Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number:
UI-2021-001141, EA/06490/2020
UI-2021-001142, EA/04835/2021

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 15 July 2022	**On 5 December 2022**

Before

UPPER TRIBUNAL JUDGE ALLEN
DEPUTY UPPER TRIBUNAL JUDGE JOLLIFFE

Between

MUHAMMAD NAEEM-UR-RASOOL

Appellant

AND

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms A Watterson, instructed by ATM Law Solicitors
For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer.

DECISION AND REASONS

Introduction

1. The Appellant is a Pakistani national and was born on 19 July 1981. He appeals against two decisions dated 13 November 2020 and 29 March 2021 to refuse him a family permit under the Immigration (European Economic Area) Regulations 2016 ("the Regulations").

The application and the Home Office's refusal decisions

2. The Appellant through his solicitors, ATM Law, made an application dated 10 December 2020 as the family member of an EEA national. The application stated *"After death of my Parents, my cousin Mr. Asad Rasool Begum (sponsor) has been supporting me financially and morally because I didn't have any other source income and he was well settled in Spain. He was constantly sending me money from Spain and since he is in the UK for my essential needs. Please find attached cover letter explaining my financial circumstances and source of income."*

3. The 13 November 2020 decision to refuse stated that the applicant had to demonstrate that he was an extended family member of the EEA sponsor within the meaning of regulation 8 and that his EEA sponsor was a qualified person and that there was financial dependence in order to meet essential needs.

4. The 13 November decision was made on the basis that the evidence submitted did not demonstrate the necessary dependency. It noted that *"sporadic money transfers from your sponsor to you covering 10 February 2016 to 30 September 2020. It is also noted that you have not submitted the corroborating remittance receipts for these transfers, therefore, these transfers cannot be verified … in isolation, the fact of transferring money is not evidence that it is needed by the recipient to meet their essential living needs."* It commented that there should have been a full account of the Appellant's financial position. Without more complete evidence, dependency was not made out. It took account of the evidence which had been provided, such as electricity bills and receipts, which did not establish financial dependence. The decision maker was not satisfied that the Appellant was part of the sponsor's household and was dependent.

5. The 29 March 2021 decision to refuse also did not accept the claimed dependency, and separately took issue with the claimed relationship. It stated that the Pakistan family registration certificate was issued on 27 October 2020 and had been submitted as proof of the relationship between their parents. However, it was not contemporaneous with their dates of birth. It also noted discrepancies in the birth registration certificate issued 30 July 2020. It concluded that *"without further historical documentary evidence or other credible documentation evidencing your parentage, I am not satisfied that you have provided sufficient evidence that your relationship with your sponsor is as stated."*

<u>The judgment of First Tier Tribunal Judge Black</u>

6. Judge Black correctly identified that the burden of proof in EEA appeals is on the appellant, and cited the case of Rahman [2012] CJEU Case-83/11 as authority for the proposition that the situation of dependence must exist, in the country from which the family member concerned comes, at the time when he applies to join the Union citizen on whom he is dependent.

7. The judge gave brief reasons for accepting the Appellant's case in respect of the relationship.

8. Judge Black considered the evidence about dependency, and identified various troubling aspects of the Appellant's case. In paragraph 17, the judge analysed the date on which the sponsor acquired Spanish nationality, which was claimed to be 2010. This was also the year in which it was said he had migrated to Spain. The judge considered that the evidence was surprising and inconsistent. In paragraph 21, the judge identified certain inconsistencies in the evidence about the remittances of money from the sponsor to the Appellant, in that although the figures in Spanish varied, the English figure was always for the same amount. The judge had raised them with the parties. The Appellant was unable to account for them satisfactorily. The judge's comment in paragraph 21 was that the sponsor speculated that:

> *"There may have been "some misunderstanding by the company"; he suggested that sometimes a person goes to them to pay a sum of money and changes their mind asking for more to be sent. This is a wholly incredible explanation for the discrepancies on each of the MoneyGram slips. I give them little evidential weight. They are not sufficient to demonstrate the sponsor was financially supporting the appellant while he lived in Spain. Indeed the existence of such anomalies, without reasonable explanation, causes me concern as to the reliability of the evidence generally."*

9. Notwithstanding this analysis of the discrepancies, the judge accepted that the sponsor had paid some remittances to the Appellant – see paragraph 22. The judge identified further discrepancies in the documents about the sponsor's status and whether he was employed or self-employed.

10. In paragraph 27, the judge identified other inaccuracies in the documents, specifically about whether the sponsor lived in Pakistan. The Appellant had produced a letter from the Municipal Corporation of Jhelum dated 13 October 2020 which stated that the sponsor lived in Pakistan. The letter was relied on by the Appellant to show that he was not employed. The judge found that there was no good reason why a public official would know his employment status, and no reason why the letter inaccurately stated that the sponsor lived in Pakistan.

11. In paragraph 28, the judge found discrepancies in the marriage certificate relating to the Appellant's marriage to the sponsor's sister, which indicated that the Appellant did not live in the same village as the sponsor, contrary to his account, and which cast doubt on it. At paragraphs 30-31, the judge analysed certain other difficulties about the documents.

12. Having set out the above analysis, the judge's core reasoning for refusing the appeal is at paragraphs 36-37:

I am not satisfied that the mere transfer of funds, most of which have occurred in anticipation of the first application or after it, are sufficient, in the face of the significant anomalies and discrepancies in the evidence, to demonstrate that the appellant has been or is currently financially dependent on the sponsor... There are sufficient anomalies in the evidence overall for me to doubt the purpose of those transfers; I find the appellant has not demonstrated they were arranged to cover the appellant's basic needs or that they do so. The appellant has not demonstrated to the required standard that he is currently dependent on the sponsor in the UK and that he meets the criteria in regulation 8.

13. The Appellant sought permission to appeal, which was refused by Deputy Upper Tribunal Judge Martin on 25 October 2021 in the following terms:

2. The grounds assert that the Judge erred in (1) taking adverse credibility findings on matters not raised by the respondent or put to the appellant; (2) failing to take into account relevant evidence; (3) attaching less weight to evidence that post-dated the first decision...

6. The Judge did not reject the evidence that post-dated the second decision, simply for that reason but explained that the evidence was all bare assertions of dependency, unsupported by evidence and from sources unlikely to be in a position to give that evidence. In short, the evidence appeared to be contrived with no mention of how the authors had the knowledge to give that evidence.

7. The decision is a careful assessment of the evidence, reaching reasoned conclusions based on the evidence, or lack of it. Neither the grounds nor the Decision and Reasons disclose any arguable error of law.

14. The Appellant renewed the application for permission to the Upper Tribunal. It was granted by Upper Tribunal Judge Lindsley on 31 January 2022 in the following terms:

5. It is arguable that the First-tier Tribunal unlawfully allocates less weight to evidence which was acquired after the first refusal decision at paragraphs 24, 30 and 31 of the decision. It will be for the appellant to show that even if the First-tier Tribunal erred in this way the error was material in light of the other findings. I observe that the other grounds appear less arguable but grant permission on all grounds.

Legal framework

15. The Immigration (European Economic Area) Regulations 2016/1052 were in force at the time of the decision letter and the First Tier Tribunal appeal, although they ceased to be in force from 31 December 2020 (see Paragraph 2(2) of Schedule 1(1) of the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020).

16. In so far as is relevant, regulation 8 of the EEA regulations states 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;*

17. Judge Black took account of the following authorities. Boodhoo and another (EEA Regs: relevant evidence) [2013] UKUT 00346 – the Tribunal may consider any evidence concerning a matter including evidence which has arisen after the date of the decision.

18. Rahman [2012] CJEU Case-83/11 concerned the issue of dependency but not by membership of the same household. The CJEU stated that, "*the situation of dependence must exist, in the country from which the family member concerned comes, at the time when he applies to join the Union citizen on whom he is dependent."*

19. In ECO (Manila) v Lim [2015] EWCA Civ 1383 the appellant sought entry, as the family member of an EU national. Applying Reyes v Migrationsverket (Case C- 423/12) it was held that it was not enough to show that financial support was in fact provided by the EU citizen to a family member; the family member must need that support in order to meet her basic needs. There needed to exist a situation of real dependence. Receiving support was a necessary but not a sufficient condition of dependence.

20. In Reyes (EEA Regs: dependency) [2013] UKUT 00314 (IAC) the Upper Tribunal held that whether a person qualified as a dependent under those Regulations was to be determined at the date of decision on the basis of evidence produced to the respondent or, on appeal, the date of the hearing on the basis of evidence produced to the Tribunal.

21. The Upper Tribunal held in Moneke (EEA – OFMs) Nigeria [2011] UKUT 00341 (IAC) that the dependency or membership of the household must be on a person who is an EEA national at the material time.

22. The Appellant cited the following further authorities before the Upper Tribunal. Lebon C-316/85 [1987] ECR 2811 was cited as authority for the proposition that the status of dependent family member results from a factual situation, namely the provision of support by the worker, without there being any need to determine the reasons for recourse to the worker's support

23. Jia v Migrationsverket [2007] INLR 336 is another judgment of the European Court of Justice. It decided that 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.

24. Reyes (EEA Regs: dependency) [2013] UKUT 00314 the Upper Tribunal considered the dependency of a relative of an EEA national in the ascending line (the EEA national's father) was dependent for the purpose of regulation 7(1)(c) of the EEA Regulations 2006. It stated

> *19. From the above, we glean four key things. First, the test of dependency is a purely factual test. Second, the Court envisages that 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. It seems to us that the need for a wide-ranging fact-specific approach is indeed enjoined by the Court of Appeal in SM (India): see in particular Sullivan LJ's observations at [27]-[28]. Third, it is clear from the wording of both Article 2.2 and regulation 7(1) that the test is one of present, not past dependency. Both provisions employ the present tense (Article 2.2(b) and (c) refer to family members who "are dependants" or who are "dependent''; regulation 7(c) refers to "dependent direct relatives .. . "). Fourth (and this may have relevance to what is understood by present dependency), interpretation of the meaning of the term must be such as not to deprive that provision of its effectiveness.*

25. The Court of Appeal in *UT (Sri Lanka) v SSHD* [2019] EWCA Civ 1095 restated that the Upper Tribunal should only interfere with a judgment of the First Tier Tribunal where there has been an error of law; the fact that the Upper Tribunal disagrees with the First Tier Tribunal's decision or might have expressed it differently is not a reason to set aside its judgment – see at paragraph 19.

26. The Upper Tribunal has taken account of the recent Supreme Court judgment in *Serafin v Malkiewicz* [2020] UKSC 23 concerning procedural fairness in a trial, the proper scope of judicial intervention and when a

judge should put matters to a witness. Paragraphs 40-41 of that case concern when a judge should put matters to a witness, and approve the dictum of Denning LJ in *Jones v NCB* [1957] 2 QB 55 that "interventions should be as infrequent as possible when the witness is under cross-examination".

27. The leading authority on the law concerning reasons in public decision making is *South Buckinghamshire DC v Porter [No.2]* [2004] UKHL 33. See the speech of Lord Brown at 36:

> *36... The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision.*

The parties' submissions

28. The Appellant was granted permission to appeal on the 3 grounds referred to in summary form in the Order refusing permission of Judge Martin. They were argued in greater detail in the Appellant's skeleton argument in the following terms. It was said that the hearing was procedurally unfair because the Appellant was not given an opportunity to address matters in respect of which Judge Black found against him; that Judge Black failed to take account of relevant evidence relied on in support of the appeal; and that Judge Black wrongly attached less weight to the evidence that post-dated the original refusal decision because it had *"been produced at a time when the appellant was on notice from the initial notice of decision that the issue of dependence was in dispute"*.

29. The first ground was argued by reference to paragraph 28, and the judge's consideration of discrepancies between the addresses recorded for the

Appellant and his wife on their marriage certificate and the evidence that the Appellant and his wife had lived in the same house since 1992. This was not put to the sponsor. It was also argued in relation to paragraph 27 that the judge had concerns about the information on the Municipal Corporation Jhelum letter dated 13 October 2020 and these concerns were not put to the sponsor.

30. The second ground was that Judge Black failed to take account of relevant evidence in making findings about dependency. In particular, it is said that the judge insufficiently addressed the evidence about money transfers – *"The Appellant acknowledges that the FTTJ addressed the Moneygram and ACE receipts, but it is submitted that she did not give any consideration to the RIA receipts"* – Grounds for permission to appeal to the Upper Tribunal, paragraph 13.

31. The third ground was that Judge Black stated that less weight was given to certain items of evidence because they had been "produced at a time when the appellant was on notice from the initial notice of decision that the issue of dependence was in dispute" (paragraph 24) or because "it has clearly been drafted to address the concerns of the respondent in the first refusal decision." The Appellant's argument was that it was wrong in principle for Judge Black to have assessed evidence which post-dated the first refusal decision or sought to address the reasons for refusal in the first refusal decision as having less weight.

32. The position of the Respondent Secretary of State can be briefly summarized – Judge Black was right to refuse the appeal for the reasons she gave. There was no legal error in her analysis and the appeal should be refused.

Analysis

33. The first ground says in essence that it was the duty of the judge to put all matters of concern to the Appellant (or the sponsor, as the case may be), and that the failure to do so is an error of law.

34. We do not accept that this is correct. Firstly, it must be recalled that the burden of proof is on the Appellant to prove his case. Dependency was at all times in issue, and there can have been no doubt about the need to make good the Appellant's case in that respect. The Appellant was legally represented, and his counsel was aware of what the issues were.

35. There are further difficulties with the first ground. The Supreme Court in Serafin has recently restated that a judge should not take upon him or herself the function of cross-examination, and that to do so can have the very serious consequence of undermining judicial impartiality. The case advanced by the Appellant runs a significant risk of infringing the guidance in Serafin.

36. There is a degree of judicial discretion in this context – some judges are more interventionist and will seek to explore and test a party's case, while others will take a more detached role. It is not a legal error for a judge in a particular case to take a more detached approach. The position is different where the parties are unrepresented and in order to understand the cases advanced the judge may need to probe and explore the arguments. However, that was not the case in this appeal.

37. Furthermore, the practical aspects of this must be recalled. It will in many cases be unrealistic and impractical for a judge who is hearing 3 appeals in a day of sitting to put every issue to every witness. A judge is entitled to rely on competent representatives to ask appropriate questions and to make appropriate submissions about how the judge should decide the case.

38. The first ground of appeal therefore does not succeed.

39. As to the second ground, that Judge Black did not consider relevant evidence in respect of dependency, this point also lacks merit. She analysed the remittance evidence with considerable forensic detail – see throughout paragraphs 21-24. She stated quite clearly in paragraph 37 that she had considered the evidence holistically, i.e. as a whole and taking all of it into account. There is no legal duty on a judge to particularise each and every piece of evidence submitted. The fact that a judge does not specifically analyse a particular document or category of documents does not without more amount to a legal error. The Upper Tribunal has reminded itself of the House of Lords' judgment in Porter that the judgment is addressed to parties who are well aware of the issues. The second ground of appeal also does not succeed.

40. The third ground of appeal is likewise unmeritorious. It depends on a selective reading of paragraphs 21-24, which must be read holistically. Having carefully analysed the evidence about remittance payments in paragraphs 21-23, at 24 the judge stated

> *Given these concerns, I give less weight to the documentary evidence which post-dates the initial refusal in November 2020. This documentary evidence has been produced at a time when the appellant was on notice from the initial notice of decision that the issue of dependence was in dispute.*

41. The judge's decision to attach less weight to the documents which post-dated the first refusal was because of the various concerns identified in the preceding paragraphs, as is made clear in the words *"Given these concerns"*. The Appellant does not take issue with that analysis, nor could he properly do so. The weight to be attached to the evidence was a matter for the judge, and she came to proper conclusions about it.

42. If the above analysis is in any way wrong, we have gone on to consider whether any legal error could have made a difference to the outcome, taking account of the comment of UTJ Lindsley that *"It will be for the appellant to show that even if the First-tier Tribunal erred in this way the error was material in light of the other findings."*

43. We conclude that the judge's analysis would have been the same in any event. Her view was that the Appellant had failed to discharge the burden of proof in relation to the core issue of dependency, and it has not been shown that any of the grounds of appeal would have altered that.

44. For these reasons the appeal is refused.

Notice of Decision

The appeal is refused, and the decision of the First Tier Tribunal Judge is confirmed.

Signed J Jolliffe Date: 24 November 2022

Deputy Upper Tribunal Judge Jolliffe