



**Upper Tribunal
(Immigration and Asylum Chamber)
EA/02096/2016**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Field House
On 16th January 2018**

**Decision & Reasons
Promulgated
On 8th February 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR ABU BAKAR SHAHZAD
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Ms A Fijiwala, Home Office Presenting Officer
For the Respondent: Ms M Butler of Counsel instructed by MA Solicitors

DECISION AND REASONS

1. Although the Appellant is the Secretary of State I will refer to the parties as they were in the First-tier Tribunal.
2. The Appellant, a citizen of Pakistan, appealed to the First-tier Tribunal against a decision made by the Secretary of State on 27th January 2016 to refuse his application for a residence card as confirmation of his right to reside in the UK as the extended family member of an EEA national (his cousin, a Dutch national). First-tier Tribunal Judge G A Black allowed his appeal under the EEA Regulations. The Secretary of State now appeals to this Tribunal with permission granted by First-tier Tribunal Saffer on 18th January 2017.

3. The decision of the Secretary of State of 27th January 2016 refused the Appellant's application for a residence card as an extended family member of an EEA national under Regulation 8(2) of the Immigration (EEA) Regulations 2006. Regulation 8(2) provides as follows:

“8. Extended family members:

- (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.”

4. In order to be issued with a residence card the Appellant had therefore to demonstrate that he had been residing outside the UK and was dependent on the EEA national or a member of his household and that since joining the EEA national in the UK he continues to be dependent on him or to be a member of his household.
5. In the reasons for refusal letter the Secretary of State considered that the Appellant had not provided sufficient evidence of his dependency on the EEA national Sponsor at any time either in Pakistan or in the UK. The Secretary of State considered that the Appellant had not provided sufficient evidence that he was dependent on the Sponsor immediately prior to entering the UK or that he has been residing with, or has been dependent upon the Sponsor since entering the UK.
6. The Secretary of State set out a number of reasons for refusing to issue the residence card set out at page 2 of the reasons for refusal letter. The Secretary of State did not accept that the Appellant and the Sponsor are cousins as claimed. The Secretary of State referred to the fact that the Appellant first entered the UK on 28th March 2011, as a Tier 4 Student with entry clearance valid until 21st July 2014, and then made a further application for leave to remain as a Tier 4 student which was refused on 20th July 2015. The Secretary of State noted that the records showed that the Appellant did not refer to dependency on his claimed family at any point. The Secretary of State referred to the fact that the bank statements provided by the Appellant in relation to himself and the Sponsor show that they lived in different addresses which raised doubts as to whether he is a member of the Sponsor's household. It was also noted that the Halifax Bank statements in the Appellant's name showed that he was in receipt of payments from various people, not just the Sponsor which raised doubts as to whether he is in fact financially dependent on the Sponsor.

7. At the hearing in the First-tier Tribunal on 13th September 2016 the Secretary of State did not appear and was not represented. The judge found that the Appellant gave credible and reliable evidence. Whilst noting that the Appellant was not subject to cross-examination as there was no Home Office representative, the judge noted that the Appellant's representative covered all of the issues raised in the refusal letter. The judge noted that the Appellant produced the originals of all of the documents relied on. The judge noted that the Sponsor was unable to attend the hearing as he had been injured in a car accident in Pakistan and was unable to return in time for the hearing. The Sponsor produced an affidavit in which he confirmed the Appellant's account but the judge placed little weight on that document in the absence of the Sponsor's attendance. The judge noted that the Appellant produced birth certificates for his mother, his cousin and his cousin's mother, establishing the links between the family members and found that the Appellant is related as a cousin to the Sponsor who is an EEA national from the Netherlands.
8. The judge also accepted that there was sufficient evidence to show that the Sponsor is exercising treaty rights in the UK. The key findings in relation to the EEA Regulations are at paragraphs 6 and 7 where the judge said:

“6. I find that the appellant was dependent on the sponsor from when he was living in Pakistan and since 2005 when the sponsor came to the UK after having lived in the Netherlands. The sponsor paid for his school fees in Pakistan in 2002, his college fees in Pakistan and when residing in the UK he paid for his tuition and living expenses as a student. He produced evidence of monthly money transfers between 2009 and 2011 and receipts from the school and college in Pakistan. When living in the UK as a student I find that the appellant supplemented the money from the sponsor with earned income as a student limited by the restrictions imposed. At that time I find that he was living in the same household as the sponsor at []. For a short time they moved out together to live at two addresses during a period when the main residence was being renovated. The appellant produced documentary evidence to support the residence at [] and the addresses where they lived during the renovations. I find that the appellant lived in the same household as his cousin and was dependent on him.”

The judge went on to conclude at paragraph 7:

“7. I asked the appellant why he had not made an application as an extended family member rather than a student visa? I accept his rely [sic] as credible. I find that he was unaware that he could make such an application at the time and his main concern was to pursue his studies in the UK. I find that his sponsor paid for his studies in the UK. The appellant was asked to explain the payment into his account of various significant sums. He provided credible explanations for those payments made which I

accept. For example one payment was a refund from the Grafton College of his fees, which was consistent with the education history. I find no evidence to support the respondent's assertion that the appellant was dependent on others."

The grounds

9. The Secretary of State challenges the judge's decision putting forward three grounds as follows:
 - 1) There was no jurisdiction to hear the appeal in light of the decision in **Sala (EFMs: right of appeal) [2016] UKUT 00411 (IAC)**;
 - 2) the First-tier Tribunal erred in failing to consider the nature of the claimed level of dependency as to whether or not the financial assistance provided by the Sponsor amounted to dependency or simply financial assistance. The Secretary of State relied on the decision in **Moneke (EEA - OFMs) Nigeria [2011] UKUT 341 (IAC)** which states that "financial dependency should be interpreted as meaning that the person needs financial assistance from the EEA national in order to meet his/her essential needs";
 - 3) the First-tier Tribunal Judge failed to make a finding on a material ground raised in the reasons for refusal letter in failing to make findings as to whether the EEA national or the Appellant were residing at different addresses.

Ground 1

10. In relation to Ground 1, Ms Fijiwala submitted at the hearing that although the decision in **Sala** was overturned in the decision of the Court of Appeal in **Khan v Secretary of State for the Home Department [2017] EWCA Civ 1755**, that decision has been stayed and the Secretary of State is seeking to appeal against that decision to the Supreme Court and the Secretary of State maintains that the decision made in **Sala** is the correct one. On the other hand, Ms Butler submitted that the reasoning given by the Court of Appeal in **Khan**, for example at paragraph 45, should be followed unless or until it is overturned. At paragraph 45 Lord Justice Irwin said:

"In my view, not only does the context favour the appellant's interpretation (for the reasons set out above) but that is the more natural meaning of the words. 'Entitlement' is subtly different from a 'right'. The natural meaning of the latter is something inherent and existing. The natural meaning of an 'entitlement' is a benefit which is obtained or granted. Moreover, a decision which concerns 'an entitlement' appears to me naturally to include a decision whether to grant such an entitlement. That is precisely what the Secretary of State must do in such a case as this."

11. I accept Ms Butler's submission that it is appropriate to follow the guidance given by the Court of Appeal in **Khan** unless, or until, the Supreme Court makes a decision in relation to this issue. In these circumstances I accept that the Appellant, having been refused a residence card as an extended family member, does have a right of appeal against that decision to refuse his application for a residence card as an extended family member. Therefore the First-tier Tribunal had jurisdiction to consider this appeal.

Ground 2

12. In terms of the second ground, Ms Fijiwala submitted that the judge's findings were inadequate in relation to dependency in Pakistan and in the UK. In relation to the circumstances in Pakistan she pointed out that the judge referred to the Appellant's education and living expenses but made no reference to his essential needs. In terms of the UK, the judge notes that the Appellant was earning money but made no finding as to needing support from the Sponsor to meet his essential needs. She referred to the decision in **Lim v ECO (Manila) [2015] EWCA Civ 1383**, in particular paragraphs 25, 29 and 32 where the Court of Appeal emphasised 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." [25]

13. And at [32] where Lord Justice Elias said:

"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."

14. In her submissions Ms Butler highlighted that the Secretary of State did not appear at the hearing and provided no representation nor did the Secretary of State provide any further written submissions. Accordingly, the only indication of the Secretary of State's view was contained in a reasons for refusal letter. She submitted that all of the matters highlighted in the reasons for refusal letter had been addressed. The judge addressed the issue of the family relationship between the Appellant and the Sponsor and this finding has not been challenged on appeal. She pointed out that the judge asked the Appellant about his decision to enter the UK as a student and accepted his reply as credible [7]. Therefore, in

her submission, this issue had been dealt with. The reasons for refusal letter noted that the bank statements suggested that the Appellant and the Sponsor were living at separate addresses. Ms Butler submitted that this was not material as the Appellant did not need to show that he is a member of the Sponsor's household but in any event the judge made a finding at paragraph 6 that the Appellant and the Sponsor had been living at [] but moved out for a short time. The judge therefore found that the Appellant and Sponsor lived in the same household. In Ms Butler's submission nothing more was required of the judge than the finding that the Appellant and Sponsor lived in the same household. The judge confirmed that she had asked questions of the Appellant and had looked at the documentary evidence and had accepted the Appellant's explanation. In her submission it would be onerous to ask the judge to provide a detailed analysis of addresses, times and dates when the Appellant and the Sponsor had lived at addresses when ultimately the judge was satisfied with the Appellant's evidence that he and the Sponsor were part of the same household.

15. In any event, in her submission, the judge also dealt with the issue of dependency which is an alternate to residence in the same household. The reasons for refusal letter refers to receipt of payments from other people. This is dealt with by the judge at paragraph 7. The judge accepted the Appellant's explanation as credible and found there was no evidence to support the Respondent's assertion that the Appellant was dependent on others. In her submission the judge's reasoning was more than sufficient where nothing had been provided by the Respondent other than the doubts expressed in the reasons for refusal letter.
16. Ms Butler submitted that, although the reasons for refusal letter raised the issue of dependency, where the Secretary of State was not represented at the hearing the Secretary of State could not now raise the broader considerations in relation to dependency. In any event, in her submission, even considering the broader considerations of dependency under the EEA Regulations, the judge has in her submission given sufficient reasons for finding that the Appellant was dependent on the Sponsor. She referred to the evidence given in the Appellant's witness statement and submitted that in accordance with this evidence it was open to the judge to make findings that the Appellant was dependent on the Sponsor. She relied on the decision in **NH (India) v ECO [2007] EWCA Civ 1330** where Lord Justice Sedley said that the appellate courts are not to engage "in a microscopic search for error and should give Immigration Judges credit for knowing their job, even if their written determinations are imperfectly expressed".
17. I have considered the judge's findings at paragraphs 5 to 7 in the context of her initial finding that the Appellant gave "credible and reliable evidence". The judge set out elements of the Appellant's oral evidence in the findings. But also of significance is the witness statement which was before the First-tier Tribunal Judge. In the witness statement the Appellant said as follows:

- “7. I confirm that I have been financially wholly dependent upon my sponsor since I was in Pakistan and this dependency continued when I arrived in the UK; this dependency continued when my sponsor was in the Netherlands and UK.
8. Whilst I was in Pakistan I was wholly dependent on my sponsor whereby he used to send me money on a monthly basis. He used to send my education fees in Pakistan directly to my school and my progress reports were sent to him. I have attached money transfer receipts and college fee receipts.
9. Apart from supporting me for my education, I have also been dependent on my sponsor for my daily/monthly expenditure such as food, travel, rent for college and general day-to-day expenditure.
- 10 He supported me financially from my school education in Pakistan through to my College education in the UK.
11. My parents were not able to financially support me throughout my education; this is primarily because for the past 25 years, my father has been suffering from liver disease. This has significantly affected his health and he has been bed bound since being diagnosed with the disease. He is taking continuous medication upon the doctor’s instruction. Due to my father’s illness, my mother’s employment opportunities were restricted as she was taking full-time care of my father. If it were not for my sponsor, I would have suffered an extremely difficult childhood and life.
12. My sponsor took my entire financial burden on his shoulders; my family and I became totally dependent on him as there was no other source of income or property in Pakistan due to my father’s illness.
13. I will never forget the amount of support my cousin has given me throughout my life; I am indebted to him for the support he has given me. He has provided me with a quality education. I look up to him as an older brother as he raised me like his own blood brother.
14. Despite having his own personal problems, he never failed to make me feel in need of anything and fully supported me in order to meet my education and other living expenses.
15. When I came to the UK in 2011, he paid for all my travelling and other related expenses; this dependency has continued in the UK and until today I am dependent on him in the UK.”
18. It is clear that the judge was relying upon this evidence in reaching her conclusions. The judge found at paragraph 6 that the Appellant was dependent on the Sponsor from when he was living in Pakistan and since

2005 when the Sponsor came to the UK. The judge referred to the documentary evidence including evidence about school fees and college fees paid in Pakistan and tuition and living expenses in the UK. The judge referred to the documentary evidence of money transfers between 2009 and 2011 and receipts from the school and college in Pakistan. In my view the judge was entitled to reach the conclusion that the Appellant was dependent on the Sponsor before coming to the UK on the basis of this evidence.

19. The judge found that the Appellant was a member of the Sponsor's household in the UK and that he was dependent upon him in the UK. I note that at paragraph 17 of the witness statement the Appellant said that, since arriving in the UK, he and the Sponsor had lived together at [] except for a period between late May 2015 and late October 2015 when that property was being renovated when the Appellant did not change his address but was regularly picking up his post whereas the Sponsor changed his address for this period. On the basis of this evidence it was open to the judge to conclude that the Appellant has been a member of the same household as his cousin since coming to the UK.
20. In my view it was also open to the judge to find that the Appellant has been dependent on the Sponsor since coming to the UK [6]. The Appellant dealt with this in his witness statement. The judge found that the Sponsor paid for the Appellant's tuition and living expenses in the UK. The judge also took into account that the Appellant has supplemented his income from a part-time job within the restrictions of his student visa.
21. I accept that the First-tier Tribunal Judge did not specifically refer to the need to evidence that the Sponsor's support is necessary to enable the Appellant to meet his basic needs. However it is clear from the evidence in the witness statement that this is the basis on which the Appellant's case was put. It is clear from the Appellant's evidence about his circumstances in Pakistan that it is his case that the Sponsor's support was necessary for his essential needs to be met. In considering the Appellant's circumstances in the UK the judge made a clear finding that the Appellant supplemented the money he received from the Sponsor with income he earned within the limits of his leave to remain as a student. In my view this finding clearly indicates that the judge accepted that the Sponsor met the Appellant's essential needs. In any event the judge also found that the Appellant is a member of the Sponsor's household and he therefore meets the requirements of Regulation 8 on that basis.

Ground 3

22. The Secretary of State contends in the third ground that the judge failed to make a proper finding as to an issue in dispute that is whether the Sponsor and the Appellant were living together in the UK. However, as set out above, in my view the judge's finding at paragraph 6 clearly deals with this issue and is based on the evidence and the witness statement. The judge found that, apart from a short time when they did not live at the address when that residence was being renovated, the Appellant and

Sponsor have lived at the same address since the Appellant came to the UK.

23. For the reasons set out above the findings made by the judge were open to her on the evidence before her. Accordingly there is no material error of law in the judge's decision.

Notice of Decision

24. There is no material error in the decision of the First-tier Tribunal Judge.

25. The decision of the First-tier Tribunal shall stand.

26. No anonymity direction is made.

Signed

Date: 5th February 2018

Deputy Upper Tribunal Judge Grimes

TO THE RESPONDENT
FEE AWARD

I maintain the fee aware made by the First-tier Tribunal.

Signed

Date: 5th February 2018

Deputy Upper Tribunal Judge Grimes