



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/09827/2016
EA/09829/2016

THE IMMIGRATION ACTS

Heard at Field House
On July 13, 2018

Decision & Reasons Promulgated
On August 28, 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

MR PETRIT POLOVINA
MS POLIKSENI POLOVINA
(NO ANONYMITY DIRECTION MADE)

Appellants

and

THE ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: No attendance by sponsor or representative
For the Respondent: Ms Kiss, Senior Home Office Presenting Officer

DECISION AND REASONS

1. No anonymity direction is made.
2. The appellants are nationals of Albania. They applied for family permits to join their son, Frants Polovina, under Regulation 7 of the Immigration (European Economic Area) Regulations 2006. The respondent refused their applications on July 27, 2016 because he was not satisfied they were wholly or mainly financially dependent on Frants Polovina or his wife (both EEA nationals).

3. The appellants lodged grounds of appeal on August 12, 2016 under Section 82(1) of the Nationality, Immigration and Asylum Act 2002 and Regulation 26 of the 2006 Regulations.
4. An entry clearance manager reviewed the grounds of appeal on December 23, 2016 but concluded the money transfers were insufficient to demonstrate they were wholly or mainly financially dependent on the EEA national or their spouse to meet their essential needs.
5. Their appeal came before Judge of the First-tier Tribunal Miller (hereinafter called "the Judge") on November 28, 2017 and the Judge dismissed their appeal under the EEA Regulations finding the first-named appellant was a self-employed builder and would have been able to obtain some employment and there were other relatives living in Albania who could provide support and the monies sent were not for their essential needs.
6. The appellants appealed this decision on December 13, 2017. Judge of the First-tier Tribunal Holmes granted permission to appeal on April 30, 2018 finding it arguable the Judge had arguably erred having accepted the sponsor had sent money regularly to the appellants. Whilst not excluding an issue of unfairness the Judge directed the hearing notes be typed up and placed on the file and the appellant's representatives should serve a witness statement setting out why the Judge's behaviour bordered on being unprofessional.
7. The respondent filed a Rule 24 response dated May 21, 2018 opposing the appeal although reserving his position on the issue of procedural unfairness.
8. Neither the sponsor or the appellant's representatives attended the hearing today. I was satisfied that both the appellants, their representatives and the EEA national had been properly served with notice of the hearing as a copy of the notices, dated July 11, 2018, were attached to the files.
9. There had been no compliance with Judge Holmes's directions on statements in respect of procedural unfairness. In the circumstances, I find no basis upon which to deal with the second ground of appeal.
10. However, despite there being no attendance by either the EEA national or the appellants' representatives I was content to deal with the error of law hearing and invited Ms Kiss to consider firstly, the grounds of appeal; secondly, the Judge's decision and thirdly, the grant of permission.
11. Ms Kiss relied on the decision but accepted that the Judge had made a finding at paragraph 31 that the EEA national had been sending money to the appellants and had not rejected the evidence advanced that neither of the appellants were working. She also accepted the Judge did not appear to dispute the EEA national's claim that he was sending money to cover the appellants' rent and living expenses as well as other bills.

12. The Court of Justice in Jia v Migrationsverket C-1/05 [2007] QB 545 at [35]-[37] summarised its understanding of the meaning of dependency as follows:

“35. According to the case law of the Court of Justice, the status of "dependent" family member is the result of a factual situation characterised by the fact that material support for that family member is provided by the Community national who has exercised his right of free movement or his spouse: see...Lebon...and...Chen...

36. The court has also held that the status of dependent family member does not presuppose the existence of a right of maintenance, otherwise that status would depend on national legislation, which varies from one case to another: Lebon's case...there is no need to determine the reasons for recourse to that support or to raise the question whether the person concerned is able to support himself by taking up paid employment. That interpretation is dictated in particular by the principle according to which the provisions establishing the free movement of workers, which constitute one of the foundations of the Community, must be construed broadly: Lebon's case...

37. In order to determine whether the relatives in the ascending line of the spouse of a Community national are dependent on the latter, the host Member State must assess whether, having regard to their financial and social conditions, they are not in a position to support themselves...”

13. The Judge found that because the first-named appellant was able to seek employment and there was evidence of a restructuring of the economy that the appellants were not dependent on the EEA national.
14. The Judge’s decision overlooks the fact it was accepted that substantial sums of money were being sent to the appellants by the EEA national and that money was being used for the appellants’ rent and general living expenses as well as any medical bills which arose. The Judges finding at paragraph 33 of the decision that the payments were to afford and “enhance standing of living” has no basis.
15. The court in Jia and subsequent case law set out what “dependency” means and the fact the appellants could seek work was not a reason to find they were no longer dependent relatives.
16. The Judge made clear findings on what monies were being sent and the only issue the Judge had to decide was whether there was a dependency.
17. Ms Kiss accepted that if the evidence, unchallenged, was that the monies were being used to pay the rent and living expenses then this would amount to dependency.
18. Having considered the grounds of appeal I am satisfied that there is an error in law.
19. The Judge was distracted by ancillary issues and should have concentrated on what money was being sent and what it was being used for.

20. The unchallenged evidence was that the EEA national had been sending, for a considerable period of time, money to support the appellants and they must be "family members" under Regulation 7 of the 2006 Regulations.
21. I therefore found an error in law. I saw no reason to adjourn this case for a further hearing as there was ample evidence and clear findings on whether money was being sent before the Tribunal.

DECISION

22. There is an error in law and I set aside the original decision and I remake it by allowing their appeals.

Signed

Date 10/08/2018



Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT
FEE AWARD

I make no fee award as no order was requested.

Signed

Date 10/08/2018



Deputy Upper Tribunal Judge Alis