Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/00255/2020
EA/00270/2020

THE IMMIGRATION ACTS

Heard at Birmingham (via Microsoft Teams)
On 3 August 2021

Decision & Reasons Promulgated
On 12 August 2021

Before

UPPER TRIBUNAL JUDGE HANSON

Between

MOHAMMAD ASHIQ
ABU BAKR IKHLAQ
(Anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Nazir Ahmed instructed by Wright Justice Solicitors.
For the Respondent: Mrs Aboni a Senior Home Office Presenting Officer.

DECISION AND REASONS

1. The appellant's appeal with permission a decision of First-tier Tribunal Judge Mehta ('the Judge') promulgated on 2 March 2021 in which the Judge dismissed the appeals of the above-named appellants.
2. The first appellant is a national of Pakistan and the father of the EEA national sponsor. The second appellant is the sponsor's nephew.

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3. On 29 November 2019 their respective applications for an EEA Family Permit as a Family Member and Extended Family Member (EFM) of an EEA national was refused by an Entry Clearance Officer (ECO). That decision was upheld on review by an Entry Clearance Manager (ECM) on 4 March 2020.
4. In the refusal notice in respect of the first appellant it is written:

> The decision
>
> - You state that your son Mussadiq Ishtiaq is a Greek national. You have provided evidence that your sponsor holds a Greek passport.
> - You have stated that you are financially dependent on your sponsor. As evidence of this you have provided an account summary from UAE exchange showing funds sent from your sponsor to you sporadically from January 2019 -present. Unfortunately, this limited amount of evidence in isolation does not prove that you are financially dependent on your sponsor. You have not provided any evidence of your own financial situation, such as bills or personal bank statements. I would expect to see evidence which fully details your circumstances; your income, expenditure and evidence of your financial position which would prove that without the financial support of your sponsor, your essential living needs could not be met.
> - You have failed to provide your sponsor's bank statements showing the funds, leaving their account. Without this corroborating evidence, I am unable to verify that the monies being sent from your sponsor as claimed.
> - Your sponsor has given an outline of the property, you will be staying at if you were granted entry clearance to the UK. This is a three bedroom home where already your sponsor, his wife and three children live, along with his brother and sister-in-law, whose house it is. This raises concerns regarding the suitability of this property and Part X of the 1986 Housing Act regarding overcrowding and your continued dependency on your sponsor upon arrival in the UK. As stated, this has no bearing on this decision, however, it is noted that as your accommodation and failure to accommodate you and your family may cast out into the nature of your dependency.

5. The refusal notice in respect of the second appellant, whilst recognising the different relationship between the second appellant and the sponsor, contains similar reasons for rejecting the application for leave to remain as an EFM.
6. The ECM in the review, having considered the appeal papers, wrote:

> I have reviewed the grounds of appeal.
>
> The Appellant has failed to submit further evidence in response to the refusal notice, no further evidence has been submitted to demonstrate the Appellant's financial dependence on the sponsor, in addition, no evidence of adequate housing arrangements has been submitted; the refusal is therefore sustained.
>
> Based on the refusal notice, I am satisfied the original decisions to refuse were correct. The decision is therefore in accordance with the law and the EA Regulations and are not prepared to exercise discretion in the appellant's case.
>
> Given all of the above considerations, I maintain the ECO's initial decision to refuse entry clearance.

Background

7. The Judge notes in the decision that although the appeal was listed for a CVP (remote online) hearing on 25 February 2021, on 22 February 2021 the sponsor emailed the First-tier Tribunal asking for the matter to be determined on the papers.
8. The Judge refers at [4] to the appellant providing a bundle consisting of 202 pages and the ECO a bundle of 27 pages and confirms the content to both bundles had been read.
9. The Judge at [6] wrote : "*The issue for me to decide was whether there was dependency on the sponsor by the appellants in that whether the money provided for support by the sponsor to the appellants was for their essential needs."*
10. The Judge's core findings are set out between [14 – 18] in the following terms:

> 14. There are a series of financial transactions evidenced in the bundle where the sponsor has sent the appellant's money. These are sporadic and dates between 3 February 2019 and 7 January 2021. I find that the sponsor did send money to the appellant's and has financially supported them.
>
> 15. The appellant's sponsor has provided a statement in support of the appeal. The sponsor states that he is a Greek national who came to the UK in 2018. The sponsor states that he had been working for engineering firms but now works for Uber. The sponsor states that he has previously sponsored his spouse to join him in the UK and before his spouse joined him he used to send money to her as she was looking after the day-to-day needs of the appellant's. The appellant states that his spouse was living in the same house as the appellant's and after she came to the UK and the sponsor send money directly to the appellant's.
>
> 16. The sponsor makes assertions in his statement which are not substantiated with documentary evidence. The evidence is easily obtainable and providable. There is no evidence either in written format from the appellants themselves or in the form of documentary evidence to show, on the balance of probabilities, that they spend the funds to meet their essential needs. There is no attempt to document where the money is spent, what the money is spent on and how often in the form of any specific broken down explanation from the appellant's. I am unable to quantify the cost of the appellant's essential needs and how much of the money which was given to the appellant's was used for their basic needs, if any at all. I have taken into account social factors and taken a holistic view. However, there is simply no reliable evidence to show that the appellants cannot support themselves without assistance from the sponsor. The appellant's sponsors written statement could not be tested as he did not request an oral hearing. This was despite directions from the tribunal making provision for an Urdu interpreter and been notified of the administrative arrangements for him to join the CVP hearing, enabling him to participate. The sponsor was directed that not being legally represented does not prevent him from participating remotely. I therefore place little weight on his statement.
>
> 17. Based on the above, I am not satisfied that the remittances sent were allocated to the appellant's essential needs on a balance of probabilities. I am therefore not satisfied that there is dependency between the appellant's and the sponsor.
>
> 18. The appellant appeals, in my judgment, fall short of discharging the burden which falls upon them to prove their case on the balance of probabilities, with appropriate documentary evidence.

11. The appellant sought permission to appeal, which was granted by another judge of the First-tier Tribunal. The operative part of the grant being in the following terms:

> 3. Having considered the Grounds in both cases, in respect of each in both Appellants, I am satisfied that it is arguable that the FtT Judge erred in his consideration of the applicable Regulations.
>
> 4. Whilst identifying the issue in the case of Mr Ashiq was one of dependency, it is right to observe that the Judge failed to mention that Regulation 7 applied to him. It is also right to observe that the Judge failed to reference and determine the issue of 'same household' when considering the case of Mr Ikhlaq. Further, in the case of both Appellants, it is arguable that the Judge failed to engage fully with the evidence available, including statements made in the applications themselves, and the written evidence of the Sponsor (particularly as to the fact that the Appellants were not working and totally relied upon the support provided to them) and failed to provide any or adequate reasons as to why this evidence was rejected.
>
> 5. In the circumstances permission to appeal is granted to both Appellants. While some of the grounds may be stronger than others and any error, even if established in respect of them may not necessarily be material, I do not consider it appropriate to restrict the grounds which may be argued.

12. In her Rule 24 response dated 17 June 2021, the Secretary of State representative wrote:

> The question to be decided is set out by the judge at [6].
>
> The factual findings begin from p.11 of the decision with the judge directing himself to the relevant case law [13].
>
> The sponsors statement is considered [15] and findings made on the issue of essential needs dependency [16] the judge, noting that the sponsor's evidence simply cannot be tested despite the Tribunal making provision for an Urdu interpreter thus little weight can be placed on this statement.
>
> The Judge notes that there is a 202 page bundle submitted by the sponsor but does not record any skeleton argument provided to direct him to what sections in this bundle he should be looking for.
>
> It is submitted that it is clear that whilst accepting that some remittances were made the judge simply could not draw the conclusion that these were for the appellant's essential needs.
>
> In light of the above the FtT decision is one that is sustainable in law.

Error of law

13. In his grounds. Mr Ahmed raised four separate issues being:

    1) A misdirection of law in relation to the application of Regulation 7(1)(c) of the Immigration (EEA) Regulations 2016 (as amended) ('the Regulations') which transpose into domestic law the provisions of Article. 2.2(d) of Directive 2000/38/EEC.

2) A misdirection of law in relation to the test of dependency under Regulation 7(1)(c) of the Regulations, in failing to apply the correct legal principles in determining the issue of dependency.
3) A misdirection of law relation to dependency under Regulation 7(1)(c) of the Regulations in having accepted that the evidence showed the sponsor was sending money to the EEA national making a series of legally flawed findings when assessing whether the relevant test had been satisfied.
4) Misdirection of law regarding Regulation 8(2), Member of Household.

14. Mr Ahmed is correct to note that in the decision there is no specific reference to regulation 7(1)(c) which reads: *(c) dependent direct relatives in A's ascending line, or in that of A's spouse or civil partner.*

15. The Judge was well aware that the first appellant was the father of the EEA national, which is specifically noted at [3] of the decision under challenge, but that is not determinative. A direct relative in the ascending line of the EEA national has to be a "dependent direct relative" (my emphasis). It is clear that the focus of the Judge throughout the appeal has been upon the question of whether the required element of dependency had been established by either appellant.

16. This is not a new matter as it can be seen from the refusal above that the failure to properly evidence dependency was of concern to both the ECO and ECM. Any failure to specifically mention regulation 7 in the determination does not establish arguable legal error if the principles of regulation 7 in relation to the assessment of dependency were properly applied.

17. The test for dependency distilled from European law can be summarised in the following terms: "*The family member must need that support in order to meet her basic needs; there needed to exist a situation of real dependence; receipt of support was a necessary condition of dependency, but not a sufficient condition; and it was necessary to determine that the family member was dependent in the sense of being in need of assistance even though it was irrelevant why he or she was dependent.*" A reading of the determination, particularly at [6], clearly shows that that was the test applied by the Judge in assessing the merits of the appeal.

18. The Judge clearly took into account all of the evidence with the required degree of anxious scrutiny and the issue is therefore whether the Judge's conclusion that the required element of dependency had not been made out is a finding not reasonably available to the Judge on the evidence.

19. In this respect, Mr Ahmed, in Ground 3 writes:

> The FTTJ has erred in respect of findings reached on the issue of *dependency* in material respects in that:
>
> (i) The findings reached by the FTTJ at 14 of the determination were sufficient and went to demonstrate that appellant was *dependent* upon the EEA National, and thus a *family member* under Regulation 7 (1) (c) of the EEA Regulations. At paragraph 14 the FTTJ reached the following finding:
>
> ***"I find that sponsor did send money to the appellant's and has financially supported them."***

(ii) Given the findings at paragraph 14 of the determination, the FTTJ then goes on to reach *contradictory/inconsistent findings* at paragraph 16 of determination where the FTTJ states as follows:

".. There is simply no reliable evidence to show that the appellant's cannot support themselves without assistance from the sponsor."

(iii) There was undisputed evidence before the FTTJ, which demonstrated that the EEA National had been sending financial support. This was material evidence that went in support of appellant's claim to be *dependent* and hence a *family member* under Regulation 7 (1)(c) of EEA Regulations. There is support for this contention, which is to be found at para. [24] of the decision in *Reyes* (above) where the ECJ stated the following:

[24] The fact that… 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, such as to show that the ascendant is in a real situation of dependence vis-à-vis that citizen.

(iv) The findings of the FTTJ at paragraph 16 of determination ate further legally flawed in that:

(a) The findings failed to take into consideration the evidence/information put forward by appellant at pages [3]; [6] and [8]-[9] in his EEA application form and the supporting evidence;

(b) The findings of FTTJ further fail to take into consideration the evidence of the EEA National – Sponsor which was submitted as part of the EEA application and also for the hearing of the appeal. All the evidence submitted, corroborated/supported the appellant's claim in relation to his personal/financial circumstances and his claim to dependent upon EEA National.

(c) The findings of the FTTJ are inconsistent and run contrary to the evidence which went to show the following:

- ***Appellant was 73 years of age and unemployed/retired;***
- ***Appellant had no resources or personal income of his own to support himself;***
- ***Appellant was residing in property/household of EEA national. The accommodation was amongst the essential needs of appellant that was been met by EEA National;***
- ***Appellant was been sent. Financial support by his son - EEA National (Sponsor);***
- ***Appellant was been financially supported by EEA National, for all his essential needs.***

(d) At paragraphs 15 and 16 of the determination, FTTJ erred in *failing* to reach any findings on these material aspects of the evidence in the appeal. The FTTJ has also erred in failing to reach any findings on the evidence of the EEA National – sponsor. The FTT J was required to indicate clearly what evidence was accepted and that which was rejected. There is simply no proper findings reached and as such the decision is unsustainable in law.

(e) There was no evidence before the FTTJ to support the conclusion of the FTTJ that the appellant had any personal resources of his own such that he could support himself. The evidence was quite to the contrary that the appellant could support himself. This was all that the appellant was required to demonstrate without the need to explore the reasons for it. See: ECJ cases (above); also *Lim* at para [32].

20. It is not sufficient for an appellant to prove they are receiving remittances and to do no more. It was not disputed that payments were being made as noted by the Judge at [14]. The source of the statements highlighted in the Grounds was only the written statement of the sponsor and the Judge was entitled to consider what weight could be given to that evidence. The first observation by the Judge at [16] was that those assertions were not substantiated with documentary evidence which could have been easily obtained, that there was no evidence from the appellants themselves in any form to show they spent the funds sent in meeting their essential needs, and therefore insufficient evidence upon which the Judge could place weight to establish that the remittances made were to meet such essential needs without which those needs could not be met. That has not been shown to be a finding outside the range of those available to the Judge on the evidence.
21. The burden has always been upon the appellants to prove their entitlement as recognised by the Judge. An opportunity was given for the UK based sponsor to attend the hearing, to enable the written statement to be tested through cross examination and any matters of concern discussed and clarified if required. The sponsor however chosen not to attend the hearing and asked for the matter to be determined on the papers. It is clear the Judge did the best he could in the circumstances that prevailed at the time, and it has not been made out there is anything arguably irrational in the Judge finding there was insufficient evidence to prove the required element of dependency. This is a factual finding.
22. This Ground is, in effect, disagreement with the Judge's finding that insufficient evidence had been provided. The Judge's findings to this effect are adequately reasoned and provides a clear indication of what evidence could be given weight and accepted and what was rejected. No material legal error is made out.
23. In relation to Ground 4, the assertion relating to Membership of Household, the difficulty the appellant's face in relation to this ground, pursuant to Regulation 8(2) which mainly concerns the second appellant as an EFM of the EEA national, is that the application for the Family Permit was not made on the basis of claim to be a member of the EEA nationals household, the grounds of appeal challenging the decision of the ECO did not raise this issue, and there is no indication it was raised as an issue before the Judge. The Judge therefore did not deal with it as it was not a live issue. It is not made out the Judge failed to take into account any live issue before him or to have undertaken an improper assessment of the evidence.
24. As a further point, the evidence in relation to membership of a household did not establish an entitlement on this basis anyway. The grounds are also misleading at Ground 4(d) where it is pleaded there was no issue taken by the ECO in the refusal decision in relation to the appellant's claim to be a member of the EEA's household, which is correct because no such claim was made in the application or evidence furnished in relation to this matter not because it was found this element was made out.
25. It does not establish legal error to claim that because something was not argued or raised in the application and not mention it was therefore accepted. There is an established burden and standard of proof and a need to raise matters in proper form in an application to enable the decision-maker to come to an

informed conclusion. That did not happen in this case in relation to membership of the household test as a result of the application actually made.

26. Having considered the written material, oral submissions, and relevant law. I find the appellants have failed to discharge the burden of proof upon them to the required standard to establish legal error material to the decision to dismiss the appeals.

Decision

27. There is no material error of law in the Judge's decision. The determination shall stand.

Anonymity.

28. The First-tier Tribunal made no order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed…………………………………………….
Upper Tribunal Judge Hanson

Dated 10 August 2021