IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-004209

First-tier Tribunal No: EA/02090/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued
On the 05 January 2023

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

ABDUL WADUD CHOWDHURY
(NO ANONYMITY ORDER MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mr Hingora, instructed by ASM Immigration Services
For the Respondent: Mr Williams, Senior Presenting Officer

Heard at Birmingham Civil Justice Centre on 6 December 2022

DECISION AND REASONS

1. The appellant appeals, with permission granted by the First tier Tribunal, against the decision of Judge French, who dismissed his appeal against the respondent's refusal of his application for an EEA Family Permit under the Immigration (EEA) regulations 2016.

2. The appellant is a Bangladeshi national who was born on 1 October 1998. By an application which was made on 18 December 2020 (and therefore prior to IP Completion Day), he sought a Family Permit in order to enable him to join his brother-in-law in the UK. His brother-in-law is an Italian national who lives in the UK with the appellant's sister and exercised his right to free movement under the

EU Treaties. The appellant's application was made at the same time as a similar application made by his mother. The appellant's mother's application was granted but the appellant's application was refused.

3. The respondent was not satisfied that the appellant was financially dependent on the sponsor. She gave the following reasons for that conclusion:

> You state that you are financially reliant on your sponsor to meet your essential living needs. Additionally, you state that you receive £50 monthly from your sponsor. For this office to establish your dependency, we must be satisfied that you require financial support from your EEA national sponsor to meet your essential living needs. In support of this, you have provided a money transfer list showing 53 transactions dated between 2 November 2015 and December 2020 showing a mixture of you and your mother as the beneficiary of these funds. The fact of transferring money is not evidence that it is needed by the recipient. I would expect to see substantial evidence of this over a prolonged period, considering the length of time your sponsor has been resident in the United Kingdom. In addition to money transfers, this office would also expect to see evidence which fully details yours and your family's 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.

4. In the only other substantive paragraph of the decision, the respondent added this:

> The submitted evidence shows that they [the sponsor] work full time hours and from this employment earns a net income of approximately £893.10 per month. Due to their income, your sponsor also receives state benefits of approximately £951.74 per month, namely, working and child tax credits. They also appear to be in receipt of several other benefits, pension credits of £164.50 per week along with the state pension and a Christmas bonus from the DWP. I am therefore not satisfied that it is sustainable for your sponsor to support you, along with their own family they appear to have in the UK. Therefore, after considering these factors, there is a risk that if you did arrive in the United Kingdom that you may become a burden on the public funds system of this country.

5. The respondent stated in the final paragraph of her decision that the application had been refused because she was not satisfied (i) that the appellant was related to the sponsor as claimed; and (ii) that the appellant was dependent upon the sponsor. That summary bears little resemblance to the preceding parts of the decision. No doubt was cast on the relationship between the appellant and the sponsor in the body of the decision and it is apparent from the second of the paragraphs which I have set out in full that the respondent also considered, in the exercise of her discretion under regulation 12(4)(c), that it was not appropriate to issue the Family Permit because of the additional burden on public funds which was likely to arise as a result of the appellant's admission.

6. It is regrettable that the summary paragraph is so inaccurate and apt to confuse but, on careful scrutiny of the decision, it is appreciably clear that the points

taken against the appellant were that the money which was being sent was not required to meet his essential needs and, in the alternative, that it was not appropriate to grant a Family Permit even if the appellant was the extended family member of the sponsor.

The Appeal to the First-Tier Tribunal

7. The appeal was heard by Judge French ("the judge"), sitting in Birmingham on 25 November 2021. The appellant was represented by Mr Hingora of counsel. The respondent was unrepresented. The judge heard oral evidence from the sponsor and submissions from Mr Hingora before reserving his decision.

8. In his reserved decision, the judge found, at [7], that the sponsor had been mainly responsible for providing financially for his wife and four children. He noted that he had no documentation about the sponsor's living expenses. He had various concerns about the evidence adduced in connection with the appellant's life in Pakistan. He did not understand why the appellant would have bought 25kg of meat, as was suggested in one of the receipts. He did not understand why the appellant was receiving medical treatment which the sponsor was supposedly paying for. The medical evidence referred to the appellant having a 'boold test', and the judge considered that a medical practitioner would not have made such a spelling mistake.

9. At [8], the judge expressed various concerns about the credibility of the sponsor's evidence. He doubted that the sponsor had accepted responsibility for supporting the appellant and his mother financially, given that he had not visited them more regularly. As he had previously noted, the sponsor had provided no documentary evidence of his own outgoings and only spoke about his mortgage and food bills. Given the sponsor's low income, the judge considered it implausible that he would be able to support the appellant as well as his own family.

10. Having cited decisions of the Upper Tribunal and Court of Appeal at [9], the judge drew his findings together at [10], which I should reproduce in full:

> Combining my reservations about the credibility of the documentation with my doubts as to the accuracy of the Sponsor's evidence, I conclude that I do not accept the Appellant's claims as being accurate. I do not believe that the Sponsor is financially capable of supporting the Appellant, because he is a low-paid worker in a restaurant with such low income that he needs to receive additional welfare benefits to meet the financial demands of supporting his 4 dependent children. Whilst there is evidence of monies being sent to Bangladesh I do not believe that the Appellant is dependent on the Sponsor for his essential needs. As I have indicated above I consider that much of the documentation is unreliable. As one example of this there is no consistency in the expenses receipts. There [sic] gaps in the periods of supply and no explanation for the nature of the purchases. I do not believe that on one occasion the Appellant should need to buy for his "essential needs" 25 kilos of meat for example. Moreover much of the documentation I would expect to see is absent. I am given some documents about medical care, with no explanation as to why the Appellant was said to need medical attention and as I have remarked

above the basic spelling error as to "blood" does not inspire confidence in the reliability of the document.

11. At [11], the judge reminded himself (correctly) that the appellant did not have available to him a human rights ground of appeal. He also noted, in purported reliance on the authorities he had previously cited, that the appellant was required to show continuing dependency "dating back before the date that the EEA nationality [sic] was granted citizenship". The appellant had in all the circumstances failed to demonstrate that he was financially dependent upon the sponsor for his essential needs.

The Appeal to the Upper Tribunal

12. The grounds settled by Mr Hingora are appreciably longer than the judge's decision. That should not occur; grounds of appeal are to be expressed with precision and concision, as has been stated on numerous occasions by both this Tribunal and the Court of Appeal. The grounds themselves may be stated quite shortly, however, and are as follows:

(i) The judge misdirected himself in law, at [8], in requiring the appellant and the sponsor to demonstrate a 'close family tie', since there is no such requirement in the Regulations or the authorities;

(ii) The judge misdirected himself in law in considering whether the sponsor could afford to support the appellant, since the relevant question was merely whether that support was required to meet the appellant's essential needs;

(iii) The judge had erred in considering a matter which was not in dispute between the parties, of whether support was actually being sent to the appellant (and his mother) by the sponsor;

(iv) The judge had failed to give adequate reasons and had failed to engage with the apparent inconsistency between the ECO's decisions in the appellant's case and that of his mother;

(v) The judge failed to take material evidence of dependency into account.

13. In his opening submissions, Mr Hingora accepted that the grounds were lengthy and detailed and stated that he did not wish to develop them any further unless there were specific matters on which I required his assistance. I did not. Mr Hingora added that the judge had failed to consider what had been said regarding dependency at [24] of Reyes v Migrationsverket (Case 423/12); [2014] 2 CMLR 39.

14. Mr Williams submitted, as he had in his rule 24 response to the grounds of appeal, that the judge's decision represented a sustainable disposal of the appeal. There were valid concerns expressed about the credibility of the appellant's account and the judge was not restricted to considering the points raised in the refusal notice. The judge had given sustainable reasons for concluding that the essential needs test was not satisfied. If the appellant's counsel had been concerned that the judge was straying outside the reasons given by the ECO, it was open to him to object or to ask for an adjournment, but he had taken neither course. The point regarding the 25kg of meat did not appear to have been raised during the hearing but that was immaterial. There

had been no clear finding regarding the 53 remittances but that was also immaterial. It might have been the case that the judge was wrongfooted by the ECO's failure to refer in terms to regulation 12(4)(c) but that was also immaterial, given the judge's central conclusion that the appellant was not the extended family member of the sponsor.

15. Mr Hingora did not wish to reply.

16. I indicated after the submissions that I was satisfied that the judge had erred in law and that his decision fell to be set aside. Written reasons for that decision were to be provided subsequently. I indicated that the appeal would be remitted to the FtT to be heard afresh by a judge other than Judge French.

Analysis

17. I am satisfied that the judge's decision is vitiated by procedural unfairness, as contended in ground three. As Mr Hingora noted in his grounds of appeal, the Entry Clearance Officer proceeded on the basis that the sponsor *had* remitted money to the appellant (and his mother) on some 53 occasions. The ECO's concern was that this was insufficient to show that the remitted money was used to meet the appellant's essential needs.

18. There was no Presenting Officer before the judge. He was, in those circumstances, required to conduct the hearing in accordance with the starred guidance provided by the Immigration Appeal Tribunal in MNM (Surendran guidelines for Adjudicators) Kenya [2000] UKIAT 5; [2000] INLR 576. Whilst those guidelines have been revisited and revised to some extent in the intervening decades, the relevant duty of the judge as regards the scope of the grounds of refusal remains unchanged. It is inevitable that there will be cases in which an Entry Clearance Officer has refused an application on one basis but, upon reading the papers, it becomes clear to the judge that there are other concerns about the appellant's ability to meet the Immigration Rules or, as here, the EEA Regulations. Proceedings before the FtT(IAC) are adversarial, however, and a judge must tread carefully indeed when the respondent is unrepresented. The solution suggested in the fifth Surendran guideline is that any additional matters of concern should be brought to the attention of the representative at the outset, so that they may dealt with in oral evidence and/or in submissions.

19. It is apparent that this procedure was not followed in this case. What was originally in doubt was whether the money which *was* sent to the appellant was used to meet his essential needs. In the judge's decision, however, he expressed doubt that the money was even sent by the sponsor, due to his comparatively low income. That was an *ex facie* concern which should have been apparent to the judge on reading the papers. If he was concerned about the point, his obligation was to canvass it with Mr Hingora at the outset so that it could be dealt with. Mr Hingora might have felt able to elicit evidence from the sponsor on the point. He might have felt able to deal with the point in submissions. He might have sought an adjournment in order to gather further evidence. The critical point, as I canvassed with Mr Williams, is that the sponsor had come to the FtT as a man whose credibility was not impugned by the respondent. The case had been prepared accordingly. If the judge was concerned that the sponsor had not told the truth about the money he had sent to the appellant, that point should have been raised with counsel. In failing to do so, I am satisfied that the judge erred procedurally.

20. As Mr Williams took me carefully through the judge's decision, a further difficulty with it emerged. Although some concern was expressed by the judge about the credibility of the sponsor's account, and the reliability of the documentary evidence, he reached no clear finding as to whether money had been remitted by the sponsor to the appellant. He reached no explicit finding on the 53 remittance records upon which the appellant primarily based his contention that he was dependent on the sponsor. The appellant was entitled to a clear resolution of that issue. It had been accepted in terms by the respondent that this money had been sent but the judge plainly had some doubts about it. If the judge found, in the final analysis, that the sponsor was lying about remitting this money, and that the remittance records were unreliable, it was necessary to state so explicitly. As it is, the appellant cannot know whether the judge accepted or rejected those transactions.

21. There are further difficulties with the judge's decision. He failed, as Mr Hingora noted, to address in any way the fact that the appellant's mother had been granted a Family Permit. It might be that the judge was not required to say very much on the point at all but there is, at first blush, something in it. She and the appellant would have been required to establish dependency in order to succeed (regulations 7(1)(c) and 8(2)(b) refer)). The evidence upon which they relied was seemingly the same. The fact that the appellant might be thought more able to get a job and become self-supporting is irrelevant if, in fact, he is dependent on the sponsor to meet his essential needs: Lim v ECO (Manila) [2015] EWCA Civ 1383; [2016] Imm AR 421. If the appellant's mother was able to persuade the ECO that she was able to meet the Regulations, therefore, it was incumbent on the judge to consider that as part of his assessment of the appellant's claimed dependency on the sponsor.

22. As I have observed above, the ECO's decision was unclear. It suggested that the relationship was in doubt when it seemingly was not. It referred in its penultimate paragraph to a concern that the appellant would become a burden on public funds if he was admitted but that concern was not attached to a regulation. As I have suggested above, it was irrelevant to the assessment under regulation 8 but it might have been relevant to the exercise of the ECO's discretion (in the alternative) under regulation 12(4)(c). As I suggested to Mr Williams at the hearing, it seemed to me that the lack of clarity in the ECO's decision in this regard might well have wrongfooted the judge, who proceeded to introduce questions of affordability into his assessment under regulation 8. Had there been a Presenting Officer, I very much doubt that this error would have occurred, as the issues between the parties would have been clarified at the outset. In large part, therefore, I consider that the errors into which the judge fell emanated from the lack of clarity in the respondent's decision and the absence of a Presenting Officer.

23. I should perhaps mention one further problem with the judge's decision, since the case will be remitted and it would be unfortunate if the error went uncorrected.

24. In the final paragraph of his decision, the judge took another point which had not been raised by the ECO, which was that the evidence did not show that the appellant had been dependent on the sponsor since the sponsor obtained Italian nationality in 2015. He attributed that requirement to authority including Moneke [2011] UKUT 341 (IAC0 and Chowdhury [2020] UKUT 188 (IAC). In doing so, the judge misunderstood the law.

25. When an applicant has made their way to the United Kingdom, and seeks to suggest that they meet the requirements of regulation 8(2)(b)(ii), it is incumbent upon them to show that they were dependent on the sponsor or a member of his household in the country from whence they have come *and* that they continue to be dependent on the sponsor or a member of his household in the UK. Chowdhury (upheld on appeal: [2021] EWCA Civ 1220; [2021] Imm AR 1748) and now Sohrab [2022] UKUT 157 (IAC) have explored the requirement of continuity and have held that a break in the continuity of dependency (or membership of household) might be fatal to an application by an extended family member.

26. Those decisions have no bearing in an appeal of this nature, however. What the appellant was required to show was dependency at the time of the hearing. He was not required to establish that he had been dependent on the sponsor for any particular period of time. The absence of evidence that he had been dependent for a long time might have been relevant to the assessment of credibility but it did not mean that the appellant was unable to be the sponsor's extended family member under regulation 8. The salient part of that regulation requires that he is currently dependent or a member of the sponsor's household and that he wants to join him in the UK. Moneke, Chowdhury and Sohrab were all 'in-country' cases, in which the requirement of continuity was to the fore. Here, it was an irrelevance.

27. For all of these reasons, I find that the FtT erred in law and that its decision should be set aside. Having considered the Senior President's Practice Statement at paragraph 7.2 and the recent decision of the Court of Appeal in AEB v SSHD [2022] EWCA Civ 1512, I have decided to remit the appeal to be heard afresh by another judge of the FtT. In doing so, I observe that it would be beneficial for the respondent to be represented at the remitted hearing so that the scope of the issues can be clarified.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law and that decision is set aside. The appeal is remitted to the FtT to be heard afresh by a different judge.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

9 December 2022