



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: EA/03158/2018

**THE IMMIGRATION ACTS**

Heard at Field House  
On Thursday 2 May 2019

Decision and Reasons Promulgated  
On Monday 13 May 2019

Before

UPPER TRIBUNAL JUDGE SMITH

Between

MR MUHAMMAD ASIM FAROOQ  
(anonymity direction not made)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Ms M Malhotra, Counsel instructed by R W Anderson & Co,  
solicitors

For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

**DECISION AND REASONS**

**BACKGROUND**

1. The Appellant appeals against a decision of First-Tier Tribunal Judge M A Khan promulgated on 28 December 2018 (“the Decision”) dismissing the Appellant’s appeal against the Secretary of State’s decision dated 12 September 2016

refusing the Appellant a residence card as the extended family member (cousin) of an EEA (Italian) national, Mr Mumtaz ("the EEA sponsor").

2. The Respondent refused to issue a residence card as he contended that the Appellant had failed to establish that he was dependent on the EEA sponsor or a member of his household prior to coming to the UK nor that he has been dependent on or living in the EEA sponsor's household since arriving in the UK. The Appellant's immigration history is adequately set out at [1] and [2] of the Decision and I do not repeat that. I note that the Appellant entered the UK initially as a student and, following curtailment of his leave in that category then sought leave to remain. According to the Respondent's decision letter, the Appellant did not mention the EEA sponsor as a source of funds when seeking entry clearance as a student. Nor did he mention him in his earlier application for leave to remain.

3. The Judge's conclusion in relation to the Appellant's claim is found at [38] of the Decision as follows:

"On the evidence as noted above and my findings of the appellant and his cousin's credibility, I find that the appellant has never been financially dependent on the EEA national, he is not dependent on his cousin in the UK and neither have they lived together under the same roof, prior to the EEA sponsor's arrival in the UK in 2015."

4. The Appellant raises four grounds of appeal against the Decision as follows:

Ground one: Failure to consider material aspects of the Appellant's evidence

The Judge rejected the Appellant's account that he lived with the EEA sponsor in Pakistan between 1991 and 1995 and "impermissibly failed to consider the wealth of documentary evidence" to that effect.

Ground two: Procedural Unfairness

The Judge took a point of his own volition in relation to the adequacy of the EEA sponsor's earnings when finding that those would have been inadequate to provide funds to the Appellant. It is said that this point was not raised with the EEA sponsor at the hearing.

Ground three: Perverse/irrational finding

The finding that the Appellant's other witness had not provided a full copy of his passport which might have shown his journeys between Italy and the UK was fundamentally flawed because, as a British citizen, his passport would not be stamped on entry and exit when travelling within Europe. It is also said that the failure of the Appellant's other witness to attend should not be held against the Appellant as that witness could not be obliged to attend.

Ground four: Failure to consider residence in the same house under the Regulations

It is said that the Judge failed to make a finding whether the Appellant lived with the EEA sponsor in the UK. That was an alternative basis on which he could succeed as an extended family member.

5. Permission to appeal was granted by First-tier Tribunal Judge Osborne on 21 January 2019 in the following terms so far as relevant:

“... [3] In an otherwise careful decision it is nonetheless arguable that the issue of sending £16,197.55 between February and September 2009 was not raised or relied upon by the respondent and therefore was not in issue between the parties; additionally, the Appellant was not cross-examined on the issue and was denied the opportunity of dealing with it.

[4] This arguably material error of law having been identified, all the issues raised are arguable.”

6. The matter comes before me to decide whether the Decision contains a material error of law and if so to either remit the appeal to the First-tier Tribunal or to re-make the decision. The Respondent has filed a Rule 24 Notice on 6 February 2019 seeking to uphold the Decision.

## DISCUSSION AND CONCLUSIONS

7. I deal with the grounds in the order pleaded, even though it is clear from the grant of permission that it was on the basis of ground two that the arguable error was found to exist. References to documents below are either to the Appellant’s bundle (referenced as [AB/xx]) or to the Respondent’s bundle (referenced as [RB/xx]).

### Ground One

8. Ms Malhotra accepted that the only evidence in relation to the Appellant and his cousin living together in Pakistan was to be found at [RB/100-101]. Those documents consist of two letters dating back to 5 May 1993 and 4 August 1995 issued by a clinic in Pakistan and on the face of it referring respectively to the EEA sponsor and the Appellant residing at an address which is the same in both cases. Leaving aside that the address appears to be written in different handwriting, that those are copies and that they do not show the EEA sponsor and the Appellant residing at the same address at the same time, those can scarcely be described as a “wealth of documentary evidence”. Further and more importantly, at best they show the Appellant and the EEA sponsor living at the same address in the 1990s when both were children. The EEA sponsor moved to Italy to join his father there in June 1995 (see [23] of the Decision). He would have been aged nine at that time (see his statement at [AB/4]). I note as an aside that this does not assist the Appellant’s case that he and the EEA sponsor were resident at the same address at the same time relying on the documents: the clinic’s letter in respect of the Appellant is dated after the EEA sponsor left Pakistan.

9. Even if the documents were accepted as showing what the Appellant says they do, that could not assist his case. It cannot sensibly be suggested that the Appellant having lived in the same house as the EEA sponsor some fourteen years before the Appellant came to the UK at a time when both were children is sufficient to show that the Appellant was a member of the EEA sponsor's household before coming to the UK. As Mr Tufan also pointed out, there is no evidence to show that the EEA sponsor was an EEA national at the time when he was living in Pakistan. He relied on what is said by the Tribunal (Mr Justice Blake, President sitting with Senior Immigration Judge Storey) in Moneke (EEA - OFMs) Nigeria [2011] UKUT 00341 (IAC) at (ii) of the headnote that "[I]n either case the dependency or membership of the household must be on a person who is an EEA national at the material time."
10. In those circumstances, the Judge was entitled to reject the Appellant's evidence that he and the EEA sponsor lived together in the same household between 1991 and 1995 for the reasons given at [27] and [28] of the Decision as follows:
- "[27] ... I do not accept the appellant and his cousin's evidence that they lived together in the same household between 1991 and 1995. There is no mention of this in the appellant's written witness statement.
- [28] The EEA sponsor in his statement states that they grew up together in the same household but gives no dates as to when this was. There is a detailed representations made with the appellant's application, however, there is no mention of the appellant and his EEA sponsor living in the same household in Pakistan. I find that this evidence has been added on to show that before arriving in the UK, both the appellant and his EEA national sponsor lived under the same together [sic]. I do not find this evidence credible or consistent."
11. Even if the documentary evidence did point to the opposite conclusion (which it does not), any error would make no difference because there could be no finding that the Appellant was a member of the EEA sponsor's household before coming to the UK.

## Ground Two

12. Ms Malhotra relied on the evidence that the EEA sponsor had sent money to the Appellant between February and September 2009. She said that this was not disputed by the Respondent in the reasons for refusal letter nor raised by the Presenting Officer. As Mr Tufan pointed out, though, there was no appearance by a Presenting Officer at the hearing before Judge Khan and the Respondent had taken issue with the evidence as showing dependency in the absence of evidence that the Appellant had received the money. The money transfers are at [RB/95-97].
13. The Judge set out the evidence on the dependency issue at [20] to [21] of the Decision in relation to the Appellant's evidence and at [23] to [25] of the Decision in relation to the EEA sponsor's evidence as follows:

“[20] In reply to my questions, the appellant stated the evidence of his EEA sponsor sending money for his studies is contained at pages 95 to 97 of his bundle. His EEA sponsor started financially supporting him from Italy in 2006. The EEA sponsor was working at a petrol pump; he did not know how much he was earning at the time. He said that before he came to the UK he was living with his parents in Pakistan. His leave to remain as a student was curtailed because he had failed to pay his college fees. He said that he had an agreement with the college to pay by instalments but they demanded all payment in advance, which he could not pay.

[21] The appellant stated that Mr Iqbal, who has provided a written statement to the effect that on occasions he brought money for him given to him by the EEA sponsor in Italy, was not in attendance because he is busy. The EEA sponsor came to live in the UK in 2015. The EEA sponsor is self-employed, he buys and sells telephone call cards, he earns between £1300 and £1500 per month. The EEA sponsor and his wife are separated, she and his three children live in Italy, and he does not financially support his children. His cousin’s father died in 2017 and his mother is in receipt of a pension. He said that the EEA sponsor has been continuously supporting him since 2007.

...

[23] The witness [the EEA sponsor] stated that whilst in Pakistan, he and his family lived with the appellant’s family at their family home. He said that in June 1995, he and his family joined his father in Italy. He has been continuously financially helping the appellant since 2007 because the appellant’s father had retired and the family were having financial difficulties.

[24] The witness stated that there is no documentary evidence that he has been supporting appellant between 2009 and 2015 because he did not keep this evidence, as he did not anticipate that he would need it. He stated that he sent money to the appellant from Italy through family members and sometimes friends. He came to the UK in 2015; he could not remember his first address in West Ealing. He is self-employed; he buys and sells telephone call cards.

[25] In reply to my questions, the witness stated that he started working in Italy in 2006 as a cashier at a petrol station; he was age 20 at he time. He is married with three children, he and his wife are separated; he visits his children in Italy but does not pay any maintenance because his wife is in employment. He pays rent in the sum of £700 per month. I put it to the witness that his accounts for 2018 show that his taxable income was £12202.00, he pays £700 in rent, how could he afford to financially support himself and the appellant? The witness stated that his earning sometimes goes up and down (vague and evasive). He said he has no evidence of his employment or earnings in Italy. He said that he worked as a cashier at a petrol station in Italy and that he was earning 1100 to 1500 Euros per month. He was in employment in Italy before he came to the UK in 2015.”

14. On the basis of that evidence, the Judge made the following findings in relation to the Appellant's dependency on the EEA sponsor prior to the Appellant's arrival in the UK:

"[29] The appellant came to the UK as a student in 2009. Both the appellant and the EEA sponsor claim that the appellant's cousin paid for the studies in the UK. The legal representations with the application state that the EEA sponsor 'arranged his visa and study expenses in the UK...' The appellant entered the UK on a student visa and not as a family member of an EEA national. There is no official documentary evidence (bank remittance receipts) to show that the EEA sponsor provided funds for the appellant's studies. What has been provided as evidence of remittance are various receipts from Al-Sahara Exchange Co. Ltd. Those are as follows:

03/02/2009 = 983.76 Euros

06/03/2009 = 104,64 Euros

10/04/2009 = 4707.65 Euros

05/05/2009 = 3836.36 Euros

03/06/2009 = 5291.00 Euros

07/07/2009 = 519.84 Euros

04/08/2009 = 339.42 Euros

08/09/2009 = 414.88 Euros

In total between February and September 2009, 16,197.55 Euros claimed to have been sent to the appellant in Pakistan by his EEA national sponsor. The EEA sponsor's evidence is that he worked at a petrol station earning 1100 to 1500 Euros per month. I do not find it credible or consistent that the EEA sponsor would be in a position to send the large amounts of remittance as claimed to the appellant in 2009. I find that all the remittance documents in the appellant's bundle have been created for the purpose of his residence card application."

15. On the face of the evidence, that finding was undoubtedly open to the Judge. In some months, the EEA sponsor was claiming to remit to the Appellant three to four times the amount he said he earned. The point made in the grounds, however, is that the finding was procedurally unfair because no point had been taken by the Respondent in his decision nor by the Presenting Officer at the hearing. I have already pointed out that issue was taken about whether the evidence showed dependency but, I accept, not based on whether the EEA sponsor himself had sufficient funds to make the payments. I have already pointed out that there was no Presenting Officer at the hearing before Judge Khan. It is no doubt for that reason that the Judge himself asked certain questions as recorded at [25] of the Decision.
16. I have no difficulty in accepting that it would be procedurally unfair for a Judge to make a finding on a point not in issue between the parties with absolutely no notice of it to the losing party. However, I cannot accept the assertion made in the grounds that the Appellant was not put on notice of the issue in light of

what is said in particular at [25] of the Decision. The grounds state without more that “the Tribunal is reminded of the FTJ’s detailed recital of the oral evidence at §§ 18-25 which contains no reference to this issue being raised during the hearing”. I do not accept that this is so. To the contrary, it is clear from the questions which the Judge posed as recorded at [25] of the Decision, that he was taking issue with the EEA sponsor’s ability to provide financial support to the Appellant whether in the UK or whilst the EEA sponsor was in Italy and the Appellant in Pakistan. There is no witness statement from Counsel who attended the hearing (not Ms Malhotra) nor from the Appellant or the EEA sponsor making good the factual assertion contained in the grounds. Counsel who pleaded the grounds (also not Ms Malhotra) was not Counsel who appeared before Judge Khan and therefore could not have known what was said.

17. For those reasons, ground two is not made out. The Judge was entitled to rely on this point adversely to the Appellant and to find that the Appellant was not dependent on the EEA sponsor before the Appellant came to the UK.

### **Ground Three**

18. Although my conclusions in relation to grounds one and two, taken together, are fatal to the success of the Appellant’s appeal as he cannot establish that he was living with or dependent on the EEA sponsor before coming to the UK, I deal with grounds three and four for the sake of completeness.
19. I accept that the Judge’s rejection of the evidence of the other witness (Mr Iqbal) on the basis that only the first page of his passport is provided is a flawed reason. Mr Iqbal is a British citizen and I accept his passport would not be stamped on exit from the UK or entry to Italy. However, Mr Iqbal did not attend to give evidence because it was said that he was “too busy”. The Appellant says in his grounds that Mr Iqbal could not be forced to attend. That is of course wrong because, if it were necessary, the Tribunal could have summonsed him to give evidence. The weight to be attributed to evidence is a matter for the Judge. Mr Iqbal’s evidence is contained in the very brief statement at [AB/36]. The Judge was entitled not to give that evidence weight due to the inability to see the evidence tested.

### **Ground Four**

20. It is said that the Judge has failed to make a finding whether the Appellant is a member of the EEA sponsor’s household in the UK. I can deal with this ground very shortly. It is implicit in the Judge’s conclusion at [38] of the Decision as set out at [3] above, that the Judge has not rejected this aspect of the Appellant’s case. Notwithstanding that implicit acceptance of this part of the case, the Appellant cannot succeed because he has failed to show that he was either dependent on the EEA sponsor or living as a member of the EEA sponsor’s household before coming to the UK.

**CONCLUSION**

21. For the above reasons, I am satisfied that the Decision does not contain an error of law. Accordingly, I uphold the Decision.

**DECISION**

**I am satisfied that the Decision does not contain a material error of law. I uphold the decision of First-tier Tribunal Judge M A Khan promulgated on 28 December 2018 with the consequence that the Appellant's appeal stands dismissed**



Signed  
Upper Tribunal Judge Smith

Dated: 9 May 2019