



**Upper Tribunal  
(Immigration and Asylum Chamber)  
HU/06141/2015**

**Appeal Numbers:**

**H**

**U/06145/2015**

**THE IMMIGRATION ACTS**

**Heard at Field House**

**Decision & Reasons  
Promulgated**

**On 31<sup>st</sup> August 2017**

**On 25<sup>th</sup> September 2017**

**Before**

**UPPER TRIBUNAL JUDGE JACKSON**

**Between**

**YATHURSHINI LOGENTHIRAN  
SAVITHIRITHEVI LOGENTHIRAN  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Ms C Proudman of Counsel

For the Respondent: Mr L Tarlow, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellants appeal against the decision of First-tier Tribunal Judge Adio promulgated on 8 December 2016, in which the Appellants' appeals against the decisions to refuse their applications for entry clearance to the United Kingdom dated 13 August 2015 were dismissed.
2. The Appellants are nationals of Sri Lanka, born on 17 June 1997 and 4 December 1960 respectively and are mother and daughter. The Appellants sought entry clearance to the United Kingdom to join Mr Velautham Logendiran, (the "Sponsor"), their father/husband, resident in the United Kingdom.

3. The Respondent refused the application on 13 August 2015 on the basis that not all of the required specific documents set out in Appendix FM-SE had been provided in relation to the financial requirements set out in Appendix FM. Article 8 of the European Convention on Human Rights was considered but entry clearance was not granted outside of the Immigration Rules on that basis.
4. Judge Adio dismissed the appeal in a decision promulgated on 8 December 2016 under the Immigration Rules. The Appellants had accepted that not all of the specified documents had been submitted with their application, they were provided at the hearing but not taken into account given that the evidence had not been before the Entry Clearance Officer. No compelling circumstances were found to consider the Appellants' circumstances outside of the Immigration Rules.

### **The appeal**

5. The Appellants appeal on four grounds, which can be summarised as follows. First, the First-tier Tribunal erred in law in failing to consider material evidence, namely, specified documents submitted after the decision under appeal. Secondly, that the First-tier Tribunal erred in law in not considering that the Respondent should have applied the evidential flexibility rule to request the missing documents. Thirdly, that the First-tier Tribunal failed to engage with the evidence and submissions as to why his salary paid in cash was not deposited in full in his bank account. Finally, that the First-tier Tribunal erred in failing to consider Article 8 outside of the Immigration Rules.
6. Permission to appeal was granted by Judge Brunnen on 7 July 2017 on all grounds. In addition, Judge Brunnen noted that it was arguable that the Judge erred in dismissed the appeal under the Immigration Rules given that the only ground of appeal under section 84(2) of the Nationality, Immigration and Asylum Act 2002 was that the decision was unlawful under section 6 of the Human Rights Act 1998.
7. At the hearing, Ms Proudman for the Appellant relied on the written grounds of appeal, although she accepted that it was paragraph D of Appendix FM-SE which potentially applied for evidential flexibility (rather than paragraph 245AA of the Immigration Rules relied upon in the written grounds) and conceded that this could not have actually been applied by the Respondent as the Appellant could not meet the requirements of the Immigration Rules in any event as his salary paid in cash was not deposited in his bank account. However, she maintained the appeal on the basis that there was a failure to engage with the evidence of why that was the case, which would be relevant to consideration of the human rights claim outside of the Immigration Rules.
8. On behalf of the Respondent, Mr Tarlow relied on the rule 24 response and emphasised that the fact that the Sponsor's salary was not paid in to his bank account was fatal to the Appellants' applications under the Immigration Rules. The circumstances of this employment and use of the

cash was considered by the Judge in paragraph 10 of the decision and there is no error of law on these grounds. Further, it was open to the Judge to find the evidential flexibility rules did not apply to this case.

9. In relation to consideration of Article 8 outside of the Immigration Rules, reasons were given as to why this was not pursued in the First-tier Tribunal which disclose no error of law. Mr Tarlow invited me to set aside the decision dismissing the appeal under the Immigration Rules (which was not a ground of appeal) and substitute the decision to dismiss the claim on human rights grounds.

### **Findings and reasons**

10. Section 82 of the Nationality, Immigration and Asylum Act 2002 provides that a person may appeal to the Tribunal where the Secretary of State has decided to refuse a human rights claim and pursuant to section 84 of the same, the only ground of appeal against such a decision is that the removal of the appellant from the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998. It was a material error of law for the First-tier Tribunal to consider and dismiss the Appellants' appeals under the Immigration Rules as there is no such ground of appeal against the decisions under challenge. It is incorrect for the Judge to have stated in paragraph 10 of the decision that the only issue in the appeal is whether the Appellants met the financial requirements of the Immigration Rules. Although the Immigration Rules are a relevant consideration in determination of a human rights appeal, whether or not a person meets the requirements is not determinative. The whole premise of the First-tier Tribunal's approach to these appeals was in error by focusing on the Immigration Rules and not on Article 8 as a human rights appeal and the decision must be set aside for that reason alone. The appeal is allowed for essentially the same reasons on the fourth ground of appeal as well, that the First-tier Tribunal materially erred in law in failing to consider the Appellants' human rights appeals outside of the Immigration Rules.
11. Although the appeal succeeds for the reasons set out above, I go on to consider the remaining grounds of appeal against the Immigration Rules part of the decision as these may still be relevant to the fresh determination on human rights grounds.
12. The first ground of appeal concerns the ability of the First-tier Tribunal to consider post-decision evidence in entry clearance applications. Judge Adio referred in paragraph 11 of his decision to the requirements of Appendix FM-SE for specified documents and the evidential flexibility provisions in paragraph D which require an Entry Clearance Officer to consider only those documents submitted with the application unless specified conditions are met. In paragraph 11 he went on to state "... my jurisdiction relates to the evidence at the date of decision for ECO cases however the specified evidence must have been submitted at the date of application." There is no authority given for this statement and it is not supported by the current applicable provisions in Part V of the Nationality,

Immigration and Asylum Act 2002, nor by the requirements set out in Appendix FM-SE itself. The statement has some similarity to the earlier provisions of section 85A of the Nationality, Immigration and Asylum Act 2002 which was repealed from 20 October 2014, although even this was only applicable to Points Based System applications and not to applications for entry clearance of family members under Appendix FM.

13. Section 85 of the Nationality, Immigration and Asylum Act 2002 governs matters to be considered by the Tribunal which in the present appeal, would include specified documents not submitted with the applications. Although this would appear to have the effect that a person in an application such as this would have the opportunity to remedy a defective application by the later submission of required evidence in the course of his or her appeal, the current statutory provisions allow for this as there is no longer any restriction in Part V of the Nationality, Immigration and Asylum Act 2002 on consideration of such evidence submitted post-decision. Such evidence can potentially still meet the requirements of Appendix FM-SE if it covers the correct time period set out therein.
14. The second ground of appeal in relation to evidential flexibility was effectively conceded at the hearing on behalf of the Appellants. The First-tier Tribunal did not err in law in failing to consider whether the Respondent should have applied evidential flexibility when deciding on the application, as the provision in paragraph D of Appendix FM-SE of the Immigration Rules could not apply to the Appellants in this case as there was another reason why their application was bound to fail under the Immigration Rules – namely that because the Sponsor’s salary was paid in cash and not deposited in his bank account in full, he could not establish the required salary level.
15. The third ground of appeal, that the First-tier Tribunal failed to consider the reasons why the Sponsor’s salary was not deposited in full in his bank account is not of itself a material error of law. It may be an argument that the Appellants wish to advance in the context of their human rights appeal outside of the Immigration Rules, but that is not the basis of the ground of appeal as drafted which was directed at the, albeit incorrect approach, of the First-tier Tribunal to consider this as an appeal against the decision on the basis that it was not in accordance with the Immigration Rules. In any event, as the decision is set aside and remitted for the reasons already given, this ground of appeal is not material.

### **Notice of Decision**

The making of the decision of the First-tier Tribunal did involve the making of a material error of law. As such it is necessary to set aside the decision.

I set aside the decision of the First-tier Tribunal and remit it to the First-tier Tribunal for fresh determination by any Judge except Judge Adio.

No anonymity direction is made.

Signed



Upper Tribunal Judge Jackson

Date

22<sup>nd</sup> September 2017