



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2023-003305
UI-2023-003306
UI-2023-003307
UI-2023-003308

First-tier Tribunal No: EA/50792/2021
EA/50793/2021
EA/50794/2021
EA/50801/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

8th February 2024

Before

**UT JUDGE MACLEMAN &
DEPUTY UT JUDGE DOYLE**

Between

**AISHA ARSHAD CHAUDHRY
ZAIN ATIF
HAMZA ATIF
ESHAL ATIF
(ANONYMITY ORDER NOT MADE)**

Appellants

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr A Boyd, of Alexander Boyd Solicitors.
For the Respondent: Mr A Mullen, Senior Home Office Presenting Officer

Heard at 52 Melville Street, Edinburgh, on 6 February 2024

DECISION AND REASONS

1. This is an appeal by the Appellants against the decision of First-tier Tribunal Judge McLaren dated 28/03/2023, which dismissed the Appellants' appeals on all grounds.

Background

2. The first Appellant was born on 26/02/1982. She is the mother of the remaining three appellants who were born on 04/01/2005, 25/12/2008 and 22/07/2011. All four appellants are citizens of Pakistan.

3. On 5 December 2020 the Appellants applied for EEA family permits to join their EEA Sponsor, Mr Fouad Chaudhry (“the Sponsor”) in the UK. The Sponsor is the brother of the First Appellant and the maternal uncle of the Second, Third and Fourth Appellants. The Appellants claim that they are the extended family members of the Sponsor because they say they are dependent on him in terms of Regulation 8(2) of the 2016 Regulations referred to below.

4. The Respondent refused the appellants’ applications on 29 January 2021 stating that there was insufficient evidence that the Appellants are related to the Sponsor as claimed, and that there was insufficient evidence that the Appellants were financially dependent on the Sponsor.

The Judge’s Decision

5. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge McLaren (“the Judge”) dismissed the appeals against the Respondent’s decision.

6. Grounds of appeal were lodged, and on 03/08/2023 First-tier Tribunal Judge Singer gave permission to appeal stating

1. The application, which is in time, argues in the grounds that the FTJ erred in law by (1) failing to consider the Appellants’ factual dependency for essential/basic needs applying the correct legal test on dependency under the EEA Regulations, (2) misconstruing the requirements to establish dependency set in the Immigration (EEA) Regulations 2016, and (3) making unreasonable and/ or unfair findings of fact which were not supported by the evidence and/or not put to the sponsor when they should have been.

2. It is arguable that the way in which the FTJ phrased paragraph 38 meant that the FTJ improperly imposed an additional requirement for there to be emotional dependency.

3. Additionally, if the FTJ made adverse findings in relation to important matters which were never raised or put to the sponsor and should have been, then it is also arguable that fairness required this to be ventilated at the hearing with the witness and the representative before rejecting credibility: (see for example *Browne v Dunn* (1893) 6 R. 67 (HL) per Lord Herschell L.C. at §70, as explained in *Deepak Fertilizers & Petrochemical Ltd v Davy McKee (UK) London Ltd* [2002] EWCA Civ

1396 per Latham LJ at §49-§50).

4. All grounds may be argued.

The Hearing

7. For the appellant, Mr Boyd moved the grounds of appeal. He told us that there are three grounds of appeal.

8. The first ground of appeal is that the Judge failed to properly consider the appellant's dependency for essential needs and failed to apply the correct legal test for dependency. The second ground of appeal is that the Judge erred in law by misconstruing the correct legal test for dependency. Mr Boyd told us that the Judge should have restricted her enquiry to the ability of the appellants to support themselves, and the regular financial support provided by the sponsor. He told us that reasons for dependency are irrelevant. He argued that the Judge materially erred in law by enquiring into the reasons for dependency and imposing a higher test for dependency.

9. The third ground of appeal is that the Judge made perverse findings of fact. Both the skeleton argument and the grounds of appeal contain 21 subparagraphs challenging the Judge's findings of fact and declaring that the findings of fact are perverse. The grounds of appeal challenge the quality and reasonableness of the Judge's findings, implying that the Judge took a lazy & superficial approach to the evidence. The grounds of appeal stridently declare that comprehensive, paginated, and easily understandable, documentary evidence was produced but the Judge did not give that evidence anxious scrutiny.

10. Mr Boyd asked to set the decision of the First-tier Tribunal aside and substitute our own decision allowing the appeals.

11. For the respondent, Mr Mullen opposed the appeal. He told us that the Judge reached conclusions well within the range of reasonable conclusions available to the Judge. He referred us to Rahman [2012] CJEU Case-83/11. Mr Mullen told us that the appellant had failed to lodge evidence which proved dependency. The documentary evidence showed that money been sent to Pakistan, and that tuition fees and rental have been paid and groceries purchased, but that is insufficient to prove that the sponsor meets the appellants' essential needs. Without evidence defining the appellants' essential needs, the appellants failed to establish dependency.

12. Mr Mullen asked us to dismiss the appeal and allow the decision stand.

The grounds of appeal

13. The three grounds of appeal can be dealt with as one. In essence the appellant says that the Judge made perverse findings of fact and applied those perverse findings of fact incorrectly to the test of dependency.

14. The rationality appeal is contained in the 21 subparagraphs of the third ground of appeal. We note that the solicitor who drafted the grounds of appeal lost himself in hyperbole. It is not helpful to carelessly create the impression that accusations are being levelled at the Judge. The language used in the grounds of appeal should be directed at the decision.

15. It is not helpful to describe the Judge's approach to documentary evidence as an "*attack*". It is not helpful to describe the Judge's approach as "*dismissive and derisory*". If grounds of appeal are framed in a manner critical of impartiality, they should be supported by witness statements and affidavits.

Analysis

16. Between [14] and [16] of the decision the Judge takes correct guidance in law. At [13] the Judge correctly recites the burden and standard of proof. The Judge's findings of fact lie between [17] and [33]. There, the Judge's focus is clearly on the evidence produced. The Judge analyses the sponsor's financial position and records the payments made by the sponsor to the appellants.

17. The grounds of appeal say that the Judge made findings of fact which no reasonable Judge would make, but we find nothing wrong with those findings. They arise from an analysis of the evidence. The grounds of appeal have been loosely framed and are not truly directed at the findings of fact recorded between [17] and [33] of the decision. The appeal focuses on the Judge's reasons - which are found between [34] and [38] of the decision.

18. [37] of the decision focuses on the sponsor's resources and is not a relevant consideration. In SSHD v Rahman & Others [2012] EUECJ C-83/11; [2013] QB 249 the CJEU made clear that the family member only needs to show that a situation of dependence exists in the country from which the family member comes from, at the very least at the time when they apply to join the Union Citizen on whom they are dependent. It would be better if [37] was not in the decision.

19. [38] is ambiguous, and might be read to the effect that financial and emotional dependency are two essential elements of proving dependency. If that is what the Judge meant, then [38] is wrong. Dependency, firstly, means financial support needed to meet essential living requirements.

20. [37] and [38] contain errors of law. We have to determine whether or not the errors of law are material.

21. [36] contains everything that is needed in the decision. The Judge might have expressed herself better, but she was correct in bemoaning the absence of a schedule of income and outgoings for the appellants to demonstrate dependency. The appellants must show that they rely on the sponsor to meet the cost of their essential needs.

22. The evidence presented (even the updated documentary evidence provided, provisionally, to the Upper Tribunal) is sufficient to create findings of fact about the amount of money sent by the sponsor to the appellants, about housing costs, education costs, and grocery bills met by the appellants. What is still missing is evidence that the appellants need the money sent by the sponsor to meet their essential needs - in other words, that if the sponsor did not send money they could not pay their rent, buy food, or attend school.

23. Without a schedule of income and expenditure the sequence of receipts is, at best, evidentially neutral. The First-tier Tribunal was only given a limited glimpse of the appellants' income and outgoings. There is no meaningful breakdown of the appellants' income nor of their living expenses.

24. The appellants presented an incomplete picture of their circumstances in Pakistan. The remittances made by the sponsor are clearly a contribution made to the appellants, but the gaps in the evidence prevented the Judge from finding that the money is provided to meet their essential needs.

25. [37] and [38] could be removed from the decision. [36] contains all that is needed. The errors of law found in [37] & [38] are not material.

26. If this appeal succeeded, it might have been a pyrrhic victory for the appellants. In Ihemedu (OFMs - meaning) Nigeria [2011] UKUT 00340(IAC) it was held that the issue of a residence card to an extended family member is a matter of discretion. We asked representatives whether it would be enough for the appellants to show financial dependence, without regard to the history and nature of "family life" among them, or to the circumstances awaiting them in the UK (there being no indication that the sponsor could support them here, or that they might support themselves). Mr Boyd insisted that the case turned on

financial dependency only. Mr Mullen said that there would still be a question of discretion. Neither representative referred us to any authority for their position. The case law, at least historically, confirmed that there is a discretion, which a tribunal should not purport to exercise unless the respondent had already considered the matter. The decisions giving rise to this appeal consider only relationship and dependency. The structure of regulation 12 is that an ECO *must* by (1) (2) and (3) issue an EEA family permit to *family members* if the relevant conditions are met, but by (4) and (5) *may* issue a permit to *extended family members* according to the circumstances. In light of the way the decisions were framed and the way this litigation has been pursued, those issues have not been considered. It is also not clear to us whether, as the appeal structure now stands, and in absence of submissions, a tribunal should leave the exercise of discretion to the ECO, or reach its own decision. The appellants have not attempted, and were not put on notice, to make their case along those lines, so we do not purport to determine it, even hypothetically; but their case is not obviously an overwhelming one. Our observations in this paragraph, however, are not decisive of the appeal.

27. A fair reading of the decision demonstrates that the Judge applied the correct test in law and carried out a holistic assessment of the evidence. There is nothing unfair in the procedure adopted nor in the manner in which the evidence was considered. There is nothing wrong with the Judge's fact-finding exercise. The appellants might not like the conclusion that the Judge arrived at, but it is the result of the correctly applied legal equation. The decision does not contain a material error of law.

DECISION

28. The appeal is dismissed. The decision of the First-tier Tribunal dated 28 March 2023 stands.

Signed **Paul Doyle**
February 2024
Deputy Upper Tribunal Judge Doyle

Date 7