



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

Appeal Number: IA/47190/2014

THE IMMIGRATION ACTS

Heard at Bradford

**Decision and Reasons
Promulgated**

On 24th June 2015

On 30th June 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR SAJJAD AHMED
(ANONYMITY NOT DIRECTED)**

Respondent

Representation:

For the Appellant: Mr M Diwnycz, Home Office Presenting Officer

For the Respondent: Mr T Hussain, Counsel instructed by BAssured Law

DECISION AND REASONS

Introduction

1. This is an appeal by the Secretary of State against the decision of First-tier Tribunal Hindson to allow the appeal of Mr Sajjad Ahmed against refusal of his application for a European Economic Community Residence Card in recognition of his status as the extended family member of a citizen of the European Union who is exercising his Community Treaty rights in the United Kingdom.

2. For ease of reference, I shall hereafter refer to the parties in accordance with their status in the First-tier Tribunal: that is to say, I shall refer to Mr Ahmed as “the appellant” and to the Secretary of State as “the respondent”.
3. It was not disputed in the First-tier Tribunal that the appellant’s sponsor (his cousin, Mr Kashif Baig Mirza) was an EEA citizen who was exercising his Community Treaty rights in the United Kingdom. The sole issue in the appeal was whether the appellant had proved, on a balance of probabilities, that he had been financially dependent upon his cousin whilst residing in Pakistan immediately prior to his arrival in the United Kingdom. This was a purely factual question. If it was resolved in the appellant’s favour, then he qualified as an ‘extended family member’ within the scope of Regulation 8 of the Immigration (European Economic Community) Regulations 2006. If it was resolved against him, then he would not be eligible to be considered for an EEA Residence Card.
4. The respondent’s second ground of appeal is that even if the judge had adequately explained why he resolved this factual issue in the appellant’s favour (the issue at the heart of the first ground) he was nevertheless wrong to allow the appeal outright. Mr Hussain did not contest the merits of this ground. He was right not to do so. This is because, although ‘family membership’ entitles an applicant to an EU Residence Card, the granting of such a card to an ‘extended’ family member is one that falls entirely within the discretion of the respondent [compare and contrast the wording of Regulation 17(1) with Regulation 17(4)]. It follows from this that (at most) the First-tier Tribunal ought only to have allowed the appeal on the limited ground that the respondent’s decision was “not in accordance with the law”, thus affording the respondent the opportunity to exercise her discretion as to whether this was an appropriate case in which to issue a Residence Card.
5. By contrast, the first ground of appeal strikes at the very heart of the basis upon which the Tribunal allowed the appeal. If the judge was wrong to resolve the factual issue in the appellant’s favour, or gave inadequate reasons for doing so, then this will vitiate the entirety of its decision. I therefore turn now to consider the first ground of appeal.
6. The appellant’s factual case is encapsulated at paragraph 11 of the First-tier Tribunal’s decision:

“While he was living in Pakistan he was financially supported by his cousin, who is a Dutch national, because his parents were impoverished. His cousin has a property in Pakistan which was rented out and the appellant received that rent. He came to the UK in 2011 as a student and was financially supported by his cousin. During his studies he was supported by his cousin but did not live with him because his studies were in Birmingham.

He did however spend the weekends and holidays with him. The appellant has lived with his cousin since 2014. The two men have a joint bank account. Mr Mirza pays money into the account the appellant has unfettered access to it.”

7. The reasons that the judge gave for resolving the factual issue in favour of the appellant can be found at paragraphs 13 to 16 of his decision:

“13 Both the appellant and his cousin gave cogent evidence that remained consistent throughout, including in cross-examination. I found the appellant’s account to be inherently plausible.

14. The appellant applied to extend his student visa in 2013. His application was refused on 21/10/2013 because his bank balance fell below the required amount during the 28 day period. His appeal against that refusal was dismissed by Judge Kelly for the same reason. Mr Mirza provided a witness statement in that appeal in which he asserted that his is providing financial support for the appellant. A copy of their joint bank account statement was also provided, this covered the month of August 2012. I am satisfied therefore that the two men have had this joint banking arrangement since at least then.

15. Further documents provided by the appellant are his mobile phone bill and a letter from his cousin’s landlord which provide some limited corroboration of his account.

16. Taking all of the evidence together, I am satisfied that the appellant has given a truthful account. I accept that he was dependent on his cousin while still living in Pakistan and that has remained the case while he has been in the UK. The appellant is now living with his cousin and his cousin’s family.”

8. The respondent’s first ground of appeal refers to the reason that she gave for refusing the appellant’s application in a letter that is addressed to the appellant and which is dated the 1st November 2014; namely, that the appellant had failed to provide any evidence of his dependency upon his cousin in either Pakistan or the UK. The kernel of the related argument is in the last sentence of paragraph 5 of the grounds. This concludes by stating that, “... the Judge has not sufficiently explained why, in the absence of any documentary evidence, he finds the appellant was dependent on the sponsor prior to arrival in the UK”. It is further argued that “there is no breakdown explaining how, if any money was provided, it was utilised by the appellant to meet his essential needs”.
9. Judge Landes granted permission to argue both grounds of appeal.
10. The first limb of the first ground of appeal (that the judge failed to explain how he was able to find in the appellant’s favour without documentary evidence) depends for its validity upon the relevant evidence having been readily accessible and the appellant being

expected to explain its absence. Judge Landes rightly observed that there is no legal requirement for documentary corroboration. She however considered it was arguable that documentary evidence of land ownership and/or rental receipts would (“on the face of it”) be relatively easy to obtain, and that the reasons for refusal letter was sufficient to place the appellant on notice that he would be expected to provide such evidence on appeal or, at the very least, to provide an explanation for its absence. I do not however accept either premise. This is principally because Mr Diwnycz was unable to satisfy me that either matter had been investigated during the course of cross-examination of the appellant or of his sponsor. In my judgement, the Tribunal was only required to deal with the absence of documentary evidence if the appellant had been asked about the matter in cross-examination and had been unable to provide a satisfactory explanation for it. Moreover, I do not accept that the reasons for refusal letter sufficed to create the expectation that the appellant would produce such documents on appeal. That letter merely referred to the absence of any evidence to support the contention that the appellant had been dependent upon his cousin when residing in Pakistan. It thus entirely left open the possibility that the evidential deficiency in his application might be cured on appeal by him giving oral testimony; oral testimony that would, of course, be subject to cross-examination. Therefore, whilst the appellant may have been well advised to provide documentary proof on appeal (if it was indeed available), he could not in my view be criticised for failing to do so in the absence an express caution that failure to provide documentary corroboration of his oral testimony may harm the prospects for his appeal being successful. In the absence of a caution in such terms or of the matter being investigated in cross-examination, the judge could only have speculated upon the reasons for the absence of documentary evidence. Moreover, he would have risked being criticised for arbitrarily imposing a requirement for documentary corroboration of oral testimony given by the appellant and his witness.

11. The other limb of the first ground of appeal is that the judge failed to provide a breakdown of the appellant’s dependency upon his cousin whilst the former was still residing in Pakistan. This, it is argued, was necessary in order to demonstrate that the dependency was one of necessity rather than choice. However, as is clear from paragraph 11 of the decision in particular, it had been the appellant’s case that he was wholly financially dependent upon his cousin. It is also clear that the judge had accepted that case. In those circumstances, it was quite unnecessary for the judge to make specific findings about such matters as (to quote Judge Landes) “the level of the appellant’s needs, what if any needs were met by his parents, the level of support from his cousin, or the amount that the support from the sponsor was used to meet the appellant’s essential needs”. The judge in effect found that the

sponsor had met both the appellant's essential needs and any costs and liabilities that arose in excess of those needs.

12. I therefore reject the basis of the respondent's first ground of appeal in its entirety. I do however note that the appellant's Rule 24 Notice does not address the respondent's second ground of appeal. This is no doubt because it is unanswerable. This appeal is therefore allowed only and to the extent that the Tribunal erred in allowing the appeal "under the Immigration (EEA) Regulations", and ought instead to have allowed it on the ground that the respondent's decision was 'not in accordance with the law'.

Notice of Decision

13. The appeal of the Secretary of State is allowed. The decision of the First-tier Tribunal to allow the appeal "under the Immigration (EEA) Regulations" is set aside and is substituted by a decision to allow the appeal on the ground that the Secretary of State's decision is not in accordance with the law.

Anonymity is not directed

Signed

Date

Deputy Judge of the Upper Tribunal