



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: EA/08926/2021
(UI-2022-001782)**

THE IMMIGRATION ACTS

**Heard at Bradford IAC
On the 14 November 2022**

**Decision & Reasons Promulgated
On the 28 November 2022**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

**MR MUHAMMAD SAAD MALIK
(ANONYMITY DIRECTION NOT MADE)**

Appellant

AND

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Ms Khan, instructed on behalf of the appellant by way of
Direct Access

For the Respondent: Mr Diwnycz, Senior Presenting Officer

DECISION AND REASONS

Introduction:

1. The appellant appeals with permission against the decision of the First-tier Tribunal (hereinafter referred to as the "FtTJ") who dismissed the appeal against the decision made to refuse the application for a family permit as a dependent extended family member of an EEA national in a decision promulgated on 29 December 2021. The appeal was heard as a paper hearing.
2. The FtTJ did not make an anonymity order and no application was made for such an order before the Upper Tribunal.

The background:

3. The background is set out in the evidence in the decision of the FtTJ and the documents. The appellant is a national of Pakistan who applied for a family permit as the extended family member of the sponsor (the appellant's Uncle), a national of Germany, resident in the United Kingdom on the 17 December 2020.
4. The application was refused by the Entry Clearance Officer (ECO) with reasons in the refusal dated 1 April 2021(served on 20 April 2021).
5. The ECO concluded that on the evidence submitted in support of the application, he was not satisfied that the appellant was dependent on the sponsor and therefore was not satisfied that he was an Extended Family Member in accordance with Regulation 8 (2) of the Immigration (EEA) Regulations 2016. The ECO also consider the circumstances of the sponsor and the evidence provided noted that he had not provided any current wage slips or a recent employer letter and was not satisfied that the sponsor was an EEA national exercising treaty rights in United Kingdom and that it would be expected as the bank statements show payments in from the current employer, an employer letter confirming employment and corresponding payslips no more than 6 weeks before the application was made.
6. The application for an EEA family permit was refused as the appellant could not meet all of the requirements of Regulation 12.
7. The Immigration (European Economic Area) Regulations 2016 have now been revoked by The Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 Schedule 1(1) paragraph 2(2) (December 31, 2020. Revocation, however, has effect subject to savings specified in The Citizens' Rights (Restrictions of Rights of Entry and Residence) (EU Exit) Regulations 2020, Regulation 2 and Schedule 1 and The Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and

Transitory Provisions) (EU Exit) Regulations 2020 Regulations ("The Transitional Provisions").

8. Schedule 3 paragraph 5 of the Transitional Provisions deals with existing appeal rights and appeals and as this appeal was extant prior to commencement day, and it is not argued by either party that the tribunal does not have jurisdiction to consider the appeal.
9. Prior to revocation Regulation 8 of the 2016 Regulations (as far as relevant) read 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 (1A),(2), (3), (4) or (5).

(1A) ...

(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.

10. The appellant appealed and the appeal came before the FtT on the 21 December 2021.
11. In a decision promulgated on 29 December 2021 the FtTJ dismissed his appeal having found that the appellant had not demonstrated on the balance of probabilities that the sponsor was a qualified person nor that the appellant was dependent on the sponsor.
12. Permission to appeal was issued and on 21 July 2022 permission was granted by UTJ O'Callaghan. The appeal came before the Upper Tribunal on the 14 November 2022. The appellant was represented by Ms Khan by way of Direct Access, and the Entry Clearance Officer ("ECO") by Mr Diwnycz, Senior Presenting Officer.
13. For the purposes of the hearing the evidence was contained in the documentation filed on the CE File, which included the bundle of documents on behalf of the appellant which had been originally filed before the FTT, the respondent's bundle including the decision letter, which had not been filed before the FtT as recognised by the FtTJ (see paragraph 7 of the FtTJ). There were also some documents held

on the respondent's electronic file relevant to the sponsor's employment which were not in any other bundles and Ms Khan did not have them either.

14. At the hearing Ms Khan and Mr Diwnycz informed the Tribunal that they were in agreement that the grounds were made out and that the decision of the FtTJ involved the making of an error on a point of law. Both advocates submitted that the decision should be set aside.
15. Ms Khan adopted her grounds of challenge and carefully went through those grounds by reference to the decision of the FtTJ. It is agreed by the advocates that when addressing the issue of whether the sponsor was exercising treaty rights that the FtTJ failed to take account of the evidence before the Tribunal or in the alternative failed to assess that evidence on the balance of probabilities. The sponsor had provided a letter from his employer dated 29 August 2019 stating that his employment began on 1 April 2019 and provided tax details in the letter. There were also copies of his payslips for May – December 2019. There was also a bank statement which evidenced a payment to the sponsor by his employers for £909.96 on 2 November 2020. Additional payslips covered dates in 2021. Notwithstanding what was stated in the decision letter, the FtTJ appeared to accept the documentary evidence as genuine but failed to make findings on the other material evidence and in particular the statement made to the ECO in an undated letter that he remained in the employment of his employers. No reference was made to that letter in the findings of fact. Furthermore the FtTJ accepted that the remittances were regular (see paragraph 13) but failed to take into account that evidence on the question of whether the sponsor was employed during the relevant period. The fact that he was able to send money was a relevant consideration to whether he was in employment.
16. Ms Khan referred the tribunal to paragraph 11 where the FtTJ referred to the payment in November 2020 and that he could not tell whether it was a one-off payment or whether the sponsor was for example out of work due to the covid restrictions. The parties agree that there was no evidence to support that finding and no assessment made of the nature of the sponsor's employment which was a delivery driver and there was no explanation as to what restrictions or regulations during the pandemic could prevent delivery drivers from working. In any event even if the sponsor had been furloughed or temporarily out of work as a jobseeker, that would still have been a relevant point to consider as to whether he was a qualified person.
17. Furthermore both parties referred to evidence of payslips from 2020 (September – December 2020). There were also payslips from January 2021 – December 2021. The FtTJ referred to payslips for May to December 2019 and April to August 2021. In the bundle there was an additional payslip showing April 2019. Mr Diwnycz had additional payslips relating to September to December 2020 and other dates in

2021. Neither advocate were able to ascertain how and when those documents had been filed, but Mr Diwnycz submitted that he had them on his file and they must have been provided by or on behalf of the appellant and it was not clear if they had been seen by the FtTJ and this was relevant evidence that went to the issue of whether the sponsor was exercising treaty rights.

18. Dealing with ground 2 and the issue of dependency it was accepted on behalf of the respondent that there had been evidence before the FtTJ which had not been taken into account when assessing whether the appellant was dependent upon the sponsor and in particular the concluding assessment at paragraph 16 that there were gaps in the evidence concerning the material aspects of the appellant's daily expenditure and costs. There was no dispute that the sponsor had been providing financial remittances and the FtTJ referred to the acceptance that regular payments were made by the appellant's sponsor to the appellant (see paragraph 13). However the FtTJ was not satisfied that the appellant sponsor was meeting the costs of the appellant's essential needs.
19. The appellant had provided a letter dated 31/9/2021 setting out his family circumstances including his educational needs. It further confirmed that he had never been employed to date and that all his financial needs, living expenses travel, grocery and utility bills were covered by a monthly allowance provided by his uncle. Reference is made some bills and receipts as attached. Whilst the FtTJ did refer to that letter/statement at paragraph 12, as Ms Khan submits he did not take it into account in the assessment at paragraph 13. The parties also identified that there was a monthly income and expenditure schedule in the bundle evidencing university fees, electrical bills groceries providing a total used for his essential needs. That document had not been taken into account in the assessment.
20. A further ancillary point is raised in the grounds which relates to paragraph 15. In that paragraph the FtTJ refers to the position of the sponsor and that he stated he had sent up to £200 a month to the appellant. Whilst noting that there was no indication of how much the sponsor needed for his own rent and living expenses, he concluded that it was extraordinary that he might be managing on as little as £700 per month in the UK. However that was not a point raised in the decision letter and therefore it was not one upon which the sponsor had any opportunity to address.
21. In conclusion, there was evidence available that was not taken into account in assessing the 2 material issues of firstly whether the sponsor was exercising treaty rights and secondly whether the appellant was dependent upon the sponsor and the issue of whether the sponsor had provided for the appellant's essential needs, and not limited purely to his education, although paying for education may be an essential need. For those reasons, it is considered on behalf of the

respondent that the grounds are made out and that the decision involved the making of an error on a point of law and should be set aside.

22. As to the remaking of the appeal. Ms Khan submitted that as the appeal requires further fact-finding that the appropriate forum is the FtT as the factual assessment requires consideration of all the relevant documents. Ms Khan indicated that both the appellant and the sponsor wished to give evidence and neither the sponsor or the appellant were available to give evidence at the hearing today. She stated that steps would be required for the appellant to give oral evidence remotely as set out in the grant of permission by UTJ O'Callaghan.
23. Therefore having taken those issues into account the views and in light of the practice statement, I am satisfied that the appeal falls within paragraph 7.2 of the practice statement, and I therefore remit the appeal to the First-tier Tribunal for that hearing to take place as Ms Khan has submitted.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law, the decision is set aside and remitted to the FtT for a hearing

Signed Upper Tribunal Judge Reeds

Dated: 14 November 2022