



IAC-AH-CO-V1

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

Appeal Number: OA/15177/2014

**THE IMMIGRATION ACTS**

Heard at Bradford  
On 2<sup>nd</sup> December 2015

Decision & Reasons Promulgated  
On 13<sup>th</sup> January 2016

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**Before**

**UPPER TRIBUNAL JUDGE D E TAYLOR**

**Between**

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

Appellant

**and**

**KALEEM ASHFAQ  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Mr M Diwnycz, Home Office Presenting Officer

For the Respondent: Mr Ahmed of A1 Immigration Services

**DECISION AND REASONS**

1. This is the Secretary of State's appeal against the decision of Judge Hillis made following a hearing at Bradford on 12<sup>th</sup> May 2015.
2. The claimant is a citizen of Pakistan. He applied to come to the UK on 14<sup>th</sup> April 2014 for settlement under paragraph EC-P.1.1 of Appendix FM of the Immigration Rules as a spouse. His application was refused because the Entry Clearance Officer was not satisfied that he met the income threshold required under Appendix FM and/or the related evidential requirements.

3. The Claimant was required to provide, in respect of his sponsor's salaried employment in the UK.
  - (a) Wage slips covering 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 (and where paragraph 13B of this Appendix does not apply); 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 (or at least six months but the person does not rely on paragraph 13A of this Appendix), or in the financial years relied upon by a self-employed person. These wage slips should demonstrate that your sponsor's income meets the financial requirements of the Immigration Rules.
  - (b) A letter from the employer who issued the wage slips at paragraph 2(a) 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 upon in the application; and
    - (iv) the type of employment (permanent, fixed term contract or agency).
  - (c) Personal bank statements corresponding to the same period as the wage slips at paragraph 2(a) showing that the salary has been paid into an account in the name of the person or the name of the person and their partner jointly.
4. The Entry Clearance Officer recorded that the bank statements submitted for October 2013 did not show the sponsor's salary from the wage slip dated 31<sup>st</sup> October 2013 as specified in (c) above. The officer noted that, after extra documents were requested from the sponsor, she provided a letter from her employer stating that the wages for 2013 were paid by cash and not BACS as stated on the original wage slip. The Entry Clearance Officer found the letter to be self-serving and only issued in an attempt to circumnavigate the Immigration Rules. Accordingly he refused the application on the grounds that, given the lack of specified evidence, he was not satisfied that the sponsor was employed and paid as stated, nor that the total income for the past six months met the income threshold.
5. The claimant accepted that the bank statement for October 2013 did not show her salary being paid into it.
6. The judge was entirely satisfied that the sponsor's gross annual income was £19,980 for the relevant period. It was accepted by the respondent that she submitted further documentation in response to their written request. It was also accepted by the Presenting Officer at the hearing that she was a credible and reliable witness and that she did in fact request and receive her monthly salary in October 2013 in cash to facilitate the purchase of items for her wedding in Pakistan before she flew out three

days later. It was agreed that her salary did in fact exceed the £18,600 minimum requirement.

7. The judge concluded as follows:

“I conclude that were the only reason the application was refused was due to the fact that the sponsor had requested her salary to be paid in cash and not into the bank account as usual to enable her to purchase a number of items for her wedding three days prior to flying to Pakistan for that wedding the ECO has not taken into account the terms of the Immigration Rules (d)(iii)(e) and (f) above.

I conclude that having exercised evidential flexibility and written to the appellant for further information the information provided in reliance of that request when taken together with the documents already submitted with the application the respondent has sufficient information before her to conclude that the appellant met the relevant terms of Appendix FM-SE.”

8. The judge concluded that the claimant had provided the required documentation and information and had met the requirements of the Rules. He allowed the appeal both under the Immigration Rules and under Article 8.

### **The Grounds of Application**

9. The Secretary of State sought permission to appeal on the grounds that the judge had erred in law in failing to make the assessment of the evidence with regard to the date of the Entry Clearance Officer’s decision. The Rules require that the sponsor earn at least the minimum income requirement for the whole of the period and there was no evidence to show that this was the case.
10. The Tribunal relied on postdecision evidence to provide an explanation for an alleged discrepancy in October 2013. Given the evidence should have been available it was not a case where evidential flexibility needed to be applied. If the decision under the Rules was not correct then the decision on Article 8 was flawed.
11. Permission to appeal was granted by Judge Andrew for the reasons stated in the grounds on 5<sup>th</sup> August 2015.

### **The Hearing**

12. Mr Diwnycz said that he had made enquiries with the Inland Revenue and there was no doubt that the sponsor had in fact worked since July 2013. He did not seek to amplify the grounds.

### **Findings and Conclusions**

13. Under Appendix DM/SE

D(a), in deciding an application in relation to which this Appendix states that specified documents must be provided, the Entry Clearance Officer or Secretary of State (the decision maker) will consider documents that have been submitted with the application, and will only consider documents submitted after the application where sub-paragraph (b) or (e) applies.

- (b) if the applicant  
 (i) has submitted

- (aa) a sequence of documents and some of the documents in the sequence have been omitted (e.g. if one bank statement from a series is missing);
- (bb) a document is in the wrong format (for example if a letter is not on a letterhead paper as specified) or
- (cc) a document that is a copy and not an original document; or
- (dd) a document which does not contain all of the specified information; or (ii) has not specified a specified document, the decision maker may contact the applicant or his representative in writing or otherwise and request the document or the correct version. The material requested must be received at the address specified in the request within a reasonable timescale specified in the request.

13. Under Appendix DM/SE(d) if the applicant has submitted;

- (i) A document in the wrong format; or
- (ii) A document that is a copy and not an original document, or
- (iii) A document that does not contain all of the specified information but the missing information is verifiable from:
  - (i) Other documents submitted with the application,
  - (ii) The application may be granted exceptionally providing the decision maker is satisfied that the document is genuine and that the applicant meets the requirement to which the document relates. The decision maker reserves the right to request the specified original document in the correct format in all cases where sub-paragraph (b) applies and to refuse applications if this material is not provided as set out in sub-paragraph (b).

(e) where the decision maker is satisfied that there is a valid reason why a specified document cannot be supplied e.g. because it is not issued in a particular country or has been permanently lost he or she may exercise discretion not to apply the requirement for the document or to request alternative or additional information or documents to be submitted by the applicant.

(f) before making a decision under Appendix FM or this Appendix the decision maker may contact the applicant or their representative in writing or otherwise to request further information or documents. The material requested must be received at the address specified in the request within a reasonable timescale specified in the request.

15. In this case, the Entry Clearance Officer was provided with all of the relevant specified evidence save for the bank statement of October 2013 and accordingly asked the claimant to provide further information. The claimant then provided a letter from the employer stating that the wages were paid in cash for that month, because the sponsor wanted the money to pay for the wedding.

16. However, the Entry Clearance Officer regarded the information to be self-serving and discounted it. The respondent no longer maintains that this was the correct decision. Both the Presenting Officer at the original hearing and the Presenting Officer today accept that the sponsor was working as claimed. Clearly the sponsor could not have ever provided a bank statement for October 2013 because the wages were simply never paid into her account.
17. The Entry Clearance Officer, had he been in possession of the facts as they are now accepted to have been, would have granted the application exceptionally.
18. The grounds challenging the judge's decision appear to be arguing that this was not a case where evidential flexibility ought to have been applied. Mr Diwnycz accepted that this was wrong.
19. Accordingly I agree with the respondent to the extent that there is an error of law in this determination in that the appeal should not have been allowed outright. It should have been allowed to the extent that the matter was remitted back to the Entry Clearance Officer to decide whether to grant entry clearance on the basis of the facts as they are now known to be.
20. In the light of the information from Mr Diwnycz who contacted the Inland Revenue and who have confirmed that the sponsor was working throughout the relevant period and earned above the income threshold there is no reason why entry clearance should not be issued.

**Decision**

21. The original judge erred in law. His decision is set aside and remade as follows. The appeal is allowed insofar as it is remitted back to the Entry Clearance Officer to decide whether the application should be granted exceptionally under Appendix DM/SE D(d).

No anonymity direction is made.

Signed

Date

Upper Tribunal Judge Taylor