



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: OA/18532/2013

**THE IMMIGRATION ACTS**

Heard at Field House  
On 24 February 2015

Determination Promulgated  
On 5 March 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

ENTRY CLEARANCE OFFICER - DHAKA

Appellant

and

MRS FAREHA JAHAN LIJA  
(ANONYMITY DIRECTION NOT MADE)

Respondent/Claimant

**Representation:**

For the Appellant: Mr L Tarlow, Specialist Appeals Team  
For the Respondent/Claimant: Mr M Ahmed, Solicitor, Lincoln's Chambers Solicitors

**DECISION AND REASONS**

1. The Specialist Appeals Team appeals on behalf of an Entry Clearance Officer from the decision of the First-tier Tribunal allowing the claimant's appeal to refuse her entry clearance as the spouse of a person present and settled here. The First-tier Tribunal did not make an anonymity direction, and I do not consider that the

claimant or her spouse requires anonymity for these proceedings in the Upper Tribunal.

2. The claimant is a national of Bangladesh. She married her sponsor in Bangladesh on 1 May 2009, which was also the day on which they first met. In her application form, she said she had last seen her sponsor on 17 July 2009. They had a child, T, who had been born in Bangladesh on 25 March 2010. T had British nationality through her father. The sponsor, Abdul Towahid, had been living in the UK since December 2002. He had two sources of income. He earned an annual income before tax of £14,400 from his employment by Daioo Event Organising Limited, a job which he had had since 1 April 2012. His second source of income was as an employee of the Khyber Pass Restaurant in Knaphill, Woking, Surrey. He had been in employment with this restaurant since 27 July 2009. His total income before tax from salaried employment in the twelve months prior to the application was £21,472.
3. The application was made on 5 June 2013, and it was refused in two stages. It was initially refused on 25 August 2013. One of the reasons for refusal was that the claimant did not meet the income threshold requirement under Appendix FM and/or the related evidential requirements under Appendix FM-SE. However, no final determination was made at this stage as to whether the claimant met the income threshold and/or related evidential requirements because the Court of Appeal had not yet decided the outcome of the Secretary of State's appeal in a legal challenge to the income threshold requirement.
4. The application was refused for a second time on 10 September 2014 on the same grounds as before. In respect of the financial requirement, the Entry Clearance Officer continued to insist that the claimant had failed to provide the specified documents in respect of her sponsor's employment by Khyber Pass Restaurant.

### **The Hearing Before, and the Decision of, the First-tier Tribunal**

5. The claimant's appeal came before a panel chaired by Designated Judge First-tier Tribunal Macdonald sitting at Taylor House on 23 October 2014. Mr Ahmed appeared on behalf of the claimant, and the Entry Clearance Officer was represented by a Home Office Presenting Officer. The sponsor gave oral evidence. In addition to his permanent employment with Event Organising Limited of £14,400 per annum, he said he had been working part-time twenty hours per week for Khyber Pass Restaurant. His annual salary from this employment was just over £7,000. He firmly asserted that the documents he had submitted were authentic and genuine. He explained that he was paid in cash, and he explained why the sums that he was paid did not always tally with the sums credited to his bank account.
6. In his subsequent decision, Judge Macdonald set out the panel's findings at paragraphs [18] to [20]. The panel found that the relationship between the claimant and the sponsor was genuine and subsisting, and that the parties to the marriage genuinely intended to live together permanently as husband and wife in the United Kingdom. He went on in paragraph [20] to address the other issue which was in dispute, namely whether the claimant satisfied the financial requirements. He said:

Wage slips from Khyber Pass Restaurant say that he was regularly paid by cash setting out the sums paid over a significant period. We also have relevant certificates from his other employer Event Organising Limited which again show he was paid in cash. We should say that we have not previously seen vouching of this nature which has the words 'paid in cash' typed on it. This causes us to pause on the issue of whether these documents are genuine, but having found the sponsor credible in terms of the relationship with his wife we are prepared to give him the benefit of the doubt in relation to documents which if genuine prove that he earns in excess of the required threshold. In the circumstances we are accepting that documents are genuine and it therefore follows that the maintenance requirements are met. From these findings the appeal must therefore be allowed under the Immigration Rules. There is no need to consider Article 8 ECHR.

### **The Application for Permission to Appeal**

7. A member of the Specialist Appeals Team settled an application for permission to appeal to the Upper Tribunal. He said the First-tier Tribunal Judge had materially erred in law in ignoring paragraph 2 of Appendix FM which stipulated that all of the following evidence must be provided in terms of salaried employment in the UK:
  - (a) wage slips covering:
    - (1) a period of six months prior to the date of application ...
  - (c) personal bank statements corresponding to the same period as the wage slips at paragraph 2(a) showing that the salary has been paid into an account in the name of the person or their partner jointly.
8. The claimant had failed to provide bank statements showing income from both employments being paid into the sponsor's account. At the hearing, the sponsor accepted he did not deposit the money into his bank account. There was a lack of specified evidence submitted to substantiate the claimed income based on the operating principles of Appendix FM-SE. These operating principles within Appendix FM-SE ensured that a person's income was properly evidenced and would be sustainable. So in allowing the appeal, the Judge of the First-tier Tribunal erred in law by failing to apply the Immigration Rules correctly. Clearly the claimant could not meet the requirements of Appendix FM-SE for the six month period prior to the date of application. These are mandatory requirements, and therefore the claimant could not succeed under the Rules.

### **The Grant of Permission to Appeal**

9. On 23 December 2014 First-tier Tribunal Judge V P McDade granted permission to appeal for the following reasons:

It is arguable that the panel of judges did not adequately explore the sponsor's claimed income given the absence of specified evidence, particularly given the panel's doubts as to the genuineness of the payslips before deciding to give the sponsor the benefit of those doubts. There is an arguable error of law.

### **The Hearing in the Upper Tribunal**

10. At the hearing before me, Mr Ahmed mounted a robust defence of the decision of the First-tier Tribunal. He acknowledged that the grounds of appeal to the Upper Tribunal were factually correct. The bank statements did not show the wages from either employment being deposited into the sponsor's bank account. He deposited money on a regular basis into his bank account, but this was less than what he was actually paid in cash. So under the strict letter of the law, the claimant did not fully meet the Rules. But on the balance of probabilities the sponsor was earning above the required minimum income threshold, and so, Mr Ahmed submitted, it was open to the panel to allow his appeal under the Rules.

### **Reasons for Finding an Error of Law**

11. The Rules are black letter law, and the panel therefore had to, in Mr Ahmed's words, apply the strict letter of the law. The panel could not ignore a mandatory requirement of the Rules. The lack of correlation between the wage slips and the bank statements was not something that had been specifically ventilated in the refusal decision. But the Entry Clearance Officer/Manager had consistently maintained that the claimant had not discharged the burden of proving that she met the financial requirements, and in particular had not provided all the mandatory documents required by Appendix FM-SE.
12. It is clear from paragraph [16] of the decision of the First-tier Tribunal that in the course of the hearing it was brought to the panel's attention that the bank statements did not show the receipt by the sponsor of his wages. Although Khyber Pass Restaurant had issued a P60 in respect of the claimant's employment in the tax year to April 2013, this was of little probative value as the claimant did not purport to be earning enough from his employment for his employer to have to account to HMRC for either tax or national insurance. But in any event a P60 is an optional piece of evidence under Appendix FM-SE, whereas the requirement to provide informative bank statements is mandatory. The bank statements provided by the claimant needed to show that his claimed salary had been paid into his account. It was apparent to the panel that the bank statements did not perform this function, so it was not open to the panel to allow the appeal under the Rules.

### **The Remaking of the Appeal**

13. As discussed in my error of law decision, this appeal cannot succeed under the Rules. Because the panel wrongly allowed the appeal under the Rules, they did not consider an alternative claim under Article 8 ECHR.
14. When upholding the refusal decision, the Entry Clearance Manager in his review dated 10 September 2014 gave his reasons for rejecting an alternative claim under Article 8 ECHR. There was no evidence at all from either the claimant or the sponsor that they would not be able to live in Bangladesh. The sponsor was born in Bangladesh, and did not require a visa to live there. The claimant had chosen to enter into an arranged marriage with someone living in another country, and she

was aware that marriage in itself would not guarantee that she would be assured entry to the UK. The maintenance of effective immigration control was important, especially where in cases such as this the claimant was unable to satisfy the requirements of a legitimate and proper Immigration Rule. Alternatively, the sponsor was free to visit Bangladesh whenever he was able to do so, as well as continuing to remain in regular contact with the claimant using all modern forms of communication. The claimant and the sponsor did not have an inherent right to decide where to establish a family life, and it was open to the claimant to go to Bangladesh or elsewhere.

15. It was not suggested by Mr Ahmed that there are or were insurmountable obstacles to family life continuing outside the UK. So the claimant does not qualify for Article 8 relief under EX.1(b).
16. Turning to an Article 8 claim outside the Rules, Article 8(1) ECHR is only weakly engaged as the interference consequential upon the refusal decision need only be temporary. If the sponsor is telling the truth about his annual salary, as the panel found he was, there should be no difficulty in the claimant providing in due course the mandatory specified evidence to show that she meets the income threshold, by way of a fresh application for entry clearance. It is open to the sponsor to rearrange his affairs so that he pays his net salary into his bank account, without making any deductions beforehand.
17. Questions three and four of the Razgar test must be answered in favour of the Entry Clearance Officer.
18. On the issue of proportionality, Mr Ahmed relies on the proposition that it is contrary to the child's best interests for his mother to be denied entry clearance. But the refusal of entry clearance to the child's mother does not prevent the child coming to the United Kingdom, as it is open to the sponsor to go and collect him and bring him back here. Although the child is a British national, I consider that the child's best interests lie in him remaining with his mother, wherever she happens to be. For at the time of decision the child had never met his father, and his mother had been his primary carer since birth.
19. On the wider proportionality assessment, there are no compelling or compassionate factors which justify the claimant being granted Article 8 relief outside the Rules. I have taken into account the public interest considerations set out in Section 117B of the 2006 Act, and I consider that the most pertinent consideration on the facts of this case is that contained in subparagraph (1), namely that the maintenance of effective immigration controls is in the public interest. My conclusion is that the interference consequential upon the refusal decision is proportionate.

**Notice of Decision**

The decision of the First-tier Tribunal allowing the claimant's appeal under the Rules contained an error of law, and accordingly the decision is set aside and the following decision is substituted: this appeal against the refusal of entry clearance is dismissed under the Rules and under Article 8 ECHR.

The First-tier Tribunal did not make an anonymity direction.

Signed

Date

Deputy Upper Tribunal Judge Monson