



IAC-FH-CK-V1

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

Appeal Number: EA/04648/2019

THE IMMIGRATION ACTS

**Heard at Field House
And via Skype
On 23rd April 2021**

**Decision & Reasons Promulgated
On 26th May 2021**

Before

UPPER TRIBUNAL JUDGE KEITH

Between

**VICTORY IMADE
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Roberto Prieto (family member)

For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. These are the approved record of the decision and reasons which I gave orally at the end of the hearing on 23rd April 2021.
2. This is the remaking of the decision in the appellant's appeal against the respondent's refusal of her application for a residence permit as the dependent child of the spouse of an EEA (Spanish) national, Mr Roberto Prieto. It is now accepted

that the appellant is the daughter of Mr Prieto's wife, Ms Wilson. The only issue is whether the appellant is dependent on Mr Prieto.

3. The appellant, a citizen of Nigeria, born on 1st June 1997, applied for a family permit to accompany her stepfather, Mr Prieto, a Spanish national who, prior to Brexit, was exercising Treaty rights, to the UK. The date of her application is not apparent from the papers, but at the time of her application she was studying in Spain and, she asserts, was in possession of an EEA Residence Card. It is not suggested that she was a minor at the date of her application.
4. In her decision dated 25th July 2019, the respondent refused the application on a number of grounds (not now all pursued), including not accepting the relationships between the appellant and Ms Wilson as claimed; and not accepting claimed dependency between the appellant and Mr Prieto. The appellant appealed against that decision on 25th August 2019.
5. In a decision promulgated on 21st April 2020, First-tier Tribunal Judge Flynn (the 'FtT') dismissed the appellant's appeal, following consideration of the appeal on the papers only. The FtT accepted that Mr Wilson and Mr Prieto were married as claimed, but not that the appellant was related to Ms Wilson; or that she was dependent on him.
6. The appellant appealed and the basis of her challenges are set out in the error-of-law decision annexed to this remaking decision.
7. In its error-of-law decision, this Tribunal set aside the FtT's decision, allowing the appeal, but preserving the FtT's finding that Mr Prieto and Ms Wilson are married and the respondent's concession that the appellant is related to Ms Wilson. This Tribunal regarded it as appropriate to remake the decision, noting the narrowness of the remaining contested issue.

The issue in this appeal

8. The sole issue remaining in dispute is whether the appellant was and remains dependent on Mr Prieto.

The gist of the respondent's refusal

9. The core points taken against the appellant were the lack of money transfers or other means of financial support, and evidence of the family's wider circumstances which would satisfy the respondent that without the financial support of Mr Prieto, the appellant's essential living needs would not be met.

The Law

10. The test that the appellant must meet, to satisfy regulation 7(2) of the EEA Regulations 2016, is one of dependency. The burden of proof is on her to prove this, to the ordinary civil standard.

11. The case of Reyes v Migrationsverket (Case C- 423/12) confirms that an appellant must need a sponsor's support in order to meet their basic needs for the purposes of financial dependency. It is irrelevant whether the dependency is out of choice, in circumstances where an appellant does not already have sufficient funds of her own, as opposed to the ability to work.

The hearing before me

12. I identified the sole issue of dependency and in light of Ms Everett's comment that she was minded to concede the appeal subject to any document that I had been able to identify that called into question the dependency, I reviewed the witness statement of Mr Prieto dated 5th April 2021 at pages [4] to [9] of the appellant's bundle. Very broadly speaking, it dealt with the various aspects of the claimed dependency including the fact that the appellant is a full-time student; that she received regular remittances solely from Mr Prieto and that also she lived in a flat co-owned (not by her) by Mr Prieto, who paid for all of those home insurances, council taxes, utilities and service contract; and for which she paid nothing.
13. Before me, Mr Prieto adopted his witness statement and his evidence was unchallenged by Ms Everett. His witness statement referred to extensive documentation in the appellant's bundle. The documentation included, by way of example, confirmation that the appellant was not registered for any tax by the Spanish authorities (document [19]); that she had been attending an education centre in Durango between 2016 and 2021 (document [12]) and a record of almost weekly financial remittances from Mr Prieto and the appellant (document [22]).
14. I asked one further supplemental question of Mr Prieto to address the question of whether the appellant had any additional, separate, savings. The context of my asking this question was to identify whether, notwithstanding the provision of accommodation; the appellant's role as a student; and remittances from Mr Prieto; the appellant had any savings of substance on which she could be expected to rely, rather than on Mr Prieto. Mr Prieto confirmed on oath that the appellant had no income and no savings of any substance. I accept his evidence without challenge or reservation.
15. In the circumstances, I find that appellant was and is dependent upon Mr Prieto for her basic needs. As a consequence, the respondent's decision dated 25th July 2019 breached the appellant's rights under the Immigration (EEA) Regulations 2016.

Conclusions

16. On the facts established in this appeal, the appellant is dependent on Mr Prieto and so meets the definition of 'family member' for the purposes of regulation 7 of the Immigration (EEA) Regulations 2016.

Decision

17. The appellant's appeal under the Immigration (EEA) Regulations 2016 succeeds. The respondent's decision is not upheld.

Signed: *J Keith*

Upper Tribunal Judge Keith

Dated: 10th May 2021

*TO THE RESPONDENT
FEE AWARD*

The appeal has succeeded. I regarded it as appropriate to make a fee award of £80.

Signed: *J Keith*

Upper Tribunal Judge Keith

Dated: 10th May 2021

ANNEX: ERROR OF LAW DECISION



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/04648/2019

THE IMMIGRATION ACTS

Heard at Field House
On 30 October 2020

Decision & Reasons Promulgated
On

Before

UPPER TRIBUNAL JUDGE KEITH
DEPUTY UPPER TRIBUNAL JUDGE WELSH

Between

VICTORY IMADE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant:

The Appellant was represented by her sponsor

For the Respondent:

Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal against a decision, promulgated on 21 April 2020, of First-tier Tribunal Judge Flynn ["the FtT"] dismissing the Appellant's appeal against a decision of the Respondent, dated 25 July 2019, to refuse her application for a

residence card pursuant to regulation 7(2)(ii) of the Immigration (European Economic Area) Regulations 2016 [“the 2016 Regulations”].

2. The basis of the Appellant’s application under the 2016 Regulations is that she is the step-daughter of Mr Prieto [“the sponsor”], who is married to the Appellant’s mother, Ms Wilson, and that she is dependent upon him.
3. The FtT decided the appeal on the papers, pursuant to rule 25(1)(a) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 [“the Tribunal Procedure Rules”]. The FtT dismissed the appeal, having found that the Appellant had not demonstrated that she is the daughter of Ms Wilson or that she is dependent upon the sponsor. The FtT accepted that the sponsor and Ms Wilson are married.

The grounds of appeal and the grant of permission

4. On 16 June 2020, permission was granted by First-tier Tribunal Judge Kelly. The grant of permission was not limited but the specific reason given was that it was arguable that the FtT had erred in taking into account an irrelevant consideration in deciding that the Appellant is not the daughter of Ms Wilson, namely by drawing adverse inferences in relation to the Appellant’s credibility from the fact that the Appellant chose to have her appeal before the FtT decided on the papers, rather than at a hearing. We refer to this as ground 1.
5. Next, the FtT erred in finding that there was no evidence, or none that was sufficiently reliable, to demonstrate the claimed relationship between the Appellant and Ms Wilson [“ground 2”] and dependency [“ground 3”].

Discussion and conclusions

Ground 1

6. At [13] of the decision, the FtT stated:

I find it surprising that the Appellant did not request an oral hearing, at which her mother and step-father could have appeared and clarified these issues [the evidential issues relating to the mother/daughter relationship]. This failure reinforces my conclusion that the relationship is not as claimed.

7. The Tribunal Procedure Rules make provision for an appeal to be decided on the papers. There can be no basis for drawing an adverse inference as to credibility by reason of the Appellant making such a request. We note that Mr Tufan, quite properly, conceded this error.

8. Before drawing the adverse inference, the FtT gave two reasons why, in her view, the Appellant had not demonstrated that she is the daughter of Ms Wilson. It may be that in using the word "*reinforces*", the FtT had intended to convey that the adverse inference drawn did nothing more than accord with a decision already made on the evidence but it is far from clear. Consequently, we cannot be satisfied that the irrelevant consideration formed no part of the decision making and we therefore conclude that it amounts to an error of law.
9. However, we have gone on to consider whether that error was material, meaning whether irrespective of the error, the same conclusion would inevitably have been reached by the FtT. We have concluded that it is material, particularly in light of the FtT's ignorance of a relevant fact, which we come on to discuss in relation to ground 2 in these reasons.

Ground 2

10. The evidence before the FtT of the familial relationship was:
 - (1) an 'Attestation of Birth', dated 13 November 2015, which records Ms Wilson as being the mother of the Appellant and
 - (2) a statutory declaration of the Appellant's age, made by Ms Wilson in her capacity as the Appellant's mother and
 - (3) family registration documents issued in Spain.
11. The FtT was not satisfied that the documents were sufficiently reliable in themselves to demonstrate the claimed relationship because there was no explanation why the birth of the Appellant was not registered in accordance with Nigerian law, which provides, as described in the reasons for refusal of the Respondent, pursuant to Decree No. 69 of the Nigerian Births, Deaths, etc. (Compulsory Registration) Act of December 1992, that all births must be registered with a period of 60 days.
12. What the FtT did not know is that, in an Entry Clearance Manager review decision dated 31 December 2019, the Respondent had reviewed the further evidence submitted by the Appellant and concluded that the relationship between Appellant and Ms Wilson was accepted. We only became aware of this concession when we were provided with that further review by Mr Tufan at the start of the hearing. The sponsor indicated that he was previously unaware of the concession. Noting the authority of E v Secretary of State for Home Department [2004] EWCA, at §66 and 91, the FtT had proceeded in ignorance of a relevant fact (the Entry Clearance Manager review decision, the evidence for which we admit). The fact of that decision is uncontroversial and Mr Tufan does not seek to resile from it. The appellant was unaware of the decision until the hearing before us and so cannot be fairly held

responsible for the error. The Appellant and the Respondent clearly have a shared interest in co-operating to achieve the correct result; and the mistaken impression clearly played a material part in the FtT's reasoning, so that there was an error of law, based on the FtT's ignorance of an established and relevant fact.

13. Her decision on this issue is therefore unsafe and cannot stand.

Ground 3

14. The FtT concluded at [20] that there was no evidence of financial dependency. Whilst we have sympathy with the FtT because the absence of written witness statements made the task of assessing the evidence far more difficult than it need have been, there was in fact documentary evidence of financial dependency in the papers:

- (1) a legal certificate, provided to the Spanish authorities, by the sponsor, that he would be *"responsible and obliged to cover all of the expenses that [the Appellant] may incur - thus being responsible for, among others, those arising from her accommodation, living expenses and healthcare and education ..."*;
- (2) documents originating from the Spanish authorities, demonstrating that the Appellant had not registered any earned income; and
- (3) written confirmation from Spanish authorities that the Appellant had not received any state financial assistance.

15. We conclude that the failure to take into account relevant evidence is an error of law and further, it renders the FtT's decision on dependency unsafe, particularly where, as here, the Respondent has accepted that the relationship between the Appellant and her mother was genuine, albeit that the FtT was unaware of this at the time.

Decision on error of law

16. The First-tier Tribunal's decision contains errors of law, such that it is unsafe and cannot stand. We set the decision aside, while preserving the finding that the sponsor and Ms Wilson are married and noting the Respondent's concession as to the genuineness of the relationship between the Appellant and her mother.

Disposal

17. With reference to paragraph 7.2 of the Senior President's Practice Statement, given the limited scope of the issues and disputed facts, it is appropriate that the Upper Tribunal remakes the FtT's decision. Directions for the remaking are set out below.

Directions

18. The following directions shall apply to the future conduct of this appeal:
- a. The Resumed Hearing will be listed at Field House before any Upper Tribunal Judge with a time estimate of 1 ½ hours.
 - b. The Appellant shall, no later than **two weeks prior to the Hearing**, file with the Upper Tribunal and serve upon the Respondent's representative a consolidated, indexed, and paginated bundle containing all the documentary evidence upon which she intends to rely. Witness statements in the bundle must be signed, dated, and contain a declaration of truth and shall stand as the evidence-in-chief of the maker.
 - c. The Respondent shall have leave to file any further documentation she intends to rely upon in response to the Appellant's evidence, provided the same is filed no later than **one week** prior to the Hearing.

Notice of Decision

The decision of the First-tier Tribunal contains material errors of law and we set it aside, subject to the preserved finding set out above.

No anonymity direction is made

C Welsh

Signed

Date 2 November 2020

Deputy Upper Tribunal Judge Welsh