



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

Appeal Number: OA/15312/2013

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 2 December 2014**

**Determination Promulgated  
On 15 December 2014**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE G A BLACK**

**Between**

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

Appellant

**and**

**MRS ASMA FERDOUS  
(ANONYMITY DIRECTION NOT MADE)**

Claimant

**Representation:**

For the Secretary of State: Mr L Tarlow (Senior Home Office Presenting Officer)

For the Claimant: Mr A Choudhury (legal representative)

**DECISION AND REASONS**

1. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal (Judge Traynor) promulgated on 3 September 2014 in which it allowed the Claimant's appeal against a decision by the Entry Clearance Officer in Dhaka to refuse entry clearance as the spouse of a person present and settled in the UK.

## **Background**

2. The Claimant whose date of birth is 13 February 1991 and she is a citizen of Bangladesh.
3. The Secretary of State raised concerns as to the evidence of the sponsor's finances. It was considered that the sponsor failed to submit bank statements for and corresponding to the period of employment and cash deposits shown in the bank statements did not match the income shown on the pay slips. With the grounds of appeal the Claimant produced correspondence from HMRC showing his earnings for the financial year ending April 2013 that amounted to £14,965. It was the claimant's case that he was employed as a head chef at the Urmi Balti House Takeaway where his salary was £18,980, that he was in full-time employment and paid in cash on a weekly basis. He submitted bank statements for the relevant six months period.
4. The Tribunal determined the appeal having regard to the date of decision as the relevant date [29&33]. It accepted the sponsor's evidence as credible. It calculated the sponsor's income on the basis that he was earning a gross income of £365 per week. It accepted the evidence of the HMRC document showing a gross income up to 5 April 2013 of £14,965. The Tribunal calculated that from 5 April up to the date of application the sponsor would have earned an additional ten weeks' income from his employment which correlated to an additional £3,650 from June 2012 to June 2013. It calculated that the sponsor's gross income for the year June 2012 to 2013 amounted to £18,615. The appeal was allowed on immigration grounds.

## **Grounds of Application**

5. The Secretary of State relied on the Rules of specified evidence set out in Appendix FM and Appendix FM-SE to the Immigration Rules.

**Ground 1** - The Tribunal erred by failing to have regard to the requirements for specified evidence. The claimant could not meet the requirements for the six month period prior to the date of application, which are mandatory requirements.

**Ground 2** - The Tribunal took into account post-application evidence and relied on the date of decision rather than date of application to find the income threshold was exceeded.

**Ground 3** - Appendix FM provides in terms of salaried employment, that the following evidence must be produced:

- (a) wage slips covering a period of six months prior to the date of application and personal bank statements corresponding to the same period as the wage slips as paragraph 2(a) showing that the salary has been paid into an account in the name of the person or their partner jointly.....

The Tribunal erred by taking into account evidence of cash paid to the claimant that was not paid into his bank account and should only have taken into account the actual amount paid into the account as earnings which was substantially less. The sponsor's actual gross income at the date of application is unclear and therefore the appeal should not have been allowed.

### **Permission**

6. Permission to appeal was granted by First-tier Tribunal Judge Simpson on 28 October 2014.

7. Judge Simpson stated:

“Only PBS applications are determined as at the date of application: overseas applications such as this are always determined as at the date of decision, i.e. June 2013. However, given that the sponsor was paid in cash at the material time and did not deposit his wages into his bank account in their entirety each week, it is arguable that the appellant was not able to meet the evidential requirements of Appendix FM-SE in relation to the submission of corroborating bank statements”.

### **The Hearing**

#### **Submissions**

8. Mr Tarlow relied on the grounds in support of the application. He was provided with copies of the Immigration Directorate Instructions dated November 2014 and those Instructions applicable prior to November 2014.

14. Mr Tarlow submitted that the Claimant was required to meet the Rules and not the Immigration Directorate Instructions. Paragraph FM-SE detailed what evidence is required to establish income and that it is sustainable. The Tribunal should only have taken into account actual income paid into the account as earnings and not the cash that was not paid into the account. He relied on all the grounds.

15. Mr Choudhury produced copies of the Immigration Directorate Instructions applicable pre and post November 2014. He submitted that it was the “old” instructions that applied and he referred to pages 7 and 16 of the same. He submitted that at the time of the application the Claimant provided the required specified evidence including six months' pay slips, bank statements, a contract of employment and a letter from his employers, as evidenced by the letter from Equity Law dated 5 February 2013. The main issue was the Claimant's income and how that was calculated by the Tribunal. He submitted that the Secretary of State must have relied on the new IDIs which, if applicable, the Claimant's appeal fails. Mr Choudhury submitted that the current Rules came into effect at the end of 2014 and

did not apply to this application. He submitted that the date of application or date of decision was not material as the sponsor's income satisfied the Rules whichever date.

16. Specifically, the new IDIs at paragraph 3.1.4 states: *"where the gross (pre-tax) amount of any income cannot be properly evidenced, the net (post-tax) amount will be counted, including towards a gross income requirement"*.

17. Paragraph 3.1.5 states:

*"Under paragraph 1(n) of Appendix FM-SE the gross amount of any cash income may be counted where the person's specified bank statements show the net amount which relates to the gross amount shown on their pay slips (or in the relevant specified evidence provided in addition to the specified bank statements in relation to non-employment income). Otherwise, only the net amount shown on the specified bank statements may be counted"*.

18. The old guidance at paragraph 5.5.2 headed Specified Evidence provides:

*"In respect of salaried employment, all of the following must be submitted:*

- *P60 (if this has been issued) and wage slips for the six month period prior to the application, or as appropriate, for the twelve month period prior to the application.*
- *Letter from the employer confirming the person's employment and annual salary, the length of their employment (and the period over which they have been or were paid the level of salary relied upon in the application), and the type of employment (permanent fixed term contract or agency).*
- *A signed contract of employment.*
- *Bank statements corresponding to the same period as the wage slips, showing that the salary has been paid into the person's account"*.

19. Paragraph 5 headed "Meeting the financial requirements" provides: *"where the gross (pre-tax) amount of any income cannot be properly evidenced, the net (post-tax) amount will be counted towards the gross requirement"*.

20. Mr Choudhury submitted that the letter from the employer enclosing the P60 demonstrated an income of £14,965, which tallied with the HMRC letter dated 1 July 2013. This was evidence relevant as at the date of decision and which corroborated the appellant's claimed income.

21. Mr Tarlow submitted that the postdecision evidence was not foreseeable and therefore not admissible. HMRC records are based on what the parties tell them. It could not be shown in evidence that the Claimant was earning the required amount some of which was and some was not shown in the bank statements.

22. At the end of the hearing I reserved my decision, which I now give with my reasons.

### **Discussion and Decision**

23. The main issue before me relates to the specified evidential requirements that ensure that a person's income is properly evidenced and will be sustainable. The first point to be made is that the application was made for entry clearance under Appendix FM of the Immigration Rules and therefore the relevant date in terms of evidence was the date of decision. Consequently, the Tribunal may consider only the circumstances appertaining as at the date of the decision. The date of decision was 18 June 2013 and the date of application was 5 February 2013.
24. With regard to the specified evidence, I am satisfied that the Claimant provided wage slips covering a period of six months prior to the date of application (he had been employed for at least six months), a letter from the employer who issued the wage slips confirming the details of his employment (gross salary, length of employment, type of employment) and personal bank statements corresponding to the same period as the wage slips at paragraph 2(a), showing that part of 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.
25. It is accepted that the sponsor did not deposit the full amount of his wages into his bank account each week and that was why his bank statements did not correlate with his wage slips. Mr Choudhury submitted that the IDIs applicable at the date the application was made ("the old IDIs"). The Tribunal made no reference to having considered any Immigration Directorate Instructions and whilst those may well have been applicable they did not appear to have been relied on at the First-tier Tribunal hearing. In any event I find that the Instructions have no bearing on the evidential requirements in the Rules to show the income. I am satisfied that the specified evidence requirements were not met because the bank statements did not show payment in all of the Sponsor's cash salary. The Rules seek to ensure that the evidence, namely the bank statements, cover the specific periods in the Immigration Rules for each of the sources of income relied upon.
27. The Tribunal conflated the financial requirements in the Rules and the date of decision. At [29] it considered that the issue was "whether the appellant's sponsor earned the minimum threshold of earnings from his employment at the time of the decision to refuse on 18 June 2013". The issue in fact was whether or not the Claimant met the requirements of the Rules including the income threshold as at the date of decision and that he met the requirements for specified evidence by reference to the period of six months prior to the date of application. It may well be that the Claimant does indeed meet the financial requirements of the Rules in terms of his annual income. However, the Tribunal erred by failing to take into account that the evidence produced did not establish that all of the cash deposits were paid into the bank account nor were the amounts evidenced in the bank statements. The Tribunal

should only have taken into account the cash income shown to be paid into the account which was insufficient to meet the threshold.

28. I find a material error of law in the decision and that the first ground of appeal is made out. The decision is set aside.
29. I now go on to remake the decision with reference to the evidence that was before the First-tier Tribunal. I substitute a decision that the appeal is dismissed under Immigration Rules. There was no correlation of the amount of earnings in the bank statements produced to show that the income threshold was met.

**Decision**

30. **There is a material error of law in the decision which is set aside.**
31. **The appeal under the Immigration Rules is dismissed.**

No anonymity direction made.

Signed

Dated 14.12.2014

Deputy Upper Tribunal Judge G A Black

**TO THE RESPONDENT**  
**FEE AWARD**

As I have dismissed the appeal there is no fee award to be paid.

Signed

Dated 14.12.2014

Deputy Upper Tribunal Judge G A Black