Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/05767/2019 (V)

THE IMMIGRATION ACTS

Heard at Field House via Teams	**Decision & Reasons Promulgated**
On 27th August 2021	**On 12th October 2021**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

MR USMAN AFZAL
(ANONYMITY DIRECTION NOT MADE

Appellant

and

ENTRY CLEARANCE OFFICER – UKLPA (LIVERPOOL)

Respondent

Representation:

For the Appellant: Ms E Rutherford, instructed by Bond Adam LLP Solicitors
For the Respondent: Mr T Lindsay, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals against the decision of First-tier Tribunal Judge Bennett, who in a decision promulgated on 15th February 2021 dismissed the appellant's appeal against the Entry Clearance Officer's refusal of an EEA family permit under the Immigration (European Economic Area) Regulations 2016.

2. That decision set out that the appellant had applied for an EEA family permit to accompany Zeeshan Afzal Ghazala into the United Kingdom as the extended family member of an EEA national. The decision set out that the appellant was claiming to

be dependent upon his sponsor, who he stated entered the United Kingdom on 16th March 2019, and that he had provided evidence of various money transfers made from the sponsor to him dated June to September 2019 with amounts ranging from £45 to £95, various undated money transfers of similar monetary value and three transfers in 2018 each of 600 euros. The Entry Clearance Officer was not satisfied that the money transfers were regular nor that he was dependent upon his sponsor as claimed.

3. The Entry Clearance Officer added that he would expect to see evidence which fully details

> *"yours and your family's circumstances. Your income, expenditure and evidence of your financial position which would prove that without the financial support of your sponsor your essential living needs could not be met.*
>
> *On the evidence submitted in support of your application and on the balance of probability I am not satisfied you are related as claimed; or dependent on your sponsor."*

4. The application was refused under Regulation 8(2) of the Immigration (European Economic Area) Regulations 2016. That decision was dated 7th October 2019.

5. The appellant submitted an appeal and at section 3B of the appeal form the appellant listed further documents that he included with his appeal as medical documents and "detail of foreign remittance year 2018 and 2019 and detailed expenditure", "bank letter for home remittance" dated 22nd October 2019 and "letter from EEA national to explain money transfer and financial position" dated 22nd October 2019 and "latest foreign remittance receipts" dated 17th October 2019, 9th October 2019 and 2nd October 2019.

6. In his appeal the appellant stated:

> *"I provided ample evidence with my application to support my claim that I am an extended family member of an EEA national and I solely depend upon my sponsor for my day-to-day needs. For this purpose I had provided money transfers and money receipts bank letter showing received home remittance."*

7. On 5th March 2020 the First-tier Tribunal issued a notice to the appellant and respondent notifying the appellant that the respondent had failed to file an appeal bundle in accordance with directions together with a direction that the respondent should file an appeal bundle. On 5th March 2020 additionally a notice of hearing of 17th April 2020 was issued.

8. Nonetheless, because of the pandemic the appellant agreed to have the matter considered on the papers and the matter was determined on the papers on 15th February 2021. At no point was the appellant represented until a decision to appeal the First-tier Tribunal decision.

9. The application for permission to appeal set out that:

(i) The judge made a material misdirection in law in that the judge found he had considered the respondent's discretion under Regulation 12(4) because there is no longer a ground of appeal that the decision was not in accordance with the law as per **Ihemedu (OFMs - meaning) Nigeria [2011] UKUT 340 (IAC)**. The judge should have determined the issues raised in the refusal and erred in considering the respondent's discretion.

(ii) The judge failed to consider material matters. The respondent's decision was primarily directed to the question of dependency and at paragraph 16 the judge states "no documentary evidence has been submitted to demonstrate that Mr A and Mr ZAG are either brothers or otherwise related, one to the other". That was wrong because the appellant and sponsor's birth certificate were submitted as part of the original application to the Entry Clearance Officer together with other identity documents. The judge had erred as to whether there was evidence of a relationship which was submitted as part of the claim. If the judge was of the view the appellant had not appreciated that relationship was at issue he should have given the appellant an opportunity to provide it or remit the matter for an oral hearing further to **Shen (Paper appeals; proving dishonesty) [2014] UKUT 00236**.

(iii) Thirdly, the judge held as a discrepancy in his evidence was that the appellant stated in his application he was "supported by spouse/partner/other" at paragraph 1(f) and paragraphs 21(d). The judge states at paragraph 21(d) that plainly this indicates the applicant was being supported by his wife, but this was an irrational finding as the answer is in a dropdown menu on the form and the only way the appellant could indicate he was supported by an "other", in this case his brother, was by that box. The finding was material to the question of dependency and vitiates his finding.

(iv) Fourthly, the finding at paragraph 18 was unfair when the judge recorded he has no evidence of remittances after October 2020 and he cannot assume that the sponsor is still employed or that the remittances had continued. This was a hearing on the papers and the appellant had submitted documentary evidence in support thereof. If there was a delay in the Tribunal determining the case on the papers it should not prejudice the appellant and if he had concerns he should have given directions that further evidence should be submitted and paragraph 27 of **Shen** was cited.

10. At the hearing itself Ms Rutherford submitted that a further raft of documentation was submitted under cover of letter dated 13th August 2021 in support of the appeal. I refused to admit the documentation that was not before the First-tier Tribunal. There was a clear direction to the appellants dated 5th March 2020 to the effect that should the appellants wished to rely on further documentation it should be submitted within 28 days.

11. Ms Rutherford submitted that there were four issues which were not raised by the Secretary of State which the judge addressed unfairly, first that the appellant was not

related as claimed, secondly, that the sponsor was not exercising treaty rights, thirdly, that the exercise of discretion was not raised and fourthly, there was no evidence post the October 2020.

12. Ms Rutherford submitted that the appellant had supplied, with the visa application, documents in relation to the relationship and it was the appellant's understanding that these would be put before the Tribunal. The judge had considered the application on the papers, which the appellant had consented to, but the appellant did not appreciate that the documents were not before him. The judge should have considered whether to direct an oral hearing when dealing with a litigant in person.

13. In terms of the dependency, the appellant did not assert that he was unable to work as indicated at paragraph 21(a) of the decision and this was irrelevant. The appellant had filled out the application form without legal assistance and there was a misunderstanding as to whether he had children or not and it was clear at question 62 of the application that he stated he had no dependent children when in fact he did.

14. Ms Rutherford accepted that there were no bank statements regarding credit or debit entries. At paragraph 21(d) the dropdown menu only permitted the response in relation to sponsor/partner/other and the appellant should not be criticised for that.

15. Further, the appellant explained the position with regard to the loan as addressed by the judge at paragraph 21(e). The appellant's sponsor had moved and could not fund the appellant for a while and therefore he took a loan and the sponsor was sending money to reimburse the lender. The facts of the loan were set out by the appellant and sponsor.

16. Ms Rutherford accepted that the overall credibility was challenged at paragraph 21(h) but that did not undermine the fact of dependency. It was clear that the remittance receipts were accepted.

17. Mr Lindsay confirmed that the appeal was resisted. The additional bundle should not be admitted because it constituted further evidence which was not before the First-tier Tribunal Judge. It was not clear at all how the new evidence would show that the First-tier Tribunal erred in law or fact. The judge had thoroughly considered the documentation and there was written consent that the appeal should be proceeded on the papers. On any view, the evidence provided was incomplete and confusing. It was not clear how many children the appellant had and it was not clear who the funds were supporting. Further, the appellant needed to show that he was the dependant under EEA law. In relation to the gap of a few months, there was no evidence, albeit that there needed to be up-to-date evidence. That said, the judge was entitled to dismiss the appeal on the dependency ground on the evidence to date and the appeal was bound to be dismissed on the basis of the relationship which the initial entry clearance refusal had put squarely in issue. The Entry Clearance Manager's Review did not deal with the issue of relationship but did not concede the matter of relationship.

18. Ms Rutherford confirmed that the birth certificates were not resubmitted but the Entry Clearance Officer had omitted to include them in the bundle.

Analysis

19. It is clear from the face of the EEA family permit refusal that the question of the relationship between the appellant and sponsor was squarely in issue. It is clearly stated that the Entry Clearance Officer is not satisfied that the appellant and sponsor are related as claimed. It was suggested that the judge should have been aware that the documentation which went to the relationship was not included in the respondent's bundle. The First-tier Tribunal direction of 5th March 2019 indicated that the respondent had not filed a bundle. Following that direction on 5th March 2019 that the appellant should submit documents on which he intended to rely, he failed to do so. I accept that the appellant was a litigant in person, but the decision refusal was clear and the direction from the Tribunal was clear.

20. There was no indication on the face of the appellant's application to the Entry Clearance Officer, even in the section where additional information may be given, that further documentation had been provided. Indeed, in the section of additional information the appellant phrases his application in legalistic terms and that he was applying as an "extended family member of the sponsor as meant under Section 8 of the Immigration (European Economic Area) Regulations 2016".

21. **Shen** was decided in the context of dishonesty, and it is not the case here that the judge was asserting dishonesty such that he needed to "investigate further". On the face of the documentation, there was nothing further for the judge to investigate. The judge specifically noted at paragraph 7 that on 12th July 2020 the appellant wrote to the Tribunal requesting that the appeal be determined on the basis of the documents submitted and that he did not require an oral hearing. The appellant repeated that request on 20th September 2020. Further evidence was not provided. From paragraph 7 onwards the judge carefully considered the prospect of the paper determination and at paragraph 8 determined that the appeal could be justly determined without an oral hearing.

22. There was nothing to suggest that the judge failed to deal with the case in accordance with the overriding objective of The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (as amended). The appellant had had ample opportunity to submit further evidence should he wish. Indeed the rules indicate that the Tribunal should 'avoid delay, so far as compatible with proper consideration of the issues' and the conduct of the appeal does not suggest otherwise.

23. The question of relationship is an important section of the refusal letter, and it was open to the judge to find as he did. On the basis of the documentation before him the judge was entitled to conclude at paragraph 16 that no documentary evidence had been submitted to demonstrate that the appellant and sponsor are either brothers or otherwise related.

24. The failure to establish the relationship was fatal to the appeal.

25. Moreover, the matter of dependency was dealt with thoroughly by the judge. I do not consider that the reference to the "supported by spouse/partner/other" by the judge undermines the decision. It is clear at paragraph 21(d) that although the judge queried that the appellant had not specifically stated whether his wife was working, the judge was alert to the possibility that the reference to "other" was consistent with the appellant also receiving funds from some other source. Paragraph 21(d) was more characterised by a detailed analysis and weighing of all the evidence.

26. At paragraph 1(d) the judge had noted that the appellant on his application form at question 62 had in fact stated to the question "do you have any dependent children?" the answer "no". That was clearly incorrect. At paragraph 5(a)(2) the judge did note that the appellant had included expenditure for "children education". Although the judge did not treat this a misrepresentation, he was entitled to find that it undermined the reliability of the assertions by the appellant.

27. In relation to dependency, the judge from paragraphs 4 to 6 went through the financial documentation provided and referred to the letters from the sponsor and appellant as to the remittances sent. Specifically, however, at paragraph 5(d) the judge commented on the letter dated 6th July 2019 which certified that between 6th July 2019 and 18th October 2019 that there had been 13 credits to the appellant's account but

> 'The source of the credits (i.e. who had made the payments) is not stated in the letter'.

28. From 16th March 2019 the appellant did not receive funds from the sponsor because it was said the sponsor had moving costs. The remittance advices showing transfers by the sponsor to the appellant with Bank AL Habib confirmed a transfer of £53 on 2nd October 2019, £53 on 9th October 2019 and £53 on 17th October 2019.

29. The judge clearly directed himself at paragraph 12 in relation to **Moneke v Secretary of State [2011] UKUT 341** and acknowledged that dependency did not have to be "necessary" in the sense of the Immigration Rules, that is 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. The judge directed himself legally appropriately.

30. When considering dependency at paragraph 21 it was open to the judge to criticise the discrepancy between the representation in the Visa Application Form that he had no children and the remittance advice and further, at 21(c), crucially, the judge stated this:

> *"21(c) Mr A did not provide copies of statements of his account with either Al Habib bank or any other bank. It is therefore not possible to see whether*

(1) there were credit entries, either of a regular or recurring nature or which otherwise indicated the receipt of remuneration or an income (other than receipts from Mr ZAG) enabling him to meet his and Mrs TB's essential needs, or

(2) there were debit entries consistent with the expenditure which he asserted in the document to which I have referred in paragraph 5(a), including the (asserted) monthly loan repayments of PKR 7,000, during 2019 (stated to have been payable for 28 months).

Nor did he provide any other documentary evidence vouching the expenditure which he asserted in that document. In addition to what I have said in sub-paragraphs (a) and (b) of this paragraph, there is no documentary evidence vouching Mr A's asserted household expenditure and cost of food (asserted as PKR 7,000 per month in 2018 and PKR 11,000 per month in 2019), the monthly sum spent on utilities (PKR 4,000 in 2018 and PKR 5,000 in 2019 or the monthly cost of 'transportation/fuel' (PKR 900 in 2018 and PKR 1,000 in 2019).

…

21(e) Although Mr A claimed in the document to which I have referred in paragraph 5(a) that (during 2019) he was discharging a loan at the rate of PKR 7,000 per month,

*(1) in his letter of 22 October 2019, **Mr ZAG stated that he (Mr ZAG) was repaying Mr A's loan** 'in monthly instalments', and*

(2) no documentary evidence vouching either the existence of the loan or that Mr A was discharging it has been submitted.

*Whilst it may be that, when Mr ZAG stated that it was **he (Mr ZAG)** who was discharging the loan, he meant that Mr A was discharging the loan out of monies sent by him (Mr ZAG). But that is not what he wrote."*

31. Specifically, at 21(f) the judge remarked that the appellant in his Visa Application Form had stated that he had lived with his parents in Sialkot and he was not satisfied that they were not still living and the appellant had not made clear whether the sums asserted as his household and living expenses included the costs of his father's and his mother's living expenses. As Mr Lindsay submitted, it was important that it was the appellant who was dependent on the sponsor.

32. And further, at paragraph 21(g) the judge reasoned:

"No details of Mr A's expenditure on any of the items specified in the document to which I have referred in paragraph 5(a) during 2020 or to date (February 2021) have been provided. Nor has any documentary evidence vouching any such expenditure been submitted in support of the appeal. There is no explanation for the absence of any such documentary evidence."

33. As indicated above the appellant had ample opportunity to submit further financial documentation. The judge was entitled to dismiss the appeal on the dependency ground on the evidence he had at the date of the determination and bearing in mind the lacunae identified, the decision is not undermined by the observation of the lack of up-to-date evidence bearing in mind the findings within the decision.

34. Overall, the judge was entitled to conclude, having recorded the evidence and analysed it, that he had not been given a "full, accurate or truthful" account of Mr A's circumstances (paragraph 22(a)) and further at paragraph 22(g) that the appellant's monthly expenditure was accurately stated in the document which he had referred to in paragraph 5(a) [detail of foreign remittances years 2018, 2019 and detailed expenditure]. In particular, the judge stated at paragraph 22(g) that he was not satisfied that he had been provided with cogent evidence in accordance with **Moneke** in relation to his source of income or in relation to:

> *"Mr A's monthly expenditure*
>
> *(1) during 2018 and 2019 is accurately stated in the document to which I have referred in paragraph 5(a) or that, without prejudice to the generality of the foregoing, his medical expenses amounted to c. PKR 5,000 per month in 2018 or to c. PKR 6,000 per month in 2019 or continuing at that (or approximately that) rate,*
>
> *(2) during 2020 was approximately as stated as having been incurred during 2018 and 2019 in the above document, or*
>
> *(3) is continuing at approximately the rates stated as having been incurred during 2018 and 2019."*

35. On the evidence the judge was entitled to conclude that the appellant was not properly categorised as dependent on the sponsor, and he specifically stated that this was independent of his conclusions set out in paragraphs 20 (that the sponsor was not a qualified person under the EEA Regulations with reference to paragraph 19) and indeed 21. Those findings are thus sustainable.

36. The judge explored the question of the matter of discretion in relation to **Ihemedu** but at paragraph 14 stated at (b):

> *"Even though in this case, the Entry Clearance Officer has not exercised the discretion under Regulation 12(4), **if** I were to conclude that the conditions in subparagraphs (a) and (b) were fulfilled and that Mr A is an 'extended family member' of Mr ZAG, I should myself have to determine whether*
>
> *(1) the discretion should be exercised, and*
>
> *(2) it would be appropriate to issue an EEA family permit to Mr A."*

37. In the event, however, as the judge found that the appellant had not fulfilled the conditions as to whether he was an extended family member or whether he was

dependent, and hence the matter of the discretion, which the judge treated conditionally, does not arise and was not a material error of law.

38. Contrary to the grounds, the judge addressed the material matters. On that basis, the criticisms of the decision, cannot be sustained regardless of some of some of the irrelevancies included; there is no material error of law in the decision and the First-tier Tribunal decision shall stand.

Notice of Decision

The appeal remains dismissed

No anonymity direction is made.

Signed *Helen Rimington* Date 14th September 2021

Upper Tribunal Judge Rimington