Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: OA/19978/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 31 October 2013	**On 01 November 2013**

Before

Upper Tribunal Judge Kekić

Between

Mui Nguyen Thi
(no anonymity order made)

Appellant

and

Entry Clearance Officer

Respondent

Representation
For the appellant: **Mr P Douglas, Counsel**
For the respondent: **Ms Z Kiss, Senior Home Office Presenting Officer**

DETERMINATION AND REASONS

1. This appeal comes before me following the grant of permission to appeal to the ECO by Designated First-tier Tribunal Judge McClure on 14 August 2013. For the sake of convenience I continue to refer to the ECO as the respondent and to Mrs Thi as the appellant. No anonymity order was made by the First-tier Tribunal and none has been requested of the Upper Tribunal.

2. The appellant is a Vietnamese national born on 19 December 1971 who seeks entry clearance as a partner under Appendix FM of the rules. The sponsor is Tan Lac. The

application was made on 23 July 2012 but was refused on 27 September 2012 under paragraph EC-P.1.1(d) and E-ECP.3.1 because the specified documents in Appendix FM-SE were not produced and the financial requirements were not met.

3. The appeal came before First-tier Tribunal Judge Adio at Hatton Cross on 3 July 2013. The sponsor attended and gave oral evidence and the judge allowed the appeal. On 17 July 2013 the respondent sought permission to appeal.

Error of Law Hearing

4. The hearing then came before me on 31 October 2013. I heard submissions on whether or not the judge had made an error of law.

5. Ms Kiss referred me to the rules. One of the specified documents required by Appendix FM was proof that the sponsor was registered with HMRC as self employed, to be demonstrated by original or certified evidence from HMRC. She submitted that this evidence had not been submitted and that indeed it had been conceded by the Counsel at the hearing and confirmed in writing by an accountant that the appellant did not have this document. She submitted that as the document did not exist, the application had been non compliant and therefore the evidential flexibility rules which the judge relied on, were inapplicable.

6. In response, Mr Douglas submitted that the rules had changed and that they now required the document to be submitted "if available". As it was not available, it being non existent, it could not have been submitted and the appellant should not be penalised for that. He submitted that the rules had changed to allow this additional phrase and that it was for the Secretary of State to show that this had not been the rules at the relevant time.

7. Ms Kiss replied. She submitted that if the appellant was relying on the rule change it was for her to show it had been applicable at the time. She took me to the 2013 issue of Phelan and pointed to various amendments made in September 2012. That, she argued, demonstrated that the rules without the "if available" phrase had not been in force at the date of the application in July 2012.

8. That completed the submissions. I then reserved my determination which I now give.

Conclusions

9. At the date of the application in July 2012 and indeed at the date of the decision in September 2012, the rules required the appellant to provide specified evidence including proof of her sponsor's self employment from HMRC. It was not until 13 December 2012 that the phrase "if available" was added to paragraph 7 (c) of Appendix FM-SE Family Members, Specified Evidence by virtue of HC 760. Counsel's reliance upon that amendment does not, therefore, assist the appellant. She

was required to provide certain documents and she failed to do so. This was not through omission but because one of the documents that was required did not exist. This does not mean that such a document could not have been issued but that it had not, for reasons which I do not know, been issued for the sponsor. In those circumstances, it has to be said that Judge Adio's reliance upon the evidential flexibility policy was entirely misplaced. The ECO could not have asked the appellant to provide a missing document when that document had never been issued to her sponsor.

10. Additionally, the judge appears to have contradicted himself in his findings. At paragraph 8 he notes that evidence in respect of the sponsor's self employment "has to be provided". At paragraph 9 he sets out the required documents. At paragraph 10 he finds that the rules require an appellant to produce those documents. At paragraph 11 he finds that the HMRC document does not exist. Yet he nevertheless goes on to conclude that the appellant "has provided the specified documents". His reasoning is confused and contradictory. The evidential flexibility policy has no relevance to the appellant's case as this was not a case where the missing document could ever have been adduced. It follows that the judge's determination is flawed and cannot stand.

11. The parties agreed at the hearing that if I were to find an error of law, I could re-make the decision on the evidence already submitted. I now do so. The appellant was required to provide the specified documents set out in Appendix FM. She failed to do so. Indeed, it is accepted that one of those documents could not have been adduced as the appellant did not have it at all, it never having been issued to the sponsor. In the circumstances, she cannot meet the requirements of the rules as they were at the relevant time.

12. I accept that the rules have since changed. It may be that she is now able to meet the requirements. It is open to her to make a fresh entry clearance application and provide the necessary evidence to the ECO for consideration. As far as this application and appeal are concerned, however, she cannot succeed.

Decision

13. The First-tier Tribunal judge made errors of law and his determination is set aside.

14. I re-make the decision and dismiss the appellant's appeal against the ECO.

Signed:

Dr R Kekić
Upper Tribunal Judge
31 October 2013