



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-002527
FtT No: EA/09088/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 05 December 2023

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN
DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

WAHAB GUL
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No attendance

For the Respondent: Mr A Basra, Senior Home Office Presenting Officer

Heard at Field House on 21 November 2023

DECISION AND REASONS

Introduction

1. The appellant appeals a decision of the First-tier Tribunal (Judge of the First-tier Tribunal Bennett) sent to the parties on 6 January 2023.
2. The underlying appeal concerns the appellant's application for a Family Permit under the Immigration (European Economic Area) Regulations 2016. The appellant's sponsor is his brother, Mr Raja Naseem Siraj Janjua, a Spanish national.

Brief facts

3. The appellant is a national of Pakistan and presently aged 41. He applied for a Family Permit as an extended family member of his sponsor on 22 December 2020.
4. The respondent refused the application by a short decision dated 10 May 2021, detailing that insufficient evidence had been provided to demonstrate that the appellant is related to the sponsor.
5. The appeal was initially considered as a paper matter by the First-tier Tribunal (Judge of the First-tier Tribunal Birrell) on 16 February 2022. At [7] of her decision Judge Birrell noted the appellant's grounds of appeal which were entirely focused upon the one issue raised by the respondent's decision letter, namely whether he had a sibling relationship with his sponsor. At [12] Judge Birrell recorded that at a pre-hearing review the appellant was placed 'on notice' that he was required to address in evidence the issue of the 'sponsor's exercise of treaty rights as a worker' and 'dependent' as they had not been expressly conceded by the respondent, and 'indeed the respondent in an email of December 20th 2021 confirmed they were not conceded'. As the appellant resides in Pakistan, sought a paper consideration of his appeal and is unrepresented, it is unclear to the Upper Tribunal as to how and when this state of affairs was confirmed to the appellant. No detail is provided as to the recipient(s) of the December 2021 email.
6. Judge Birrell refused the appeal on the ground that the appellant had failed to establish that he is a dependant of an EEA national exercising EU Treaty rights.
7. The decision of Judge Birrell was set aside in its entirety on 9 June 2022 by a decision of Resident Judge Campbell under rule 32 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014.

Decision of the First-tier Tribunal

8. The appeal was considered by Judge Bennett as a paper appeal. The Judge observed that Judge Birrell had accepted that the appellant and sponsor are siblings. Consequently, the Judge found that the relationship between the brothers was as asserted and that the sponsor is a Spanish national who is living and working in the United Kingdom.
9. The Judge turned to the issue of financial dependency. He noted that there was limited documentation filed. Such documentation evidenced that between December 2021 and September 2022 the sponsor had remitted £632 and €1,500 to the appellant.
10. The Judge further found:

"16. I find that there is a bunching of the purported money transfers in the period before the Appellant's case initially came before the

Tribunal, and that there is then a lengthy absence of evidence of further transfers until the decision was taken to put aside the original Tribunal decision (on 9 June 2022). I find that this undermines the Appellant's case.

17. I also note the relatively low financial value of most of the transfers. In the absence of any details of the Appellant's day to day living expenses and incomings/outgoings I am unable to draw the conclusion that he is dependent upon the Sponsor for these amounts. I further note that there are no receipts for the money transfers to show that they were in fact received by the Appellant.
 18. According to the visa application form (page 9 Respondent's bundle) the Appellant has a wife and two children. Given the irregularity of the payments from the Sponsor I am not satisfied that the Appellant can be solely reliant on the money from the Appellant to support his family and I consider it more likely than not that he also receives money from elsewhere. Whilst this finding is not determinative of his claim, it means that in the absence of further information I am not satisfied that the Appellant does in fact rely on the money from the Sponsor for his essential living needs".
11. Additionally, the Judge found that the sponsor's income is not sufficient to support the appellant "by sending him the regular payments as described".
 12. We observe that no adequate reasoning is provided as to why the remittances in the sums identified were properly to be considered as being of "low financial value" when sent to someone in Pakistan over the course of ten months.

Grounds of Appeal

13. The appellant is a litigant in person and has provided short grounds of appeal. He raises several challenges including:
 - The sole ground of refusal in the respondent's decision letter of 10 May 2021 was directed towards the sibling relationship.
 - He was not aware that the issue of financial dependency was live in this appeal.
 - There was no consideration of money receipts filed with the Tribunal that predate December 2021.
 - There was a failure by the First-tier Tribunal to adequately consider the sponsor's monthly income.
14. Permission to appeal was granted by Judge of the First-tier Tribunal Hamilton who reasoned in his decision dated 24 May 2023:
 - "2. The appellant's application was refused by the Entry Clearance Officer solely on the basis that the appellant had not shown he

was related to the sponsor as claimed. The Judge found that the appellant and sponsor were related as claimed but then went on to refuse the appeal on the basis that the appellant had not shown he was dependent on the sponsor as claimed.

3. It is arguable that it was unfair of the Judge to consider the issue of dependency when it had not been raised by the respondent”.
15. The respondent filed a Rule 24 response, dated 7 August 2023, observing:
- “3. The appellant has to show that he relies on his family member to provide for his essential needs. The Judge was not constrained by what was in the Respondent’s decision. He reached conclusions which were open to him in all the circumstances”.

Law

16. Regulation 8 of the Immigration (European Economic Area) Regulations 2016 details, as relevant to this appeal:
- ‘(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; 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.’

[Emphasis added]

Submissions

17. The core of Mr Basra’s submissions before us was that the Judge approached his assessment of regulation 8 of the 2016 Regulations in a fair manner. He was entitled to properly consider whether all requirements of the relevant regulation were met.

Discussion

18. The First-tier Tribunal’s function is, in most instances, a merits determination and in such instances the First-tier Tribunal is not limited to

a secondary reviewing function such as would be appropriate in judicial review. Its appellate function is an extension of the decision-making function. The First-tier Tribunal stands in the shoes of the decision-maker. It is independent of the executive - in this appeal the respondent - but undertakes the same task by applying the relevant Rules and/or Regulations, namely regulation 8 in this matter, and is required to reach a reasoned conclusion that the appellant meets the relevant requirements.

19. The focus of an appellant, as in this case, can properly be expected to be upon the express reasons for refusal, and accordingly in many cases documentation will be filed to address the respondent's adverse reasoning. However, the First-tier Tribunal is not limited to considering the particular provision(s) of the relevant Rule(s) or Regulation(s) expressly referenced by the respondent. To be so constrained could lead to the First-tier Tribunal allowing what it identifies as an unmeritorious appeal solely on a technicality. Such approach undermines the notion that the First-tier Tribunal steps into the shoes of the decision-maker.
20. A long-established principle flows from the established function that fairness dictates that if the First-tier Tribunal identifies a potentially adverse issue outside that initially relied upon the respondent, an appellant should be notified and offered the opportunity of an adjournment, thereby enjoying sufficient time to address such concern: *Macharia v. Immigration Appeal Tribunal* [2000] Imm. A.R. 190, at [18].
21. Turning to the facts in this appeal, we are mindful that the appellant is a litigant in person residing in Pakistan. Whilst a legal representative would have been expected to understand that all elements of the relevant regulation were to be met, we accept that this may not have been clear to the appellant. We note his observation in his grounds of appeal that 'there is no mention of financial support being an issue or even mentioned on the home office [sic] decision dated 10/05/21.' As noted above, it is unclear to us whether the appellant was informed, or placed 'on notice', following a pre-hearing review that he was required to address in evidence the issue of dependency. We also accept, being mindful that the appellant is unrepresented, that he may have concluded that the setting-aside of Judge Birrell's decision had the effect of setting aside the reference to dependency being an issue. We draw this conclusion from the appellant's grounds of appeal, where he clearly details that he was unaware that the issue of financial dependency was a live issue in this appeal.
22. We conclude, on the particular facts arising, that the Judge was required to act in a procedurally fair manner and to ensure that the appellant understood that he was to address all requirements of regulation 8 of the 2016 Regulations that had not been expressly relied upon by the respondent in his decision letter, including dependency. We conclude that fairness required the paper consideration to be delayed, and for the appellant to be informed by the First-tier Tribunal that he would be required to address all elements of the relevant regulation. He should have been given sufficient time in which to file and serve any documents relating to dependency that he wished to rely upon.

23. We are satisfied that the approach adopted by the Judge was procedurally unfair. We therefore set aside the decision in its entirety, save that the findings detailed below, unchallenged by the respondent before us, are preserved:
- i. The appellant and his sponsor are brothers, at [9]
 - ii. The sponsor is a Spanish national living and working in the United Kingdom, at [10]
 - iii. The sponsor is genuinely employed in the United Kingdom, at [11]
 - iv. The sponsor has pre-settled status, at [12]

Re-making the Decision

24. It is unfortunate that this matter has now twice been considered by the First-tier Tribunal. However, having concluded that the decision of Judge Bennett was procedurally unfair, Mr Basra did not demur from our observation that the appellant should be entitled to enjoy the benefit of his appeal before the First-tier Tribunal.
25. We therefore remit this matter to the First-tier Tribunal to re-make the decision.
26. Usually, we do not consider it appropriate that the Upper Tribunal issue directions on behalf of the First-tier Tribunal. However, we observe that the appellant is now on notice consequent to our decision that he is required to satisfy all requirements of regulation 8 of the 2016 Regulations, including the financial dependency requirement. This will necessitate the appellant having sufficient time to file any further relevant documentary and/or witness evidence.
27. Additionally, we note that in correspondence with the Upper Tribunal the appellant has indicated that over time additional documents were filed with the First-tier Tribunal. It will be for the First-tier Tribunal to ensure that all relevant documentation is placed before a Judge.
28. This is a matter where on its face the First-tier Tribunal would be aided by an oral appeal hearing so that issues could be addressed with the sponsor. Ultimately, it is a matter for the appellant as to whether he wishes to pursue his appeal by means of a paper consideration or to have an oral hearing.
29. In the circumstances the Upper Tribunal considers that it is proper to direct that the appellant has 42 days from receipt of this decision in which to write to the First-tier Tribunal and indicate whether he would wish for his appeal to be converted into an oral hearing. Silence will be taken as the appellant being content that it proceeds to a paper consideration.
30. Accordingly, it is appropriate that this matter is not listed by the First-tier Tribunal for at least three months after promulgation of our decision.

Direction

31. The Upper Tribunal directs:

- (1) The appellant has 42 days from receipt of this decision in which to write to the First-tier Tribunal and request that his appeal be converted into an oral hearing.
- (2) Silence will be taken as the appellant being content that the appeal proceeds to a paper consideration.

Notice of Decision

32. The decision of the First-tier Tribunal sent to the parties on 4 January 2023 is subject to material error of law. It is set aside, save for the preserved findings identified at [23] above.
33. The re-making of the decision is remitted to the First-tier Tribunal sitting in Manchester, not to be listed before Judge Birrell or Judge Bennett.

D O'Callaghan
Judge of the Upper Tribunal
Immigration and Asylum Chamber

30 November 2023