



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: EA/04864/2019
EA/04866/2019
EA/04868/2019
EA/04869/2019

THE IMMIGRATION ACTS

Decision under Rule 34
On 2 November 2020

Decision & Reasons Promulgated
On 5 November 2020

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

(1) MUHAMMAD [R]

(2) ANAM FIRDOUS

(3) [M A R]

(4) [M S R]

(ANONYMITY DIRECTION NOT MADE)

Appellants

and

ENTRY CLEARANCE OFFICER

Respondent

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of Judge of the First-tier Tribunal Wyman ('the Judge') sent to the parties on 2 April 2020 by which the appellants' appeals against the decision of the respondent to refuse to grant them EEA Family Permits was refused. The respondent's decision is dated 15 August 2019.

2. Upper Tribunal Judge Norton-Taylor granted the appellants permission to appeal on all grounds.

Rule 34

3. This decision is made without a hearing under rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008 ('the 2008 Rules').
4. In light of the present need to take precautions against the spread of Covid-19, and the overriding objective expressed at rule 2(1) of the 2008 Rules, and also at rule 2(2)-(4), UTJ Norton-Taylor indicated his provisional view that it would be appropriate to determine the following questions without a hearing:
 - (i) Whether the making of the First-tier Tribunal's decision involved the making of an error of law, and if so
 - (ii) Whether the decision should be set aside.
5. The parties were requested to inform the Tribunal if, despite the directions, a hearing was required. Both parties confirmed that they were content for the matter to proceed without a hearing.
6. The appellant's legal representatives, Law Lane Solicitors, filed short submissions by means of email correspondence, dated 13 August 2020.
7. The respondent filed a response under rule 24 of the 2008 Rules, authored by Ms. Aboni, Senior Presenting Officer, dated 25 August 2020, confirming that the respondent did not oppose the error of law appeal made on behalf of the appellants.
8. I have considered whether it is appropriate to proceed with this appeal by means of a paper consideration under rule 34. In undertaking such consideration, I am mindful as to when an oral hearing is to be held in order to comply with the common law duty of fairness and also as to when a decision may appropriately be made consequent to a paper consideration: *Osborn v. The Parole Board* [2013] UKSC 61; [2014] AC 1115. In the circumstances, being mindful of the importance of these proceedings to the appellants and to the overriding objective that the Tribunal deal with cases fairly and justly, I am satisfied that it is just and appropriate to proceed under rule 34.

Anonymity

9. The Judge did not issue an anonymity direction and no request was made by either party for such direction to be issued.

Background

10. The appellants are a family consisting of a husband, wife and two children who are presently aged 6 and 3. They are citizens of Pakistan. They applied for EEA Family Permits as dependent family members of Mr. [TS], an Irish national residing in the

United Kingdom. Mr. [S] is a first cousin of the first appellant, Mr. Muhammad [R]. Mr. [S] asserts that he has been supporting the family in Pakistan since 2014 and on average remits £150 per month to them. The first appellant is not employed and asserts that he is unable to find employment.

11. The respondent refused the application by a decision dated 15 August 2019. It was accepted that Mr. [S] is an EEA national, but the respondent concluded, *inter alia*:

‘While it is noted that you have provided wire transfers dated 2019, a record of wire transfers dated 2014-18 showing payments to you from your sponsor it is noted that you have not provided any documentation that would show that the payments made to you were intended for your essential needs.

It is also noted that you have not provided any evidence regarding your own financial situation such as bank statements or other documents including financial ingoing and outgoings. In the absence of this evidence this department cannot sufficiently establish your dependency, either wholly or partly, upon your EEA sponsor because we are unable to establish if you need the financial support from the EEA national to meet your essential needs.’

12. The respondent’s decision was confirmed by an Entry Clearance Manager on 15 November 2019.

Hearing Before the FtT

13. The appellants requested that the appeal be considered on the papers and it was so considered by the Judge sitting at Hatton Cross on 23 March 2020. The decision was sent to the parties on 2 April 2020.

Grounds of Appeal

14. The appellants rely upon grounds of appeal drafted by Mr. J Gajjar, Counsel, dated 1 July 2020.
15. It is appropriate in this matter to detail UTJ Norton-Taylor reasons when granting permission where he stated, *inter alia*:

- ‘1. ... The respondent had accepted that the sponsor was a qualified person and that he had been financially supporting the appellants in Pakistan. However, it was not accepted that the financial support had created relevant dependency. This conclusion, the respondent had not considered the exercise of discretion under regulation 12(4) of the Regulations.

2. Ground 1 is arguable. It appears as though the judge concluded that the appellants were relatives of the sponsor who were materially dependent upon him: see [27] and [34]. In light of this, it is arguable that the judge should then have proceeded to allow the appeal on the basis that the appellants were extended family members under regulation 8(2) of the Regulations. It would then have been for the respondent to exercise her

discretion under regulation 12. In apparently exercising that discretion for herself, it is arguable that the judge erred in law.

3. Ground 2 is arguable. If, contrary to what is asserted under ground 1, the judge did not accept the issue of dependency, it is arguable that she failed to make a clear finding in that respect and/or took irrelevant matters into account, namely the sponsor's own finances and/or domestic circumstances.
4. Paragraph 16 [of the grounds of appeal] appears to be misconceived. Once a person is issued with a family permit, they are to be treated as a 'family member'. Regulation 13 would then apply to them. Having said that, the judge was, in respect of the appeal before her, concerned with regulation 8, not regulation 13. Thus, her assessment of the sponsor's ability to maintain the appellants after arrival was arguably erroneous.
5. Ground 3 is also arguable. The points taken by the judge may have involved procedural unfairness. Alternatively, it may simply be that they were irrelevant considerations (see above).'

16. By means of her rule 24 response the respondent confirmed, *inter alia*:

'Although the Entry Clearance Officer accepted the evidence of the appellant receiving remittances from the sponsor, the application was refused as the appellant had not provided sufficient evidence that the funds were intended for essential needs and that he and his family were dependent on the sponsor.'

The issue before the FTT was therefore that of dependency.

The SSHD agrees that consideration of the sponsor's financial circumstances was not relevant to the assessing the needs of dependency and that the Judge of the FTT failed to give adequate consideration to the appellant's financial circumstances and whether he was dependent on the remittances from the sponsor to meet essential needs.

The Tribunal is invited to set aside the determination and remit the appeal to the FTT to be heard afresh.'

Decision on Error of Law

17. Article 3(2)(a) of Directive 2004/38 ('the Citizens Directive') requires the host Member State to facilitate entry and residence of family members other than spouses, civil partners and direct relatives in the ascending or descending line irrespective of their nationality who, 'in the country from which they had come', were dependents or members of the household of the Union Citizen having a primary right of residence. Article 3(2)(a) has been transposed domestically by regulation 8 of the Immigration (European Economic Area) Regulations 2016 ('the 2016 Regulations').
18. The defining criteria of an extended family member under regulation 8 is the requirement for there to be dependency upon the Union citizen or to be a member of the Union citizen's household.

19. As confirmed by the CJEU in (*C-83/11 Secretary of State for the Home Department v. Rahman* EU:C:2012:519, [2013] Q.B. 249 article 3(2) does not require Member States to grant every application for entry or residence submitted by family members of an EU citizen who do not fall under the definition in article 2(2) of the Citizens Directive, even if they are able to demonstrate dependence on that citizen. The method of entry under this route is therefore discretionary in nature.
20. In (*C-1/05 Jia v Migrationsverket* EU:C:2007:1, [2007] Q.B. 545, at [43], the ECJ confirmed that dependence under article 1(1)(d) of Directive 73/148/EEC, a Directive concerned with the abolition of restrictions on movement and residence within the EC, must be interpreted to the effect that 'dependent on them' meant that members of the family of a Community national established in another Member State within the meaning of article 43 of the EC Treaty needed 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 came at the time when they applied to join the Community national.
21. In *Bigia v. Entry Clearance Officer* [2009] EWCA Civ 79, [2009] Imm. A.R. 515, a matter concerned with the Citizens Directive, the Court of Appeal confirmed at [24] that where the question of whether someone is a 'family member' depends on a test of dependency, that test is as per [43] of the ECJ's judgement in *Jia*.
22. In *Moneke (EEA - OFMs) Nigeria* [2011] UKUT 00341(IAC), [2011] Imm. A.R. 928 the Tribunal confirmed at [41] and [42]:
 41. Nevertheless dependency is not the same as mere receipt of some financial assistance from the sponsor. As the Court of Appeal made plain in *SM (India)* (above) dependency means dependency in the sense used by the Court of Justice in the case of *Lebon* [1987] ECR 2811. For present purposes we accept that the definition of dependency is accurately captured by the current UKBA ECIs which read as follows at ch.5.12:

"In determining if a family member or extended family member is dependent (i.e., financially dependent) on the relevant EEA national for the purposes of the EEA Regulations:

Financial dependency should be interpreted as meaning that the person needs financial support from the EEA national or his/ her spouse/civil partner in order to meet his/her essential needs - not in order to have a certain level of income.

Provided a person would not be able to meet his/her essential living needs without the financial support of the EEA national, s/he should be considered dependent on that national. In those circumstances, it does not matter that the applicant may in addition receive financial support / income from other sources.

There is no need to determine the reasons for recourse to the financial support provided by the EEA national or to consider whether the

applicant is able to support him/herself by taking up paid employment

The person does not need to be living or have lived in an EEA state which the EEA national sponsor also lives or has lived.”

42. We of course accept (and as the ECIs reflect) that dependency does not have to be “necessary” in the sense of the Immigration Rules, that is to say an able bodied person who chooses to rely for his essential needs on material support of the sponsor may be entitled to do so even if he could meet those needs from his or her economic activity ...
23. Consequently, provided a person would not be able to meet his or her essential living needs without the financial support of the EEA national, they should be considered dependent on that national. It was this issue that was before the Judge. Unfortunately, I am satisfied that the Judge did not lawfully engage with it.
24. UTJ Norton-Taylor observed by his grant of permission that it ‘appeared’ that the Judge had concluded that the appellants were ‘materially dependent’ upon Mr. [S] at [27] and [34] of her decision. By means of their grounds of appeal, the appellants rely upon the positive findings made at [34]. The relevant paragraphs of the Judge’s decision detail:
 - ‘27. The respondent also accepts that the sponsor has been financially supporting the appellant [sic] in Pakistan for the past five years. It is noted that regular money transfer receipts have been submitted and copies of the same had been provided.’
 - ‘34. I am therefore not satisfied that if the appellant and his family come to the United Kingdom, they would not become a burden on social assistance. Given the sponsor himself receives significant public funds of over £1,400 per month, he is not able to financially support the sponsor [sic] without becoming a further burden on social assistance. Whilst it is acknowledged that the sponsor does send money regularly to Pakistan, the standard of living is much cheaper in Pakistan than it is in the United Kingdom, it is far cheaper to support a family of four in Pakistan than in the United Kingdom, even if there was no additional rental costs. The amount the sponsor spends on food, electricity, other utility bills would all significantly increase if the sponsor has four extra people to support, notwithstanding that he currently receives public funds for his own family.’
25. Neither paragraph addresses the issue before the Judge, namely whether the appellants are dependent upon their sponsor because they would be unable to meet their essential living needs without the financial support provided by the sponsor. I am satisfied that [27] of the decision is simply a summary reciting of the respondent’s decision, without identifying the refusal on ‘essential living needs’ grounds, whilst [34] identifies that money is remitted to the appellants but identifies no engagement with the dependency consideration that was an essential element of the appeal.

26. I am also in agreement with the appellants that the Judge erred in taking irrelevant matters into account when undertaking an assessment of Mr. [S]'s own finances and personal circumstances. As accepted by the respondent, this was not a relevant consideration when assessing the issue of dependency.
27. I therefore find that the Judge materially erred in law in her consideration of the issue of dependency and in the circumstances the decision must be set aside.

Remaking the Decision

28. As to the re-making of this decision I note the fundamental nature of the material errors identified. I have given careful consideration to the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal, in particular paragraph 7.2, and conclude that the effect of the errors has been to deprive the appellant of a fair hearing before the First-tier Tribunal.
29. Consequently, I set aside this decision and remit it back to the First-tier Tribunal at Hatton Cross. The appeal fee paid by the appellants is for a paper consideration. It is a matter for the appellants to liaise with the First-tier Tribunal if they wish for their appeal to be determined at an oral hearing.

Notice of Decision

30. The decision of the First-tier Tribunal involved the making of an error on a point of law and I set aside the Judge's decision promulgated on 2 April 2020 pursuant to section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007.
31. The matter is remitted to the First-tier Tribunal for a fresh hearing before any judge other than Judge of the First-tier Tribunal Wyman.
32. No findings of fact are preserved.

Signed: *D. O'Callaghan*
Upper Tribunal Judge O'Callaghan

Dated: 2 November 2020