Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/13005/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 29 April 2016	**On 13 May 2016**

Before

UPPER TRIBUNAL JUDGE O'CONNOR

Between

MIZANUR RAHMAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER – NEW DELHI

Respondent

Representation:
For the Appellant: Mr M Islam, of London Law Associates
For the Respondent: Mr K Norton, Senior Presenting Officer

DECISION AND REASONS
(Given orally on 29 April 2016)

1. The appellant is a citizen of Bangladesh, born on 10 October 1984. He appeals against a decision of an Entry Clearance Officer dated 17 September 2014 refusing to grant him entry clearance as the spouse of a Mrs Nipa Begum, a person present and settled in the United Kingdom.

2. The First-tier Tribunal (Judge Cohen) dismissed this appeal in a decision promulgated on 28 August 2015. During the course of his determination Judge Cohen, contrary to the conclusions of the Entry Clearance Officer, found the appellant and Mrs Begum to be in a genuine and subsisting relationship and that

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they intend to live together permanently (see paragraph 2 of Judge Cohen's decision).

3. Judge Cohen also came to the following conclusion:

> "[15] I firstly note that the sponsor had not been in both of her claimed employments for at least six months at the date of application and therefore [sic] find that the appellant could not meet the requirements of the Immigration Rules as at the date of application and had not submitted the mandatory documentation to show that the sponsor had been employed in those employments earning a minimum of £18,600 for the six-month period immediately prior to the date of application. I find that the appellant's application under the Immigration Rules is bound to fail."

4. In relation to the claimed employment at a company called Chadnis Indian Cuisine Limited, Judge Cohen further said this at paragraph 16:

> "I find that she is not genuinely working at this restaurant in the claimed capacity or at all and find that she does not [sic] he claimed income arising from this employment. I find that the sponsor has created documentation to substantiate a false claim that she has sufficient income to meet the requirements of the Rules."

5. In relation to a further employment that it is said Miss Begum undertook at Kashmir Gardens, Judge Cohen found at paragraph 17:

> "I find that she is not genuinly working at this restaurant in the claimed capacity or at all and find that she does not [sic] he claimed income arising from this employment. I find that the sponsor has created documentation to substantiate a false claim that she has sufficient income to meet the requirements of the Immigration Rules."

6. The rationale for these conclusions can be deduced from reading paragraphs 8, 16 and 17 of the FtT's decision. These findings were, however, clearly made in the alternative to the primary finding that the appellant had failed to produce the necessary specified documemntation and therefore could not meet the evidenetial requirements of the Immigration Rules.

7. The appellant appeals to the Upper Tribunal with the permission of Judge Southern granted on 17 February 2016. The grounds are lengthy but can be distilled into the following two propslitions:

   (i) The First-tier Tribunal was incorrect to conclude that the appellant did not meet the financial requirements of the Rules because he had provided all of the necessary documentation and evidence to demonstrate that his wife earnt over the miniuim requirement of £18,600; and,

   (ii) The First-tier Tribunal's finding that the sponsor was not employed in the Kashmir Gardens restautant or Chadnis Indian Cuisine Limited was unfair because the genuineness of these employments was not a point taken by the ECO or otherwise put in issue. In any event, the conclusions in this regard are irrational.

8. In granting permission Judge Southern said as follows:

> "The grounds assert, confidently and without qualification, that the judge simply misunderstood the documentary evidence before him. Had he examined this documentary evidence porpery he would have seen that it did in fact demonstrate precisely that which was required by the applicable Immigration Rules. As that assertion is made by legal representatives, whose duty not to mislead the Tribunal is a seious and a fundamental one ... I must accept it to be correct and on that baiss will grant permission. London Law Associates must comply with the following directions:
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> Directions:
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> No later than 10 working days from the date upon which this grant of permission is sent out to the parties, the appellant's representatives must file with the Tribunal and serve upon the respondent a chronology setting out clearly the history of the beginning and end of each of the sponsor's employments and an indexed and paginated bundle containing copies of each of the documents relied upon to establish the sponsor's income including each of the documents specifically referred to in the grounds for seeking permission to appeal."

9. It is important to set out the relevant evidential requirements of Appendix FM-SE to the Immigration Rules, which the appellant was required to meet. Both parties agree that it is the following requirements in paragraph A1(2) to Appendix FM-SE which are applicable:

> "(2) In respect of salaried employment in the UK (except where paragraph 9 applies), all of the following evidence must be provided:
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> (a) Payslips covering:
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> (i) a period of 6 months prior to the date of application if the person has been employed by their current employer for at least 6 months ... ; or
>
> (ii) any period of salaried employment in the period of 12 months prior to the date of application if the person has been employed by their current employer for less than 6 months… .
>
> (b) A letter from the employer(s) who issued the payslips at paragraph 2(a) confirming:
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> (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 upon in the application; and
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> (iv) the type of employment (permanent, fixed-term contract or agency)."

10. It is pertinent at this point to identify the date of the application to the Entry Clearance Officer which was, at least according to the appellant's chronology, made on the 20 July 2014. Thus, six months prior to this date would be 21 January 2014. It is also necessary to set out the relevant terms of the Entry Clearance Officer's refusal decision which, in relation to the financial requirements of the Rules, states as follows:

> ".... From the payslips you have submitted I have calculated your gross annual income as £24,612. However, at the time of application, your sponsor had been employed in

> both jobs for less than six months. Given this you must meet the requirements set out in Appendix FM-SE, specifically that the gross amount of any speicified non-employment income received by their partner in the twelve months prior to the date of application must be £18,600 or above. However, I am unable to do this because you have not submitted all the documents required by Appendix FM-SE. Specifically, you have not provided an employer letter from your previous employer, Studio 71, which contains details of your sponsor's employment, their gross annual salary, the length of their employment, the period over which they have been paid, the level of income relied upon in the application and the type of employment. You also have to provide bank statements showing that the salary has been paid into an account in the name of the person. I reocngise that you submitted some bank statements but these do not cover the whole twelve month period prior to the date of decision.
>
> I note that this office contacted you on two occasions (14/08/2014 and 26/08/2014) offering you the chance to provide missing documents, but you have not done this."

11. At the hearing before the Upper Tribunal Mr Islam properly accepted that the requirements of subparagraph A2(a) of Appendix FM-SE could not be met by the appellant because his 'partner' was not, on his own chronology, employed by Kashmir Gardens Aylesbury Limited for a period of six months prior to the date of application - that employment starting on or around 6 April 2014 - and neither was she employed by Chadnis Indian Cuisine Limited for the entirety of the six month period prior to the date of application, because this comppnay was only set up during that period and she only began employment with it on 1 February 2014. Prior to that, on the appellant's case, his partner had been employed with Chadnis Aylesbury Limited. Although it is said that this had the same members of staff, operated from the same property and had the same management structure it is, nevertheless, a different legal entity and thus appellant's partner's employer changed after 1 February.

12. Consequently, as Mr Islam properly accepted during the course of the hearing, the appellant needed to demonstrate that the requirements of the rule had been met in relation to the employment at Stuidio 71 and/or Chadnis Aylesbury Limited.

13. It is to be recalled that the Entry Clearance Officer specifically took the point in the refusal letter that in relation to Studio 71 there was no letter from the "employer" incorporating all of the features required of it by paragraph A1(2)(b) of Appendix FM-SE of the Immigration Rules. Again, Mr Islam properly accepted this to be so, explaining that compliance with the rule was impossible because Studio 71 had ceased to exist by the date of the appellant's application.

14. Initially it appeared that Mr Islam was submitting that the requirements of Appendix FM–SE could be met by the production of documentation other than of the type specified therein. If this was indeed intended to be the submission then it is plainly incorrect. The requirements of the Rule are clear and the documents specified therein must be produced if such requirements are to be met.

15. The production of alternative documentation in lieu of that specified in the Rules goes to the exercise of discretion outside the Rules, as was subsequently accepted by

Mr Islam during the course of his submissions. Turning to that issue, Mr Islam asserted that neither the ECO nor the First-tier Tribunal had considered this matter. This though is unsurprising because neither was asked to. The covering letter to the entry clearance application drafted by a firm called 'Your Immigration Limited' boldy asserts that the requirements of the rule have been met. It says nothing of the failure to produce a specified document, or the reasons for such a failure. Neither was this a point taken before the First-tier Tribunal as Mr Islam once again accepts.

16. If neither the Entry Clearance Officer nor the First-tier Tribunal were asked to consider this issue it cannot be demonstrated in my view that the First-tier Tribunal erred for failing to do so. The Immigration Rules cannot be met, no submission was made that discretion should be exercised outside of the rules and it was not for the First-tier Tribunal to take such a point of its own volition.

17. This conclusion seems to me to entirely accord with the reported decision of the President in the case of Sultana and Others (Rules: waiver/further enquiry; discretion) [2014] UKUT 540 (IAC).

18. For these reasons I conclude that the appellant fails to make out the first of the aforementioned grounds.

19. As to the ground relating to the findings that the appellant had produced fraudulent documentation in support of her claims – this was a finding made by the First-tier Tribunal in the alternative and it had no material impact on the outcome of the appeal. However, it is necessary for me to express a view on this ground because such findings are likely to impact on any future application made by the appellant. For my part, I conclude that such findings are vitiated by legal error. There was no dispute between the parties as to the geneuineness of the appellant's partner's claimed employment, and the respondent was not represented at the hearing to put the matter in issue. The judge clearly entered the arena in this regard. Having done so he should have put the appellant's legal representative on notice as to what was in his mind and given the sponsor an opportunity to directly address the issue of whether the documents produced were false. He did not do so. For this reason, although not material to the FtT's decision, it is clear that no future reliance should be placed on Judge Cohen's findings in this regard.

Notice of Decision

The appeal is dismissed. The First-tier Tribunal's decision remains standing.

Signed:

Upper Tribunal Judge O'Connor