Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: EA/00785/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 27th March 2018	**On 04th April 2018**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK
UPPER TRIBUNAL JUDGE LINDSLEY

Between

ALI ALEM
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Ms K Anifowoshe, of Counsel, instructed by Elkettas & Associates Solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Algeria born on 8th July 1991. He entered the UK as a visitor and overstayed. He made a claim for asylum which was unsuccessful, and then two applications for an EEA residence card as an extended dependent family member which failed as he could show no past dependency in his country of origin on his EEA sponsor, Mrs Karima Cherid. He returned to Algeria in 2015.

2. On return to Algeria in 2015 he applied for a family permit under Regulations 8 and 12 of the Immigration EEA Regulations 2006 as an extended family member to join his sister-in-law, Mrs Karima Cherid, an Italian citizen in the UK who is married to his brother Mr Faouzi Alem. His application was refused by the respondent on 6th August 2015. His appeal against the decision was dismissed by First-tier Tribunal Judge Beach in a decision promulgated on the 9th June 2017 on the basis that there was no valid appeal before her.

3. Permission to appeal was granted and time extended by Judge of the First-tier Tribunal Andrew on 22nd November 2017 on the basis that it was arguable that the First-tier judge had erred in law in finding that there was no valid appeal in light of the decision in Khan [2017] EWCA Civ 1755. The hearing of the appeal was adjourned in January 2018 pending the outcome of the Supreme Court decision in SM (Algeria) v Entry Clearance Officer [2018] UKSC 9.

4. The matter came before us to determine whether the First-tier Tribunal had erred in law.

Submissions – Error of Law

5. The appellant submits that the First-tier Tribunal erred in law by relying upon the case of Sala which was overturned by the Court of Appeal in the case of Khan. This position is accepted by the respondent in the light of the decision in SM(Algeria).

Conclusions – Error of Law

6. We agree that this is the case and set aside the decision of the First-tier Tribunal.

7. The appellant requested that the decision be re-made before the Upper Tribunal so that it could be resolved promptly without further delay. Ms Anifowoshe took time to check her instructions from her client on this point. We accept that this was appropriate given the request made to us.

8. Unfortunately, Mr Melvin did not have the bundle for the re-making hearing which had been provided to the respondent in January 2018. We therefore adjourned the re-making hearing until after lunch so that Mr Melvin had time to copy and read the bundle, and also review a small amount of updating evidence provided by the appellant documenting the continuing exercise of Treaty rights by Mrs Cherid and also the continuation of the sending of £100 a month by Ms Cherid to the appellant. On resumption of the hearing Mr Melvin confirmed that he had had sufficient time to prepare. He also confirmed that he accepted that the sponsor, Mrs Cherid, continued to exercise Treaty rights in the UK as a worker in the UK.

Evidence & Submissions – Re-making

9. Mrs Karima Cherid attended the Upper Tribunal and gave oral evidence through an Arabic interpreter, whom she confirmed she could understand. In her written

and oral evidence she says, in summary, as follows. She is married to Mr Faouzi Alem and they have three children. She has worked continually at all material times, apart from short periods when her children were born. She received maternity benefits at this time. Her husband is also in employment.

10. The appellant is her brother-in-law. He lived with her family from 2008 to 2015, and was financially dependent on her during this time. He did not work whilst he was in the UK. She, her husband and children are all very attached to him. He made applications to remain with an EEA residence card whilst he was in the UK but these were all refused and the appeals dismissed.

11. In May 2015 the appellant went back to Algeria but he has remained financially dependent on her. The £100 a month she sends converts into approximately 1500 Algerian dinars which is enough money to pay for all of the appellant's food, electricity, gas and other expenses. In fact a family could live on this amount in Algeria. He has not managed to obtain employment in Algeria despite trying and lives solely on the money she sends. It is very hard to obtain a job in Algeria and the appellant has no educational qualifications so he has tried to get jobs such as a cleaner or a guard but without success. The appellant does not get any unemployment benefit as this does not exist in Algeria.

12. Since returning to Algeria the appellant has lived alone in a room provided to him by his aunts and uncles in his deceased grandfather's house. These aunts and uncles do not provide the appellant with any financial support as they have their own families to support. The house is in the Hussein Dey district of Algiers, and she confirmed the address is [4……..]. His parents live between 1 and 2 hours away from him and do not provide him with money. His parents gave the [4……..] address when they applied for entry clearance to visit the UK in the past because it is the main family house and they lived there previously before the appellant's grandparents passed away.

13. The appellant's twin brother, Madani Alem, was refused an EEA family permit by the respondent but was successful in his appeal and now lives with her and her family. She does not believe the appellant should be treated differently from his brother.

14. Mr Faouzi Alem attended the Upper Tribunal and gave oral evidence. In his written and oral evidence he says, in summary, as follows. He is married to Mrs Karima Cherid and they have three children together. The appellant is his brother. The appellant lived with his family from 2008 to 2015, and was financially dependent on his wife during this time. The appellant did not work whilst he was in the UK. He and his wife and the children are all very attached to the appellant. The appellant made applications to remain with an EEA residence card whilst he was in the UK but these were refused and the appeals dismissed.

15. In May 2015 the appellant went back to Algeria but he has remained financially dependent on his wife since that time. He lives at [4……] in Algiers where he has a room in a shared house left to relatives by his grandfather. He does not live with his parents, and his parents do not support him. His parents

live about an hour's drive away. The appellant lives solely on money sent by his wife and is not working. He has no skills to find a job and did not work in the UK. He did study English at college in the UK. It is very hard to find a job in Algeria, and so although he is sure he has tried to find work he has not managed to do this.

16. He and his wife sponsored the appellant's twin brother Madani Alem to come to the UK and he won his appeal in 2014. He feels the appellant should be treated equally with Madani. Madani continues to live with his family although he now has employment in the UK.

17. Mr Melvin argues for the respondent, relying upon the refusal notice, his skeleton argument and oral submissions, that the EEA sponsor sending £20 a week to the appellant in Algeria is a cynical attempt to show that the EEA Regulations are met and not indicative of actual dependency. In the refusal letter it is contended that the appellant lives with his parents who provide accommodation as the same address was used by his parents when they visited the UK in October 2007, and, that £100 a month is a modest amount and therefore insufficient to feed and clothe the appellant, and so he must either be dependent on his parents or work in Algeria. The appellant's history of prior residence in the UK between 2008 and 2015 during which he made three unsuccessful applications (asylum, and two residence card applications on the current basis – appeals against these refusals being dismissed by a First-tier Tribunal because he had failed to show prior dependency on his EEA sponsor) showed that he would do or say anything to secure a family residence permit. The evidence of the sponsors should not be seen as credible as it was not credible the appellant could support himself on that amount of funds and no evidence had been provided of the break-down of the appellant's expenses, and also as the sponsors had not been found to be entirely credible in the previous decision of Judge of the First-tier Tribunal MPW Harris promulgated on 11th January 2013.

18. Mr Melvin also drew our attention to Lim v Entry Clearance Officer Manila [2015] EWCA Civ 1383, and particularly to paragraph 32 of that decision which clarifies that the question is whether the appellant has the financial means to enable him to meet his basic needs. If the appellant has other means, other than the money sent by Mrs Cherid, to support himself then he is not financially dependent.

19. Ms Anifowoshe submits for the appellant that it is accepted by the respondent that Mrs Karima Cherid is an Italian citizen and a worker in the UK with a residence permit.

20. She argues that the evidence is clear that Mrs Cherid sends £100 a month to the appellant, and has done so since the appellant's departure to Algeria in 2015, and also that it is clear that Mrs Cherid fully supported him financially whilst he was living in this country between 2008 and 2015 in her home. She argues that whether the amount sent is modest is irrelevant. The question is whether the dependency is an economic fact, and it is not relevant whether it was a dependency of necessity, see Lebon [1987] ECR 2811. Ms Anifowoshe also relies

upon EU Commission guidance which states that the question of dependency is, in essence, whether the appellant needs his UK sponsor for material support to meet his essential needs in his country of origin.

21. Ms Anifowoshe submits that the sponsors' evidence was credible and should be believed. Two previous First-tier Tribunal judges had believed the sponsors' evidence that the appellant had been dependent on Mrs Cherid since coming to the UK. The appellant has behaved properly in leaving the UK and applying for a family permit as neither of these judges had believed he had been able to show dependency prior to coming to the UK. There was no issue of abuse here. Judge of the First-tier Tribunal Stokes in a determination promulgated on 5th November 2014 had found that a payment of £80 a month to the appellant's twin brother, Mr Madani Alem, sufficed to show that Madani Alem was dependent on the sponsors for his material needs, and thus qualified for a family permit. The amount was therefore a credible amount to support the appellant, and even if it is correctly described as modest this does not mean that the appellant could not rely upon it for his essential needs particularly as he has a free room in shared accommodation provided by family which reduces his costs. It was further believable that he would not be able to obtain employment in Algeria given that he had come to the UK as a minor and had only studied English in the UK and so had no transferable skills or qualifications or work experience when he returned to Algeria.

22. Ms Anifowoshe therefore argues that the appellant is entitled to succeed in his appeal as he can meet the requirements of Regulations 8 and 12 of the EEA Regulations. She confirmed that she did not pursue the Article 8 ECHR arguments in her skeleton argument.

23. Mr Melvin pointed out that Ms Anifowoshe's skeleton argument contained a statement that the appellant lived with his parents which was at odds with the evidence of the sponsors and her submissions. As this document had been written in January 2018 she explained she was uncertain where she had obtained this information or if it was a simple error on her part, and so she was given until 10am on 28th March 2018 to email the Upper Tribunal with her explanation. On 28th March 2018 Ms Anifowoshe wrote apologising and confirming it had been an error on her part and there was no corresponding evidence that she had been provided with to support this contention.

24. At the end of the re-making hearing we reserved our determination.

Conclusions – Re-making

25. The relevant provision of the Immigration (EEA) Regulations 2016 for this appellant who wishes to qualify for a family permit as a dependent extended family member is as follows:

Extended family member

8.—(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 a condition in paragraph (2), (3), (4) or (5).

(2) The condition in this paragraph is that the person is—

(a)a relative of an EEA national; and

(b)residing in a country other than the United Kingdom and is dependent upon the EEA national or is a member of the EEA national's household; and either—

(i)is accompanying the EEA national to the United Kingdom or wants to join the EEA national in the United Kingdom; or

(ii)has joined the EEA national in the United Kingdom and continues to be dependent upon the EEA national, or to be a member of the EEA national's household.

26. We are guided by the decision of the Court of Appeal in Lim v Entry Clearance Officer Manila which, at paragraph 16, cites the case of Lebon, in finding that it was not necessary to determine the reasons for financial support or raise the question as to whether the person is able to support himself by taking employment. The question is a factual one: simply whether or not the family member is able to support themselves having regard to their financial and social conditions. It is not enough to show simply that financial support is provided by the EU national. There must be a need for material support to meet the extended family member's basic needs. The extended family member must be unable to support himself without the finances supplied by the EEA national and therefore the support of EU national must be necessary.

27. We must take the findings of the previous decisions of the First-tier Tribunal as our starting point in accordance with the starred decision of the Upper Tribunal Devaseelan [2002] UKAIT 702, however these may be built upon and the outcome of this appeal may be different from that of previous Tribunals and we must decide this appeal on the evidence before us.

28. First-tier Tribunal Judge Warner decided that the appellant had been dependent on Mrs Cherid whilst living in the UK since 2009 in his 2011 determination, but that his claim could not succeed as there was no evidence he had been dependent on them prior to entry to the UK. First-tier Tribunal Judge Harris upheld this position in his decision of 11th January 2013, and found that the appellant remained dependent on Mrs Cherid in the UK but again had shown no prior dependency in his country of origin, see paragraph 45 of his decision. Judge Harris decided that he could not be satisfied that there had been dependency on Mrs Cherid by the appellant prior to his entering the UK as the only evidence was the oral testimony of the appellant, Mrs Cherid and her husband and

discrepancies in this evidence meant that they were not "reliable witnesses on their word alone about the claimed dependence" in Algeria.

29. The decision of Judge of the First-tier Tribunal Stokes allowing the appeal of Mr Madani Alem promulgated on 5th November 2014 [OA/21025/2013] concerns the appellant's twin brother's appeal against refusal of a family permit with an identical claim to be dependent on the same sponsors. We consider that it is appropriate to allow reliance upon this decision in accordance with paragraph 11.1 of the Revised Practice Directions Immigration and Asylum Chambers of the First-tier Tribunal and Upper Tribunal amended on the 13th November 2014. In this decision the credibility of the sponsors is said not to be in doubt as the dependency of Madani Alem was supported with documentation, see paragraph 24 and 25 of the decision. It is found that provision of £80 a month in remittances by Mrs Cherid meant that Mr Madani Alem was financially dependent on his sponsor for his material needs, and qualified under Regulation 8 of the Immigration (EEA) Regulations 2006 and should therefore be issued with a family permit to come to the UK.

30. It was not disputed by Mr Melvin that Mrs Cherid sends £100 a month to the appellant, and on the combined documentary and witness evidence provided to us we find that this takes place and has taken place since his return to Algeria, and relying upon the prior decisions of the First-tier Tribunal that the appellant was supported and housed by Mrs Cherid and her husband in the UK going back to 2009. Clearly this alone is not sufficient when applying the test set out in Lim. We must be satisfied that this amount is sufficient to meet the appellant's basic needs and that he does not have other funds by which these basic needs are met.

31. To approach these questions we must assess the credibility of the witness evidence from Mrs Cherid and Mr F Alem. Mr Melvin suggests that the amount of £100 a month sent to the appellant is so derisory that it is not possible that the appellant is solely dependent on these funds and thus the sponsors must be telling untruths as the appellant must either be working or supported by other relatives, which they deny. We do not however find that this amount is so derisory to meet the appellant's basic needs. It is described by the entry clearance officer in the refusal notice as "modest" but a modest amount may meet basic needs. As Ms Anifowoshe has argued the appellant has only to keep himself and not pay for accommodation as he has a free room in a shared family house. We note that Judge Stokes found a slightly lesser amount sufficient to allow the appellant's twin brother's appeal. We do not find this a proper basis to disbelieve the evidence of the witnesses.

32. We note that Judge Harris did not find the evidence of Mrs Cherid and Mr F Alem to be reliable relating to historic support for the appellant in Algeria prior to his coming to the UK in 2008 due to discrepancies in their evidence and that of the appellant. However, Judge Harris and Judge Stokes did find them to have given reliable evidence about the UK dependency. The oral witness evidence before us was consistent with the statements and consistent as between the witnesses themselves. The witnesses answered all questions put to them in a full and

helpful fashion, giving detailed explanations to all matters put to them in rigorous cross-examination. We therefore find that Mrs Cherid and Mr F Alem were credible witnesses.

33. It is therefore the credible evidence of Mrs Cherid and Mr F Alem that the remittances made by Mrs Cherid cover all the material living expenses of the appellant and that he has no other resources on which he can rely as he receives no support from other relatives and has not managed to find employment due to high rates of unemployment and his lack of skills, qualifications and work experience. There is no evidence before us which contradicts this. We are therefore satisfied on the balance of probabilities that the appellant is dependent on his sponsor for his material needs and that the support of his sponsors is necessary to meet his material needs as he has no other resources to draw upon.

34. It follows that the appellant qualifies under Regulation 8 of the Immigration (EEA) Regulations 2016 because he is a relative of an EEA national and he is dependent upon that EEA national and he wants to join the EEA national in the UK. We therefore find that the refusal to issue the appellant with a family permit under Regulation 12(4) of the Immigration (EEA) Regulations 2016 was unlawful and this appeal should be allowed.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

2. We set aside the decision of the First-tier Tribunal with no findings preserved.

3. We re-make the decision by allowing it under the Immigration (EEA) Regulations 2016.

Signed: *Fiona Lindsley* Date: 3rd April 2018
Upper Tribunal Judge Lindsley

Fee Award Note: this is **not** part of the determination.

In the light of our decision to re-make the decision in the appeal by allowing it, we have considered whether to make a fee award. We have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals. We have decided to make no fee award because we were not asked to make one by the appellant.

Signed: *Fiona Lindsley* Date: 3rd April 2018
Upper Tribunal Judge Lindsley