Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/11801/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12 January 2021	**On 2 March 2021**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

MALVINA GJERGJI
(anonymity direction not made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr T Wilding, Counsel instructed by Kilby Jones Solicitors
For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by a female citizen of Albania against the decision of the First-tier Tribunal dismissing her appeal against the decision of the respondent, by an Entry Clearance Officer, on 17 June 2019 refusing her entry clearance as the wife of a person present and settled in the United Kingdom.

2. Her husband is a British citizen. It is accepted that theirs is a genuine marriage. The difficulty in the case is that the appellant was not able to satisfy the respondent that her husband had the necessary means to ensure her financial independence. Her main difficulty with the case is that the appellant's husband could not produce the required documentation.

3. In his skeleton argument produced for the hearing Mr Wilding accepts that the appellant could not meet the requirements of the Rules. He contended there were two reasons for this. The appellant could not produce a "statement of account" issued by HMRC because HMRC no longer issued such documents and the requirement in the Rules was otiose. The second difficulty is that the appellant's husband's documentation did not support in the prescribed way his claim to be paid certain sums. In summary and for the purposes of introduction it was the appellant's case that the bank statements as a whole show such clear evidence of sufficient means that the appeal ought to be allowed on human rights grounds.

4. I begin by considering carefully the First-tier Tribunal Judge's decision and reasons.

5. The judge set out, correctly, the history of the appeal and the personal circumstances of the appellant so far as they are relevant and identified the issues raised by the Entry Clearance Officer and also the documentary evidence produced before him. There are appropriate self-directions in law. For the purposes of this appeal the important parts of the decision and reasons begin at paragraph 28 under the heading "Discussion and Findings".

6. The judge said that it was the appellant's case that the sponsor's declared income for the tax year ending 5 April 2018 comprised of three elements. These were: £9,600 in respect of his employment as a salaried director of ARG, £8,666 in respect of dividends paid because he is a shareholder in ARG and £20,754 in respect of his self-employed income.

7. The required minimum income from a supporting partner at this time was £18,600.

8. It appears therefore at first blush as though the appeal ought to have been allowed. However, the First-tier Tribunal Judge looked carefully at the evidence in support of these claimed sums.

9. The claim to receive an income of £9,600 as a salaried director was uncontroversial.

10. The claim to have received a dividend payment of £8,666 was problematic. The First-tier Tribunal Judge was not satisfied that the sum of £8,666.67 was paid as a dividend to the sponsor. The judge said at paragraph 58 that he accepted that there were unaudited accounts from ARG showing a profit of £26,000 which was divided into thirds of £8,666.67 and that sum would be paid to each of the three partners who had established ARG. However, as the judge also noticed, the unaudited accounts for the tax year ending 2019 showed dividends of £50,000 but no evidence was provided to show that anybody had been paid any of the money. The judge noted that he could find nothing in the sponsor's bank statements relating to dividends being paid other than a reference to a dividend payment of £5,000 made on 26 March 2018. The balance of £3,666.67 (£8666.67 one third share of £26,000 less £5,000 shown in the statement) was attributed to authorised cash withdrawals but the cash withdrawals could not be traced into the bank account.

11. The judge's reference to the tax year ending 2019 and the lack of evidence about tax being paid is criticised but I am satisfied that the First-tier Tribunal Judge, far from considering irrelevant material, was looking for evidence that might make more sense of the accounts and was not able to find it.

12. The point is that there was a fundamental mismatch between what the judge expected to be in the bank statements because of what was said to be due in the accounts and what he could find.

13. The judge found at paragraph 56 that the sponsor's evidence about cash withdrawals was contradictory and the judge was:

> "left with the impression that he did not really know what withdrawals he had made. Furthermore I was not directed to any payment from ARG's accounts that was said to relate to the dividend payments to the other directors of ARG during this tax year."

14. This is not a finding that the sponsor was dishonest but that he was unreliable because he was inaccurate. This is not surprising if, as appeared to be the Sponsor's evidence, he was taking cash out of the business in a somewhat cavalier way.

15. Neither was the judge impressed with the evidence of receipt of £20,754 in respect of self-employed income.

16. Certainly the appellant's partner produced an accountant's report on the unaudited accounts of "Roberts Rental Properties" showing that, in the tax year ending 5 April 2018, a profit was allocated between the three people engaged in the joint enterprise including the sponsor. The allocated income was £20,754. There is a degree of sloppiness in the accounting here. The appellant was described as one of three "partners" but there is later correspondence indicating that the joint venture was not a partnership but a trading arrangement which produced profit to the benefit of the appellant and, presumably, the other investors although their involvement is not important to these proceedings.

17. The judge described the inappropriate use of the word partnership as "sloppy" and did not regard it as telling evidence of the reliability of the accounts. However, the judge was concerned at an inconsistency in the evidence about the distribution of the profit from the join venture. There was a joint venture agreement produced at the hearing on the second hearing day which referred to the current sponsor contributing one third of the capital to set up Robert's Rentings. However, notwithstanding that he contributed a third the entitlement from the profits was said to be 25.72%. There was absolutely no reason why those involved could not have agreed almost any percentage but it is curious that a percentage less than 33% would be made available to somebody who was said to have come up with a third of the set up investment. The judge said that this "does raise a question mark about the reliability of the information provided about the Sponsor's role in RR". The judge noted that there was a transfer from the bank account of RR to the sponsor in the sum of £10,000 during the tax year ending April 2018 but that is clearly rather less, in fact less than half of the required sum. The judge described this as failing to provide the required evidence. This is an imperfect phase because there was no particular evidence was "required" before him but the judge did conclude, with regret, that he did not find the evidence "sufficiently clear to enable me to conclude that the financial requirements of Appendix FM would be met in any event."

18. It is quite plain from the Decision and Reasons that the judge was not saying that the appellant or, more realistically, the appellant's sponsor was dishonest. The judge did not say that the appellant's sponsor was not earning enough money to support her. The judge's finding was that the financial situation was too unclear to be satisfied.

19. The judge noted that there was no evidence to show that expecting the appellant to wait while a better presented and further application was made would cause enduring harm to the appellant's relationship with her partner and there was no persuasive reason advanced to show that the sponsor could not return to Albania and indeed live with the

appellant there if that is what he chose to do. The judge did not suggest that this was a realistic alternative but it was possible.

20. In the last paragraph the judge decided that the evidence had not persuaded him that the appellant had shown that the circumstances exist that "make requiring her to reapply unduly harsh or even unreasonable". The judge decided it followed that a disproportionate interference in private and family life had not been established and dismissed the appeal.

21. In considering the appellant's case I rely heavily on Mr Wilding's skeleton argument. I have not ignored the oral submissions. I dictated this decision the day after the hearing and they are very much in my mind but I see nothing there that adds in any significant way to the written material before me. This is not to criticise anybody. It is for the good reason that the written material was done well.

22. Ground 1 complains there is a material error of fact and misinterpretation of the Immigration Rules. The criticism is that the judge bothered himself with evidence about tax being paid and this was not a requirement of the Rules. With respect this misses the point. It is common ground that the appellant could not satisfy the Rules. The reference to problems with tax not being paid are not reasons to say the appellant did not meet the requirements of the Rules but reasons to say that the judge has not been given a complete picture of the appellant's financial circumstances. That is all that the judge meant and it was plainly a conclusion that was open to him. The judge explained in painstaking care why he found the evidence of the declared income unsatisfactory and the fact that he was looking for income and evidence of taxes has not altered this finding in any way. Rather I see it as indicative the judge who, correctly, was looking at the evidence as a whole. Certainly he was not constrained by the requirements of the Rules when they could not be met and is illustrative of why the evidence as a whole was unsatisfactory.

23. Ground 2 complains there is a misapplication of the Rules and Article 8(2). There is criticism that the judge found that the appellant had not served a form SA302 and advances as the reason for this that they no longer exist. I have seen no evidence directly on that point. I would have preferred it if there had been evidence although I accept Mr Wilding's oral submission that the evidence they had been able to produce is silent on the point supporting his contention that they are no longer available. If that were the sole reasons for dismissing the appeal then I would have been concerned. It is not. The problem was not the SA302 or lack of it but the "ends not tying up" in the way I have already indicated.

24. It is not particularly important that the judge did not say that the evidence about the earnings was wrong. I do not agree with Counsel that the judge did not say that the evidence was unreliable. It is quite clear that it was not persuasive for the reasons that have been given. I disagree fundamentally and respectfully with Mr Wilding's submissions on the evidence. I read the decision differently.

25. It said in Ground 3 that the judge had accepted that the appellant's sponsor earned at least £24,600 and that was more than sufficient to read the Rules. That is a potentially good point. I have not been able to find anything that shows that the judge did accept that was the income. The ground is premised on the judge accepting the "undisputed gross annual income of £24,600". This is clearly the aggregate of the salary as a director of ARG

Building Services Limited in the sum of £9,600 and transfers into the business account of Robert Rentals of £10,000 and a bank transfer from ARG Building Services Limited bank account of £5,000. The judge did not agree that these were sums paid as indicated. The judge was looking for the claimed income which was larger than the sums indicated and found payments of the sums indicated. There is no basis for saying that the £10,000 was paid as an income from the business even if it came from the business account. The claimed sum was much more and it could not be traced. The judge was not satisfied with the evidence as a whole and that is the point that the grounds have missed. It does not follow that a person who claims an income of say £20,000 and proves a transfer of £10,000 has had an income of £10,000. It leaves unexplained why the much higher sum was claimed. Yes the money was transferred but the unreliability of evidence as a whole means the judge was entitled not to consider that as proved income, which is what the judge did.

26. Ground 3 again is built on the same premise which for the reasons given I reject.

27. The judge had not lost sight of the fact that this was an Article 8 claim, which is why he was looking for potential harm arising from further delay to see how that impacted on the balancing exercise.

28. It is perfectly plain from reading the decision as a whole that the judge was not satisfied that the sponsor was dishonest but was satisfied that his affairs were so muddled and improbable that the evidence about income was unreliable. That was a permissible decision and illuminated the Article 8 balancing exercise. No-one is suggesting that this is a case that ought to be allowed on human rights grounds if the appellant cannot be supported at least to the extent required by the Rules and the conclusion by the judge that the sponsor had not established the income was permissible. It follows that I dismiss the appeal. The First-tier Tribunal had not erred in law.

Notice of Decision

29. This appeal is dismissed.

Jonathan Perkins

Signed
Jonathan Perkins
Judge of the Upper Tribunal

Dated 23 February 2021