Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/07684/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 23 October 2017	**On 1 November 2017**
Prepared 30 October 2017	

Before

DEPUTY UPPER TRIBUNAL JUDGE MCGEACHY

Between

SHELDON MITCHEL
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER – ST LUCIA

Respondent

Representation:
For the Appellant: Mr C Nwadi, Counsel instructed by Nicholas Solicitors
For the Respondent: Mr E Tufan, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of St Lucia born on 30 November 1977 who appeals against a decision of Judge of the First-tier Tribunal Coll who in a determination promulgated on 17 July 2017 dismissed his appeal against a decision of the Entry Clearance Officer made on 22 February 2016 to refuse him entry clearance as the husband of Mrs Andrea Cooper-Mitchel, a British citizen born on 1 November 1982.

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2. The reason for refusing the decision was that the appellant had not produced the required documents under the provisions of Appendix FM with respect to paragraphs E-ECP1.1.(d) and E-ECP.3.1. which refers to the specified gross annual income of £18,600 and also those provisions of Appendix FM-SE which set out the specified documentary evidence which must be established to show that the financial requirements indicating the salaried employment of the sponsor into Britain should be met.

3. In the determination the judge set out the relevant Immigration Rules and considered the documentary evidence before her. She noted that it was argued that missing bank statements had been provided to the Secretary of State but that these missing statements were not on the Home Office file. Having set out the burden of proof the judge set out her findings of fact in paragraph 16 onwards of the determination.

4. In paragraph 18 of the determination she stated that she found that all the requirements of paragraph FM were met including the provision of payslips for the relevant period. In the previous paragraph she had pointed out that the relevant period for the purposes of that Appendix which was April 2015 to October 2015.

5. In paragraph 19 of the determination the judge went on to find that she accepted that the sponsor was earning at least £22,699 plus London Weighting at the date of application and concluded that it was likely that therefore when the application had been made the appellant should have been able to meet the financial requirements. However, in paragraphs 20 onwards she pointed out deficiencies in the evidence. She noted these as follows:-

> "(1) The Employer's letter does not mention how long the Sponsor has been in receipt of her level of salary (quoted as £22,699 plus London Weighting as at 17 May 2017). The letter is silent on this and on whether she was in receipt of a salary in excess of £18,600 for the six month period (of April to October 2015). Given her starting salary, it is highly likely that she was. Nevertheless, this information which is supposed to be in the employer's letter is missing.
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> (2) The bank statements for the period May to October 2015 in their entirety are missing. The bundle contains statements dated 27 October, 27 November and 24 December 2015 and dated 27 January and 26 February 2016. There are thus only five months' of statements and the following five relevant months are missing: May 2015 to September 2015."

6. She went on to find that the further information placed before her contained identical information to that which had been in the bundle and therefore the additional information submitted after the hearing by the appellant's representative did not resolve the evidential issues. She therefore found the financial requirements under Appendix FM were not met.

7. Her conclusion therefore was that the decision of the Entry Clearance Officer was not undermined by the sponsor's evidence and therefore the appellant had not discharged the burden of proof. She went on to dismiss the appeal under the Immigration Rules.

8. The grounds of appeal which are handwritten and unclear appear to argue that relevant documentation had been submitted or alternatively that the decision of the judge was inconsistent in that the judge should have taken into account the sponsor's oral evidence and that the credibility of the sponsor was not taken into account and that that was itself irrational.

9. Permission was granted in the First-tier by Judge of the First-tier Tribunal Hollingworth. He stated in his decision granting the application that:-

> "2. It is arguable that given the evidence of the Sponsor, together with the degree of corroboration available from documentary evidence that the level of importance attributed to the policy rationale underlying the provisions relating to the financial requirements under Appendix FM, did not require the Judge to reach the overall conclusion set out at paragraph 22 of the decision.
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> 3. It is arguable that the Judge has set out an insufficient analysis at paragraph 23 of the decision in concluding that the same conclusion is reached as that of the Entry Clearance Officer. The Judge states that the Entry Clearance Officer's conclusions had not been undermined by the Sponsor evidentially on the day of the hearing.
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> 4. It is arguable that the Judge has set out an insufficient analysis as to why, if at all, the evidence given by the Sponsor together with any corroborative documentary evidence did not enable the burden of proof to be discharged, in contradistinction to the approach of considering whether the Entry Clearance Officer's conclusions had been undermined. The Judge has drawn the conclusion that the Appellant had therefore not discharged the burden of proof from the immediately prior stated proposition that the Entry Clearance Officer's conclusions had not been undermined by the Sponsor evidentially. The Judge has referred to the Appellant therefore not discharging the burden of proof to show that he could comply fully with the relevant Immigration Rules applicable for entry into the United Kingdom.
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> 5. It is unclear whether the Judge was adhering to the strict requirements as to the evidence to be provided in the context of the financial requirements, as opposed to making credibility findings as to the evidence given by the Sponsor in considering whether the burden of proof had been discharged."

10. At the hearing before me Mr Nwadi accepted that in any event the appellant had been caught by the provisions of Section 85 of the 2002 Act – he stated that the initial application had not been considered by his firm. He said, however, that I should adopt the credibility findings of the judge in that the judge had stated that she accepted that the appellant met the financial requirements when the application was made. He argued that the judge had contradicted herself because she had stated that she required payslips and other documentary evidence, when in fact she accepted that the sponsor had met the relevant requirements. He adopted the reasoning set out in the grant of permission. Mr Tufan referred to the decision in **SS (Congo) [2015] EWCA Civ 387** at paragraph 51. In that paragraph the Court of Appeal had said that:-

> "In our judgment, the approach to Article 8 in the light of the Rules in Appendix FM-SE should be the same as in respect of the substantive LTE and LTR Rules in Appendix FM. In other words, the same general position applies, that compelling circumstances would have to apply to justify a grant of LTE or LTR where the evidence Rules are not complied with."

11. He went on to refer to the judgment in **MM (Lebanon) & Ors [2017] UKSC 10** stating that although that judgment in part overturned the decision in **SS (Congo)** it did not overturn the requirement for the qualifications of the Rules to be met – the reason that the decision of the Court of Appeal was in part quashed in that case was that there had been insufficient argument to overturn the conclusion of the court that the sponsor could not return to the DRC with the appellant.

Discussion

12. The reality appears to be that the appellant in this case could not meet the financial requirements of the Rules insofar as to meet those requirements specified documents were required and those had not been produced to the Entry Clearance Officer before the decision, nor indeed had they been put before the Immigration Judge. The fact that the judge accepted that the income requirement was likely to have been met when the application was made does not mean that she was contradicting herself when she found that the specified evidence had not been produced. She was therefore entitled to dismiss the appeal under the Rules.

13. Although it does not appear to have been argued before the judge in the First-tier that the appeal should have been allowed on human rights grounds, that was clearly an underlying issue in the decision of Judge Hollingworth to grant permission, and indeed was an issue that was addressed by the representatives before me. However, I find there is no breach of the Article 8 rights of the appellant. I have quoted above the relevant paragraph of the Court of Appeal in **SS (Congo)**. The reality is that there are no compelling circumstances which would lead to a grant of leave to enter. I reach that conclusion because I see no reason why the applicant should not make a fresh application with all the relevant documentation, and indeed I see no reason why such an application should not be successful. This is not a **Chikwamba**

situation in that there appears to be no reason why the sponsor could not live with the appellant in St Lucia, but be that as it may, it is clear that the judge accepted that it was likely that the financial requirements would be met and there has been no indication that it was not accepted that this was a genuine marriage. I see therefore no reason why the applicant should not be successful in a further application and I would comment that it is unfortunate that this matter went to appeal rather than a fresh application being made when the reasons for the refusal were considered. I would add that while I consider that the decision of the judge was fully open to her and that her application of the law was correct I would hope that the ECO might speedily deal with an application containing all necessary evidence and, if possible, consider the waiving of the fee for a fresh application.

14. For the above reasons I therefore find that there is no material error of law in the determination of the judge in the First-tier and I find that her decision should stand.

Notice of Decision

This appeal is dismissed.

Signed Date 31 October 2017

Deputy Upper Tribunal Judge McGeachy

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed Date 31 October 2017

Deputy Upper Tribunal Judge McGeachy