



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/21354/2014

THE IMMIGRATION ACTS

Heard at North Shields

On 17th March 2016

**Decision &
Promulgated
On 5th April 2016**

Reasons

Before

DEPUTY UPPER TRIBUNAL JUDGE MANDALIA

Between

MR. SAJEEVAN ATHMANATHAN

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

Respondent

Representation:

For the Appellant: Mr. V Lingajothy, of Linga & Co

For the Respondent: Mr. J Kingham, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision and reasons promulgated by First-tier Tribunal Judge Carlin on 10th March 2015, in which he dismissed an appeal against the refusal by the Secretary of State for the Home Department on 6th May 2014 to issue a “Residence Card” to the appellant as confirmation of a right to reside in the UK under the

Immigration (European Economic Area) Regulations 2006 (“the 2006 Regulations”).

Background

2. The appellant is a national of Sri Lanka who was born on 9th January 1986. He came to the UK on 1st March 2007 having been granted a student visa. His immigration history is not entirely clear but on 10th March 2014, he applied for a residence card as confirmation of a right of residence in the UK. The appellant applied as the non-EEA national family member of Sukumar Vaithilingam (*the appellant’s maternal uncle*), a national of Norway exercising treaty rights in the UK in accordance with the 2006 Regulations. It was the decision refusing that application, which gave rise to the appeal before First-tier Tribunal Judge Carlin.
3. At paragraphs [1] and [2] of his decision, First-tier Tribunal Judge Carlin identifies the two issues that were to be determined by the Tribunal.
4. At paragraph [1] of his decision, the Judge identifies the first issue. That is, whether the appellant is entitled to a residence card. The Judge’s findings of fact, his analysis of the relevant legal framework, the relevant authorities and his analysis of the evidence before him, is to be found at paragraphs [3] to [42] of the decision.
5. The Judge notes at paragraph [14] of his decision that the appeal turns on whether the appellant falls within the definition of ‘extended family member’ as set out in Regulation 8(2) of the 2006 Regulations. The appellant’s case was that he satisfied the requirements of Regulation 8(2)(a). That is, the appellant is “dependant upon the EEA national or is a member of his household.”
6. At paragraph [18] of the decision, the Judge noted the reliance placed by the appellant upon the decision of the Upper Tribunal in **Dauhoo**

(EEA Regulations - Reg 8(2))[2012] UKUT 79. At paragraph [20] he refers to the meaning of the words “membership of a household” as set out in the decision of the Court of Appeal in **KG (Sri Lanka) [2008] EWCA Civ 13.** Finally, at paragraph [40] the Judge refers to the meaning of the word “dependency” as set out in **Jia Migrationsverket Case C-1/05** and **Moneke (EEA-OFMs Nigeria) [2011] UKUT 00341.**

7. At paragraph [42] of his decision, the judge concluded overall that the appellant had neither established that he was dependant upon the EEA national nor that he is a member of his household.
8. At paragraph [2], the Judge states that the second issue was “whether the appeal invokes the right to a private and family life under Article 8 and whether there has been a violation of Article 8.” The Judge deals with that second issue at paragraphs [43] to [47] of his decision. At paragraph [47], the Judge states:

“I was of the view that Article 8 was not engaged in the present case, broadly for the reasons put forward by Mr Hammonds. The appellant does not have to leave the UK as a result of the decision that I have made. As such, there has been no interference with the right to respect for private or family life. If and when such a decision has been made, Article 8 may be relevant then.”

The grounds of appeal

9. The appellant advanced four grounds of appeal in support of the appeal to the Upper Tribunal;
 - a. The Judge arrives at findings of fact without any reference to the correct standard and burden of proof;

- b. The Judge erred in law in assessing whether the appellant's sponsor sent him money in order to meet his essential needs;
 - c. The Judge erred in law in his assessment of the evidence of Mr Premachandran MP;
 - d. The Judge erred in law in failing to consider whether there is any potential breach of the appellant's rights under Article 8 ECHR
10. Permission to appeal was granted by Deputy Upper Tribunal Judge Chamberlain on 23rd July 2015. In doing so, she noted:

"I have carefully considered the grounds and the decision. The Appellant's central claim was under the EEA Regulations. He also submitted that the decision was a breach of his rights under Article 8. The judge did not consider the Appellant's claim under Article 8 on the grounds that the Appellant did not need to leave the United Kingdom as a result of the decision. This ground is arguable and merits the grant of permission to appeal. I am disinclined to reject the other grounds."

The hearing before me

11. It is convenient to deal with the fourth of the appellant's grounds of appeal that I have identified at paragraph [9] above, first. Although the appellant's appeal on the Article 8 ground was maintained in the appellant's skeleton argument relied upon by Mr Lingajothy, Mr Lingajothy in my view rightly, abandoned that ground at the hearing of the appeal before me. In **Amirteymour and others (EEA appeals; human rights) [2015] UKUT 466 (IAC)**, the Upper Tribunal held that where no notice under section 120 of the 2002 Act has been served and where no EEA decision to remove has been made, an appellant cannot bring a Human Rights challenge to removal in an appeal under the EEA Regulations.

12. As to the remaining three grounds of appeal, Mr Lingajothy initially submitted that the Judge fails to identify the standard of proof that he has applied in reaching his decision. He submitted that the appellant is therefore unable to know whether the Judge adopted the correct burden and standard of proof in determining the appeal. However during the course of the hearing before me, Mr Lingajothy accepted that the Judge appears to have applied the civil standard of proof, and considered whether the appellant has established, on a balance of probabilities, that the requirements of Regulation 8(2)(a) of the 2006 Regulations are met.

13. As to the second ground of appeal, Mr Lingajothy submitted that in finding that money sent by the sponsor to the appellant and his family, was not used exclusively for essential items, but was in the main, used to make life easier for the appellant and his family, the Judge fails to identify the information that leads to that finding. Mr Lingajothy submitted that the appellant was not required to establish that the money provided by the sponsor to the family, was exclusively for essential items. It was sufficient for the appellant to establish that the funds were used for essential items and for other uses. Furthermore, he submitted that it is not clear whether the Judge has considered the Appellant's evidence as set out in paragraph [30] of the appellant's witness statement. If the evidence of the appellant is rejected, the Judge has failed to provide any reasons for rejecting that evidence and has failed to make any findings as to the credibility of the Appellant or his Sponsor.

14. Finally, as to the third ground of appeal, Mr Lingajothy submits that the finding at paragraph [33] that the evidence of Mr. Suresh Premachandran MP could not be relied upon, is based solely upon speculation by the Judge and it was open to the Judge to raise any concerns about that evidence with the appellant or his representative at the hearing, in order to clarify matters.

15. In reply, Mr Kingham submitted that a careful reading of the decision demonstrates that the Judge has correctly identified the legal framework, and has properly addressed the correct test in his assessment of whether the requirements of Regulation 8(2)(a) of the 2006 Regulations are met by the appellant. He submits that the grounds advanced by the appellant amount to nothing more than a disagreement with the findings that were properly open to the Judge.

Discussion

16. It is unfortunate that the Judge failed to expressly set out in his decision, upon whom the burden of proof rests, and the standard of proof that he has applied in his assessment of the evidence. However it is plain from a proper reading of the decision that the Judge proceeds upon the premise that it is for the appellant to establish, on a balance of probabilities, that the requirements of Regulation 8(2)(a) of the 2006 Regulations are met. In my judgement, Mr Lingajothy was right to accept that the Judge appears to have correctly applied the civil standard of proof to his assessment of the evidence. That he has done so, is in any event plain when one turns to the Judge's assessment of the evidence. For example, at paragraph [26], the Judge states "*...I found it more likely¹ that the appellant's sponsor was a member of the appellant's parent's household.*". In assessing the weight to be attached to the statements adduced by the appellant, at paragraph [33], the Judge states "*..So far as these four statements are concerned, I was of the view that they support the assertion that the sponsor was helping out financially but I felt that it is unlikely that the [sic] makers of the statements had first hand knowledge of the use to which the monies sent were put.*". At paragraph [39], the Judge states "*Given that the appellant's father was in employment, I was of the view, on a balance of probabilities that he did contribute to the cost of the appellant's education.*". In my judgment, it is plain that the Judge applied the

¹ My emphasis

correct burden and standard of proof and that there is no substance to the first of the appellant's grounds of appeal.

17. Before addressing the two remaining grounds of appeal, I remind myself that in **R & ors (Iran) v SSHD [2005] EWCA Civ 982**, the Court of Appeal held that before the Tribunal can set aside a decision of a Judge on the grounds of error of law, it has to be satisfied that the correction of the error would have made a material difference to the outcome, or to the fairness of the proceedings. A finding might only be set aside for error of law on the grounds of perversity if it was irrational or unreasonable in the *Wednesbury* sense, or one that was wholly unsupported by the evidence.
18. At paragraph [18] of his decision, the Judge refers to the decision of the Upper Tribunal in **Dauhoo (EEA Regulations - Reg 8(2))[2012] UKUT 79** and at paragraph [19] sets out the principle to be derived. At paragraph [20] the Judge refers to the decision of the Court of Appeal in **KG (Sri Lanka) [2008] EWCA Civ 13**. Having correctly directed himself to the relevant authorities, the Judge turned to the evidence and found at paragraph [20] that:

"..the appellant has never been a member of the sponsor's household whilst in Sri Lanka..."

The Judge sets out at paragraphs [22] to [26], his reasons for that finding. In my judgment that was a finding that was open to the Judge on the evidence before him. It is a finding that cannot be said to be perverse, irrational or unreasonable in the *Wednesbury* sense, or one that was wholly unsupported by the evidence.

19. Having found that the appellant has never been a member of the sponsor's household whilst in Sri Lanka, the Judge went on at paragraphs [27] to [41] to consider the evidence of 'dependency'. Importantly, the Judge found;

“27. There were a number of examples where it was possible to follow the paper trail and see that money had been transferred from the sponsor to the appellant and the rest of the family.

30. Equally, there is evidence of sums of money being transferred from the sponsor into the appellant’s account....

35. I was of the view that the money was not used exclusively for essential items and was, in the main, used to make life easier for the appellant and his family. I was of this view for the following reasons.

At paragraphs [36] to [39] the Judge sets out his reasons for the finding that the money transferred by the sponsor to the family, including transfers of money to the appellant was not used exclusively for essential items, and was used, in the main, to make life easier for the appellant and his family. In my judgment that was again a finding that was open to the Judge on the evidence before him. In my judgment, it is a finding that cannot be said to be perverse, irrational or unreasonable in the *Wednesbury* sense, or one that was wholly unsupported by the evidence.

20. In considering the grounds of appeal advanced by the appellant, I have considered the evidence that was before the First-tier Tribunal Judge. The evidence of the sponsor in his witness statement dated 29th September 2014 is as follows:

“9. I went back to Sri Lanka to visit my sister and her family. Sajeevan was 11 years old then. I was really happy to see him, as he was the next boy in the family, after me.

10. I got to spend some time with young Sajeevan. I took him out with me everywhere I went, and bought him a lot of gifts². I gave my sister money for Sajeevan’s private schooling, as I wanted for him to get the

² My emphasis

best education possible, so that he may progress in his life. I did not want him to miss out on these opportunities, as he was capable and I wanted him to be happy and successful.

11. *In 2002, I again travelled to Sri Lanka, and I went to Jaffna this time. I also brought my son with me, who was 7, so that he could meet Sajeevan, who was 16 at the time. I bought him a new motorcycle, a computer and study materials; something his parent's were not able to afford for him. I paid for his college fees in Colombo, and also funded towards his driver's license.*

12. *I bought furniture for the house, since it was my house as well. I wanted to make sure that everyone was living comfortably.*

...

24. *My sister and her husband were not very well off, as her husband worked as an irrigator, in the irrigation department of the government and my sister was a housewife. They had two children who needed support for their day to day care, their sustenance and schooling etc.*

25. *Traditionally, I as a brother, I had to make sure that my sister was being supported adequately and I was responsible for her maintenance, while she was financially unstable due to her husband's insufficient salary, which he was unable to run his house, maintain his family properly and risked being unable to pay for the essentials, such as, household goods, grocery and the children's schooling.*

27. *I was in constant contact with my family in Sri Lanka, that being my sister especially. I made regular fund transfers for my sister and her family, so that they could live comfortably with the children having enough to eat and paying for their tuition and maintenance. They were dependent on my monthly support. "*

21. At paragraph [40] of his decision, the Judge refers to the meaning of the word "dependency" as set out in **Jia Migrationsverket Case C-1/05** and **Moneke (EEA-OFMs Nigeria) [2011] UKUT 00341**. In **Moneke (EEA-OFM's Nigeria)**, the Upper Tribunal held;

“41. Nevertheless dependency is not the same as mere receipt of some financial assistance from the sponsor. As the Court of Appeal made plain in SM (India) (above) dependency means dependency in the sense used by the Court of Justice in the case of Lebon [1987] ECR 2811. For present purposes we accept that the definition of dependency is accurately captured by the current UKBA ECIs which read as follows at ch.5.12:

“In determining if a family member or extended family member is dependent (i.e. financially dependent) on the relevant EEA national for the purposes of the EEA Regulations:

*Financial dependency should be interpreted as meaning that the person needs financial support from the EEA national or his/ her spouse/civil partner in order to meet his/her **essential needs** – not in order to have a certain level of income.*

Provided a person would not be able to meet his/her essential living needs without the financial support of the EEA national, s/he should be considered dependent on that national. In those circumstances, it does not matter that the applicant may in addition receive financial support / income from other sources.

There is no need to determine the reasons for recourse to the financial support provided by the EEA national or to consider whether the applicant is able to support him/herself by taking up paid employment.

The person does not need to be living or have lived in an EEA state which the EEA national sponsor also lives or has lived.”

42. We of course accept (and as the ECIs reflect) that dependency does not have to be “necessary” in the sense of the Immigration Rules, that is to say an able bodied person who chooses to rely for his essential needs on material support of the sponsor may be entitled to do so even if he could meet those needs from his or her economic activity: see SM (India). Nevertheless where, as in these cases, able

bodied people of mature years claim to have always been dependent upon remittances from a sponsor, that may invite particular close scrutiny as to why this should be the case. We note further that Article 10(2)(e) of the Citizens Directive contemplates documentary evidence. Whether dependency can ever be proved by oral testimony alone is not something that we have to decide in this case, but Article 10(2)(e) does suggest that the responsibility is on the applicant to satisfy Secretary of State by cogent evidence that is in part documented and can be tested as to whether the level of material support, its duration and its impact upon the applicant combined together meet the material definition of dependency.

43 Where there is a dispute as to dependency (as there was in the present case) immigration judges should therefore carefully evaluate all the material to see whether the applicant has satisfied them of these matters.”

22. The Judge found at paragraph [40]:

“..... In the present case, because the appellant’s father was working, it cannot be said that this test is met.”

I reject the submission made by Mr Lingajothy that the appellant was not required to establish that the money provided by the sponsor to the family, was exclusively for essential items. As the Upper Tribunal confirmed in **Moneke (EEA OFM’s Nigeria)**, dependency is not the same as mere receipt of some financial assistance from the sponsor. In my judgment, it was open to the Judge to find that the money was, in the main, used to make life easier for the appellant and his family for the reasons identified by the Judge. The finding is again one that cannot be said to be perverse, irrational or unreasonable in the *Wednesbury* sense, or one that was wholly unsupported by the evidence.

23. Finally, I turn to the remaining ground relied upon by the appellant. That is, the Judge erred in law in his assessment of the evidence of Mr Premachandran MP. At paragraph [33], the Judge states;

“I noted that there was documentary evidence supporting the appellant’s assertion that money was sent by his sponsor. For example the sworn statements of various dates at pages 1- 4 of the bundle submitted on 30th September 2014 indicate that this is the case. Mr Premachandran, in the statement dated 19th September 2014 indicates that the sponsor paid the appellant’s day-to-day expenses whilst the appellant was in Jaffna and Colombo. I was not told where this person obtained his evidence. I was of the view that the information could not be relied on. The information is contained in a statement sworn in 2014 and relates to the situation a number of years earlier. The information is likely to have come from the appellant or his sponsor and thus is not independent...”

24. The weight to be attached to the evidence set out in the sworn statements was a matter for the Judge, and in my judgment it was open to the Judge to have concerns about some of the evidence set out in the statements. The Judge did not take the view that he could not attach any weight to the statements. He plainly considered them and found, at paragraph [38] that the statements support the assertion that the sponsor was helping out financially. In my judgement it was open to the Judge to find that it was unlikely that the makers of those statements had first hand knowledge of the use to which the monies sent, were put and that this information within their statements could not be relied upon.
25. In my judgement, the grounds advanced by the appellant do not disclose an error of law and the appeal is dismissed.

Notice of Decision

26. The decision of the First-tier Tribunal discloses no error of law and stands.

Signed

Date

Deputy Upper Tribunal Judge Mandalia

TO THE RESPONDENT
FEE AWARD

As I have dismissed the appellant's appeal there can be no fee award.

Signed

Date

Deputy Upper Tribunal Judge Mandalia