



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-002945

First-tier Tribunal No: EA/06836/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 26th of January 2024

Before

UPPER TRIBUNAL JUDGE KEBEDE
DEPUTY UPPER TRIBUNAL JUDGE BLACK

Between

MRS KOMORUN NESA
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Hingora, instructed by Law Valley Solicitors
For the Respondent: Ms A Ahmed, senior home office presenting officer

Heard at Field House on 17 January 2024

DECISION AND REASONS

1. The appellant appeals, with permission, against the decision of First-tier Tribunal Judge Beg (“the Judge”), dismissing her appeal against the respondent’s decision to refuse her application for a family permit under the EU Settlement Scheme (EUSS).
2. The appellant is a national of Bangladesh born on 3 March 1955. She applied on 16 February 2022 as the family member of a relevant EEA citizen, her daughter in law. The respondent refused the application on 14 July 2022. The respondent noted the money transfer receipts dated September 2015 to 2022 from Mr J to the appellant. The respondent considered that the limited evidence provided failed to show that the appellant was financially dependent on the sponsor for her essential needs and there was no evidence of her own domestic circumstances. No issue was taken as to the relationships.
3. In her decision the Judge identified the determinative issue as “whether the appellant is dependent upon the EEA national sponsor to meet her essential

living needs” [6]. She cited Reyes v Sweden [2015] EUECJ C-423/12 [8]-[9] and Lim [2015] EWCA Civ 1383 [41]. She heard oral evidence from the appellant’s daughter in law/sponsor IEM , the appellant’s son Mr J, his brother Mr M and his sister AK. The Judge found the witnesses to be lacking in credibility.

4. The Judge made the following findings:-

- a. That IEM /the sponsor was not a credible witness given her statement that it was not her business to know if her brother in law and sister in law provided money to the appellant [17].
- b. That the witness AK was not credible as her evidence that she could not recall how much she earned and her claim not to be a carer for her nieces/nephews was inconsistent with the evidence of IEM. {Note that the final sentence of [21] appears to contain a typo incorrectly referring to “Ms Mazur “when the substance of the paragraphs relates to “Ms Khanam”}
- c. That the appellant’s son Mr J given his limited earnings is not in a position to support the appellant financially [22]
- d. That it was not credible that the appellant’s second son Mr M was not sending more financial support to the appellant given that he was self employed and running his own business[23] and bearing in mind the limited earning capacity of Mr J. Mr M was not a credible witness [24]
- e. That Mr J was not a credible witness given his failure to mention that his sister lives with them, pays half of the rent and did not send money to the appellant [24][36].
- f. That AK was not credible because she stated that she provides £50 per month to her brother Mr J to send to the appellant that is used for clothes and shoes [25].
- g. That there was inconsistency in the evidence as to the existence of relatives in Bangladesh. Mr M stated that they had 4 uncles there whereas Mr J and IEM stated that there were none [28]. This was accepted by AK when it was put to her in cross examination [29].
- h. That the appellant has relatives living in the same village as her who she can call on for assistance but that they do not provide financial support [30].
- i. That there is no credible documentary evidence that the sponsor and her husband provided financial support from 2014. The remittance slips dated 2019-2022 show that the funds were sent to the appellant by Mr J [34].
- j. That the financial support provided to the appellant in fact comes from Mr M given that he has a grocery business and given Mr J’s limited earnings, and that the application used IEM and Mr J because she is an EEA national [35].
- k. In the absence of documentary evidence of the appellant’s bank account, there was insufficient evidence about funds in her account and the source of those funds, including income from farming [37].
- l. There was no credible evidence of the appellant’s income and outgoings including utility or medical bills, accepting that she may not have kept grocery receipts [38].
- m. All of the witnesses were unreliable as to the funds sent to the appellant [38].
- n. That the appellant is a widow and does not work, and lives in the former family home now owned by her following her husband’s death [39].
- o. The financial support is provided by Mr M [39].

- p. The profit made by Mr J in the last financial year was £16,000 from which he pays rent and supports his wife and 2 children. In addition he receives a contribution from AK who earns £200 pw.
 - q. That the appellant relies on her son Mr M to financially support her for her essential needs and not from the sponsor and her husband Mr J as claimed [42].
- 5. In grounds of appeal the appellant argues that the Judge considered the appeal on a factual basis not with reference to the reasons given for the refusal in which it was accepted that remittances had been sent to the appellant by Mr J. The respondent did not accept that the appellant had demonstrated her circumstances in Bangladesh. The appellant was not prepared to deal with the issues raised at the hearing, nor able to counter the finding made by the Judge. The Judge erred by finding a threshold amount of money sent for the appellant.
- 6. The Judge's assessment of credibility was affected by her observation recorded at [16] that she had concerns that the appellant's sons had entered into marriages of convenience.
- 7. Permission was granted by UTJ Reeds on 3 November 2023 who found it arguable that the Judge had undertaken an assessment not previously raised and the appellant was not in a position to counter it and in circumstances where there was no evidential basis to support the finding.

Error of law hearing

- 8. At the hearing before us Mr Hingora relied on Abdi [2023]EWCA Civ 1455 and expanded on the grounds of appeal. His main point was that the respondent identified the core issue as essential needs. The Judge had strayed from that narrow focus and it was not reasonably foreseeable that those issues would arise, leading to unfairness to the appellant who was not in a position to deal with the issues raised and had no opportunity to adduce evidence in support. The Judge could have allowed an adjournment for further evidence to be provided. In Abdi the Court made it clear that unfairness arose where the refusal did not make it obvious that the further matters had to be dealt with, and that it was not reasonably foreseeable by the appellant to have known that such matters would be raised. It was not possible to say what the outcome would have been nor that it would be pointless to remit the appeal to the FTT.
- 9. As to Ground 2 Mr Hingora submitted that the Judge had shown bias in recording her concerns that there were marriages of convenience [15]. It is likely that her observations would have impacted on her assessment of credibility.
- 10. Ms Ahmed opposed the appeal. She submitted that the refusal had covered the failure to provide adequate evidence of dependency, the 14 transfers were accepted but there was insufficient evidence to show that the funds were for essential needs. The issue of credibility was incorporated. The appellant was on notice that there was a lack of evidence as to her domestic circumstances. The Judge carefully analysed the evidence and found credibility to be at the heart of the case, finding that none of the witnesses were credible, a finding open to her to make having heard the evidence. It was only necessary for the Judge to determine dependency and credibility as relevant to the core of the claim. The Judge further found it lacking in credibility that there were no bank statements produced by the appellant. Abdi was fact specific and over relied on by the

appellant's counsel. In this case the witnesses were cross examined and there were significant inconsistencies. If there was an error then it was immaterial given the other findings as to essential needs.

11. As to ground 2 it was not necessary for the Judge to have raised her concerns about marriages of convenience and she did so in order to alert the respondent. Had she relied on this then the decision would have been short.
12. Mr Hingora responded that caselaw specifically required the refusal to unequivocally point out matters relied on. The points raised by the Judge were not flagged up in the refusal and ought to have been highlighted by the Judge so as to ensure a fair hearing. Taking the decision as a whole it was unsafe given the procedural unfairness, misapplication of Reyes and the biased comment.

Our discussion and conclusions

13. We are satisfied that the Judge made a finding [42] that the appellant required financial support to meet her essential needs. In other words she found in favour of the appellant as to the main issue relied on in the refusal letter. She found on the evidence before her that the appellant was unemployed and relied on financial support. What she did not agree with was that the funds came from the EEA sponsor and her husband Mr J, by finding that they had insufficient funds available to them and that in reality the funds were provided by the appellant's other son, Mr M. Her findings were supported by her credibility assessment of all the witnesses whose evidence she found to be inconsistent.
14. We were referred to Abdi which is fact specific, but contains some general points of assistance to us. The Court took the view that there was procedural unfairness where an issue had not been raised in the refusal letter nor at the hearing and which formed the basis of the dismissal of the appeal. Here the Judge identified the main issue (essential needs) and proceeded with the hearing at which the witnesses were cross examined and gave evidence as to their income and outgoings and the funds provided to the appellant, which the Judge found to be unreliable. We consider what the consequences of that are for the appellant? Mr Hingora submits that the appellant was deprived of an opportunity to deal with the concerns raised by the Judge in her decision, and which establish a possibility that there would have been a different outcome. Ms Ahmed submits that there was no unfairness and that it was properly open to the Judge to determine credibility at the hearing. Given that the issue of credibility was not specifically raised in the refusal, we take the view that it would not have been foreseeable for the appellant to be expected to deal with that issue at the hearing. It is unclear whether or not the Judge specifically put to the witnesses that a) Mr J could not afford to make the payments claimed and b) that the funds in fact came from Mr M. It is certainly possible that had the appellant been on notice of this issue that some documentary evidence could have been adduced in response, notwithstanding that the Judge found their evidence to be unreliable and concluded that the EEA sponsor was in effect being used as a conduit. The appellant was therefore deprived of an opportunity to respond to the matter which in her decision was central to the dismissal of the appeal. In that context and in light of the inappropriate observations by the Judge that the witnesses had entered into marriages of convenience, which we find could have impacted on her assessment of credibility, it seems to us that the decision cannot stand. We acknowledge that the Tribunal? in such appeals the overall focus is on the issue of dependency but the main focus will be on the precise concerns raised in the

refusal letter. It may well be that during the hearing evidence given may result in new issues arising which will impact of the Judge's consideration, but where that occurs fairness needs to be considered. We take the view that this is consistent with the Practice statement No 1 of 2022 which endorses and encourages an issue focussed approach (TC(PS compliance -"issues-based" reasoning Zimbabwe [2023] UKUT 00164 (IAC). In this instance, the matter at the heart of the appeal was whether the evidence of the appellant's domestic circumstances showed that she needed the support to meet her essential needs. There was no indication from the respondent that the remittances dated 2019-2022 were not accepted, nor that they had not been paid by Mr J. And no issue was raised as to the EEA nationals exercise of Treaty Rights. We conclude that there was procedural unfairness amounting to an error in law. The Judge gave no indication during the hearing that she was concerned about the credibility of the witness as to the source of funds and ability to provide the funds. This was exacerbated by her raising irrelevant matters which could have been perceived as negatively impacting on her assessment of credibility.

Notice of Decision

15. The appeal is allowed. The decision is set aside as it contains an error of law. We remit the matter to the First-tier Tribunal for hearing de novo (excluding Judge Beg).

G A Black

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

25.1.24