



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

**Appeal Number
OA/17144/2013**

THE IMMIGRATION ACTS

**Heard at Field House
On 30 September 2014 On 01 October 2014
Determination
promulgated**

Before

Deputy Judge of the Upper Tribunal I. A. Lewis

Between

**Entry Clearance Officer,
Bangkok**

Appellant

and

**Pan Ei Khaing
(Anonymity direction not made)**

Respondent

Representation

For the Appellant: Mr. P. Duffy, Home Office Presenting Officer.
For the Respondents: Mr. M. Biggs of Counsel instructed by
Blacjstone Law Associates.

DETERMINATION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Lambert promulgated on 4 July 2014, allowing the appeal of Ms Khaing against the Respondent's decision dated 24 September 2013 to refuse to grant entry clearance as the spouse of Mr Arvind Kohli ('the sponsor').

2. Although in the proceedings before me the Entry Clearance Officer ('ECO') is the appellant, and Ms Khaing is the respondent, for the sake of consistency with the proceedings before the First-tier Tribunal I shall hereafter refer to Ms Khaing as the Appellant and the ECO as the Respondent.

Background

3. The Appellant is a national of Myanmar born on 26 May 1985. She made an application for entry clearance as the spouse of the sponsor using an on-line application form completed on 2 July 2013. The application was refused on 24 September 2013 for reasons set out in a Notice of Immigration Decision with particular reference to the 'Relationship Requirements' of Section E-ECP of Appendix FM of the Immigration Rules.

4. The Respondent also gave consideration to the 'Financial Requirements' of Appendix FM and the associated evidential requirements under Appendix FM-SE, but made no decision in this regard - "*no final determination has been made at this stage as to whether you meet the income threshold and/or related evidential requirements*" - because of pending litigation. In this context, the Notice of Immigration Decision stated:

"If you appeal against this refusal decision, a final determination as to whether you meet the income threshold, and/or related evidential requirements under the Rules may be made at a later stage. In making any such determination account would be taken of any further information or document(s) regarding the income threshold and/or related evidential requirements which you enclose with your appeal".

5. The Appellant appealed to the IAC. Her appeal was allowed for reasons set out in the First-tier Tribunal Judge's determination.

6. The Respondent sought permission to appeal to the Upper Tribunal which was granted on 15 August 2014 by First-tier Tribunal Judge Grant-Hutchison.

7. A Rule 24 reply has been filed on behalf of the Appellant dated 12 August 2014.

Consideration

8. I am grateful to the helpful and co-operatives way in which both representatives dealt with the issues in the appeal today.

9. Although the Respondent had – quite correctly – taken the decision on the Appellant’s application by reference to Appendix FM, it had been common ground before the First-tier Tribunal that the Respondent had erred in failing to consider the pre-Appendix FM rules, specifically paragraph 281. At paragraph 9 of Mr Biggs’ Skeleton Argument before the First-tier Tribunal it was asserted that it was plain that the Appellant’s application fell for consideration pursuant to paragraph 281; it appears from paragraph 1.2 of the determination of Judge Lambert that the Respondent’s Presenting Officer conceded that the application had been made before the provisions of Appendix FM came into force, and the Judge accepted this concession. It is now acknowledged that both the representatives and the Judge were wrong in this regard, having seemingly mixed up the year: the change in the Rules was introduced in 2012, not 2013.

10. Nonetheless, the Appellant in the Rule 24 response has maintained that this error was not material, and that the Appellant would have succeeded in the appeal in any event bearing in mind the favourable findings and supporting evidence.

11. In this context Mr Duffy acknowledged that the issues raised in the Notice of Immigration Decision in respect of the ‘Relationship Requirements’ were variously conceded by the Respondent on review (see section 3 of the Entry Clearance Manager review of 5 June 2014), or were the subject of favourable unchallenged findings by the First-tier Tribunal Judge. The only ‘live’ issue upon which permission to appeal had been sought related to the ‘Financial Requirements’.

12. In this regard the Appellant’s representatives have identified at paragraph 6(b) of the Rule 24 response the relevant income of the sponsor, and more particularly at subparagraph (ii) have cross-referred to the documents that were before the First-tier Tribunal that met the requirements of Appendix FM-SE in respect of income from dividends - specifically, the relevant dividend vouchers and personal bank statements showing those dividends were paid into an account in the name of the sponsor.

13. Mr Duffy had sight of and considered those documents at the hearing today, and accepted that they met the relevant requirements of both Appendices FM and FM-SE. In such

circumstances, he did not seek to prosecute the appeal, but indicated that he was not in a position formally to withdraw the Respondent's challenge.

14. In such circumstances whilst it is common ground that the Judge erred in considering the appeal under the wrong Rules, it is also common ground that the outcome of the appeal should not be altered. Both representatives indicated their agreement to my suggestion that in the circumstances the decision of the First-tier Tribunal should be left to stand.

Decision

15. The decisions of the First-tier Tribunal Judge contained an error of law. However, in all of the circumstances I do not exercise the discretion to set aside the decision of the First-tier Tribunal, pursuant to section 12(2)(b) of the Tribunals, Courts and Enforcement Act 2007. The decision of the First-tier Tribunal stands.

16. The appeal of Ms Khaing remains allowed.

**Deputy Judge of the Upper Tribunal I. A. Lewis 30
September 2014**