Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/22094/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 28 April 2014	**On 06th Aug 2014**

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

ENTRY CLEARANCE OFFICER - AMMAN

Appellant

and

MRS BAFRAW JAAFAR SALEEM SALEEM

Respondent

Representation:

For the Appellant (ECO): Ms A Everett, Home Office Presenting Officer
For the Respondent (Mrs Saleem): Mr O Popoola, Legal Representative of Community Legal Centre

DETERMINATION AND REASONS

1. This is an appeal brought by the Entry Clearance Officer against a decision of First-tier Tribunal Judge Napthine. For ease of reference I shall refer throughout this

determination to the Entry Clearance Officer, who was the original respondent, as "the ECO" and to Mrs Saleem, who was the original appellant, as "the claimant".

2. The claimant is a citizen of Iraq who was born on 16 January 1982. She is married to Mr Razi Tofiq Fatah, a British citizen, on 9 July 2012 and applied for entry clearance as a spouse the following day. On her application form she states that this was an arranged marriage.

3. The application was refused by the ECO on 14 October 2012, and the notice of immigration decision giving the ECO's reasons for refusal, is dated the same date. The ECO was not satisfied that there was a genuine subsisting marriage between the claimant and the sponsor or that the couple intended to live together permanently in the UK. Also, the ECO was not satisfied that either the maintenance/financial requirements or accommodation requirements set out within the Rules were satisfied.

4. The claimant appealed against this decision and her appeal was heard before First-tier Tribunal Judge Napthine sitting at Hatton Cross on 27 January 2014. Her husband, the sponsor, Mr Fatah attended that hearing, at which he gave evidence. Both the claimant and the ECO were represented at that hearing.

5. In a determination promulgated on 12 February 2014 Judge Napthine allowed the appellant's appeal.

6. The ECO now appeals against that decision, permission to appeal having been granted by First-tier Tribunal Judge Shimmin on 10 March 2014.

Grounds of Appeal

7. The ECO's grounds of appeal are succinct and are as follows:

> "**Making a material misdirection in law**
>
> 1. The rules of specified evidence are comprehensively set out in Appendix FM-SE to the Immigration Rules. These set out what types of evidence are required, the periods they cover and the format that they should be in. The Tribunal has had no regard to this at paragraphs 21-24 of the determination where it sets out its finding on this issue. It is respectfully submitted that the Tribunal has failed to comply with the Immigration Rules and that its findings are therefore unsustainable.
>
> 2. Furthermore, it is clear that the Tribunal has not had appropriate regard to the relevant date. For Appendix FM the significant date is the date of application (not the date of determination – see paragraph 25 of the determination where the Tribunal makes this error) and the significant evidence is from the specified period before that date. The Tribunal has

not addressed the relevant evidence from prior to July 2012 (the date of application). This also renders the conclusions unsustainable.

3. It follows from this that it is not clear what the sponsor's actual gross annual income was at the date of application. It also follows that the appeal can therefore not be made out. However, it is also worth noting that if the sponsor's current income does exceed the income threshold, there is no reason to prevent the appellant making a fresh application based on the sponsor's income at this time... ."

8. When granting permission to appeal, Judge Shimmin stated as follows:

"...

3. The grounds of appeal argue that the judge erred in that (1) he has failed to apply Appendix FM-SE of the Immigration Rules; (2) he has had regard to the date of determination, not as he should have done under Appendix FM, the date of application.

4. The grounds of appeal disclose an arguable error of law."

9. Judge Napthine accepted that there was a genuine and subsisting marriage and also that the accommodation requirements were satisfied. There is no challenge to these findings. The judge also found that the maintenance requirements were met, on the basis of evidence which was produced to him and which referred back to the date of decision. His findings with regard to the sponsor's income are set out at paragraphs 21 to 26 of his determination as follows:

"21. The sponsor had to have an income of £18,600 at the date [of] decision in order to satisfy the requirements of E-ECP.3.1.

22. The sponsor had been working for Middlesbrough Food Supplies until 19/8/2012 when he left. His P45 shows he earned £7,350 from that employment in the 2012-2013 tax year.

23. The sponsor started trading on a self-employed basis as "Mobile Car Services" from 1/8/2012. He has produced unaudited accounts prepared by Sarmad & Co Chartered Certified Accountants, for the period 1/8/2012 to 5/4/2013 showing a taxable income from this venture of £12,800.

24. This income is substantiated by the sponsor's online income tax return and a letter from HMRC confirming that tax has been calculated upon that total income of £20,150.

25. It is in the nature of self-employment that a person's income and his tax liability thereon cannot be calculated until the end of the tax period. The sponsor could not at the date of decision have produced meaningful

accounts to cover that period. However, the accounts he has produced and the income tax return refer back to that period.

26. I am satisfied that the sponsor has produced evidence to show that at the date of decision he had income in excess of £18,600, to wit, £20,150 as shown by his accounts and the calculation produced by HMRC."

The Hearing

10. I heard submissions on behalf of both parties, which I recorded contemporaneously in my Record of Proceedings. Accordingly, I shall not set out these submissions in full, but shall summarise the arguments which were advanced before me. I have however had regard to everything which was said before me as well as to all the documents contained within the file, whether or not the same is specifically referred to below.

11. Ms Everett's submissions can be summarised as follows. The basis of the ECO's challenge as set out within the grounds is that it is now clear from the Rules what evidence can be considered and that with regard to the evidence required under Appendix FM specified evidence has to be produced at the time of application. The judge therefore erred by giving consideration to evidence which he should not have taken into account. Although the judge was satisfied on the evidence which was put before him that the claimant did have the relevant income, this finding was made with the benefit of hindsight which the Immigration Rules did not allow. The task for the judge was to consider whether when the claimant applied the sponsor could demonstrate that he had the income in the way required under the Rules. There were a number of ways in which income could be demonstrated, but these were set out within Appendix FM-SE. Although it was permissible to look at later evidence, if it went to the issue to be determined, that is not what the judge did. He looked at the evidence at the date of decision, which was wrong. For example he looked at the sponsor's income from self-employment, which started after the application had been made.

12. Ms Everett referred the Tribunal to the relevant Rules regarding employment and self-employment and to the evidence which was required, which is referred to below. As at the date of decision, the sponsor had only been self-employed for two months, and had simply not produced the documents required. So far as the evidence relating to self-employment was concerned, some of this was post-decision. Although the Rules do not in terms say that whether or not there is sufficient income from self-employment must be determined at the date of application, it is clear that the information set out at paragraph 7 was not before the ECO at the date of decision. All the evidence that was before the Tribunal was contained at pages 35 through to page 69 of the claimant's bundle.

13. Although it may be the case that the sponsor would feel aggrieved because the judge had found that he now earned the money, the answer was for the claimant to make another application.

14. On behalf of the claimant, Mr Popoola submitted that the judge's decision should stand, relying on *DR (Morocco)* and also the Upper Tribunal decision in *Khatel* (which Mr Popoola was apparently unaware had been overturned by the Court of Appeal). It was the claimant's submission that the judge was allowed to look at the circumstances appertaining at the date of decision pursuant to Section 85(4) of the Nationality, Immigration and Asylum Act 2002. The judge was accordingly right to consider the new evidence which was before him, because this was not excluded under Section 85(5) (that is the sub-Section that states that sub-Section (4), which allows a Tribunal to consider evidence which it thinks relevant to the substance of the decision, including evidence which concerns a matter arising after the date of decision, is subject to the exceptions in Section 85A).

15. Although it was accepted that the ECO could not be faulted for having refused the application on the basis of the evidence which was before him, nonetheless the judge was right to allow the appeal based on the new evidence.

16. Mr Popoola submitted that to the extent that what was said in Section 85(5) of the 2002 Act was inconsistent with the Rules, Section 85 should prevail.

Discussion

17. I reserved my decision, but informed the parties that in the event that I found that there had been an error of law in the determination of the First-tier Tribunal, I would be able to re-make the decision without hearing further evidence.

18. I do not consider that there is a conflict between Sections 85 and 85A of the 2002 Act and the Rules.

19. Paragraph 85 of the 2002 Act provides as follows:

> "**85. Matters to be considered**
>
> ...
>
> (4) On an appeal under Section 82(1) against a decision, the Tribunal may consider evidence about any matter which it thinks relevant to the substance of the decision, including evidence which concerns a matter arising after the date of decision.
>
> (5) But sub-Section (4) is subject to the exceptions in Section 85A."

20. The exceptions are not relevant in this case. Accordingly, insofar as Mr Popoola submits that the First-tier Tribunal was entitled to take into consideration evidence

arising after the decision was made but which appertains to that decision, that submission is correct.

21. However, it does not follow that this means that the claimant is entitled to succeed if she could show merely that the sponsor's income at the relevant date was above the threshold now required, because the Rules require more. The requirements of the Rules are specific with regard to what evidence must be provided before income either in respect of salaried employment or in respect of self-employment can be considered. It follows that the evidence adduced after the date of decision can only be taken into account to be extent that it shows that the requirements under the Rules were indeed satisfied. Otherwise it will not be relevant to the decision. This will be explained more fully below in the context of this particular case.

22. The relevant provisions with regard to the specific evidence which must be provided in support of the claim that the financial requirements have been satisfied are set out at paragraphs 2 and 7 of Appendix FM-SE and are as follows:

> "APPENDIX FM-SE
>
> FAMILY MEMBERS – SPECIFIED EVIDENCE
>
> A. This Appendix sets out the specified evidence applicants need to provide to meet the requirements of Rules contained in Appendix FM and, where those requirements are also contained in other Rules and unless otherwise stated, the specified evidence applicants need to provide to meet the requirements of those Rules.
>
> ...
>
> (2) In respect of salaried employment in the UK, all of the following evidence must be provided:
>
> (b) [There does not appear to be an (a)]. The P60 for the relevant period or periods of employment relied on if issued.
>
> (c) Wage slips covering:
>
> (i) a period of six months prior to the date of application if the applicant has been employed by their current employer for at least six months; or
>
> (ii) any period of salaried employment in the period of twelve months prior to the date of application if the applicant has been employed by their current employer for less than six months.
>
> (d) A letter from the employer(s) who issued the payslips at paragraph 2(c) confirming:
>
> (i) the person's employment and gross annual salary;

(ii) the length of their employment;

(iii) the period over which they have been or were paid the level of salary relied on in the application; and

(iv) the type of employment (permanent, fixed-term contract or agency).

(e) A signed statement of employment for employment currently held.

(f) Monthly personal bank statements corresponding to the same period(s) as the wage slips at paragraph 2(c), showing that the salary has been paid into an account in the name of the person or in the name of the person and their partner jointly.

...

(7) In respect of self-employment in the UK as a partner, as a sole trader or in a franchise all of the following must be provided:

(a) evidence of the amount of tax payable, paid and unpaid, for the last financial year.

(b) .....:

(i) annual self-assessment tax return to HMRC;

(ii) statement of account (AS300 or SA302); and

(iii) the same for the previous financial year if the latest return does not show the necessary level of gross income, but the average of the last 2 financial years does.

(c) Proof of registration with HMRC as self-employed. This evidence must be either an original or a certified copy of the registration documentation issued by HMRC.

(d) Each partner's unique tax reference number (UTR) and/or the UTR of the partnership or business.

(e) Where the person holds or held a separate business bank account(s), monthly bank statements for the same 12-month period as the tax return(s).

(f) Monthly personal bank statements for the same 12-month period as the tax return(s) showing that the income from self-employment has been paid into an account in the name of the person or in the name of the person and their partner jointly.

(g) Evidence of ongoing self-employment through:

(i) evidence of payment of class 2 national insurance contributions (for self-employed persons); or

(ii) current appointment reports from Companies House (for directors).

(h) One of the following documents must also be submitted:

(i) the organisation's latest annual audited accounts with:

(1) the name of the account clearly shown; and,

(2) the accountant must be a member of an accredited accounting body.....

(ii) A certificate of VAT registration and the latest VAT return confirming the VAT registration number, if turnover is in excess of £73,000....".

23. With regard to the requirements under paragraph 2 in respect of salaried employment, the requirement under paragraph 2(c)(i) to provide wage slips covering a period of six months **prior to the date of application** [my emphasis] must be noted or in the alternative wage slips for a period of twelve months again prior to the date of application with a previous employer in circumstances where the applicant (or in this case the sponsor) had not been employed by their current employer for a period of at least six months. There is also of course the requirement to provide monthly personal bank statements corresponding to the same period. It is common ground that none of these documents were provided (and indeed they could not have been, because the sponsor had not been employed for the required period).

24. The interplay between the requirements under the Rules with regard to the evidence necessary to establish income from salaried employment and the provision within Section 85(4) of the 2002 Act allowing the Tribunal to consider evidence about any matter which it thinks relevant to the substance of the decision, including evidence which concerns a matter arising after the date of the decision, is illustrated when one considers this specific requirement. The requirement under the Rules is for an applicant to provide evidence in the form set out in the Rules. In the case of salaried employment, this includes evidence such as wage slips covering a period "prior to the date of application". Under Section 85(4) an applicant could establish that this requirement was satisfied by providing the wage slips covering this period after the date of decision, but what a Tribunal cannot take into account is wage slips for a subsequent period (or any period other than that specified) or other evidence which would tend to show that notwithstanding the failure to provide the specified evidence, an applicant nonetheless earned the sums of money claimed. This is because the specific requirement within the Rules is to provide evidence in a specified form. In this case, the applicant failed to provide this evidence, and none of

the evidence submitted later could cure the defect with regard to salaried employment.

25. With regard to the evidence which has to be provided in order to satisfy the requirements of the Rules with regard to self-employment, although it is not specifically provided that evidence must be submitted in respect of periods "prior to the application", nonetheless it is clear from the relevant paragraphs set out above that a considerable body of evidence must be provided. The requirement under paragraph 7(b) of Appendix FM-SE cannot be satisfied if the necessary evidence does not relate at the latest to the date of decision. So the requirement for an annual self-assessment tax return to HMRC must require at the very least that this period ended before the date of decision. It is arguable that the requirement is for this return to cover the period before the date of application, but on any view it cannot sensibly be argued that an applicant can rely on evidence which could not have been available as at the date of decision.

26. In this case, the sponsor did not even produce accounts covering the whole year. The accounts he provided showed a taxable income of £12,800 for the period 1 August 2012 to 5 April 2013, a period of just over eight months. So he has not even produced evidence of one year's income from self-employment exceeding the sum required. Even if one was to assume that his income was at a level rate throughout this period, this would show an income to the date of decision from self-employment of under £4,000 (only two months and thirteen days comes with this period). If this were sufficient, then theoretically, an applicant could succeed in his claim by commencing self-employment a mere week before the date of decision, and substantially after the date of application, if before the hearing he could produce some accounts which showed he was earning at a pro rata rate above £18,600 a year. In this case, of course, at the time of application, the sponsor had not even begun to work in a self-employed capacity.

27. Accordingly, in my judgment Judge Napthine was not entitled to take into account either the sums claimed in respect of employment or the income claimed in respect of self-employment. The income shown on his later tax return of £7,350 from Middlesbrough Food supplies was not evidenced in the form required in the Rules, and Section 85(4) only permits a Tribunal to consider evidence which is relevant to the substance of the decision. It does not permit a Tribunal to consider evidence which is not admissible under the Rules. Similarly, with regard to income from self-employment, the later tax returns cannot be taken into account either. The judge was no doubt correct when he found at paragraph 25 that "it is in the nature of self-employment that a person's income and his tax liability thereon cannot be calculated until the end of the tax period" but that is precisely why it is a requirement within the Rules that evidence of consistent income be produced for a previous period.

28. Essentially, the judge erred in finding at paragraph 21 that what was required was that "the sponsor had to have an income of £18,600 at the date of decision in order to satisfy the requirements of E-ECP.3.1." What the claimant had to show was that the

specific evidence had been provided in accordance with the Rules to establish that this was the case. It was not.

29. It follows that the appeal of the ECO must succeed. Judge Napthine's determination must be set aside and the decision re-made.

30. It is not necessary to hear further evidence in order to re-make the decision. As I have already found, the claimant failed to provide sufficient evidence in the form prescribed within the Rules to establish that the maintenance requirements were satisfied and so her appeal must fail under the Rules.

31. It has not been suggested before me that the claimant could succeed under Article 8 in the circumstances of this case where she has failed under the Rules, and clearly she could not. If and to the extent that she can demonstrate that the maintenance requirements are now satisfied, there is no reason why the claimant should not submit a fresh application, but it she will have to provide the necessary evidence in support as prescribed within Appendix FM-SE. Unless circumstances change, there is no apparent reason why the judge's findings with regard to the other requirements under the Rules should not be maintained.

Decision

I set aside the determination of the First-tier Tribunal as containing a material error of law and substitute the following decision:

The claimant's appeal against the decision of the respondent refusing her entry clearance is dismissed.

Signed: Date: 31 July 2014

Upper Tribunal Judge Craig