Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: EA/03132/2017**
EA/03131/2017

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice, Belfast	**Decision & Reasons Promulgated**
On 3 April 2019	**On 24 April 2019**

Before

UPPER TRIBUNAL JUDGE DAWSON

Between

KHALID AHMAD KHALID
TEHMINA KHALID
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr McTaggart, instructed by Andrew Russell & Co Solicitors
For the Respondent: Mr M Matthews, Senior Presenting Officer

DECISION AND REASONS

1. The appellants who are nationals of Pakistan aged 67 and 61, have been granted permission to appeal the decision of First-tier Tribunal Judge Gillespie. That appeal had been against the Entry Clearance Officer's decision dated 7 March 2017 refusing their applications for an EEA permit to join their son Awais Khalid (the sponsor), an Irish national living in Northern Ireland.

2. The Entry Clearance Officer did not accept that Awais Khalid was a qualified person in accordance with Regulation 6 of the Immigration (European Economic Area) Regulations 2016. It was acknowledged the appellants had provided evidence of money transfers/bank deposits from the sponsor and that records indicated the

appellants had a monthly income of US $1,000 at the time. There was no evidence of the tenancy for the property in which they lived and a series of cash deposits to their joint bank account were not consistent with the funds transferred by their son. Although acknowledging that the sponsor had sent money, the Entry Clearance Officer was not satisfied that the appellants have demonstrated that the money paid for their essential needs in Pakistan, including food, accommodation and healthcare.

3. It was conceded by the Entry Clearance Officer at the hearing in the FtT that the sponsor is an Irish national (by naturalisation) and that he is exercising treaty rights as a self-employed person in Northern Ireland. After directing himself as to the legal approach with reference to the decision of the Court of Appeal in *Siew Lian Lim v ECO (Manila)* [2015] EWCA Civ 1383 and the Court of Justice decision in *Reyes v Migrationsverket* 2014/C-423/12, the judge surveyed the evidence in some detail which included reference to the first appellant's financial decline. In short, the sponsor's evidence was that his parents have no pension, savings or earnings and are also required to pay for medical treatment. All these costs fall to him.

4. The judge also recorded the documentary evidence including the bank statements before setting out his conclusions at paragraph *38ff* as follows:

> "38. I have considered all of the evidence and am satisfied that the appellants' sponsor has been remitting regular monthly payments equivalent to about £400 per month to his parents from at least in or about the date of opening of their Allied Bank account on 15 February 2017. There is little, however, in the way of evidence predating the ECO's decision. The bank account was not opened until after the decision. There are only five Western Union receipts for payments of £420, £420, £310, £282 and £286 to his mother for the whole of 2016. He and his parents needed a minimum of 60,000 PKR per month to survive.
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> 39. The tax return apparently evidencing a nil income, and again after the decision, would suggest that if the first appellant was required to file a tax return, even as someone without income, and did no scrupulously, evidence of his financial decline would be available from previous tax returns duly authenticated.
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> 40. The brothers said their father failed in business over a decade ago but there is no evidence to show how his fortunes deteriorated in that period with the disposal of assets from a position of prosperity in the high value business of steel fabrication and construction.
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> 41. The two tenancy agreements for their Karachi home are dated 1 February 2017 and 11 January 2018 and again after the decision even though the application records that they have been living at this address since 1998 (Q 22 visa application form). If this is rented property one would expect evidence prior to the decision.
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> 42. The evidence of Waqis Ali Khalid was vague in regard to the sending of monies to his parents and the reasons for documentation being destroyed at the time of his house move when according to evidence it had in fact been kept. He was also vague in regard to the cost of his father's surgical operation and how it was paid for. His brother who was not involved had no such difficulty. Waqis Ali Khalid

has more to account for than the sponsor given that he claims to have supported his parents for a number of years.

43. In **Miller v Minister of Pensions**, Lord Denning said apropos the standard of proof in a civil case, "that degree is well settled. It must carry a reasonable degree of probability, not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'we think it more probable than no', the burden is discharged, but if the probabilities are equal it is not."

44. In this case the most that can be said of the appellants' evidence is that the probabilities are equal and accordingly I find they have not proved that they cannot support themselves from their own resources in meeting their basic needs and are genuine dependants of their sponsor."

5. The grounds of challenge argue:

(i) Irrationality.

(ii) A duty to give reasons (and by implication a failure to do so).

(iii) Mis-application of EU case law on dependency.

6. In granting permission, First-tier Tribunal Judge Gibb considered that it was arguable that the consideration by the judge did not contain adequate reasoned findings.

7. I proceeded with the hearing whether the First-tier Tribunal had erred in law in the absence of Mr Matthews. He had been held up on his flight from Glasgow. There was no Rule 24 response and having regard to the issues in the case, I considered it was not unjust to proceed in the absence of representation for the Secretary of State. After hearing submissions from Mr McTaggart I gave my decision to set aside the decision of the First-tier Tribunal. My initial view was the case should be remitted to the First-tier Tribunal in the light of the further findings that would be needed. When this news reached Mr Matthews on his arrival, he invited me to allow the appeal on the basis of the positive findings reached by the First-tier Tribunal as to the financial support provided by the appellants' son Awais in the absence of any evidence of other income by the appellants. Both parties were content for me to give brief reasons for my decision.

8. As to the error of law by the First-tier Tribunal, I do not accept that its decision was irrational nor that it was appropriate for a challenge to be launched on this basis. The Court of Appeal in *R (Iran) v SSHD* as per Brooke LJ made these observations on such a ground being run in the Tribunal as it then was. Specifically at paragraphs [11] and [12] he observed:

"11. It may be helpful to comment quite briefly on three matters first of all. It is well known that "perversity" represents a very high hurdle. In *Miftari v SSHD* [2005] EWCA Civ 481, the whole court agreed that the word meant what it said: it was a demanding concept. The majority of the court (Keene and Maurice Kay LJJ) said that it embraced decisions that were irrational or unreasonable in the *Wednesbury*

sense (even if there was no wilful or conscious departure from the rational), but it also included a finding of fact that was wholly unsupported by the evidence, provided always that this was a finding as to a material matter.

12. We mention this because far too often practitioners use the word "irrational" or "perverse" when these epithets are completely inappropriate. If there is no chance that an appellate tribunal will categorise the matter of which they make complaint as irrational or perverse, they are simply wasting time – and, all too often, the taxpayer's resources – by suggesting that it was."

9. Nevertheless, I am satisfied that the judge failed to provide an adequately reasoned decision for his conclusion that the appellants had not proved they could not support themselves from their own resources in meeting their basic needs or that they were genuine dependants of the sponsor. The judge had made a positive finding in respect of current support by Awais at paragraph [38] cited above. The judge also had evidence before him regarding the collapse of the appellants' fortunes in terms of the oral testimony of their sons against whom no adverse credibility findings had been made whose evidence reflected their witness statements. There was also evidence before the judge of the extent of the appellants' needs by reference to the tenancy agreement and the need for medical treatment by the first-named appellant as well as his nil tax return.

10. The judge's concern over the vagueness of Waqis's evidence regarding his historical support was not relevant to the issue before him. Having accepted the evidence from Awais on the extent of his financial support for his parents, the judge should have proceeded to make a finding on the extent of their dependency. The evidence was before him but he failed to do so or disregarded it and focused on immaterial evidence.

11. Having given these brief reasons I am satisfied that the First-tier Tribunal erred in law in its decision which I set aside. The decision is re-made and as invited by Mr Matthews on behalf of the Secretary of State I allow the appeal.

Signed Date 18 April 2019

UTJ Dawson

Upper Tribunal Judge Dawson