



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/02301/2020**

THE IMMIGRATION ACTS

**Heard at Birmingham CJC
On the 26 July 2022**

**Decision & Reasons Promulgated
On the 22 August 2022**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

[K S]

(Anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No appearance.

For the Respondent: Mr McVeety, a Senior Home Office Presenting Officer.

DECISION AND REASONS

- 1.** The appellant appeals with permission a decision of First-tier Tribunal Judge Andrew ('the Judge') promulgated on 8 October 2020 in which the Judge dismissed her appeal against the Secretary of State's refusal of an application for leave to remain in the United Kingdom. The date of the respondents decision is 21 January 2020 and the appeal was on human rights grounds.
- 2.** The appeal before the Judge was listed for a face-to-face hearing. At [8 - 10] the Judge records procedural issues in the following terms:

8. The Appellant's husband applied to the Tribunal for an adjournment of the hearing before me on 1 October 2020. He indicated that the Appellant has recently suffered with some mental health difficulties and she has been in hospital for three weeks between July and August 2020 for treatment and assessments to be conducted. He went on to say the Appellant 'keeps on having lapses and is not in a good place at present'. He was of the view that the hearing should be postponed for some four to six weeks.
9. The application was refused by a Tribunal Support Worker as there was no medical evidence to confirm the Appellant's present condition and the contention that she was unfit to participate in her appeal.
10. On the morning of the hearing an email was received asking that the matter be dealt with on the papers. It had, of course, already been listed and I accordingly heard brief submissions from the Respondent's representative.
- 3.** The Judge records those submissions at [10 - 12] and clearly considered the evidence that had been made available with the required degree of anxious scrutiny before setting out findings of fact which are supported by adequate reasons.
- 4.** The finding of the Judge at [15] that the appellant could not meet the Immigration Status Requirement as her previous leave to remain expired on 6 August 2019 and she did not make a further application until 7 September 2019, some 32 days later, and therefore out of time, is a finding not infected by legal error.
- 5.** The Judge finds the appellant could not satisfy the Eligibility Financial Requirements for the reasons set out at [16 - 18] which are in the following terms:
 16. Further, I am unable to find, on the evidence before me, the Appellant meets the Eligibility Financial Requirement. The financial evidence that is before me is somewhat muddled. I have noted the document at page 38 of the Appellant's Bundle. The annotation against the Sponsors pay would suggest that this has now ceased. I have nothing before me to show that the Sponsor has obtained further employment. In any event I have nothing to show that the Sponsor was earning these sums at the date of application. The wage slips in the Appellant's Supplementary Bundle are from March 2018 until August 2018. I have nothing before me to show that the Sponsor has been employed since that date. In saying this I bear in mind that the date of application was 7 September 2019.
 17. So far as the Sponsor's self-employment is concerned it would appear from the document at page 38 of the Bundle, he made a profit of £2070.00. In the Appellant's Supplementary Bundle, she claims to have made a profit from her self-employment of £3287.00. There has also been counted into this a pension payment (which would appear to be a lump sum drawn from a pension) of £18,961.00. I do not know when this payment was made as the documentation from Sun Life does not show this. I can only make the assumption that it was paid on 6 August 2018 as there appears to be a credit there for £17,554.17 from Sun Life on that date. (See page 14 of the Appellant's Supplementary Bundle.) At page 17 of the Appellant's Supplementary Bundle there is a further payment in on 29 October 2018 which is annotated 'rest of pension'. That payment in is for £4239.59 making a total of £21,420.07 which, I accept, does not accord with the sum shown at page 38 of the Bundle. However, I can find no other payments. Of course, these payments were made prior to the date of application. I have nothing before me to show what has happened to those funds. I do not know if they have been invested and, if so, what income they produce. What does appear

to be clear is that this is not a recurring income of the Sponsor but a one-off payment.

18. Accordingly, and on the evidence that I have before me it would seem that the only income of the Appellant and the Sponsor amounts to their income from self-employment, which, in any event, is not properly evidenced in accordance with the Rules. Further, I have nothing before me to show what their present income is. Thus, I find that the financial requirements of the Rules cannot be met.
6. The appellant challenged this aspect of the decision claiming the evidence clearly showed that they met the financial eligibility requirements as at [17] the Judge had stated that all the monies added together showed that the appellant and his wife had £21,420.07 which is far in excess of what is required to meet the financial eligibility requirements of the Immigration Rules.
 7. Permission to appeal was refused by another judge the First-tier Tribunal but renewed to the Upper Tribunal. In relation to the financial issue the Grounds of Appeal read:
 1. The IJ erred in law in a number of ways. It is argued that the judge stated that all the monies added together shows that my husband and I have £21,420.07. It is argued that this is far more than what is required to meet the eligibility financial requirements. It is also argued that all the documents are sufficiently and properly arranged in the initial and supplementary bundle and that it is a shame that I and my husband were unable to attend in order to clarify this due to my medical condition. With regards to the funds referred to by the judge acknowledge this amount and a further amount annotated rest of pension which made up the total sum referred to. The judge noted what does appear to be clear that it is not a recurring income of my husband but a one-off payment. The judge erred on this matter as this is a recurring payment and, therefore, I do meet the requirements of the Rules in question.
 8. I shall comment on this issue further below.
 9. The Judge then went on to consider whether, notwithstanding the finding in relation to financial means, the appellant was able to succeed by reference to paragraph EX1 (b) of the Immigration Rules.
 10. The Judge accepts there was no dispute the appellant and sponsor are in a genuine subsisting relationship, that the appellant has been in the United Kingdom since 2014, and that during this time she has made friends and acquaintances and they ran a business, although there was nothing before the Judge to show that was still the case. The Judge also accepts the sponsor is a British citizen [19].
 11. The Judge noted that the appellant and sponsor claimed there were insurmountable obstacles and very significant difficulties in carrying on their family life in Thailand, which was said, in the main, to be because they care for the appellant's mother-in-law who suffers from agoraphobia and no other care could be provided for her. The Judge notes it was claimed that due to the mother-in-law's assets she would not be entitled to State funded care, but there was no evidence available to support this contention other than the assertions of the appellant and sponsor to show this lady was unable to leave the house and that they must care for her as a result. The Judge specifically notes at [20] "*they were well aware that evidence needed to provided as this was referred to at Case Management Review*".

12. At [21] Judge writes:

21. As it is the application shows that the Appellant's mother and two children live in Thailand. On the evidence that is before me I can find no insurmountable obstacles to the Appellant and the Sponsor carrying on family life there. I have no evidence before me to show that any medical or psychiatric difficulties the Appellant has cannot be treated in Thailand. The Appellant returned to Thailand in 2018 to see her family there. She will be well aware of the customs and traditions of that country and she will be in a position to assist the Sponsor in his relocation to that country. There would appear to be no credible reason why both could not find employment in Thailand. I have nothing before me to show that any health issues could not be attended to in that country.

13. The Judge's conclusion that on the evidence the appellant had not established that the provisions of paragraph EX could be met was also challenged in the initial application and the renewed application for permission to appeal. In relation to this matter the appellant's second ground reads:

2. It is also argued that there are insurmountable obstacles as my husband's mother suffers from agoraphobia and is afraid to leave the house and it makes it difficult to seek medical help and get evidence. It is also argued that the I and my husband have been living in the UK for six years and have established ourselves in the UK. The judge erred in that he/she did not take this into account at all.

14. From [24] the Judge considered the merits of appeal outside the Immigration Rules pursuant to article 8 ECHR. The Judge specifically took into account the length of time the appellant had been in the United Kingdom, her private life with friends, section 117 of the Nationality, Immigration Asylum Act 2002, the findings in relation to the Immigration Rules and lack of evidence of insurmountable obstacles, before concluding at [29] that there were no exceptional circumstances in the appellant's case that would result in unjustifiably harsh consequences for her and the sponsor or any other member of her family in the United Kingdom, leading to the appeal being dismissed.

15. The Upper Tribunal grant of permission, dated 10 February 2021, reads:

1. The appellant seeks permission to appeal, out of time, against the decision of First-tier Tribunal Judge Andrew promulgated on 8 October 2020. In view of the shortness of the delay as well as the appellant's personal circumstances which are set out in the following paragraph, time for appealing is extended.

2. The appeal proceeded as a face-to-face hearing in the absence of the underrepresented appellant who states in the grounds that she was unable to attend owing to her medical condition. At an earlier stage, the appellant's husband had sought an adjournment owing to the appellant's mental health issues. The grounds also states that had the appellant been able to attend she could have clarified the financial documents and that the judge made a mistake of fact in assessing the evidence of income. The appellant also prays in aid the difficulty in obtaining evidence as to the medical condition of her mother-in-law. It is arguable that the First-tier Tribunal erred in proceeding to hear the appeal in the circumstances.

Error of law finding

- 16.** The first point to note is that this is not an appeal in which an application to adjourn was made supported by adequate evidence which was unfairly refused. The Judge noted at [9] that the application was refused by a Tribunal Support Worker as there was no medical evidence to confirm the appellant's present condition and the contention that she was unfit to participate in her appeal. The Judge further notes at [10] a specific request being made for the appeal to be determined on the papers.
- 17.** No unfairness has been made out in the manner in which the Judge determined the appeal.
- 18.** The Secretary of State in a Rule 24 response dated 3 March 2021 opposes the appeal asserting the appellant suffered no prejudice in asking for the appeal to be considered on the papers and that the grounds have no merit.
- 19.** There is reference made by the Judge to a Case Management Review hearing which took place before First-tier Tribunal Judge O'Brien on 30 June 2020, at Birmingham, in which directions were given for the provision of additional evidence upon which the appellant was seeking to reply by 21 July 2020. The sponsor Mr Campling was present before Judge O'Brien.
- 20.** The Summary of the issues in the case recorded by Judge O'Brien are in the following terms:

Summary

1. Following the case management hearing which took place on 30 June 2020, the following was agreed between the parties:
 - (a) The appellant had applied for further leave to remain as the spouse of a British citizen, and had been refused because the application had been made out of time, because he did not meet the financial threshold, because she did not hold the requisite English language qualification, and because there were no insurmountable obstacles to family life continuing outside the United Kingdom.
 - (b) The appellant claimed compassionate reasons for failing to make the application in time (amongst other things, the death of her father-in-law), and also asserting that she did in fact meet the requirements of the Immigration Rules. Insofar as she relied on EX.1., or otherwise on compelling circumstances, the appellant relied on her mother-in-law's inability to leave the house in which they lived together because of agoraphobia, or otherwise to look after herself properly.
 - (c) The respondent now accepts that the appellant does hold the necessary English language qualification but otherwise does not accept that the Rules are met.
 - (d) The appellant has not yet provided any medical evidence of her mother-in-law's agoraphobia. The only other family member living nearby was a sister whose work took her all over the world. Attempts to get state funded assistance for the mother-in-law had been unsuccessful.
 - (e) The couple were insistent that together they earned well above the financial threshold, when taking into account their earnings from self-employment, Mr Campling's earnings from employment, and pension drawdowns. The evidence presently relied upon by the appellant was not particularly easy to follow in this regard.

- (f) Consequently, it was agreed that the appellant could have three weeks to file and serve any further evidence to be relied upon in respect of the financial requirement, her mother-in-law's situation and generally whether there were insurmountable obstacles to family life continuing outside United Kingdom.

- 21.** It was specifically noticed that the issues to be determined in the appeal were whether:
- The appellant satisfied the financial requirements of Appendix FM.
 - There are insurmountable obstacles to family life continuing outside the UK.
 - There are other exceptional circumstances rendering removal disproportionate (i.e. removal would cause unjustified hardship).
- 22.** What is clear is that prior to the hearing before the Judge the appellant and sponsor were fully aware of what was required of them in terms of providing necessary evidence and the issues to be determined. This is in addition to the points raised in the reasons for refusal letter in which was found that the appellant had not established that she met the required minimum income level of £8600 per annum.
- 23.** The Supreme Court in R(on the application of MM (Lebanon) and Others) v Secretary of State for the Home Department [2017] UKSC 10 held that the challenge to the acceptability in principle of the minimum income requirement failed. The minimum income requirement pursued the legitimate aim of ensuring so far as was practicable that a couple did not have recourse to welfare benefits and had sufficient resources to be able to play a full part in British life. That legitimate aim justified interference with Article 8 rights.
- 24.** The Judge clearly considered the evidence with the required degree of anxious scrutiny as noted above. The Sun Life of Canada plan, which provided the lump sum relied upon by the appellant, belonged to Mr Campling. It is described as a retirement annuity contract which started on 28 June 1988 with a selected retirement age of 28 July 2038. It is therefore not a policy for which payment is being made as the specified retirement age had been reached. The financial statement confirms that the current value of the plan, and its transfer value, was £18,273.05 on which there is a handwritten allocation indicating that the amount that could be drawn down at this stage is £21,420.07 which will be subject to tax and reference to a tax-free lump sum of 25%. The annotation correctly reflects the tax treatment of sums taken from pension funds pre-retirement.
- 25.** The Judge was correct to note an entry in the Santander bank account of the sponsor on 6 August showing a credit of £17,554.17. The Judge's observation regarding the lack of clarity in the evidence is well-founded. For example, in the appeal bundle page 148 is reference to the payment from Sun life referred to above which appears on bank statement 5 of 24. The balance at the end of that statement is a credit of £6,559.75. The following bank statement, described as page 6 of 24

shows a closing balance of £2,358.75 at page 149 of the bundle, yet the following page, page 150, is a bank statement with a closing balance of £50.02 described as page number 19 of 24 which eventually discloses a bank statement described as page 21 of 24 with a closing balance of £0. There was no evidence of regular payments of a similar sort from the pension fund which was clearly a drawdown of a capital lump sum.

26. Home Office guidance relating to financial eligibility criteria reads:

Sources for meeting the financial requirement

Where the applicant has to meet the minimum income requirement, the financial requirement can generally be met in the following 5 ways:

- income from salaried or non-salaried employment of the partner (and/or the applicant if they are in the UK with permission to work) - this is referred to as Category A or Category B, depending on the employment history
- non-employment income, for example, income from property rental or dividends from shares. This is referred to as Category C. of this guidance
- cash savings of the applicant's partner and/or the applicant, above £16,000, held by the partner and/or the applicant for at least 6 months and under their control - this is referred to as Category D
- state (UK or foreign), occupational or private pension of the applicant's partner and/or the applicant - this is referred to as Category E
- income from self-employment, and income as a director or employee of a specified limited company in the UK, of the partner (and/or the applicant if they are in the UK with permission to work) - this is referred to as Category F or Category G, depending on which financial year(s) is or are being relied upon

In exceptional circumstances in which refusal of the application could otherwise breach ECHR Article 8 and paragraph GEN.3.1. of Appendix FM applies, other credible and reliable sources of income, financial support or funds available to the couple may be taken into account under the minimum income requirement, under paragraph 21A of Appendix FM-SE.

Sources of income not permitted

Income from the following sources will not be counted towards the financial requirement:

- any subsidy or financial support from a third party (other than child maintenance or alimony payments, academic maintenance grants/stipends or gifts of cash savings that meet the requirements specified in paragraph 1(b) of Appendix FM-SE), except where paragraph GEN.3.1. of Appendix FM and paragraph 21A of Appendix FM-SE apply
- income from others who live in the same household (except any dependent child of the applicant who has turned 18 and continues to be counted towards the higher income threshold the applicant has to meet until they qualify for settlement)
- loans and credit facilities
- income-related benefits: Income Support, income-related Employment and Support Allowance, Pension Credit, Housing Benefit, Council Tax Benefit or Support (or any equivalent) and income-based Jobseeker's Allowance

- the following contributory benefits: contribution-based Jobseeker's Allowance, contribution-based Employment and Support Allowance and Incapacity Benefit
 - Child Benefit
 - Working Tax Credit
 - Child Tax Credit
 - Universal Credit
 - Unemployability Allowance, Allowance for a Lowered Standard of Occupation and Invalidity Allowance under the War Pensions Scheme
 - any other source of income not specified in Appendix FM-SE as counting towards the financial requirement.
- 27.** It is not sufficient for the appellant and/or sponsor to make assertions regarding their ability to satisfy the income requirements. They have to prove it. It appears that the income from employment and self-employed sources was not sufficient to meet the required minimum amounts. The lump sum drawdown from the pension may well have been intended to demonstrate that at that time there was in excess of the minimum amount available in the Santander bank account. The difficulty with this approach is that whilst it may have shown that at one particular short period of time such funds were available, the requirement is for the appellant and sponsor to show that they did will not have recourse to welfare benefits and sufficient resources to be able to play a full part in British life as noted by the Supreme Court. The funds received from Sun Life appear to have been quick dissipation, without explanation or further evidence. The Judge's finding the appellant could not meet the requirements in relation to financial ability were within the range of those reasonably available to the Judge on the evidence. It was not made out that the additional payments of the level reflected in the Santander account were sustainable or likely to be repeated.
- 28.** I find the finding of the Judge that the appellant had provided insufficient evidence to prove her ability to comply with the financial requirements of the immigration rules, is finding clearly within the range of those available to the Judge, and arguably the only permissible finding available in light of the state of the evidence and request for the matter to be dealt with on the papers.
- 29.** The Judge noted the claim in relation to the appellant's mother-in-law's condition, and this was an issue clearly highlighted at the Case Management Review hearing. In the reasons for refusal letter it was noted that the appellant had claimed that her mother-in-law was dependent upon her and the sponsor for support, but noted the lack of evidence to show that this would create insurmountable obstacles sufficient to make the decision disproportionate.
- 30.** There is still insufficient evidence, as was the case before the Judge, to prove the claim. Again, even though the appellant and sponsor claim they provide such support, insufficient evidence was provided to the Judge to prove that what they were saying is true.

- 31.** I find that in light of the evidence available the finding made by the Judge in relation to this issue was, arguably, the only finding the Judge was able to make. It has not been shown that that is a finding outside the range of those reasonably available to the Judge on the evidence.

Procedural issues before the Upper Tribunal.

- 32.** The Error of Law hearing before the Upper Tribunal sitting in Birmingham was set for 26 July 2022.
- 33.** On 5 July 2022 at 19:30 hours an email was received from Mr Campling stating the appellant, his wife, was currently inside the Wells Road Mental Health Centre as she was 'currently not herself' and requesting an extension of the hearing.
- 34.** The appellant was asked, on 12 July 2022, to provide any evidence from Wells Road confirming the appellant's condition and giving an opinion as to whether she was able to attend the hearing at Birmingham.
- 35.** On 13 July 2022 an email was received from the sponsor claiming to have Covid, to be unable to prepare anything, and asking for an extension. There was no medical evidence to support such a claim or to show, even if the sponsor had covid and was required to isolate, additional documentation could not have been provided. In light of the evidential history of this appeal it was also directed that evidence is required of any medical condition relied upon by anyone involved in the case seeking any action dependent upon the same.
- 36.** On 13 July 2022, later in the afternoon, another email was received from the sponsor stating that the appellant will be at the Leicester Crown Court on 25th and 26th of July and so will be unable to attend the hearing.
- 37.** The Upper Tribunal also received an email from the appellants assigned Social Worker at Wells Road Centre, described as a Low Secure Hospital in Nottingham, stating the appellant had been detained under Section 36 of the Mental Health Act 1983, but also confirming she has a two-day hearing at the Leicester Crown Court beginning on 25 July 2022.
- 38.** To obtain further information, a further request was sent to the sponsor, asking what the purpose of the hearing at the Leicester Crown Court was, why the appellant was required to attend, and what her role was in those proceedings. In his reply received later that afternoon the sponsor confirmed that it was for an alleged assault by the appellant and that the appellant had submitted a defence by her barrister.
- 39.** In light of the length of communication with the sponsor, of which the Secretary of State's representative was not aware, on 15 July 2022 it was directed that a copy of the emails be sent to the Senior Presenting Officer covering Birmingham, asking whether he was aware of the criminal proceedings concerning the appellant, and whether he had a view on the adjournment application.
- 40.** The Presenting Officer's reply, received on 15 July 2022, read:

Subject: RE: [K.S] 14/9/86 HU/02301/2020

Good morning,

In response to the emails from Mr Camping and Ms Miller,

1. I am aware the appellant was on remand at the time of the last hearings (23rd Nov 21, 18th Jan 22), however this appears to be in relation to possession of an 'air weapon' as opposed to assault as described in the email of Mr Campling.
2. In relation to the adjournment request, I note the error-of-law hearing has been adjourned twice (on the dates above). On reading Ms Aboni's note of the last hearing (18th Jan 22), it appears the sponsor was made aware of a number of options he had, such as arranging for a Litigation Friend who would then instruct representatives on the appellant's behalf. It is unclear whether any progress in this respect has been made in the 6 months since that hearing.

I oppose the adjournment request, inviting the Tribunal to consider whether the presence of the appellant herself is necessary considering the nature of an 'error of law' hearing, and the time the sponsor has had to make arrangements for legal representation since he was made aware of his options in January.

- 41.** The email from the Senior Presenting Officer contains reference to previous adjournments to which there had been no reference by the appellant or sponsor. It also appears that the issues have been considered and options proposed.
- 42.** As there had been no communication from the appellant specifically in line with that anticipated following the hearing on 18 January 2022 it was directed that a copy of Mr William's emails be sent to the sponsor asking what arrangements had been made for legal representation since January and why the appellant's attendance was required at the error of law hearing. It was indicated that attendance may be required if error of law is found, but that the hearing was not at that stage yet. That request for additional information was sent to the sponsor on 15 July 2022 at 13:55 hours and chased up by the Administration team at Field House on 21 July 2022 at 13:28 hours as a result of his failure to respond.
- 43.** There had been no response by 25 July 2022, the only further communication being an email from the Social Worker at 11:56 hours asking for an update following the hearing so the hospital is aware of the next steps for the appellant.
- 44.** The continued failure by the appellant or sponsor to engage with the proceedings and requests to ensure procedural fairness is an ongoing issue. Whilst I accept that as the appellant is concerned, as she faces difficulties and requires the support why her appointed Social Work, there was no indication that she would not be able to attend court (prior the notification of the criminal proceedings), nor any indication of any action being taken following the adjourned error of law hearing.
- 45.** The case proceeded on the 26 July 2022 as it not been established that the interests of justice or procedural fairness required the same to be adjourned; especially as this is one of those cases which, on the basis of the available evidence, there was only one finding available namely with that found by the Judge. No further evidence been

adduced to suggest otherwise. It was therefore not appropriate to adjourn again as the outcome would have been exactly the same.

46. The Social Worker in a more recent email posed the question of what may occur in the future. The notice accompanying this determination will set out onward rights of appeal if the second appeal criteria can be satisfied. What is not known is the outcome of the proceedings before the Leicester Crown Court for if the appellant is convicted and receives a custodial sentence of at least 12 months the Secretary State is likely to issue proceedings for her deportation from the United Kingdom. That is, however, not a matter of which this tribunal need be concerned at this stage.

47. In terms of removal following this decision, the Secretary of State is required to issue removal directions which will be served upon the appellant. Whether she has any grounds for challenging the same will have to be assessed at the relevant time. The sponsor will not be subject to removal directions as he is a British citizen, but it has been found that he can be reasonably expected to return with the appellant to enable them to continue their family life together in Thailand. Until removal directions are served the appellant remains in limbo - unless she has any basis for making an application for leave on any other ground, which I cannot comment upon at this stage as there is no evidence to support the same.

Decision

48. There is no material error of law in the Immigration Judge’s decision. The determination shall stand.

Anonymity.

49. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008. No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

Signed.....
Upper Tribunal Judge Hanson

Dated 27 July 2022