



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Numbers:
UI-2022-001312, UI-2022-001313
UI-2022-001314, UI-2022-001315
UI-2022-001316, UI-2022-001317

On appeal from:
EA/06763/2021, EA/06764/2021
EA/06765/2021, EA/06769/2021
EA/06770/2021, EA/06773/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 17 August 2023

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

ANJUM HAQUE
SALMA ANJUM
MAHNOOR ANJUM
MOIZ ANJUM
MUHAMMAD MOAZZAM
MUNTAHA ANJUM
(NO ANONYMITY ORDER MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr Kashif Ahmad of Counsel, appearing by Direct Access
For the Respondent: Ms Amrika Nolan, a Senior Home Office Presenting Officer

Heard at Field House on 7 August 2023

DECISION AND REASONS

Introduction

1. The appellants challenge the decision of the First-tier Tribunal dismissing their appeals against the respondent's decision on 26 March 2021 to refuse them an EEA family permit as the extended family members of the principal appellant's uncle, a naturalised. They are citizens of Pakistan, a husband and wife and their four children, who range between 9 and 18 years old.
2. This appeal turns on the proper application of Regulation 12 of the Immigration (European Economic Area) Regulations 2016 (as saved) and the right of these appellants to a Family Permit as the extended family members of the sponsor.
3. For the reasons set out in this decision, I have come to the conclusion that the First-tier Judge made no material error of law in the decision and the appeals fall to be dismissed.

Procedural matters

4. **Mode of hearing.** The hearing today took place face to face. I am satisfied that the hearing was completed fairly, with the cooperation of both representatives.
5. In the days preceding, and on the morning of the hearing, Mr Ahmad sent in a number of documents, which reached me on the morning of the hearing, on Monday 7 August 2023:
 - (1) **On Friday 4 August**, a copy of the First-tier Tribunal bundle of documents;
 - (2) **On Sunday 6 August**, copies of the following authorities and judgments:
 - (a) *SM (India) v Entry Clearance Officer (Mumbai)* [2009] EWCA Civ 1426;
 - (b) *Singh v Secretary of State for the Home Department* [2022] EWCA Civ 1054;
 - (c) *SM (Algeria) v Entry Clearance Officer, UK Visa Section* [2018] EWCA Civ 1109; and
 - (d) *Court of Justice of the European Union in Secretary of State for the Home Department v Banger (Citizenship of the European Union - Right of Union citizens to move and reside freely within the territory of the European Union - Judgment)* [2018] EUECJ C-89/17.

(3) **On Monday 7 August 2023**, the day of the hearing, at 10:03 am, two further witness statements from the first appellant and the EEA sponsor, both signed on Sunday 6 August 2023.

6. There is no Regulation 15(2A) application to adduce additional evidence and Mr Ahmad did not refer to the new witness statements in oral argument. As this appeal does not proceed to remaking, I have had no regard to those statements.

Background

7. In her refusal letter, the respondent stated:

- (1) That she was not satisfied that the appellants were related to the sponsor as claimed;
- (2) That she was not satisfied by the evidence of dependency; and accordingly
- (3) That she was not satisfied that the appellants qualified as family members of the sponsor under Regulation 12 and the Entry Clearance Guidance issued to her caseworkers at 2.23).

8. In particular, the respondent considered that the evidence of money transfers covered only the 6-month period between 3 February 2020 and 7 September 2020, but that only the outward transfers were provided, with no evidence that the funds reached a bank account or were otherwise received by the appellants; that insufficient evidence was provided concerning the appellants' income, expenditure, and evidence of their financial position, such that she could not be satisfied that the sponsor's payments were necessary to meet their essential living needs; and that there was no evidence of the sponsor's current financial situation, to show that he would be able to support the six appellants, in addition to his own financial needs and those of any family members dependent upon him.

9. The decision letter makes it clear that the respondent considered that the requirements of Regulation 12 were not met.

10. The appellants appealed to the First-tier Tribunal.

First-tier Tribunal decision

11. In listing directions issued on 13 September 2021, the First-tier Tribunal gave directions for the hearing:

"1. The Respondent has failed to file a bundle in accordance with directions given on 27/07/2021.

2. If the Appellant has not already done so, they should file and serve all documents that will be relied upon by the Appellant at the hearing of this appeal, within 14 days from the date of issue of these Directions.

3. The hearing of this appeal will take place on the first available date after 14 days from the date of issue of these Directions. This will be a final hearing not a Pre-Hearing Review or a Case Management Review. The Tribunal will proceed on the basis that the Respondent relies only on the refusal decision.

4. Either party may make an application to vary these directions at any time.”

No variation application was made. The respondent did not arrange representation before the First-tier Tribunal, nor did she file her bundle of documents.

12. The First-tier Judge dismissed the appeal because she was not satisfied that the appellants met the requirements of Regulation 12. She asked Mr Ahmad to explain how the sponsor came within Regulation 12(1)(a), but he was unable to assist her. Mr Ahmad did not seek any adjournment to obtain further instructions,
13. The First-tier Judge further found as facts that:
 - (1)The sponsor had sent all the money payments relied upon by the appellants from Germany, not the UK;
 - (2)Mr Ahmad conceded that he had not been able to produce any evidence that the sponsor had ever lived in the UK or been a qualified person here;
 - (3)The sponsor said that he had applied for settled status in the UK but had produced no evidence to support that assertion;
 - (4)The sponsor had not explained where he had been living after ceasing to be part of the same household as the appellants in Pakistan;
 - (5)The sponsor appeared to have been in Germany throughout: all the payments relied upon from October 2020 to October 2021 came from Germany, not the UK; and
 - (6)On their application form, the appellants said that when they reached the UK, they would not be living with the sponsor, but in the house of a friend of his.
14. The First-tier Judge held that the essential condition in Regulation 12(1)(a) was not met and that the appellants were not entitled to a family permit. She did not consider that Regulation 13 was relevant to the appellant’s circumstances.
15. Further, a grant of leave under the discretionary EUSS settlement scheme was not itself evidence that the sponsor was exercising Treaty rights in the UK and there was no other evidence before him of the exercise of Treaty rights in the UK by the sponsor, who appeared to be based in Germany, where he was a citizen.
16. The judgment concluded that:

“In conclusion, I find that the appellants, who have the burden of proof, cannot show that they meet the requirements of Regulation 12(1)(a) of the 2016 Regulations in relation to their sponsor and therefore they are not entitled to a family permit. It is not necessary for me to consider financial dependency or membership of a household or to make any findings in these circumstances. ”

17. The appellants appealed to the Upper Tribunal.

Permission to appeal

18. The grounds of appeal assert that raising Regulation 12(1) was both procedurally and substantively unfair, by reference to the *Surendran* guidelines; and that the First-tier Judge erred in failing to resolve all issues before her;

19. Permission to appeal to the Upper Tribunal was granted because:

“3. The respondent’s refusal letters, dated 26 March 2021, state in the final paragraph that the application for an EEA Family Permit is refused because of a failure to meet all of the requirements of reg 12. However, the reason given in the respondent’s decisions for refusing the applications is a failure to establish that the conditions of reg 8 are met. It is arguable that there is nothing in the refusal decisions indicating that the respondent refused the applications because reg 12(1)(a) was not satisfied.

4. The judge found that there was a lack of evidence to establish that reg 12(1)(a) was satisfied. It is clear from para 7 of the decision that the judge raised this with the appellants’ representative. However, it does not appear that an adjournment was proposed (or requested) following this issue being raised.

5. It was arguably procedurally unfair for the judge to decide the appeal on the basis of there being insufficient evidence to establish that reg 12(1)(a) was met without adjourning the hearing in order for the appellants to have the opportunity to obtain this evidence once on notice that reg 12(1)(a) was at issue.”

20. The respondent did not file a Rule 24 Reply.

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

Upper Tribunal hearing

22. The oral and written submissions at the hearing are a matter of record and need not be set out in full here. I had access to all of the documents before the First-tier Tribunal and was assisted by detailed submissions from Mr Ahmad for the appellants and Ms Nolan for the respondent.

23. Mr Ahmad in his grounds of appeal and submissions did not address the finding in the refusal letter that the parties had not satisfied the Entry Clearance Officer that they were related to the sponsor in the manner

claimed, nor the finding that there was no satisfactory evidence that the sponsor had ever resided in the UK or exercised Treaty rights here, which was based on a concession made by Mr Ahmad at the First-tier Tribunal hearing.

24. Mr Ahmad acknowledged that he had been asked about Regulation 12(1)(a)(ii) at the hearing. However, he argued that he could rely on Regulation 12(5) on a stand-alone basis, and that both the Entry Clearance Officer and the First-tier Judge had failed to undertake an extensive examination of the personal circumstances of these appellants before reaching a decision.
25. Mr Ahmad contended that since Regulation 13 gave the sponsor the right to enter the UK and remain here as an EEA migrant for 3 months without any need for entry clearance or permission, the sponsor's expressed intention to come to the UK was sufficient to entitle the appellants to accompany him.
26. Mr Ahmad argued that the Tribunal ought to have gone on to consider financial dependency and/or membership of the sponsor's household and that it was a material error of law for the Tribunal not to have done so. The Tribunal had failed to give 'extensive examination' irrespective of the merits of the application, as required by *SM (Algeria)*.
27. I indicated at the hearing that I would dismiss the appeals but reserved my written decision which I now give.

The *Surendran* guidelines

28. The *Surendran* guidelines prescribe how a First-tier Judge should approach an appeal where the respondent does not appear at the hearing to argue her case. The guidelines were considered and clarified in the starred decision of the IAT, *MNM** (*Surendran guidelines for adjudicators*) (*Kenya*) [2000] UKIAT 00005.
29. The Guidelines appear as an Appendix to the Tribunal's decision and so far as relevant in these appeals are as follows:

"...3. Where [a judge] is aware that the Home Office is not to be represented, he should take particular care to read all the papers in the bundle before him prior to the hearing and, if necessary, in particular in those cases where he has only been informed on the morning of the hearing that the Home Office will not appear, he should consider the advisability of adjourning for the purposes of reading the papers and therefore putting the case further back in his list for the same day. ...

7. Where, having received the evidence or submissions in relation to matters which he has drawn to the attention of the representatives, [the judge] considers clarification is necessary, then he should be at liberty to ask questions for the purposes of seeking clarification. We would emphasise,

however, that it is not his function to raise matters which a Presenting Officer might have raised in cross-examination had he been present.

8. There might well be matters which are not raised in the letter of refusal which [the judge] considers to be relevant and of importance. We have in mind, for example, the question of whether or not, in the event that [the judge] concludes that a Convention ground exists, internal flight is relevant, or perhaps, where, from the letter of refusal and the other documents in the file, it appears to [the judge] that the question of whether or not the appellant is entitled to Convention protection by reason of the existence of civil war (matters raised by the House of Lords in the case of *Adan*). Where these are matters which clearly [the judge] considers he may well wish to deal with in his determination, then he should raise these with the representative and invite submissions to be made in relation thereto. ...

10. We do not consider that [a judge] should grant an adjournment except in the most exceptional circumstances and where, in the view of [a judge], matters of concern in the evidence before him cannot be properly addressed by examination of the appellant by his representative or submissions made by that representative. If, during the course of a hearing, it becomes apparent to [a judge] that such circumstances have arisen, then he should adjourn the case part heard, require the Home Office to make available a Presenting Officer at the adjourned hearing, and prepare a record of proceedings of the case, which should be submitted to both parties up to the point of the adjournment, and such record to be submitted prior to the adjourned hearing."

30. Contrary to Mr Ahmad's submissions, it was not unfair, nor an error of law for the First-tier Judge to ask him about Regulation 12(1)(a): it was plainly relevant to the decision to be made on these appeals and the Judge had a *Surendran* duty to seek submissions on the point, to assist her in reaching her decision.
31. This was not a case where submissions from the respondent would be needed, as the burden of proof remained on the appellants and could be properly addressed by submissions by Mr Ahmad.
32. The refusal letters put the whole of Regulation 12 in issue and Mr Ahmad was therefore on notice of the relevance of the need to show that the appellants could satisfy all of its requirements. There is nothing in the *Surendran* guidelines fairness challenge.

Regulation 12 and 13 of the 2016 Regulations

33. Mr Ahmad sought to rely on Regulations 12(5) and 13 to argue that insufficient scrutiny had been given to the appellant's circumstances before the respondent reached her decision, and that the First-tier Judge had made the same error.
34. Regulation 13 gives each individual EEA national an initial right of residence in the UK for three months, without the need to be exercising Treaty rights. As the First-tier Judge stated, it has no bearing on whether

such EEA national can bring an extended family member into the UK with him.

35. Regulation 12, which is relied on in the refusal letters, has a very clear scheme:

“Issue of EEA family permit

12.—(1) An entry clearance officer *must* issue an EEA family permit to a person who applies for one if the person is a family member of an EEA national and—

- (a) the EEA national—
 - (i) is residing in the United Kingdom in accordance with these Regulations; or
 - (ii) will be travelling to the United Kingdom within six months of the date of the application and will be an EEA national residing in the United Kingdom in accordance with these Regulations on arrival in the United Kingdom; and
- (b) the family member will be accompanying the EEA national to the United Kingdom or joining the EEA national there. ...

(4) An entry clearance officer *may* issue an EEA family permit to an extended family member of an EEA national (the relevant EEA national) who applies for one if—

- (a) the relevant EEA national satisfies the condition in paragraph (1) (a);
- (b) the extended family member wants to accompany the relevant EEA national to the United Kingdom or to join that EEA national there; and
- (c) in all the circumstances, it appears to the entry clearance officer appropriate to issue the EEA family permit.

(5) Where an entry clearance officer receives an application under paragraph (4) an extensive examination of the personal circumstances of the applicant must be undertaken by the Secretary of State and if the application is refused, the entry clearance officer must give reasons justifying the refusal unless this is contrary to the interests of national security.” *[Emphasis added]*

36. It will be seen that Regulation 12(1)(a) is crucial to the issue of a Family Permit, both for family members and, in the exercise of the Entry Clearance Officer’s discretion, for extended family members. The respondent was not satisfied that the appellants were even extended family members of the proposed sponsor. Leaving that to one side, Mr Ahmad conceded before the First-tier Judge that there was no objective evidence that the sponsor had ever spent any time in the UK, nor was there evidence to support his claim to have made an EUSS pre-settlement application.

37. The provisions of Regulation 12(1)(a)(i) were not met. I have considered the authorities relied upon by Mr Ahmad. I do not find that they avail the

appellants. The decisions in *Banger* and in *SM (Algeria)* both relate to persons who were undoubtedly family members and whom the respondent is required to admit, if Regulation 12(1) is met. The evidence the appellants produced to support their claim was examined with care and I am satisfied that if there was a duty to conduct an extensive examination, the First-tier Judge did not err in concluding that it had been discharged: see *SM (India)*, *SM (Algeria)*, and *Banger*.

38. These appellants have not produced evidence which would have discharged the duty on them of establishing that they are extended family members of a qualified person: even if they are related as claimed, there was no evidence that the sponsor had ever exercised Treaty rights in the UK, and no evidence beyond his assertion, that he would do so in the 6-month window provided for in Regulation 12(1)(a)(ii), or indeed, that he did so.
39. The provisions of Regulation 12(1)(a)(ii) were supported only by the sponsor's assertion of future travel. The Judge was entitled to enquire of Mr Ahmad what his case was on that, and to find it insufficient to satisfy Regulation 12(1)(a)(ii). Regulation 12(5) does not stand alone: the Entry Clearance Officer did the best he could with the very sparse information provided by the appellants.
40. Even if the Judge had proceeded to consider dependency, Mr Ahmad appeared to accept that the evidence of financial dependency was inadequate. He relied on the appellants' continued occupation of a house in which they had previously all lived together. The house is said to belong to the sponsor, but again, there was no satisfactory evidence to support that contention.
41. The evidence of the household is similarly inadequate. After the sponsor left Pakistan, it is not clear where he went, or in whose household he was, until he received German citizenship. Absent any corroboration of the sponsor's assertion that he has an EUSS pre-settlement application pending (which would not be the same thing as exercise of EEA Treaty rights) or that he intended to come, or did come to the UK, the First-tier Judge did not err in considering that the question of whether the parties lived in the same household before the sponsor came to the UK was not reached.
42. The grounds of appeal are unarguable and disclose no material error of law in the decision of the First-tier Judge. These appeals are dismissed.

Notice of Decision

43. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of no error on a point of law

I do not set aside the decision but order that it shall stand.

Appeal Number: UI-2022-001312, UI-2022-001313
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Judith A J C Gleeson
Judge of the Upper Tribunal
Immigration and Asylum Chamber

Dated: 7 August 2023