IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2021-001748
First-tier Tribunal No: EA/03620/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 11 April 2023

Before:

UPPER TRIBUNAL JUDGE GILL

Between

Zabada Khanum — Appellant
(ANONYMITY ORDER NOT MADE)

And

Entry Clearance Officer — Respondent

Representation:
For the Appellant: No legal representation but the sponsor attended.
For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

Heard at Field House on 8 February 2023

DECISION

1. The appellant, a national of Pakistan born on 2 October 1956, appeals against a decision of Judge of the First-tier Tribunal Shakespeare (hereafter the "judge") promulgated on 1 November 2021 by which the judge dismissed her appeal under the Immigration (European Economic Area) Regulations 2016 (the "EEA Regulations") against a decision dated 17 November 2020 to refuse her application of 28 September 2020 for a family permit in order to join her niece, Ms Asma Hafeez, a Norwegian national residing in the United Kingdom in exercise of her Treaty rights (the "sponsor").

2. The EEA Regulations were revoked with effect from 31 December 2020. However, as the appellant's application for an EEA family permit and the respondent's decision were made prior to 31 December 2020, the relevant provisions of the EEA Regulations continue to apply to this case by virtue of paras 3 and 5 of Schedule 3 to the Immigration and Social Security Co-ordination (EU Withdrawal) Act

(Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020/1309.

3. The sole issue in this appeal to the Upper Tribunal is whether the judge materially erred in law in reaching his finding that the appellant had not shown that she was financially dependent upon the sponsor for her essential needs. He noted, at para 18 of his decision, that the appellant did not claim that she was then or had previously been part of the sponsor's household.

4. Permission to appeal was granted by Judge of the First-tier Tribunal Curtis (the "permission judge") on grounds that were not articulated in the appellant's self-prepared grounds, as explained below. It appears that the permission judge was not aware of the decisions of the Upper Tribunal in AZ (error of law: jurisdiction; PTA practice) Iran [2018] UKUT 00245 (IAC) and Durueke (PTA: AZ applied, proper approach) [2019] UKUT 00197 (IAC).

5. The sponsor attended the hearing before me. There was no legal representation on the appellant's behalf. Upon a request having been made in advance of the hearing, the Upper Tribunal arranged for an interpreter in the Urdu language to be present in order to enable the sponsor to participate in the hearing.

6. The sponsor did not request an adjournment. She informed me that she was aware of the requirements that need to be satisfied for a family permit to be issued.

7. I explained to the sponsor that my role was to decide whether the judge had materially erred in law based on the evidence that was before him. I further explained the terms "*error of law*" and "*material*" in simple language. I then explained the procedure I would follow at the hearing.

The judge's decision

8. In her Notice of Appeal against the respondent's decision, the appellant had ticked the box to request a paper hearing. The respondent did not object to the matter being dealt with on the papers. The judge said that he was satisfied that it was appropriate to determine the appeal without a hearing. The judge therefore proceeded to decide the appeal on the papers pursuant to Rule 25(1)(a) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014.

9. The judge considered the evidence before him at paras 19-22 which read:

> "19. The Appellant has provided bank statements for the period 5 November 2018 to 10 March 2021. **These show ten credits into her account between November 2018 and November 2019 of amounts ranging from 14,624.91 rupees to 482,248.71 rupees.** These credits are referenced as 'fund transfer - link switch BAH' with a corresponding reference number. The Appellant has also provided bank statements from a Norwegian bank account held by the Sponsor, from 31 October 2018 to 30 October 2019, which show ten debits, reference "Til Zabada Khanum" on dates that correspond to the credits into the Appellant's account. I therefore accept that in the period 5 November 2018 to 30 October 2019 the Sponsor transferred money to the Appellant on a reasonably regular basis.
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> 20. However, **it is noticeable that there are no credits at all into the Appellant's bank account after 21 November 2019.** In her letter the

> Appellant claims that due to Covid 19 the Sponsor transferred the full annual amount in January 2020. However, there are no bank statements from the Sponsor for this time and there is no credit shown into the Appellant's bank account in January 2020. January 2020 also pre-dated the Covid-19 pandemic. **The English bank statement in the Sponsor's name for 1 November 2019 to 22 November 2019 and 12 March 2021 to 13 April 2021 contain no reference to any transfers to the Sponsor *[sic?, appellant?].* The evidence of financial dependency therefore amounts to ten remittances between November 2018 and October 2019.**
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> 21. Furthermore, there is very little evidence before me of the nature of the Appellant's life and financial position in Pakistan to support the contention that she cannot meet her essential needs without the material support of the Sponsor. The Appellant does not address this in her letter, nor does she attempt to explain the outgoings in the bank statement. The only document she has provided in this regard is an electricity bill for the period October 2018 to August 2019, which is in the names of both the Appellant and the Sponsor. This alone does not establish that the Appellant needs support from the Sponsor to meet her essential needs.
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> 22. Looking at the evidence in the round I do not accept that the Appellant has demonstrated to the balance of probabilities that she cannot meet her essential needs without the material support of the Sponsor, and therefore I find that she is not financially dependent on the Sponsor."
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> (my emphasis)

The grounds and the grant of permission

10. In her grounds dated 31 October 2021, the appellant said, inter alia, that she is jobless and her husband is medically unfit to work. She submitted a copy of a letter dated 17 June 2020 from Amna Hospital, Rawalakot, Pakistan, confirming that her husband was permanently unfit for work due to cardiac disease.

11. In her grounds, the appellant reiterated twice that, due to the Covid-19 pandemic, the sponsor transferred the full annual amount in January 2020.

12. There is nothing in the appellant's grounds which articulates any error of law.

13. Accordingly, the issues before me are as have been articulated by the permission judge. Since I have decided that it is appropriate (exceptionally) to deal with the grant of permission (see para 36 below), I now quote the relevant paragraphs:

> "2. Accompanying the grounds of appeal are a number of documents, some of which do not appear to have been before Judge Shakespeare. It appears to amount to an attempt by the Appellant to adduce additional evidence after the determination was promulgated. Such documentation can only be relevant to this permission to appeal application in limited circumstances (cf. E & R [2004] EWCA Civ 49).
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> 3. The appeal revolved around dependency. Judge Shakespeare accepted that the sponsor had transferred money to the Appellant "on a reasonably regular basis" between 5 November 2018 and 30 October 2019 [19]. The Judge then considered it "noticeable that there are no credits at all into the Appellant's bank account after 21 November 2019" and referred to the sponsor's letter which stated that the full annual amount had been

transferred by her in January 2020 because of the Covid-19 pandemic [20]. Whilst the Judge's observation is not arguably incorrect, it glosses over the fact that the Appellant's bank account statement (which the Judge was in possession of) showed a very large deposit of 482,248 PKR on 21 November 2019.

4. In my view, where the Judge arguably erred was in stating that the sponsor's English bank account statement, between 1 November 2019 and 22 November 2019, contained "no reference to any transfers to the Sponsor" [20]. In context, that last word must be a typo because with reference to the sponsor's bank statement it cannot logically be relevant whether the sponsor transferred money to herself. Assuming that the word "sponsor" in that sentence should be replaced by the word "Appellant", the Judge has found that there was no reference to any transfers to the Appellant on the sponsor's English bank account during that period of November 2019.

5. However, the document headed Preliminary Statement, in the name of the sponsor, was before the Judge. There is a clear reference on that statement to "acemoneytransfer.com" in the sum of £2,389.11 on 18 November 2019. Assuming that each pound was worth 200 PKR, that sum roughly equates to the 482,248 PKR that credited the Appellant's account on 21 November 2019, three days later. Thereafter, the Appellant makes a withdrawal each month from an ATM of, generally, between 25,000 – 36,000 PKR. It seems to me that those withdrawals are consistent with the Appellant using that significant lump sum credit in November 2019 for her living expenses throughout the subsequent 18-month period shown on the statement. As at 10 March 2021 (the last date of the period shown in the bank statement), the account remained in credit in the sum of 92,715 PKR.

6. It is arguable, then, that the Judge's finding that there was no reference in the Appellant's bank account statement to a transfer to the sponsor during November 2019 is a misstatement of the evidence that was presented. There was clear evidence of a transfer and it is arguable that the Judge should have made a finding as to whether or not she accepted it was a transfer from the sponsor to the Appellant. It arguably infected the decision because of the conclusion in paragraph 20 that the evidence of dependency was effectively limited to the period between November 2018 and October 2019.

7. Furthermore, I note that the Appellant has provided (with the grounds of appeal) a copy of an ACE money transfer receipt, dated 18 November 2019, from the sponsor to the Appellant in the sum of 482,248 PKR. Whilst this receipt was not, it appears, before Judge Shakespeare, it is relevant because it further supports the Appellant's argument that the Judge proceeded to make a decision on a wrong factual hypothesis because it is entirely consistent with the credit that can be observed in the Appellant's bank account on 21 November 2019."

14. Accordingly, the key issue before me is whether, in the three sentences at para 20 of the judge's decision that I have emboldened in the quote at para 9 above, he overlooked relevant evidence, i.e. a debit from the sponsor's account on 18 November 2019 in the sum of £2,389.11 and a credit in the appellant's account on 21 November 2019 in the sum of 482,248 PKR and thereby misstated the evidence; if so, whether any such error of law was material to the outcome.

The respondent's Rule 24 response and the appellant's response to it

15. In his response pursuant to Rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (the "UT Rules"), the respondent drew attention to the fact that the evidence before the judge was that the sponsor had made a large transfer in January 2020 and that the large transfer was made in January 2020 because of the Covid-19 pandemic. In view of this evidence, the respondent submitted that the judge was entitled to find it damaging that there was no evidence of a large transfer from the sponsor's account in January 2020.

16. The respondent further submitted that the Covid-19 pandemic provided an incredible explanation for the large transfer taking place in January 2020 given that the restrictions in the United Kingdom only commenced in March 2020.

17. Finally, the respondent submitted that, in any event, the grounds failed to address the material issue at para 21 of the judge's decision.

18. The appellant has responded to the respondent's Rule 24 response. She sent an email dated 28 June 2022 timed at 19:53 in which she stated, inter alia, that there was a typing mistake in her evidence before the judge. The transfer from the sponsor’s account took place on 18 November 2019 and the appellant received the money on 21 November 2019.

19. In relation to the respondent's observation concerning para 21 of the judge's decision, the appellant asked whether further evidence was needed. She submitted further evidence to address para 21 of the judge's decision.

The hearing

20. The sponsor said that it was a typing mistake that the appellant's evidence before the judge stated that the large transfer was made in January 2020 when it was in fact made on 18 November 2019. Although the judge did not have a bank statement in her (the sponsor’s) name for January 2020, the evidence before the judge showed that a huge payment was made on 18 November 2019.

21. In relation to para 21 of the judge's decision, the sponsor said that the judge had before him a bank statement from HBL in the appellant's name for the period from 5 November 2018 to 10 January 2021 which gave the appellant’s address. The sponsor informed me that this address was a property that belonged to her (the sponsor). This bank statement was therefore evidence that the appellant was living in her house. She said that they share the same accommodation. There was also an electricity statement in both their names.

22. Although the sponsor initially stated that the medical evidence attached to the appellant's grounds was before the judge, I gave her an opportunity to go through a paper-copy of the entire bundle that the appellant had submitted in her appeal. She then agreed that the medical evidence was not before the judge and said she did not know why it had not been submitted.

23. The sponsor said that the appellant was fully dependent upon her.

24. Ms Cunha submitted that, even if it was accepted that there was a typing error in the appellant's evidence, this does not address the reason that had been given for

the large transfer taking place, i.e. that it was because of the Covid-19 pandemic. The pandemic was even less of a credible reason for the timing of the transfer if it took place in November 2019 and not in January 2020.

25. In response, the sponsor submitted that it was irrelevant whether the large transfer took place due to the pandemic. The reasons for the large transfer taking place were that a better exchange rate can sometimes be obtained for a larger amount and the fee payable is also less.

26. Much of what the sponsor said at the hearing constituted evidence that was not before the judge, something which I reminded her of at convenient points.

27. I reserved my decision.

ASSESSMENT

28. Plainly, the evidence before the judge about the large transfer in issue was that it had been made in January 2020 and that the reason for the transfer being made in January 2020 was because of the Covid-19 pandemic. The explanation that there was a typing error in the appellant's evidence in stating that the transfer was made in January 2020 when it was in fact debited from the sponsor's account on 18 November 2019 and credited to the appellant's account on 21 November 2019 was not before the judge and is plainly not admissible pursuant to the principles in E & R [2004] EWCA Civ 49 and R (Iran) & Others v SSHD [2005] EWCA Civ 982.

29. For the above reasons, the judge was entitled to proceed on the basis of the evidence that was before him, that the sponsor had made a large remittance in January 2020 due to the Covid-19 pandemic and then take into account that there was no evidence to support the contention before him that the sponsor had made a large annual transfer in January 2020.

30. Before me, the sponsor said that it was irrelevant whether the large transfer took place due to the pandemic and she then proceeded to explain the reasons for the large transfer. Her explanation that a better exchange rate can sometimes be obtained and a smaller fee payable for a large remittance constitutes new evidence that was not before the judge and which I therefore do not take into account in deciding whether the judge erred in law.

31. In relation to the sponsor's 'submission' that the reason why she made the large transfer is irrelevant, this ignores the fact that the judge was plainly taking into account the credibility of the explanation given for the timing of the large remittance and noting that January 2020 pre-dated the pandemic.

32. It is by no means clear that the judge overlooked the credit into the appellant's account of 482,248.71 Pakistani rupees given that he specifically mentioned this figure at the end of the second sentence of para 19 of his decision. I have carefully considered the appellant's bundle that was before the judge. The appellant's bank statement is repeated several times but it is clear that there was only one credit into her account in the sum of 482,248.71 Pakistani rupees. That was the sum credited into her account on 21 November 2019. It follows that, in second sentence of para 19 of his decision, the judge was referring to the same deposit into the appellant's bank account that the permission judge considered the judge may have overlooked.

33. As the permission judge stated, the first sentence of para 20 of the judge's decision was factually correct. However, the words "*October 2019*" in the last sentence of para 20 must be wrong, because the evidence before the judge included the deposit into the appellant's account of 482,248.71 Pakistani rupees on 21 November 2019 that the judge had noted in the second sentence of para 19. In other words, the last sentence of para 20 of the judge's decision is not consistent with the second sentence of para 19.

34. However, even if the judge did err in law in his consideration of the evidence of remittances, his reasoning at para 21 was determinative of the appeal before him, for the following reasons:

(i) The post-decision evidence that the appellant submitted with her response to the respondent's Rule 24 response is not admissible in order to establish an error of law. This includes the medical evidence relating to the appellant's husband.

(ii) At the hearing before me, the sponsor referred me to the HBL bank statement in the appellant's name and informed me that the address stated on that bank statement was her (the sponsor's) house and therefore this bank statement showed that the appellant was living in her house and that they share the same accommodation. However, the fact is that there was no evidence before the judge that the property was *owned* by the sponsor and therefore no evidence before the judge that the sponsor provided the appellant with her accommodation.

(iii) At the hearing before me, the sponsor also referred me to the electricity bill that was in joint names, i.e. her name and the name of the appellant. However, the judge took into account that evidence. Plainly, the existence of an electricity bill in joint names does not constitute evidence that the sponsor (as opposed to the appellant or someone else) owned the property and/or that the sponsor (as opposed to the appellant) paid the electricity bills. The judge was therefore correct to state (final sentence of para 21) that the electricity bill alone did not establish that the appellant needed the support of the sponsor to meet her essential needs.

(iv) Furthermore, the judge noted that there was very little evidence before him of the appellant's financial position to support the contention that she cannot meet her essential needs without material support from the sponsor.

35. Plainly, the appellant's case before the judge was poorly prepared. It was for the appellant to ensure that she submitted sufficient evidence to establish to the standard of the balance of probabilities that she was dependent upon the sponsor for her essential needs. She failed to do so.

36. Finally, I turn to the grant of permission. It is appropriate for me to say, exceptionally, that permission should not have been granted in this case, for the following reasons:

(i) I have decided that para 21 of the judge's decision is determinative in this appeal, even if it is the case (which is no means clear) that the judge misapprehended or overlooked relevant evidence in relation to the sponsor's

remittances to the appellant. For this reason, even if the judge did err in law, any such error of law is plainly immaterial to the outcome.

(ii) That para 21 of the judge's decision was determinative was plain, on any reasonable view. Accordingly, this is not a case in which it could reasonably be said that there was a strong prospect of success even assuming that the *Robinson obvious* principle applies to a family permit application under the EEA Regulations.

(iii) It has to be said, on any fair reading of the grant of permission, that the permission judge dealt with the evidence that was before the judge in all respects of as if he was seized of the appeal in the first instance.

(iv) Finally, the observation of the permission judge at para 7, that the post-decision evidence "*further supports the appellant's argument that the Judge proceeded to make a decision on a wrong factual hypothesis*" is problematic for two reasons: Firstly, it is very difficult to square the appellant's grounds with the permission judge's observation that the appellant had contended in her grounds that the judge made a decision on the wrong factual hypothesis. Secondly, and more importantly, the justification that the permission judge gave for taking into account post-hearing evidence, in reality, circumvents the general rule that post-hearing evidence is not admissible to establish an error of law except in very limited circumstances, a rule to which he referred at para 2 of his decision but proceeded to ignore or circumvent. If the justification he gave for doing so (i.e. that it "*further supports the appellant's argument that the Judge proceeded to make a decision on a wrong factual hypothesis*") were to be accepted, that could be applied in practically any case to admit post-hearing evidence which simply cannot be right.

37. For the reasons given above, the judge did not materially err in law. The appellant's appeal to the Upper Tribunal is therefore dismissed.

Decision

The making of the decision of the First-tier Tribunal did not involve the making of any error of law sufficient to require it to be set aside.

Accordingly, the appellant's appeal to the Upper Tribunal is dismissed.

Signed
Upper Tribunal Judge Gill Date: 14 February 2023

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent.

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**
3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.
4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**
5. **A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.**
6. **The date when the decision is "sent' is that appearing on the covering letter or covering email.**