Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/05203/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16 October 2019	**On 21 October 2019**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

KHAYYAM BASHIR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Z Iqbal, of Greystone Solicitors
For the Respondent: Ms R Bassi, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of Judge of the First-tier Tribunal Herlihy (the judge), promulgated on 5 June 2019, dismissing the appellant's appeal against the respondent's decision, dated 10 July 2018, refusing to issue him a residence card pursuant to the Immigration (European Economic Area) Regulations 2006 (the 2006 Regulations) as confirmation of his right to reside in the UK as the dependant family member of an EEA national exercising Treaty rights.

Background

2. The appellant is a national of Pakistan, born on 6 April 1986. In May 2007, when he was 21 years old, the appellant applied for entry clearance as a Tier 4 (General) Student. His application was supported by an affidavit from Mr Muhammad Arif, whom the appellant says is his uncle. According to the respondent Mr Arif's affidavit stated that he would sponsor the appellant as a student and that he was providing for the appellant's essential needs. Although the application was initially refused it was eventually granted following an appeal and the appellant entered the UK in 2010 as a Tier 4 (General) Student. It is not clear on the papers before me when the entry clearance expired.

3. On 14 April 2015 the appellant applied for a residence card as the dependent extended family member of Mr Malik Munshi Khan, his maternal uncle. Mr Khan is a national of Denmark who is said to have entered the UK in 2015 and started working in November of that year. The appellant claimed that Mr Khan provided him with financial support to enable him to meet his essential needs in Pakistan and after the appellant entered the UK, and that since Mr Khan moved to the UK in 2015 the appellant has been living with him. This application was refused, and an appeal withdrawn following legal advice given to the appellant by former representatives. A further application was made in 2016 and, after a protracted series of events, including the challenge of judicial review proceedings, a decision was made on 10 July refusing the application.

4. In her decision the respondent referred to Mr Arif's affidavit and his claim to have been providing for the appellant's essential needs. The respondent considered this was inconsistent with the appellant's claim that Mr Khan had provided for his essential needs in Pakistan. The respondent did not accept that the appellant was dependent on Mr Khan, or a member of his household, prior to entering the UK. The respondent made no finding one way or another in respect of whether the appellant was dependent on Mr Khan or lived in his household after the appellant entered the UK. As the refusal to grant the residence card was issued pursuant to the 2006 Regulations, the appellant had a right of appeal.

The decision of the First-tier Tribunal

5. The judge had before her a bundle of documents provided by the appellant running to 151 pages which included, inter alia, statements from the appellant and Mr Khan, an affidavit from Mr Arif dated 9 July 2018, some money transfer receipts from the sponsor in Denmark to the appellant in Pakistan, two money transfer documents relating to the appellant after her arrived in the UK, fee receipts documents stating that Mr Khan paid for the appellant's course fees at two different colleges in the UK, and several affidavits and statements from individuals asserting that Mr Khan financially supported the appellant and attesting to their character. The judge heard oral evidence from the appellant and Mr Khan and summarised their evidence at 6.1 to 6.8 of her decision, and properly directed herself as to the requisite standard and burden of proof [4].

6. The judge's findings are contained in section 7 of her decision. At 7.3 the judge addressed her mind to the legal test for determining dependency under the EEA Regulations. Although Mr Khan claimed in oral evidence that he obtained Danish nationality in 1978 the judge noted the absence of any clear evidence to support this assertion. A copy of Mr Khan's Danish passport showed that it was issued on 10 May 2007. The judge noted the claim by the appellant and Mr Khan that the appellant's father was not working and could not afford to support him and his family. The evidence before the judge suggested to her that Mr Khan chose to support the appellant because of their close relationship.

7. At 7.4 the judge indicated that she had considered all the oral and written evidence and the written statements contained in the appellant's bundle, and at 7.5 the judge considered four handwritten receipts issued by Money Transfer Services DNK between 18 June 2001 and 18 April 2005. The judge considered these receipts in detail noting that, over a four-year period, they amounted to an equivalent of £93. The judge stated, "There was no evidence before me that this was in any way sufficient to meet all the Appellant's essential needs in Pakistan." The judge then stated,

> "If they were remitted in Danish Kroner the amount sent and amounts received do not appear to be consistent as for example the document at page 61 indicates the Appellant is to receive 2560 Pakistani rupees and the amount sent is expressed to be 350.07. However 2560 Pakistani rupees is today the equivalent of 120 Danish Kroner and there is a big disparity between the sum of 350.07 shown on the remittance."

8. At 7.6 the judge noted the absence of any evidence of the income his family received in Pakistan order to determine if the money is remitted by the sponsor could be regarded as meeting "all his essential needs." The judge found that the very small amounts of money remitted had not established that they were sufficient to meet "all" of the appellant's essential needs. The judge additionally stated,

> "I am not satisfied that I can place any great weight on the documents at pages 61 to 64 due to the disparities in the documents between the sums remitted and the sums received."

9. At 7.7 the judge considered further money remittance receipts contained in the appellant's bundle between pages 65 and 72, which covered the period from 10 January 2006 to 25 November 2009. The judge calculated the equivalent value of the money is remitted in pounds sterling and concluded that the amounts were insufficient to meet the appellant's essential needs in Pakistan.

10. At 7.9 the judge considered the respondent's reliance on the affidavit from Mr Mohammed Arif in respect of the appellant's Tier 4 (General) Student application for entry clearance. The judge referred to a new affidavit from Mr Arif which had a date stamp of 19 July 2018. The judge noted that the otherwise un-dated affidavit was in English and that there was no evidence that Mr Arif could write or speak English. The judge could not be certain that the affidavit was read to Mr Arif in a

language that he understood and there was no translation of the original affidavit if it had been made in a language other than English.

11. At 7.10, 7.11 and 7.12 the judge considered two fee receipts purportedly provided by 2 separate colleges, one dated 8 November 2011 and the other dated 22 April 2013. The judge agreed with the respondent that these were not genuinely issued documents as both contained a spelling mistake in respect of the word receipt (spelt "recipt") and both were written in identical fonts of identical size. The judge noted that the appellant had been unable to produce any physical evidence other than these 2 letters of the actual payments by Mr Khan. The judge found that the 2 college fee receipts casts serious doubt on the appellant's claim to have been dependent upon Mr Khan. The judge also found the appellant's claim that Mr Khan had been meeting "all his essential needs" to be incredible as it was contradicted by the appellant's Tier 4 (General) Student application in which he claimed that another individual (Mr Arif) was meeting all his needs and would sponsor him.

12. At 7.13 the judge found that the lack of any evidence of the remittance of monies from Mr Khan to the appellant after he entered the UK in 2010 and before Mr Khan arrived in 2015 to undermine the appellant's claim to have been dependent upon Mr Khan. There were no statements from any individuals who, as the appellant claimed, had visited him in the UK and handed him money from Mr Khan. The oral evidence relating to how much money he received from Mr Khan was vague and there was no evidence produced by Mr Khan of his bank statements from Denmark showing withdrawals from his account which would have matched the sums paid to the appellant. Nor had the appellant produced any copies of bank statements from 2010 to 2016 which would have been reasonable for him to have produced had he been receiving significant sums of money in cash which would be deposited into his account to meet its outgoings. Nor had Mr Khan produced any evidence of his regular travel to the UK between 2010 and 2015.

13. At 7.14 the judge noted that several other affidavits provided from individuals in Pakistan were in English and were undated. There was no evidence that the deponent of the affidavits were able to write and understand what they were saying in English and there was no evidence that the affidavits initially been made in another language. Furthermore, the writers of the affidavits did not indicate how they knew that the appellant was being financially supported by Mr Khan. At 7.15 the judge considered several letters from people based in the UK, some of which made no mention of any dependency. Those that did talk about dependency did not disclose how the authors came upon or were aware of this information. The judge found it likely that the statements and affidavits are prepared based on information given by the appellant to the authors of those statements. At 7.16 the judge did not find it credible that Mr Khan would have been able to support the appellant given that he also had his own family comprising a wife and 4 children to support. The judge additionally noted the

absence of any evidence of money being transferred by Mr Khan to the appellant after March 2017.

14. At 7.17 the judge stated that there was no evidence before her as to what level of income was required in order for the appellant to meet his essential needs. The judge noted that the appellant did not into the UK until he was 24 and that he provided no evidence of what he did in Pakistan after finishing his schooling and before coming to the UK. The judge did not find it credible that the appellant, who was at the date of the hearing aged 33, had, since the age of 15, been "entirely dependent upon the EEA sponsor who is aged 84 to meet all his essential needs." The judge stated,

> "I am satisfied that the sponsor has provided some limited financial assistance to the Appellant in Pakistan but I do not find that the Appellant was dependent in Pakistan or after his arrival in the United Kingdom on his uncle the EEA national to meet all his essential needs."

15. Finally, at 7.18 the judge again rejected the appellant's claim that he was financially dependent upon Mr Khan "for all his essential needs" before he came to the United Kingdom.

16. The appeal was dismissed.

The challenge to the First-tier Tribunal's decision

17. The grounds contend that the judge erred in law in requiring Mr Khan to meet "all" of the appellant's essential needs and that the financial assistance provided by Mr Khan was sufficient to meet the appellant's essential needs as there was no requirement to achieve a certain level of income. This assertion was supported by reference to the respondent's Policy Guidance 'Extended family members of EEA Nationals, version 7.0, published for Home Office staff on 27 March 2019 and the decision in RK (OFM) - membership of household-dependency) India [2010] UKUT 421 (IAC).

18. The grounds also contend that it was unclear on what basis and from which source the judge arrived at the figures that she did between 7.5 and 7.7 in relation to money remittances. If the judge made calculations based on conversion rates applicable at the date of her decision she failed to take into account that currency rates may have been very different over a decade earlier. The grounds further contend that the judge failed to take into account the appellant's explanation for the absence of further records of money transfer receipts, as detailed in paragraph 17 of his statement.

19. It is argued that the judge misdirected herself in looking at the reasons why Mr Khan may have provided financial support to the appellant as there was no requirement to determine the reasons for recourse to such support (with reference to **Moneke (EEA – OFMs – assessment of evidence) Nigeria** [2011] UKUT 430). The appellant further maintains that there were bank statements and pages hundred 38 250 of his bundle showing not only electronic money transfers from

Mr Khan to the appellant's account but confirming that they lived at the same address. There was, in any event, no need for the appellant to show that he was financially dependent upon Mr Khan after Mr Khan's arrival in the UK if the appellant was a member of Mr Khan's household. Moreover, even if there was no evidence as to when Mr Khan obtained Danish nationality, his passport showed that he was a Danish national from at least 10 May 2007, at a time when the appellant still resided in Pakistan.

20. The appellant contends that the judge engaged in undue speculation when attaching little or no weight to Mr Arif's affidavit in the absence of any evidence of Mr Arif's proficiency in English or that the statement was originally written in another language or that it was translated and read back to Mr Arif. The judge's conclusion was based on stereotyping and no doubt was placed on the bona fides of Mr Arif's affidavit written in 2007 which was also written entirely in English.

21. The grounds finally contend that the judge reached speculative findings in concluding that Mr Khan would not have managed to bear the financial burden of looking after his wife and 4 children and supporting the appellant, and that the judge was wrong in concluding that the college fee receipts were written in identical fonts and identical sizes.

22. In granting permission judge of the First-tier Tribunal M Robertson stated,

> "The grounds of appeal lengthy and whilst all grounds are not equally arguable, there is arguable merit in the grounds of paragraphs 2-8, in that the judge has repeatedly relied on the Appellant failing to establish that his uncle's contributions had met all his essential needs. It is arguable that, in establishing prior dependency, the Appellant does not need to establish that all his essential needs were met by Mr Khan. Although it is stated in the grounds that the judge accepted that the Appellant has been residing with Mr Khanna since he came to the UK, but no finding of fact appears to have been made on this issue, although it is a matter that the judge arguably should have considered in the absence of a finding of dependency. As permission is granted on this ground, the Appellant is permitted to rely on all grounds."

23. In his oral submissions Mr Iqbal submitted that there are had only been one issue before the First-tier Tribunal, that being prior dependency. Present dependency had not been raised by the respondent as an issue in her decision. Mr Iqbal relied on the written grounds and reiterated that the judge failed to identify how she made her calculations at 7.5 to 7.7. of her decision and that she failed to engage with the explanation given by the appellant for the absence of any other documentary evidence of money remittals. There was no evidence before the judge that Mr Arif's statement had not been translated to him or that he had not understood what was contained in the statement, and the same applied to the other individuals who provided affidavits from Pakistan.

24. Ms Bassi submitted that the judge had not erred in law by referring to Mr Khan meeting "all" of the appellant's essential needs and drew my attention to the appellant's statement at paragraph 21 when he stated that he was dependent on

the money that Mr Khan sent him and that "the money met all of my basic needs." If the was any error by the judge it was not material as she had considered all of the documents before her (she stated at 7.15) and even if she was wrong in respect of her currency conversion calculations this would not have made any material difference. The judge was entitled to take into account the 2007 affidavit from Mr Arif and to find that this was inconsistent with the appellant's claim that he had been dependent upon Mr Khan. The judge had been entitled to find both the appellant and Mr Khan incredible and the was, in any event, a gap of financial support provided by Mr Khan between 2010 and 2015. Ms Bassi acknowledged that the refusal letter didn't deal with the issue of present dependency but submitted that the appellant could only succeed in his appeal if he was able to demonstrate the existence of past dependency. She invited me to dismiss the appeal.

25. I reserved my decision.

Discussion

26. On the facts of this appeal the relevant conditions are contained in Reg 8(2). This reads, in material part,

> 'A person satisfies the condition in this paragraph if the person is a relative of an EEA national, his spouse or his civil partner and –
>
> (a) The person is residing in a country other than the United Kingdom … and is dependent upon the EEA national or is a member of his household;
>
> (b) The person satisfied the condition in paragraph (a) and is accompanying the EEA national to the United Kingdom or wishes to join him there; or
>
> (c) The person satisfies the condition in paragraph (a), has joined the EEA national in the United Kingdom and continues to be dependent upon him or to be a member of his household.'

27. Dependency on the EEA sponsor and membership of the EEA sponsor's household are alternative routes under Reg 8(2)(c) (see, for example, **Moneke (EEA – OFMs) Nigeria** [2011] UKUT 341 (IAC)). In **Lim v Entry Clearance Officer Manila** [2015] EWCA Civ 1383 the Court of Appeal stated, at [32],

> "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."

28. Although the judge properly directed herself in respect of the relevant legal test at 7.3, her assessment at 7.5, 7.6, 7.12, 7.17 and 7.18. refers to the funds provided by Mr Khan as being necessary to meet "all" the appellant's essential needs. There is however no requirement that Mr Khan provides funds to enable the appellant to meet "all" his essential needs. The relevant case law indicates that the support that Mr Khan provides only needs to be 'material' or 'necessary' to enable the appellant to meet his essential needs (see **Lim**, at [25] & [32]; see also the respondent's Policy Guidance 'Extended family members of EEA Nationals, version 7.0, published for Home Office staff on 27 March 2019, which states, "The applicant does not need to be dependent on the EEA national to meet all or most of their essential needs. For example, an applicant is considered dependent if they receive a pension which covers half of their essential needs and money from their EEA national sponsor which covers the other half."). To this extent the judge has misdirected herself. Given the frequency with which she refers to the need for Mr Khan's funds being necessary to meet "all" the appellant's essential needs, I find this misdirection to be material.

29. I am additionally satisfied that, despite the appellant offering an explanation for the absence of money transfer receipts in his statement (at paragraph 17 the appellant stated, "as support has been on-going for years we do not have all records. I did not keep all the receipts as I did not realise that I would need them. I have destroyed or misplaced many of the receipts and the ones I have are enclosed."). This explanation was, prima facie, plausible. The judge failed to engage with this explanation or make any findings in relation to the explanation. Whilst the judge was entitled to find that the appellant and Mr Khan were incredible witnesses in relation to their claim that Mr Khan sent money to the appellant when he came to the UK, and whilst the judge gave sustainable reasons for finding that the receipts from the 2 colleges were not genuine documents, it does not necessary follow that the judge would have rejected the explanation at paragraph 17 of the appellant's statement. It at least required some consideration by the judge. I am satisfied that the judge failed to take into account a relevant consideration when she failed to engage with the appellant's explanation.

30. I am additionally concerned with the judge's findings at 7.5 and 7.6 relating to a "big disparity" between the Pakistani rupee equivalent of converted kroner detailed in money transfer receipts covering the period 2001 to 2005. At 7.5 the judge found that the 350.07 Kroner detailed in a money transfer receipt dated 18 June 2001 converted to 2560 Pakistani rupees, but that 2560 Pakistani rupees "… is today the equivalent of 120 Danish Kroner and there is a big disparity between the sum of 350.07 shown on the remittance." It is not clear why the judge decided to convert 2560 Pakistani rupees into Kroner at the time that she made her decision in 2019 rather than using the conversion rate on 18 June 2001. Having obtained the consent of the parties I visited the oanda.com currency converter website which enables one to access historical conversion rates. The amount of 350.07 Danish

Kroner converted to 2,558.87 Pakistani rupees on 18 June 2001. This is substantially the same as the converted amount detailed in the money transfer receipt at page 61 of the appellant's bundle. To the extent that the judge considered that she could not "place any great weight on the documents at pages 61 to 64 due to the disparities in the documents between the sums limited and the sums received", she has attached weight to an irrelevant matter. This constitutes an error of law.

31. At 7.5 the judge found that the monies remitted by Mr Khan to the appellant over the four-year period 2001 to 2005, as disclosed in the 4 money transfer receipts, amounted to the equivalent of £93. The judge does not identify the conversion date that she used in reaching this calculation. Using the oanda.com website refer to above, and using the conversion dates identified in each of the money transfer receipts, the amount remitted by Mr Khan amounted to £169. Whilst this is still a small amount, and whilst the judge may still have been entitled to conclude that it was insufficient to materially enable the appellants to meet his essential needs, I am not persuaded that she would have been bound to reach this conclusion, especially if the appellant's explanation for the absence of any further money remittance receipts had been considered.

32. For similar reasons I am persuaded that the judge's calculations at 7.7 of her decision also discloses and error of law because the judge appears to have used a conversion rate from Pakistani rupees to pounds Sterling at the time that she wrote her decision. She states that Mr Khan remitted sums equivalent to £27 and £43 in 2007, but the oanda.com website for the specific dates identified in the money transfer receipts amounted to £47 and £72 respectively. There are similar disparities between the remaining equivalent figures stated by the judge and the figures that result from using the oanda.com conversion website. The actual equivalent in pounds sterling at the date of the money transfers is, in some cases, almost double that relied on by the judge. In relying on a currency conversion date when she wrote the decision rather than the date of the actual money transfers the judge took into account an irrelevant consideration.

33. I am additionally persuaded that the judge's finding at 7.16 - that it was not credible that Mr Khan would have provided the appellant with funds in order for him to meet his essential needs in addition to meeting the needs of his own family - was unduly speculative. The judge provided no other reasons for this conclusion and did not identify any particular evidence supportive of this conclusion.

34. I am not persuaded that the judge erred in law in attaching little or no weight to the 2018 affidavit from Mr Arif. The judge was entitled to take into account the absence of any evidence that Mr Arif spoke would read or understand English and the absence of any evidence that the affidavit was translated to Mr Arif and the absence of any evidence that the affidavit was originally composed in another language and subsequently translated. This was a decision rationally open to the judge for the reasons given. Nor am I persuaded that the judge erred in law in concluding that the college fee receipts were unlikely to contain the same spelling

mistake and that the term "Fee Receipt" was in identical script and size. Having considered the two separate documents myself I am satisfied that was a conclusion reasonably open to the judge.

35. Ms Bassi submits that the appeal stood to be refused in any event because the judge rejected the appellant's claim that Mr Khan's funds were necessary for him to meet his essential needs, that the judge was entitled to her findings for the reasons given, and that there was therefore a five-year gap between the appellant entering the UK in 2010 and Mr Khan arriving in 2015, at which time the appellant became a member of Mr Khan's household. Ms Bassi supports her contention by reference to **KG and AK v SSHD** [2008] EWCA Civ 13 (at [79]), **MR (EEA extended family members) Bangladesh** [2010] UKUT 449 (at [17(ii)]), and the decision of the Grand Chamber in **SSHD v Rahman** (Case C-83/11). Whilst I accept that these authorities provide some (although not conclusive) support for the respondent's submission that a significant break in the continuity of dependency prevents the appellant from being regarded as an extended family member, this is premised on the findings of fact relating to the period between 2010 and 2015 being retained. Although I have not been persuaded that some of the judge's factual findings, including some adverse credibility findings, were not open to her, I have found that she did materially err in law in relation to other findings, including those relating to the credibility of the appellant and Mr Khan (detailed in paragraphs 28 to 33 above). For these reasons I find that the identified errors of law undermine sustainability of all the judge's findings.

36. Given the nature of the errors of law identified and their impact on the judge's factual findings, I consider it appropriate, having regard to the relevant practice direction, to remit the appeal to the First-tier Tribunal for a fresh hearing. No doubt the next judge hearing the appeal will reach a view on the respondent's arguments relating to the potential gap in the continuity of dependency between 2010 and 2015, dependent on his or her factual findings.

Notice of Decision

The decision of the First-tier Tribunal contains an error on a point of law and is set aside.

The case is remitted back to the First-tier Tribunal for a fresh hearing, to be determined by a judge other than judge of the First-tier Tribunal Herlihy.

D. Blum — 18 October 2019

Signed — Date