IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: UI-2021-001101; EA/07243/2021**
UI-2021-001108; EA/07244/2021
UI-2021-001109; EA/07248/2021

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On the 15 June 2022	**On the 18 July 2022**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

SHARANJIT SINGH
RAMANJIT KAUR
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(ANONYMITY DIRECTION NOT MADE)

Appellants

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mr M Nadeem, counsel, instructed by City Law Immigration Ltd Slough
For the Respondent: Ms A Ahmed, Senior Home Office Presenting Officer

DECISION AND REASONS

1. These are appeals against the decision of Judge of the First-tier Tribunal Woodcraft ("the judge"), promulgated on 14 October 2021, dismissing the appellants' appeals against the respondent's decisions,

dated 27 March 2021, refusing to issue them EEA Family Permits pursuant to the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations") as dependent Extended Family Members ("EFM's") of an EEA national (Ms Satnam Kaur - "the sponsor") exercising EEA free movement rights.

Background

2. The appellants are nationals of India. The 1st appellant, born on 7 March 1990, is the husband of the 2nd appellant, born on 29 July 1994, and they are the parents of the 3rd appellant, born on 20 Sept 2018. They applied for EEA Family Permits based on their relationships with the sponsor, who is the first appellant's aunt. They maintained that they relied on financial support from the sponsor in order to meet their basic needs, and therefore met the definition of EFM in article 8(2) of the 2016 Regulations.

3. The applications were refused as the respondent was not satisfied that the appellants were dependent on the sponsor. Whilst the respondent acknowledged that evidence of money transfers via Ria (a money transfer service) from the sponsor had been provided covering the period 14 August 2019 to 23 November 2020, money transfers from Western Union did not display the name of the sender of the funds. There was no evidence of dependency on the sponsor between March 2018 and August 2019, even though the sponsor entered the UK on 1 March 2018. The respondent expected to see evidence which fully detailed the appellants' circumstances and those of their family members. There was insufficient evidence of the appellants' income, expenditure and financial position to satisfy the respondent that they were dependent on their sponsor.

4. The appellants appealed the respondent's decisions pursuant to regulation 36 of the 2016 Regulations.

The decision of the First-tier Tribunal

5. The judge had before him a bundle of documents prepared on behalf of the appellants that included, inter-alia, statements from the sponsor and the 1st appellant, evidence of money transfers, medical evidence relating to the 1st appellant, and evidence of the sponsor's employment status. Further money transfer documents were supplied during the course of the hearing.

6. The judge heard oral evidence from the sponsor, who adopted her statement and who underwent cross-examination.

7. In his decision the judge properly directed himself as to the test for dependency, set out in the Court of Appeal authority of Lim v Entry Clearance Officer, Manilla [2015] EWCA Civ 1383.

8. At [11] the judge referred to the appellants' financial costings and expenditure which was set out in the skeleton argument (and in the first appellant statement). The judge noted that this "varied from month to month." The judge noted the assertion in the skeleton argument that the average cost was 22,500 Indian rupees, the equivalent of £215. The judge noted the assertion in the skeleton argument that the money transferred by the sponsor each month ranged between £200 and £250.

9. Having summarised the evidence before him, including the oral evidence from the sponsor, and having summarised the submissions of the representatives, the judge set out his findings of fact and his conclusions at [30] to [38].

10. At [30] and [31] the judge noted the sponsor's assertion in her oral evidence that she had sent money to the appellants prior to August 2019, and that this was inconsistent with the assertions in the skeleton argument and in the sponsor's own statement that she had been financially supporting the appellants since August 2019. There was no documentary evidence before the judge that the sponsor had previously supported the appellants financially other than her assertion in oral evidence. At [32] the judge drew an adverse inference from the absence of documentary evidence of financial support prior to August 2019. Nor was the sponsor's assertion that she had been sending monies to the appellants since the 1st appellant had an accident in 2016 supported by any independent evidence or by the 1st appellant in his statement.

11. At [33] the judge stated:

> "Nor is it the case that all of the appellant's basic needs are being met by the sponsor even on the appellant's case. The appellant and his family live in the house owned by the appellant's parents, rent free in a property which has no mortgage on it. This is a considerable contribution to the Appellant and his family and I have seen no evidence that the Sponsor could make good the cost of accommodation if it became payable. The appellant's parents live in the property, but the Sponsor was vague in her evidence as to their financial position. The burden of proof that he was not receiving funds from elsewhere rested on the Appellant and the lack of information about the parents meant he could not discharge that burden."

12. At [34] the judge referred to medical evidence relating to a brain injury suffered by the 1st appellant in 2016. The judge noted that the 1st appellant appeared to continue to receive "medication of some sort". There was however no up-to-date information as to the 1st appellant's present condition or prognosis for the future. The judge concluded that, in the absence of evidence that the 1st appellant no longer required medical treatment, it was "… difficult to see how were the appellant to be in [*sic*] United Kingdom the sponsor would be able to pay for his medical treatment here. Inevitably the appellant would

need to be treated under the National Health Service and that would constitute a drain on public funds."

13. At [36] the judge found the position of the appellants' other family members to also be unclear. The judge recorded the evidence from the sponsor that the 1st appellant's brother and sister, who also resided in India, although in their own households, did not provide the appellants with financial support. The judge found the sponsor's evidence on this point to be vague. On the one hand the sponsor claimed that the 1st appellant's siblings were not working but, on the other hand, she could not say how they were being supported. The judge concluded that the appellants had not demonstrated that they did not receive funds from either the 1st appellant's brother or sister.

14. At [37] the judge stated:

> "both the appellants and the sponsor's witness statements and the skeleton argument reproduced the same very brief schedule of expenditure by the appellant. It was not clear what this related or know [*sic*] whether it's changed over time. As the authorities which I have cited above make clear the respondent in the refusal notice was entitled to ask for accurate accounts which in this case would mean better than those provided. The appellant was on notice that he needed to provide much more information to show dependency than he has in fact produced."

15. And at [38] the judge stated:

> "Whilst it is correct that the sponsor's financial circumstances were not put in issue in the refusal notice, the sponsor's finances was so vague when she was questioned about them that it is difficult to match the figures she says she can afford and some of the amounts shown on the payment schedules. It was for the appellant to resolve these difficulties but he has not done so. It is difficult to see how for example the sponsor will be able to afford to pay rent for the appellant and his family should they arrive in the United Kingdom. This too, potentially could lead to a drain on public funds. Although the issue of dependency arises under EEA legislation, the authorities make clear that it is a matter for national law to determine the factual situation whether there is or is not a dependency. On the basis of the vague and contradictory evidence that has been presented to me, I do not find that there is a dependency in this case which would bring the appellant and his family within a [*sic*] regulation eight. As such I find that the appellants are not entitled to be issued with family permits and I dismiss the appeal."

The challenge to the First-tier Tribunal's decision

16. The grounds contend that the judge erred in law in his assessment of the evidence relating to the appellants' income and expenditure. Specifically, there was no adequate reasoning as to why the judge was unclear that the schedule detailing the appellants' expenses was

"unclear". The judge failed to take into account the assertions in the skeleton argument that the schedule reflected a monthly average, and the judge failed to take into account the full record from Ria relating to all the money remitted by the sponsor to the appellants. It was submitted that the record from Ria did match the details of the schedule of expenditure and the evidence in support.

17. The grounds additionally argue that there was a procedural impropriety in the decision because the judge relied on the sponsor's financial circumstances and made findings in respect of her financial circumstances when this had never been raised as an issue in the decisions, and in circumstances where the sponsor was thereby prevented from rebutting the concerns raised in cross examination.

18. The grounds further contend that the judge misdirected himself in law at [33] by relying on the fact that the sponsor did not provide the appellants' accommodation, and that the sponsor did not therefore meet all of the appellants' essential needs. There was no need for the sponsor to meet all of the appellants' essential needs.

19. The grounds also contend that the judge engaged in undue speculation when he considered that the first appellant may need further medical intervention in the UK and would thus be a drain on the NHS.

20. In granting permission to appeal to the Upper Tribunal Judge of the First-tier Tribunal Campbell stated:

> "In the grounds, it is contended that procedural unfairness undermines the judge's assessment and findings. In the adverse decisions giving rise to the appeals, the claimed dependency between the appellants and their sponsor was identified as the determinative reason. At the hearing, however, it was the sponsor's financial circumstances that became the focus of cross-examination and led to the judge's conclusion that the appeals should be dismissed.
>
> This ground is arguable and has merit. At paragraph 38 of the decision, the judge acknowledges that the sponsor's financial circumstances were not put in issue in the notice of decision but proceeded to give weight to her answers to questions about her finances. On the basis of what he described as the vague and contradictory evidence, he found that dependency was not shown.
>
> The appellants were not given notice that their sponsor's circumstances were in issue (nor, it appears, was the sponsor given any notice that she would be questioned about her own finances). The appellants have drawn attention to **IO (Points in Issue) Nigeria [2004] UKIAT 00179** in support of the application. In the absence of the sponsor's circumstances being put in issue in the notice of decision or notice subsequently that the respondent intended to question her in this context at the hearing, it was arguably unfair for the judge to proceed and take

what emerged into account in dismissing the appeals.

21. In his oral submissions Mr Nadeem adopted and relied on the grounds of appeal. It was not clear why the judge found the schedule of expenses to be "unclear", and there was procedural fairness in the raising of issues relating to the sponsor's ability to afford financial support in circumstances where this had never previously been raised. The judge failed to take into account evidence before him relating to the sponsor's financial circumstances, including the fact that she had £5000 in savings.

22. Ms Ahmed relied on a Rule 24 response provided by the respondent and she resisted the appeal on the basis that the judges assessment of the sponsor's financial circumstances was open to him and that, in any event, in circumstances where there was no challenge to the judges adverse credibility finding in relation to the sponsor, the judge was entitled to find that the lack of evidence relating to the appellants' immediate family members in India entitled the judge to conclude that the issue of dependency had not been made out.

23. I reserved my decision.

Discussion

24. On the facts of this appeal the relevant legislative provisions at the material time were contained in regulation 8(2) of the 2016 Regulations. A person satisfies the condition in this paragraph, and is therefore an Extended Family Member, if the person is –

> (a) a relative of an EEA national; and
>
> (b) residing in a country other than the United Kingdom and is dependent upon the EEA national or is a member of the EEA national's household; and either—
>
> > (i) is accompanying the EEA national to the United Kingdom or wants to join the EEA national in the United Kingdom; or
> >
> > (ii) has joined the EEA national in the United Kingdom and continues to be dependent upon the EEA national, or to be a member of the EEA national's household.

25. In Lim v Entry Clearance Officer Manila [2015] EWCA Civ 1383 Lord Justice Elias stated, at [32],

> In my judgment, the critical question is whether the claimant is in fact in a position to support himself or not, and Reyes now makes that clear beyond doubt, in my view. That is a simple matter of fact. If he can support himself, there is no dependency, even if he is given financial material support by the EU citizen. Those additional resources are not necessary to enable him to meet his basic needs. If, on the other hand, he cannot support himself from his own resources, the court will not ask why that is the case, save perhaps where there is an abuse of rights. The fact that he chooses not to get a job and become self-supporting is irrelevant.

26. The relevant case law indicates that the support that the EEA sponsor provides only needs to be 'material' or 'necessary' to enable the appellants to meet their essential needs (see Lim, at [25] & [32]; see also the respondent's Policy Guidance 'Extended family members of EEA Nationals, version 7.0, published for Home Office staff on 27 March 2019, which states, "The applicant does not need to be dependent on the EEA national to meet all or most of their essential needs. For example, an applicant is considered dependent if they receive a pension which covers half of their essential needs and money from their EEA national sponsor which covers the other half.").

27. I am satisfied that the judge erred in law at [33] by noting that the sponsor did not meet "all of the appellant's basic needs". Whilst the judge was entitled to find that the sponsor did not accommodate the appellants or provide finances in support of accommodation (points never disputed by the appellants themselves), in my judgement it is an inescapable reading of [33] that the judge proceeded on the basis that all of the appellant's basic needs had to be met by the sponsor. In reliance on the authorities and guidance in the preceding paragraph, this is not the case.

28. I am additionally satisfied that the judge erred in law at [37] in his assessment of the schedule of expenditure and in his assessment of the evidence of money transfer receipts. Although the schedule of expenditure contained in both the skeleton argument and the 1st appellant's statement was brief, it did provide a breakdown of the appellants' expenses in respect of medical treatment, food, clothes, travel, bills, and TV/phone. The appellants' bundle contained a number of receipts in support of these expenses, including continued medical treatment and grocery expenses. The judge has not adequately reasoned why he found the schedule to be "unclear" or why it was not clear whether it changed over time. The skeleton argument specifically indicated that the schedule related to an average month. Whilst the judge was entitled to then find at [37] that the money transfer receipts supplied in the bundle were of poor quality, the judge failed to take into account the clear record of all the Ria money transfers covering 2019 and 2020. If the judge had considered this record of all the Ria money transfers he would have found that the funds remitted were generally consistent with the assertions contained in the 1st appellant's statement and the skeleton argument. The judge's failure to consider this evidence constitutes an error of law.

29. I am additionally persuaded that the decision contains a procedural impropriety. The decisions refusing to issue the EEA Family Permits took no issue with the sponsor's financial circumstances or her ability to financially support the appellants, either in India or in the UK. The judge acknowledged this himself at [38]. It was procedurally unfair for the judge to have then relied on an issue that had never previously been raised. Nor is it apparent to me that the likelihood of the

appellants becoming a public burden was a relevant consideration in an application for an EEA family permit.

30. Although there is some force in Ms Ahmed's submission that the errors of law identified above were not material because there had been no challenge to the judge's assessment of the sponsor's credibility and there remained insufficient evidence of the circumstances of the appellants' other close family members in India, I am ultimately persuaded that the errors of law I have identified are material. The judge made no reference to the evidence of remittances of money from the sponsor that continued in 2021, a relevant factor in determining whether there was genuine dependency, and the unfairness in the focus on the sponsor's finances and his assessment of her ability to financially support the appellants infected his overall assessment of her evidence and rendered the decision, considered as a whole, unsafe. As such, it cannot be said with confidence that the judge would inevitably have reached the same conclusion.

Remittal to First-Tier Tribunal

31. Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 18 June 2018 a case may be remitted to the First-tier Tribunal if the Upper Tribunal is satisfied that:

    (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or

    (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

32. Both parties considered appropriate that, if I identified errors of law that were material to the decision, the case should be remitted for a fresh hearing before the First-tier Tribunal. Given the absence of any consideration of evidence before him, and my concerns relating to the judge's assessment of the sponsor's evidence, I consider that, in these circumstances, there will need to be a full re-assessment of all the evidence rendering it appropriate to remit the matter back to the First-tier Tribunal for a full fresh (de novo) hearing.

Notice of Decision

The making of the First-tier Tribunal's decision involved the making of an error on a point of law requiring it to be set aside.

The case will be remitted back to the First-tier Tribunal for a de novo hearing before a judge other than Judge of the First-tier Tribunal Woodcraft.

Signed D.Blum Date: 16 June 2022

Upper Tribunal Judge Blum