Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/10554/2012
OA/10558/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 4 December 2013	**On 28 February 2014**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

LUZ MARY RIVILLA RODRIGUEZ (1)
MIGUEL ANGEL VALLEJO RIVILLAS (2)

Appellants

and

ENTRY CLEARANCE OFFICER, BOGOTÁ

Respondent

Representation:

For the Appellants: Ms Benitez of Counsel, instructed by Howe & Co
For the Respondent: Mr I Jarvis, Presenting Officer

DETERMINATION AND REASONS

1. The appellants appeal with permission against the determinations of First-tier Tribunal Judge Davda, promulgated on 26 July 2013 in which she dismissed their

appeals against the decision of the respondent made on 24 April 2012 to refuse to issue them with EEA family permits to come to the United Kingdom as the dependants of Mary Luz Vallejo Rivillas and her husband Lorenzo Acanfora.

The appellants' case

2. The first appellant, born 6 April 1959 is the mother of the second appellant, born 27 June 1995. Both are citizens of Colombia. The first appellant is the mother of Miss Vallejo-Rivillas; the second appellant is Miss Vallejo-Rivillas' brother. It is the appellants' case that they are dependent on the sponsor and that accordingly, the first appellant is entitled, pursuant to Regulation 7(1) of the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations") as the dependent direct relative of the spouse of an EEA national; and, in the case of the second appellant, as the extended family member of Mr Lorenzo Acanfora and thus pursuant to Regulation 8(2) as an extended family member of his and thus, both appellants are entitled to family permits pursuant to Regulation 12.

The Respondent's case

3. The respondent refused the applications on the basis that, although it was accepted that funds were remitted to the appellants and had been since January 2011, he was not satisfied that either appellant was wholly or mainly dependent on the EEA citizen to meet either of their essential needs in Colombia.

4. The respondent noted that the first appellant's own income exceeded that of the financial support provided by Mr Acanfora and that was in any event her own income, regardless of the issue of any additional amount she received from him was in excess of the average Colombian salary.

The appeals before the First-tier Tribunal

5. Both appeals came before Judge Davda on 5 July 2013 when she heard evidence from the sponsors. For reasons which are not at all clear and which have caused considerable difficulty the judge decided to produce two separate decisions despite the fact that both cases are inextricably linked.

6. In her determination in respect of the first appellant, the judge directed herself on the applicable law [16], [18] noting the differences between "family members" and "other family members" noting that a distinction is to be drawn between those who qualify under Article 3.2 of the Directive, under which there is a duty to undertake an extensive examination of personal circumstances. After reciting the evidence the judge concluded: -

> "For all the above reasons and bearing in mind Article 3.2(a) of the EC Directive and the provisions of Regulation 12 of the [2006 Regulations] I am satisfied the respondent had correctly undertaken the extensive examination of the personal circumstances of the appellant and having given reasons for her refusal not to issue an EEA family permit to this appellant. Having considered the evidence as at present, I find the appellant has not discharged the burden of proof upon

her and therefore I find that the appellant is entitled neither to entry clearance [sic] nor to an EEA family permit."

In respect of the second appellant, the judge states: -

"13. The appellant's mother Mrs Luz Mary Rivilla Rodriguez has failed to meet the requirements of the Immigration (European Economic Area) Regulations 2006, therefore this appellant, as her dependant, also does not meet the requirements under Regulation 12.

I have borne in mind Article 3.2(a) of the EC Directive and the provisions to Regulation 12 of the Immigration (European Economic Area) Regulations 2006, I am satisfied the respondent has correctly undertaken an extensive examination of the personal circumstances of this appellant and his mother and given reasons for his refusal not to issue an EEA family permit to this appellant.

Applying therefore the relevant law to the established facts and then reminding myself that the standard of proof is the balance of probability I am satisfied on the evidence before me that this appellant has not met the requirements of the Immigration Rules. For this reason I dismiss the appeal."

7. The appellants sought permission to appeal against this decision on the grounds:

(1) that Judge Davda materially erred by failing to consider the second appellant's appeal;

(2) despite restating the respondent's case failed to make any clear findings on the first appellant's case in respect of any of the material aspects making no findings regarding the ownership of land said by the sponsor to belong to her and not the first appellant; and

(3) stated that money transfer evidence would not be considered as details had not been provided as to how the money was spent.

Hearing before the Upper Tribunal on 1 November 2013

8. When the matter first came before me, it became apparent that although a copy of the determination in respect of the second appellant had been sent to him, it had not been sent either to the respondent or to the appellants' solicitors; both were unaware of its existence.

9. With the agreement of the parties, I considered that it was appropriate to proceed on the basis that the grounds of appeal lodged in respect of the first appellant as an, albeit, out of time, application for permission to appeal against the decision dismissing the second appellant's appeal. I therefore constituted myself as a Judge of the First-tier Tribunal to consider that application. I was satisfied that neither the respondent nor the appellants' solicitors had been properly served with the

determination in respect of the first appellant and were unaware of its existence (as is clear from the grounds of appeal). I concluded, therefore, that it would be appropriate in these exceptional circumstances to admit the application out of time. I am satisfied also that it was arguable that the judge had made inadequate findings and simply recited the respondent's case without considering the matter herself.

10. It was rightly accepted by the respondent that the determinations were wholly inadequate in failing to reach findings of fact and therefore disclosed a clear error of law. It was also accepted that in the circumstances there were no facts or findings of fact to be preserved and that the matters would as a result have to be reheard afresh and I therefore adjourned the matter for a full hearing on all issues de novo.

Hearing on 4 December 2013

11. I heard evidence from both sponsors as well as submissions from Ms Benitez and Mr Jarvis. In addition I had the following before me:

    (a) appellants' consolidated bundle;

    (b) respondent's bundle, including explanatory statements and notices of refusal;

    (c) appellants' supplementary bundle;

    (d) Ms Benitez' skeleton argument.

Oral evidence

12. The sponsor gave evidence in Spanish through a court interpreter. This was not without its difficulties given a significant degree of incomprehension between the sponsor and the interpreter who was apparently less familiar with Latin American Spanish. Despite these problems, neither representative submitted that the interpreter should be discharged.

13. The sponsor adopted her witness statements adding that her mother's business is registered at her own residential address, Correa 82A 21 and that she has no other premises that she uses for cooking. She explained that she had said in her witness statement that her mother's business was not an ongoing concern and had a "limited shelf-life" as her sales were becoming less and less over time because people in Colombia wished to make their own products in their own kitchens and due to the economic situation. She said that her mother's accountant had said the business had ceased to be registered, and her mother had decided to do that because the taxes she had to pay were higher than the income, explaining that she had to pay a percentage of income to the government in order to be registered.

14. The sponsor said that there were two different receipts for the taxes on the current property as one covered the main house and the other covered a utility annex. She said the gas bills varied according to consumption and the bill was in her name as she is the property owner. She said in addition, as the house is in a gated

community, she has to pay 260,000 pesos a month in charges and security. She said that the bill is in the name of Dora Acevedo as she is the previous owner and the administrators of the estate had not changed the bill to her name yet. She referred me to the deed of sale confirming the sale of the property to her from Dora Acevedo.

15. The sponsor also identified in the bundle telephone bills, her mother's health card in the bundle, explaining that she pays 220,000 pesos a month to the state insurance fund. She estimated the food expenses at a total of 150,000 pesos per month.

16. Turning to the second appellant, the sponsor said that she paid for his fees each year but that she was yet to receive confirmation of the most recent year. She said he had just finished at secondary college, and that there are additional expenses in addition to the fees, uniform, books and food which she also meets.

17. The sponsor said that her mother owns a separate flat which is small, approximately 30 square metres in area, consisting of one room which is not currently let out. She said there was tax payable on that but it is much less than the other house, the purchase price of which had been 150 million pesos, the purchase price of the flat being 4.5 million.

18. The sponsor explained that the large transfer of money in 2011, £25,000, was to pay to repair the main house which had been damaged by damp and the roof had had to be removed and replaced.

19. In cross-examination the sponsor said that the house she owns in which her mother and brother live has four bedrooms over three floors. She said it is approximately 175 to 180 square metres in area, is a gated property with around 60 houses and communal grounds. She said she bought the house in 2011 and before that, the appellants had lived in another house which was also her property where they had lived since December 2010. She said that her mother and brother had never lived in the small flat as it is only a one-room property and had been occupied by her older brother who had been killed four months ago. She said it was very small which is why they could not live in it. The sponsor said that her brother is not working despite that he has now turned 18.

20. Asked about the document at page 154A of the bundle, setting out the cancellation of the registration of her mother's work, she said that the 6 November 2013 date referred to the date on which the licence would have to have been renewed not that it had been renewed and she said the original documents were all in Colombia, and she had been sent scans by email.

21. It was put to the appellant that in her last witness statement she had said that her mother earned approximately £150 per month but that the letter from the accountants suggests she earns approximately £200 for the last two months. She said it depends on the exchange rate and that her mother has no other source of income. She said that her mother has not tried to set up another business or find work as she suffers from arthritis. She says she had no medical evidence about it as she had not thought it would be important.

22. There was no re-examination. In response to my questions the appellant said that the tax on their property was as high as £680 per calendar month because of its location, size and the security provided. She said that the telephone bills were not so big as it appeared. She confirmed that the food bill for her mother and brother was approximately £700 a month submitting that she spends approximately £800 a month for her family of three saying that the cost per person per month in Colombia was a little bit lower than one might be likely to pay in the United Kingdom.

23. I then heard evidence from Mr Acanfora who adopted his witness statement adding that he was aware that the first appellant had had a catering business for a long time; when they had first met she had had quite a good time but quite dramatically in the last four years the income had gone down and there was no sense in keeping on employees or the business structure as it was not making as much money as before. He said that since he and his wife had started living together in 2009 he had started sending money to the appellants. He said that before his wife had come to the United Kingdom, she had helped support her family in Colombia and since she had come here they had started to support them, paying for the second appellant's school fees.

24. In cross-examination Mr Acanfora said that his mother-in-law has a tiny studio flat which is currently vacant and had previously been used by her son who had recently been killed.

Submissions

25. Mr Jarvis relying on the refusal notices submitted the appeal should be dismissed and submitting that, relying on the opinion of Advocate-General Mengozzi in **Reyes v Migrationsverket** [2014] CJEU C-423/12 proof of support was not sufficient and it was necessary to show that essential, that is basic needs, were being met (see paragraphs 53 and 58) and the amount of the expenses which required to be paid, such as the property taxes and so on related to the fact that they were living in a large house, owned by the sponsor and that in order to make out dependency, the appellants would need to show that they would not be able to reside in alternative accommodation. He submitted further that there was need for a close and careful assessment, with particular regard to Regulation 8 and it should be taken into account whether the second appellant was capable of working himself. He submitted that other family members were to be subjected to a closer examination and that circumstances, - the mother having been in employment, had changed.

26. Turning to the evidence, Mr Jarvis submitted that limited weight could be attached to the documentary evidence given that most of it had not been translated and that there were no direct statements regarding dependency from either appellant.

27. In reply, Ms Benitez submitted that there were two principal questions to be answered: first, whether the appellants are genuinely dependent; and, second, is the money remitted to them necessary to cover essential needs.

28. Ms Benitez submitted also that in any event the first appellant's income was just over £4,200 and that since then the business has had to shut down. On that basis, even basic needs in Colombia could not be met and that there was no authority for the proposition that in order to show dependency, the individual must show that they are at the breadline. Miss Benitez pointed out that even on the respondent's own figures as to average salary in Colombia, approximately £350 a month, would be needed.

29. Ms Benitez submitted that what is to be considered is the particular appellant and that particular appellant's needs. It cannot be expected for somebody who comes from an affluent background to give that up and to reduce themselves to a level of poverty. She submitted the evidence of the sponsor had not been challenged to any great degree and whilst agreeing that some of the costs appear excessive, even taking some of that out there was still a huge amount of money required. She submitted that even taking into account health insurance, phone bills, gas and electricity, as well as tuition fees it was evident that it was only with the funds transferred by the sponsor that these could be met and accordingly the appeal should be allowed.

30. I reserved my determination but prior to promulgating it, the CJEU handed down its decision in **Reyes.** I had directions issued to both parties inviting them to make submissions on that matter, or to state that they did not intend to make submissions. The respondent has not replied; Ms Benitez made further written submissions.

Remaking the decisions

31. Although the appellant is overseas, as the application concerns an EEA family permit, this is an appeal to which Section 85(4) of the 2002 Act does not apply. I am therefore entitled to consider material or circumstances which have arisen after the date of decision.

32. The issue in dispute is whether the appellants cans show that they are "dependent" for the purpose of, in the case of the first appellant, Regulation 7 of the EEA Regulations and, in the case of the second appellant, Regulation 8 of the said regulations, it being stated in the respondent's review

> "The [second] appellant applied to join his sister and her EEA (Italian) husband in the UK. Given that the appellant is applying to join his sister's husband he is correctly being considered as an extended dependent family member of an EEA national. In order to qualify for entry clearance he must therefore demonstrate that he is 'dependent on his EEA national brother-in-law or sister' ".

33. The differences between the two categories, those of dependent relatives in the ascending line and other family members is reflected in the Directive which permits member states to make an "extensive examination of the personal circumstances" of an applicant in the case of other family members. (See **Rahman and Others [2012] C-83/11** at [19], [23] and [24].

34. The situation for dependent family relatives is different. In J**ia** it was held

> "In order to determine whether the relatives in the ascending line of the spouse of a community national are dependent on the latter, the member state must assess whether, having regard to their financial and social conditions, they are not in a position to support themselves. The need for material support must exist in the state of origin." [37]

35. It is clear (see **Lim (EEA -dependency)** [2013] UKUT 437 (IAC)) that the question of dependency is one of fact, that is "Is the applicant in fact dependent on the EEA sponsor?" That does not permit the question "Is the applicant wholly or mainly financially dependent on the sponsor?"

36. In **Reyes**, the CJEU held:

> 20 In that regard, it must be noted that, in order for a direct descendant, who is 21 years old or older, of a Union citizen to be regarded as being a 'dependant' of that citizen within the meaning of Article 2(2)(c) of Directive 2004/38, the existence of a situation of real dependence must be established (see, to that effect, *Jia*, paragraph 42).
>
> 21 That dependent status is the result of a factual situation characterised by the fact that material support for that family member is provided by the Union citizen who has exercised his right of free movement or by his spouse (see, to that effect, *Jia*, paragraph 35).
>
> 22 In order to determine the existence of such dependence, the host Member State must assess whether, having regard to his financial and social conditions, the direct descendant, who is 21 years old or older, of a Union citizen, is not in a position to support himself. The need for material support must exist in the State of origin of that descendant or the State whence he came at the time when he applies to join that citizen (see, to that effect, *Jia*, paragraph 37).
>
> 23 However, there is no need to determine the reasons for that dependence or therefore for the recourse to that support. That interpretation is dictated in particular by the principle according to which the provisions, such as Directive 2004/38, establishing the free movement of Union citizens, which constitute one of the foundations of the European Union, must be construed broadly (see, to that effect, *Jia*, paragraph 36 and the case-law cited).
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> 24 The fact that, in circumstances such as those in question in the main proceedings, a Union citizen regularly, for a significant period, pays a sum of money to that descendant, necessary in order for him to support himself in the State of origin, is such as to show that the descendant is in a real situation of dependence vis-à-vis that citizen.
>
> 25 In those circumstances, that descendant cannot be required, in addition, to establish that he has tried without success to find work or obtain subsistence support from the authorities of his country of origin and/or otherwise tried to support himself.

37. The first question which must be asked is what are the essential or basic needs of the applicant. That is of course a question of fact and is likely to vary between

individuals. There is no requirement here that this benchmark should or could be subsistence level in the relevant country.

38. There is no authority for the proposition, certainly in the context of EU law, for Mr Jarvis' submission that the benchmark in this case would be a consideration of a smaller property. Still less can it properly be argued that at age 18 the second appellant could share the same single room apartment as his mother. Further, and in any event, for the reasons set out below, I find that the appellant's income is insufficient to meet their basic needs, even before housing costs are factored in, without the support of the sponsor.

39. With regard to the second appellant as regards the issue of dependency, it would be difficult, artificial and impossible to consider basic needs in his circumstances on an abstract basis based on an assumption that he is not living as part of the same household as his mother.

40. The starting point in assessing whether the appellants are dependant is their income. I accept from the documentary evidence and that of Mr Acanfora and the sponsor that the second appellant is in full-time education and is not working. I accept he has no income.

41. The position of the first appellant is less clear. The case put is that while she had her own business, and was (as the respondent accepted) earning the equivalent of approximately £4200, that is no longer the position. Her income has decreased, it is said, because there is less demand for her services and her trade registration has been cancelled.

42. While there was a significant amount of cross-examination about the latter, the utility of questioning a witness through an interpreter about a translation of a document is questionable. Looking at the document which is a certificate issued on 7 November 2013 recording that documents dated 5 November 2013 were "inscripted" on 6 November 2013. While there is a reference to a renewal date, that appears to be the date on which the registration ended and from which it was to be renewed. I do not consider that it is an inconsistency.

43. There is at page 22 a letter from the first appellant's accountant, estimating her monthly income at 600,000 pesos. That letter is dated 15 March 2013. The same accountant has also said (page 156) in another letter dated 8 November 2013 stating that the income was about 600,000 pesos in the previous six months. That is a substantial reduction. 600,000 Pesos is said to be the equivalent of approximately £200 per month according to the sponsor in her witness statement of 1 July 2013 or £300 according to her witness statement of 23 April 2013. This discrepancy is said to be due to fluctuations in the exchange rate.

44. It is evident from the money transfers contained within the appellants' bundle that the exchange rate has fluctuated considerably, and I consider that this explanation is plausible.

45. The sponsor's evidence was somewhat confused although given the difficulties with the interpreter, it would not be appropriate to draw adverse inferences. On reflection, there appears to have been confusion over whether food costs were 1,500,000 pesos per month and 150,000 pesos per month. There were also doubt as to whether some bills were monthly or bi-monthly

46. That said, the first appellant's income and the closure of her business is confirmed by the documentary evidence. While it is for the most part photocopies, I have no reason to doubt that they are accurate and I accept that, given the volume of documents, sending the originals which are in many cases computer-generated is unlikely to add much to the evidence.

47. I accept the explanation from the first appellant's accountant which was confirmed by Mr Acanfora that the first appellant's business is no longer viable. She is, I accept, now in her 50s and the economic situation in Colombia is not good. It is difficult to see what other employment she could find; it is not, however, in light of **Reyes** necessary to speculate about that.

48. I find no indication in the evidence that the appellants' have any sources of income apart from the wages from the first appellant's business and funds transferred to them by the sponsor.

49. I am prepared to accept that through no fault of her own, the first appellant's income has reduced considerably to in the region of about 100,000 pesos a month. That is well below the average wage according to the respondent's own figures; indeed the earlier figure of 600,000 pesos per month is below that. I accept also, in the light of the oral evidence, that the £25,000 transferred in 2011 was to pay for repairs to the house .

50. There is, as Mr Jarvis submitted, a significant difficulty with the evidence of the appellants' expenditure in that much of it is not translated and much of it requires additional evidence of the sponsor to give it weight.

51. That said, it is evident that the second appellant's school fees, receipts for which are provided (pages 113-118) are in the region of 2 million pesos per annum. I accept that that is a necessary expenditure. The telephone bill (page 102) in the first appellant's indicates payments of over 100,000 pesos a month.

52. While for the reasons set out above, I consider that the sponsor's evidence as to the appellants' expenditure is not entirely reliable, it is inevitable that they will have to meet the costs of heating, lighting, water and food. I consider also that in a case where a state does not provide free health care that the costs of health insurance would come within essential needs. These would be on top of the costs of telephone and schooling.

53. Here, given the very low level of the appellant's income, less than one sixth of the average wage, I am satisfied on the balance of probabilities that those essential costs which the appellants have to meet are well in excess of their income, and that thus

they require the financial support of the sponsor to meet their essential needs, and thus they are dependant for the purpose of EU law.

54. Accordingly, I am satisfied that the appellants do meet the requirements of the EEA Regulations and are entitled to be issued with family permits. I therefore allow the appeals on that basis.

SUMMARY OF CONCLUSIONS

1. The decisions of the First-tier Tribunal did involve the making of errors of law and I set them aside.

2. I remake the decisions by allowing the appeals under the Immigration (European Economic Area) Regulations 2006.

Signed Date: 27 February 2014

Upper Tribunal Judge Rintoul