Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/06066/2013

THE IMMIGRATION ACTS

Heard at : Field House
On : 5 March 2014

Determination Promulgated
On : 12 March 2014

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

ENTRY CLEARANCE OFFICER

Appellant

and

AZIZ CHEKLAT

Respondent

Representation:

For the Appellant: Ms J Isherwood, Senior Home Office Presenting Officer
For the Respondent: Mr W Rees, Counsel

DETERMINATION AND REASONS

1. This is an appeal by the Entry Clearance Officer (ECO). However, for the purposes of this decision, I shall refer to the ECO as the respondent and Mr Cheklat as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

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2. The appellant is a citizen of Algeria, born on 23 May 1980. He applied for entry clearance as a partner under Appendix FM of the immigration rules, in order to settle in the United Kingdom with his wife.

3. The appellant's application was refused on 4 February 2013 under paragraph E-ECP.2.6 & 2.10 on the grounds that it was not accepted that the relationship was genuine and subsisting and that the parties intended to live together permanently; and with respect to the rules relating to the financial requirements of Appendix FM, under paragraphs EC-P.1.1(d) and E-ECP.3.1 of Appendix FM. The former ground for refusal under EC-P.1.1(d) was subsequently conceded on review by the Entry Clearance Manager. With regard to paragraphs EC-P.1.1(d) and E-ECP.3.1, the respondent noted that the appellant was relying on income from his wife's employment to confirm her gross income of at least £18,600 per annum as required under the rules. However the evidence did not show that her income reached the required amount.

4. In reviewing the decision relating to the financial requirements, following the appellant's claim in his grounds of appeal that the sponsor had a gross income of £19,000 per annum, the Entry Clearance Manager (ECM) considered that the evidence produced showed that the sponsor had earned £11,647 for the financial year 2012 up until 23 November 2012. The appellant had provided only payslips with no further evidence to show that the financial threshold had been met. The ECM noted that the sponsor had suggested in a letter supporting the appeal that if she had submitted a further six months worth of payslips she would have demonstrated that she had met the threshold. However, having considered the payslips accompanying the application the ECM was not satisfied that that was the case as a calculation of the mean average weekly gross payment multiplied by 52 provided an annual salary of £17,593. In any event it was noted that only 24 payslips had been submitted for a period of 34 weeks from 6 April 2012 to 23 November 2012 which indicated that either a salary was not received every week or the pay may have been lower in some weeks. The ECM noted a letter from Café Med stating that the sponsor's salary was £19,000 per annum but that employment started in January 2013, after the date of the application, and was not accompanied by any further evidence. The ECM therefore maintained the decision to refuse the application.

5. The appellant's appeal against that decision was heard in the First-tier Tribunal on 28 November 2013 by First-tier Tribunal Judge Devittie. The judge noted that the sponsor accepted that at times she did not receive a payslip from her employer but confirmed that she did receive a salary on each occasion. She produced bank statements as evidence of that. The judge was satisfied from the bank statements that the sponsor had received 52 weeks of pay amounting to a gross salary of, at the very least, £17,593 and was satisfied that the figure calculated by the ECM was the correct one. He was satisfied that he was entitled to take the bank statements into account. With regard to the shortfall, the judge was satisfied that that was met by evidence showing that in settlement of legal proceedings taken by the sponsor against her employer she had received £2000 in unpaid wages. He accepted that if that award was taken into account and added to the £17,593 the sponsor's annual gross income exceeded the required financial threshold. With regard to evidence of the sponsor's current employment, the judge accepted that that was post-

decision evidence but considered it relevant to the extent that it demonstrated her earning capacity. He accordingly allowed the appeal under the immigration rules.

6. Permission to appeal against that decision was sought by the respondent on the grounds that the judge had had no regard to the rules on specified evidence and that at the date of the appellant's application the sponsor's income did not meet the specified evidence rules on income threshold.

7. Permission was granted on 28 January 2014 on the grounds raised.

Appeal hearing

8. In response to my enquiry, Mr Rees confirmed that there had been no evidence of the £2000 settlement before the Entry Clearance Officer or the Entry Clearance Manager. The appellant's difficulty was that the sponsor had been employed by a rogue employer who had not provided her with a contract of employment or continuous payslips. The sponsor had taken her employer to the Employment Tribunal because she was summarily dismissed as a result of her pregnancy but her employer had settled before the case got to the tribunal. She had been dismissed a day after the appellant's application. The evidence of that was before the First-tier Tribunal and was not challenged by the respondent. Mr Rees provided me with documentation from ACAS relating to the legal proceedings.

9. Ms Isherwood submitted that the appellant was unable to meet the requirements of the immigration rules. Article 8 had never been raised as a ground of appeal before the First-tier Tribunal or to the Upper Tribunal. The appeal was allowed on the basis of the £2000 award but the ECO and ECM were not aware of that. The sponsor had accepted that she had failed to provide the specified documents. The ECM had tried to assist by calculating a gross annual income on the evidence provided, even though the specified documents had not been produced, but had concluded that the income was insufficient. The £2000 was not foreseeable at the date of the decision as the sponsor may not have succeeded in the proceedings.

10. Mr Rees, in response submitted that the ECO had not contacted the appellant as required under Appendix FM-SE D(b). The sponsor had a cast-iron case before the Employment Tribunal and would have received her remaining salary. The £2000 related to her period of employment and was relevant. She could have clarified the shortfall with the ECO had she been asked. Appendix FM-SE did not cover the sponsor's circumstances. Section D(e) gave the ECO discretion not to apply the requirement for the specified documents and the judge was entitled to exercise that discretion. There was ample evidence of a gross income above £18,000 even without taking the £2000 into account.

11. In response to my enquiries, Mr Rees confirmed that there was no evidence of payments of tax by the sponsor.

12. In response, Ms Isherwood submitted that the judge accepted, from his own calculations, that the evidence of gross annual income was insufficient and allowed the appeal only by accepting the evidence of the £2000. He erred by doing so.

13. I enquired of the parties whether there was further evidence to be submitted in the event of the decision being set aside. It did not appear that there was. Mr Rees confirmed that the appeal had been presented on the basis of the immigration rules and Article 8 had not been raised.

Consideration and findings.

14. I do not accept Mr Rees' submission that the judge was satisfied that there was evidence of adequate gross annual income without taking account of the £2000 award. It is clear that the existence of the £2000 award was the only basis upon which he allowed the appeal, having quite clearly found, at paragraphs 4 and 5 of his determination, that he agreed with and accepted the figure reached by the ECM for the sponsor's income following a calculation based upon the limited evidence available, namely the 24 payslips, and upon his own calculations from the sponsor's bank statements. There has been no challenge to the judge's findings in those paragraphs or to his calculations from the bank statements. It is plain, therefore, that even without considering the requirements for specified evidence, the appellant had failed to show that the sponsor's gross annual income at the time of his application reached the financial threshold of £18,000. That was the judge's finding and in that he did not err in law.

15. Where the judge plainly did err in law, however, is in accepting the evidence of the £2000 award as demonstrating that the sponsor's gross annual income met the required threshold. Aside from the requirements of the rules relating to specified evidence, that evidence was simply not before the ECO or the ECM and indeed was not even in existence at the date of the decision. The document from ACAS providing details of the settlement confirm the date of settlement as being 2 April 2013, which post-dated the refusal of entry clearance by some two months. Furthermore, whilst Mr Rees submitted that the £2000 award related to unpaid salary, there is no evidence that that was the case. It was his submission that the sponsor had instigated legal proceedings against her employer for unfair dismissal as a result of being summarily dismissed owing to her pregnancy. Accordingly it is not apparent, and certainly not from the evidence available, that the award of £2000 represented unpaid salary. It is submitted on behalf of the sponsor that her employer was a rogue employer, but that was not a finding made by the judge or confirmed by any evidence other than the fact that a dispute was resolved by way of settlement.

16. It was Mr Rees' submission that section D(d) of Appendix FM-SE was applicable in that the ECO ought to have contacted the sponsor in the light of the limited evidence. However I do not consider that that assists the appellant's case given that the missing payslips had not been omitted by an oversight but did not exist. In any event the ECM clearly went on to consider the application outside the requirements of the specified evidence and made his own calculation from the available documents, reaching a figure

for gross annual income which was accepted by the judge on the basis of his own calculations from the sponsor's bank statements.

17. Neither do I find any merit in Mr Rees' submission as to the exercise of discretion under section D(e). Such a submission is clearly not relevant to the issue of error of law, as it was not the basis upon which the judge allowed the appeal. In any event, it is clear that the sponsor had no further documentation at all to confirm her claim of an annual salary of above £18,000 and the evidence confirming the deposits of her salary into her bank account were calculated by the judge as being below the required financial threshold. I find no merit in the suggestion that the sponsor could have explained the impending legal proceedings to the ECO had she been contacted. She did not mention that in her grounds of appeal and in any event, as Ms Isherwood submitted, there was no certainty that she would have been successful in her claim.

18. In all of the circumstances I find that the judge materially erred in law by taking into account, in calculating the sponsor's annual income, the £2000 award. His comment at paragraph 6 of his determination about her earning capacity demonstrated by her current employment is clearly not relevant to the respondent's decision. On the evidence properly accepted by the judge at paragraphs 4 and 5 of his determination it is clear that the appellant could not meet the requirements of the rules. Accordingly I set aside his decision to allow the appeal under the immigration rules.

19. I see no reason why the decision ought not to be re-made on the evidence before me by dismissing the appeal on the basis of the reasons already set out above. There was no indication before me of any further evidence to assist the appellant. All the financial evidence was available before the First-tier Tribunal and, as already stated, the judge properly found that it demonstrated that the sponsor's annual income fell short of the required level, irrespective of considerations of the appellant's inability to meet the requirements of specified evidence under Appendix FM-SE. Accordingly, the respondent's decision to refuse the application under paragraphs EC-P.1.1(d) and E-ECP.3.1 was in accordance with the law and the immigration rules and the appeal is dismissed under the immigration rules.

20. With regard to Article 8, it is the case, as Ms Isherwood submitted, that Article 8 has never been raised either before the First-tier Tribunal or the Upper Tribunal. Indeed, Mr Rees confirmed that the appeal was pursued solely under the immigration rules. I note that the ECM's observation, that the appellant and sponsor were living together at a time when he had no permission to be in the United Kingdom, is confirmed in the sponsor's own letter. Accordingly, in terms of the principles in Nagre, Gulshan and Shahzad, there are no arguably good grounds for considering Article 8 outside the rules. It is open to the appellant to make a fresh application with the benefit of the evidence of the sponsor's current employment.

DECISION

21. The making of the decision of the First-tier Tribunal involved an error on a point of law. The Entry Clearance Officer's appeal is accordingly allowed and the decision of the First-tier Tribunal is set aside. I re-make the decision by dismissing Mr Cheklat's appeal on all grounds.

Signed Date
Upper Tribunal Judge Kebede