Upper Tribunal
(Immigration and Asylum Chamber) HU/19919/2019

THE IMMIGRATION ACTS

Heard by "*Microsoft Teams*" from George House on 11 August 2021

Determination and reasons promulgated on 08 September 2021

Before

UT JUDGE MACLEMAN

Between

SARASWATI DAWADI

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

For the Appellant: no legal representative; sponsor attending
For the Respondent: Ms Cunha, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Nepal, born on 13 October 1994. The "sponsor" is Daniel John Colgan, a UK citizen. They married in a cultural ceremony on 12 December 2018 and in civil form on 1 February 2019, in Kathmandu. On 24 September 2019 the appellant applied for entry clearance, based on their relationship.

2. The respondent refused her application on 7 November 2019. The appellant had to show the sponsor's earnings up to the financial threshold of £18,600. He had income

from employment of £14,520.72. The balance of income required was £4079.28. It was said that he had self-employed income to make up the balance, but the documents were found not to meet the requirements specified in the rules. Outside the rules, the ECO found no exceptional circumstances, resulting in unduly harsh consequences, to justify a grant of leave (the formula in paragraph EX.1 of appendix FM of the rules).

3. In grounds of appeal to the FtT, the sponsor says that after submitting the visa application further information was asked for, and he supplied firstly an accountant's letter, and secondly unaudited accounts; and that the ECO's decision is mistaken, because his employed income was shown to be £14839.46, not £14520.72, and so the requirement was met.

4. FtT Judge Landes dismissed the appellant's appeal by a decision promulgated on 26 January 2021.

5. The case came before the judge initially as "a case management review hearing to consider costs". From [5] – [29] of her decision she dealt with difficulties which had arisen over procedure, documents not produced and directions not complied with by the respondent, and penalised the respondent in costs. At that stage, the sponsor said he was "happy to proceed" with a video hearing of the substantiative case.

6. The judge at [50] found that in terms of the rules the evidence showed income from the sponsor's employment of £14,520.72 and not £14,893.47 as shown on his payslip. I was not taken at the hearing before me to the underlying evidence, which was incompletely produced by the respondent; but the point appears to be either that as some payment was made in cash, there was not complete congruity with payments into a bank account, or that one payslip was missing, see also [49]. The rules on specified evidence require there to be no missing documents in a series, and for payments into the bank and payslips to match perfectly.

7. The judge at [52-53] found the evidence to show self-employed income of £3840.00, and a total in terms of evidential requirements of "£18,360.72 … not quite … £18,600".

8. The judge therefore turned at [54-55] turned to paragraph EX.1, but that test was not met. From [56] she considered proportionality "more widely", and at [57] found earnings for the period on which the ECO's decision was based to be just over the threshold. However, as this was a human rights appeal, she turned to circumstances as they then stood, and having "no details" of the sponsor's income, was not satisfied that the £18,600 requirement was met. Weighing up various factors up to [61], the appeal was dismissed.

9. The appellant (whose case has been conducted through the sponsor, without legal representation, since the application was made) asked the FtT for permission to appeal to the UT. FtT Judge Osborne refused permission on 10 March 2021, on the view that the sponsor had agreed to the appeal proceeding, and that if financial

circumstances had changed, that should be the subject of a new application to the ECO, with evidence in the form required.

10. The appellant sought permission from the UT, stating these grounds:

> FtT ignored that the Home Office lost or deleted the evidence used to make the original decision … I was asked to provide evidence on current finances … not relating to the 2019 decision.
>
> I was not granted flexibility to show I still met the minimum income as I said I lost my main [salaried] income due to Covid 19.
>
> I was told I had no choice but to move to Nepal if I wanted to be with my wife full-time. Ignoring the great difficulty and poverty we would be forced into as I provide for both of us.
>
> This whole thing began as an application for human rights access. Please someone see the evidence from the start. All met the criteria and at no point [has there] been a reasonable or lawful reason to deny settlement.

11. UT Judge Sheridan granted permission on 20 April 2021:

> It is arguable that the judge erred by treating the threshold in appendix FM as the test whether the public interest in financial independence – section 117B(3) – weighed against the appellant when the relevant question was whether the appellant would be financially dependent on the state, not whether the sponsor's income [met] … the requirements under appendix FM; see *Rhuppiah* [2018] UKSC 58 …
>
> A further arguable error arises from failure to adjourn … Given that the hearing was originally listed as a case management review and that the appellant was not represented, it was arguably procedurally unfair to proceed … once it became apparent that evidence not before her about the sponsor's income would be material …

12. Mr Colgan took part in the hearing by telephone only, as computer difficulties prevented him from establishing a video link. He did so patiently and courteously. Allowing for lack of legal representation, I asked him a number of questions, to which he gave clear answers. Having also heard the submissions of Ms Cunha, and from Mr Colgan in reply, I reserved my decision.

13. The FtT did not doubt the credibility of Mr Colgan as a witness (apart from declining to find that his income was as claimed, in absence of "details"). Ms Cunha did not suggest that he was in any respect not credible.

14. Information taken from Mr Colgan goes both to setting aside and to remaking the decision. I found no reason to doubt his evidence. I found it straightforward, credible, and reliable.

15. Mr Colgan said that when he agreed to the hearing proceeding, he expected the decision to be based on his earnings up to the date of application. That had been the focus of the case and the cause of delay up to that point. He and his wife had not sought delay, which was due to the FtT and the respondent. They were keen to have the case resolved. It was not his fault, and he found it difficult to comprehend, that the respondent could not produce documents which should have been preserved in digital form. He had not understood that his wife might be expected to prove his

income again, by the standards of specified documents, for the period up to the date of the hearing. If he had been asked to supply further details, he could have done so.

16. Ms Cunha said that the appellant, through the sponsor, had not asked for an adjournment; the sponsor, who had conducted the application and appeal competently, must have been aware that the relevant period shifted, and that he was being asked at the hearing not about the prior but about the more recent period; even after the hearing, no further evidence was tendered; an adjournment would not have helped; and the judge could not have done any more.

17. Procedural fairness is a highly contextual issue. Bearing in mind how this case had developed, what the appellant and the sponsor might be expected to make of that, and the nature of the hearing fixed, it is not surprising that the sponsor thought the case was about his income as evidenced in the application. I think it took the appellant unfairly by surprise that the judge founded on the absence of evidence (other than the sponsor's oral evidence) to show income over the period up to the date of the hearing. That requires the decision to be set aside.

18. The alternatives are to fix a fresh hearing (in the FtT or in the UT) or to substitute a fresh decision, based on all evidence available to date. The presumption is in favour of the latter, so I look firstly at what is yielded by the evidence as it stands.

19. Mr Colgan said that his income for the period up to the original application and up to the present has always been over the minimum threshold. The pandemic led to a decline in wages but he more than made up for that through self-employment as a gardening contractor. Such documentary evidence as there is, although not up-to-date, tends to confirm what he says. As explained above, I found him a satisfactory witness.

20. I find that, more likely than not, the minimum financial requirement specified in the rules was met when the application was made, and has been met continuously until the date of the hearing before me.

21. Mr Colgan said that his wife is able and willing to work in the UK, he has never claimed benefits, and there is no risk of them falling back on benefits. I see no reason not to accept that.

22. The appellant (implicitly, and as suggested in the grant of permission) relies on the generality in section 117B(3) of part 5A of the 2002 Act that it is in the public interest for entrants to the UK to be financially independent, and not a burden on taxpayers.

23. I find that, more likely than not, the appellant would be financially independent and would not be a burden on public funds.

24. That is not conclusive in the appellant's favour. The rules remain the starting point in the article 8 balancing exercise. The evidential requirements are deliberately specific, going far beyond the generality of part 5A of the 2002 Act, as part of public policy and of the scheme of immigration control.

25. The evidential requirements were not quite satisfied at the time of the ECO's decision; and despite my findings above, those technical requirements are not satisfied for any period since.

26. It is well established in case law that a near miss in terms of the rules is usually of little help in the case outside the rules.

27. In terms of paragraph EX.1, it is readily understandable why the appellant and the sponsor prefer to carry on their family life in the UK, but there is no evidence reaching the high tests of "very significant difficulties … which could not be overcome or would entail very serious hardship".

28. Rather than the sponsor moving to live in Nepal, the more likely result of a negative outcome in these proceedings is that the appellant would try to show compliance with the rules, including evidential requirements, in a fresh application. Such an application would have to be decided on its own merits, but, on my findings, looks to have good prospects of success. If someone can succeed by complying with the rules, it would often be proportionate to expect her to do so.

29. Notwithstanding those general observations on near misses, the need to apply the rules, and the alternative of a fresh application, it goes into the balance that the original failure of the application was by a tiny margin and was only technical. The broad public interest considerations in part 5A of the 2002 Act tend towards the balance being struck in favour of the appellant and the sponsor. While they might have opted for another course, they have been subject to delay in procedure, obscurity of issues, and loss of documentation, through the fault of the respondent, in course of the appeal, and they have been unable to pursue their family life in the UK for almost two years. On those facts, and at this time, I find that the rights to family life of the appellant and sponsor outweigh the public interest in requiring strict compliance with the rules.

30. The decision of the FtT is set aside. The decision substituted is that the appeal, as first brought to the FtT, is allowed.

31. No anonymity direction has been requested or made.

Hugh Macleman

12 August 2021
UT Judge Macleman

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as

follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email.