Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number:
UI-2022-002696, EA/07666/2021
UI-2022-002698, EA/07951/2021
UI-2022-002700, EA/07952/2021
UI-2022-002702, EA/07953/2021
UI-2022-002703, EA/07954/2021

THE IMMIGRATION ACTS

Heard at Birmingham CJC
On the 22nd December 2022

Decision & Reasons Promulgated
On the 23rd January 2023

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

SHAKEEL AHMED (1)
ZILL HUMA (2)
MISS BANO (3)
MASTER BAHAWAL (4)
MASTER SHAKEEL (5)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr N Ahmed, Counsel instructed by Wright Justice Solicitors
For the Respondent: Mr F Gazge, Senior Home Office Presenting Officer

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DECISION AND REASONS

1. The appellants are nationals of Pakistan. The first appellant is the husband of the second appellant. They are the parents of the third, fourth and fifth appellants. They appealed the respondent's decisions of 14th March 2021 to refuse to issue an EEA Family Permit as the extended family members of an EEA national exercising treaty rights in the UK in accordance with Regulation 8 of the Immigration (European Economic Area) Regulations 2016 ("the 2016 EEA Regulations"). The EEA national, Mr Tamziz Ahmed ("the sponsor") is the brother of the first appellant. The appeal was dismissed by First-tier Tribunal Judge Freer ("the judge") for reasons set out in a decision promulgated on 27th April 2022.

2. The appellants claim the judge misdirected himself regarding the test for 'dependency' and erred in his consideration of the evidence before the Tribunal regarding that issue. The appellants claim the judge appears to have accepted that the second to fifth appellants have no earnings of their own and are unable to support themselves. It is said that the judge erred in speculating that the first appellant has probably been working when there was no evidence before the Tribunal of the first appellant having been in employment. Similarly, they claim the judge erroneously speculated that the first appellant's mother had previously been in receipt of a pension in Pakistan and/or had worked. The appellants claim the judge also speculated as to whether the property in which they live, has been inherited. They claim the accommodation forms part of their essential needs. The appellants claim there is no requirement in law for the appellants to demonstrate that they could support themselves, by, for example, the first appellant taking up paid employment. The appellants claim the approach adopted by the judge regarding the first appellant's ability to take up employment was erroneous, and contrary to the correct legal approach. The appellants claim the relevant point at which they must establish 'dependency' is the point at which they applied to join the EEA national, and there is no specified or mandatory evidence that they must provide to support their claim.

3. Permission to appeal was granted by First-tier Tribunal Judge Robinson on 6th June 2022. Judge Robinson said:

> "It is arguable that the Judge made a mistake in concluding that the Appellants did not meet the test of dependency under regulation 8 of the EEA Regulations 2016 in particular with regard to whether dependency may be of choice. Moreover the appeals are dismissed under the Immigration Citizens' Rights Appeals (EU Exit) Regulations 2020 as applications under the EU Settlement Scheme whilst it appears that the original applications were for EEA family permits under the EEA Regulations 2016."

The application for an adjournment

4. By email sent to the Tribunal on 21st December 2022, Wright Justice Solicitors applied for an adjournment. They said that the first appellant's (and sponsor's) elder brother had tragically died in Greece on 3rd December 2022. The deceased brother's body was repatriated to Pakistan and he was buried on 20th December 2022. The sponsor had travelled to Pakistan and had informed the appellants' representatives that he intended to return to the UK during the first week of April 2023. They stated that the sponsor wishes to attend the hearing to answer any questions that arise during the course of the hearing. The parties were informed that although the Tribunal had every sympathy with the position the appellants and sponsor find themselves in, the appellants are represented and there is no reason why the Tribunal should not consider whether the decision of the First-tier Tribunal judge is vitiated by a material error of law. The attendance of the sponsor was not necessary in circumstances where the appellants have legal representation. If a material error of law is found, the Tribunal would consider how the appeal should be disposed of, and it would be open to the Tribunal to either remit the appeal to the FtT or list the appeal for a resumed hearing in due course.

5. At the outset of the hearing before me, Mr Ahmed renewed the application for an adjournment. He submitted the sponsor would like to attend the hearing of the appeal. I refused the application for the reasons

that had already been provided to the appellants' representatives. It is in the interests of justice and in accordance with the overriding objective for the Tribunal to determine whether the decision of the FtT is vitiated by a material error of law, without undue delay. Determination of that issue will not require any evidence from the sponsor or further input from the sponsor. The appellants were represented at the hearing of the appeal before the FtT by Mr Ahmed. The grounds of appeal have been settled by Mr Ahmed, and Mr Ahmed attended the hearing of the appeal listed before me. In my judgement, an adjournment to simply allow the sponsor to be present at the hearing of the appeal, would result in unjustified and unnecessary delay.

The submissions before me

6. Mr Ahmed adopted the grounds of appeal. He confirmed the focus of the appeal before me is the judge's conclusion that the appellants have not established they are dependent upon the sponsor, an EEA national. He accepts the judge's findings and conclusions regarding the question of whether the appellants are members of the sponsor's household that are set out at paragraphs [78] and [79] of the decision.

7. Mr Ahmed submits that in paragraphs [80] to [82], of the decision the judge focuses upon whether there was dependency by choice. He submits the authorities make clear that there can be dependency by choice. He submits that in Lim v ECO (Manila) [2015] EWCA Civ 1383, the appellant was financially independent, and did not need the additional resources for the purpose of meeting her basic needs. Mr Ahmed submits that here, the appellants rely upon the support provided by the sponsor to meet their basic needs.

8. Mr Ahmed accepts that in paragraph [55] of the decision, the judge noted that on 19th October 2021, the first appellant had received a large sum of 124,898 PKR that, on the evidence before the Tribunal, had not come from the sponsor. That credit into the first appellant's bank account is

shown in the bank statement at page 49 of the appellants' bundle. Mr Ahmed referred me to the bank statement at page 46 of the appellants' bundle which also shows a credit of 169,859 PKR on 3rd July 2021 but which is not referred to by the judge, and the judge does not appear to take issue with. Mr Ahmed submits it is quite possible that occasionally, larger sums were sent by the sponsor to the first appellant as a combination of several months payments rather than the remittances being sent monthly.

9. Mr Ahmed submits there was reliable evidence before the Tribunal that funds were regularly sent by the sponsor to the first appellant. The sponsor's evidence was that the essential needs of the appellants were met by the funds sent by the sponsor. He submits the judge's error in approach is evident by what is said in paragraph [74]. The judge found it had not been proved on the balance of probability that the sponsor gave support for between "half and all of the essentials of life". There is no requirement that the support should provide for more than half of the essential needs. The support can be for any proportion of the essential living needs, however small.

10. Mr Ahmed submits the respondent made no allegation of any abuse of EU rights. The judge erroneously focused upon the claim that the first appellant was not working and erroneously concluded that here, there was a dependency of choice. He submits that when the decision is read as a whole, it is deficient in material respects, and must be set aside.

11. On behalf of the respondent, Mr Gazge submits that in granting permission to appeal, Judge Robinson noted that the appeals are dismissed under the "2020 Regulations" (i.e. under the Immigration Citizens' Rights Appeals (EU Exit) Regulations 2020), but that is immaterial. He submits it is clear from the decision that the judge had in mind Regulation 8 of the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations") that applied to this appeal.

12. Mr Gazge submits the question for the judge was whether the appellants are dependent on the sponsor for their essential living needs. He submits the Judge went through all the evidence that was before the Tribunal very carefully, and could not be sure, on balance, where sums received by the first appellant come from. The sponsor had himself made the assertion that the first appellant had not worked, and it is therefore unsurprising that the judge addressed that issue. Mr Gazge submits the judge looked at all the evidence in the round. It was open to the judge to make the adverse credibility findings he did, and to conclude that the appellants have not established that they rely upon the sponsor to meet their essential living needs. He submits the judge was entitled to dismiss the appeal for the reasons set out in the decision.

Error of Law

13. Insofar as is material, the expression "extended family member" is defined in Regulation 8 of the 2016 Regulations as follows:

> "Extended family member"
>
> (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)…
>
> (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) 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.

14. The appellants must first establish that they are the relatives of an EEA national. Provided, as here, the relationship is established, there are two separate routes to qualification. The appellants must demonstrate they were either: (i) dependent on the EEA national in a country other than the

UK, or (ii) a member of the EEA national's household in a country other than the UK. Although 'dependence' and 'membership of the EEA national's household' are alternative routes, there is often likely to be some overlap in the evidence.

15. The grounds of appeal do not directly challenge the finding at paragraph [78] of the decision, that the appellants have not established on the evidence before the Tribunal that they satisfy the requirement that they 'are a member of the EEA national's household'. The judge noted that the home in which the appellants live, appears to have belonged to the first appellant's now deceased parents. There was no evidence before the Tribunal that the property was transferred and is now owned by the sponsor. Mr Ahmed does not seek to challenge that finding made by the Judge and the focus of his submissions before me was upon whether the appellants are dependent on the sponsor.

16. I reject the grounds of appeal that each concern the judge's analysis of the evidence before the Tribunal regarding 'dependence'. In Reyes v Migrationsverket (C-423/12) the CJEU confirmed that dependency is a question of fact, and the dependency must be genuine, but if it is found that the family members essential needs are met by the material support of an EEA national, there is no need to enquire as to the reasons for the dependency. The CJEU held that 'family members' could not be required to prove that they have searched for a job in the country of origin in order to be regarded as dependent and thus come within the definition of a family member under Directive 2004/38 art.2(2)(c).

17. In his decision the judge refers to the decision of the Court of Appeal in Lim – ECO (Manila) [2015] EWCA Civ 1383 in which Lord Justice Elias, with whom McCombe LJ, and Ryder LJ agreed, held that in determining whether a family member was a "dependent direct relative" for the purposes of the Immigration (European Economic Area) Regulations 2006 reg.7(1)(c), the critical question is whether they were in fact in a position

to support themselves. The Court of Appeal held the Malaysian mother-in-law of an EU national living in the UK was not dependent on him, despite the fact that she received financial support from him: she was financially independent and did not need the additional resources for the purpose of meeting her basic needs. Having reviewed the decisions of the CJEU regarding the test for dependency, at paragraph [25] of his decision, Elias LJ stated:

> "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. For example, paragraph 20 refers to the existence of "a situation of real dependence" which must be established; paragraph 22 is even more striking and refers to the need for material support in the state of origin of the descendant "who is not in a position to support himself"; and paragraph 24 requires that financial support must be "necessary" for the putative dependant to support himself in the state of origin. It is also pertinent to note that in paragraph 22, in the context of considering the Citizens Directive, the court specifically approved the test adopted in Jia at paragraph 37, namely that:
>
> > "The need for material support must exist in the State of origin of those relatives or the State whence they came at the time when they apply to join the Community national.""

18. The correct test was set out at paragraph [32] of the decision:

> "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."

19. Whether the appellants are dependent on the sponsor was therefore a factual question for the judge to assess on the evidence before the Tribunal. The burden rested upon the appellants to establish their entitlement to an EEA Family Permit on a balance of probabilities.

20. The judge noted the appellants had previously made an application in 2019 that had been refused. A copy of the respondent's decision dated 5th July 2019 to refuse the application made by the first appellant for an EEA family permit to join Tamziz Ahmed in the United Kingdom as the extended family member of an EEA national was to be found at pages 30 to 32 of the respondent's bundle. The judge confirmed, at [17], that although that decision was not entirely irrelevant, he addressed the appeal based upon the current evidence and matters arising from the 2021 decisions.

21. The judge summarised the claim made by the appellants at paragraph [21] of the decision. The sponsor attended the hearing of the appeal. His evidence is summarised at paragraphs [22] to [34] of the decision. To summarise, the evidence of the sponsor was that the appellants have no income from any other source. He claimed that since 2013 he has sent remittances through a variety of routes. When his mother was alive, he provided money for the family's basic living expenses, including the costs of schooling. He claimed his mother passed away in 2018 and he had visited the family in Pakistan at that time.

22. He estimated the appellants' combined monthly expenses in Pakistan are between 35,000 and 40,000 PKR. They do not pay rent but incur costs for utilities like electricity and water, and have to meet the costs of school fees and groceries. He accepted there was no evidence before the Tribunal regarding the utility bills and was not sure that the utility bills were in fact directed to the first appellant following the death of his mother in January 2018. He accepted there was no evidence before the Tribunal regarding the costs of schooling but estimated the cost to be 3000 PKR for the youngest child, 4000 PKR for the next and 5000 to 6000 PKR for the eldest child.

23. The judge's findings and conclusions are set out at paragraphs [50] to [83] of the decision. At paragraph [50], the judge noted that the second

to fifth appellants are not earning and so they must be dependent either upon the first appellant, or upon whoever funds the first appellant if he is not self funding, for the basic essentials of life. The judge noted at paragraph [51], that much depends on credibility. The judge noted at [52] that 'work' is not the only possible alternative source of funds available to the appellants, to the sponsors remittances. At paragraph [55], the judge said:

> "On the 19th October 2021 the First Appellant received a large sum of 124,898 PKR and it is not shown to be from the sponsor. Nothing matches with it. It could be the case that he has another backer or he is working or he borrowed money or he is independently wealthy (perhaps via inheritances). It has not been explained."

24. The judge sets out his findings as to the credibility of the sponsor at paragraphs [57] to [67] of the decision. He noted that the receipts from the schools do not match the unsupported figures for schooling expenses given by the sponsor during the hearing. The judge noted, at [58], that the sponsor was confused about who supported the appellants until the death of his (and the first appellant's) mother in 2018. He noted that the appellant did not have a detailed breakdown of the living expenses of the five appellant's and found the sponsor is not a reliable witness regarding the situation of the appellant's in Pakistan. The judge noted, at [61], that in the respondent's previous decision dated 5th July 2019, the first appellant had provided money transfer remittance receipts from the sponsor for a 6-month period in 2018. The respondent had noted that the first appellant had claimed his sponsor had sent approximately £8366.62 in the 6-month period, but that amount was greater than the amount the sponsor would have earned in the same period. Although there had been no appeal against that decision, the judge found it likely that the payments were contrived for the purpose of that first application.

25. The judge noted, at [63], that in the second application that led to the refusals dated 14th March 2021, the appellants relied upon 18 money transfer receipts demonstrating money sent from the sponsor over a

period between 11th June 2018 to 16th December 2020. The Judge noted the observation made by the respondent when refusing the application that there were no documents submitted to show receipt of the funds by the first appellant. The judge also noted the respondent had referred to the lack of evidence regarding the family's circumstances in Pakistan. The respondent had highlighted the need for *"Evidence of your income, expenditure and evidence of your financial position which would prove that without the financial support of your sponsor your essential living needs could not be met".* The judge said at paragraph [64]:

> "… Commonly this is answered by supplying a detailed monthly budget breakdown with shopping receipts and bank statements and supportive statements from local officials, and perhaps tax documents to. In the hearing it was apparent that we still have no clarity about the financial circumstances at all. This raises the real possibility of there being deliberately arranged obscurity; at the very least, there is certainly not shown an efficient and organised and thorough approach to assembling relevant evidence."

26. The judge noted at [66], that there is no evidence regarding the occupation of the first appellant's father, or the size of his estate when he passed away. Similarly there was no information regarding the first appellant's mother aside from the fact that she had a government pension. The judge noted there was no independent evidence that the family only has the house and no other income or assets. At paragraph [67], the judge concluded:

> "For these reasons taken in the round, I find the sponsor has not established sufficient credibility to give evidential weight to any matter he has put forward which has not been proved by other independent evidence. Where there is corroborative and credible, independent evidence, there I accept what he says is being reasonably likely to be the case. However, that is in short supply here."

27. At paragraphs [68] to [77], the judge considered the claim made by the sponsor that the first appellant had never worked. He found that he had not been given a reliable explanation of why the first appellant had not been working. He said that the probability is that the first appellant has in fact been working, albeit with the possibility of a short break up to

around January 2018 when his mother passed away. At paragraph [73], the judge found that even if the first appellant has no work history at all, there are numerous gaps in the evidence and an unexplained major payment that did not appear to come from the sponsor. At paragraphs [74] to [75], the judge said:

> "74. I find it not proved to the balance of probability that the sponsor gave support for between half and all of the essentials of life, which satisfies the definition of dependency. The evidence does not rise to satisfy the legal tests in Lim and/or Reyes. The appellants have not established to the balance of probabilities that they have been continuously (for some period) supported as extended family members of the sponsor. For the avoidance of any doubt, I find that continuity of dependency once started is part of the legal test and it is not satisfied by the evidence to the necessary standard.
>
> 75. It is not dependency, if the primary purposes of funds sent to sustain a certain lifestyle or to support a migration application."

28. At paragraphs [80] to [83] of the decision the judge addressed whether the appellant's are 'dependent' upon the sponsor or can support themselves.

29. I accept that the judge erred in saying, at [78], that the sponsor had not established that he gave support for 'between half and all of the essentials of life', but when the decision is read as a whole the judge's expression of the test in that way is immaterial. In Reyes the CJEU confirmed that dependency is a question of fact, and if it is found that the family members essential needs are met by the material support of an EEA national, there is no reason to enquire as to the reasons for the dependency. The question of dependency is not determined by the mere fact that the EU national has made resources available to the appellants. Although it is irrelevant why the appellants are dependent, dependency is not established simply by evidence confirming funds have regularly been transferred or a bare assertion that the appellants are not working or have no other income. The question was whether, without the support the appellants receive from their sponsor, they would be unable to meet their essential needs.

30. Although the decision could have been better expressed, an appellate court should resist the temptation to subvert the principle that they should not substitute their own analysis and discretion for that of the Judge by a narrow textual analysis which enables it to claim that the judge misdirected themselves. It is not a counsel of perfection. An appeal to the Upper Tribunal is not an opportunity to undertake a qualitative assessment of the reasons to see if they are wanting, perhaps even surprising, on their merits. A fact-sensitive analysis was required.

31. It is clear from a reading of the decision as a whole that the judge had concerns about the credibility of the sponsor and the paucity of evidence before him in material respects. The judge found that in 2019, the appellant sought to rely upon payments from the sponsor that appeared likely to be contrived for the purposes of that first application.

32. The judge found the sponsor's evidence regarding the appellants' expenditure was not supported by evidence that would reasonably have been available and that there remained no clarity regarding the financial circumstances of the appellants. The evidence was obscure. The judge did not speculate but reached findings and conclusions that were open to him on the limited evidence before the Tribunal.

33. The judge was entitled to have regard to unexplained income shown on the first appellant's bank statements. The submission by Mr Ahmed that it is quite possible that funds were provided to cover extended periods, was not how the claim was advanced by the sponsor before the First-tier Tribunal. It would be surprising if the sponsor had provided evidence of smaller remittances sent by him to the first appellant, but failed to provide evidence of, or an explanation for larger remittances sent by him. The fact that there may have been more than one unexplained remittance, but only one was referred to by the judge adds nothing. That raised the possibility that the appellants had the funds to support themselves, were financially independent and did not need the additional

resources received from the sponsor for the purpose of meeting their essential living costs. The Judge noted, quite properly at [75] that it is not dependency if the primary purpose of funds sent are to sustain a certain lifestyle or to support a migration application.

34. The judge was entitled to note that in the absence of any picture of the wider context, in the end, he was unable to accept that the appellants are dependent on their sponsor in the way they claim. It follows that in my judgement, the findings and conclusions reached by the judge were open to him on the evidence and there is no material error of law in the decision of the First-tier Tribunal.

Notice of Decision

35. There is no material error of law in the decision of FtT Judge Freer promulgated on 27th April 2022 and it was open to the judge to dismiss the appeal under the EEA Regulations 2016

V. Mandalia

Upper Tribunal Judge Mandalia **22nd December 2022**