Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/02533/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 8th October 2018	**On 14th March 2019**
And 4th March 2019	

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

Amtul Hafeez

(Anonymity Direction Not Made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No appearance at either hearing.

For the Respondent: Mr T Melvin, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Pakistan born on 5th September 1933 and was granted permission to appeal against a decision of First-tier

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Tribunal Judge H Graves, promulgated on 24th May 2018, which dismissed an appeal against the decision of the Secretary of State dated 7th March 2018. The appellant claimed to have entered the United Kingdom on 1st September 2017 and sought a residence card on 9th December 2017. The EEA sponsor was said to be her son of German nationality, Mr Ahmed Tahir, born on 18th November 1962. It was asserted that she had been living in Pakistan and had become widowed subsequently relying on her grandson in Pakistan. She travelled to the USA to live with her other son, but he became no longer able to provide proper care for her owing to domestic issues. The letter from Mr Ahmed Tahir stated that 'it became necessary to bring our mother to the United Kingdom'.

2. The Secretary of State refused the application for a residence card under Regulation 7 of the Immigration (European Economic Area) Regulations 2016, because the appellant had not provided adequate evidence to prove that she was the direct family member of an EEA or Swiss national and that she was related as claimed. She had only provided a photocopy of her birth certificate which was not acceptable.

3. The First-tier Tribunal judge recorded that

(i) the appellant had provided, by post, the original of the documents requested by the respondent, in relation to the familial relationship.

The judge found

> '*it may be that the respondent wishes to undertake her own checks of these documents. As the originals were sent directly to the Tribunal, and this is a paper case, they will not have been seen by the respondent*'. [8]
>
> '*There is no documentation or information to enable a full assessment of the appellant's right to residence, such as evidence of exercise of Treaty rights by the sponsor or evidence of dependency under Regulation 7(1)(c). The familial relationship of mother and son is not sufficient to establish family membership between adults, unless evidence of dependency is also provided. This is not before me. The Tribunal has also not been provided with evidence of the sponsor's nationality or any other information. [9]*
>
> *For the appeal to be allowed, the appellant needs to establish that she is the family member of an EEA national, that she is dependent and in the ascending line, and that the sponsor is exercising Treaty rights in the United Kingdom. Since the grounds of appeal only address the family relationship and not dependency or the exercise of Treaty rights by the sponsor, it is not possible to allow the appeal on the basis that the residence card should now be*

> *issued, as the burden of proof in relation to all legal and factual matters has not been discharged by the appellant. The information in the application does not provide a clear picture and suggests past dependency on at least two other family members. Since the appeal is against the refusal of a residence card, it is not possible to allow the appeal outright, to the extent that the appeal is entitled to such a residence card, without having information and evidence to address the remainder of the requirements under the Regulations. However, there is nothing to prevent the appellant from making a fresh application to the respondent addressing all that is required under the Regulations'*. [10]

Application for Permission to Appeal

4. The application for permission to appeal stated that the determination contained material errors of law, specifically that the appeal was made only on the point of not having sufficient proof of maternal relationship. The grounds noted that the sponsor, Tahir Ahmed, had provided his German passport with his residence card to prove that he was exercising his right to live in the UK as an EU citizen and had done so since 2004. The appeal was made on this discrete ground and the grounds for appeal, drafted by the sponsor, made reference to

> *'... correspondence made by the HM Courts & Tribunal Services, dated 11.04.2018, where it clearly states that respondent must provide 'any statement of evidence, application form, record interview, or any other unpublished documents'. These statements caused us to be under the impression that the respondent had already sent you copies of all documents we sent together with the application form.*
>
> *Further the grounds for appeal have been addressed by us when we provided original documents that clearly showed and proved the existence of a maternal relationship between I and Amtul Hafeez. To conclude all original documents necessary were provided and under EEA regulations, all criteria have been met'*.

The grounds thus complained that the appellant had answered the specific point raised in the Secretary of State's refusal letter, but the judge had unlawfully extended consideration beyond the remit of the appeal and erred in refusing the appeal.

5. Permission to appeal was granted by Judge Alis on 31st July 2018 on the following basis.

> *'There is always a danger when dealing with an appeal on the papers that the Judge enters into areas for which no issue had been raised. The decision letter dated March 7, 2018 only challenged the relationship between the appellant and sponsor. The respondent did not challenge*

the appellant to demonstrate she was dependent on the sponsor.

In refusing the appeal the Judge arguably erred by firstly stating the sponsor had not demonstrated he was exercising treaty rights (according to the decision he had acquired permanent residence on December 1, 2010 and would therefore not have to demonstrate ongoing exercise of treaty rights) and secondly, by requiring the appellant to demonstrate dependency when the same had not been raised in the decision letter. The second issue raised in issue of procedural unfairness'.

The Hearing

6. At the first hearing the appellant failed to attend although I was satisfied that she was notified of the date time and venue of the hearing. In the interests of justice, I proceeded with the appeal.

7. Mr Melvin submitted that the appellant had not attended and further the appellant could not succeed under the Immigration (European Economic Area) Regulations 2016. She had not shown the requisite elements of dependency.

8. Following finding an error of law as set out below I issued directions inviting the parties to have the matters decided on the papers. In the event neither the appellant nor the Secretary of State responded to my direction and the matter was set down for a hearing, of which both parties were notified. The appellant failed to attend the second hearing and failed to submit any further evidence in relation to dependency or otherwise. I proceeded to determine the matter.

Conclusions

9. Albeit the notice from the Tribunal, dated 11th April 2018, advised the respondent to file any documents upon which reliance was placed, there was a similar direction to the appellant. This stated

> '*The Tribunal may determine the appeal on the basis of the appeal documents together with any further written evidence or submission you may wish to make. You must send any written evidence and submission to the Tribunal and the Respondent by 9th May 2018'*.

10. It is trite law that it is for the appellant to prove her case and it is misconceived to place faith in the respondent to provide documentation on which an appellant hopes to rely. It is a matter for the appellant to provide documentation to support her appeal and whether or not the respondent provides the relevant documentation.

11. To allow an appeal in relation to the Immigration (European Economic Area) Regulations 2016 the judge must be satisfied that

the relevant requirements have been met. Although the following judgment was in relation to the Immigration Rules the same principle applies. **RM (Kwok On Tong: HC395 para 320) India** [2006] UKAIT 00039 observed at paragraph 11

> *'In Kwok On Tong (and also in R v IAT ex parte Hubbard [1985] Imm AR 110) the Court had to consider what the position was if a refusal of entry clearance was based on one element of the Rules, but by the time of the hearing it became apparent that there was some other requirement of the Rules which the appellant could not meet. Both those cases decide that the notice of refusal is not equivalent to a pleading; if new elements of the Immigration Rules come into play, they are to be dealt with on the appeal, and the parties must be allowed any appropriate adjournment in order to avoid the injustice of being taken by surprise. The reason is the wording of s19. Even if the appellant shows that he met a particular requirement of the Immigration Rules that had been in issue at the appeal, the decision to refuse him is not a decision that was "not in accordance with the law including any applicable Immigration Rules" unless, at the time of the decision, he met the requirements of the Immigration Rules applicable to his case. To put it another way, an appellant can lose his appeal by failing to meet just one requirement of the Rules (whether specified or not in the notice of refusal), but he can win only by meeting all the requirements of the Immigration Rules (whether specified or not in the notice of refusal)'*.

12. As set out in **ZB & HB (Validity and recognition of marriage) Pakistan** [2009] UKAIT 00040

> *So far as concerns the first, it is not right to say, as Mr Mohammed does in his letter, that the decision of Glidewell J in R v Immigration Appeal Tribunal ex parte Kwok on Tong [1981] Imm AR 214 has been superseded. On the contrary, it is clearly good law, and has recently been re-emphasised by the Tribunal in RM [2006] UKAIT 00039. Those are not the only authorities for the proposition that the respondent's notice of decision is not a pleading: provided that the appellant is given a proper opportunity to deal with any new points, it is open to the respondent to open new points, and the Tribunal is obliged to deal with them, because it cannot allow an appeal against a non-discretionary decision unless satisfied that the decision was 'not in accordance with the law (including Immigration Rules)': those are the words of s 86(3)(a) of the Nationality, Immigration and Asylum Act 2002'*

13. Clearly the context of the decision taken by the Secretary of State was that of the Immigration (European Economic Area) Regulations

2016 and not the Immigration Rules but the principle remains the same. The appellant must fulfil all relevant requirements under the regulations to succeed in the appeal.

14. Regulation 7 of the EEA Regulations sets out the relevant requirements. The appellant needed, inter alia, to show dependency as follows:

> ***"Family member"***
>
> ***7.*** *- (1) In these Regulations, "family member" means, in relation to a person ("A")—*
>
> *(a) A's spouse or civil partner;*
>
> *(b) A's direct descendants, or the direct descendants of A's spouse or civil partner who are either—*
>
> *(i) aged under 21; or*
>
> *(ii) dependants of A, or of A's spouse or civil partner;*
>
> *(c) dependent direct relatives in A's ascending line, or in that of A's spouse or civil partner.*

15. The issue of dependency was raised by the First-tier Tribunal. The question and definition of dependency was addressed in **Lim v Entry Clearance Officer, Manila** [2015] EWCA Civ 1383 and

> '*the critical question is whether the claimant is in fact in a position to support himself or not*'**.**

16. In my error of law decision I set aside the First-tier Tribunal judge's decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007) owing to the procedural error of failing to adjourn proceedings to raise the issue of dependency and the matter was adjourned with directions for the parties to produce further evidence and specifically for the appellant to produce evidence on dependency. The matter was resumed before me to remake the decision.

17. On appeal, and as I have explained above, it is still for the appellant to make good her fulfilment of the regulations and without which she will not be construed as a 'family member' for the purposes of the EEA Regulations. As the FFT judge pointed out the matter of dependency was part of the criteria to which the appellant had not complied.

18. In this instance, however, I also noted in my error of law decision that the birth registration certificate did not accord with the name given in the application form. The application and grounds of appeal refer to 'Tahir Ahmed' whilst the birth certificate refers to 'Tahir Ahmad'. This was not a point taken by the judge and I specifically

raised the matter for the appellant to address. No representation on this was received.

19. In order to remake the decision both parties were directed to submit any further pleadings or evidence in relation to the point on dependency by 25th October 2018 following which the matter was to be determined. I directed that the matter would be determined on the papers unless there was any objection with reasons in writing given.

20. No evidence was received but nonetheless the matter was set down for an oral hearing on 6th March 2019 and both parties advised of the same. In the event there was no attendance by the appellant, no evidence in relation to the point on dependency and no evidence in relation to the discrepancy between the application form and the birth certificate. I discerned no unfairness in proceeding with the appeal. The appellant failed to satisfy me, despite the lengthy opportunity to produce further evidence despite the explanation in my previous error of law decision on the requirements for the appellant to produce evidence, that she could satisfy the requirements in Regulation 7 (1) (c) namely that she was a dependent direct relative in the Appellant's ascending line. As such her appeal is therefore dismissed.

Order

21. Mrs Hafeez's appeal is dismissed under the Immigration (European Economic Area) Regulations 2016.

Signed Helen Rimington Date: 6th March 2019

Upper Tribunal Judge Rimington

<u>To the Respondent: FEE AWARD</u>

Since the appeal was dismissed there can be no fee award.

Signed Helen Rimington Date: 6th March 2019

Upper Tribunal Judge Rimington