**Upper Tribunal**
**(Immigration and Asylum Chamber)**

Appeal Numbers:
HU/08773/2019
HU/08775/2019

**THE IMMIGRATION ACTS**

| **Heard at: Manchester Civil Justice Centre (remote)** | **Decision & Reasons Promulgated** |
|---|---|
| **On: 30th November 2020** | **On: 13th January 2021** |

**Before**

**UPPER TRIBUNAL JUDGE BRUCE**

**Between**

**Sara Nurhussein Beshir**
**MA**
**(anonymity direction made)**

Appellants

**And**

**Entry Clearance Officer, Sheffield**

Respondent

| | |
|---|---|
| **For the Appellants:** | **Mr Greer, Counsel instructed by All Nations Legal Services (Doncaster)** |
| **For the Respondent:** | **Mr McVeety, Senior Home Office Presenting Officer** |

**DECISION AND REASONS**

1. The Appellants are both nationals of Eritrea. The First Appellant Ms Beshir was born on the 9th November 1985. The Second Appellant is her son born on the 18th July 2015. They seek entry clearance to the United Kingdom in order to

settle here with the Sponsor Mr Abdu Salih Adem who is respectively their husband/father.

2. The Appellants made their applications on the 24th January 2019. They were refused on the 16th April 2019. The Respondent noted that to meet the financial eligibility requirements set out in Appendix FM of the Immigration Rules the Appellants would need to demonstrate, by the production of specified evidence, that the household income had been in excess of £22,400 per annum during the relevant period (July 2018 - January 2019). The Sponsor submitted evidence to show that he was employed by Mach Recruitment and that he there earned £18,392.42 in the relevant period. This evidence was accepted. The Sponsor further stated that he had earned £544.19 per month working part time at Selam Internet Café. The Respondent accepted that these additional earnings would take the Sponsor over the minimum income requirement, but not that the earnings had been properly evidenced. In particular the ECO explained that the Sponsor had failed to demonstrate his earnings at Selam Internet Café by the production of 6 months of bank statements showing his wages deposited. Nor had a complete set of payslips been produced. All other requirements were met.

3. The Appellants appealed. On the 29th October 2019 an Entry Clearance Manager reviewed the case. He found that the payslips from Selam Internet Café had been produced, but maintained the refusal on the ground that the wages could not be seen to have been deposited in the Sponsor's bank account (issue i). In addition the ECM could not be satisfied that the correct tax had been paid on these earnings (issue ii). These then were the matters that fell for consideration when the appeal came before the First-tier Tribunal in January 2020.

4. The First-tier Tribunal (Judge Myers) decision was promulgated on the 5th February 2020.

5. In respect of issue (ii) the simple explanation offered by the Sponsor is that no tax is deducted week-to-week from his pay at the café because his earnings there are too low. HMRC is however aware of this part time work and he pays the correct amount of tax overall. In the year 2018/19 he did have some additional tax to pay (presumably on top of the PAYE tax deducted from his wages at Mach Recruitment) but this was resolved by changing his tax code. The Tribunal had regard to written evidence from HMRC which confirmed this account. Having done so it found in the Appellants' favour on issue (ii).

6. In respect of issue (i) the Tribunal heard evidence from the Sponsor to the effect that he is paid in cash for his job at the café, and he has never deposited it in the bank because this is the money that he lives on. If he paid it in, he would have to immediately withdraw it again so he doesn't see the point. The Sponsor's

employer at the café also attended the hearing to give evidence. He confirmed that he pays the Sponsor weekly in cash. The Tribunal noted the evidence of HMRC that the Sponsor declared and paid tax on a gross income of £25,560.76 in the relevant period. Having had regard to all of that, the Tribunal was satisfied that the Sponsor does, as a matter of fact, earn a sufficient amount of money to maintain and accommodate his family, and to comply with the substantive requirements of Appendix FM. It could not however be satisfied that the Appellants had, at the date of the application, complied with the requirements of Appendix FM-SE, which sets out the 'specified evidence' to be produced before any claimed earnings can be recognised. Although the Tribunal regarded the Sponsor's stance on his cash earnings to be "understandable", and the effects of the rule to be "draconian", it held that it was unable to ignore the evidential requirements in Appendix FM-SE. The whole point of the financial documentation is to establish that the Appellants meet the financial requirements of the rules. The appeal was accordingly dismissed, the Tribunal finding no reason compelling reasons why entry clearance should be granted 'outside of the rules'.

7. In this appeal that conclusion of the First-tier Tribunal is challenged in two ways. First, Mr Greer submits that in fact there was scope within Appendix FM-SE/Appendix FM to find the rules met. Second, and in the alternative, it is submitted that having found that the Sponsor did in fact earn that money the Respondent could not show the continued refusal of entry clearance to be a proportionate response to the need to maintain immigration control, and on that basis the appeal should have been allowed.

**The Rules**

8. The Immigration Rules are simply statements of policy, made by the Secretary of State to explain the criteria by which applications will be judged. In 2012 the Secretary of State introduced the 'new' rules relating to Article 8, with the intention of clarifying and delineating where the balance should be struck when it came to the Article 8 rights of non-settled migrants seeking to enter or remain in the United Kingdom with family members. The substantive requirements relating to 'suitability' and 'eligibility' are set out in Appendix FM. The procedural requirements are set out in Appendix FM-SE: here the Secretary of State sets out the 'specified evidence' that must be produced upon application. The requirements of Appendix FM-SE have in some cases given rise to results that appear harsh, or as the First-tier Tribunal puts it, "draconian". Applicants who otherwise met all of the relevant, substantive, requirements have for instance failed because they were unable to produce a specific piece of paper. For that reason Appendix FM-SE was amended to provide certain exceptions to the otherwise stringent evidential requirements. Section D provides as follows:

D (a) 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), (e) or (f) applies.

(b) If the applicant:

(i) Has submitted:

(aa) A sequence of documents and some of the documents in the sequence have been omitted (e.g. if one bank statement from a series is missing);

(bb) A document in the wrong format (for example, if a letter is not on letterhead paper as specified); or

(cc) DELETED

(dd) A document which does not contain all of the specified information; or

(ii) Has not submitted a specified document, the decision-maker may contact the applicant or his representative in writing or otherwise, and request the document(s) or the correct version(s). The material requested must be received at the address specified in the request within a reasonable timescale specified in the request.

(c) The decision-maker will not request documents where he or she does not anticipate that addressing the error or omission referred to in sub-paragraph (b) will lead to a grant because the application will be refused for other reasons.

(d) If the applicant has submitted:

(i) A document in the wrong format; or

(ii) DELETED

(iii) A document that does not contain all of the specified information, but the missing information is verifiable from:

(1) other documents submitted with the application,

(2) the website of the organisation which issued the document, or

(3) the website of the appropriate regulatory body,

the application may be granted exceptionally, providing the decision-maker is satisfied that the document(s) is genuine and that the applicant meets the requirement to which the document relates.

(e) Where the decision-maker is satisfied that there is a valid reason why a specified document(s) cannot be supplied, e.g. because it is not issued in a particular country or has been permanently lost, he or she may exercise discretion not to apply the requirement for the document(s) or to request alternative or additional information or document(s) be submitted by the applicant.

(f) Before making a decision under Appendix FM or this Appendix, the decision-maker may contact the applicant or their representative in writing or otherwise to request further information or documents. The material requested must be received at the address specified in the request within a reasonable timescale specified in the request.

9. At paragraph 14 of its decision the First-tier Tribunal records that it was submitted on the Appellants' behalf that they should enjoy the benefit of sub-paragraph (e). At §15 it rejects such a notion: the 'documents' – ie bank statements showing earnings deposited – were not unavailable because of some insuperable obstacle, they were unavailable because the Sponsor had chosen not to pay his cash wages into the bank.

10. On appeal Mr Greer accepts that the case does not fall within the ambit of (e), but contends that in fact he never advanced the proposition that it did. Mr Greer, who was Counsel before the First-tier Tribunal, submits that the only part of FM-SE that he relied upon was sub-paragraph (D)(b)(i)(dd)[1]: "a document which does not contain all of the specified information". Before I address this ground I pause to note this. This proposition was not advanced in the written grounds, which were prepared by those instructing Mr Greer. Mr McVeety very fairly made no objection to the grounds being amended and the argument being put. Nor did Mr McVeety put Mr Greer to proof as to his assertion about what was argued before the First-tier Tribunal. He did so, and I permitted the point, on the basis that the rule is the rule and if the Appellants

[1]This section, perhaps more than any other, exemplifies truly farcical drafting.

should have the benefit of it, then it would be an error of law to pretend otherwise.

11. Having said all of that I struggle to see that sub-paragraph (D)(b)(i)(dd) is of much assistance to the Appellants at all. It is true that the bank statements did not contain all of the 'specified information' but when the entire section is read that doesn't get them very far. Where the applicant:

> (i) **Has submitted**:
>
> …
>
> (dd) **A document which does not contain all of the specified information**; or
>
> (ii) Has not submitted a specified document, **the decision-maker may contact the applicant or his representative in writing or otherwise, and request the document(s) or the correct version(s).** The material requested must be received at the address specified in the request within a reasonable timescale specified in the request.

Had the ECO contacted the Appellants and asked for the "correct version", we know that this would not have advanced matters at all, since such a document does not exist.

12. Far more straightforward, it seems to me, would be an application of sub-paragraph D(d)(iii)(1):

> (d**) If the applicant has submitted**:
>
> (i) A document in the wrong format; or
>
> (ii) DELETED
>
> (iii) **A document that does not contain all of the specified information, but the missing information is verifiable from**:
>
> (1) **other documents submitted with the application**,
>
> (2) the website of the organisation which issued the document, or
>
> (3) the website of the appropriate regulatory body,
>
> **the application may be granted exceptionally, providing the decision-maker is satisfied that the document(s) is genuine and that the applicant meets the requirement to which the document relates**.

13. The bank statements were before the Tribunal; they did not contain all of the specified information, but the missing information was verifiable from the Sponsor's payslips, the statement of his employer and his tax records. There was no question that the statements were genuine, and that the applicants meet the requirements to which the document relates: this was the express finding of the Tribunal. Furthermore, by its own estimation the Sponsor's behaviour in not depositing those cash wages (only to withdraw them again) was "understandable" [§13]; the effect, for this genuine family who are able to maintain themselves, was yet further interference. At the date of the First-tier Tribunal decision over a year had passed since the applications had been made, where husband was separated from wife, and father from son. There were no countervailing factors at all. In those circumstances I find that had the Tribunal directed itself to sub-paragraph D(d)(iii)(1) it would have allowed the appeal "exceptionally". I set the decision aside, the error of law being a failure to consider D(d)(iii)(1), and I remake the decision allowing the appeal.

**Article 8**

14. It follows that I need not dwell at any length on the alternative, second ground, that having found the substantive requirements of Appendix FM to be met the Tribunal should have allowed the appeal 'outside of the rules' since there was nothing weighing on the Respondent's side of the scales in the proportionality balancing exercise. In granting permission First-tier Tribunal Judge Grant observed that the *ratio* of TZ & PG [2018] EWCA Civ 1109 does not appear to have been applied. In response the ECO relies on the oft-cited *dictum* of Lord Justice Laws in SS (Congo) and Ors [2015] EWCA Civ 387 to the effect that the procedural requirements of Appendix FM-SE are there for a reason, that reason being the need to ensure that the applicant has sufficient funds: Laws LJ held that since the evidence rules have that same general objective as the substantive rules, the same approach must be taken to both. In the context of Article 8, that required decision makers to only depart from the rules where there are compelling reasons to do so.

15. SS (Congo) was of course one of the appeals before the Supreme Court in MM (Lebanon) & Ors. Unlike the other litigants, who all sought leave to remain in the United Kingdom, SS (Congo), like these Appellants, sought leave to enter. Unlike these Appellants, she was unable to demonstrate that her Sponsor earned the minimum income required by the rules. One of the matters that the Court therefore had to consider was whether sources of income not provided for by the rules could be taken into account by decision makers in their wider consideration of Article 8. Here the Court discusses the question of third-party support, with my emphasis added:

> 99. Operation of the same restrictive approach outside the rules is a different matter, and in our view is much more difficult to justify under the HRA. This is not because "less intrusive" methods might be devised (as Blake J attempted to do: para 147), but because it is inconsistent with the character of evaluation which article 8 requires. **As has been seen, avoiding a financial burden on the state can be relevant to the fair balance required by the article. But that judgment cannot properly be constrained by a rigid restriction in the rules.** Certainly, nothing that is said in the instructions to case officers can prevent the tribunal on appeal from looking at the matter more broadly. **These are not matters of policy on which special weight has to be accorded to the judgment of the Secretary of State. There is nothing to prevent the tribunal, in the context of the HRA appeal, from judging for itself the reliability of any alternative sources of finance in the light of the evidence before it**. In doing so, it will no doubt take account of such considerations as those discussed by Lord Brown and Lord Kerr in Mahad, including the difficulties of proof highlighted in the quotation from Collins J. That being the position before the tribunal, it would make little sense for decision-makers at the earlier stages to be forced to take a narrower approach which they might be unable to defend on appeal.

16. Before me Mr McVeety attempted to distinguish this passage on the facts: the Supreme Court was considering third party support, whereas here we are concerned with the cash income of a sponsor. I am unable to accept that the principle at stake – the fair balance to be struck by the Article – can be so constrained. The objective – to ensure that this couple are financially self-sufficient – is the same. In MM the Court held that decision-makers should be able to take into account promises of future support from third parties. In Mahad v Entry Clearance Officer [2009] UKSC 16 Lord Brown had properly described such promises as "unenforceable", "precarious" and "less easily verifiable" than a sponsor's own legal entitlements, but the Court nevertheless held that where appropriate, they should be weighed in the balance in an Article 8 evaluation. Here the rule is concerned not with some future hope of income from external sources, but with monies *already earned*: the Sponsor's wages from Selam Internet Café were neither unenforceable, precarious or less easily verified. To the contrary they were payments which the Tribunal, quite properly in my view, had accepted to have been made. The tax records, the payslips and the credible evidence of two witnesses established that to be the case. If the First-tier Tribunal was concerned, as it was at its §17, to find an "exceptional" or "compelling" reason to allow the appeal, that was it.

17. If I am wrong about the application of sub-paragraph D(d)(iii)(1), I would in the alternative allow the appeal on the grounds that the continuing decision to refuse leave is a disproportionate interference with the family life of this father

with his wife and young child. The objective of the rules being met, the Entry Clearance Officer simply could not show the continuing interference with family life to be justified.

**Decisions**

18. The determination of the First-tier Tribunal contains material error of law and it is set aside. I remake the decision in the appeal by allowing the appeal on human rights grounds.

19. There is no order for anonymity in respect of the First Appellant, but the Second Appellant is a minor. Having had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders I therefore consider it appropriate to make an order in the following terms:

> "Unless and until a tribunal or court directs otherwise, the Second Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him. This direction applies to, amongst others, both the Appellant and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings"

Upper Tribunal Judge Bruce
16th December 2020