



**Upper Tribunal
(Immigration and Asylum Chamber)
EA/01453/2016**

Appeal Numbers:

EA/01446/2016

EA/01451/2016

THE IMMIGRATION ACTS

**Heard at Birmingham Employment
Centre
On 22nd June 2017**

**Determination & Reasons
Promulgated
On 4th July 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

**(1) MRS SYEDA SHAGUFTA MAZHAR
(2) MR SYED ASAD ALI
(3) MISS SYEDA NIDA MAZHAR
(ANONYMITY DIRECTION NOT MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: No legal representation
For the Respondent: Mr David Mills (Senior HOPO)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Shergill, promulgated on 24th November 2016. In the determination, the

judge dismissed the appeals of the Appellants, whereupon the Appellants subsequently applied for, and were granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellants

2. The Appellants comprise a family of a mother, the first Appellant, who was on 14th August 1963, and her two children, the second Appellant, her son, born on 27th January 1990, and her daughter, the third Appellant, who was born on 6th December 1988. All claimed to be dependants of an EEA national, Mr Syed Abbas Mazhar, who was a citizen of Italy. They appealed against the Respondent's refusal of a residence card as a confirmation that they were entitled to reside in the UK as the family members of an EEA national exercising treaty rights.

The Judge's Findings

3. At the hearing before Judge Shergill, the judge accepted that the Sponsor had been a qualified person throughout the period from his application to the decision, and up to the date of the hearing (see paragraph 9) but the issue was whether the three Appellants were dependent upon the Sponsor, Mr Syed Abbas Mazhar. As the judge explained, she queried "where the evidence was relating to this in the bundle", but she was met with a reply that, "it was submitted that this was not a live issue relied on by the Respondent", to which the judge stated, "I explained that I had to be satisfied that the Regulations were met" (paragraph 17).
4. The judge offered the Appellants an adjournment for further instructions to be taken and this was declined (paragraph 17). The judge went on to then conclude that she could not be persuaded about the evidence relating to dependency because there were two adult children, who were fast approaching 30 years of age, and there was no satisfactory evidence about dependency, and how it arose. In particular, the second Appellant failed to explain what he had been doing with his time and there is no real explanation given about the third Appellant, and what she did in Italy or in the United Kingdom.
5. In fact, the judge went on to quote that, "those issues went to credibility and to assess that there was not an abuse of rights" (paragraph 18). The judge went on to note that the son had been educated to a level whereby he could have worked as an accountant in Italy and it begged the question as to why he remained a dependant at the age of 27 years (paragraph 18).
6. The second reason why the judge could not conclude that the Appellants were dependants as claimed was that there was "very little disposable income in the household" and, "it begs the question whether there is true dependency on the Sponsor alone" so that the judge was driven to the conclusion that there must be income from other sources (paragraph 19). In short, the judge was not satisfied that there was a dependency such as to meet with the requirements of European law.

Grounds of Application

7. The grounds of application state that the judge erred in raising a new matter not relied upon by the Respondent and that the judge erred in finding that the EEA national had to show he was working continuously between the date of the decision and the hearing.
8. On 6th April 2017, permission to appeal was granted on the basis that given that the judge had accepted that the EEA national was in employment, it was arguable that the judge erred in finding him not to be a worker. It was also arguable that the judge erred in raising a new issue in circumstances where the Respondent was represented and present at the hearing and had not sought to raised this issue.
9. On 2nd May 2017, a Rule 24 response was entered to the effect that the judge had directed himself appropriately.

The Hearing

10. At the hearing before me, the Appellants were unrepresented. Their sponsoring EEA national, Mr Syed Abbas Mazhar, undertook to explain to the Tribunal how the appeal was being pursued. He said that he was now working. He had brought evidence with him. He said that there was no proof earlier on. The proof was now provided and he wanted to submit it.
11. For his part, Mr Mills submitted that this appeal could not succeed for the following two reasons. First, any evidence that was not before the judge, could not now be presented, unless this Tribunal first made a finding of an error of law, so as to allow the Tribunal to admit new evidence. Second, it was simply incorrect to say that the judge was raising issues that had not been raised before. Mr Mills handed out the Presenting Officer's typed notes, which are detailed and clear, to show that the judge at the outset set out that there were three issues that needed to be determined. The first was the relationship of all three Appellants with the EEA national.
12. The second was the dependency of the second and third Appellant on the EEA national in the light of them being over 21.
13. The third was whether or not the EEA national was exercising treaty rights. The refusal letter had only concentrated on the issue of relationship, but in order for the Appellants to meet the EEA Regulations, all parts had to be met for a residence card to be granted under Regulation 17. The Presenting Officer states in his notes that he accepted that this must be right. He also states that the judge then gave the representative of the Appellants, Mr Nazir Ahmed of Counsel, who is a skilful and knowledgeable practitioner of EEA law, the opportunity to take further instructions and to consider his position in the light of the documentary evidence only addressing the one issue.
14. The notes say that, "he declined to take the opportunity of either and said he was content to deal with it in the hearing. The judge double checked

and Counsel confirmed his willingness to continue". The Presenting Officer records that no concessions or undertakings were given by either party.

15. Mr Mills went on to submit that, once Counsel for the Appellants had decided to proceed, it could no longer be argued that they had been taken by surprise and that a new issue had been raised. Second, and in any event, the Rules had to be complied with, and dependency had to be proven, in the appropriate manner, and in this case the judge was not satisfied that there was a dependency. It was accepted that there could be a dependency "of choice", but the judge was not satisfied that even this was the case, because he was of the view that some income must be coming into the family, given the paucity of financial resources that the Sponsor enjoyed, and the judge was entitled to come to this view. As for the issue of Regulation 8(B) raised in the determination, this was a "red herring" because the judge only dealt with this because it featured in Mr Ahmed's skeleton argument, but did not go to the central issue which was before the judge, and which the judge properly decided.
16. For his part, Mr Syed Abbas Mazhar, the Sponsor, explained that he had enquired at the reception before coming to the courtroom whether he could tender the new evidence that he had brought with him, and he was told that he could present it to this Tribunal, and he should be allowed the chance to have the matter considered on the basis of the new evidence, now that he could show that he was working.

No Error of Law

17. I am satisfied that the making of the decision by the judge did not involve the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision. My reasons are as follows.
18. First, both the judge's determination, and the typed up notes of the Presenting Officer on the day, confirm that the judge set out three issues, under EEA law that he had to decide, in the light of that gave Counsel for the Appellants the opportunity to take further instructions, and if necessary to seek an adjournment, but this offer was declined. In fact, the offer was put twice to Counsel who indicated that he was content to proceed with the hearing and to deal with issues as they arose. Having taken this stance, it was not open then to the Appellants to say that they had been taken by surprise by an issue that was not in the refusal letter.
19. Second, and in any event, a decision maker cannot make a decision that is not empowered by law to be made. Compliance with the Rules and Regulations is essential. In that respect, there had to be evidence of dependency. It is a fact that the only assertion that the Sponsor was working before the decision letter was one that was made orally. By the time that the hearing arose before Judge Shergill, all that existed were witness statements. There were no payslips, no letters of employment, and no P60, or other financial documentation.

20. The Sponsor is now aggrieved that he has been prevented from presenting evidence about his employment but this Upper Tribunal can only proceed to that extent if there is firstly a finding of an error of law.
21. As explained to the Sponsor, I can make no such finding unless I conclude that the judge was wrong on the material that existed before the judge on 21st November 2016. That is a conclusion I cannot come to given the careful and sensitive manner in which the judge has approached the hearing and the comprehensive manner in which the determination is set out. Accordingly, the Appellants cannot succeed.

Notice of Decision

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

No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge Juss

2nd July 2017