Neutral Citation Number: [2020] EWCA Civ 191

Case No: C9/2019/0605

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)
UTJ Hanson
IA/24865/2015

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 February 2020

Before :

THE SENIOR PRESIDENT OF TRIBUNALS
LORD JUSTICE PETER JACKSON
and
LORD JUSTICE SINGH

- -

RONNIE LATAYAN — **Appellant**

-and-

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT — **Respondent**

- -

Greg Ó Ceallaigh (instructed by **Lawmatic Solicitors**) for the **Appellant**
Julia Smyth (instructed by **Government Legal Department**) for the **Respondent**

Hearing date: 13 February 2020

- -

Approved Judgment

Lord Justice Peter Jackson:

Introduction

1. This appeal raises two questions:

   (1) Whether as a matter of law the child of a person who is in a relationship with an EU citizen (which is not a marriage or a civil partnership) is a direct descendant of the citizen within the meaning of the Regulations that give effect to the Citizens Directive – a question of law.

   (2) Whether, if the Appellant is not a direct descendant but an extended family member, she was before arriving in the UK a dependant of the EU citizen within the meaning of the Regulations – a question of fact.

   The First-tier Tribunal decided both questions adversely to the Appellant and the Upper Tribunal upheld its conclusions. For the reasons given below, I consider that both decisions were clearly correct on the first issue and that on the second issue, the FTT reached a decision that was open to it and that the UT was right so to hold.

The facts

2. The Appellant is 46 years old. She was born in the Philippines and is a national of that country. In 1986 her parents divorced. In 1990 her mother came to the UK and has since become a British citizen. In about 1998 she (the mother) began to live with Mr E, an Irish national, now aged 77, who is resident in England.

3. The Appellant is the youngest of her parents' five children. Her father died in 1995. She claimed to have been financially dependent on Mr E (who she describes as her stepfather) between 1998 and the time she came to the UK. Her case, supported by evidence from her mother and Mr E, was that Mr E would give her mother money to send to her in the Philippines "at least once every quarter". She provided proof of five remittances sent between 1996 and 2004, in the total sum of some £560.

4. The Appellant entered the UK in March 2004, aged 24, on a visitor's visa, since when she has lived with her mother and Mr E. In September 2004 she applied to extend her visa to work as a domestic worker, but in 2006 her application for further leave was refused. She made several subsequent applications for leave which were also refused.

5. This appeal arises from her application for an EEA residence card made on 1 February 2015, which was refused by the Secretary of State's decision dated 24 June 2015. The Appellant was treated as a potential extended family member of Mr E but her application was refused on the basis that she had not shown dependency upon him, either prior to entering the UK or since.

6. The Appellant appealed. By its determination dated 8 April 2016, the FTT (Judge Moan) dismissed her appeal, holding that she was not a direct descendant of Mr E, and finding that she had not established her dependency upon him before entering the UK, although it was accepted that she had been a member of his household thereafter.

7. The Appellant appealed and, after a complex procedural history that I need not chart, her appeal was heard by Judge Hanson who dismissed it on 22 October 2018. He held that the Appellant could not succeed because a *de facto* stepchild of an EU citizen was not a direct descendant, and because the findings of the FTT on dependency had not been shown to be irrational or ones that were not reasonably available on the evidence. Permission to bring a second appeal was granted by McCombe LJ on 5 August 2019.

The Directive and the Regulations

8. The regulations relevant to this case are the Immigration (European Economic Area) Regulations 2006. They have been replaced by the Immigration (European Economic Area) Regulations 2016, which are not materially different in relation to this issue. Regulations 7 and 8 are in point. They respectively give effect to Articles 2 and 3 of the Citizens' Directive (2004/38/EC).

9. The Appellant's case is that she falls within Regulation 7(1)(b)(ii).

> "7.— **Family member**
>
> (1) Subject to paragraph (2), for the purposes of these Regulations the following persons shall be treated as the family members of another person—
>
> (a) his spouse or his civil partner;
>
> (b) direct descendants of his, his spouse or his civil partner who are—
>
> (i) under 21; or
>
> (ii) dependants of his, his spouse or his civil partner;
>
> (c) dependent direct relatives in his ascending line or that of his spouse or his civil partner;
>
> (d) a person who is to be treated as the family member of that other person under paragraph (3)…"

10. The Appellant's alternative case is that she falls within Regulation 8(2)(c).

> "8.— **"Extended family member"**
>
> (1) In these Regulations *"extended family member"* means a person who is not a family member of an EEA national under regulation 7(1)(a), (b) or (c) and who satisfies the conditions in paragraph (2), (3), (4) or (5).
>
> (2) A person satisfies the condition in this paragraph if the person is a relative of an EEA national, his spouse or his civil partner and—

> (a) the person is residing in [a country other than the United Kingdom] and is dependent upon the EEA national or is a member of his household;
>
> (b) the person satisfied the condition in paragraph (a) and is accompanying the EEA national to the United Kingdom or wishes to join him there; or
>
> (c) the person satisfied the condition in paragraph (a), has joined the EEA national in the United Kingdom and continues to be dependent upon him or to be a member of his household…"

11. As noted, the Regulations mirror Articles 2 and 3 of the Directive:

> "**Article 2**
>
> Definitions
>
> For the purposes of this Directive:
>
> 1. 'Union citizen' means any person having the nationality of a Member State;
>
> 2. 'family member' means:
>
> (a) the spouse;
>
> (b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;
>
> (c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);
>
> (d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);
>
> 3. 'host Member State' means the Member State to which a Union citizen moves in order to exercise his/her right of free movement and residence."
>
> A**rticle 3**
>
> Beneficiaries
>
> 1. This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a

> national, and to their family members as defined in point 2 of Article 2 who accompany or join them.
>
> 2. Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:
>
> (a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;
>
> (b) the partner with whom the Union citizen has a durable relationship, duly attested.
>
> The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people."

12. Recitals 5 and 6 to the Directive are relevant as showing what the drafters had in mind when distinguishing between family members and extended family members:

> "(5) The right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality. For the purposes of this Directive, the definition of 'family member' should also include the registered partner if the legislation of the host Member State treats registered partnership as equivalent to marriage.
>
> (6) In order to maintain the unity of the family in a broader sense and without prejudice to the prohibition of discrimination on grounds of nationality, the situation of those persons who are not included in the definition of family members under this Directive, and who therefore do not enjoy an automatic right of entry and residence in the host Member State, should be examined by the host Member State on the basis of its own national legislation, in order to decide whether entry and residence could be granted to such persons, taking into consideration their relationship with the Union citizen or any other circumstances, such as their financial or physical dependence on the Union citizen."

13. The difference between being a family member and an extended family member is therefore that the former enjoy automatic rights of residence while the latter benefit

from the more limited right to facilitated entry and residence in accordance with national legislation.

The first issue: direct descendant

14. The leading authority on the nature of direct descendancy is the decision of the Court of Justice in *SM (Child placed under Algerian Kafala) v Entry Clearance Officer* Case C-129/18; [2019] INLR 507, given on a reference from our Supreme Court in *SM (Algeria) v Entry Clearance Officer* [2018] 1 WLR 1035. An Algerian court had placed an abandoned child under the kefalah guardianship of married EU citizens. The ruling of the CJEU was that the child was an extended family member but not a direct descendant of the EU citizens because the relationship created by kefalah was not a parent-child relationship. The Court noted that the meaning and scope of the concept of a 'direct descendant' is an autonomous concept of EU law and that it is not defined in the Directive (see paragraphs 50-51). It then continued:

> "52 In that regard, it should be noted that the concept of a 'direct descendant' commonly refers to the existence of a direct parent-child relationship connecting the person concerned with another person. Where there is no parent-child relationship between the citizen of the Union and the child concerned, that child cannot be described as a 'direct descendant' of that citizen for the purposes of Directive 2004/38.
>
> 53 Although that concept primarily focuses on the existence of a biological parent-child relationship, it should nonetheless be borne in mind that, according to settled case-law, the aim of Directive 2004/38 is to facilitate the exercise of the primary and individual right to move and reside freely within the territory of the Member States, which is conferred directly on citizens of the Union by Article 21(1) TFEU, and that one of the objectives of that directive is to strengthen that right (judgments of 12 March 2014, *O. and B.*, C-456/12, EU:C:2014:135, paragraph 35, and of 5 June 2018, *Coman and Others*, C-673/16, EU:C:2018:385, paragraph 18). In view of those objectives, the provisions of Directive 2004/38, including Article 2(2) thereof, must be construed broadly (see, to that effect, judgments of 16 January 2014, *Reyes*, C-423/12, EU:C:2014:16, paragraph 23, and of 10 July 2014, *Ogieriakhi,* C-244/13, EU:C:2014:2068, paragraph 40).
>
> 54 Therefore it must be considered that the concept of a 'parent-child relationship' as referred to in paragraph 52 above must be construed broadly, so that it covers any parent-child relationship, whether biological or legal. It follows that the concept of a 'direct descendant' of a citizen of the Union referred to in Article 2(2)(c) of Directive 2004/38 must be understood as including both the biological and the adopted child of such a citizen, since it is established that adoption

> creates a legal parent-child relationship between the child and the citizen of the Union concerned.
>
> 55 By contrast, that requirement for a broad interpretation cannot justify an interpretation, such as that which is apparent from point 2.1.2 of Communication COM(2009) 313 final, whereby a child placed in the legal guardianship of a citizen of the Union is included in the definition of a 'direct descendant' for the purposes of Article 2(2)(c) of Directive 2004/38.
>
> 56 Given that the placing of a child under the Algerian kafala system does not create a parent-child relationship between the child and its guardian, a child, such as SM, who is placed in the legal guardianship of citizens of the Union under that system cannot be regarded as a 'direct descendant' of a citizen of the Union for the purposes of Article 2(2)(c) of Directive 2004/38."

15. The concept of a 'direct descendant' therefore requires the existence of a direct parent-child relationship, meaning any parent-child relationship, whether biological or legal. A legal parent-child relationship includes adoption but it does not include legal guardianship such as kefalah.

16. In a spirited argument, Mr Greg Ó Ceallaigh contends that the CJEU should not be taken to have limited parent-child relationships so as to exclude social or *de facto* relationships. In the present case a 'real-world' parental relationship exists between the Appellant and Mr E and he is her *de facto* stepfather. The fact that her mother and Mr E never married does not make any difference to a relationship that has existed for 25 years. In what he accepts is a novel submission, he argues that society has evolved and that the tribunals erred in failing to look to the substance of a relationship that is functionally equivalent to a biological or legal relationship. (The concept of 'functional equivalence' originates in the opinion of the Advocate General in *SM* where, at paragraph 33, he poses the question whether kefalah could be considered to be functionally equivalent to an adoptive relationship: but this question was answered in the negative at paragraph 82 and subsequently by the Court.)

17. Mr Ó Ceallaigh also referred to *Depesme & ors v Ministre de l'Enseignment supérieur et de la Recherche* Joined Cases C-401/15 to 403/15; ECLI:EU:C:2016:955 for the observation by the Advocate General at paragraph 59 that a strictly legal definition of the parent-child relationship was inappropriate in the context of Regulation 492/2011, governing social and tax advantages for migrant workers. However, this observation was made in relation to step-children who were the children of the worker's spouse or recognised partner under national law, as paragraph 49 of the judgment of the Court makes clear.

18. These submissions were rebutted by Ms Julia Smyth for the Secretary of State in a written argument of high quality.

19. In my view the Appellant's case on this issue cannot succeed for these reasons:

(1) On a natural reading of the words of the regulation, a person who is not a biological descendant or an adopted child is not a direct descendant.

(2) The decision of the CJEU in *SM* places it beyond doubt that the autonomous EU meaning of the words 'direct descendant' conforms to their natural meaning. By specifying 'any parent-child relationship, whether biological or legal' the Court was defining the concept, not giving examples.

(3) It would be anomalous for the Appellant, an adult with no legal relationship of any kind with Mr E, to be considered to be a direct descendant, when the child in *SM*, an infant subject to formal legal guardianship, is not.

(4) The drafting of Article 2(2)(c) is inconsistent with an argument that *de facto* step-children should be treated as direct descendants of an EU citizen. If that were so, the second limb of the clause, which provides that children of spouses and registered partners also qualify as direct descendants, would be unnecessary.

(5) The Appellant's argument, if correct, would give rise to serious problems of definition. The recitals to the Directive show that Articles 2 and 3, as reflected in Regulations 7 and 8, are designed to distinguish between 'family members' and 'extended family members' and to provide for the former, but not the latter, to enjoy an automatic right of entry and residence. It would be contrary to the intention of the Directive to blur that distinction. Clarity and predictability about who is and who is not a direct descendant would be replaced by the need for a qualitative assessment of the substance of a wide range of social or *de facto* relationships. Under this approach, any step-child could argue that they were a direct descendant, and indeed that they were a direct descendant of more than one family. There is no good reason to accept an approach that comes at such a high cost to legal certainty in order to accommodate relationships that are in reality extended family relationships if they are anything.

20. I would therefore hold that a step-child of an EU citizen (meaning a child of a person who is in a relationship with an EU citizen, not being a marriage or a civil partnership) is not a direct descendant of the citizen within the meaning of the Regulations that give effect to the Citizens Directive. The FTT and UT were right. The first ground of appeal fails.

21. I would add for completeness that Mr Ó Ceallaigh made clear that he was not pursuing an argument that had not found favour below to the effect that to avoid unlawful discrimination, the direct descendant of any partner of an EU citizen ought to be treated as a direct descendant of the EU citizen. That argument was in any event convincingly despatched by Ms Smyth, who points out that it is not contrary to EU law to treat unmarried partners and spouses differently because, as the UT noted, the difference in treatment is deliberately built into the EU legal order. Moreover, it is reflected in the decisions of the CJEU in *O and B* Case C-673/16; [2014] QB 1163, *SSHD v Banger* Case C-89/17; [2019] 1 CMLR 6 and *Coman v Inspectoratul General pentru Imigrări* Case C-673/16; [2019] 1 WLR 425. Since the CJEU has been clear in these decisions that unmarried partners do not fall to be treated as direct family

members, then *a fortiori* there could not be any justification for treating their adult children any differently.

The second issue: dependency

22. Regulation 8(2)(c) requires that in order to qualify as an extended family member, a person must show dependency before coming to the UK and continuously thereafter.

23. Dependency entails a situation of real dependence in which the family member, having regard to their financial and social conditions, is not in a position to support themselves and needs the material support of the Community national or his or her spouse or registered partner in order to meet their essential needs: *Jia v Migrationsverket* Case C-1/05; [2007] QB 545 at [37 and 42-43] and *Reyes v Migrationsverket* Case C-423/12; [2014] QB 1140 at [20-24]. As the Upper Tribunal noted in the unrelated case of *Reyes v SSHD (EEA Regs: dependency)* [2013] UKUT 00314 (IAC), dependency is a question of fact. The Tribunal continued (in reliance on *Jia* and on the decision of this court in *SM (India) v Entry Clearance Officer (Mumbai)* [2009] EWCA (Civ) 1426):

> "19. … questions of dependency must not be reduced to a bare calculation of financial dependency but should be construed broadly to involve a holistic examination of a number of factors, including financial, physical and social conditions, so as to establish whether there is dependence that is genuine. The essential focus has to be on the nature of the relationship concerned and on whether it is one characterised by a situation of dependence based on an examination of all the factual circumstances, bearing in mind the underlying objective of maintaining the unity of the family."

Further, at [22]

> "… Whilst it is for an appellant to discharge the burden of proof resting on him to show dependency, and this will normally require production of relevant documentary evidence, oral evidence can suffice if not found wanting. …"

24. As to the approach to evidence, guidance was given by the Upper Tribunal in *Moneke and others (EEA - OFMs) Nigeria* [2011] UKUT 341 (IAC):

> "41. Nevertheless dependency is not the same as mere receipt of some financial assistance from the sponsor. As the Court of Appeal made plain in SM (India) (above) dependency means dependency in the sense used by the Court of Justice in the case of Lebon [1987] ECR 2811. For present purposes we accept that the definition of dependency is accurately captured by the current UKBA ECIs which read as follows at ch.5.12:

> *"In determining if a family member or extended family member is dependent (i.e. financially dependent) on the relevant EEA national for the purposes of the EEA Regulations:*
>
> *Financial dependency should be interpreted as meaning that the person needs financial support from the EEA national or his/her spouse/civil partner in order to meet his/her* ***essential needs*** *– not in order to have a certain level of income.*
>
> *Provided a person would not be able to meet his/her essential living needs without the financial support of the EEA national, s/he should be considered dependent on that national. In those circumstances, it does not matter that the applicant may in addition receive financial support / income from other sources.*
>
> *There is no need to determine the reasons for recourse to the financial support provided by the EEA national or to consider whether the applicant is able to support him/herself by taking up paid employment.*
>
> *The person does not need to be living or have lived in an EEA state which the EEA national sponsor also lives or has lived."*
>
> 42. We of course accept (and as the ECIs reflect) that dependency does not have to be "necessary" in the sense of the Immigration Rules, that is to say an able bodied person who chooses to rely for his essential needs on material support of the sponsor may be entitled to do so even if he could meet those needs from his or her economic activity: see SM (India). Nevertheless where, as in these cases, able bodied people of mature years claim to have always been dependent upon remittances from a sponsor, that may invite particular close scrutiny as to why this should be the case. We note further that Article 10(2)(e) of the Citizens Directive contemplates documentary evidence. Whether dependency can ever be proved by oral testimony alone is not something that we have to decide in this case, but Article 10(2)(e) does suggest that the responsibility is on the applicant to satisfy Secretary of State by cogent evidence that is in part documented and can be tested as to whether the level of material support, its duration and its impact upon the applicant combined together meet the material definition of dependency.
>
> 43. Where there is a dispute as to dependency (as there was in the present case) immigration judges should therefore carefully evaluate all the material to see whether the applicant has satisfied them of these matters."

25. In the present case, the FTT read statements and heard evidence from the Applicant, her mother and Mr E. This was its analysis and conclusion:

"36. The Guidance from the Home Office entitled "Extended family members of EEA nationals" dated 7 April 2015 states that an applicant must submit financial evidence of dependency such as bank statements or money transfers between the EEA National and the extended family member. The Guidance does not specify how much information must be provided.

37. Between 1996 and 2004 five remittance slips were provided. I note that two large remittances were sent to the Appellant in the two months prior to the Appellant coming to the UK in March 2004. Other than those transfers in 2004 there are 3 payment slips between 1996 and 2004 for that 7-8 year period. I would have expected to see many more payment slips if 12 monthly payments or more were paid per year over such a long period.

38. The Appellant was less than specific about her financial needs whilst in the Philippines. She said that she needed 15,000 Peso a month to survive. All of the transfers made to the Appellant were for less than 15,000 Peso other than the one made in February 2004.

39. Whilst I accept that I do not need to have evidence to show that the Appellant's mother was covering all of the expenses of the Appellant in the Philippines, I am unclear as to how the Appellant maintained herself bearing in mind the shortfall between the sums sent by her mother and her expenses. I was not given a breakdown of what income was required and how it was met in the Philippines.

40. The evidence given by the Appellant was less than satisfactory. She suggested that she was still studying when her mother started to send money in 1997/8. The Appellant later said that she finished studying when she was 22 years (i.e. 1996). This was inconsistent.

41. The Appellant said that she started to receive money from her mother in 1998. Mr E was clear that in 1997 the Appellant's mother was left unemployed and without a home and so started to live with him. The evidence on the money transfer from 1996 shows that the Appellant's mother was at that time living with Mr E.

42. During the hearing both the Appellant and Mr E gave a piece of evidence in almost identical terms. They both said that that the Appellant's mother suffered a stroke in 2011 and had been hospitalised every year since 2011. The latter part of that sentence being offered voluntarily and not as a result of a direct question. It was striking to me that the Appellant and Mr E both voluntarily said at the Appellant's mother had been "hospitalised every year since 2011" without prompting and in

> identical terms. It left me with the impression that some of the evidence may have been rehearsed.
>
> 43. It is also interesting that the Appellant had held employment whilst in the UK as a nanny but that Mr E gave evidence that she had not been employed. I found it hard to understand why Mr E would not know that she had been working when she lived in his household.
>
> 44. I note that the money was sent by the Appellant's mother and not Mr E but I am less concerned with this factor as I note that Mr E said that he gave money to the Appellant's mother for the Appellant.
>
> 45. What I am less certain about is the frequency of the payments to the Appellant, these have certainly not been established by the documentary evidence and whether each and every of the payments made to the Appellant were from Mr E's resources and not that of the Appellant's mother.
>
> 46. I have been given no breakdown of the essential living expenses of the Appellant and I have some concerns about the accuracy of the evidence on behalf of the Appellant due to inaccuracies about dates and concerns about reliability.
>
> 47. I am not satisfied that the Appellant has proved on the balance of probabilities that she was dependent on Mr E prior to coming to the UK."

26. The Appellant appealed on the ground that the FTT had failed to conduct "a holistic examination having regard to the family, physical and social conditions of the Appellant, not just financial". She also argued that it was unreasonable to have expected her to produce more documentary evidence after such a passage of time. But in the UT, Judge Hanson described the FTT as having considered the evidence that had been made available with the required degree of anxious scrutiny. The conclusion that the Appellant had failed to satisfy the requisite test was not shown to be irrational or not reasonably available to the judge on the evidence.

27. On this appeal, the Appellant's ground of appeal was simply that the UT had erred in not finding that the FTT was wrong about dependency. In his written submission Mr Ó Ceallaigh (who did not appear below) charges the FTT with a failure to carry out the holistic examination of dependency mandated by the Upper Tribunal in *Reyes*. He concedes that in this case, there being no evidence that the Appellant had met Mr E before coming to the UK, any previous dependency could only have been of a financial nature. He nonetheless argues that the FTT gave insufficient weight to the evidence of the three witnesses, who gave clear evidence of significant support.

28. In oral argument, Mr Ó Ceallaigh sharpened this submission in two ways. He contended that the absence of any specific reference to the evidence of the Appellant's mother was a critical flaw in the determination: had her evidence been properly considered, the dependency claim was, he said, bound to have succeeded. He also

emphasised the difficulty for an applicant in producing comprehensive documentary evidence after such a passage of time, and suggested that the limited number of remittance documents may have been because others could not be found.

29. In response, Ms Smyth notes the high hurdle facing an appellant in establishing an error of law in relation to a conclusion of fact. It essentially requires a conclusion either that there was no evidence to support the challenged finding of fact, or that the finding was one that no reasonable judge could have reached: *Perry v Raleys Solicitors* [2019] 2 WLR 636, [2019] UKSC 5 at [52], summarising much previous authority. That cannot be said in this case. The Appellant simply did not produce documentary or oral evidence of sufficient cogency to survive the scrutiny appropriate to a case of alleged adult dependency. Here, the documentary evidence was limited and, to use the language of the Upper Tribunal in *Reyes,* the oral evidence had been 'found wanting'. This ground of appeal is no more than a disagreement with the FTT's assessment of evidence.

30. Ms Smyth further objected that the oral arguments about the absence of reference in the FTT decision to the evidence of the Appellant's mother had not been a ground of appeal before the UT and was not a ground of appeal to this court. As to the possibility of documents having been lost (an argument made in the grounds of appeal to the UT, but not in the grounds of appeal to this court) the written evidence of the Appellant and her witnesses made no such claim: on the contrary, their complaint was that the Secretary of State had not properly considered those that had been produced. To this Mr Ó Ceallaigh replied that his oral arguments were implicit in the grounds of appeal and in his written submissions; if they were not, they were *Robinson*-obvious (*R v Secretary of State for the Home Department, ex parte Robinson* [1997] 3 WLR 1162).

31. In my judgment, this ground of appeal fails for the reasons given by Ms Smyth and recorded at paragraph 29 above, to which I do not seek to add.

32. I would however comment on the additional submissions made by Mr Ó Ceallaigh as recorded at paragraph 28. Any counsel appearing for the first time on an appeal will seek to refresh the arguments so as to present them in the most persuasive way, and I do not criticise counsel for his efforts on behalf of this Appellant. Nor should a party be penalised for drafting grounds of appeal concisely. However, these arguments were not pleaded at all on this appeal and in my view they cannot be raised now. An appeal court can entertain a new argument of law where that is in the interests of justice (though it will be slow to do so) – *Miscovic v Secretary of State for Work and Pensions* [2011] EWCA Civ 16 per Elias LJ at [69], Sedley LJ at [109-112] and Moore-Bick LJ at [134] – but these arguments relate entirely to an assessment of the facts and they cannot fairly be raised on the hoof. They are not *Robinson*-obvious points that the tribunals or court could be expected to appreciate for themselves in a case where the Appellant was represented by counsel. As my lord, Lord Justice Singh, said in *Talpada v The Secretary of State for the Home Department* [2018] EWCA Civ 841 at [69]:

> "Courts should be prepared to take robust decisions and not permit grounds to be advanced if they have not been properly pleaded or where permission has not been granted to raise them. Otherwise there is a risk that there will be unfairness, not only to the other party to the case, but potentially to the wider

> public interest, which is an important facet of public law litigation."

33. As it happens, the additional arguments, taken at their highest, could not avail the Appellant. The lack of specific reference to the evidence of her mother is of no special significance as her written evidence was the same as that of the Appellant and Mr E. Nor does the record contain any indication that the Appellant had told the Secretary of State or the FTT that the remittance documents were samples only. The evidence of the Appellant's mother, which draws both matters together, was that "We have submitted numerous remittance slips confirming regular and consistent money transfers to Philippines, which were unfortunately not considered by the Home Office."

34. I therefore conclude that the UT was correct to find that there was no error of law in the FTT's assessment of dependency.

Conclusion

35. I would dismiss the appeal.

Lord Justice Singh

36. I agree.

The Senior President of Tribunals

37. I also agree.