IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-001066
First-tier Tribunal No: HU/54313/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 13 June 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE LEWIS

Between

JENIFFER KERR
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: In person
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

Heard at Field House on 2 June 2023

DECISION AND REASONS

1. This is an appeal against a decision of First Tier Tribunal Judge Seelhoff promulgated on 29 September 2022 dismissing an appeal against a decision of the Respondent dated 14 July 2021 on human rights grounds.

2. The Appellant is a citizen of the Philippines born on 20 February 1979.

3. On 20 February 2014 the Appellant was married to Mr Glen Kerr, a British citizen born on 1 January 1959 ('the Sponsor'). Thereafter the marital relationship was maintained by the Sponsor regularly visiting the Appellant in the Philippines.

4. On 10 March 2020 the Appellant was issued with a multi-entry visit visa for the UK, and entered on 16 March 2021 - just before the first national Covid lockdown. During the time in the UK she became pregnant. She was due to leave on 17 August 2020 but cancelled this because she felt unwell; on 20 August 2020 she miscarried. On 10 September 2020 the Appellant applied for leave to remain as a spouse.

5. The application was refused for reasons set out in a 'reasons for refusal' letter ('RFRL') dated 14 July 2021. Although the Respondent accepted the fact of the marital relationship, the application was refused on the basis that the Appellant was present in the UK as a visitor and not entitled to 'switch' status to partner or spouse; consideration was also given to paragraph EX.1 of Appendix FM of the Immigration Rules but it was concluded that there were no insurmountable obstacles to family life continuing in the Philippines; similarly the application was refused on private life grounds with reference to paragraph 276ADE(1) of the Rules.

6. The Appellant appealed to the IAC.

7. On appeal the Appellant argued that relevant Covid policies permitted persons to switch in circumstances where they could not leave due to Covid restrictions, and that accordingly her application should not have been refused by reference to her 'visitor' status.

8. Upon review the Respondent did not accept the interpretation of the Covid policy, but in any event noted that the financial requirements of the Rules were not met – which would be a necessary requirement in circumstances where paragraph EX.1 did not apply.

9. Evidence filed in the appeal on behalf of the Appellant included assertions in respect of, and documentary supporting evidence concerning, Mr Kerr's financial circumstances.

10. The IAC is an expert Tribunal. It is clear that the First-tier Tribunal Judge brought his experience and expertise to bear on the issue of the scope of the Covid policy relied upon by the Appellant in respect of switching: e.g. see paragraphs 10, 25, and 26. The Judge concluded:

> "*I am satisfied that at the time the Appellant made her application there was a lockdown restriction in effect and that the policy would have enabled her to switch status notwithstanding the fact that her visa category does not normally allow that to happen. I am aware that it was common for the Home Office to allow persons in the UK on visitor visas to switch into the partner route on the basis of this policy. It appears that there may have been confusion over this as a result of the delay in the Respondent resolving the application meaning that the policy no longer existed in the same format*" (paragraph 26).

11. However, the Judge went on to comment that "*the policy makes clear, applicants were still required to meet all the other requirements of their visas*" (paragraph 27). The Judge noted that the inability to meet the financial requirements had been acknowledged in the application.

12. In this context I note the 'Finance' section of the application form, in which the financial requirement threshold was stated to have been calculated at £18,600, and in response to the question 'Will you be able to prove that the financial requirement is met?' the response "*No*" was given: (Respondent's bundle before the First-tier Tribunal at A11). See further the accompanying 'Additional notes and further information to visa application' (Respondent's bundle Annex B) at paragraph 5, in particular 5a - "*We have answered no to this question because on the surface, we are not able to show that we are in a position to do so*".

13. In such circumstances the Judge was critical of the assertions made on appeal to the effect that the financial requirements were met (paragraph 27). (I pause to note that before me the Sponsor sought to distance himself from such assertions, acknowledging that both his and the Appellant's witness statements before the First-tier Tribunal did not adequately reflect what was in his mind.) The Judge went on to make further criticisms of the presentation of the documentary evidence in his analysis of the Sponsor's financial circumstances (paragraphs 28-30).

14. In particular, having rehearsed the evidential requirements of Appendix FM-SE of the Immigration Rules, the Judge: observed "*Not a single one of the documents required under appendix FM-SE for self-employment income has been provided*"; noted "*There is no route under Appendix FM-SE whereby an income requirement can be met without an applicant or their sponsor producing personal bank statements. I do not have a single personal bank statement for the Appellant or the Sponsor*"; further noted "*the only financial documents that have been provided cover the years 2021 and 2022*", commenting "*They entirely fall outside the time periods I would be required to consider under appendix FM-SE)*". Such matters plainly informed the Judge's view "*There appears to have been no attempt on the part of the Appellant's representatives to consider the requirements of either Appendix FM or Appendix FM-SE in detail*" (paragraph 28); see similarly "*It appears on the papers that the representatives have not considered the relevant rules at all*" (paragraph 30).

15. The Judge's conclusions in respect of the financial issues in the appeal were these:

> "*…on the oral account given to me by the Sponsor and on the basis of the information given in the original application form I am satisfied even if they had provided the specified evidence, the financial requirement would not have been met on the basis of the period*

> *preceding the application which is what I am required to consider and accordingly I am satisfied that the financial requirement would not be met. I am also not satisfied that sufficient evidence has been provided to evidence the Sponsor's claimed current income.*" (paragraph 30)

16. In circumstances where the Judge found that the financial requirements of the Rules were not satisfied, he went on to consider and reject in turn the case with reference to paragraph EX.1 of the Immigration Rules (paragraphs 31-33) and Article 8 of the ECHR (paragraphs 34-36). The appeal was dismissed accordingly.

17. The Appellant applied for permission to appeal to the Upper Tribunal. In the first instance this was refused on 22 February 2023 by a decision of First-tier Tribunal Judge Pickering. However, upon renewal, permission to appeal was granted by Upper Tribunal Judge Kebede on 18 April 2023.

18. The reasons for the grant of permission to appeal succinctly state the issue before me:

> "*Arguably the Judge only considered the Covid-19 policy relevant to immigration status and failed to consider the Covid-19 financial concession and thus arguably erred by concluding that the requirements of the immigration rules were not met on financial eligibility grounds.*"

Hearing before the Upper Tribunal

19. Although the Appellant had been represented before the First-tier Tribunal, she appeared before me unrepresented. She was accompanied by her husband, the Sponsor. In the absence of formal representation, and given that the issues in the appeal now focused upon the financial circumstances of the Sponsor, and with no objection being raised by Ms Isherwood, I allowed both the Appellant and the Sponsor to address me in the course of the hearing.

20. No Rule 24 response has been filed by the Respondent. Ms Isherwood informed me that the appeal was resisted: she accepted that it was not apparent that the First-tier Tribunal Judge had considered the Covid financial concession, but argued that consideration of the concession would not have availed the Appellant because she could not have met those financial requirements that persisted notwithstanding the concession.

21. During the course of submissions the Appellant sought to raise wider matters in respect of Article 8, but I restricted her in this regard on the

basis that I was required only to consider the Grounds of Appeal together with the basis of the permission to appeal.

22. For completeness I note that after the hearing I became aware of a written submission - with the heading 'Chronology, History and Skeleton Argument' – that had been sent by the Sponsor by email the day before the hearing. I confirm that there is nothing therein that materially alters the conclusion that I indicated that I had reached at the end of the hearing.

Analysis

23. The Appellant relies upon a 'Coronavirus (Covid-19) concession' policy under which, amongst other things, the financial requirements of the Immigration Rules were relaxed. Evidence of this policy was before the First-tier Tribunal by way of a print out from the gov.uk website headed 'Coronavirus (Covid 19): advice for UK visa applicants and temporary UK residents' (see Appellant's bundle before the First-tier Tribunal at pages 5-8, and in particular at page 8 under the sub-heading 'Changes to the minimum income and adequate maintenance requirement'). Further evidence of this policy has been appended to the Grounds of Appeal to the Upper Tribunal in the form of an extract from guidance published for the Respondent's staff on 7 December 2021.

24. Whilst it is plain that the Judge was aware of the concession in respect of 'switching' categories, such that the Appellant was able to apply for leave to remain as a spouse notwithstanding her status as a visitor, there is – as acknowledged by Ms Isherwood – nothing in the Decision that gives any indication that the Judge was alert to, or otherwise considered, the financial concession under the Covid policy.

25. In this context, given that the financial concession is being relied upon, it is a curious feature that, notwithstanding that the issue of finances appears to have been the more significant focus of the hearing once the Judge indicated his position in respect of the 'status' concession, the Appellant's representatives did not seemingly articulate any submission based upon the financial concession.

26. The approach taken at the hearing is manifest from paragraph 11 to 13:

> "*11. I indicated that the financial requirements of the Rules did not appear to be met and asked the representative to clarify how it was that she said that it was met given assertions to that effect in the statements and the skeleton argument. The representative took time to take instructions and said that the sponsor had been self-employed*

in November 2018 and had other income from church and as an author. It was asserted that the sponsor's income was above £20,000 as of the hearing.

12. I noted that the documents before me seemed to be unclear and only related to a period after the date of application. I noted that the case of Begum required me to consider the position prior to the date of application in accordance with the provision in Appendix FM-SE.

13. The representative asked if they could provide evidence after the hearing and I said I was not going to formally grant permission to do that albeit the tribunal might be obliged to consider any evidence served before the matter was determined. I note that as of my promulgating this decision [9 days after the hearing] no further evidence had been uploaded on behalf of the Appellant."

27. It is plain from the policy that the Respondent intended to make allowance for persons whose income had been impacted by the pandemic, and who would otherwise have met any relevant financial threshold.

28. The first national lockdown was announced on 23 March 2020. The policy covers temporary loss of income between 1 March 2020 and 31 October 2021. Any loss of employment income between those dates is to be disregarded provided the minimum income requirement was met for at least 6 months immediately prior to the date the income was lost; similarly a temporary loss of annual income will generally be disregarded for self-employment income.

29. However, the difficulty for the Appellant is that on the basis of the analysis of the First-tier Tribunal Judge it is clear that she could not have availed herself of the policy.

30. In the premises, the Appellant did not claim in her application to be able to satisfy the financial requirements of the Immigration Rules (i.e. without any applicable concession). In the note accompanying the application the Sponsor stated that he had been in full-time employment until November 2018, but then started his own accountancy practice which "*is in its infancy but growing*". (The note suggests he attached his first year financial statement: however, it is not possible to identify this document in any of the bundles on file. Before me it seems that the Sponsor was in some small confusion as to whether or not he did submit such a document, and the period that might have been covered; be that as it may he did not think that the net profit was any more than £5000.) The application form also indicates occasional income from book sales and charitable donations.

31. Evidence filed in the appeal included a tax return for the year 1/12/2021 to 30/11/2022 showing a profit for the business of £16,599; business accounts indicate a profit for the previous year of £5091 (139). Neither figure covers the period up to lockdown. Nor do the bank statements in the Appellant's bundle cover the relevant period.

32. Paragraphs 28–30 of the Decision show the state of the evidence was wholly inadequate, such that even if the Judge had had regard to the Covid financial policy concession there quite simply was not relevant evidence before him upon which he could have reached a favourable conclusion that the Sponsor was suffering a temporary loss of annual income between 1 March 2020 and 31 October 2021 due to the pandemic, and otherwise his earnings had been, or would have been, compliant with the financial requirement under Appendix FM.

33. In my judgement the First-tier Tribunal Judge's identification of the following requirement is of particular note: "*The Appellant's husband was described as being self-employed. Where an individual relies on self employment income their income is to be calculated on the basis of paragraph 13 (e) of appendix FM-SE. that would mean that it were to be calculated on the basis of the last completed financial year prior to the date of application namely that ending April 2020*" (paragraph 28). The end of the tax year 2019/2020 on 5 April 2020 would have been less than two weeks after the imposition of lockdown. It follows that a tax return up to this date would not have been significantly impacted by any loss of income because of the pandemic.

34. Moreover, the Judge was clear that even disregarding the failure to comply with the evidential requirements of Appendix FM-SE, the testimony of the Sponsor was not sufficient to show that the financial requirement could be met. Whilst this observation is vulnerable to the criticism that the Judge may have reached this conclusion without taking into account the concession, as noted above the impact of lockdown would have been minimal on the financial year to 5 April 2020. In any event, in addressing me the Sponsor was frank in his acknowledgement that his earnings would not have been adequate even making allowance under the concession – and indeed acknowledged that he had perhaps not hitherto understood the terms of the concession.

35. In all such circumstances I agree with Ms Isherwood's submission that the omission of any reference to the financial concession on the part of the First-tier Tribunal Judge was ultimately immaterial.

36. The grant of permission to appeal was limited to this single issue. (This is the issue that is raised in Ground 1 of the Grounds of Appeal. Grounds 3 and 4 are essentially contingent on Ground 1. Ground 2 – which pleads that the Judge applied a burden of proof of 'beyond reasonable doubt' – is wholly without foundation or merit.)

37. For completeness I note that the Grounds of Appeal to the Upper Tribunal in substance assert that the Respondent *did* apply its Covid financial policy in favour of the Appellant. This assertion is based on the fact that the financial requirements were not raised in the RFRL. The RFRL is actually wholly silent on the financial requirements: the decision-maker was satisfied in respect of suitability, but having noted - wrongly in light of the Covid status policy – that the Appellant did not meet the status requirements of the Rules, moved on to consider paragraph EX.1. I do not accept that it could be inferred that the Covid financial policy had been applied favourably to the Appellant; this is underscored by the fact that the policy in respect of status was not applied. In any event it is clear from the Respondent's review before the First-tier Tribunal that the financial requirements were in issue – and indeed the Appellant made assertions and filed evidence on this premise. Yet further, as noted above, the Judge made it absolutely clear that there was an issue in respect of finances and afforded time during the hearing day for such an issue to be considered, and also indicated that any evidence sent after the hearing would be considered if it arrived prior to promulgation – which in the event was 9 days after the hearing.

38. The Sponsor was essentially candid before me in acknowledging that his income prior to lockdown would not have been adequate for the purposes of the Rules. It seems adequately clear to me that the intention of the policy concession is only to avail those who would meet the requirements of the Rules but for the impact on their income of the pandemic. The Appellant was not such a person.

Notice of Decision

39. The decision of the First-tier Tribunal contained no material errors of law and stands accordingly.

40. The Appellant's appeal remains dismissed.

Ian Lewis

Deputy Judge of the Upper Tribunal
(Immigration and Asylum Chamber)

4 June 2023