



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/47133/2013

THE IMMIGRATION ACTS

Heard at Field House
On 5th June 2014

Determination Promulgated
On 9th June 2014

Before

UPPER TRIBUNAL JUDGE COKER

Between

MAYURATHAS RASARATNAM

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

Respondent

Representation:

For the Appellant: Mr R Singer, counsel, instructed by S Satha & Co
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant appeals a decision of the First-tier Tribunal which dismissed his appeal against a decision of the respondent to refuse to issue him with a residence card as an extended family member of an EEA national in accordance with Regulation 8(2)(a) and (c) of the Immigration (European Economic Area) Regulations 2006 (the "EEA Regulations").
2. Permission to appeal had been granted on the basis that it was arguable that the First-tier Tribunal Judge had failed to have regard to material evidence relating to the appellant's financial dependency and had acted unfairly in making

adverse findings concerning membership of the EU family member's household without enabling the appellant to give oral evidence in connection therewith.

Background

3. The appellant claims that he was supported financially by his uncle, a German citizen, whilst in Sri Lanka although funds were sent for him to his father rather than direct to him. The appellant started work in Sri Lanka in 2007 after his father had a heart attack. His father returned to work after 6 months but was not able to work full time. The appellant is recorded as having conceded that had his father continued working his income would have been sufficient to support the whole family "up to a point" but that money was needed for education for his sister. The appellant is recorded as accepting that the uncle/sponsor sent money for the whole family but it was partly for him as part of the family.
4. The appellant came to the UK on 22nd August 2010; his uncle continued to send money to his father. The appellant lived with other relatives when he first arrived in the UK and said he started living with his uncle in September 2012. He is recorded as saying that prior to September 2012 he was financially assisted by other relatives but after September 2012 his uncle provided him with financial help in cash. The appellant earns £800 per month and is recorded as saying that he looks after his family in Sri Lanka and if he did not send money to Sri Lanka the money he is earning would be sufficient because he is living with his uncle.

Error of law

5. In paragraph 21 the First-tier Tribunal judge sets out the evidence he has considered with regard to the financial dependency of the appellant upon his uncle. He refers to the "only documentary evidence" he has of money being sent is "by the admission of both the appellant and his uncle purely for the purposes of his student visa application and therefore does not comprise "essential needs" as defined in the European Casework Instructions." The judge was "not satisfied on the balance of probabilities that [the appellant] has ever been financially dependant upon his uncle for his essential needs."
6. In paragraph 22 the judge refers to discrepancies in the address ie letters and documents being sent to the appellant at 204a Archway Road and to his uncle at 204 Archway Road and states that he has "no documents addressed to [the uncle] at 204a Archway Road, but only to 204 Archway Road". The judge does not accept that the addresses are interchangeable stating "According to the appellant, his uncle has been living at 204a Archway Road since at least September 2012 and yet there is absolutely no documentary evidence to this effect. There are numerous documents he could have produced such as tenancy agreement, various utility bills, council tax statements etc but absolutely nothing has been produced in this respect. His uncle may well have a shop at 204 Archway Road but I am not satisfied anywhere near the balance of probabilities that he resides at 204a Archway Road....I am most definitely not satisfied that they are living together in the same household."

7. Ground 1 is essentially that the judge failed to have regard to four Western Union payments dated 12th February 2008 (£105); 18th July 2008 (£110); 31st July 2009 (£100) and 21st September 2010 (£80) which were “significant evidence in that it corroborates the appellant’s account that his uncle was making frequent payments to his father in Sri Lanka to help them in meeting their “essential needs”. It is also argued that the payment on 21st September 2010 was corroborative of the appellant’s oral evidence that one of the payments was made for the purpose of paying for his father’s operation, which took place on 21st September 2010.
8. Ground 2 is that it was only in submissions that the appellant was made aware that the judge considered that the addresses of 204 and 204A were not interchangeable and that they were not given an opportunity to address this. The ground asserts that the judge placed little weight on the explanation given by counsel for the appellant.

Ground 1

9. The judge states in [21]

“There is evidence that [the uncle] sent funds to the appellant’s father in the sum of £2000 in March 2008, £4,500 in August 2009, and £2500 in June 2010. However apart from the three Western Union money transfer receipts send (sic) over a period of just two years there is no other independent evidence of any funds sent to the appellant or his family in Sri Lanka other than his mother’s letter to which I do not attach great weight as it is clearly in the family’s interest that the appellant succeeds in his appeal.....In fact the appellant at paragraph 11 of his witness stamen states that the three sums of £2500, £2,000 and £4,500 “all went towards the fees for my student visa and my course”. Therefore none of these funds were used for any medical bills and there is no evidence whatsoever that the uncle has paid any medical bills. There are no bank statements from the appellant’s father showing receipt of any other funds from abroad that may have been from the appellant’s uncle. The appellant claims that he was only earning Rs.4,000 per month from his employment with the communications centre but there is no evidence of this and it is just as likely he was earning considerably more and was financially independent. Again there is no documentary evidence to show that his father ceased work for six months and then resumed work only for 2 or 3 days per month. The appellant’s uncle also confirms that the three Western Union transfers were solely for the purpose of the appellant’s student visa application. He states that he sent other money transfers but did not keep the receipts as he thought he would never need them. Quite simply I only have the oral evidence of the appellant and his uncle and the written statement of the appellant’s mother that the appellant’s uncle has supported their family for a number of years dating back to 1989 when he first went to Germany but there is absolutely no documentary evidence of this whatsoever.....The only documentary evidence I have of money being sent to the appellant’s family is by the admission of both the

appellant and his uncle purely for the purposes of his student visa application and therefore does not comprise “essential needs”I am not satisfied on the balance of probabilities that he has ever been dependent upon his uncle for his essential needs. The only evidence I have is that in effect his uncle sponsored his student visa application, which I do not interpret as being within the definition of “essential needs”. As it was conceded by Ms Walker at the beginning of the hearing that the appellant was not relying upon being from the same household as his uncle in Sri Lanka. He clearly fails to satisfy point iii of the headnote to Dauhoo.”

10. There is no challenge to the finding that the meeting of the appellant’s student visa fees and course fees is not “essential needs”. The judge in his findings has clearly not referred to the four Western Union payments referred to in paragraph 7 above. His findings that “there is absolutely no documentary evidence” that the uncle has supported the family appears to be an error of fact.
11. Mr Singer submits that the last payment, made on 21st September 2010, was to pay for the father’s medical bill and this was evidence given by the appellant. There is no medical bill to that effect in the bundle before the judge but there is a “Diagnosis Ticket” for a ‘lateral sphincterotomy’ on 21 September 2010 for A. Rajarathnam, discharge on 22 September 2010 (page 19 appellant’s bundle). There are medical bills for an appendectomy for R. Mouradaas (also spelt Mayurdaas) between 31 July 2009 and 3 August 2009 which total somewhere in the region of Rs68,000 (pages 15-18 appellant’s bundle). There is a diagnosis of recurrent tonsillitis for Mast. R Myuradas on 23 August 1999 to 25 August 1999 but no medical bill (page 13 appellant’s bundle). There is a diagnosis ticket for A Rajarathna 15 December to 18 December 1998 for headache and neurological examination but no medical bill. There is a description of a complaint of umbilical discharge for Mayuradas on 1 October 1993 but no medical bill (page 9 appellant’s bundle).
12. The uncle, in his witness statement says that he

“...always tried to help [the family] by sending them money when they have asked, although I have not always had money and so sometimes it was not possible. I was able to send money to Mayurathas’ father in 1989 when his bus was destroyed but I cannot recall how much money it was that I sent back. I would try and send lump sums of money when I could, perhaps once every three to six months (although there was no fixed pattern) for everyday essentials such as food. I know that it was difficult for my wife’s family to support themselves financially. Mayurathas’ father did not earn that much money as a driver and he had three children and a wife to support. I have also previously sent one off payments to Mayurathas’ family to pay for medical bills...I know that the appellant and his father were able to pay for part of the medical bills but they could not afford to pay for it all and I was happy to help.
13. The appellant in his witness statement says that the Western Union payment made on 31 July 2009 was for his medical fees. The appellant refers to his

father having a heart attack in 2007 and thus not working full time; there is no medical evidence of this and no reference to this in the witness statement of the uncle. There is no reference in the uncle's witness statement to the claimed reduction of working by the father after the heart attack or whether and to what extent the uncle sent additional money for essentials given the reduction in income of the family. In oral evidence the uncle said that when he sent money to Sri Lanka that was for the whole family and not merely for the appellant himself. He said that he no longer sent money to Sri Lanka since the appellant was in the UK. The appellant said that he now sends money to his family in Sri Lanka.

14. Although in his record of the evidence before him and the submissions, the judge refers to the assertion that the uncle sent money to the family and that this therefore included the appellant and thus the appellant was dependent upon him and that this was evidenced by the four Western Union receipts, the judge has not referred to this in his conclusions as to dependency in Sri Lanka.
15. It is however inconceivable that the judge could have reached any other conclusion than that which he reached namely that the appellant had never been dependent upon his uncle for essential needs. The evidence before the judge amounted to confirmation that two medical bills were met and two other sums of money were sent. There was no independent evidence of the appellant's earnings in Sri Lanka, the family's costs in Sri Lanka, the reduction in the father's income, that the father had even had a heart attack (despite there being other, older, medical records produced). Western Union would, if asked, have produced a schedule of payments made since February 2008 – of the receipts that were produced all were made through the same agent. But no such schedule was before the judge. Ms Walker in her submission had stated that the average wage in Sri Lanka was between Rs6,500 and Rs7,000 per month and that the appellant's income in Sri Lanka was at best RS6000 but his basic was Rs4000. Even if those figures are accepted as correct (and the judge makes the point that all were not evidenced by way of documentation) there is no documentary evidence or even oral evidence of any shortfall in family income such that essential daily needs of food, fuel and other household necessities could not have been met without the uncle's financial support. Two of the Western Union receipts appear to be directly referable to medical costs. Dauhoo [2012] UKUT 79 (IAC) considering the issue of dependency makes clear that the burden is upon the appellant to show dependency. [16] of Dauhoo states

“...It should be recalled that in Ihemedu (OFMs-meaning) Nigeria [2011] UKUT 340 (IAC) the Upper Tribunal held that:

“If an applicant chooses not to apply from abroad for a family permit under reg 12 of the 2006 Regulations, thereby denying the UK authorities an opportunity to check documentation in the country concerned, he cannot expect any relaxation in the burden of proof that applies to him when seeking to establish an EEA right”

17....By having afforded the British post in Mauritius no opportunity to receive and check documentation relating to dependency, and having chosen to travel to the UK instead (and eventually to apply from here), the appellant could not expect the judge to overlook a lack of satisfactory

documentary evidence just because he was able to produce witness statements and witnesses.”

16. Leaving aside the respondent's assertion that monies sent to the father do not amount to monies upon which the appellant is dependent for his essential needs, there is, quite simply a lack of evidence before the judge that could have resulted in a different conclusion being drawn.
17. Therefore, even though the judge has overlooked the four Western Union receipts in drawing his conclusions as to financial dependency in Sri Lanka, I find that this does not amount to an error of law such that the decision be set aside. The decision is neither perverse nor irrational.

Ground 2

18. The judge, for completeness, considered whether the applicant and his uncle formed part of the same household here in the UK. He does not accept that the addresses of 204 and 204A Archway Road are interchangeable and draws attention to the lack of evidence that the uncle resides at 204A. Complaint is made that this should have been raised by the judge at the hearing and to fail to enable the appellant and his uncle to give evidence on this issue amounts to a breach of the common law duty of fairness. I do not agree. The judge heard and took account of Ms Walker's submission as regards this issue. The appeal to the First-tier Tribunal was specifically upon the ground that the appellant was a member of the uncle's household whilst in the UK. The uncle's evidence was that he moved into the 3 bedroom flat at 204A Archway Road in 2012 when the other tenants moved out and the appellant joined him there. Although the appellant produced evidence of admission to the electoral register and bank documents to 204A there was not one single piece of independent evidence that the uncle was living at that address despite his witness statement and oral evidence being to the effect that he paid utility bills and rent and he does not ask the appellant for a contribution. Such documentation would plainly have been available to him. It was clear from the reasons for refusal of the residence permit that the respondent did not accept that the appellant was a member of the uncle's household in the UK. This was not an issue raised only during submissions. Furthermore counsel for the appellant did not, when the judge referred to this during her submissions, request an adjournment or for the appellant and/or his uncle to be recalled to give further evidence. The judge was entitled to reach a decision on the basis of the evidence before him, which is what he did.
19. Even if ground 1 were made out, the appellant and his uncle are not members of the same household. There is no error of law in the judge's findings.
20. I should mention that having looked at the documents that were before the judge very carefully I have noted that one of the Western Union documents dated 21st June 2010 for £2,500 gives the sender's address as 204A Archway Road. I do not consider this to be relevant to the issue before either the First-tier Tribunal judge or me – that date pre-dates the date the appellant arrived in the UK and pre-dates the date on which the uncle claims to have started living at 204A

Archway Road (sometime in 2012). This document was not drawn to my attention or, it appears to the First-tier Tribunal judge and was not relied upon by the appellant. It does not in any event alter the findings of the judge as to the total lack of documentary evidence of the uncle's claimed residence at 204A Archway Road from sometime in 2012.

21. During the course of the hearing before me I indicated to both parties that the word "continuous" in the regulation may impact upon the appellant's claim in any event. I note that Dauhoo considers this in [12]. I heard no argument from either party with regards to this and make no finding. A view as to this is not relevant on the facts of this appeal (and I have taken no view), but it may be that at some point in the future further consideration may be given to that concept given the underlying purpose of the Directive.

Conclusions:

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

I do not set aside the decision

The decision of the First-tier Tribunal judge stands.

Date 9th June 2014

Judge of the Upper Tribunal Coker