



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number IA/02117/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 2 September 2014**

**Decision & Reasons promulgated
On 15 January 2015**

Before

Deputy Judge of the Upper Tribunal I. A. Lewis

Between

ZK

(Anonymity direction order made)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation

For the Appellant: Mr P Richardson of Counsel instructed by Morgan Mark Solicitors.

For the Respondent: Ms A Holmes, Home Office Presenting Officer.

DECISION AND REASONS: ERROR OF LAW

1. This is an appeal against the decision of First-tier Tribunal Judge Ross promulgated on 13 June 2014, dismissing the Appellant's appeal against the Respondent's decision dated 19 December 2013 to refuse to issue a Residence Card as the extended family member of an EEA national.

Background

2. The Appellant is a national of Pakistan born on 27 September 1985. He entered the UK on 8 May 2010, pursuant to entry clearance as a Tier 4 Student valid until 30 January 2015. On 3 September 2013 the Appellant applied for a Residence Card as confirmation of a right to reside in the UK on the basis that he was the nephew and dependant of Mr Shahid Iqbal, a Portuguese national exercising 'Treaty rights' in the UK.
3. The Appellant's application was refused for reasons set out in a 'reasons for refusal' letter ('RFRL') dated 19 December 2013. A Notice of Immigration Decision was issued on the same date.
4. The Appellant appealed to the IAC.
5. The Appellant's appeal was dismissed by the First-tier Tribunal for reasons set out in the determination promulgated on 13 June 2014.
6. The Appellant applied for permission to appeal to the Upper Tribunal which was granted by First-tier Tribunal Judge Cheales on 8 July 2014.

Error of Law

7. I am persuaded that the First-tier Tribunal Judge erred in law in what was otherwise a carefully written and closely reasoned determination, by in effect requiring dependency to be proved by the production of documentary evidence when there is no such requirement under EEA law or in the Immigration (European Economic Area) Regulations 2006.
8. The Appellant claimed a dependency on his Portuguese uncle predating his arrival in the UK. The supporting documentary evidence was limited. Otherwise the Appellant relied upon his own testimony (supported by his oral evidence at the hearing), and the testimony of his uncle (who also gave evidence at the hearing).
9. The First-tier Tribunal Judge determined the issue in the following terms at paragraphs 14 and 15 of the determination:

*"14. However, the appellant told me that he has never lived with his uncle in Pakistan. It follows that in order to satisfy the requirements the appellant would have to prove that he was a dependent of his uncle in Pakistan. As was pointed out in **Ihemedu (OFMs - meaning) Nigeria [2011] UKUT 340** if an applicant chooses not to apply from abroad for a family permit under regulation 12 of the 2006 regulations, thereby denying the UK authorities an opportunity to check documentation in the country concerned, he cannot expect any relaxation in the burden of proof that applies to him when seeking to*

establish an EEA right. Had he applied from Pakistan he would have had to produce documents certifying dependency. Dependence means not just occasionally sending some money to a person, it means that the dependent is dependent upon the third party for his everyday needs.

15. The evidence of dependency in this case consists of money orders, which had been sent to the appellant's father in Pakistan. There is one money order on 12 May 2012, one on 17 December 2012. There are money orders in April, May, June, August 2013, and further money orders in 2014. These money orders do not establish that the appellant was a dependent of his uncle before he came to the UK, since at the time when the money orders were sent he had already arrived in the UK, having arrived here in 2010. There is no evidence that the appellant was a dependent of his uncle when he lived in Pakistan, or that his uncle was sending money from Portugal. Furthermore, the appellant came to the UK as a student, and he has produced no evidence that his uncle has paid for his fees as he claimed. I therefore conclude that the appellant's appeal based on his being an extended family member must fail."

10. The Judge was correct to identify that there was no difference in the burden of proof as between an in-country and out-of-country application. In using the word 'burden' I acknowledge the Judge must have had in mind both 'onus' and 'standard' of proof. Be that as it may, neither the *burden* of proof nor the *standard* of proof equate to, or inevitably dictate, the *method* of proof. The Judge was in error to state that there was no evidence of dependence: in effect, what the Judge was saying was that there was no documentary evidence of dependence, which was to disregard the oral evidence of dependence. There is no finding on the credibility of the Appellant and his uncle, and as such no finding as to the reliability or otherwise of their assertions of dependence.
11. I entirely accept, consistent with the Judge's reference to **Ihemedu**, and perhaps more pertinently paragraph 17 of **Dauhoo (EEA Regulations - reg 8(2)) [2012] UKUT 79 (IAC)** that a decision-maker is entitled to have regard to the absence of supporting documents. But, in my judgement, this does not obviate the requirement also to determine the issue of fact by reference to all of the available evidence, which necessarily requires a finding on oral testimony even when unsupported by satisfactory documentary evidence.
12. It follows that the Judge materially erred in law, and his decision must be set aside.
13. In all the circumstances, and in particular because it will be necessary for a full rehearing to take place, it is appropriate that the appeal should be remitted to the First-tier Tribunal, to a Judge other than Judge Ross, for the decision in the appeal to be remade.

14. It is not necessary to make any specific directions in respect of the rehearing: standard directions will suffice whereby any further materials must be filed and served within seven days of the new hearing.

Notice of Decision

15. The decision of the First-tier Tribunal Judge contained an error of law and is set aside.
16. The decision in the appeal is to be remade before the First-tier Tribunal by any judge other than First-tier Tribunal Judge Ross.

Deputy Judge of the Upper Tribunal I. A. Lewis

14 January 2014