Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/08583/2021
(UI-2021-001354)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 23 March 2022	**On 12 December 2022**

Before

UPPER TRIBUNAL JUDGE KEBEDE
DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

ANDIOL CENAJ
[NO ANONYMITY ORDER]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr A Stedman, of Counsel
For the respondent: Mr R Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

Decision and reasons

1. The appellant appeals with permission from the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision on 22 April 2021 to refuse his application under the EU Settlement Scheme. He had applied on the basis of his dependency on his brother Admir Cenaj, an Italian citizen. The appellant is a citizen of Albania, born on 10 May 1988.

Background

2. The appellant entered the UK in March 2015 (according to the representations dated 8 March 2021 made by his representative – respondent's bundle, B2). The appellant lived in Albania with his family, which included his older brother, Admir Cenaj (whom we shall refer to as the sponsor). The sponsor moved to Italy in 1997 for work. The sponsor became an Italian citizen in January 2015 (according to the appellant's 5 March 2021 witness statement – respondent's bundle C3). The sponsor's Italian passport was issued on 2 January 2015. The sponsor then moved to the UK. The appellant moved to the UK from Albania in March 2015.

3. The appellant made an online application on application form EUSS on 26 December 2020 (although this is recorded by the respondent as made on 28 December 2020). Although this application was made under the EU Settlement Scheme, further written representations were made by the appellant's representative on 8 March 2021 indicating that the appellant was relying both on the Immigration (European Economic Area) Regulations 2016 (the 2016 Regulations) as an Extended Family Member (EFM) under Regulations 8 and 17, and on the EU Settlement Scheme, as someone who it was claimed was entitled to settled or presettled status.

4. The respondent refused that application on 22 April 2021 on the grounds that the appellant did not meet the requirements for settled status or pre-settled status under the EU Settlement Scheme, as the respondent's records did not show that the appellant had been issued with a family permit or residence card under the EEA Regulations as a relative of an EEA national who was a dependent of the EEA national or of their spouse or civil partner, a member of their household or in strict need of their personal care on serious health grounds. The refusal did not consider the issue of dependency.

First-tier Tribunal decision

5. The appellant appealed against that decision, his appeal being heard by First-tier Tribunal Judge Iqbal on 25 October 2021. In a decision promulgated on 18 November 2021, Judge Iqbal, whilst accepting the appellant's argument that his 28 December 2020 application, supplemented with detailed representations on 8 March 2021, should be treated as an application for a residence card under the 2016 Regulations, dismissed the appellant's appeal. This was on the basis that the appellant failed to demonstrate that he is the EFM of the sponsor under Regulation 8 of the 2016 Regulations.

6. Judge Iqbal found that the appellant had demonstrated that since his arrival in the UK (in March 2015) he had been a member of the sponsor's household and had been dependent on the sponsor, as the appellant had not had permission to work and the sponsor, who had now acquired settled status under the EUSS scheme and had provided evidence to demonstrate he was working, was in a position to support his brother.

7. Judge Iqbal went on to find (paragraph 31) that any claimed dependency or claimed membership of the sponsor's household, prior to when the sponsor became an EEA national in 2015, could not be considered. In the alternative, Judge Iqbal was not satisfied that there was any dependency prior to the appellant's arrival in the UK. Judge Iqbal also found that there was no evidence that the appellant and the sponsor had been living in the same household after the sponsor became an Italian national, prior to entry in the UK or in the years preceding that. Judge Iqbal found that the appellant and the sponsor had lived in independent households for a number of years prior to the appellant arriving in the UK in 2015 and also noted that the appellant had been employed in Albania prior to coming to the UK.

Permission to appeal

8. Permission to appeal was sought by the appellant on the grounds that the judge had erred in wrongly applying the definitions of extended family member, set out in **Dauhoo (EEA Regulations - regulation 8(2)) Mauritius [2012] UKUT 79 (IAC)**; that the judge had applied a restrictive approach in the interpretation of EU law when a purposive approach was required; and had included further requirements which were not necessary under the Regulations, with reference to her finding that he had been employed prior to coming to the UK. Permission was granted, on both grounds, in the First-tier Tribunal on 11 January 2022.

Rule 24 Reply

9. The respondent opposed the appellant's appeal submitting that the judge had directed herself appropriately and that the judge had found that there was scant evidence to demonstrate the appellant's dependency on his sponsor for essential needs. It was further submitted that the appellant's argument, that the sponsor did not need to be an EEA national in order for household membership to be considered, was contrary to EU law.

10. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

11. The matter came before us and both parties made submissions.

12. Mr Stedman relied on his skeleton argument, although he indicated that he was no longer relying on the appellant's claimed membership of the sponsor's household in Albania (it not being disputed that the sponsor was not an EEA national at this point). He submitted that the judge's approach to prior dependency was inadequate, particularly when considered in the context of the findings, at paragraph 29, of dependency in the UK. Mr Stedman submitted that the judge fell into error in an over-emphasis on documentary evidence in relation to prior dependency at a time when the sponsor was an EEA national. He submitted that there was no mention of how the judge approached the oral evidence of dependency.

13. Mr Whitwell submitted that the appellant was mounting a disguised perversity challenge. Mr Whitwell submitted that where the judge noted the oral evidence of the appellant working in Albania prior to coming to the UK, he was not stating that the appeal could not succeed due to the appellant's prior employment. Rather, the judge was indicating that there was a paucity of evidence to discharge the burden of proof that there was prior dependency. The critical question, including as identified by the Court of Appeal in **Lim v Entry Clearance Officer Manila [2015] EWCA Civ 1383**, was whether the appellant was in fact in a position to support himself or not and if the appellant could support himself, there is no dependency, even if they are given material support by the EEA citizen. In the absence of knowing what incomes and outgoings there were, the judge could not make a finding in the appellant's favour. Those reasons were adequate and the appellant had not discharged the burden of proof, of prior dependency, before the First-tier Tribunal. Mr Whitwell acknowledged that ground 2 was not being relied on by the appellant and that this applied to paragraphs 9-12 of ground 1, which had also argued that the judge had erred in not accepting membership of the same household, prior to the appellant coming to the UK, at a time when the sponsor was not an EEA citizen. Mr Whitwell relied on **Begum v Secretary of State for the Home Department [2021] EWCA Civ 1878** and the fundamental point that without an EEA national there is nothing (for an EFM) to which to tie a derivative residence.

14. In reply, Mr Stedman reiterated that he was no longer pursuing the prior membership of a household point. He submitted that this was not a disguised perversity challenge; the judge had identified that the appeal should be considered under the 2016 Regulations, rather than Appendix EUSS of the Immigration Rules. The judge then proceeded to look at the evidence. Given her findings on dependency in the UK it was important for the judge to undertake a proper consideration of prior dependency and the judge failed to deal with the oral evidence. The findings were inadequate, given the oral evidence and the historical context.

Analysis

15. We note that there was no dispute that the First-tier Tribunal had correctly considered the appellant's appeal under the 2016 Regulations. As the judge found (at paragraph 26) that whilst the appellant had not made his application for a residence card under the 2016 Regulations on the appropriate form, Regulation 21(6) applied, as the judge found that this was due to circumstances beyond the appellant's control and the respondent ought therefore to have accepted the application under the 2016 Regulations. As that application was made prior to the end of the transitional period on 31 December 2020, Articles 10(2) and 10(3) of the October 2019 Withdrawal Agreement apply. These provide that persons falling within Article 3(2) of Directive 2004/38/EC (the Directive), whose residence was facilitated by the host state before the end of the transition period, or who applied before the end of the transition period, retain their right of residence in the host state providing they continue to reside there.

16. Regulation 8 of the 2016 Regulations provides including as follows:

> **"Extended family member"**
>
> **"8.**—(1) In these Regulations "extended family member" means a person who is not a family member of an EEA national under regulation 7(1)(a), (b) or (c) and who satisfies a condition in paragraph (2), (3), (4) or (5).
>
> (2) The condition in this paragraph is that 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.
>
> …
>
> (6) In these Regulations, "relevant EEA national" means, in relation to an extended family member—
>
> (a) referred to in paragraph (2), (3) or (4), the EEA national to whom the extended family member is related;
>
> …"

17. The judge, having accepted that the appeal fell to be decided under the 2016 Regulations set out the provisions of Regulation 8 and correctly directed herself to the guidance in **Dauhoo** which was summarised as follows:

> *"Under the scheme set out in reg 8 (2) of the Immigration (European Economic Area) Regulations 2006, a person can succeed in establishing that he or she is an "extended family member" in any one of four different ways, each of which requires proving a relevant connection both prior to arrival in the UK and in the UK:*
>
> *i. prior dependency and present dependency;*
>
> *ii. prior membership of a household and present membership of a household;*
>
> *iii. prior dependency and present membership of a household;*

iv. prior membership of a household and present dependency.

It is not necessary, therefore, to show prior and present connection in the same capacity: i.e. dependency- dependency or household membership-household membership ((i) or (ii) above). A person may also qualify if able to show (iii) or (iv). "

18. It was not disputed before us that this was the correct approach, rather that the judge had wrongly applied this caselaw. The judge accepted, at paragraph 29, that the appellant had provided evidence to demonstrate both current membership of the sponsor's household and current dependency on the sponsor, including as the appellant has not had permission to work in the UK. The judge correctly identified that the outstanding issue was 'the Appellant and his sponsor's position prior to the Appellant's entry in the United Kingdom'. The judge then sets out, at paragraph 30, the evidence before her in relation to the claimed circumstances when the sponsor and the appellant were both living in Albania, where it was claimed that the family struggled financially, their mother had to work and the sponsor cared for the appellant. The sponsor left for Italy in 1997 and then claimed to continue to support the family financially. Although Mr Stedman submitted that the judge was making positive findings at paragraph 30, it is clear that the judge sets out the evidence and submissions at paragraph 30, going on to make her findings at paragraphs 31 and 32, where she found as follows:

"31. In order to benefit from the regulations, the dependency/membership of the household, must have been at the time the sponsor was an EU national. The evidence before me is that the Appellant's brother became and EU national in 2015. Therefore any claimed dependency before that cannot be considered. Even if I were able to consider that time period, I note there is a paucity of evidence to demonstrate any kind of financial support that the sponsor provided to his family in Albania. It was submitted that the proximity in relation to Italy and Albania would have allowed for numerous visits and transfer of funds during those visits from the sponsor to his family. However, I have no schedule of any financial support and, I have heard evidence that the Appellant himself was a physiotherapist who did work in Albania prior to coming to the United Kingdom. I cannot be satisfied that there is any dependency prior to the Appellant's arrival in the UK.

32. Additionally, insofar as being members of the same household, the sponsor left Albania in 1997, and there is nothing before me to demonstrate that either of them had lived in the same household after the sponsor became an Italian national (prior to entry in the UK) or even in the years preceding that. I find that they have had independent households for a number of years prior to the Appellant arriving in the United Kingdom in 2015."

19. The grounds of appeal submitted that it was an arguable error of law to hold that the appellant was not dependent on the sponsor because the appellant worked as a physiotherapist. We agree with Mr Whitwell that that was not the judge's finding. Whilst it was uncontroversial before us that earning some income through employment would not necessarily preclude dependency, it was for the appellant to demonstrate such dependency, prior to the appellant's arrival in the UK in March 2015.

20. Given that it had been the appellant's oral evidence that he had worked in Albania prior to coming to the UK, considering this in the round, including in light of the lack of any schedule of financial support, breakdown of what was said to be the appellant's essential needs, or any other documents that might demonstrate financial support, it was open to the judge to not be satisfied that the appellant had demonstrated that he was dependent on the sponsor prior to the appellant's March 2015 arrival in the UK. The judge was applying, in substance, the guidance in **Lim**, that if an appellant is in a position to support himself (in this case through his employment as a physiotherapist) there is no dependency, even if they are given support by the EEA citizen. If it was the appellant's claim that despite working as a physiotherapist in Albania prior to coming to the UK, he remained dependent on the sponsor for his essential needs, it was for the appellant to evidence how this was the case. There was no error in the judge attaching weight to the appellant's oral evidence that he had been working prior to coming to the UK.

21. The judge had accepted, on clear evidence, that the appellant has been both a dependent of the sponsor's and a member of his household since his arrival in the UK. Mr Stedman's submission that inference could be made on the basis of those findings as to the appellant's dependency prior to his arrival in the UK cannot be correct.

22. The judge noted, in contrast, it would appear, to the sufficiency of evidence founding the judge's findings at paragraph 29 in relation to present dependency, the lack of evidence to 'demonstrate any kind of financial support that the sponsor provided to his family in Albania'. Whilst Mr Stedman submitted that the judge failed to give appropriate weight to the passage of time or to give sufficient reasons for rejecting the oral evidence of claimed financial support, the judge's findings disclose that she considered both oral and documentary evidence in reaching her reasoned conclusions. It was incumbent on the appellant to identify how he claimed to have met the dependency requirements including prior to his arrival in the UK.

23. The judge took into consideration the claim that the 'proximity in relation to Italy and Albania would have allowed for numerous visits and transfers of funds' which relates to the evidence of the appellant and sponsor, including as set out in the witness statements that the sponsor visited and sent money in cash (page 20 Appellant's Bundle, paragraph 5). Ultimately, on the balance of probabilities, the judge was not satisfied that dependency by the appellant on the sponsor had been shown. In reaching

her findings the judge took into consideration the limited evidence to demonstrate financial support, including the lack of any schedule of financial support. That was not, in our view, to place an over-emphasis on documentary evidence to the exclusion of oral evidence.

24. As we have noted Mr Stedman, correctly in our view, withdrew the appellant's challenge to the judge's findings at paragraphs 31 and 32, on the necessity for the sponsor to have been an EEA national at the time of the claimed dependency/membership of the household. Although the judge granting permission in the First-tier Tribunal did not understand Judge Iqbal's approach to this issue, we are satisfied that the judge's approach was on all fours with that taken by this tribunal in **Moneke and others (EEA-OFFMs) Nigeria [2011] UKUT 341 (IAC)** (although technically obiter) and approved by the Court of Appeal in **Begum.** The Directive and the 2016 Regulations can only be engaged upon someone becoming an EEA citizen, by virtue of which they can then exercise free movement rights.

25. Although therefore Ground 2 and paragraphs 9-12 or Ground 1 are without merit, the issue of when the sponsor became an EEA citizen is relevant to the remainder of Ground 1 and the appellant's argument that the judge wrongly applied the **Dauhoo** definitions of EFMs. It was the judge's primary finding at paragraph 31, that as the sponsor became an EEA citizen in 2015 (it being the appellant's undisputed evidence before the First-tier Tribunal that this was January 2015; although we note that the sponsor's Italian passport was issued on 2 January 2015 there was no evidence before the First-tier as to any earlier point when his citizenship might have been granted) any claimed dependency and (at paragraph 32) membership of the same household, prior to January 2015, cannot therefore be considered.

26. Therefore the judge's findings on prior dependency, made at paragraph 31, can only relate to the approximate two month period from January 2015 when the appellant says the sponsor became an Italian citizen, until March 2015 when the appellant moved to the UK. The fact that this period is not specifically identified by the judge (nor was it by the parties before the First-tier Tribunal) is not material, as the judge made adequate holistic findings on the appellant's claimed dependency on the sponsor prior to the appellant moving to the UK.

27. As already noted, the judge highlighted the paucity of the evidence before her in relation to the sponsor's claimed financial support of his family in Albania. Whilst it cannot be precluded that prior dependency could potentially exist within such a short timeframe, it was for the appellant to demonstrate that this was the case. We note that although the evidence before the First-tier Tribunal considered by the judge included the claim that the proximity of Albania to Italy facilitated such support, it was the appellant's claim that in 2015 his brother (the sponsor) 'became an Italian citizen and then he migrated to the UK' with the appellant following in March 2015. Despite that change in the sponsor's circumstances, in that

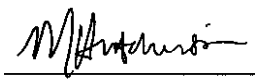
he migrated to the UK (and was no longer in such claimed close proximity to Albania) at some point during the approximate two month period when the issue of prior dependency can be considered, there was no evidence before the First-tier Tribunal, for example bank statements or other evidence showing transfers or other means of support from the UK.

28. It was open to the judge to not accept the witness statement and oral evidence of the appellant and the sponsor as to claimed dependency prior to the appellant's arrival in the UK in March 2015. It was for the appellant before the First-tier Tribunal to discharge the burden on him to demonstrate that claimed dependency from January to March 2015 on the sponsor and he failed to do so. No error of law is disclosed in the grounds before us.

DECISION

29. For the foregoing reasons, our decision is as follows:

The making of the previous decision did not involve the making of an error on a point of law and we do not set aside the decision but order that it shall stand.

Signed  Date: 28 November 2022

Deputy Upper Tribunal Judge Hutchinson