Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/02139/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 14th January 2019	**On 12th February 2019**

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

GLAUCIONE DE PAULA FERREIRA
(NO ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Bellara, instructed by Western Solicitors
For the Respondent: Ms A Brocklesby-Weller, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Brazil born on 4 December 1966. She appeals against the decision of First-tier Tribunal Judge Geraint-Jones QC dated 30 April 2018 dismissing her appeal against the refusal of a residence card under Regulation 7(1)(c) of the Immigration (EEA) Regulations 2006.

2. Permission to appeal was granted by Upper Tribunal Judge Grubb on 20 November 2018 for the following reasons:

> "The judge did not accept that the appellant was dependent on her son-in-law. It is arguable that the judge placed excessive weight upon his conclusion that the appellant had used deception by coming to the UK as a visitor and in doing so failed to give adequate reasons why she did not accept the evidence of dependency given orally at the hearing. Further, the judge also seems to have found that she was not dependent because it was a matter of choice rather than necessity. This is arguably a misunderstanding of the concept of dependence in the 2006 Regulations after Lim v ECO [2015] EWCA Civ 1383."

Immigration History

3. The Appellant arrived in the UK on or about 25 November 2015 with a visit visa valid for six months. She did not leave the UK when her visa expired but made an application for a residence card on the basis that she was an adult dependent relative in ascending line to the wife of an EEA citizen. Her application was refused by the Respondent on 25 January 2017 on the basis that there was insufficient evidence submitted and she had failed to demonstrate that she was genuinely dependent upon her EEA family member or their spouse.

The Judge's Findings

4. The judge summarised the oral evidence of the Appellant, her daughter and her daughter's husband at paragraphs 5 to 11 of the decision. He then concluded at paragraph 12 onwards:

> "12. I am in no doubt that the appellant was untruthful when she said that when she arrived into this country it was her intention to remain here only as a temporary visitor. That much is clear from the witness evidence given by her daughter and the appellant's own initial evidence to the effect that when she arrived it was her intention to regularise her position before her visa expired.
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> 13. Accordingly, I find as a fact that the appellant deceived the Entry Clearance Officer into granting her a visit visa. The appellant did not intend to come here as a genuine visitor but intended cynically to abuse the immigration laws of this country and remain as an illegal overstayer on the basis that it would provide her with the opportunity to allege that she was a dependent relative of her daughter and son-in-law.
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> 14. However, the mere fact that somebody uses deceit against the immigration authorities of this country is not necessarily fatal to an application or an appeal, especially as there are areas within immigration law where the higher courts have failed to consider such conduct to be especially relevant. I need not set out examples in this Determination for it suffices for me simply to record that the fact of such deceit is not necessarily fatal."
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> …
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> 17. The real issue in this appeal is whether I can or should accept the evidence given to the effect that the appellant is a dependent relative of her son-in-

law (not her daughter). Such dependence has been squarely put on the basis that the appellant resides in the same accommodation as her daughter and son-in-law and that each of them gives her £100 per calendar month as pocket money.

18. The appellant ha (sic) initially desisted from giving any evidence about her personal circumstances or the extent to which, if any, she owns property or assets. This is highly relevant because for somebody to be dependent upon another means just that. It is not enough for a person to manufacture an appearance of dependency when that person would be or is capable of maintaining herself in her home country so as not to be dependent upon the identified relative. In answer to questions asked by me the appellant said she lived in a rented flat in Brazil but that she had no or no significant assets.

19. My starting point is that there was, as I find, plainly an intention on the part of the appellant to deceive the immigration authorities of this country when she came here purportedly as a temporary visitor notwithstanding that, at that time, she had every intention of remaining here permanently. I reject as untruthful her later evidence to the effect that she had intended to return to Brazil but that her daughter and son-in-law decided that they were concerned about her should she return to Brazil. I am equally satisfied that the appellant's daughter and son-in-law connived, or at the very least condoned, her determined deception practised against the Entry Clearance Officer.

20. In the foregoing circumstances I must exercise great caution before I accept the evidence given by the appellant, or in support of her appeal, given that she has demonstrated a willingness to deceive and to give evidence which is entirely self-serving and designed to procure an outcome that she wants to procure. When I add that to the fact that the appellant rather obviously desisted from giving any relevant evidence about her circumstances whilst she lived in Brazil, including details of her accommodation, employment, savings and/or connections, it leads me to concluding that the appellant's evidence has been tailored to procure a desired outcome.

21. The evidence given by the appellant, her daughter and her son-in-law is assertive in nature and relies substantially on the assertion that the appellant is provided with accommodation by her daughter and son-in-law. In circumstances where I do not consider the appellant to be a reliably truthful witness, I do not accept the implied (but not express) assertion that the appellant would be unable to afford to house herself in Brazil whilst working in the kind of employment that she seems to have given up when she decided that she would relocate to the United Kingdom.

22. The mere fact that the appellant resides with her daughter and son-in-law does not make her their dependent, let alone her son-in-law's dependent. Any such dependency will only be established if she lives with them as a matter of necessity rather than choice. I do not consider that the preponderance of evidence allows me to conclude that such residence is a matter of necessity rather than a matter of choice. This is a case where, quite plainly, the appellant has decided that she will reside in the United Kingdom and has laid the ground to procure her desired outcome by

deceiving the Entry Clearance Officer and then claiming dependency based upon assertion rather than a detailed disclosure of her personal circumstances and assets.

23. For the foregoing reasons the appellant fails to persuade me that it is more probable than not that she is truly dependent upon her daughter and/or son-in-law. I have little doubt that it is an alleged dependency of convenience to procure the outcome which the appellant wishes to procure."

Submissions

5. Mr Bellara relied on the very detailed grounds submitted in support of the application. He submitted that the judge's comment at paragraph 15 where he states "I have to consider whether the deceitful appellant meets the requirements of regulation 7(1)(c) of the 2006 Regulations" was unhelpful and suggested the judge had a degree of pre-judgment. There was no assessment of the Regulation anywhere in the decision. The test for dependency was that set out in Reyes [2013] UKUT 314 namely:

> "First, the test of dependency is a purely factual test. Second, the court envisages questions of dependency and must not be reduced to a bare calculation of financial dependency but should be construed broadly to involve a holistic examination of a number of factors including financial, physical and social conditions, so as to establish whether there is dependence that is genuine. The essential focus has to be on the nature of the relationship concerned and on whether it is one characterised by a situation of dependence based on an examination of all the factual circumstances, bearing in mind the underlying objective of maintaining the unity of the family. It seems to us that the need for a wide-ranging fact-specific approach is indeed enjoined by the Court of Appeal in SM (India): see in particular Sullivan LJ's observations at [27]–[28]. Third, it is clear from the wording of both Article 2.2 and regulation 7(1) that the test is one of present not past dependency. Both provisions employ the present tense. Fourth (and this may have relevance to what is understood by present dependency), interpretation of the meaning of the term must be such as not to deprive the provision of its effectiveness."

6. Mr Bellara submitted that the issue in this appeal was whether the Appellant could accommodate and support herself and this had not been addressed by the First-tier Tribunal Judge. She had not desisted from giving evidence about her finances as stated by the judge and he failed to apply the guidance in Lim v Entry Clearance Officer [2015] EWCA Civ which states:

> "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. It follows

> that on the facts of this case there was no dependency. The appellant had the funds to support herself. She was financially independent and did not need the additional resources for the purpose of meeting her basic needs."

7. Mr Bellara submitted that the judge focused on the discrepancy given in oral evidence but failed to refer to Lim or Reyes in the decision. This was essential to show that the judge had considered the general guidance. In Lim a potential ability to support oneself was not determinative. It was a question of real dependency and whether the Appellant was able to support herself. This was missing from the decision. The judge failed to address whether the Appellant could support herself without assistance from her family.

8. On behalf of the Respondent, Ms Brocklesby-Weller submitted that the Appellant had failed to discharge the burden of proof. The judge was entitled to make credibility findings and he adopted a holistic approach to the evidence. He acknowledged at paragraph 14 that deceit was not fatal to the application but found that the Appellant's failure to detail her personal circumstances and provide evidence of her finances meant that she had failed to show real dependency. The judge correctly identified the issue at paragraph 17 of the decision and at paragraph 18 found that there was a complete lack of evidence of personal assets. At paragraph 19 the judge found that given the lack of credibility and lack of other objective evidence of the Appellant's circumstances the oral testimony in itself was insufficient to satisfy the Regulations. The Appellant had dis-ingenuine intentions and therefore the judge was entitled to treat the rest of her evidence with circumspection. The Appellant has said she would return to Brazil which suggests she had a life to return to. The judge did not accept that she was unable to pay rent given her claim that she intended to return. The judge identified these two factors as the reasons for why her testimony was rejected and, at paragraph 23, the judge put all factors together in concluding that the dependency was not real.

9. In relation to paragraph 22, Ms Brocklesby-Weller submitted that, although it may contain an erroneous sentence, it did not amount to a misdirection in law. She accepted that the Appellant's dependency did not have to be that of necessity but one of real dependency. She submitted that it was apparent, when paragraph 22 was read in context with the judge's other findings, that he did not accept the Appellant's oral evidence for a number of reasons and there was no other evidence of her personal circumstances or financial assets. Given that there was no independent evidence other than the oral testimony, his rejection of her oral evidence meant that the Appellant had failed to show that she was dependent upon her son-in-law for her basic needs and she did not have funds to be able to support herself.

10. In response to these submissions, Mr Bellara submitted that it was clear from paragraph 22 that the judge had applied the wrong legal test, the error was material and the decision should be set aside. A failure to properly apply Lim was the basis upon which permission was granted and it was clear from paragraph 22 that the judge had misdirected himself in law.

Discussion and Conclusions

11. On reading the decision as a whole I am satisfied that the judge did not pre-judge the issue and his conclusion that the Appellant had been deceitful was open to him on the evidence before him. The judge's approach was consistent with AK (Failure to assess witnesses' evidence) Turkey [2004] UKIAT 00230 which was relied on in the grounds of appeal.

12. The judge assessed the evidence of all three witnesses at paragraphs 5 to 11 and found that the Appellant had lied to the ECO in her application for a visit visa. His reasons for coming to this conclusion were set out at paragraphs 12 to 14.

13. Having found that the witnesses were not reliable and that the Appellant was deceitful in her previous application the judge then went on to assess whether he could accept the evidence of dependency. There were no documents to support the assertion made by all three witnesses that the Appellant was dependent on her son-in-law. The judge gave adequate reasons for why he could not accept the oral evidence on this point, namely the Appellant had not disclosed her personal circumstances in Brazil in her witness statement and no evidence was led on this in examination-in-chief.

14. I reject Mr Bellara's submission that the judge should have put this point to the Appellant if it was of some concern to him. I am of the view that it is not for the judge to cross-examine a witness but for the Appellant to discharge the burden upon her of providing evidence to prove, on the balance of probabilities, that she was dependent on her son-in-law. She has simply failed to provide any evidence, other than her assertion given in her oral testimony, to show that the dependency was real and genuine. A further reason is that the Appellant had employed deceit to obtain a visit visa and her daughter and son-in-law at the very least had condoned such action. These were adequate reasons for not accepting the oral testimony of the three witnesses and for finding that their evidence could not be relied upon.

15. Paragraphs 21 and 22 make it clear that there was insufficient evidence of dependency. The oral evidence was unreliable and in the absence of any other evidence the Appellant had failed to show she satisfied the Regulations. The judge assessed credibility, then addressed the Regulations and gave adequate reasons for concluding at paragraph 23 that the Appellant's dependency on her son-in-law was not genuine.

16. Although the judge did not refer to Lim or Reyes he did apply the test therein. The sentence in paragraph 22 which states "Any such dependency will only be established if she lives with them as a matter of necessity rather than choice" was not material when the decision is read as a whole. The judge focused on the nature of the relationship and whether it was characterised by a situation of dependence based on all the circumstances of the case. The Appellant had not shown that she was not in a

position to support herself. She had not shown that £100 was necessary to enable her to meet her basic needs and she had not shown that she did not have funds in order to be able to support herself because she failed to provide sufficient evidence of her own resources.

17. I find that the judge's finding, that the evidence of the Appellant and her witnesses was not reliable, was open to him on the evidence before him and he gave adequate reasons for coming to that conclusion. Given the lack of any documentary evidence to support this oral testimony, his conclusion that the Appellant had failed to provide sufficient evidence to show that she satisfied Regulation 7(1)(c) of the 2006 Regulations was open to the judge on the evidence before him. The judge properly directed himself in law and a failure to refer specifically to relevant authorities was not material in this case. The judge had applied the correct test to the facts as he found them and there was no error of law in his decision to dismiss the appeal.

18. Accordingly, I find that there was no error of law in the judge's decision dated 30 April 2018 and I dismiss the Appellant's appeal.

Notice of decision

Appeal dismissed.

No anonymity direction is made.

J Frances

Signed Date: 11 February 2019

Upper Tribunal Judge Frances

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

J Frances

Signed Date: 11 February 2019

Upper Tribunal Judge Frances