Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: EA/01201/2019**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On the 12th October 2022	**On the 30 January 2023**

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN
DEPURTY UPPER TRIBUNAL JUDGE SYMES

Between

HAMID HUSSAIN
(ANONYMITY ORDER NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Lee
For the Respondent: Mr Whitwell

DECISION AND REASONS

1. This is the appeal of Hamid Hussain, a citizen of Bangladesh born 8 March 1984, against the decision of the First-tier Tribunal of 26 September 2019, itself dismissing his appeal against the Respondent's refusal of his application for a residence card as an Extended Family Member under the Immigration (European Economic Area) Regulations 2016.

2. The Appellant was born 8 March 1984. He entered the UK on 17 January 2010 with entry clearance as a student. A series of applications as a

dependent of his EEA Sponsor, his uncle Amjad Zia Hussain (“Mr Hussain”), were refused, on 19 May 2015, 31 August 2018, and 20 February 2019, the latter giving rise to this appeal. The first application’s refusal led to an appeal to the First-tier Tribunal which was dismissed by Judge Parkes in a decision of 30 January 2018. Materially for present purposes, Judge Parkes found that there was no historic cohabitation before the Appellant arrived in the UK and so only a case on prior dependency could succeed. But the evidence put forward did not show that any remittances were essential for the support of the individuals concerned, and absent clear evidence of the overall financial position of the other members of the family unit in Pakistan (including any employment), this issue could not be determined in the Appellant's favour. Details of the family unit’s circumstances were important because the Appellant had three adult siblings, and his uncle in Pakistan Shah Hussain Kazmi had five adult sisters, living with them at times over the relevant period.

3. The case put on the Appellant's application leading to the present refusal was that he was financially dependent on the EEA Sponsor Mr Hussain, who had paid £3,000 to the University of Wolverhampton on his behalf shortly before he arrived in the UK, and previously assisted with his maintenance needs via a series of money transfers from MNA Enterprises. The Appellant lived with Mr Hussain's brother, Mr Kazmi, who was head of the family abroad, and had remitted sums to him, as shown by a series of credit advices from Habib Bank Ltd in 2002, 2003 and 2005.

4. The Respondent refused the application because, whilst the Appellant’s relationship to his Sponsor Mr Hussain was not questioned, it was not accepted that he had established his dependency on, or residence with, Mr Hussain before travelling to the UK, nor after his arrival here. In particular

   (a) Mr Hussain’s payment of the Appellant's student fees were made on 7 August 2010, ie after the Appellant's arrival in the UK, and thus did not assist in establishing prior dependency.

   (b) The Appellant entered the UK as a student, identifying his Sponsor as Riaz Ahmed, rather than his present EEA Sponsor Mr Hussain.

   (c) Such remittances as were evidenced did not show a continuous period of dependency during the Appellant's residence in Pakistan, and payments to Mr Kazmi were not established as made to his asserted uncle absent clear evidence of a familial link.

   (d) There was no evidence that the Appellant had cohabited with Mr Hussain in Pakistan or Holland (the latter’s place of residence before moving to the UK), the identity cards proffered as evidence of cohabitation in Pakistan having been issued years after both Appellant and Mr Hussain had moved to the UK.

5. The First-tier Tribunal (Judge Bart-Stewart) dismissed the Appellant's appeal, citing and relying partly on the findings on the previous appeal, and adding

   (a) The credit advices provided from Habib Bank did not advance the case, and nor did an affidavit from the uncle and the Appellant's grandmother in 2015 declaring that the latter owned the home where the Appellant resided;

   (b) There was no independent supporting evidence of the essential living needs of the household in Pakistan, and details given, such as the assertion that the uncle there had never worked, were surprising given the professional occupations of other close relatives: the Appellant's father's death certificate referred to him as a doctor, and Mr Hussain was an engineer;

   (c) A handwritten document said to comprise translations of accounts from the diary of the uncle in Pakistan did not appear to be contemporaneous with the narrated expenditure, and mainly referenced payments to the Appellant which was surprising given the many other family members (13 in all) ostensibly needing support from Mr Hussain too, and was difficult to follow because of the translation's presentation of balance, debit and credit columns;

   (d) There was no explanation for Mr Hussain not being named as the Appellant's Sponsor in his student application in the UK;

   (e) The evidence re the Appellant's circumstances in the UK was inconsistent, given he had referred to a second bank account not evidenced in the documents, failed to explain payments he had made to Mr Hussain, and appeared to have worked in Asda at one time; on the other hand, taking the evidence of addresses at face value, he seemed to have resided with Mr Hussain in the UK for a significant period.

6. Rather discursive grounds of appeal of 10 October 2019 contended, essentially, that the First-tier Tribunal had erred in law

   (a) In referring to remittances of "relatively small amounts" which took no account of the exchange rate at the relevant time;

   (b) By a perverse lack of reasoning, for example stating that the credit advices from Habib Bank "do not take matters further" and baldly stating that the diary entries did not appear contemporaneous, and at times making unintelligible criticisms;

   (c) Overlooking evidence in chief led as to the Appellant's family's circumstances abroad, which had elicited responses that the family received 500,000 PKRs from Mr Hussain, that Mr Kazmi did not work, and that there was no other source of support; and that the 500,000

PKRs transferred just prior to his travel to the UK was for the Appellant specifically;

(d) Failing to take account of the fact that the diary excerpt provided from Uncle Kazmi was merely an excerpt focussing principally on expenditure associated with the Appellant, that being the focus of the appeal – the original diary was available at the hearing below for the FTT's inspection if required, and it was unsurprising that significant sums were spent on the Appellant, for example over the period when he was preparing for and travelled to the UK – it was irrational to attach little weight to this evidence particularly when it was unchallenged in cross examination by the Respondent;

(e) Concentrating unduly on historic dependency whereas the true focus should have been on circumstances surrounding the time when the asserted dependent came to the UK, as per *KG (Sri Lanka)* [2008] EWCA Civ 13, this being a material error of law given the evidence of significant money transfers at September 2008, May and November 2009, as well as the payment of the University fees;

(f) Overlooking evidence of present dependency.

7. The First-tier Tribunal granted permission to appeal, without any limitation on the available grounds, on 28 February 2020.

8. The appeal's progression then took a typical though unfortunate turn, in that it was determined as per the Presidential Guidance Note No.1 2020 addressing *Arrangements during the Covid-19 Pandemic*, by which the Upper Tribunal would consider whether in all the circumstances it was appropriate to decide the questions of whether the First-tier Tribunal's decision involved the making of an error on a point of law; and, if so, whether that decision should be set aside, without a hearing, subject to the written submissions of the parties.

9. The Upper Tribunal's Deputy President issued standard directions in line with the Presidential Guidance Note on 18 March 2020, and on 18 May 2020 Judge Hanson issued a decision without a hearing, having had regard to the parties' written submissions, finding there to be no material error of law. Judge Hanson refused permission to appeal to the Court of Appeal on 3 August 2020.

10. The Administrative Court in *Joint Council for the Welfare of Immigrants v The President of the Upper Tribunal (Immigration and Asylum Chamber)* [2020] EWHC 3103 (Admin) found the procedure endorsed by the Presidential Guidance Note and here adopted to be unlawful, to the extent that it indicated that appeals should normally be decided on the papers rather than at remote hearings during Covid, contrary to the basic common law rules informing the overriding objective of justly and fairly disposing of appeals. Whether or not individual decisions were unlawful would depend on the facts of the case.

11. The *JCWI* decision led to an appeal against Judge Hanson's mode of determining the absence of an error of law, Dingemans LJ granting permission to appeal on 5 October 2021, and on 11 February 2022 the Court of Appeal issued an Order remitting the appeal to the Upper Tribunal to be determined afresh.

12. Whilst several sets of written submissions were provided earlier in this appeal's history, we need not dwell on them, as before us Mr Lee correctly concentrated on developing the original grounds of appeal.

13. Mr Lee advanced the Appellant's case with a precision and concision both lacking from his predecessors' earlier drafting. In essence he argued that the FTT's decision was wrong in law, relying on three arguments distilled from the assembly of written pleadings:

    (a) The decision was incoherent to a degree that rendered it incomprehensible;

    (b) Key evidence was overlooked or rejected for legally inadequate reasons;

    (c) There was undue concentration on historic dependency given the manifest uplift in expenditure by the EEA Sponsor Mr Hussain on the Appellant immediately before the latter's journey to the UK.

14. We considered it unnecessary to hear from Mr Whitwell and gave our decision, though not its reasons, at the hearing. We now provide those reasons, addressing Mr Lee's submissions alongside them.

Decision and reasons

15. In *Dauhoo* [2012] UKUT 79 (IAC) the Upper Tribunal explained that "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."

16. Dependency is a question of fact: the Tribunal in *Reyes* [2013] UKUT 314 stated at [19] that

> "First, the test of dependency is a purely factual test. Second, the Court general envisages 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. 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. [There is a] need for a wide-ranging fact-specific approach …"

17. The UKVI Guidance to which the Tribunal's attention is often drawn *Free Movement Rights: direct family members of European Economic Area (EEA) nationals* (Version 7.0; February 2019) (articulated by reference to direct family members but relevant to dependency generally) sets out:

> "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 received a pension which covers half of their essential needs and money from their EEA national sponsor which covers the other half … Essential needs include accommodation, utilities and food. Dependency will normally be shown by financial documents that show money being sent by the sponsor to the applicant."

18. The Appellant's case (as summarised, eg grounds of appeal §18, and as maintained before us by Mr Lee), focussed on the third of those possibilities: prior dependency and present membership of a household.

19. Given the First-tier Tribunal effectively accepted the latter proposition as established, this appeal now turns wholly on whether its approach to the anterior question of "prior dependency" was lawful.

20. Some reference to the evidence before the First-tier Tribunal is useful. The Appellant's witness statement sets out that after his father's death in 1995 his mother found it very difficult to survive, as might be expected for a young widow with children in Pakistan; they lived with their paternal grandparents for some time, but it became increasingly financially and emotionally difficult for his mother to survive with her young family of four children, the youngest then aged two. They moved to the Appellant's maternal grandparents' house, where Mr Hussain then resided. There were official documents supplied to confirm their cohabitation over that period. There was no other means of survival than to rely on the Sponsor's remittances. These transfers were completed long ago and nobody had thought to keep records.

21. A declaration from Mr Kazmi of August 2015 records that he is the Appellant's uncle; the Appellant is his sister's son whose husband had passed away, since when he had become his guardian, supporting him in every way after his father's death. He had received full financial support from Mr Hussain to raise the Appellant, his sister and nieces: Mr Kazmi was jobless and financially dependent on Mr Hussain.

22. A series of entries (described as emanating from Mr Kazmi's diary, though more commensurate with a set of household accounts) records numerous individual remittances: one, labelled "Hamid A/C", records payments from March 2005 for boarding and semester fees at Hazara University, then from January to June 2007, then from January to March 2008 (including a computer and the legal costs of an appeal), and, undated, for pocket money, trouser and shirt, board and lodging.

23. Additional evidence has been (rather informally) adduced, post-dating the First-tier Tribunal's decision, from the Appellant's solicitor, Urvi Shah, at Vision Solicitors, which states that the original credit advices from Habib Bank were produced at the hearing below. It also sets out the oral evidence said to have been given below.

24. The FTT's decision is at times unclear. It is not always apparent when Judge Bart-Stewart is endorsing, rather than simply rehearsing, the conclusions of Judge Parkes. It appears to not have been proof-read; there are various slips and grammatical infelicities, the syntactic nadir being at §38-39:

> "There are now 4 credit advice from Habib Bank. They are legible and do not take matters further.
>
> The appellant complains that receipts were not characters it was not known that they would be needed. However the burden of proof is on the appellant."

25. This is undoubtedly unimpressive: one suspects that "legible" was intended to be "illegible", and the word "characters" strips the sentence in which it appears of rational meaning. But imperfections of this kind are not necessarily fatal to a decision, see e.g. Moses LJ in *Detamu* [2006] EWCA Civ 604: "It has to be said that the decision of the adjudicator was slipshod. Words were missing in his decision; parts were incoherent. It seems clear to me that he had not proof read the decision. In decisions as important as these to the future lives of those seeking refuge here, that does not inspire confidence; but it is not itself an error of law."

26. At our instigation Mr Lee took us to the underlying material to which these passages relate. A series of credit receipts from Habib Bank Ltd allegedly record the crediting of an account (with the undermentioned amount being the equivalent foreign currency less bank charges), each bearing a manuscript note which is only partially legible, one of the four bears a date stamp which is from the 21st century but which cannot be discerned with any further particularity, and whilst there is space for text to be added to gloss the entries "From …" and "Rupees", any such text is too faint to read. In the light of our review of that material, there is no real doubt in our minds that Judge Bart-Stewart intended to say that those credit advices are illegible and hence do not take matters further. We note Mr Shah's statement made after the hearing below, to the effect that he believed Judge Bart-Stewart considered this material *legible* and that the originals were available for the Tribunal's inspection. Whilst post-decision

evidence is not generally admissible in the Upper Tribunal, material of this nature is potentially admissible before us as going to the fairness of the proceedings. However, no legible copies of the advices were made available to us and his statement thus takes matters no further.

27. The essential reason for the appeal's failure before both Judge Parkes and Judge Bart-Stewart was the lack of reliable evidence as to the circumstances of the family abroad. This was central to the viability of the case on dependency. European Union law requires that dependency arises in the context of *essential* living needs. For example, the receipts summarised above refer to matters such as a computer, legal costs, pocket money, clothing, board and lodging: yet the vague way in which the Appellant's case has been consistently advanced leaves it unclear as to whether that support was truly *essential* in the light of the family's overall circumstances. As Judge Parkes originally noted, at material times the Appellant cohabited not only with Uncle Kazmi but additionally with three adult siblings, and as Judge Bart-Stewart observed, both the Appellant's father and Mr Hussain have pursued professions. Given that context, it cannot simply be assumed, absent cogent evidence, that other relatives lacked qualifications sufficient for them to have gained employment which would have empowered them to provide for the family unit themselves. Whether or not they did so is unclear. Whilst the European Union concept of dependency focusses on the reality rather than the necessity of remittances, it remains the case that there is real doubt as to the earnings and income of the family in Pakistan. It was not unreasonable for the Tribunal below to conclude that the lack of evidence as to the finances of the numerous other family members in Pakistan, the Appellant aside, was a real concern. These considerations were a reasonable basis for Judge Bart-Stewart to conclude that the Appellant had not established that his *essential* living needs (as supposed to *some* living needs) were being met by Mr Hussain's remittances.

28. There is the further point taken by Judge Bart-Stewart that it seems surprising that Mr Hussain was not named in the Appellant's student visa application as a source of financial support. The obvious inference from this omission is that the Appellant was in truth receiving significant financial support from the then named sponsor (Riaz Ahmed) at the time of the student application, which casts doubt on the extent to which Mr Hussain provided the Appellant's *essential* living needs. The issue is not that this is in principle an unanswerable concern; but rather that it was, in fact, not answered by any evidence on the appeal.

29. Mr Lee made the point that the lack of detail of the family's circumstances abroad had not been expressly raised in the refusal letter against which the present appeal was brought. It is true that in adversarial immigration proceedings the refusal letter generally represents the case which an Appellant must meet. However, prior appellate decisions are also important, not least because of the principle in *Devaseelan* (*D (Tamil*) [2002] UKIAT 00702) that a prior judicial determination on the issues in the appeal represents the starting point for the subsequent appeal,

representing the authoritative historic resolution of the case, albeit that judges later required to determine the same issues are entitled to take account of subsequent evidence where there is good reason for it not having been adduced sooner. It can hardly be said that the Appellant was taken unaware by these concerns as to his extended family's financial circumstances, given it was a significant reason why his appeal had previously failed. In fact the failure to clearly address the point at the latest appeal makes Judge Bart-Stewart's concerns all the more weighty.

30. As to his second argument, Mr Lee would have it that material evidence was overlooked, in particular the Appellant's oral evidence, and the affidavit evidence, attesting to the Appellant's uncle's employment status. However, this amounts to no more than an unexplained assertion. Even taking it at its highest, it does not address the circumstances of the Appellant's other family members, particularly his siblings, and any contribution that they might have made to his essential living needs. Mr Lee is right to say that the First-tier Tribunal's finding that the diary entries did not appear contemporaneous is inscrutable: both diaries and book-keeping records are generally contemporaneous and there is no overt evidence to the contrary here. But that is a relatively minor point and does not touch on this more central concern.

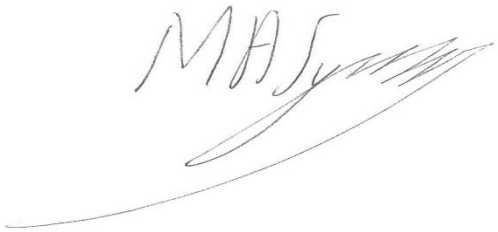
31. As to the third argument maintained before us, true it is that *KG (Sri Lanka)* encourages a focus on dependency between the EEA Sponsor and their third country national relative in the period immediately before their joint residence in the UK. However, wherever one directs one's focus, the evidence remains blurred as to the extent to which the Appellant's essential living needs were being met by Mr Hussain at the relevant time. Whilst education expenses can be relevant to essential living needs, as per Birss LJ in *Shwainder Singh* [2022] EWCA Civ 1054, it remains unclear as to what other sources of support he then had, and the role of Riaz Ahmed, his named student Sponsor, in his overall support is particularly important, given that it raises doubts as to the relative contribution of Mr Hussain at that critical juncture.

32. In conclusion, we find that there is no material error of law in the First-tier Tribunal's decision.

Decision:

1. The making of the decision of the First-tier Tribunal involved no material error of law.

2. We uphold the decision of the First-tier Tribunal dismissing the appeal.



Signed:

Deputy Upper Tribunal Judge Symes Date: 16th November 2022