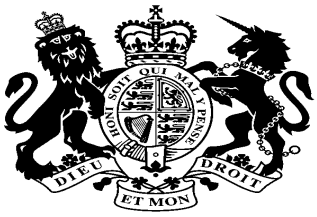

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal numbers: EA/00320/2017
EA/00321/2017

THE IMMIGRATION ACTS

Heard at: Field House
On 29 October 2018

Decision & Reasons promulgated
On 9 November 2018

Before

Upper Tribunal Judge Gill

Between

Aimen Bakhtawar — First appellant
Surriya Bakhtawar — Second appellant
(ANONYMITY ORDER NOT MADE)

And

Entry Clearance Officer (ECO) refused to issue — Respondent

Representation:

For the appellant: Mr Z Nasim, of Counsel, instructed by Legal Rights Partnership.
For the respondent: Ms. A Holmes, Senior Presenting Officer.

Decision and Directions

1. The appellants appeal, with permission, against a decision of Judge of the First-tier Tribunal Nixon who, following a hearing on 7 December 2017, dismissed their appeals against the respondent's decisions of 22 November 2016 by which he refused to issue family permits under the Immigration (European Economic Area) 2006 (hereafter the "2006 Regulations").

2. The appellants are nationals of Pakistan born. The first appellant (hereafter "AB") was born on 1 April 1989. The second appellant (hereafter "SB") was born on 7 December 1953. SB has another daughter, Ms Farhina Adnan (hereafter "FA") who is also a national of Pakistan. FA married Mr Adnan Latif Bhatti (hereafter the "sponsor"), said to be an EEA national exercising Treaty rights, in June 2014. FA joined the sponsor in the United Kingdom in January 2015. Up until then, she was living in Pakistan with the appellants, initially in a property owned by the second

appellant's brother. FA said in her witness statement before the judge that, at around the time that she and the sponsor agreed to marry, her maternal uncle said that he needed his property and "*gently*" asked FA and the appellants to move out. The sponsor then rented alternative property for them. He also provided FA and the appellants with financial support. The judge had evidence of remittances from March 2015 onwards by FA/the sponsor to the appellants. It was claimed in evidence before the judge that SB's husband, who is AB's and FA's father, left them many years ago and that, prior to financial support being provided by the sponsor, FA used to support herself and the appellants in Pakistan. She used to work as a teacher. AB does not work.

3. The appellants made more than one application for EEA family permits as dependent members of the household of an EEA national exercising Treaty rights. The applications were refused. The instant appeals concern the decisions dated 22 November 2016 (not 7 September 2016, as incorrectly stated at para 1 of the judge's decision).

The judge's decision

4. The judge found that the appellants had not established that they were dependent on FA/ the sponsor. Her reasons are given at paras 11-16 of her decision. Before I quote paras 11-16, I should say, in order to avoid any confusion, that she used the term "*sponsor*" to refer to FA whereas I have used this term to refer to the EEA national whose status in the United Kingdom was relied upon as the basis of the applications for EEA family permits. Paras 11-16 of the judge's decision's read as follows:

> "11. I note that there is no longer an issue as to the nature of the relationships between the appellants and the sponsor and her husband. However I find that the appellants have still failed to show on the balance of probabilities that they are dependent on the sponsor and her husband.
>
> 12. I have seen money transfer paid to the second appellant since she came to the UK in the sum of around £200 per month. I have seen evidence that the appellants live in rented accommodation and that the second appellant pays the rent. I have not however seen any evidence of how much their rent is, how much money they need to cover their monthly expenses, other than what the second appellant sets out in her witness statement. I have seen no independent evidence as to the rental cost or the utility bills, which I would have expected to have put before me. Looking at the second appellant's figures, this does not appear to take into account clothing or any other unexpected expenses.
>
> 13. I do not find on what I have seen that the money sent from the UK is their only source of income. I am concerned on what I have seen as to the credibility of the account given, that the second appellant does not work and that her husband is no longer part of the family and therefore offers no support. I note that the sponsor completed her visa application in 2013 stating that both of her parents work. She did not state that her mother had never worked, nor that her father had not been part of the family since around 2007/2008. She has stated that this information was not correct and stated that she was advised to mislead the immigration authorities. I find that this affects her credibility: she was either lying in 2013 or she is lying for the purposes of this application.
>
> 14. I am also concerned as to truth of the account given that her father plays no part in their lives. I have seen 2 family registration certificates, one dated 15th April 2016 and one

dated 25th July 2016. The account given by the sponsor and the second appellant is that the sponsor's father left in around 2007 and has cut off all ties. This leaves the question as to why the certificate in April 2016 does not show her father, as I would expect if he had left, but the certificate dated only 3 months later and shortly before this application, shows her father as part of the family, suggesting that the account relied on is not reliable. If it were the case that the father's photograph remained on the certificate simply because there had been no divorce, which would be arguably plausible, it does not explain how only 3 months earlier, his picture had been removed. I find that this document, taken alongside the sponsor's dishonest visa application causes me to have concerns over the credibility of this application. I have indeed seen letters from Mushtaq Chaudhery, Advocate and Naseer Usman, but I do not find that these letters take the appellant's case much further, as these are self serving documents, based on what the authors have been told. The contents do not suggest that they have seen evidence to substantiate what they have written. Furthermore these letters do not sit comfortably with the recent family registration certificate as set out earlier.

15. The sponsor states that her maternal uncle, the second appellant's brother, paid for her studies and provided the appellants with accommodation for a period of time. I have seen no evidence from him in this regard. Moreover I have seen no evidence as to whether or not he had provided financial support to his sister and other niece, which I would have expected if he had funded the other niece's education. It is unclear why the accommodation he offered was withdrawn.

16. Taking all of the evidence before me into account, I find that the appellants have failed to show that they are dependant on the sponsor and her husband. Whilst I have seen some regular money transfers, these alone are insufficient to show that the appellants have no other source of income and are dependant upon the sponsor and her husband. These appeals fail accordingly."

The grounds

5. The grounds may be summarised as follows:

(i) procedural unfairness: the judge had acted unfairly in failing to give FA and the sponsor an opportunity to respond to certain issues relied upon by the judge in her decision. An example is given at para 12 of the grounds, i.e. that, if the judge had asked FA to explain the Family Registration Certificates, she would have said that such certificates are normally only used to prove a relationship; they are not evidence as to whether parties live together or are separated.

(ii) the judge failed to take into account the respondent's policy which, it is contended, makes it clear that the reasons for the claimed dependency are irrelevant and the question is simply whether the applicant was in fact dependent on the EEA sponsor.

(iii) In any event, the judge ignored relevant evidence. In summary, the following:

a) "Evidence" in the form of representations by the appellants' representatives in their letter dated 10 August 2016 to the British High Commission (BHC) in Islamabad, at pages 94-95 of the bundle. The letter explained, inter alia, that the appellants do not have a formal tenancy agreement as tenancy agreements are unusual in Pakistan; that there was no evidence of the appellants' dependency on FA before she came to the United Kingdom because FA and the appellants lived in the same household; that evidence of remittances from March 2015 onwards to date had been provided; that a breakdown of the appellants' expenses, which

totalled Rs 26,000 per month, was given; and it was said that the remittances, which were £200 per month equating to Rs 30,000 per month, were sufficient to cover the appellants' expenses.

b) Two letters from Mr Naseer Usman who is a Union Counsellor for the area and who knows the family personally. He had confirmed that the second appellant was separated from her husband.

c) A letter from Mr Mushtaq Chaudhery, an Advocate of the High Court, who also confirmed that the second appellant's relationship with her husband had broken down.

d) In stating that there was "*no evidence*" from FA's maternal uncle, the judge overlooked the written evidence from the appellants and FA about their circumstances prior to FA's arrival in the United Kingdom and, further, the judge failed to appreciate that the respondent had not raised any issue in relation to the maternal uncle in the decision notice.

e) In stating that "*it was unclear why the accommodation [from the uncle] was withdrawn"*, the judge overlooked FA's evidence in her statement where she explained that her uncle needed his property and "*gently*" asked FA and her family to move out.

f) The judge failed to take into account and give due weight to the factual background as set out in FA's statement and the detailed representations by the appellants' representatives at pages 89-98 of the bundle.

(iv) The judge was wrong to reject the letters from the Union Counsellor on the basis that they were self-serving, having regard to para 14 of the decision of the Immigration Appeal Tribunal in Cledias Moyo [2002] UKIAT 001104.

Assessment

6. At the hearing before me, Mr Nasim took me through the history of the previous applications for EEA family permits and explained that, upon each refusal, the appellants produced evidence to address the issues/concerns raised by the Entry Clearance Officer in the relevant decision notice. He submitted that the judge had failed to take this history, reasons for the previous refusals and evidence produced by the appellants to respond to the previous refusals into account and stressed that the respondent had not raised, in the decision notice that was the subject of the appeal, any concern about the lack of evidence from the second appellant's brother.

7. I have to say that I do not consider it helpful to be taken through the history of the applications and reasons for previous decisions in any detail. The fact is that the appellants have to establish, with specific and detailed evidence as opposed to relying on the history of their applications and refusals, that they meet the dependency issue. Once the respondent had raised the issue that the appellants had not established that they were dependent on the sponsor, it was for them to establish that they were dependent, to the standard of the balance of probabilities. There was no need for the judge to refer to the history of applications and refusals. The judge was entitled to assess the evidence before her and take into account the lack of

evidence from the second appellant's brother, if such evidence was relevant to her assessment of the dependency issue. It is reasonably obvious that they would have to establish, by way of evidence or explanations for any lack of evidence, the amount of support that they were receiving from the sponsor and the amount of their outgoings. It was reasonably obvious that they would have to establish their outgoings by providing supporting evidence.

8. The position might be otherwise in relation to the Family Registration Certificates if (which was not readily apparent to me) the second certificate was obtained in order to address a specific point raised by the Entry Clearance Officer (ECO) in a refusal decision. If this was the case, this aspect of the history may have been relevant in addressing the reason for any inconsistency on the face of the two certificates. The two certificates also raise another question, i.e. how it was possible for the second certificate to bear the photograph of a man in his advanced years if the relationship between SB's husband and SB broke down 9 years ago leading to his departure for his home village and if SB and her daughters have not had any contact with him since (para 2 of SB's witness statement). Although the judge did not rely upon this point, the appellants would be well advised to address it at the next hearing.

9. As I said at the hearing, the representations from the appellants' representatives in their letter dated 10 August 2016 at pages 94-95 of the appellants' bundle is not evidence; they are representations. However, Mr Nasim took me through the witness statements and other evidence in the bundle from which I am satisfied that the representations that he relied upon before me concerning, inter alia, the breakdown of the appellants' expenses, that the sponsor had made remittances for the support of the appellants from March 2015 and the history of past dependency on FA when FA lived in Pakistan, were evidenced in the bundle before the judge.

10. Ms Holmes submitted, inter alia, that it is clear from the judge's reasoning, that she simply did not find FA credible, given that FA had said in her visa application of 2013 that both of her parents worked. She submitted that the judge was entitled to find that this affected her credibility because she was either lying in 2013 or she was lying for the purposes of the applications that were the subject of the appeals. She submitted that the judge was entitled to conclude that this fact, when taken together with the issues raised by the judge concerning the Family Registration Certificates, materially undermined the credibility of the appellants' case that the sponsor had been making remittances to them for their financial support.

11. There is no substance in the submission that the judge erred in law by failing to take into account the respondent's policy to the effect that the reasons for the claimed dependency are irrelevant, given that the judge did not say that she found the reasons given for the claimed dependency to be incredible. It is plain, from her reasoning as a whole, that she was considering whether the appellants had established their claimed dependency as a fact as opposed to the reasons for their claimed dependency.

12. In my judgment, the judge was right to have concerns as to the credibility of the evidence that the second appellant's husband was no longer part of the appellants' and FA's family. In my view, she was also entitled to take into account the issue she raised concerning the Family Registration certificates. The fact that the father was included in a second certificate three months after the first certificate had been

issued legitimately raised the concern she raised which was reasonably within the contemplation of the appellants and their solicitors for them to have addressed without the judge having to raise the matter at the hearing, given that it was not apparent to me that the second certificate was obtained in order to address a specific point in a refusal decision.

13. Nonetheless, having carefully considered the submissions of the parties, I have concluded that the judge did materially err in law as follows:

14. Firstly, the sponsor and FA both attended the hearing to give evidence. There was no Presenting Officer. The judge heard evidence from FA whilst the sponsor remained outside the hearing room. The judge then said that she did not need to hear evidence from the sponsor. Given that the case was that financial support was being provided by the sponsor to the appellants, the judge's decision not to hear evidence from the sponsor whilst concluding that the evidence of FA concerning the financial support that the sponsor was providing to the appellants was not credible was procedurally unfair. In effect, the judge took issue with the credibility of the evidence that the sponsor was providing financial support but took a positive step to say she did not need to hear from him, thus denying him the opportunity of persuading her, through his oral evidence, that he had genuinely been making remittances to the appellants for their financial support.

15. The appellants were therefore deprived of a fair hearing before the judge. This is sufficient, in itself, for the judge's decision to be set aside and the appeals remitted to the First-tier Tribunal for a fresh decision on the appeals, whatever may be said about the remaining grounds.

16. Secondly, it was not sufficient, in the particular circumstances of the case, for the judge to say that either FA was lying when she made her 2013 visa application or she was lying now, given that FA's evidence was to the effect that she had lied in her 2013 visa application for the reasons she explained, i.e. that she was advised to mislead the immigration authorities. It was necessary of the judge to make a specific finding on this evidence. If it was the case that FA had lied in her 2013 visa application, it must follow, from the judge's logic (that she was either lying in her 2013 visa application or lying now), that she was now telling the truth. Her evidence would then materially support the appellants' case that they were financially dependent on the sponsor.

17. Accordingly, by failing to make a clear finding as to whether FA had lied in her 2013 visa application or was lying now, the judge failed to resolve a question of fact that was material to her own reasoning. This difficulty in the judge's decision would not have arisen if, for example, she had said that she was satisfied that FA was lying on both occasions.

18. Thirdly, in her assessment of the letters from Mushtaq Chaudhery and Naseer Usman, the judge said that the letters were *"self serving documents, based on what the authors have been told. The contents do not suggest that they have seen evidence to substantiate what they have written. Furthermore these letters do not sit comfortably with the recent family registration certificate as set out earlier."* However, it was not correct to say that the letter from Mr Usman was based on what he had been told, given that Mr Usman said in his letter that he knows the appellants very

well. Apart from this sentence in his letter, there was nothing in the letter which indicates one way or the other whether he had based the contents of his letters on what he had been. The sentence in which he states that he knows the appellants very well suggests, on the other hand, that he based the contents of his letters on his own personal knowledge of the appellants and the FA and their past and present circumstances.

19. The issues I have raised at paras 16-18 above are sufficient, when taken together, to materially undermine the judge's reasoning.

20. For the reasons given at paras 14-15 above and, in the alternative, paras 16-18 above, there were material errors of law in the judge's decision. I set aside her decision in its entirety save that her summary of the evidence she heard, at paras 6 and 7 of her decision, stand as a summary of the evidence she heard and may be relied upon by either party at the next hearing.

21. In the majority of cases, the Upper Tribunal when setting aside the decision will re-make the relevant decision itself. However, para 7.2 of the Practice Statements for the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal (the "Practice Statements") recognises that it may not be possible for the Upper Tribunal to proceed to re-make the decision when it is satisfied that:

> "(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
>
> (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal."

22. In my judgment this case falls within para 7.2 (a) for the reasons given at paras 14-15 above. I therefore remit these appeals to the First-tier Tribunal for a fresh decision on the merits on each appellant's appeal by a judge other than Judge of the First-tier Tribunal Nixon.

23. As I said at the hearing, I had difficulty finding the decision notices dated 22 November 2016. In the event, the copy that was located related to the second appellant only. I was unable to locate a copy of the decision notice dated 22 November 2016 addressed to the first appellant.

Notice of Decision

The decision of the First-tier Tribunal involved the making of errors on points of law sufficient for it to be set aside. The appeals are remitted to the First-tier Tribunal for a fresh hearing on the merits by a judge other than Judge of the First-tier Tribunal Nixon.

Directions to the parties

(1) The decisions on the appellants' appeals await determination by a Judge of the First-tier Tribunal other than Judge Nixon.

(2) No later than 5 calendar days of this decision being sent to the appellants' UK representatives, the first appellant to file and serve a copy of the decision notice dated 22 November 2016 addressed to her.

(3) An interpreter in the Urdu language will be made available for the hearing. If an interpreter in another language is required instead, the appellants to notify the First-tier Tribunal within 5 calendar days of this decision being sent to their UK representatives:

(a) the language in which an interpreter is required; and

(b) the number of witnesses who will give evidence.

(3) The Tribunal's file contains a copy of the appellants' bundle that was submitted under cover of a letter dated 28 November 2017 and an identical bundle submitted under cover of a letter dated 17 October 2018. If the appellants wish to rely upon any additional evidence, any such evidence must be served within 21 days of the date on which this “Decision and Directions” is sent to the parties.

Upper Tribunal Judge Gill Date: 31 October 2018