 for the six-month period preceding the date of application on the evidence that was provided to the First-tier Tribunal Judge.

26. There is no error in the Judge's finding on evidential flexibility. It was open to the appellant and sponsor to provide all the necessary bank statements and valuation reports by way of appeal, together with a comprehensive schedule as discussed above, to show clearly and transparently that the MIR was met through cash savings of the required amount, *if that was truly the case*.

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision of the First-tier Tribunal stands.

This appeal to the Upper Tribunal is dismissed.

I make no anonymity direction.

Signed Date 29 July 2017

Judge Monson

Deputy Upper Tribunal Judge