IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2021-001582
First-tier Tribunal No:
EA/02151/2021

THE IMMIGRATION ACTS

Heard at Field House IAC
On the 3 May 2022

Decision & Reasons Promulgated
On the 02 February 2023

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

RAKIB PATWARY
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr T Melvin (Senior Home Office Presenting Officer)
For the Respondent: Mr P Richardson (Instructed by Law Valley Solicitors)

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of a judge of the First-tier Tribunal who in a decision promulgated on 30 November 2021 allowed the appeal of Mr Patwary against the Secretary of State's decision of 20 January 2021 refusing his application for an EEA family permit to join his brother, Mr Ibrahim Patwary, in the United

Kingdom. I shall refer hereafter to the Secretary of State as the respondent as she was before the judge and Mr Patwary as the appellant, as he was before the judge.

2. The refusal was on the basis that although the appellant had provided 16 money transfer receipts between June 2015 and December 2020, these in isolation were not sufficient to demonstrate dependency in the absence of evidence of his essential needs or his financial documents to demonstrate his circumstances.

3. The Entry Clearance Officer also had concerns, given that the sponsor was in receipt of working and child tax credits, leading her to doubt that the sponsor would be able to support any family which might already be reliant on the sponsor as well as the appellant. The Entry Clearance Officer was therefore not satisfied that the appellant was a family member of an EEA national and that he could meet the requirements of regulation 12 of the Immigration (European Economic Area) Regulations 2016.

4. The judge noted the sponsor's evidence that he earned £920 per month and was also in receipt of working and child tax credit and other benefits because he was not working full time. He lived with his wife and four children in rented accommodation which cost him £900 per month.

5. The judge placed reliance on Kempf v Staatssecretaris Van Justitie [1971] CMLR 764 which it was held that as long as work was effective and genuine as opposed to marginal and ancillary, the person was a worker for community purposes and entitled to a residence permit even if he was also receiving public funds.

6. The judge noted that the respondent did not dispute that the sponsor was working and was a qualified person and therefore the fact that he was in receipt of benefits because of a low income was irrelevant under the EEA Regulations. The judge was satisfied that the sponsor was able to support the appellant.

7. She went on to consider the issue of dependency and concluded that all that was needed to be shown was dependency as evidenced by money transfers or bank statements as clarified in Reyes v Migrationsverket [2014] EU ECJ C-423-12.

8. There was no specific time during which the appellant was required to have been dependent upon the sponsor other than "a significant period". There was no requirement for a national court to consider the reasons for the dependence on a Union citizen, in order to follow the principle that the Citizens Directive should be broadly construed.

9. The judge concluded that she was satisfied that the sponsor had been sending money to the appellant for a significant period of time for him to be able to meet his essential needs, which for the avoidance of doubt she found included his education. In line with what had been said in Ihemedu

[2011] UKUT 340 (IAC), because the issue of an EEA family permit to an extended family member was a matter of discretion for the respondent, all she could do was to allow the appeal and leave the exercise of the discretion to the respondent under Regulation 12(4) and (5).

10. The Secretary of State sought and was granted permission on the basis that the decision was inadequately reasoned in that the judge had not resolved adequately whether the appellant would be maintained without recourse to public funds and it was not sustainable for him to support the appellant in addition, bearing in mind that his family comprised six people living in rented accommodation and given that the cost of supporting the appellant in the United Kingdom would be significantly higher.

11. The appellant put in a Rule 24 response.

12. In his submissions, Mr Melvin argued that the judge's decision lacked reasons, given that the sponsor was in the United Kingdom with his wife and four children and enjoyed substantial public benefits and only worked part time. As had been pointed out in the grant of permission, the authority of Kempf was on a different point and it was said to be arguable that the judgment related to the effect of claiming public funds on whether an EEA national was considered to be a worker and not whether the appellant would be able to continue to be maintained by the sponsor and would therefore be dependant on him. Reliance was placed on that and on the grounds.

13. The consideration at paragraph 21 was wholly inadequate. The issue was not only one of assessing the overall circumstances and clearly the judge had effectively dismissed this. The £100 sent was found to meet the appellant's essential needs. The decision was insufficiently reasoned on the main point of fact but clearly the sponsor could not maintain the appellant from his own resources.

14. In his submissions Mr Richardson relied upon and developed the points made in the Rule 24 response. It had not been shown what provision created an obligation on the decisionmaker to assess whether the applicant for a family permit was not allowed to rely upon the use of public funds. There was no such provision. For example, it was not a requirement of regulation 12(4) and it could have been included but it was not. The closest was the use of the word "appropriate" in regulation 12(4)(c) but that referred to the extensive examination of personal circumstances, and it could not be an error by the judge to fail to factor into that examination this point. The judge was limited as it was clear in Ihemedu in that it was for the Secretary of State to conduct the examination.

15. The Secretary of State did not expressly rely on any other provision. For example regulation 13(3) dealt with people who had come to the United Kingdom and become a burden on the social welfare system. It was to do with the initial right of residence after a person had arrived in the United

Kingdom. It was not forward looking. It was not a requirement of the Rules.

16. In his reply Mr Melvin argued that the Entry Clearance Officer had exercised the discretion. The judge had remitted it back for discretion to be exercised and that was the issue for the judge to decide and she had not done so. It would be irrational to ignore the guidance in an authority such as Moneke [2011] UKUT 430 (IAC).

17. By way of reply, Mr Richardson made the point that the Entry Clearance Officer had not done so and found the appellant was not an extended family member as he was not a dependant.

18. When one comes to consider regulation 12 and regulation 8, the former of which provides for the issue of a family permit and the latter provides a definition of an extended family member, neither includes a requirement for an applicant to show that they can be supported by their EEA national sponsor and it does not appear that such financial considerations are a relevant factor in the extensive examination of personal circumstances stage referred to in regulation 8(8). Though the respondent referred in the Grounds of Appeal to regulation 13(3), that relates to the initial right of residence and not to the issue of family permits ,and the specific provision in 13(3) relates to individuals exercising that right who become a burden on public funds. It is, as Mr Richardson argued, not a forward-looking provision but one which deals with individuals who through becoming such a burden lose their right to reside. Regulation 12(4)(c) is properly, I consider, to be regarded as referring to the extensive examination stage which has not yet been reached as the judge noted in her reference to Ihemedu.

19. The absence of any provision requiring an applicant to show that any sponsorship would be sustainable or that he could be maintained and accommodated without recourse to public funds is of real significance in this case. I have not been taken to any case authority on the point and I conclude that there is nothing in the law to show that a sponsor is precluded from relying in part on benefits to show that an appellant is dependent on them and the benefit element of the sponsor's income does not fall to be discounted. To the extent that Kempf is not on the specific point, its reasoning can in my view be read across to apply to the situation in this case, as the judge anticipated.

20. Accordingly, I find no error of law in the judge's decision and therefore her conclusion that the appellant's appeal against the Secretary of State's decision is to be allowed is maintained.

Notice of Decision

The appellant's appeal against the Secretary of State's decision is allowed.

No anonymity direction is made.

Signed Date 31 January 2023

Upper Tribunal Judge Allen