



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: EA/09871/2016
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THE IMMIGRATION ACTS

Heard at Field House
On 28 February 2019

Decision & Reasons Promulgated
On 18 March 2019

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

MH (FIRST APPELLANT)
FE (SECOND APPELLANT)
SHF (THIRD APPELLANT)
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr M West, Counsel, instructed by City Heights Solicitors
For the Respondent: Mr T Lindsay, Home Office Presenting Officer

DECISION AND REASONS

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any

member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings

1. The Appellants are citizens of Bangladesh. I have anonymised the Appellants to protect the identity of the child. MH's date of birth is 15 October 1981. He came to the UK in 2008 on a student visa. He was granted further leave until 1 January 2016. However, his leave was curtailed on 15 May 2015 with effect from 11 September 2015. He is married to FE. Her date of birth is 19 July 1990. Their son, SHF, was born on 1 August 2013. FE and SHF were granted leave in line with MH. I shall refer to MH as the Appellant throughout this decision.
2. On 3 February 2016 the Appellant applied for a residence card as an extended family member of an EEA national under the Immigration (European Economic Area) Regulations 2006. He claimed to be dependent upon an EEA national, a relative, HR, an Italian national. That application was refused by the Secretary of State. The relationship was not accepted and neither was dependency. The Appellant appealed. The appeal was dismissed by Judge of the First-tier Tribunal (FTT) Shamash in a decision that was promulgated on 18 October 2018, following a hearing at Taylor House on 17 September 2018. Permission was granted by Deputy Upper Tribunal Judge Davey on 19 January 2019.

The decision of the FTT

3. The FTT heard evidence from the Appellant and HR and set this out at paragraphs 8 to 17 of the decision. The judge directed herself on the law at paragraphs 20 to 30 and set out the relevant Home Office Guidance at paragraphs 31 and 32. The judge make the following findings:-
 - "33. I accept that the first appellant and sponsor are related by marriage. I do not think that the distinction that the respondent has made between the first, second and third appellants is correct because the regulations are broadly defined and cover those who are related through marriage. No point was taken at the hearing in relation to the first appellant's wife and child and as I have found that the first appellant is the sponsor's cousin-in-law, his wife and child also meet the requirements.
 34. I do not accept that the appellants have provided sufficient evidence to show past and present dependence. I accept that the two families are close. However, I am compelled to make mixed credibility findings. For example, I accept that the sponsor helped the appellant by paying his fees/travel to the United Kingdom in 2008 and I accept that he has periodically given him money in the past. The one receipt from 2008 and the oral evidence are insufficient to show past dependence. It was a payment to the appellant's mother at a time when the sponsor was not an EEA national, which both parties stated was by way of a contribution towards his travel and studies in the UK. Taking the appellant's evidence at it's (sic) highest he accepted that whilst studying in the UK this (sic) earnings and his wife's earnings

were sufficient to meet his essential needs. In fact at times they had sufficient money to send money back to Bangladesh. Similarly, the letters from [HM] and [TK] were inconsistent with Mr [R]'s oral evidence. They stated in their letters that they were given the money by Mr [R] before they travelled, whereas, he stated that Mr [R] stated that the money was paid directly by them from money they owed him. They have not provided any identification documents, they did not attend the hearing and I attach little weight to the letters.

35. There was no documentary evidence in this case in relation to current dependence and the appellant's and sponsor's evidence was not consistent. For example, the appellant was clear that the sponsor gives him money every month towards his rent. He said that he gives him £250 - £300 per month. The sponsor said he gave the appellant £120 in cash per month. He then went on to mention two large payments to the appellant in the period immediately before the hearing, which the appellant failed to mention. None of the payments were documented. The Guidance makes it plain that appellants should provide documentary evidence and there is almost none in this case. There is no evidence of regular transfers of funds or any form of payments and the appellant and the sponsor were inconsistent on this basic point.
36. In addition, the (sic) Mr [R] is dependent on his younger brother in Italy for help and on various benefits in order to meet his everyday needs. He himself only works two days a week and it would make a nonsense of the legislation if a sponsor was able to use benefits acquired from the State in order to support another family. In this case the sponsor is working two days a week earning a relatively small wage. His benefits of £800 exceed his earned income of £700 per month. The additional sums that he receives from the State are not just a carer's allowance, he receives support for low income families and makes it less likely that he would be able to meet another family's essential needs when he cannot meet his own essential needs.
37. Thus, there was insufficient evidence of prior dependence. Secondly, the oral evidence of current dependence was inconsistent. There were clear and marked discrepancies between the first appellant and the sponsor's evidence which were so significant that I find that they cannot establish past or present dependence. I find that the appellants have not shown that they are dependent on the sponsor. For the reasons set out above I find that the lack of documentation in this case and the discrepancies in the oral evidence which related very specifically to the amounts of discrepancies in the oral evidence which related very specifically to the amounts of money that were given mean that the appellants have not discharged the burden of proof."

Conclusions

4. Three days before the hearing, on 14 September 2018, the represented Appellant submitted further evidence; namely, a witness statement from his mother in Bangladesh dated 13 June 2018. Attached to the witness statement there was evidence of a money transfer from HR to the Appellant dated 10 June 2008. The

evidence was served as an “additional bundle”. The judge was clearly aware of the money transfer receipt (see paragraph 9 of her decision). Throughout the decision she did not mention the mother’s witness statement. She referred to the Appellant’s bundle containing 246 pages, but not to the “additional bundle” which had been served at the last minute. Mr West informed me that he handed the “additional bundle” to the judge at the start of the hearing. Mr West has not submitted a witness statement and indeed he continues to represent the Appellant and is therefore cannot be a witness. However, there is no reason for me to believe that that statement was not before the judge because it is clear from her decision that she took into account the receipt which was attached to it. I accept that she did not make findings on it, however, whether this amounts to a material error of law is an issue which I must determine.

5. The judge heard evidence from the Appellant and HR. She accepted the relationship as claimed. Therefore, the determinative issue was dependency. She properly set out the law in her decision. I specifically refer to paragraph 27 where the judge set out the head note of Dauhoo [2012] UKUT 79. She went onto direct herself in relation to dependency in the paragraphs following. There is no challenge to the self-direction. The case was advanced before the FTT on the basis that there was prior and present dependency.
6. I have considered the Appellant’s mother’s witness statement. My first observation is that it is not clear why this evidence was submitted at the eleventh hour, particularly considering it was dated 13 June 2018. There has never been an explanation for this. It is not clear how the statement was obtained. The Appellant’s mother resides in Bangladesh. The statement is in English and there is no translation. In any event, she states that HR started to give the Appellant and family money in 2002. He used to send them monthly amounts which was used for living expenses because the family was not getting support from her husband (the Appellant’s father) who was at that point estranged. In 2008 HR sent the family a substantial sum amounting to approximately 8 lacs for the Appellant’s tuition fees. The receipt attached to her witness statements supports this. He continued to support the family on a frequent basis. The judge accepted that there was a payment made in 2008 and that HR had given money periodically to the Appellant during the period between 2004 and 2008. The evidence of the receipt is evidence capable of supporting that a payment of 7,405.60 Euros was made to the Appellant from HR. The judge may have erred when observing the payment was made to the Appellant’s mother. However, contrary to the assertions made in the grounds, nothing turns on this. Critically HR was not an EEA national at this point, as found by the judge at paragraph 34. This is not challenged in the grounds. Mr West confirmed to me that HR did not become an EEA national until 2014. The judge may well have erred when concluding, at paragraph 9, that the receipt was evidence of a payment of £800, however, this may have been a typographical error. In any event, whilst there is a significant difference between £800 and €7,405.60 it is simply not material to this appeal. Nothing turns on it because at this time HR was not an EEA national as found by the judge and, in any event, the judge accepted that a payment had been made. The receipt was the only

piece of documentary evidence establishing that a payment had been made to the Appellant during a period relied on to establish prior dependency (between 2004 and 2008) many years before HR was an EEA national exercising treaty rights.

7. It is argued in the grounds that the judge erred at paragraph 34 when she recorded that while studying in the UK the Appellant and his wife's earnings were sufficient to meet his essential needs. This is not accepted by the Appellant who claims that his evidence was that during the time he was studying, HR continued to support him, albeit to a lesser extent. This ground like others relied on by the Appellant is a bare assertion that the judge incorrectly recorded evidence. There has been no proper response to the grant of permission by Deputy Upper Tribunal Judge Davey in this respect. At no time has the Appellant asked for disclosure of the Record of Proceedings supported by disclosure of Counsel's note of the hearing. The Appellant does not rely on the evidence of Mr West who represented him before the FTT. In any event, Mr West continued to represent the Appellant before the UT and cannot be a witness.
8. The judge had evidence in the form of letters from two witnesses (M and K) and concluded that their evidence was inconsistent with the HR's. The judge gave reasons for this. Contrary to the assertion in the grounds, the reasons given are comprehensible. The judge recorded HR's evidence was that friends in Italy would travel to the UK and give the Appellant money on his behalf. There was no evidence that before the judge that M and K lived in Italy and no evidence of identification. They did not attend the hearing to give live evidence. HR's evidence as recorded at paragraph 15 is as follows: "... He said that his friends had paid back some of the money that they owed him by giving it directly to the Appellant ...". M said that HR gave him £2,500 to hand to the Appellant in January 2013 when he travelled to the UK. K's evidence was that HR gave him HR £3,000 to give to the Appellant in August 2013. The judge drew a reasonable inference from the evidence and was entitled to conclude that HR's evidence was not consistent with that of M and K. It is asserted that the judge erred and mistook the evidence of HR. This is wholly unsupported. The judge reasonably interpreted the evidence that was before her and the grounds do not identify an error.
9. In respect of present dependency, it is asserted in the grounds that the judge did not apply the Home Office Guidance when she stated at paragraph 35 that "The Guidance makes it plain that Appellants should provide documentary evidence and there is almost none in this case." However, the assertion is wholly unarguable. The judge sets out the policy relied upon by the Appellant at paragraph 32 as follows:-

"have (sic) looked at the Guidance to Caseworkers relating to dependency and it reads as follows:

'You must consider the following:

 - Does the applicant need financial support to meet their essential needs from the EEA national, their spouse or civil partner.

- If the applicant cannot meet their essential living needs without the financial support of the EEA national, they must be considered dependent even if they also receive financial support or income somewhere else.

You do not need to consider the reasons why the applicant needs the financial support or whether they are able to support themselves by working. Essential needs include accommodation utilities and food. Dependency will normally be shown by financial documents that show money being sent by the sponsor to the applicant. If the applicant is receiving financial support from the EEA national as well as others they must show that the support from the EEA national is supporting their essential needs. The applicant does not need to be dependent.

The applicant does not need to be dependent on the relevant EEA national to meet all or most of their essential needs. For example, an applicant can still be considered dependent if they receive a pension to cover half of their essential needs and money from the relevant EEA national to cover the other half. Under proof of dependency it reads:

The applicant must provide proof of their dependency this can include:

- Bank or building society statements.
- Evidence of money transfers.
- Evidence of living in the same household if applicable.
- Other evidence to show their EEA national sponsor has enough money to support them and the applicant is reliant on them for this.”

10. The judge did not determine this appeal on the basis that documentary evidence is mandatory. She reasonably expected that there would be corroborative evidence, particularly of post-dependency. Her interpretation of the guidance that there “should” be documentary evidence is reasonable. Her findings must be considered in the light of the extraordinary dearth of documentary evidence produced by the Appellant in support of prior or post-dependency.
11. It is asserted in the grounds that the judge wrongly recorded the Appellant’s evidence at paragraph 35. In respect of the amount of money that he said he received from the HR which led her to conclude that there was an inconsistency in the evidence. Again, this assertion is wholly unsupported. There is no reason to conclude that the judge made a mistake and she was wholly entitled to conclude that the evidence was inconsistent.
12. The grounds take issue with paragraph 36 of the decision. Suffice to say that these were matters that the judge was wholly entitled to take into account. Although I do not necessarily agree with the judge that someone on benefits could not for the purposes of the Regulations support a family member, the judge was entitled to attach weight to the evidence that HR was supported by his brother in Italy and that

he was in receipt of support because he has a low income and was therefore less likely to meet some of the Appellant's essential needs.

13. It was agreed by the parties that the judge accurately set out the test at paragraph 28 onwards. It was agreed that essential needs do not have to be all of the Appellant's essential needs. Whilst the judge does not specifically refer to the test when she summarised her conclusions at paragraph 37, it was not necessary for her to do so. She had already adequately set it out at paragraphs 28 and 30. The issue here was not whether HR's support covered all or some of the Appellant's essential needs. Whilst the judge accepted that HR had in the past given the Appellant money with reference to the 2008 receipt and that he periodically gave him money in the past (see [34]), the evidence did not come close to establishing dependency in the sense that it covered some of the Appellant's essential needs. In any event HR was not an EEA national at the time it is asserted there was prior dependency. In either case the dependency or membership of the household must be on a person who is an EEA national at the material time. The appeal cannot therefore succeed with reference to Dauhoo. Moreover, the judge did not accept any element of present dependency.
14. The judge was entitled to conclude that there was insufficient evidence and that the oral evidence was inconsistent. She did not conclude that the documentary evidence or the lack of it was determinative of the outcome, but it was a matter that she properly attached weight to. This was not inconsistent with the policy of the Home Office which she set out. The Appellant's mother's witness statement has no material bearing upon the outcome in this case. I am not persuaded that the judge did not consider it in any event. She did not have to make findings on each piece of evidence. She may have taken the view that it was not necessary because it took the Appellant's case no further. In any event, I have considered whether there is a material error on the basis that she did not take it into account. The evidential value of it is limited for the reasons I have given. Part of her evidence is accepted (the payment in 2008 and that there was some support). However, there was no supporting evidence of frequent payments having been made. The Appellant's case was problematic for a number of reasons properly identified by the judge. The Appellant's mother's statement once considered in the round is not capable of making any difference to the outcome in this case. In any event, the insurmountable problem for this Appellant is that there can be no prior dependency because at the critical time HR was not an EEA national exercising treaty rights. It is simply unarguable that the evidence of the Appellant's mother could have made a material difference to the outcome in this appeal.
15. The grounds in my view are insufficiently particularised, unsupported and amount to a disagreement with the findings of the FTT. They fail to properly identify an arguable error of law capable of making a difference to the outcome in this case. There were significant problems with the evidence. The Appellant's case was unsupported by independent and documentary evidence. Furthermore, there is no support for the contention that the judge misapplied the policy and to claim

otherwise misrepresents the findings. There is no support for the assertion that the judge did not accurately record the evidence.

16. I am not impressed with the presentation of the appeal. I understand that Mr West is Counsel and I do not seek to blame him. His solicitors have conduct of the case insofar as the preparation of a bundle and witness statements are concerned. The statements produced in the main bundle are deficient. They fail to set out the Appellant's case with a degree of necessary clarity and detail reasonably expected. The witnesses gave oral evidence very much outside of them. The statement of the mother was served out of time. No reason was advanced for this. The judge heard oral evidence and made what she could of it, drawing reasonable inferences and reaching rational conclusions. It was for Appellant to establish that he met the requirements of the Regulations. He could not do so for a number of reasons. It was asserted in the grounds that the judge did not understand the evidence. Despite the problems in the presentation of this case and the lack of assistance from the solicitors, the judge's understanding of the case was an accurate reflection of how it was advanced before her.

Notice of Decision

17. In the absence of a material error of law, the decision of the FTT to dismiss the Appellant's appeal under the 2006 Regulations is maintained.

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Signed

Joanna McWilliam

Date 14 March 2019

Upper Tribunal Judge McWilliam