



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM CHAMBER**

Case No: UI-2022-005620  
UI-2022-005619  
First-tier Tribunal No:  
EA/10707/2021  
EA/01920/2021

**THE IMMIGRATION ACTS**

Decision & Reasons Issued:  
On the 03 April 2023

Before

**UPPER TRIBUNAL JUDGE KAMARA**  
**DEPUTY UPPER TRIBUNAL JUDGE BEN KEITH**

Between

**MUNAWAR BEGUM**  
**JUNAID AHMED**  
**(NO ANONYMITY ORDER MADE)**

Appellant

and

**THE ENTRY CLEARANCE OFFICER**

Respondent

**Representation:**

For the Appellant: Mr S Hingora, counsel instructed by Adam Bernard Solicitors  
For the Respondent: Mr S Whitfield, Senior Home Office Presenting Officer

**Heard at Field House on 10 March 2023**

**DECISION AND REASONS**

Introduction

1. This is the appellant's appeal against the decision of First-tier Tribunal Judge Moon promulgated on 16 December 2021.
2. On 26 October 2022, First-tier Tribunal Judge Elliott extended time for appealing and granted permission to appeal.

Anonymity

3. No anonymity direction was made previously, and there is no apparent reason for one now.

## Factual Background

4. The appellants are the mother-in-law and adult stepson of the sponsor, Mrs Joanna Orchel, who is a Polish national residing and exercising Treaty rights in the United Kingdom. Mrs Orchel is married to Muhammed Rafiq who is the first appellant's son and the second appellant's father.
5. The appellants applied for EEA Family Permits as the dependent family members of the sponsor, with reference to the Immigration (European Economic Area) Regulations 2016. Those applications were refused by way of decisions dated 29 January 2021. The Entry Clearance Officer (ECO) commented that the sponsor was earning around £700 per month and her income was topped up with Universal Credit of around £1,171.62 per month. The ECO was not therefore satisfied that it was sustainable for the sponsor to financially support the appellants along with her own family in the United Kingdom. The respondent considered there to be a risk that the appellants may become a burden on public funds in the United Kingdom.

## The decision of the First-tier Tribunal

6. At the hearing before the First-tier Tribunal, the sponsor and her husband gave evidence remotely. The judge also heard submissions on behalf of the appellants and the ECO. Evidence was produced which indicated that Mrs Orchel was earning approximately £32,000 per annum by the time of the hearing. Evidence was also provided of the appellants' essential needs which the judge accepted. The appeal was dismissed because there were no 'obvious transfers' to the appellants, apart from one possible transaction. The judge was also concerned by a series of credits into the second appellant's account which were in excess of his monthly expenses of around 66,400 PKR (£280 GBP). It was not accepted that the appellants had demonstrated that they needed the support of the sponsor to meet their essential living costs.

## The grounds of appeal

7. There are three grounds of appeal. Firstly, there was procedural unfairness because the judge did not put the concerns as to the bank credits to the representatives of the appellants and had they been put on notice, an explanation would have been provided. Secondly, there was a failure to take into account relevant evidence in the form of money transfers dating from 2009 onwards as the judge had focused on the period between 2020 to 2021. Lastly, the judge failed to resolve a conflict of fact or law, namely the issue of sustainability of support which was raised in the decision notices.
8. Permission to appeal was granted on the basis sought, with the judge granting permission making the following remarks.

The Judge's determination correctly sets out the law in relation to the issue of dependency. It is clear that the Judge was concerned by unaccounted for transfers to the first appellant's bank account in deciding whether the appellants were dependent on their sponsor. However, in failing to seek an explanation from the appellants about those, when they had not been raised in cross-examination by the respondent is arguably unfair.

9. The respondent filed a Rule 24 response dated 18 November 2022. In which, the appeal was opposed, with the following comments being made.
4. *It is submitted that the grounds are seeking to re-argue the case.*
  5. *The grounds do not provide any evidence to support the assertion that the issue of bank transactions where(sic) not put to the sponsor or that the Judge highlighted the concern at any part of the proceedings*
  6. *The issue of sustainability is concluded in paragraph 38 because of the lack of explanation of the funds in the bank statement.*

#### The hearing

10. This was a hybrid hearing, with Mr Hingora appearing remotely. Mr Hingora had not seen the Rule 24 response and the relevant paragraphs were read to him. Thereafter we heard succinct submissions from both representatives which we have taken into account in reaching our conclusions
11. At the end of the hearing we announced that we were satisfied that the matters identified in the first ground amounted a material error of law and we set aside the decision of the First-tier Tribunal. We accepted Mr Hingora's invitation to remit the matter to the First-tier Tribunal for a de novo hearing as the appellants had not had a fair hearing.

#### Decision on error of law

12. While there is merit in grounds two and three, this decision focuses on the first ground.
13. The judge fell into procedural error in that, post-hearing, an issue was taken with the transactions shown in the first appellant's bank statements [34-35]. The evidence of the appellants was that they were wholly reliant on financial support from the sponsor and her husband for their essential living needs. The judge's consideration of the bank statements directly led to a finding that the 'unexplained credits' meant that the appellants had not demonstrated that they needed the support of the sponsor [38].
14. We have considered the respondent's submission that there is no witness statement from the appellants' counsel who appeared before the First-tier Tribunal, which addresses whether the judge raised these concerns during the hearing. Nonetheless, we consider it obvious from the decision and reasons itself, that the judge did not raise bring up the issue of the transactions. We say this because, at [14-24], the judge carefully sets out the evidence of the sponsors in detail, as well as the submissions made by the representatives. Yet there is a conspicuous absence of a record of any explanation being sought or provided by the sponsors on the topic of the transactions. We conclude from these passages that the sponsors were not asked any questions regarding the first appellant's bank statements. There is also no reference to this issue in the submissions of either representative. In addition, the judge mentions more than once at [38] that the credits were 'unexplained.' The judge says the following, 'it may be that some of these unexplained credits were paid by the sponsor or Mr Rafiq but it is not for the Tribunal to speculate or assume that this is the case.' Had the judge asked for an explanation, there would have been no need for inclusion of the preceding sentence in the decision.

15. We also note that a substantial bundle of evidence was filed with the Upper Tribunal in advance of the error of law hearing which we understand goes to the points taken by the judge. In the grounds it is said that the appellants would be able to put forward an explanation for the credits.
16. Lastly, while the judge rightly states that the burden of proof is on the appellants, it is the case that the sole issue raised by the ECO was the sustainability of support from the sponsor owing to her previously modest income which the appellants were prepared to and did address. For the foregoing reasons, we conclude that there was procedural unfairness in the First-tier Tribunal failing to put the appellants on notice regarding the concerns as to the transactions and this amounts to a material error which renders the decision unsafe.
17. As indicated above, we canvassed the views of the parties as to the venue of any remaking should the panel detect a material error of law and have taken them into account. Applying *AEB* [2022] EWCA Civ 1512 and *Begum* (Remaking or remittal) Bangladesh [2023] UKUT 00046 (IAC), the panel carefully considered whether to retain the matter for remaking in the Upper Tribunal, in line with the general principle set out in statement 7 of the Senior President's Practice Statements. We took into consideration the history of this case, the nature and extent of the findings to be made as well as our conclusion that the nature of the error of law in this case meant that the appellants were deprived of a fair hearing and of the opportunity for their case to be put. We consider that it would be unfair for either party to be unable to avail themselves of the two-tier decision-making process and we therefore remit the appeal to the First-tier Tribunal.

## **Decision**

**The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.**

**The decision of the First-tier Tribunal is set aside.**

**The appeal is remitted, de novo, to the First-tier Tribunal to be reheard by any judge except First-tier Tribunal Judge Moon.**

T Kamara

Judge of the Upper Tribunal  
Immigration and Asylum Chamber

**13 March 2023**