



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

Appeal Numbers: OA/18626/2013
OA/18628/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 29 January 2015**

**Decision & Reasons Promulgated
On 20 February 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

**CHIJA GURUNG RAI
AJIJ RAI
(ANONYMITY ORDERS NOT MADE)**

Appellants

and

**ENTRY CLEARANCE OFFICER,
NEW DELHI**

Respondent

Representation:

For the Appellant: Mr D Williams, Legal Representative
For the Respondent: Ms K Pal, Home Office Presenting Officer

DECISION AND REASONS

1. These are linked appeals against the decision of First-tier Tribunal Judge Wright promulgated on 16 October 2014 dismissing the Appellants' appeals against the Respondent's decisions dated 26 August 2013 to refuse entry clearance as the wife and son respectively of Mr Robin Rai, a British citizen, (hereafter 'the sponsor').

Background

2. The Appellants are nationals of Nepal born on 28 November 1972 and 3 December 1995 respectively. The current appeals arise from their joint applications made on 5 July 2013 to join the sponsor in the United Kingdom. Their applications were refused for reasons set out in respective Notices of Immigration Decision dated 26 August 2013. Essentially, in respect of the First Appellant, the Respondent was not satisfied with regard to the relationship requirements of Appendix FM (paragraphs E-ECP.2.6 and 2.10), and further the Respondent raised concerns in respect of the financial requirements pursuant to paragraph E-ECP.3.1. The Second Appellant was refused because his mother had been refused – rule E-ECC.1.6. The same issues in respect of the financial requirements were also raised in the Notice of Immigration Decision in respect of the Second Appellant.
3. However, in respect of the financial requirements the following passage appear in the Notices of Immigration Decision. (I quote from the decision in respect of the First Appellant, but a similar passage also appeared in the decision in respect of the Second Appellant.) Having set out the issues identified by the decision-maker under the Rules the following was said:

“In light of the above, your application also falls to be refused under the Immigration Rules because you do not meet the income threshold requirement under Appendix FM and/or the related evidential requirements under Appendix FM-SE. However, no final determination has been made at this stage as to whether you meet the income threshold and/or related evidential requirements. This is because the Courts have not yet decided the outcome of the Secretary of State’s appeal in a legal challenge to the income threshold requirement. More information about this is set out in the Home Office website. 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 documents regarding the income threshold and/or related evidential requirements which you enclosed with your appeal.”
4. The Appellants appealed to the IAC against the refusals of entry clearance, lodging appeals on 30 September 2013. It is not apparent that there was any further review in respect of the financial requirements and it is not apparent that the matter to which I have alluded was identified as being possibly relevant before the First-tier Tribunal.
5. The appeals were dismissed for the reasons set out in the decision of First-tier Tribunal Judge Wright. Although the Judge found in the Appellants’ favour in respect of the relationship requirements as between the sponsor and the First Appellant, the Judge was not satisfied in respect of the financial requirements of the Rules.
6. The Appellants applied for permission to appeal to the Upper Tribunal which was granted on 16 December 2014 by First-tier Tribunal Judge Cheales.

Consideration

7. The focus of consideration in respect of the financial requirements before the First-tier Tribunal was with reference to paragraphs 13 and 15 of Appendix FM-SE. The

Judge rejected the Appellants' case with reference to paragraph 13(a) of Appendix FM-SE at paragraph 29 of his decision. There is no challenge to the findings in that paragraph. Accordingly the issue that has been pursued by the Appellants to the Upper Tribunal is in respect of paragraph 13(b) of Appendix FM-SE. The Judge addresses this at paragraph 30 of the decision in the following terms:

"Applying (alternatively) paragraph 13(b) of Appendix FM-SE ('Calculating Gross Annual Income under Appendix FM') to the payslips submitted with the application, whilst 'The gross annual salary from employment as it was at the date of application' (paragraph 13(b)(i)) would appear to be £35,877 (taking weekly salary figure of £689.96 from last payslip submitted dated 21/6/2013 and multiplying by 52) when additionally applying paragraph 15 of Appendix FM-SE (as required) it cannot be said that the sponsor also meets the level of gross annual income required by Appendix FM (£22,400) 'on the basis that their income is the total of (i) the gross income from salaried employment in the UK or overseas earned by the person [sponsor] in the 12 months prior to the date of application; (ii) N/A; (iii) N/A' (paragraph 15(b)(i)-(iii)) (the sponsor's income for this period being only £18,479 when taking the P60 figure of £12,159 [covering TAG employment from October 2012 - April 2013] and adding £6,320 [covering TAG employment from April 2013 to last payslip dated 21/6/2013 submitted with application dated 5/7/2013]; NB no pre-October 2012 income figures)."

8. The challenge that has been raised in the grounds in support of the application for permission to appeal in respect of this passage essentially comes down to a submission that the Judge was in error in having regard to the sponsor's income in a twelve month period up to the date of application. It is argued that the sponsor only needed to demonstrate his earnings for a six month period prior to the date of application.
9. In considering this basis of challenge the starting point must be the Rules. They are, so far as they are applicable, in the following terms:

"Based on evidence that meets the requirements of this Appendix and can be taken into account with reference to the applicable provisions of Appendix FM gross annual income under paragraphs E-ECP3.1, E-LTRP3.1, E-ECC2.1 and E-LTRC2.1 will be calculated in the following ways:

- (b) Where the person is in salaried employment in the UK at the date of application and has been employed by their current employer for less than six months (or at least six months but the person does not rely on paragraph 13(a)) their gross annual income will be the total of:
 - (i) the gross annual salary from employment as it was at the date of application;
 - (ii) [As identified by the First-tier Tribunal Judge this is not applicable and Mr Williams confirms no reliance is placed upon it];
 - (ii) the same considerations apply as in respect of (ii).

In addition the requirements of paragraph 15 must be met."

10. Paragraph 15 is in the following terms:

"15. In respect of paragraph 13(b) and paragraph 13(d) the provisions in this paragraph also apply:

- (a) In order to evidence the level of gross annual income required by Appendix FM the person must meet the requirements in paragraph 13(b) or 13(d)(i) and
- (b) the person must also meet the level of gross annual income required by Appendix FM on the basis that their income is the total of:
 - (i) the gross income from salaried employment in the UK or overseas earned by the person in the twelve months prior to the date of application.”
 - (ii) and (iii) are not applicable, nor is (iv) to the current case.

11. During submissions it became apparent that Mr Williams’ real complaint was in respect of the Rules themselves and not specifically how they had been applied to the Appellants. In particular he argued that there was an inconsistency in specifying a period of six months in paragraph 13 but referring to twelve months in paragraph 15.
12. Whilst I accept that the Rules are complex, I do not accept that paragraphs 13 and 15 are inconsistent, rather in my judgment they are complementary. It seems to me essentially that an applicant is being asked to comply with two complementary requirements. Under paragraph 15 it is a requirement to demonstrate an actual income in the twelve months preceding the date of application that meets the income threshold. Under paragraph 13 there is a further requirement to demonstrate by the production of specified evidence the income received in the preceding six months. There is no inconsistency in those two requirements.
13. Given that Mr Williams accepts that it cannot be shown that the sponsor’s income in the twelve months up to the date of application met the required income threshold of £22,400, the Appellants cannot meet the requirements of the Rules by reference to the circumstances at the date of the Respondent’s decision; in my judgment to that extent the First-tier Tribunal Judge did not err.
14. However, as identified above, the First-tier Tribunal Judge was not alert or at least made no reference to, the passages in the Notices of Immigration Decision indicating no decision had been taken in respect of the financial requirements and that, if appropriate, a decision would be taken by reference to matters that necessarily post-dated the Appellants’ applications and the Respondent’s decisions. It does not follow that the Tribunal could undertake such an assessment confined as it is by section 85A to circumstances appertaining at the date of the Respondent’s decision. However in my judgment it was an error of law to fail to recognise that a decision in respect of the financial requirements had not been made and that there had been a clear representation giving rise to a legitimate expectation that a decision would be made at a later date in the event of an appeal, if appropriate.
15. It may be that on the facts of this particular case the Entry Clearance Manager on review did not undertake such re-calculation because the issue in respect of the genuineness of the relationship was still a ‘live’ issue and accordingly it was not necessary to embark on a calculation of the financial requirements at a time when the circumstances informing the approach taken in the Notices of Immigration Decision still applied. Be that as it may, the findings of the First-tier Tribunal are such that the relationship issue has now been settled in the Appellants’ favour. In my judgment

this means that the offer of the Respondent to undertake a re-calculation of the financial requirements by reference to materials that would not be restricted to the date of the Appellants' application remains outstanding and requires to be honoured. Applying those considerations to the context of the challenge before me, and mindful of the extent of the jurisdiction that the Tribunal may exercise, I reach the following conclusions.

16. In my judgment the decision of the First-tier Tribunal was in error of law because of a failure to recognise that there was effectively an outstanding decision to be made by the Respondent in respect of the financial requirements. I consider that that is sufficient to warrant setting aside the decision of the First-tier Tribunal Judge dismissing the Appellants' appeals. That means the decisions in the appeals require to be re-made and in re-making them I find that the application of the Appellants remain outstanding before the Respondent because no relevant decision has been taken in respect of the financial requirements.
17. Whether this ultimately will avail the Appellants is not for me to say, but in my judgment the matter must go back to the Respondent to re-determine the applications with reference to the financial requirements on the premise that the relationship between the First Appellant and the sponsor is a genuine relationship.

Notice of Decisions

18. The decisions of the First-tier Tribunal contained material errors of law and are set aside.
19. I re-make the decisions in the appeals. The appeals are allowed to the extent that the Respondent's decisions were not in accordance with the law; the applications remain outstanding and require to be decided by the Respondent in accordance with the law.

The above represents a corrected transcript of an ex-tempore decision given at the hearing on 29 January 2015.

Signed

Date: **19 February 2015**

Deputy Upper Tribunal Judge I A Lewis

TO THE RESPONDENT **FEE AWARD**

The basis upon which the appeal has been determined was not a matter raised on the motion of the Appellants. In all of the circumstances I make no fee award.

Signed

Date: **19 February 2015**

Deputy Upper Tribunal Judge I A Lewis