Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: UI-2021-000973
EA/06931/2021

UI-2021-000983 EA/06932/2021
UI-2021-000986 EA/06933/2021
UI-2021-000988 EA/06934/2021
UI-2021-000989 EA/06936/2021

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 6th May 2022	**On 12th July 2022**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

UB
SG
AAG
AM
MG
(ANONYMITY DIRECTION MADE)

Appellants

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellants: Mr A I, Sponsor
For the Respondent: Ms A Ahmed, Home Office Presenting Officer

DECISION AND REASONS

1. The appellants appeal against the decision of First-tier Tribunal Judge Jepson, who on 2nd October 2021 following consideration on the papers, dismissed the appellants' appeal against their refusal of a family permit under Regulation 8 of the Immigration (European Economic Area) Regulations 2016 "the EEA Regulations 2016").

2. The appeal relates to the sister-in-law of the sponsor, Mr A I, an Italian and EEA national, and her four children, who assert that they are dependent upon an EEA national, that is Mr A I. It was submitted in the grounds as follows:

Ground 1

(1) The judge discussed the case of **Reyes v Secretary of State for the Home Department (EEA Regulation: dependency) [2013] UKUT 314** and in that case, it was established 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"*

and there should be an examination of all the factual circumstances. It was asserted that the judge had focussed mainly on a financial calculation and failed to consider the physical and social condition such that the appellant was a mother looking after four young children and her family and social circumstances which "don't allow me to work when I am unable to work, and I don't have any other source of earning except money send [sic] by my brother-in-law and my husband who is also dependent on his brother". It was asserted that the judge had failed to consider these factors.

Ground 2

(2) The judge failed to consider that the husband had been issued with a family permit as an extended family member and the sponsor's name is apparent on the EEA family permit visa which showed that dependency was established. The judge made an error of law by not considering all the documents and facts available to him.

Ground 3

(3) It was clear from the objection raised in the refusal that the ECO was not convinced as to the remittance receipts, "my circumstances and dependency" but never raised the objection in relation to whether the sponsor was exercising Treaty rights or if he was working or what his financial position was. The only reason there was no evidence

relating to the sponsor's financial circumstances was because there was no objection raised. The judge made an error of law by considering an issue which was not raised.

Ground 4

(4) It was submitted that these are not simple extended family member cases, but this was a close family of an extended family member who had been issued with a family permit and they were close family to the husband and extended family to the brother. The decision was stopping the appellant and her children from living with their immediate family member and their brother-in-law and there was a question of law which was how close family members of an extended family member should be treated when establishing the relationship under EEA Regulations.

3. The grant of permission to appeal stated that: "Arguably the findings reached by the judge on the appellants' financial dependence on the sponsor are inadequate. Ground 3 is therefore arguable." As the grant stated with respect to grounds 1, 2 and 4, the judge found at [26] that the utility and household bills provided a reasonable snapshot of the appellants' costs in Pakistan and the appellants' 121 page bundle did not include any details nor documents relating to the first appellant's husband's application for a family permit nor his life with the appellants prior to and since his arrival in the UK.

4. With regard to ground 3, that as part of their assessment of the appellants' dependence the judge arguably erred in making findings on the sponsor's exercise of Treaty rights and ability to financially support them, which were issues not raised in the refusals.

5. At the hearing before me, despite having specifically set up a remote link because the appellants stated that they had no representative in the UK, the sponsor attended court and on discussion with the appellants the first appellant confirmed to the sponsor by telephone that she was content that the sponsor make any oral submissions as required.

6. The first issue was the Rule 24 response, which stated that the respondent did not oppose the appellants' application for permission to appeal on ground 3 and invited the Tribunal to determine the appeal with a fresh oral continuance hearing. At the hearing, however, Ms Ahmed applied to withdraw the Rule 24 response.

7. The reasons for refusal by the Entry Clearance Officer of the family permit stated that the documents provided put

> *"into doubt that you are dependent upon your sponsor. Therefore, I am not satisfied that you have provided sufficient evidence that you are dependent upon your sponsor.*
>
> *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. I am therefore not satisfied that you are an extended family member in accordance with Regulation 8(2) of the Immigration (European Economic Area) Regulations 2016."*

8. Ms Ahmed, and in my view rightly so, submitted that the refusal letter was widely drafted, clearly addressed dependency and the dependency required a holistic assessment. The refusal was clearly placing the appellants' financial dependency into question which included the financial circumstances of the sponsor. Additionally it was clear that the judge made observations as to the exercise of treaty rights by the sponsor but went on to make findings in the alternative.

9. Although the Rule 24 response asserted there was an error of law the writer clearly did not consider the materiality of that error of law. Albeit that facts may conceded, an error in the law cannot and Regulation 8 clearly sets out as confirmed by **Reyes** that the appellants must be directly dependent on the sponsor. It was open to the judge to make that holistic assessment. Further, the judge did say even if he was wrong about his assessment of whether the sponsor was exercising Treaty rights he was not satisfied on the evidence of dependency.

10. Overall, it is clear that the judge properly directed himself in accordance with **Reyes** such that "it must be shown that the appellants rely on the sponsor for their essential needs". Indeed, the judge stated at [23] the following:

> *"23.) In order to establish the first, it must be shown the Appellants rely on the sponsor for their essential needs. The reason for dependency does not matter. Nor has the sponsor to cover every penny of their costs; it should simply be an appreciable portion. Essential need encompasses the basics of life, not the maintenance of a certain lifestyle."*

There was no challenge to the finding by the judge that they did not fulfil the "same household requirement" and that finding stands.

11. In the circumstances therefore I permitted the withdrawal of the Rule 24 response. The First-tier Tribunal decision was drafted in the alternative and although a concession can be made in fact it cannot be made in law. An assessment of the circumstances of the sponsor and his ability to be able to pay for the needs of the appellants was a legally sound approach and permissible in the light of the Entry Clearance Officer's refusals.

Analysis

12. As confirmed in **Latayan v Secretary of State for the Home Department** [2020] EWCA Civ 191 dependency is a question of fact and **Latayan**, inter alia, cited the relevant case law at paragraph 23 as follows:

> *"23. Dependency entails a situation of real dependence in which the family member, having regard to their financial and social conditions, is not in a position to support themselves and needs the material support of the Community national or his or her spouse or registered partner in order to meet their essential needs: Jia v Migrationsverket Case C-1/05; [2007] QB 545 at [37 and 42-43] and Reyes v Migrationsverket Case C-423/12; [2014] QB 1140 at [20-24]. As the Upper Tribunal noted in the unrelated case of Reyes v SSHD (EEA Regs: dependency) [2013] UKUT 00314 (IAC), dependency is a question of fact. The Tribunal continued (in reliance on Jia and on the decision of this court in SM (India) v Entry Clearance Officer (Mumbai) [2009] EWCA (Civ) 1426):*
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> > *"19 ... 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."*
>
> *Further, at [22]*
>
> > *"... Whilst it is for an appellant to discharge the burden of proof resting on him to show dependency, and this will normally require production of relevant documentary evidence, oral evidence can suffice if not found wanting. ..."*

13. Turning to the grounds as they were drafted in terms of consideration of the financial, physical and social conditions, as dictated by **Reyes**, the judge was fully aware that the appellants consisted of a mother and five young children (and their ages 14, 11, 5 and 3 years [1]) and they asserted that they were dependent on the brother-in-law in the UK. Those facts were set out at the outset and the judge at [26] noted that he had been given "some evidence setting out the appellants' position in Pakistan". There was no indication that the judge had failed to take into account that the first appellant was not working as asserted in the grounds

because of the ages of the children. Indeed, their assertion is that they were provided with their essential needs. The judge was also aware that the husband had been granted entry clearance [18] and to the UK [25]. He was aware that utility bills bore the name of her relatives and thus there clearly were relatives present in Pakistan. I find that this ground has no merit. The financial aspect to the claim that they are dependent on the sponsor is not the sole aspect to the consideration but a critical aspect. As identified in **Lim v SSHD** [2015] EWCA Civ 1383 at [16], when citing from **Jia v Migrationsverket (KC/1/05),** [2007] QB 545 at [37], "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." It is not arguable that the judge failed to take into account relevant material.

14. Turning to ground 2, as stated in the grant of permission, the appellants' 121 page bundle did not include any details nor documents relating to the first appellant's husband's *application* for a family permit nor his life with the appellants prior to and since his arrival in the United Kingdom. There was simply minimal evidence on that basis. The fact that he has been issued with a family permit as an extended family member and that that was apparent from his family permit visa which had the sponsor's name, does not elaborate on the details of the application made by the husband nor the documents, nor shed light on the dependence of the *appellants* on the sponsor. It is not whether the first appellant can prove her husband is dependent but whether the appellants can show *their* dependency on the sponsor. Even if the husband were an extended family member dependent on the sponsor that does not make good the evidence required in relation to the appellants' dependency, particularly bearing in mind there are five of the appellants. Again there was no material error of law.

15. Turning to the third ground, which is that the judge raised an issue that was not raised in the reasons for refusal, it was accepted by Ms Ahmed that the judge erred at [27] by querying whether the sponsor was exercising Treaty rights but as indicated above, it was open to the judge at [27] to question the wider financial position of both the sponsor and the appellants and this was within the framing of the refusal letter. How much the sponsor earned and his basic outgoings when assessing whether the appellants would be dependent, was relevant and the nature of the rejection of dependency in the Entry Clearance Officer's refusal letter encompassed that approach. The judge was not raising an issue of surprise. There was no evidence which the judge described at [27] as "basic information" on the file to that effect. It was open to the judge to adopt a more wide-ranging and holistic assessment to consider those factors, which is the financial circumstances of the sponsor when assessing whether the appellants were dependent on their brother-in-law for their essential needs. Despite the fact that they had sent in utility bills

which bore the name of their relatives which shows that indeed they had a family in Pakistan there was no indication of what the sponsor could afford.

16. The exercise of treaty rights relates to the sponsor himself establishing himself as a qualifying person and that is distinct from whether the sponsor does and can actually support financially the five appellants. It is correct that the Entry Clearance Officer did not challenge that the sponsor was exercising Treaty rights. That, however, is not a material error of law however, because the judge immediately following his observations on the complete absence of any documentary evidence of the sponsor exercising treaty rights, made his findings in the alternative. At [28] the judge phrased his findings in the following way:

> *"28.) Even if I were persuaded of that, establishing dependency is problematic here. Nothing has been submitted to show the sponsor can afford the support provided. I am not told what the sponsor does for a living, or his income from that. No doubt the Appellants would point to the sponsor's name on the transfer receipts, but that alone does not to my mind necessarily show dependency. It is entirely possible someone else could be paying for that. Given all of this could have been shown by readily available documents – such wage slips, bank statements – in my judgement the Appellants' case is fatally undermined. The burden lies on the Appellants to fulfil the Regulations."*

17. This confirms that there was no information or evidence as to what the sponsor's income was, hence, it was open to the judge to consider that the transfer receipts showed the sponsor's name but that alone did not show dependency by the appellants. As the judge states, "*it is entirely possible someone else could be paying for that. Given all of this could have been shown by readily available documents – such [as] wage slips , bank statements- in my judgement the appellant's case is fatally undermined. The burden lies on the appellants to fulfil the regulations"* [28].

18. Those were cogent reasons given by the judge. The sponsor is someone said to be exercising treaty rights in the UK and documentation could have been accessed. It was the lack of relevant evidence which undermined the success of this appeal Again it was open to the judge to make that finding.

19. In terms ground 4 it seems to be asserted that this was a special category of close family members of an extended family. I find that this challenge is not sustainable. **Fatima and Others v Secretary of State for the Home Department** [2019] EWCA Civ 124 held at paragraph 26 that

> "*The dependency has to be on the relevant union citizen. That is clearly and correctly transposed into the domestic law by Regulation 8(2)(c) of the 2006 Regulations*."

20. The applicable regulation is that in relation to an extended family member under Regulation 8, which is what was applied by the judge, and not Regulation 7 of the EEA Regulations 2016. It is the relationship with the sponsor, who is the brother-in-law, which is relevant in this instance and the law is clear, contrary to the grounds, in this situation. It is the freedom of movement of the sponsor which is relevant because he is the EEA national.

21. I find no material error of law and the decision shall stand.

Notice of Decision

The decision of the First-tier Tribunal will stand

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

"Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant/respondent is granted anonymity. No-one shall publish or reveal any information, including the name or address of the appellant/respondent, likely to lead members of the public to identify the appellant/respondent. Failure to comply with this order could amount to a contempt of court."

Signed Helen Rimington Date 18th May 2022

Upper Tribunal Judge Rimington