



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Numbers: EA/04600/2020

**THE IMMIGRATION ACTS**

Heard at Field House  
On the 8<sup>th</sup> November 2021

Decision & Reasons Promulgated  
On the 19<sup>th</sup> November 2021

Before  
UPPER TRIBUNAL JUDGE REEDS

Between  
MISS TAQVIM RAHAT TAYYEBA

(ANONYMITY DIRECTION NOT MADE)

AND

Appellant

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr R. Parkin, Counsel instructed on behalf of the appellant

For the Respondent: Mr Whitwell, Senior Presenting Officer

**DECISION AND REASONS**

*Introduction:*

1. The appellant appeals with permission against the decision of the First-tier Tribunal Judge Dilks (hereinafter referred to as the "FtTJ") who dismissed her appeal against the decision made to refuse her application for a family permit as a dependent extended family member of an EEA national in a decision promulgated on 10 May 2021.
2. The FtTJ did not make an anonymity order no application was made for such an order before the Upper Tribunal.

*The background:*

3. The background is set out in the decision of the FtTJ and the evidence in the bundle. The appellant is a national of Pakistan. The appellant, with her mother applied on 9 March 2020 for residence cards as the extended family members of the sponsor (the appellant's sister), a national of Italy, resident in the United Kingdom.
4. The application made on behalf of the appellant's mother was allowed but the appellant's application was refused in a decision taken on 4 September 2020.
5. The decision letter stated that to apply for an EEA permit as the extended family member of an EEA national in accordance with Regulation 8 of the Immigration (EEA) Regulations 2016, the appellant must satisfy the respondent that she is financially dependent on the sponsor.
6. It was noted that in the application the appellant stated that she was financially supported by her sponsor. As evidence of this she had provided money transfer remittance receipts. However, the ECO was not satisfied that this sufficiently demonstrated that she was dependent on her sponsor to meet her essential needs. The limited amount of evidence in isolation did not prove that she was financially dependent on her sponsor.
7. Furthermore, it was stated that the appellant had provided no evidence to demonstrate her and her family circumstances including her income, expenditure and evidence of her financial position which would prove that without the financial support of the sponsor her essential living needs could not be met.
8. The ECO concluded that on the evidence submitted in support of the application, he was not satisfied that the appellant was dependent on the sponsor and therefore was not satisfied that she was an extended family member in accordance with Regulation 8 (2) of the Immigration (EEA) Regulations 2016. The application for an EEA family permit was refused as the appellant could not meet all of the requirements of Regulation 12.

9. The appellant appealed and the appeal came before the FtT on the 26 April 2021. In a decision promulgated on 10 May 2021 the FtTJ dismissed her appeal having found that the appellant had not demonstrated on the balance of probabilities that she was dependent on the sponsor.
10. Permission to appeal was issued and on 22 June 2021 permission was granted by FtTJ Parkes.

*The hearing before the Upper Tribunal:*

11. The Upper Tribunal issued directions, inter alia, indicating that it was provisionally of the view that the error of law issue could be determined as a face-to-face hearing. Subsequently, the Tribunal listed the hearing to enable oral submissions to be given by each of the parties.
12. The hearing took place on 8 November 2021. Mr Parkin of Counsel appeared on behalf of the appellant and Mr Whitwell, Senior Presenting Officer appeared on behalf of the respondent.
13. Mr Parkin relied upon the grounds which he amplified in his oral submissions. He submitted that the basis of the challenge was one based on procedural unfairness. The starting point was the decision refusing the application made on 4 September 2020. The issue set out in the decision related to that of dependency and whether the money provided met the appellants essential needs. He submitted that there were no issues of credibility taken nor was the sponsor's ability to either sponsor or transfer funds to the appellant in issue. However this was developed significantly during the hearing. At paragraphs 21 – 23 of the FtTJ's decision, he stated that the sponsor's evidence that she had saved money was not credible. At paragraph 22 in relation to the evidence from the business the judge disbelieved the sponsor for failing to produce documentary evidence. At paragraph 23 the FtTJ appeared to recognise that the sponsor's ability to support the appellant had not previously been raised by the ECO in the decision letter but because the payslips had been put into evidence by the sponsor, he saw no reason why the sponsor would not have mentioned her earnings from her business before the hearing. Mr Parkin submitted that the judge disbelieved the evidence of the sponsor because documentary evidence to demonstrate her circumstances was not before the tribunal. The judge did concede at paragraph 23 that this was not a formal requirement of the EEA Regulations, but the judge placed determinative weight in his assessment based on what he referred to as the lack of documentary evidence.
14. Mr Parkin submitted that the judge had misconstrued the reasons for providing the payslips from the sponsors business and that it was just to show that the sponsor was exercising treaty rights. In the grounds of appeal at paragraph 9.2, it was clearly set out that the respondent did not challenge the sponsor's evidence that she was exercising treaty rights in the United Kingdom, but the

payslips had been provided simply for completeness on this issue and it was not provided to show that the sponsor was supporting the appellant.

15. Mr Parkin submitted that the criticisms made by the FtTJ were made for the first time during the hearing and as conceded by the judge at paragraph 23. However the sponsor was given no further opportunity to produce the documentary evidence to answer the concerns that the FtTJ raised subsequently in his decision. He submitted that the issues outlined could have been addressed with these on the basis of bank statements which could be provided and also accounts in relation to the business. As the appellant was not on notice that such points would be taken, the documentary evidence had not been before the tribunal.
16. Mr Parkin submitted that the respondent was not excluded from asking these questions and the judge was entitled to take them into account, but it was procedurally unfair in the way it was undertaken as it prevented the sponsor from answering a point that had not been previously raised.
17. In his submissions Mr Parkin made reference to a recent decision of the Court of Appeal, *Wahid, R (on the application of) v Entry Clearance Officer* [2021] EWCA Civ 346. He submitted that where there were concerns which were likely to be determinative of the appeal, the appellant should have been given the opportunity to provide the evidence but that she was not given the opportunity to do so. In those circumstances the adverse credibility findings in circumstances where the sponsor could answer those criticisms were not because she was unable to do so but because she did not know the point being taken.
18. He submitted that money was being paid to the appellant and that was not in dispute and that had been used for expenses thus there was no alternative basis in the refusal decision and therefore the points taken by the FtTJ was central to the outcome and that the procedural irregularity infected the rest of the decision.
19. Mr Parkin submitted that in the circumstances the decision should be set aside and remitted to the FtT for a hearing afresh.
20. Mr Whitwell on behalf of the respondent relied upon the written submissions that had been sent to the tribunal on 22 October 2021. In those written submissions, it was submitted that the judge had directed himself appropriately in law and that the assessment of the evidence was one that was open to him.
21. It was submitted that the ECO when assessing the appellant's application was not satisfied that the appellant had demonstrated the sponsor provided material support for her essential needs as such it had not been accepted that the sponsor was supporting the appellant and therefore the matter had to be fully ventilated. As the sponsor at the hearing sought to rely on new evidence and as this was evidence upon which the respondent had not had any

opportunity to form a view it was open the judge to consider the reliability of the evidence and its relevance in establishing whether the appellant had shown that the support was being provided and whether it had been used as claimed.

22. In his oral submissions, Mr Whitwell submitted that credibility was in issue as set out in the decision letter where the issue of dependency was clearly raised and therefore the issue of credibility arose from that.
23. In this context Mr Whitwell sought to rely upon the decision in *WN (Surendran; credibility; new evidence) DRC [2004] UKIAT 00213*.
24. He submitted that it was open to the judge to consider the points as credibility was an issue. He submitted that a hearing was not a “dress rehearsal”, and it was for the representatives to deal with the issues so that the judge could resolve them.
25. Mr Whitwell submitted that the appellant’s argument was that the judge should have adjourned the hearing however the primary responsibility would be for the appellant’s counsel at the hearing to make such an application. Looking at the decision it does not appear that he made any such application for an adjournment. He therefore invited the tribunal to uphold the decision.
26. Mr Parkin by way of response submitted that there is a difference between documentary evidence and oral evidence and there had to be a line drawn as to what issues were raised in the decision letter and what issues were not. The parties cannot be expected to anticipate all points being raised.
27. He submitted that whilst credibility in a general sense was alluded to it was not expressly put in issue on the points made by the judge and in particular on the point relating to the sponsor’s ability to fund the dependency or the source of the income for that dependency. If those had been put in issue then the sponsor would have been able to respond to it comprehensively and thus there had been procedural unfairness.
28. Mr Parkin accepted that there had been no application for an adjournment but that was only one way of looking at it. The court could have placed less weight on these points given the lack of notice and an application for an adjournment could have been made by the tribunal on its own motion. The question of adjournment was not whether it was reasonable but whether a fair hearing could be obtained in the absence of an adjournment.
29. At the conclusion of the hearing I reserved my decision which I now give.

*Decision on error of law:*

30. The Immigration (European Economic Area) Regulations 2016 have now been revoked by The Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 Schedule 1(1) paragraph 2(2) (December 31, 2020.

Revocation, however, has effect subject to savings specified in The Citizens' Rights (Restrictions of Rights of Entry and Residence) (EU Exit) Regulations 2020, Regulation 2 and Schedule 1 and The Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020 Regulations ("The Transitional Provisions").

31. Schedule 3 paragraph 5 of the Transitional Provisions deals with existing appeal rights and appeals and as this appeal was extant prior to commencement day, and it is not argued by either party that the tribunal does not have jurisdiction to consider the appeal.

32. Prior to revocation Regulation 8 of the 2016 Regulations (so far as relevant) read 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 (1A),(2), (3), (4) or (5).

(1A) ...

(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.

33. Having had the opportunity to hear the oral submissions in the light of the decision of the FtTJ and the material before him , I am satisfied that the FtTJ's decision involved the making of an error on a point of law. I shall set out my reasons for reaching that conclusion.

34. The primary issue raised in the ground is whether there was any procedural unfairness in the FtTJ deciding the appeal on a point upon which the appellant had been given no notice and thus had no opportunity to respond to. Other issues have been raised in the grounds, but as reflected in the submissions made by Mr Parkin on behalf of the appellant, the principal ground is that of procedural unfairness and that if that ground is made out, it is not necessary to make address the other grounds of challenge.

35. To consider this issue I turned the decision letter which is the decision under appeal.
36. There is no dispute that in the light of the lack of challenge to the nature of the relationship between the sponsor and the appellant, the place of residence of the appellant and her desire to join the sponsor in the UK and that the sponsor was exercising treaty rights and had made financial remittances that the only issue that remained was that of dependency.
37. This is clear from the decision letter. Whether that entailed issues of credibility is not so clear. The decision letter did not raise issues of credibility against either the appellant or the sponsor. What was stated in the reasoning was that while the appellant had provided money transfer remittances from the sponsor, the ECO was not satisfied that this was sufficient to demonstrate she was dependent on the sponsor to meet essential needs. This is because the ECO considered that the sponsor had provided no evidence of family circumstances, income and outgoings, etc. In my view Mr Parkin is correct to state that no specific issues of credibility had been raised. In particular no specific evidential points were raised by the ECO by reference to the sponsor and any ability by her to sponsor the appellant or by reference to her income and ability to transfer funds to the appellant. That said, I remind myself that a decision letter is not akin to a "pleading".
38. The FtTJ heard oral evidence from the sponsor (although not from the appellant) and it is plain that the sponsor was asked a number of questions about her financial circumstances (I refer to paragraphs 14, 16, 18 - 20). At paragraph [21] the FtTJ considered the evidence of the sponsor as set out at paragraph [20] as to the payments made to the appellant and to the appellant's mother. The sponsor had given oral evidence in answer to these questions and that she had used her savings. The FtTJ's assessment of this evidence is set out between paragraphs [21 - 24].
39. At paragraph [21] the FtTJ took into account that the sponsor had not provided documentary evidence of the savings that she had referred to in her oral evidence and he did not find her evidence as to how she could save to be credible. At paragraph [22] the FtTJ considered her explanation as to how she was able to save and that she had started a small beauty business in 2018. Having heard this explanation the FtTJ stated as follows: "*I note that this business had not previously been mentioned in the witness statements or documentary evidence in support of this case.*" At [23] the FtTJ acknowledged that the sponsor's ability to support the appellant had not been previously raised by the ECO and also that there was no requirement in the EEA Regulations as regards the sponsor's financial position but that he considered the issue to be "*relevant to the issue of credibility*". He went on to state: "*I consider that even though the respondent had not raised any concern with regards to the sponsor's ability to support the appellant in the refusal letter, nonetheless evidence of the sponsor's employment and earnings with GC had been put in evidence by the sponsor and I can see no reason why the sponsor will not also have mentioned her earnings from her business before the hearing.*" At [24] the FtTJ concluded that he

considered that the sums of money were relevant to the issue of credibility and "I was not satisfied by the sponsor's explanation and did not find evidence credible."

40. I would accept the point made by Mr Whitwell that in general terms in the course of a hearing oral evidence may be given which is elicited for the first time and the judge may have to consider the relevance of that evidence in the general context of the issues raised in the decision under challenge. This would not generally mean that the judge is required to raise these points with the advocates. In this context I would also accept the sponsor's general credibility was a matter upon which the FtTJ was entitled to reach a conclusion upon in the context of the appellant's claim of dependency.
41. As set out in the relevant jurisprudence and recently in the decision of Latayan v SSHD [2020] EWCA Civ 191, dependency is a question of fact. In that decision, at paragraph 23 the court cited the decision of SM (India) v ECO (Mumbai) [2009] EWCA Civ 1426 as follows:

"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. In Lim, the Court of Appeal stated at [25]:

"In my judgment, this makes it unambiguously clear that it is not enough simply to show that financial support is in fact provided by the EU citizen to the family member. There are numerous references in these paragraphs which are only consistent with a notion that the family member must need this support from his or her relatives in order to meet his or her basic needs. "

and at [32]:

" In my judgment, the critical question is whether the claimant is in fact in a position to support himself or not, and Reyes now makes that clear beyond doubt, in my view. That is a simple matter of fact. If he can support himself, there is no dependency, even if he is given financial material support by the EU citizen. Those additional resources are not necessary to enable him to meet his basic needs. If, on the other hand, he cannot support himself from his own resources, the court will not ask why that is the case, save perhaps where there is an abuse of rights. The fact that he chooses not to get a job and become self-supporting is irrelevant. It follows that on the facts of this case, there was no dependency. The appellant had the funds to support herself. She was financially independent and did not need the additional resources for the purpose of meeting her basic needs. "

43. The question of dependency as set out above entails a situation of real dependence in which the family members, in this case the appellant, having regard to their financial and social conditions is not in a position to support themselves thus needing the material support of the sponsor in order to meet their essential needs. It is also plain that questions of dependency must not be reduced to a bare calculation of financial dependency but to be construed broadly to involve holistic examination of a number of factors and so as to establish whether there is a dependence that is genuine.

44. By way of an example the FtTJ took into account at paragraph [25] the sponsor's evidence as to why the appellant did not work and the FtTJ was entitled to find the evidence on this issue as given was inconsistent. That was plainly relevant to the issue of dependency.
45. However the basis upon which the FtTJ's decision is challenged is set in a different context. As set out above and acknowledged by the FtTJ at paragraph [23] the sponsor's ability to support the appellant was not raised as an issue by the ECO. No specific evidential points were raised by reference to the evidence that she had provided or in any way at all. I again observe that the decision of the respondent is not a pleading. However it is plain that the FtTJ disbelieved the sponsor's evidence concerning her sources of income not only based on the answers that she had given but on the basis that she had not provided documentary evidence in support of her oral evidence. At [21] the judge expressly stated that he did not find her evidence credible and pointed to the absence of documentary evidence. The same is set out at paragraph [22] and expressly refers to the lack of documentary evidence in support of the beauty business. He concluded at paragraph [24] that he was not satisfied as to the sponsor's explanation and thus did not find her evidence to be credible.
46. As Mr Parkin submitted as the sponsor was not on notice that her income and sources of income were in issue, she did not have the documentary evidence available at the hearing to answer those critical points. Those points were raised for the first time at the hearing. As I have stated those points may arise in oral evidence and there can be no legal error in either the respondent's representative or even the judge in clarification, by asking questions of the sponsor. What was procedurally unfair was not providing the sponsor with the opportunity to answer these points by way of the provision of documentary evidence upon points that had not previously been raised. As Mr Parkin submits, those issues could have been adequately answered by the provision of specific documentary evidence, but the opportunity had not been provided.
47. It is in this context that I distinguish the decision relied upon by Mr Whitwell. As Ouseley J set out paragraph 28 of that decision, an applicant is not entitled to regard such a point as uncontroversial merely because it had not been raised by a judge; it is further stated that it is open to a represented applicant to grapple with points and a failure to do so risks the judge attaching significance to the contradiction in the evidence. However the circumstances are different in the present appeal. The FtTJ did not solely rely on oral evidence given but expressly made findings that the sponsor had not provided documentary evidence in support of her claimed circumstances. In holding the absence of documentary evidence against the sponsor in circumstances when she could not have anticipated their relevance, gave rise to procedural unfairness as the sponsor was not able to answer those criticisms made.

48. I do not think that the decision in *Wahid* (as cited) gives any real assistance to the appellant. The case was on an entirely different factual basis and related to whether a grant permission to apply for judicial review was arguable and should have been stated to have so been. However, a general principle which can be drawn from the cases cited before the court is that procedural fairness requires the applicant to have the opportunity to respond and the requirement to procedural fairness depends on the facts and the context in which the decision is taken. When applied to this decision, the context is all important and I am satisfied that the sponsor could not have anticipated that she would be required to provide documentary evidence/ answer issues that had not been previously raised given the specific issues which were under challenge.
49. I take into account Mr Whitwell's submission that the appellant's representative did not ask for an adjournment. However that is not a complete answer to the issue of whether there was procedural fairness. The tribunal has powers to adjourn the proceedings on its own motion and also the tribunal has wide case management powers including directions for the provision of further evidence.
50. There were other points made by the FtTJ which were adverse to the appellant's claim, and I have had to consider the materiality of the error relied upon. However I am persuaded by Mr Parkin that the evidence of the sponsor was central to the issue of dependency and that it necessarily would have an impact on his overall assessment of this issue.
51. For those reasons, I am satisfied that it has been demonstrated that the decision of the FtTJ did involve the making of an error on a point of law. I therefore set aside the decision.
52. As to the remaking of the decision, both parties stated in their submissions that they are in agreement that if an error of law was found, that the appeal should be remitted to the First-tier Tribunal.
53. I have given careful consideration to the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal.

"[7.2] The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:-

- (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
- (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal."

54. In light of the agreement of the parties but also because the tribunal is satisfied that it falls within the practice direction above under paragraphs (a) and (b) that the right forum for remaking the decision is the First-tier Tribunal. The decision of the FtTJ is set aside, other than as a record of what was said at the hearing, and the cases remitted for a fresh hearing before the First-tier Tribunal.

### **Notice of Decision**

The decision of the First-tier Tribunal involved the making of an error on a point of law, the decision is set aside and shall be remitted to the first-tier Tribunal for a fresh hearing.

Signed *Upper Tribunal Judge Reeds*

Dated: 9 November 2021