Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/04946/2019 (V)

THE IMMIGRATION ACTS

Heard at : Field House
On : 10 November 2020

Decision & Reasons Promulgated
On: 20th November 2020

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

AHMED ABDELRAHMAN ALI

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Afzal of Global Migration Solution UK Ltd
For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This has been a remote hearing to which there has been no objection from the parties. The form of remote hearing was Skype for business. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

2. The appellant, a national of Somalia born on 12 June 1998, appeals with permission against the respondent's decision to refuse to issue him with an EEA family permit under the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations") to join his brother, a Dutch national exercising treaty rights in the UK.

3. The appellant applied for an EEA family permit as the family member of Ahmed Ali on 9 April 2019. His application was refused on 5 July 2019 on the basis that he could not be considered as a direct family member under the EEA Regulations, but could only be considered an extended family member under Regulation 8, and that he had failed to meet the requirements of Regulation 8. On the limited evidence submitted with the application, consisting of four money transfer remittance receipts, the respondent could not be satisfied that the appellant was dependent upon his sponsor and was therefore not satisfied that he was an extended family member in accordance with the EEA Regulations.

4. The appellant appealed against that decision and produced further money transfer receipts and some medication receipts. The matter was then reviewed by an entry clearance manager who upheld the decision on the basis that there still remained insufficient evidence of dependency and of the appellant's financial circumstances.

5. The appellant's appeal was heard by First-tier Tribunal Judge French on 10 March 2020. The judge heard from the sponsor, Ahmed Ali, and recorded his evidence. The evidence was that the family came from Somalia and moved to Yemen in 1993. The sponsor fled Yemen in 2008 and was granted refugee status in the Netherlands and was subsequently naturalised as a Dutch citizen. His father died in 2012, at which time his mother and the appellant moved to Egypt. In 2013 his mother departed Egypt for the UK and left the appellant in the care of her sister who then died in August 2018. The sponsor arranged for someone, Emad, to assist the appellant and he reported back concerns about the appellant's mental health and ability to live alone. Emad then moved in with the appellant at the end of 2018. The sponsor said that he lived with his mother in the UK and he gave evidence about his income and outgoings. The judge noted that a DNA report was submitted at the hearing to confirm the relationship between the appellant and the sponsor. There were also three medical reports from a hospital in Egypt confirming the appellant's epilepsy, together with receipts for his medication. In addition there was a tenancy agreement in the sole name of the appellant dated 17 May 2015 and another rental agreement dated 9 September 2018, again in the sole name of the appellant. The agreements made reference to the appellant's British brother being a guarantor.

6. On behalf of the respondent it was argued before the judge that the appellant had not demonstrated dependency on the sponsor because the sponsor did not have the financial means to maintain him. Further, it was argued that the family relationship between the appellant and the sponsor was not accepted because the DNA report did not verify the identity of the people tested.

7. Judge French considered that there was a fundamental inconsistency between the claimed concern of the sponsor for the appellant because of his health difficulties and the fact that he had visited him only once between December 2017 and January 2018. The judge also noted that, whilst the sponsor claimed that the appellant was unable to live on his own, the tenancy

agreements were in his sole name and the second agreement stated that he was precluded from having anyone live on the premises. In addition, the judge did not find it credible that the sponsor could meet all of his commitments and make payments to the appellant on the income evidenced and he did not believe that the sponsor had the capacity to make regular payments to the appellant. He did not accept that the appellant was financially dependent upon the sponsor for his essential needs. Furthermore, the judge did not believe that the appellant and the sponsor were brothers because of the unreliability of the DNA evidence and the lack of visits by the sponsor to the appellant despite his health concerns. The judge therefore concluded that the appellant did not meet the requirements of Regulation 12 of the EEA Regulations to be entitled to a family permit.

8. The appellant sought permission to appeal that decision to the Upper Tribunal on the grounds that the judge had erred in his approach to the DNA evidence and had wrongly assessed the evidence in regard to the relationship of the appellant to the sponsor; and that the judge had erred when considering the evidence of dependency and had disregarded evidence of funds sent to the appellant.

9. Permission was granted on 11 August 2019 in response to the grounds raised and also on the basis that the judge arguably applied too high a standard of proof.

10. The matter came before me and both parties made submissions.

11. Mr Afzal submitted that the judge had erred by finding against the appellant on the DNA evidence when there had been no challenge by the respondent to the relationship between the appellant and the sponsor. The DNA report had been before the ECO and ECM when the decision was made and no challenge had been raised. The judge applied the wrong test when considering the issue of dependency. There was ample evidence before the judge of funds sent to the appellant by the sponsor and there was evidence of what the funds were spent on, in the form of medical and food receipts. The question of dependency was a factual one and the sponsor had provided evidence of funds to meet the appellant’s essential needs. The judge applied too high a test for dependency.

12. Mr Lindsay submitted that, contrary to the suggestion in the grounds, there was no concession by the respondent as to the relationship between the appellant and sponsor. The matter was raised on behalf of the respondent at the hearing and the appellant’s representative could have objected at that point if there were concerns about procedural fairness. The judge was entitled to have concerns about the relationship as the DNA report had been prepared based only on the appellant’s photograph with no identity documents produced. The judge did not err in that regard. As for the question of dependency, the respondent had not accepted that there was legally adequate evidence of funds remitted to the appellant. The judge gave clear reasons for not accepting the evidence of dependency - he did not believe that the sponsor would have been too busy to visit the appellant if they were genuinely

brothers, he did not accept that the sponsor had financial capacity to maintain the appellant and he did not accept the sponsor's evidence that the appellant was unable to live alone. The judge applied the correct standard of proof and was entitled to conclude as he did.

13. Mr Afzal responded, reiterating the points previously made.

Discussion

14. The first issue before me was the relationship between the appellant and the sponsor, which the judge found not to be established by the evidence. Whilst the grant of permission and the submissions made by Mr Afzal in that respect amounted to a challenge on the grounds of procedural unfairness (although the term was not specifically used), the original grounds were couched in terms of an erroneous approach to and assessment of the evidence. The fact that no issue as to procedural unfairness was raised in the original grounds undoubtedly diminishes the weight of the submissions made before me at the hearing in that regard, particularly as there was no objection made at the hearing before the First-tier Tribunal itself.

15. In any event, I do not agree that there was any procedural unfairness. Whilst it is the case that neither the refusal decision of 5 July 2019 nor the ECM review of 18 December 2019 specifically challenged the relationship between the appellant and the sponsor, neither was there any concession in that regard. Insofar as the grant of permission and the submissions referring to [4] of the judge's decision suggest otherwise, they are clearly misconceived. The respondent, at the end of the first page and the top of the second page of the refusal decision, was simply advising the appellant that brothers were not considered as direct family members under the EEA Regulations, but fell within Regulation 8 as extended family members. Furthermore, although there was no prior specific challenge to the relationship, the respondent made it clear at the hearing that it was challenged (at [4]) and, at [5], the appellant's representative, although stating that he was not aware that the relationship was disputed, did not object to the matter being raised and did not request an adjournment or an opportunity to adduce further evidence and had a full opportunity to respond to the challenge.

16. As for the challenge made in the grounds, which was to the judge's approach to the evidence of the relationship between the appellant and the sponsor, it seems to me that the judge gave full consideration to all the evidence and was entitled to have the concerns that he did for the reasons properly given. The integrity of the organisation which produced the DNA report was not disputed, but the judge was entitled to accord the weight that he did to the DNA report, given that it appeared to have been prepared without the benefit of any identity document from the appellant, aside from a photograph, and that no adequate explanation was given for that, as stated at

[7] of his decision. The judge had other concerns aside from the DNA testing, namely the inconsistencies identified in the sponsor's evidence and the fact that the sponsor had only visited the appellant in Egypt once in December 2017/January 2018 despite his concerns about his health. I note further that the judge observed at [3] that there was no statement from the appellant himself and accordingly the only evidence he had was the sponsor's inconsistent oral evidence and a DNA report which gave rise to concerns. For all those reasons the judge was perfectly entitled to conclude that the evidence was not such as to satisfy him that the appellant and sponsors were brothers.

17. In any event, even if the judge erred by engaging in a challenge to the relationship between the appellant and sponsor (which, for the reasons given, I find that he did not), that is clearly not a material error given his properly made findings that the appellant could not meet the requirements of the EEA Regulations in relation to the question of dependency. The challenge made in the original grounds to the judge's findings in that regard was a limited one, at [2(c)], namely that he disregarded the evidence of funds sent by the sponsor to the appellant. The grant of permission was in fact made on a different basis, namely the judge's application of too high a standard of proof, which in my view is not made out. Looking at the judge's findings and conclusions as a whole, beyond his use of the words mentioned in the grant of permission, it is clear that he applied the correct standard of proof to the evidence.

18. Mr Afzal's submission was that the judge applied a higher test for dependency, requiring evidence of funds beyond those for the appellant's essential needs. He submitted that there was ample evidence of funds remitted to the appellant from the sponsor to meet his essential needs, together with evidence in the form of medical and food receipts to show how the funds were used to meet those needs. However, the judge plainly applied the correct test for dependency, as is apparent in his conclusions at [11] of his decision. Furthermore, the submission misses the point made by the judge, that the evidence of the sponsor's financial circumstances did not show that he had the capacity to provide such support, despite the fact that there was evidence of remittances made, and that the evidence of the appellant's circumstances in Egypt and of his financial needs was inconsistent.

19. It is clear from the judge's decision at [6] that he undertook a full and careful assessment of the evidence produced in regard to the question of dependency. The judge noted that, whilst the sponsor claimed that the appellant required support as he was unable to live on his own owing to his health concerns, that he had been looked after by his aunt from the time his mother left Egypt in 2013 until his aunt's death in September 2018, and that his friend had moved in with him at the end of 2018 to look after him, the tenancy agreements produced in the appeal bundle, dating back to May 2015 showed that he was living alone. On that basis alone the judge was entitled to conclude that he had not been provided with a credible account of the appellant's circumstances and his support needs. However in addition the judge, having carefully considered the evidence of the sponsor's income and financial commitments and outgoings, at [2] and [6], found that there were insufficient funds available for the sponsor to make the payments claimed to

cover the appellant's essential needs. It seems to me that there is nothing inconsistent in the judge's findings in that regard with the evidence before him and that he was fully and properly entitled to conclude as he did on the available evidence.

20. For all of these reasons, I find neither ground of challenge made out. In my view the judge undertook a full and careful assessment of all the evidence, he gave cogent reasons for according the evidence the weight that he did, applying the correct legal tests, and he made properly reasoned findings. The judge was fully and properly entitled to conclude that the appellant had failed to demonstrate that he was the extended family member of the relevant EEA national and that he could not, therefore, meet the requirements of the EEA Regulations to be issued with a family permit. Accordingly I find no errors of law in the judge's decision. I uphold the decision.

DECISION

21. The making of the decision of the First-tier Tribunal did not involve an error on a point of law. I do not set aside the decision. The decision to dismiss the appeals stands.

Anonymity

Although Judge French made an anonymity order I do not agree that there is a need for anonymity in this case and I therefore discharge the order, pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed: S Kebede
Upper Tribunal Judge Kebede Dated: 11 November 2020