Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/11427/2018

THE IMMIGRATION ACTS

Heard at Manchester CJC	**Decision & Reasons Promulgated**
On 3rd April 2019	**On 29th April 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MRS MANZOOR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S A Salam (Solicitor)
For the Respondent: Mr A McVeety (Senior HOPO)

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Pickup, promulgated on 23 October 2018, following a hearing at Manchester on 9th October 2018. In the decision, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a citizen of Pakistan, was born on 2nd April 1938, and is a female. She appealed against the decision of the Respondent, Entry Clearance Officer, dated 20th April 2018, to refuse her application to come to the UK as the spouse of a Mr Mohammed Sabir, who is a British citizen resident in the UK.

The Appellant's Claim

3. The essence of the Appellant's claim, rests on her ability, under E-ECP.3.1. to 3.4. of Appendix FM, to demonstrate that she is exempt from the minimum income threshold requirement, on the basis that her sponsoring husband, is in receipt of Attendance Allowance. She wished to come and join her husband because this is a case whereby she had originally been in the UK with her husband, who she was now seeking to rejoin. She is 80 years of age and her husband is 82 years of age. He is seriously ill, bedridden, an amputee, and unable to attend the hearing. She had come to the UK as his spouse but lived for a short period of time, only to return back to Pakistan to care for her ill mother-in-law. She had made a few applications in recent years to come to the UK on a visit, but had been refused each time. She was now apprehensive because given her husband's illness and her fears for the length of time he was going to live, and wanted to care for him, and had applied for a spousal's entry clearance, which had been refused on financial grounds.

4. Although she claimed that she was exempt from the minimum income threshold requirement, given that the Sponsor was in receipt of Attendance Allowance, Appendix FM-SE specified that this must be proved by:-

   (a) official documentation from the DWP confirming the entitlement and the amount received, and

   (b) at least one personal bank statement from the twelve month period prior to the date of application showing payment of the amount of the benefit or allowance in the recipient's bank account.

   The judge held that whilst the DWP evidence had been produced, the NatWest Bank statements did not show the allowance paid into the Sponsor's bank account. This is because the amount was paid into his daughter's account.

5. The Appellant argues that there is evidence from the DWP of income relating to the Sponsor, being received into his daughter's account, and rental income from the Sponsor going directly into his son's account. His pension income has been accepted. The son and daughter are clear that the amounts that they are receiving are those of their father. They receive them because due to his mobility being restricted there are issues of his being able to easily receive these amounts.

The Judge's Findings

6. The judge held that the Appellant could not succeed because, although it was the case that, "In reality, very little of the essential factual evidence is in dispute"

(paragraph 14), the fact remained that the Sponsor's income was paid into the son's bank account (paragraph 15) and that the father's Attendance Allowance goes into his daughter's account (paragraph 16). Although this is an arrangement said to be agreed with the DWP, "there is no evidence to confirm that". The DWP letters in the bundle confirm only that the Sponsor is entitled to the Attendance Allowance; "nothing indicates to which account it is paid" (paragraph 16).

7. The judge went on to conclude that he could not accept the argument that Appendix FM-SE l(m) "can cover these unusual circumstances", where it was argued that paragraph l(m) of FM-SE is to the effect that, "(m) Cash income on which the correct tax has been paid may be counted as income under this Appendix, subject to the relevant evidential requirements of this Appendix" (see paragraph 11 of the skeleton argument before the First-tier Tribunal). The judge's reasoning here was that, as far as the Sponsor is concerned:-

> "he is not receiving a cash income and in any event, it still requires the cash to be deposited in an account in the person's name. Merely asserting some form of cash income is not sufficient" (paragraph 21).

Grounds of Application

8. The Grounds of Application state that the judge had erred in law in misconstruing the relevant statutory provisions. In relation to evidencing the financial requirements in Appendix FM-SE, the "general provisions" that were said to apply included l(m), which was to the effect that, "cash income on which the correct tax has been paid may be counted as income under this Appendix, subject to the relevant evidential requirements of this Appendix". It was argued that soon after the introduction of Appendix FM in 2012, changes were then made in paragraph l(m) inserted by HC 1739 on 21st March 2013, to include the words that "to confirm that cash income on which the correct tax has been paid may be counted as income".

9. Indeed, the new changes in paragraph 1, were inserted under the heading of "General Provisions" to apply all over the Rules. If income was received in some other account then the bank statement of such other account would be relevant evidence that could be properly taken into account. In the instant case, the earnings that were not accepted by the Respondent and then also by Judge Pickup, were better than cash payments because they were received in bank accounts of the Sponsor's son and the daughter respectively for rent of commercial property and for Attendance Allowance from the DWP. It was not correct that there were no DWP confirmations in this respect because the letter from the DWP (see pages 119 to 123 of the Appellant's bundle) clearly demonstrated that the Sponsor's income remained his income, even if it had not been received in his own bank account.

10. Finally, this was a case where there was a couple of 80 and 82 years of age, the Sponsor was on his death bed; the Appellant had previously lived with the Sponsor in the UK as a spouse; the Sponsor owned residential and commercial properties; the Sponsor had access to £52,483.00 in his savings, and annual earnings of £20,252.00;

the Sponsor had support from family members, and that there were exceptional circumstances.

11. Permission to appeal was granted by the First-tier Tribunal on 4th December 2018 on the basis that this was a case where the Appellant was seeking to rejoin a British citizen Sponsor who was aged 82, where both the parties were in poor health, and the unchallenged evidence was that the Sponsor presented with "significant morbidity which will deteriorate with age" (paragraph 18). Moreover, the Supreme Court had made it clear in **MM (Lebanon) [2017] UKSC 10**, that reference to other sources of income could fall for consideration to meet the minimum income rule. The genuine basis of the parties' marriage was not under challenge. Having accepted the husband's significant morbidity, it was not open to the judge to state that the circumstances of their living apart for many years was "one of their own making and choice" because this arguably disclosed "a poverty of understanding of the decisions that family members make over the course of their lives", but one which "with the advancement of age" and the "likely vulnerabilities increase", such that there could be "unjustifiably harsh consequences" in keeping them separate.

Submissions

12. At the hearing before me on 3rd April 2019, Mr Salam, relied upon the Grounds of Application. He submitted that he had taken the opportunity to discuss the appeal with Mr McVeety, the Senior Home Office Presenting Officer, and that he was in agreement that there was indeed an error of law in this decision by the judge, because he had failed to proceed on the basis that this was a case where the Sponsor was in receipt of Attendance Allowance, and therefore was exempt from the £18,600.00 threshold (see Appendix FM, Section E-ECP.3.3.(a)(iv)).

13. Second, and in any event, he was earning more than £20,000.00 from his rental income and the Attendance Allowance. The judge did not accept the rental income, but was wrong to not accept it, on the basis that it was going into the son and daughter's bank accounts respectively. The reason however, given for this was that the Sponsor was unwell and bedridden and needed his children to receive the money. The letter from the DWP demonstrated that the Sponsor was entitled to £83.10 as Attendance Allowance (and this appears at page 119 of the Appellant's bundle). The rental from the commercial property in the Sponsor's name (see pages 136 to 150), showed that he was earning £200.00 per week as rental income from a commercial property in Bolton.

14. When this was combined with the Attendance Allowance of £83.10 per week, he was receiving a total of £283.10 per week, which after payment of council tax of £21.80, meant that he was left with a balance of £261.30, which exceeded the required amount of £243.25, even if he was to be subject to the £18,600.00 financial threshold, which he was actually not to be subjected to. The judge was wrong to have taken the view that tax was not being paid on the cash income. It was being paid. In addition, the Sponsor had savings of £52,483.78, for which there had been a bank statement at page 111 of the Appellant's bundle.

15. For his part, Mr McVeety submitted that he could only agree, and that he would simply draw attention to the fact that **MM (Lebanon)** allowed for a less strict interpretation of the Rules when they were first drafted, and that the judge had erred in applying to restrict an approach.

Remaking the Decision

16. I have remade the decision on the basis of the findings of the original judge, the evidence before him, and the submissions that I have heard today. I am allowing this appeal for the reasons that have been put forward by Mr Salam, and agreed upon by Mr McVeety. There is no bar to the Sponsor's income being received by either his son or his daughter. This is a case where the Sponsor in fact has £52,482.78 in his bank account (see page 111 of the Appellant's bundle) and his income is £20,252.00 per annum from pension, Attendance Allowance and rent. His son and daughter have lived with the Sponsor in a large six bedroom house that is owned by the Sponsor. The Supreme Court in **MM (Lebanon)** drew attention to the fact that compelling and compassionate circumstances of the couple should be taken into account. Paragraph I(m) of Appendix FM-SE makes it clear that cash income is acceptable, and that receiving cash income in one's own bank account is not a mandatory requirement, and in this case there are perfectly supportable reasons for why this particular Sponsor is not receiving that income into his own account. There is indeed a letter from the DWP (pages 119 to 123 of the Appellant's bundle) that provides proof of the Sponsor's income. I also have a Halifax Bank statement from the Sponsor handed up to me, which is dated 11th January 2018, that confirms that the Sponsor had £52,483.78 in his own bank account. On any view, the Appellant has satisfied the burden of proof that is upon him. This appeal is accordingly allowed.

Notice of Decision

17. The decision of the First-tier Tribunal involved the making of an error on a point of law. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed.

18. No anonymity direction is made.

19. The Appellant's appeal is allowed.

Signed Date

Deputy Upper Tribunal Judge Juss 25th April 2019

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have made a fee award of any fee which has been paid or may be payable.

Signed Date: 25th April 2019

Deputy Upper Tribunal Judge Juss