Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/16432/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20th May 2016	**On 1st June 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MISS KHADIJA SIKANDAR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No legal representation
For the Respondent: Mr E Tufan, (HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge M Whalan, promulgated on 30th September 2015, following a hearing at Taylor House on 4th September 2015. In the determination, the judge allowed the appeal of Miss Khadija

Sikandar, whereupon the Respondent Entry Clearance Officer, subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a citizen of Pakistan, a female, and she was born on 12th February 1986. She appealed against the decision of the Respondent Entry Clearance Officer dated 18th November 2014, refusing her application for a spouse visa to join her husband, Dr Hasnat Ali, a British citizen, living in the United Kingdom.

The Judge's Findings

3. The judge had regard to the fact that following the decision of the Entry Clearance Officer on 18th November 2014, there was a review that was carried out by the Entry Clearance Manager on 9th February 2015, and, accordingly it was accepted in the review that the Appellant "had filed properly various documents stated to be missing in the original notice". These were (1) tax returns for 2013 to 2014; (2) accounts for 2015/2014; (3) SA302 for 2012 to 2013; (4) class 2 national insurance bill which has been stamped as paid; and (5) twelve months' bank statements for 2013 to 2014. Despite this, as the judge observed, the Respondent continued to assert that the Appellant had "still not provided the SA302 for 2013 to 2014 or any of this which would show the amount of tax payable by the Sponsor for the 2013/2014 financial year". Accordingly, the appeal was said not to meet the requirements of Appendix FM-SE, paragraph 7(a) and 7(b)(ii).

4. The judge went on to record the evidence of the Appellant's sponsoring husband, Dr Ali, who "was pretty clear during the oral hearing that the Appellant had in fact filed all the relevant documentation, or at least most of it, at the time of the substantive application". (Paragraph 7). The judge did not determine this issue, however.

5. At the hearing on 4th September 2015, the Presenting Officer, before Judge Whalan, was able to look at the additional documentation supplied and this "concerned specifically an HMRC document dated 20th August 2015 which referred to the fact that Dr Ali had paid £3,024.33 to his self-assessment account in September 2015". The judge held that, "it is clear from this document that with this claimant, Dr Ali's account is up-to-date". (Paragraph 8). The judge went on to note that Dr Ali was a dental surgeon trading as Crystal Dental Practice, in a business with a turnover of £300,000, whereby his own salary was £23,289 to 31st March 2014 and £30,725 to 31st March 2013, but which nevertheless satisfied adequately the £18,600 threshold of the financial requirements in Appendix FM (see paragraph 9).

6. The appeal was allowed.

Grounds of Application

7. The grounds of application state that the judge erred in law in allowing the appeal on the basis of documents and evidence submitted after the date of the decision contrary to what was required in Appendix FM.

8. On 6th April 2016 permission to appeal was granted.

Submissions

9. At the hearing before me on 20th May 2016, Mr Tufan, appearing on behalf of the Respondent Entry Clearance Officer, stated that the correct date for determination of the evidence was the date of the application. It was not the date of the hearing. It was not enough even to submit evidence before the Entry Clearance Manager's review. All the evidence had to be in with the application itself. The Appellant could not have succeeded under the Rules. The correct approach for him was now to make a new application.

10. For his part, Mr Atsham Ali, who appeared as McKenzie friend for the Appellant as her brother-in-law, stated that there was no error of law. In submissions that were lucid, comprehensive, and attractively made, Mr Ali stated that the 2013 to 2014 tax return was with the original decision maker. The certified accounts were with the original decision maker. The only thing that was missing was the SA302 document, and this was not provided quite simply because it had to be produced by the HMRC, and at the date of the application itself, HMRC had not produced this document.

11. Second, and no less importantly, what the Rules require is for a statement of accounts. There is no requirement that these should be the current accounts. There is no requirement that these should be the most recent accounts. The Appellant, or any other applicant, could only submit that which was available from the HMRC. If the HMRC had not produced as yet the requisite SA302, but only did so after the application had been made, then the applicant was justified in explaining why he could not have produced it, provided he produced what he was able to produce from that office. This is what he had done.

12. Third, it was quite clear that the Appellant was reasonably entitled to rely on such evidence because what the SA302 referred to was the amount of £6,027.63 and this was exactly the figure that had already previously been disclosed to the Respondent Entry Clearance Officer in terms of the information from the Appellant himself at the relevant time. Mr Ali also stated that he was not happy with the suggestion that it was always open to the Appellant to make another application, because this was an application that had been made in 2014, and some two and a half years had gone by, after which there was still a refusal that the Appellant was now having to appeal. Delays of that magnitude could not be viewed with equanimity.

13. Finally, in an impressive submission, Mr Ali took me to the guidance on Appendix FM-SE. He submitted that the Rules here could be divided up into three separate categories. First, there were cases where the Entry Clearance Officer could

"reconsider documents that had been submitted with the application" and this is set out at Section D. Some of these would include cases where "sequence of documents" had been missing or where "a document is in the wrong format". Second, there was a situation where the Respondent Entry Clearance Officer had discretion as to whether or not to give consideration to matters as yet not before the receiving authority. This was set out at Section D(b)(ii) and it applied where an applicant "has not submitted a specified document, the decision maker may contact the applicant or his representative in writing or otherwise and request the documents …". Thirdly, there was a situation set out at Section D(c) where the "decision maker will not request documents where he or she does not anticipate that addressing the error or omission referred to … will lead to a grant because the application would be refused for other reasons".

14. On this basis, Mr Ali submitted that, given that the only document that was missing was SA302, the decision maker should have exercised his discretion to contact the Appellant and request the necessary document because the use of the word "may contact the applicant" was designed to serve precisely that purpose and it was a provision in the Rule that was meant to be employed to this effect and a failure to so exercise a discretion by a decision maker could not be overlooked because to do so would be to frustrate the purposes of the Rules which were not always designed to look only at documents that were submitted with the application and exclude consideration of all else that followed after it.

15. In reply, Mr Tufan submitted that the fact here was that the relevant documents were not submitted. The judge had alluded to the fact that some of the documents still had not been submitted at paragraph 7 of the determination, and were only submitted at the hearing. The appeal could not have been allowed.

No Error of Law

16. I am satisfied that the making of the decision by the judge did not involve the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision. My reasons are as follows. This is a case where the judge recorded that the Entry Clearance Manager had "accepted in the review that the Appellant had filed properly various documents stated to be missing in the original notice" (paragraph 6). These documents included the tax return for 2013 and 2014 as well as the tax accounts for 2013 and 2014. What was missing was the SA302 for 2013 to 2014. The judge observed (at paragraph 6) that, "the Entry Clearance Officer still could continue to assert" that the Appellant had "still not provided the SA302 for 2013 to 2014 or any evidence which would show the amount of tax payable by the Sponsor for the 2013 to 2014 financial year".

17. It is plain that the failure was only to submit the SA302 for 2013 to 2014 (which was not at the time of the application available) could not have been fatal to the application at the date of the consideration by the decision maker because the decision maker had also other evidence "which could show the amount of tax

payable" and this other evidence included two substantial pieces of evidence, namely, the tax return for 2013 to 2014 and the tax accounts for 2013 to 2014.

18. Second, an in any event, had there been any doubt in relation to this the provisions of Appendix FM-SE could have been utilised by the decision maker, particularly in circumstances where these two substantial pieces of evidence were available for consideration by the decision maker, to "contact the applicant or his representative" to ascertain the availability of further evidence.

19. But more importantly still, the decision maker had an obligation whereby he could "reconsider documents that had been submitted with the application" and the submission of these two substantial pieces of evidence was something that had to be considered, following which, it is difficult to see how, on a balance of probabilities, the application could have been refused.

20. In the circumstances, Judge Whalan reached the right decision and one that was open to him on a balance of probabilities under the Immigration Rules.

Notice of Decision

There is no material error of law in the original judge's decision. The determination shall stand.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Juss 31st May 2016