IAC-AH-DP-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/09263/2014
OA/09264/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8 January 2016	**On 19 January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

MRS SHAIK MOHIDEEN NACHIYAR ABDUL RAFIQ (FIRST APPELLANT)
MS SITHI SAJIDHA ABDUL RAFIQ (SECOND APPELLANT)
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellants: Mr P Richardson, Counsel instructed by Lewis Kennedy Solicitors
For the Respondent: Mr T Melvin, Specialist Appeals Team

DECISION AND REASONS

1. The appellants appeal to the Upper Tribunal from the decision of the First-tier Tribunal (Judge Moore sitting at Taylor House on 16 June 2015) dismissing on financial grounds their appeal against the decision of the Entry Clearance Officer (Chennai post) to refuse them entry clearance for the purposes of settlement as respectively the wife and daughter of a person present and settled here. The First-

tier Tribunal did not make an anonymity direction in favour of the appellants, and I do not consider the appellants require anonymity for these proceedings in the Upper Tribunal.

2. The background to this case is that the appellants are both nationals of India. The first appellant was born on 10 March 1969, and the second appellant was born on 21 June 1995. As the first appellant is the main appellant in this appeal I shall hereafter refer to her simply as the appellant, save where the context otherwise requires.

3. On 19 June 2013, two days before their daughter's 18th birthday, the appellant applied to join her husband, Mr Rafiq, in the United Kingdom, and Ms Rafiq made a parallel application.

4. On 13 September 2013 an Entry Clearance Officer wrote to the appellant in India stating that her application fell to be refused solely because she did not meet the income threshold requirement under Appendix FM and the related evidential requirements under Appendix FM-SE. The letters from her sponsors' (two) employers did not meet the requirements of Appendix FM-SE because neither letter confirmed the sponsor's gross income or the period over which his current level of income had been paid. The letter from Merit Recruitment also did not confirm his employment type. In addition, one payslip was missing in respect of the sponsor's employment with TC Facilities Management, and two of the sponsor's Barclays bank statements for the period 19 October 2012 to 17 May 2013 were photocopies, not originals, (namely the statements from 19 October 2012 to 18 December 2012) and so were not acceptable.

5. The decision on the application had been put on hold until the courts have decided the outcome of the Secretary of State's appeal in a legal challenge to the income threshold requirement. In the meantime if by 4 October 2013 she submitted any further information or documents, it had to relate directly to the reasons given above as to why she did not meet the income threshold requirement. It must also relate only to her circumstances and/or those of the sponsor as they were at the date of application, or in the relevant periods prior to that date. If on the basis of further information or documents, her application met all the requirements of the Rules, a decision would be taken on her application and it would be granted.

6. The appellant's application was eventually refused on 5 August 2014. To meet the financial requirements of the Rules for the entry clearance of herself and her daughter, her sponsor needed a gross income of at least £22,400 per annum. She had failed to provide the required specified documents to evidence this. She provided two letters from Merit Recruitment, but neither of them confirmed her sponsor's salary or the period of time he had been paid it. She provided a letter from T C Facilities Management. But it did not confirm her sponsor's salary or the period of time he had been paid it.

7. On a separate decision of the same date, the Entry Clearance Officer gave identical reasons for refusing the second appellant's application.

8. The grounds of appeal were settled by the appellant's solicitors. They argued the decision was not in accordance with the Rules, or was otherwise not in accordance with the law, or discretion ought to have been exercised in a different way as to how it was "legally" exercised by the initial decision maker. The application had been refused without considering the P60, twelve months' payslips, corroborated bank statements, letter from the employer and the employment contract. Exact reasons for the refusal was not detailed anywhere in EC-P.1.1 of Appendix FM of the Rules.

9. On 2 December 2014 an Entry Clearance Manager gave his reasons for upholding the refusal decisions, notwithstanding the grounds of appeal. While there appeared to be, on face value, significant evidence to support the fact the UK sponsor met the minimum income threshold, Appendix FM-SE required certain key pieces of documentary evidence to prove that employment and income was as claimed by the appellant and not contrived for the purposes of the application. In this instance, the appellants have failed to provide two pieces of specified evidence in support of their applications and had, in the intervening period since, still failed to provide the two documents despite being notified of despatch on two separate occasions. He had to question why such basic documents could not be procured to support the applications.

10. He noted the assertion that the ECO should have exercised discretion differently. This in itself appeared to imply that the appellants could not meet the requirements of the relevant Rule, as reliance has been placed on the exercise of discretion. In any event, there was no explanation, supported by evidence, as to why the appellants believed that discretion ought to have been exercised differently. He was satisfied that in this specific area the ECO had no discretionary powers, "given the documents as specified under Appendix FM-SE".

The Hearing Before, The Decision of, the First-tier Tribunal

11. Both parties were legally represented before Judge Moore. For the purposes of the appeal, the appellants' solicitors compiled a bundle running to 167 pages which contained a further, but unsigned, letter from Merit Recruitment dated 3 August 2014. Mr Colin Champion, site manager, confirmed that the sponsor was employed on a permanent full-time basis by Merit Hygiene Services, a division of Merit Recruitment Ltd. His role was that of a warehouse hygiene assistant. His employment with MHS had commenced on 15 January 2008 and, "his annual salary is circa £17,721.60 (O.T.E.)".

12. In his subsequent decision, the Judge set out the case of the respondent at paragraphs [9] to [10]. Mr Kandola on behalf of the Entry Clearance Officer submitted that the appellant could not satisfy the Rules. Even though this might be a technicality, the appeal could not be allowed because there were no near exceptional circumstances which would justify it being allowed. The appellant had been given ample opportunity on at least two occasions to provide the relevant documentation, but had failed to do so.

13. The Judge set out the appellant's case at paragraphs [11] to [17]. Mr Davidson, Counsel for the appellants, submitted that this was a narrow issue case and that the letter from Merit Recruitment which had been provided after the decision of the Entry Clearance Officer appeared to address all of the concerns of the Entry Clearance Officer with regard to employment, sponsor's salary and the period over which that salary had been paid. Clearly this was not a case where either the sponsor or the lead appellant had contrived in any way to give a false picture, as could be seen by consideration of all the evidence provided. So the appeal should be allowed outside the Rules.

14. The Judge set out his findings of fact and conclusions from paragraph [18] onwards. He found that the appellant could not satisfy the Rules since the required specified documents had not been provided from the two employers, Merit Recruitment and TC Facilities Management. In the circumstances, he had to consider the facts and the evidence before reaching any decision outside the Rules.

15. In paragraph [20], he observed that on two separate occasions the Entry Clearance Officer had afforded an opportunity to the appellant to provide the relevant documentary evidence required. These were evidential requirements under the Rules and the appellant and/or sponsor failed to provide specified evidence to the respondent not only at the time of application but also on occasions subsequent to the application being submitted. Where the failure to satisfy the Rules was a technicality was neither here nor there, since the Rules were not. He was not satisfied he could allow either appeal outside the Rules. His reasoning was that there were not circumstances which could be considered to be anything near exceptional since the appellant was provided adequate opportunity to provide specified evidence and failed to do so at the time of application or even within a reasonable period thereafter.

16. The Judge went on to consider whether there were compassionate circumstances which justified the appeal being allowed by reference to Article 8 ECHR. He noted that since the marriage in 2005, the wife and daughter had been living together in India. The sponsor had acquired British citizenship, and in those circumstances he had a degree of freedom of movement. He had effectively lived apart from his wife and daughter for the past eight years, and he did not consider it unreasonable for the sponsor either to live in India, or to visit the appellants there. He was satisfied that the decision was proportionate, having regard to Section 117B of the 2002 Act.

The Application for Permission to Appeal

17. Mr Davidson settled the application for permission to appeal to the Upper Tribunal. He quoted from the first part of paragraph [19] of the decision as follows:

> "It would now appear to the respondent that there would appear to be significant evidence supporting key pieces of documentary evidence demonstrating that employment and income is as claimed by the appellant and not contrived."

18. In the circumstances, Mr Davidson submitted that the evidential flexibility provisions at the beginning of Appendix FM-SE were engaged. The evidence was clearly verifiable from other documents submitted with the application, and the Judge should have considered the exercise of discretion himself or referred the matter back to the Entry Clearance Officer. To undertake neither course of action, and to make no reference to reference to paragraph D(d) of Appendix FM-SE, disclosed an arguable error of law.

19. The Judge had also wrongly referred at paragraph [23] to the prospective removal of the appellants, when what was in issue was their exclusion.

20. The Judge had failed to give reasons in paragraph [24] why the maintenance of effective immigration control was in the public interest in the light of his primary findings of fact. Having found that the Entry Clearance Officer had significant evidence to demonstrate the sponsor earned more than was required to meet the financial requirements of the Rules, Mr Davidson asked rhetorically how it could be in the pursuance of effect immigration control to prevent his wife and child joining him in the UK?

The Grant of Permission to Appeal

21. On 22 October 2015 First-tier Tribunal Judge Ransley granted permission to appeal on all grounds raised for the following reasons:

> "It is arguable, as submitted in the grounds, that the Judge may have erred in law due to (a) failure to take into account the appellant did not receive the respondent's request for additional documents until after the option achieved to address the issue would close; and (b) the finding [at 23] that the proposed removal would not interfere with the appellant's Article 8 right when the appeal relates to an entry clearance application."

22. Judge Ransley continued that the decision had been shown to involve arguable errors of law that might have made a material difference to the outcome of the appeal.

The Hearing in the Upper Tribunal

23. At the hearing before me to determine whether an error of law was made out, Mr Richardson developed the grounds of appeal settled by his colleague Mr Davidson. In reply, Mr Melvin adhered to the Rule 24 response opposing the appeal. He submitted that the Judge had directed himself appropriately, and had given adequate reasons for dismissing the appeal under the Rules, and also outside the Rules.

Discussion

24. The Judge made two errors, neither of which is material. He wrongly referred to the appellants' removal, as opposed to their exclusion, when addressing the alternative claim under Article 8 ECHR. It is apparent from the context that this was merely a slip, and the Judge did in fact appreciate that the prospective interference was one of

exclusion, not removal. The Judge gave adequate reasons for finding that the interference consequential upon the refusal decision was proportionate, and the challenge to the finding under Article 8 is no more than expression of disagreement with a conclusion that was reasonably open to the Judge for the reasons which she gave.

25. The Judge also erred in failing to acknowledge the existence of a third letter from Merit Recruitment which, unlike the previous two letters which had been shown to the Entry Clearance Officer, contained information about the appellant's current gross salary.

26. However, the Judge's error is not material for two reasons. Firstly, contrary to Mr Richardson's submission, the third letter still did not fully comply with paragraph 2(b) of Appendix FM-SE. The letter from the employer needed to confirm, inter alia, the period over which the sponsor had been paid the level of salary relied upon in the application. The letter in the appellant's bundle did not discharge this function. It merely confirmed the appellant's *current* basic salary.

27. Secondly, as Mr Richardson acknowledged, even at the appeal stage the appellant had not provided a letter from the sponsor's other employer specifying either his current gross annual salary, or the period over which he had been paid the level of salary relied upon in the application.

28. It was not part of the case advanced before the First-tier Tribunal that the decision appealed against was not in accordance with the law as the Entry Clearance Officer/Entry Clearance Manager had failed to exercise discretion pursuant to paragraph D of Appendix FM-SE or had wrongly exercised his discretion. Mr Davidson also does not appear to have put the case on the basis that the Judge ought *now* to exercise discretion in the appellant's favour under paragraph D of Appendix FM-SE on the ground that the employment letters did not contain all of the specified information, but the missing information was verifiable from other documents submitted with the application.

29. This line of attack only emerges for the first time in the grounds of appeal to the Upper Tribunal, apparently triggered by the finding of the Judge at the beginning of paragraph [19].

30. In effect, it is argued that, because of the Judge's finding at the beginning of paragraph [19], the Judge should have, of his own motion, found that the decision appealed against was not in accordance with the law.

31. But this case does not stand up to scrutiny. At the beginning of paragraph [19] the Judge is merely summarising one aspect of the respondent's case rehearsed in the ECM appeal review. The error of law challenge ignores the remaining aspects of the respondent's case rehearsed in the ECM appeal review, which was that, notwithstanding the concession that the minimum income threshold was probably met, the appellant had *without good excuse* failed to provide all the specified evidence

under Appendix FM-SE despite being given ample opportunity to do so, and therefore discretion was not going to be exercised in her favour.

32. Mr Richardson submitted that the Entry Clearance Manager had wrongly fettered his discretion under paragraph D of Appendix FM-SE by asserting that the ECO had no discretionary powers, given that the documents were specified under Appendix FM-SE.

33. In support of this submission, Mr Richardson relied on sub-paragraph (d) of paragraph D as follows:

> 'If the applicant has submitted:
>
> (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 ... 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.'

34. However, it is necessary to read on. The same sub-paragraph goes on to state as follows:

> 'The decision maker reserves the right to request the specified original document(s) in the correct format in all cases where sub-paragraph (b) applies, and to refuse applications if this material is not provided as set out in sub-paragraph (b).'

35. It is also necessary to consider sub-paragraph (e) which provides as follows:

> 'Where the decision maker is satisfied 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.'

36. It is clear from the ECM appeal review the Entry Clearance Manager was not satisfied that the appellant met the requirement to which the deficient employment letters related. The failure by the appellant to provide compliant employment letters, when specifically requested to do so, was a legitimate cause of concern. Moreover, the appellant had not provided a valid reason why compliant employment letters could not be supplied. So, on the face of it, the exercise of discretion by the Entry Clearance Manager was lawful and in accordance with paragraph D of Appendix FM-SE. At the beginning of paragraph D, the decision maker is defined as being either the Entry Clearance Officer or the Secretary of State, and so the First-tier Tribunal Judge could not exercise discretion differently in the light of new documentary evidence that had been produced after the ECM appeal review.

37. Permission to appeal was granted on the premise that the appellant may have been a victim of unfairness in that she was not given enough time to respond to the initial

request for the provision of missing documents, and that the Judge may thus have wrongly excluded from consideration the employment letters which had been provided after the short cut off date. This premise is incorrect. It is clear that the Entry Clearance Manager made his assessment on the basis of the position as it stood on 2 December 2014, which was more than a year after the appellant had been requested in writing to provide the missing specified documents. So neither he nor the Judge excluded from consideration documents which had been provided after the original cut-off date.

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Monson