Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/09650/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 24 July 2019	**On 21 October 2019**

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

MALIK ZAHEER HUSSAIN
(anonymity direction not made)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the appellant: Mr Z. Raza, instructed by Marks & Marks Solicitors
For the respondent: Mr E. Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appealed the respondent's decision dated 14 July 2016 to refuse to issue a family permit facilitating entry to the UK as the 'extended family member' of an EEA national with reference to The Immigration (European Economic Area) Regulations 2006 ("EEA Regulations 2006"). The appellant is the brother of a Portuguese national who is exercising his rights of free movement under the EU treaties in the UK.

2. The appeal was initially dismissed for lack of jurisdiction following the Upper Tribunal decision in *Sala (EFMs: right of appeal)* [2016] UKUT 00411 in a decision promulgated on 09 August 2017. Following the Court of Appeal decision in *Khan v SSHD* [2017] EWCA Civ 1755 it was set aside by a judge of the First-tier Tribunal in a decision promulgated on 26 October 2018.

3. First-tier Tribunal Judge E.B. Grant ("the judge") subsequently dismissed the appeal in a decision promulgated on 15 March 2019. She was satisfied that there was sufficient evidence to show that the appellant was related to the EEA sponsor as claimed. However, she dismissed the appeal because she was not satisfied that there was sufficient evidence to show that the appellant was dependent on the sponsor.

4. In a decision promulgated on 06 June 2019 (annexed) a panel of the Upper Tribunal (UTJ Canavan and UTJ Pickup) found that the First-tier Tribunal decision involved the making of an error of law. The judge's finding relating to the familial relationship was preserved. The case was adjourned for up to date evidence to be served. The appeal now comes before the Upper Tribunal for the decision to be remade in relation to the issue of dependency.

Legal framework

The Citizens Directive

5. Recitals 5 and 6 of the Directive say the following about family members.

> '(5) The right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality. For the purposes of this Directive, the definition of 'family member' should also include the registered partner if the legislation of the host Member State treats registered partnership as equivalent to marriage.
>
> (6) In order to maintain the unity of the family in a broader sense and without prejudice to the prohibition of discrimination on grounds of nationality, the situation of those persons who are not included in the definition of family members under this Directive, and who therefore do not enjoy an automatic right of entry and residence in the host Member State, should be examined by the host Member State on the basis of its own national legislation, in order to decide whether entry and residence could be granted to such persons, taking into consideration their relationship with the Union citizen or any other circumstances, such as their financial or physical dependence on the Union citizen.'

6. Article 2 sets out the following definitions.

> 'For the purposes of this Directive:
>
> 1. 'Union citizen' means any person having the nationality of a Member State;
> 2. 'family member' means:
>
> (a) the spouse;

(b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;

(c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);

(d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);

3. 'host Member State' means the Member State to which a Union citizen moves in order to exercise his/her right of free movement and residence.'

7. Article 3 provides.

'1. This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.

2. Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:

(a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;

(b) the partner with whom the Union citizen has a durable relationship, duly attested.

The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people.'

The EEA Regulations 2006

8. The relevant part of regulation 8 of the EEA Regulations 2006 was:

'8. (1) In these Regulations "extended family member" means a person who is not a family member of an EEA national under regulation 7(1)(a), (b) or (c) and who satisfies the conditions in paragraph (2), (3), (4) or (5).

(2) 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 satisfied 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. …..'

Case law

9. In *Lebon* C-316/85 [1987] ECR 2811 the European Court of Justice (ECJ) concluded that the status of dependent family member results from a factual situation, namely the provision of support by the worker, without there being any need to determine the reasons for recourse to the worker's support.

10. In *Jia v Migrationsverket* [2007] INLR 336 the European Court of Justice made the following findings relating to the meaning of dependency within the context of an application made by a dependent direct family member in the ascending line of the European national's spouse.

> "35. According to the case law of the Court of Justice, the status of "dependent" family member is the result of a factual situation characterised by the fact that material support for that family member is provided by the Community national who has exercised his right of free movement or his spouse: see…*Lebon*…and…*Zhu and Chen*…
>
> 36. The court has also held that the status of dependent family member does not presuppose the existence of a right of maintenance, otherwise that status would depend on national legislation, which varies from one case to another: (*Lebon*…) According to the court there is no need to determine the reasons for recourse to that support or to raise the question whether the person concerned is able to support himself by taking up paid employment. That interpretation is dictated in particular by the principle according to which the provisions establishing the free movement of workers, which constitute one of the foundations of the Community, must be construed broadly (*Lebon* …).
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> 37. In order to determine whether the relatives in the ascending line of the spouse of a Community national are dependent on the latter, the host Member State must assess whether, having regard to their financial and social conditions, they are not in a position to support themselves. The need for material support must exist in the State of origin of those relatives or the State whence they came at the time when they apply to join the Community national."
>
> ….
>
> 43. In those circumstances, the answer to Question 2(a) and (b) must be that Article 1(1)(d) of Directive 73/148 is to be interpreted to the effect that 'dependent on them' means that members of the family of a Community national established in another Member State within the meaning of Article 43 EC need the material support of that Community national or his or her spouse in order to meet their essential needs in the State of origin of those family members or the State from which they have come at the time when they apply to join the Community national. Article 6(b) of that directive must be interpreted as meaning that proof of the need for material support may be adduced by any appropriate means, while a mere undertaking

from the Community national or his or her spouse to support the family members concerned need not be regarded as establishing the existence of the family members' situation of real dependence."

11. In *SM (India) v Entry Clearance Officer (Mumbai)* [2009] EWCA Civ 1426 the Court of Appeal made the following observations.

> "26. For the sake of completeness, I should mention the fact that, although Mr Palmer invited the court to apply the test for dependency that is set out in Jia, he made it clear in the respondent's skeleton argument that, in the Secretary of State's submission the question whether the applicants' essential needs are met because of the material support of the Union citizen (or his or her spouse or civil partner) needs to be approached with care and is in any event subject to the qualification that Community law cannot be relied upon for abusive or fraudulent ends. Thus a person who is in a position to support himself because, for example, he has adequate savings or a sufficient income but who nevertheless chooses to live off a Union citizen's contributions because he prefers to keep his savings intact or to invest his income, would not, in the Secretary of State's submission, be someone who was in need of material support. A person who artificially placed himself in a position of dependency on a Union citizen for the sole purpose of obtaining an immigration advantage, although he might then be in need of support, would be excluded from relying on the Directive by the application of the general principle in Community law that its provisions cannot be relied on for abusive or fraudulent ends. The example was given in this context of an applicant who had deliberately given up employment or some other source of income or who had divested himself of assets which would have made recourse to support from the Union citizen unnecessary.
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> 27. Since those issues have not previously been raised in the present proceedings, I would prefer to express no view as to whether these two further submissions of the Secretary of State are well-founded. The "fraud or abuse" exception is well-established in principle in community law, but its application to dependency cases should be considered in the light of specific and sufficiently detailed findings of fact by the AIT. Considering the matter in the abstract, it is possible to see a distinction between a person who, for example, has sufficient savings or income but prefers to rely on support from a Union citizen and a person who could work and earn an income but who prefers not to do so and to rely on support from a Union citizen. In the former case the Secretary of State would contend that there was simply no need for material support to meet essential needs, whereas in the latter case there is a need as a matter of fact and it is unnecessary to explore the reasons for the applicant's recourse to support.
>
> 28. In reality, people's circumstances, their lives and their lifestyles are not always quite so straightforward, and any attempt to draw a bright line between determining whether an applicant has a need for material support to meet his "essential needs" and where there is recourse to support, it being unnecessary to determine the reasons for that recourse, is best considered not on the basis of hypothetical examples but on a case-by-case basis, with the benefit of clear and sufficient factual findings by the AIT. I

would therefore go no further than to say that the test for dependency is to be found in Lebon, read together with Jia, and insofar as AP and FP decided that the latter had effectively overruled the former, it was wrongly decided and should not be followed."

12. The headnote of the Upper Tribunal decision in *VN (EEA rights – dependency) Macedonia* [2010] UKUT 380 summarised the findings as follows:

> "The judgment in Pedro [2009] EWCA Civ 1358 establishes that in respect of family members who are dependent direct relatives as defined by Article 2.2(d) of Directive 2004/38/EC, proof of dependence in the host Member State (the United Kingdom) can suffice for them to qualify for a right of residence. However, this judgment does not have application to the case of "Other family members" (OFMs) as defined by Article 3.2(a) of the Directive. In order to establish a right of residence the latter are required to show both dependence in the country from which they have come and dependence in the UK."

13. The headnote in *Moneke (EEA – OFMs) Nigeria* [2011] UKUT 00341 summarised the Upper Tribunal's findings as follows:

> "i. A person claiming to be an OFM under Article 3(2) of Directive 2004/38/EC may either be a dependant or a member of the household of the EEA national: they are alternative ways of qualifying as an OFM.
>
> ii. In either case the dependency or membership of the household must be on a person who is an EEA national at the material time. For this reason it is essential that tribunal judges establish when the sponsor acquired EEA nationality.
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> iii. By contrast with Article 2(2) family members, an OFM must show qualification as such before arrival in the United Kingdom and the application to join the EEA national who is resident here.
>
> iv. Membership of a household has the meaning set out in KG (Sri Lanka) [2008] EWCA Civ 13 and Bigia & Ors [2009] EWCA Civ 79; that is to say it imports living for some period of time under the roof of a household that can be said to be that of the EEA national for a time when he or she had such nationality. That necessarily requires that whilst in possession of such nationality the family member has lived somewhere in the world in the same country as the EEA national, but not necessarily in an EEA state.
>
> v. By contrast the dependency on an EEA national can be dependency as a result of the material remittances sent by the EEA national to the family member, without the pair of them having lived in the same country at that time before making those remittances.
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> vi. The country from which the OFM has come can be either the country from which he or she has come to the United Kingdom or his or her country of origin.
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> …
>
> viii. Where relevant, findings need also to be made on whether it is appropriate to issue a residence card in accordance with the discretion afforded by

regulation 17(4) of the Immigration (European Economic Area) Regulations 2006.

ix. In deciding whether a person falls within the material scope of regulation 8 of the 2006 Regulations, policy considerations relating to such matters as the appellant's immigration history, the impact of an adverse decision on the exercise by the EEA national of his or her Treaty rights, etc are irrelevant. Such policy considerations are relevant, however, to the exercise of regulation 17(4) discretion."

14. In *SSHD v Rahman* [2013] QB 249 the Grand Chamber of the Court of Justice of the European Union (CJEU) considered the case of 'other family members' of an EEA national who were relatives of the EEA national's spouse. The focus of the decision was to answer questions relating to the assessment of dependency of other family members. The court made the following findings:

"19. As contended by the governments which have submitted observations to the Court and by the European Commission, it follows both from the wording of Article 3(2) of Directive 2004/38 and from the general system of the directive that the European legislature has drawn a distinction between a Union citizen's family members as defined in Article 2(2) of Directive 2004/38, who enjoy, as provided for in the directive, a right of entry into and residence in that citizen's host Member State, and the other family members envisaged in Article 3(2) of the directive, whose entry and residence has only to be facilitated by that Member State.

20. That interpretation is borne out by recital 6 in the preamble to Directive 2004/38 …

21. Whilst it is therefore apparent that Article 3(2) of Directive 2004/38 does not oblige the Member States to accord a right of entry and residence to persons who are family members, in the broad sense, dependent on a Union citizen, the fact remains, as is clear from the use of the words 'shall facilitate' in Article 3(2), that that provision imposes an obligation on the Member States to confer a certain advantage, compared with applications for entry and residence of other nationals of third States, on applications submitted by persons who have a relationship of particular dependence with a Union citizen.

22. In order to meet that obligation, the Member States must, in accordance with the second subparagraph of Article 3(2) of Directive 2004/38, make it possible for persons envisaged in the first subparagraph of Article 3(2) to obtain a decision on their application that is founded on an extensive examination of their personal circumstances and, in the event of refusal, is justified by reasons.

23. As is clear from recital 6 in the preamble to Directive 2004/38, it is incumbent upon the competent authority, when undertaking that examination of the applicant's personal circumstances, to take account of the various factors that may be relevant in the particular case, such as the extent of economic or physical dependence and the degree of relationship between the family member and the Union citizen whom he wishes to accompany or join.

> 24. In the light both of the absence of more specific rules in Directive 2004/38 and of the use of the words 'in accordance with its national legislation' in Article 3(2) of the directive, each Member State has a wide discretion as regards the selection of the factors to be taken into account. None the less, the host Member State must ensure that its legislation contains criteria which are consistent with the normal meaning of the term 'facilitate' and of the words relating to dependence used in Article 3(2), and which do not deprive that provision of its effectiveness."

15. In assessing further questions relating to dependency the CJEU said the following about the objective of Article 3(2) of the Directive.

> "32. So far as concerns the time at which the applicant must be in a situation of dependence in order to be considered a 'dependant' within the meaning of Article 3(2) of Directive 2004/38, it is to be noted that, as follows from recital 6 in the directive's preamble, the objective of that provision is to 'maintain the unity of the family in a broader sense' by facilitating entry and residence for persons who are not included in the definition of family member of a Union citizen contained in Article 2(2) of Directive 2004/38 but who nevertheless maintain close and stable family ties with a Union citizen on account of specific factual circumstances, such as economic dependence, being a member of the household or serious health grounds."

16. In *Reyes (EEA Regs: dependency)* [2013] UKUT 00314 the Upper Tribunal considered the question of dependency of a relative of an EEA national in the ascending line (the EEA national's father) was dependent for the purpose of regulation 7(1)(c) of the EEA Regulations 2006. The Upper Tribunal reviewed relevant case law and concluded:

> "19. From the above, we glean four key things. First, the test of dependency is a purely factual test. Second, the Court envisages that questions of dependency 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 (Article 2.2(b) and (c) refer to family members who "are dependants" or who are "dependent"; regulation 7(c) refers to "dependent direct relatives…"). 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 that provision of its effectiveness."

17. In *Flora May Reyes v Migrationsverket* EU:C:2014:16 the Fourth Chamber of the CJEU considered the issue of dependency in relation to a dependent direct family member who was over 21 years old for the purpose of Article 2 of the Directive and made the following findings:

> "19. By its first question, the referring court asks, in essence, whether Article 2(2)(c) of Directive 2004/38 is to be interpreted as permitting a Member State to require, in circumstances such as those in question in the main proceedings, that, in order to be regarded as being dependent and thus to come within the definition of 'family member' set out in that provision, a direct descendant who is 21 years old or older must show that he has tried without success to find employment or to obtain subsistence support from the authorities of the country of origin and/or otherwise tried to support himself.
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> 20. In that regard, it must be noted that, in order for a direct descendant, who is 21 years old or older, of a Union citizen to be regarded as being a 'dependant' of that citizen within the meaning of Article 2(2)(c) of Directive 2004/38, the existence of a situation of real dependence must be established (see, to that effect, *Jia*, paragraph 42).
>
> 21. That dependent status is the result of a factual situation characterised by the fact that material support for that family member is provided by the Union citizen who has exercised his right of free movement or by his spouse (see, to that effect, *Jia*, paragraph 35).
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> 22. In order to determine the existence of such dependence, the host Member State must assess whether, having regard to his financial and social conditions, the direct descendant, who is 21 years old or older, of a Union citizen, is not in a position to support himself. The need for material support must exist in the State of origin of that descendant or the State whence he came at the time when he applies to join that citizen (see, to that effect, *Jia*, paragraph 37).
>
> 23. However, there is no need to determine the reasons for that dependence or therefore for the recourse to that support. That interpretation is dictated in particular by the principle according to which the provisions, such as Directive 2004/38, establishing the free movement of Union citizens, which constitute one of the foundations of the European Union, must be construed broadly (see, to that effect, *Jia*, paragraph 36 and the case-law cited).
>
> 24. The fact that, in circumstances such as those in question in the main proceedings, a Union citizen regularly, for a significant period, pays a sum of money to that descendant, necessary in order for him to support himself in the State of origin, is such as to show that the descendant is in a real situation of dependence vis-à-vis that citizen.
>
> 25. In those circumstances, that descendant cannot be required, in addition, to establish that he has tried without success to find work or obtain subsistence support from the authorities of his country of origin and/or otherwise tried to support himself."

18. The CJEU went on to make the following findings relating to whether a dependent direct relative ceased to become dependent if they intended to begin work

> "29. By its second question, the referring court asks, in essence, whether, in interpreting the term 'dependant' in Article 2(2)(c) of Directive 2004/38, any significance attaches to the fact that a family member – due to personal circumstances such as age, education and health – is deemed to be well placed to obtain employment and in addition intends to start work in the Member State, which would mean that the conditions for him to be regarded as a relative who is a dependant under the provision are no longer met.
>
> 30. In that regard, it must be noted that the situation of dependence must exist, in the country from which the family member concerned comes, at the time when he applies to join the Union citizen on whom he is dependent (see, to that effect, *Jia*, paragraph 37, and Case C-83/11 *Rahman* [2012] ECR, paragraph 33).
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> 31. It follows that, as, in essence, has been stated by all the parties which have submitted observations to the Court, any prospects of obtaining work in the host Member State which would enable, if necessary, a direct descendant, who is 21 years old or older, of a Union citizen no longer to be dependent on that citizen once he has the right of residence are not such as to affect the interpretation of the condition of being a 'dependant' referred to in Article 2(2)(c) of Directive 2004/38.
>
> 32. Furthermore, as the European Commission has rightly pointed out, the opposite solution would, in practice, prohibit that descendant from looking for employment in the host Member State and would accordingly infringe Article 23 of that directive, which expressly authorises such a descendant, if he has the right of residence, to take up employment or self-employment (see, by analogy, *Lebon*, paragraph 20).
>
> 33. In consequence, the answer to the second question is that Article 2(2)(c) of Directive 2004/38 must be interpreted as meaning that the fact that a relative – due to personal circumstances such as age, education and health – is deemed to be well placed to obtain employment and in addition intends to start work in the Member State does not affect the interpretation of the requirement in that provision that he be a 'dependant'."

19. In *Lim v ECO (Manila)* [2016] Imm AR 421 the Court of Appeal considered the CJEU decision in *Reyes* and found that it cast doubt on the analysis in the earlier decision of the Court of Appeal in *Pedro v SSHD* [2009] EWCA Civ 1358. The court concluded:

> "25. In my judgment, this makes it unambiguously clear 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. For example, paragraph 20 refers to the existence of "a situation of real dependence" which must be established; paragraph 22 is even more striking and refers to the <u>need</u> for material support in the state of origin of the descendant "who is not in a position to support himself"; and paragraph 24 requires that financial support must be "necessary" for the

> putative dependant to support himself in the state of origin. It is also pertinent to note that in paragraph 22, in the context of considering the Citizens Directive, the court specifically approved the test adopted in Jia at paragraph 37, namely that:
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> > "The need for material support must exist in the State of origin of those relatives or the State whence they came at the time when they apply to join the Community national."
>
> …
>
> 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. 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."

Decision and reasons

20. The following principles can be derived from the legal framework set out above.

(i) The Directive recognises that having to live apart from close family members might act as an obstacle to European citizens exercising rights under the Treaties.

(ii) The Directive makes a distinction between 'family members' who have a right of entry and residence in a host Member State and 'other family members' whose entry and residence should be facilitated by the host Member State.

(iii) The measure of whether a person is an 'other family member' who should be facilitated entry is whether they maintain "close and stable family ties with a Union citizen on account of specific factual circumstances, such as economic dependence, being a member of the household or serious health grounds".

(iv) A person needs to show "a situation of real dependence" on the EEA national to meet their essential needs. If a person cannot support himself or herself from their own resources, it is not necessary to ask why, save in cases involving abuse of rights. The fact that a person chooses not to work is irrelevant.

(v) The competent authority in the host Member State, when undertaking an examination of the applicant's personal circumstances, can take into account various factors that may be relevant such as the extent of the economic or physical dependence and the degree of relationship between the family member and the Union citizen who they wish to accompany or join.

(vi) The host Member State has a wide discretion regarding the selection of factors to be taken into account "in accordance with national legislation". Nevertheless,

the host Member State must ensure that legislation is consistent with the normal meaning of the term 'facilitate' and must not deprive Article 3(2) of its effectiveness.

(vii) Policy considerations may be relevant to the respondent's exercise of discretion to issue a family permit (regulation 12(2)(c)) or a residence card (regulation 17(4)) to an 'extended family member' under the EEA Regulations 2006.

(viii) The exercise of discretion by the host Member State must be done in line with the provisions of the Charter of Fundamental Rights of the European Union. In particular, Article 7 of the Charter recognises the right to family life.

21. I found the EEA sponsor to be a credible witness who gave his evidence in an open and unhesitating way. The appellant's brother produced documentary evidence to support his claim that he has provided the appellant with financial support since his jewellery business closed in 2015. As set out in the previous decision of the Upper Tribunal, there is evidence to show that the sponsor sends regular remittances to the appellant. There are numerous money transfer receipts from the sponsor to the appellant to show that money is sent on a regular basis. The most recent evidence shows that he declared an annual income of £22,407 in the last tax year (2018-2019). The sponsor shares the costs of his accommodation with another brother. I am satisfied that the evidence shows that he has sufficient income to afford the remittances of around £600 a month albeit he admits it is a struggle to do so. The appellant and the sponsor both say that these funds are the appellant's only source of income. He has not worked since his business closed and is reliant on the EEA sponsor for financial support. There is no evidence to suggest that the appellant has savings that he could draw on to meet his essential needs. The fact that he has not found work or attempted to set up a new business is immaterial if he is in a situation of real dependency upon the EEA sponsor to meet his family's essential needs. I am satisfied that the evidence shows on the balance of probabilities that the appellant is likely to be dependent upon the EEA sponsor within the meaning of regulation 8 of the EEA Regulations 2006.

22. The EEA sponsor said that the appellant plans to join him in the UK, but his wife and children will remain in Pakistan. He said that the appellant would live with him in the UK, but intends to seek work to support his family in Pakistan. It is to the EEA sponsor's credit that he was open about these plans. Although I am satisfied that the appellant is in a situation of genuine financial dependence upon the EEA national there is little evidence to suggest that the familial relationship between the two adult relatives has any other elements of dependency over and above the usual relationship one might expect between adult siblings in order to engage the right to respect for family life. The appellant has a family in Pakistan and intends to join his brother in the UK to seek work. There is no evidence to suggest that the familial relationship between the EEA sponsor and the appellant is of a 'close and stable' nature such that their continued separation might act as an obstacle to the EEA sponsor being able to exercise his rights under the EU Treaties. The application appears to have been made in order to assist the appellant to gain economic advantages in the UK to support his family rather than because there is a particularly

close relationship between himself and the EEA sponsor requiring them to live together in the UK.

23. I note that the CJEU decision in *Reyes* found that it mattered not that a dependent direct relative who was over 21 years old intended to find work in the UK. However, as in that case, much of the case law relating to dependency refers to the situation of dependent direct relatives who were 'family members' with rights of residence as opposed to 'other family members' whose entry need only be facilitated if their continued separation from the EEA national might act as an obstacle to the EEA national exercising their rights under the EU treaties. The appellant is not the 'family member' of an EEA national.

24. The Directive makes clear that it does not affect more favourable national provisions. Regulation 8 of the EEA Regulations 2006 only requires the appellant to show that he is an extended family member who is dependent on the EEA national and intends to join his brother in the UK. I am satisfied that, in so far as that test is concerned, the appellant has shown he meets the requirements of regulation 8. However, his case falls squarely within the discretionary area afforded to the respondent to decide whether, in light of my findings, the appellant should be issued a family permit with reference to regulation 12(2)(c) of the EEA Regulations 2006.

25. The decision breaches the appellant's rights under the EU Treaties in respect of entry to or residence in the United Kingdom.

DECISION

The appeal is ALLOWED on EU law grounds

Signed  Date 17 October 2019
Upper Tribunal Judge Canavan

ANNEX

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/09650/2016

THE IMMIGRATION ACTS

Heard at Field House
On 03 June 2019

Decision Promulgated

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Before

UPPER TRIBUNAL JUDGE CANAVAN
UPPER TRIBUNAL JUDGE PICKUP

Between

MALIK ZAHEER HUSSAIN

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the appellant: Mr R. Ahmed, instructed by Marks & Marks Solicitors
For the respondent: Mr C. Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appealed the respondent's decision dated 07 July 2016 to refuse to issue a family permit as an extended family member of an EEA national with reference to regulation 8 of The Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations 2006").

2. The respondent was not satisfied the appellant was related to the EEA sponsor as claimed. The respondent was not satisfied there was sufficient evidence to show that the appellant was wholly or mainly financially dependent upon the EEA sponsor.

3. First-tier Tribunal Judge E.B. Grant ("the judge") dismissed the appeal in a decision promulgated on 15 March 2019. The judge was satisfied that the appellant produced sufficient evidence to show that he was related to the EEA sponsor [8]. She was satisfied that there was evidence to show that the appellant's brother was an EEA national who was exercising his rights of free movement in the UK [9]. The judge went on to consider the evidence relating to the sponsor's income as well as evidence relating to money transfers to the appellant in Pakistan [10-16]. The judge noted the declared income on the sponsor's tax returns. For the year ending 05 April 2016 his net income was £19,724 [11]. For the year ending 05 April 2017 his net income was £16,684 [10]. The judge recorded a number of money transfer receipts for the period 10 January 2014 to 08 January 2017, many of which were for sums in the region of £500-£1,000 [13]. The judge raised concerns about the sponsor's ability to afford the money transfers on his income given that his evidence was that the rent on the property where he lived was £1,200 a month [15]. When the judge raised her concerns, the sponsor clarified that he only pays £400 towards rent and his brother pays the rest [16]. Despite this clarification, and the evidence of money transfers, the judge was not satisfied that the sponsor was a credible witness as to how he could afford to send the sums claimed to the appellant in Pakistan [20]. She concluded that the appellant had failed to discharge the burden of proving that he was dependent upon the sponsor.

4. The appellant appealed the First-tier Tribunal decision on the following grounds:

   (i) The judge's finding that the sponsor could not afford to send remittances was irrational in light of the money transfer receipts, which showed, at least to the required standard, that the sponsor was able to afford to send monies to his brother.

   (ii) The judge failed to take into account relevant evidence showing the sponsor's income for the year ending 05 April 2018, which indicated that he earned a net income of £20,606.

   (iii) The judge failed to give adequate reasons to explain why she did not find the sponsor to be a credible witness in light of his explanation that he only paid £400 towards the rent for the house he lived in with his brother in the UK. It was not implausible that he could afford to send the monies he claimed.

Decision and reasons

5. Having considered the grounds of appeal and the oral submissions, we conclude that the First-tier Tribunal decision involved the making of errors of law and must be set aside.

6. We are satisfied that the judge's conclusions were not sufficiently supported by reasons given that she appeared to accept that the sponsor earned a net income of

£16,684 in the tax year up to 05 April 2017, which would amount to an average monthly income of around £1,390. Having expressed her concern about the sponsor's ability to afford the remittances she failed to make any finding as to whether she accepted the sponsor's evidence that he only contributed around £400 to the rent on the property, which he shared with his brother. While we accept that a judge need not make findings on each and every aspect of the evidence, it was necessary to give sufficient reasons to justify her finding that the sponsor could not afford to send the remittances. A basic calculation indicates that the sponsor would have had around £1,000 a month income after he contributed to the rent.

7. The judge noted the large number of money transfer receipts showing that the sponsor did appear to be able to afford to send the amounts he claimed. At [21] the judge found that there was no evidence to show that the sums were received by the appellant in Pakistan or that they were sent from the sponsor despite the fact that there were a number of money transfer receipts showing transfers from the sponsor to the appellant in Pakistan. The judge's reason for placing little weight on this evidence seems to have been rooted in her doubts about the sponsor's ability to afford to transfer the funds.

8. The judge also failed to consider more up to date evidence of the sponsor's income relating to the tax year ending 05 April 2018. A letter from the sponsor's accountant dated 21 December 2018 stated that his net income for the year was £20,606 and was supported by an accountant's report. By the time the supplementary bundle was prepared and served on 08 March 2019 it might have been reasonable to expect a copy of the sponsor's tax return. However, the figure was broadly consistent with the sponsor's income in a previous year. The supplementary bundle contained further copies of money transfer receipts for the period from April 2017 to January 2019, which showed average transfers of around £600-700. The judge failed to consider the evidence contained in the supplementary bundle, which was at least capable of showing that the sponsor earned a net monthly income of around £1,717 a month and that he appeared to continue to be able to afford to send regular remittances from that income. The judge's failure to consider relevant evidence amounts to an error of law.

9. Although the Upper Tribunal makes standard directions for the parties to be ready to proceed to a remaking of the decision if the First-tier Tribunal decision is set aside, no up to date evidence was served in preparation for the hearing. A copy of the sponsor's recent tax return would be of assistance. As would a schedule of his monthly income and expenditure to assess whether he can afford the remittances. We also note that there is no statement from the appellant to explain how he spends the claimed remittances and whether the money is used to support other family members in Pakistan. The parties agreed that it was in the interests of justice to adjourn for up to date evidence to be produced so that the Upper Tribunal could remake the decision.

10. The First-tier Tribunal finding relating to the relationship between the appellant and the EEA sponsor is preserved. The appeal will be listed for a resumed hearing to

determine the issue of dependency with reference to regulation 8 of the EEA Regulations 2006.

DIRECTIONS

11. Both parties are given permission to file up to date evidence, which must be served at least **14 days** before the next hearing.

DECISION

The First-tier Tribunal decision involved the making of an error on a point of law

The decision is set aside

The appeal will be relisted for a resumed hearing in the Upper Tribunal

Signed  Date 04 June 2019
Upper Tribunal Judge Canavan