Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: OA/07810/2015**

THE IMMIGRATION ACTS

Heard at Birmingham Employment Centre	**Decision & Reasons Promulgated**
On 24th April 2017	**On 16th May 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

SHAMILA BEGUM
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER, ISLAMABAD

Respondent

Representation:

For the Appellant: Mr R K Khan (Counsel)
For the Respondent: Mr D Mills (Senior HOPO)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Birk, promulgated on 18th August 2016, following a hearing at Birmingham on 12th August 2016. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant 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 25th March 1987. She appealed against the decision of the Entry Clearance Officer dated 26th August

2014 refusing her application to join her sponsoring husband, Mr M. Hanif, a person present and settled in the UK. The applicable Immigration Rules are paragraph EC-P.1.1(b) of Appendix FM. The reasons for the refusal are that the Appellant had not submitted an appropriate employer's letter. When the decision was reviewed by the ECM on 14th September 2015, the decision was upheld on the basis that the information provided was still inadequate.

The Judge's Findings

3. The judge heard evidence that the Sponsor, Mr Hanif, had received the employer's letter late, and when he received it he took it to the embassy straightaway. Thereafter there is a second letter dated 24th August 2014. The first one did not have the precise details necessary on it and so a second letter proved necessary. In fact, he had sent in five letters in total but none of these had been accepted (see paragraph 4). The Respondent in reply stated that the 2013 letter was not in evidence, but the second letter of 2014 still did not comply with the requirements of paragraph (b)(iii) because the information required still was not submitted. In reply, the Appellant's representative submitted that at the hearing today there were now P60s submitted and that "each P60 shows each and every time that the salary was above the threshold" (paragraph 5).

4. The judge held that the Appellant's Sponsor was unable to produce a copy of the employer's letter as required under Appendix FM-SE A1.2.2(b). It was true that subsequent letters had been produced from the same employer. However, no copy of the employer's letter dated 2013 had been produced. The Appellant's representative had sought to argue that the employer's letter did not contain all the details initially, but if one looked at the later letter of 24th October 2014, it still did not meet all of the requirements in Appendix FM-SE A1.2.2(b)(iii). The judge went on to say that

> "The refusal letter refers to there being no such employer's letter with the application. On the basis that I have not seen a copy of the 2013 letter, that the Sponsors accepts that the 2013 letter did not contain all the details required I am not able to find that a correctly formatted letter was more likely to have been submitted with the application …" (paragraph 9).

5. The appeal was dismissed.

Grounds of Application

6. The grounds of application state that it was wrong for the judge to conclude that the Sponsor had not included all the details required under Appendix FM, because all that had happened was that "it was not as verbose as the second letter" (see paragraph 5). This is plainly wrong and does the drafter of the Grounds of Appeal no credit whatsoever. It is wrong for the reasons that I will come to below.

7. On 27th November 2016, permission to appeal was granted on the basis that the Sponsor's evidence regarding the letter of employment may have been misconstrued.

8. On 8th February 2017, a Rule 24 response was entered by the Respondent to the effect that the judge directed himself correctly. The requirements in Appendix FM-SE are not a mere technicality. They have the same status as the Immigration Rules. They need to be complied with. The Appellant in this case had not complied with them.

The Hearing

9. At the hearing before me Mr Khan, appearing on behalf of the Appellant, relied on the fact that, firstly, the judge had at the time of the hearing before her, P60s for the Appellant going back five years, all of which showed that the Sponsor was well above the financial threshold requirement, and that the judge should have taken this into account in reaching her conclusions.

10. Second, he submitted that the Sponsor had by now been able to discover the 2013 letter from the employer. He handed up a letter from "Metsec" dated 3rd December 2013. This is signed off by Chris Groves, the wages administrator. It reads as follows: "Mr Mohammed Hanif has been employed by Metsec PLC since October 2006 as a general operative in our profile manipulation division. This is a permanent position for which his annual salary is £20,222". However, Mr Khan accepted that this letter does not contain details about how long the Sponsor has been on this salary of £20,222. This information, he accepted, was necessary, in order to root out fraud, so that potential applicants could not simply get an employer of the Sponsor to write out letters such as this, without it being properly stated how long the Sponsor was on such a salary for. Mr Khan also accepted that the letter of 2013 had not been sent to the ECO at the time of the decision. He further accepted that no P60 had been sent to the ECO either.

11. Third, Mr Khan then went on to submit that when the ECM was asked to review the decision, this was done on the basis of a "letter from Sponsor's employer, but this was a reference to a letter subsequently written. There was, however, here a reference to a "P60" (see sub-paragraph (e)). That suggested only a reference to a single P60. At this stage, Mr Mills, for the Respondent, reminded Mr Khan that the P60 here did not cover the correct tax year, such as to enable the Sponsor to show that it was commensurate with the missing information in the employer's letter. Finally, Mr Khan relied upon the "evidential flexibility" Rule which applies in the Home Office's own guidelines at "Appendix FM1.7: financial requirement (May 2016)". Mr Khan took me to the section at paragraph 3.4.6 (at page 12, and this states that

> "In deciding an application in relation to which this Appendix states that specified documents must be provided, the Entry Clearance Officer or the 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."

Mr Khan went on to say that he would place reliance upon sub-paragraph (dd) which reads, "a document which does not contain all of the specified information;".

12. For his part, Mr Mills submitted that the suggestion that it was incumbent upon the Secretary of State to invoke sub-paragraph (dd) requiring the decision maker to request "a document which does not contain all of the specified information", every time such information is missing, was absurd under the evidential flexibility requirement. It was for the Appellant to have provided the necessary employer's letter with the necessary information stipulated on it. The failure was entirely that of the Appellant. Indeed, the initial decision letter by the ECO expressly stated that requests had been made for the employer's letter and this had not been forthcoming. However, to his credit, Mr Mills submitted that what the Appellant could rely upon is the requirement within the relevant sub-paragraph of the evidential flexibility Rules, which is to the effect that "a document in the wrong format" or "a document that is a copy and not an original document" or "a document that does not contain all the specified information" may be recognised provided that the missing information is verifiable from other sources, such as other documents submitted with the application, or the website of the organisation which issued the document, or the website of the appropriate regulatory body. In such a case, Mr Mills submitted, "the application may be granted exceptionally, providing the decision maker is satisfied that the document is genuine and that the applicant meets the requirements to which the document relates". Mr Mills submitted that it would have been open in these circumstances, given that the five years' P60s were placed before the Tribunal judge, to have allowed the appeal exceptionally, because it would have been plain to see that the salary of the Sponsor as claimed, was reflected in the manner alleged, ever since 2011. Were a finding of an error of law to be made, and the decision remade on this basis, so as to be allowed for the Appellant, the Secretary of State would not seek to challenge that decision, given the circumstances.

Error of Law

13. The decision of the First-tier Tribunal involved the making of a decision on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision. My reasons for so doing are that the judge had before her P60s going back to 2011. Two of these P60s closest to the year 2013 would have sufficed to show the "missing information" from the numerous employer's letters which the Appellant submitted. No doubt if he had been advised properly, he would have requested the employer to provide specifically what was required of the employer. Although Appendix FM-SE had not been technically complied with, the very same framework of Rules contained a provision for the application of "evidential flexibility", and had this been invoked in an appropriate manner, it is clear that the missing evidence would have surfaced and the appeal would have been allowed.

Remaking the Decision

14. I remade the decision on the basis of the findings of the original judge, the evidence before her, and the submissions that I have heard today. I am allowing this appeal for the reasons that I have set out above.

Notice of Decision

15. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed.

16. No anonymity direction is made.

Signed Dated

Deputy Upper Tribunal Judge Juss 12th May 2017

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have made a fee award of the whole amount that paid or is payable.

Signed Dated

Deputy Upper Tribunal Judge Juss 12th May 2017