



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: EA/02674/2018

THE IMMIGRATION ACTS

Heard at Field House  
On 4 December 2019

Decision & Reasons Promulgated  
On 20 December 2019

Before

UPPER TRIBUNAL JUDGE O'CONNOR  
UPPER TRIBUNAL JUDGE PLIMMER

Between

AHMED SHAHIR  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Khan of Counsel, instructed directly  
For the Respondent: Mr S Whitwell, Senior Presenting Officer

DECISION AND REASONS  
(Given orally on 4 December 2019)

Introduction

1. The appellant is a national of Afghanistan, born in December 1992. He appeals to the Upper Tribunal, with the permission of Upper Tribunal Judge O'Callaghan, challenging a decision of the First-tier Tribunal promulgated on 10 May 2019 dismissing his appeal against the Secretary of State for the Home Department's decision of 26 October 2015 refusing to issue him with an EEA residence card as an

extended family member of Mr Abdullah Sefati who, as we understand it, is the appellant's brother-in-law.

### Secretary of State's decision

2. In refusing the appellant's application, the Secretary of State rejected both the contention that the appellant was dependent on Mr Sefati prior to his (the appellant's) arrival in the United Kingdom on 4 June 2012 and the further contention that the appellant was dependent upon, or lived in the household of, Mr Sefati subsequent to his (the appellant's) arrival here.

### Legal Background

3. Article 3(2) of the Citizens Directive (Directive 2004/38/EC), states as follows:

“Article 3

- 1 This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.
2. Without prejudice to any right to free movement and residence the persons concerned may have in their own right, **the host member state shall, in accordance with its national legislation, facilitate entry and residence for the following reasons:**
  - (a) **any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having primary right of residence ...;**
  - (b) the partner with whom the Union Citizen has a durable relationship, duly attested

The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people”

[emphasis added]

4. Article 3(2) of the Citizen's Directive was, for the purposes of the instant appeal, incorporated into UK law by regulation 8 of the Immigration (EEA) Regulations 2006 (although there have been subsequent EEA Regulations, given the date of the application in the instant case it is the 2006 Regulations which apply).
5. Regulation 8 of the 2006 EEA Regulations is headed “Extended Family Member” and reads:

“(1) In these Regulations ‘extended family member’ means a person who is not a family member of an EEA national under Regulation 7(1)(a), (b) or (c) and who satisfies the conditions in paragraph (2), (3), (4) or (5).

(2) A person satisfies the condition in this paragraph if the person is a relative of an EEA national, his spouse or civil partner and –

(a) the person is residing in a country other than the United Kingdom and is dependent upon the EEA national or is a member of his household;

...

(c) the person satisfied the condition in (a), has joined the EEA national in the United Kingdom and continues to be dependent upon him or to be a member of his household. " Regulation 8 of the 2006 EEA Regulations states:

6. The meaning of dependency, as applied in the instant scenario, was summarised in the decision of Lebon [1987] ECR 2811, where at [43] the Court of Justice of the European Union stated as follows:

"Dependent on them means that members of the family of a Community national established in another member state within the meaning of Article 43 EC [which was subsequently changed] need the material support of that Community national or his or her spouse in order to meet their essential needs in the state of origin of those family members or the state from which they have come at the time when they apply to join the Community national."

7. This approach has been approved domestically by the Court of Appeal in Lim v Entry Clearance Officer [2015] EWCA Civ 1383, in which the Court said at [29]:

"Receipt of support is a necessary but not sufficient condition. It is still necessary to determine that a family member is dependent in the sense of being in need of the assistance. I accept that the authorities clearly establish that it is irrelevant why he or she is dependent, whether because he has given his money away or because he is unwilling to work, save for abuse of rights being established, but paragraph 62 of Pedro [an earlier case of the Court of Appeal] does not establish that dependency is determined by the mere fact that the EU national makes resources available to the dependent relative."

### **Discussion and Decision**

8. Returning to the instant case, the First-tier Tribunal rejected the appellant's case on both limbs of the requirements under regulation 8 of the 2006 Regulations/ Article 3 of the Citizen's Directive. In challenging this decision, the appellant drafted grounds of appeal without legal assistance.

9. Mr Khan summarised the grounds of challenge thus:

(i) The First-tier Tribunal's failure to adjourn the proceedings to enable production of evidence from the appellant in support of his contention that he was not working in a pizza shop when encountered there in a uniform by immigration officials was procedurally unfair;

(ii) The First-tier Tribunal's adverse credibility findings are perverse;

10. Taking these grounds in turn, the first ground is targeted at the conclusion in paragraph 26 of the First-tier Tribunal's decision that the appellant was working in a pizza shop in the UK and thus was not dependent on his sponsor post-arrival. The evidence relied upon by the Secretary of State in support of such assertion was only produced on the day of the hearing before the First-tier Tribunal. The appellant contends that he could have provided evidence to the contrary had he been given an opportunity to do so. Thus, he says, the First-tier's findings were founded on a procedural unfairness.
11. At first blush there is some merit in the assertion that the First-tier Tribunal ought to have adjourned the hearing to allow the appellant to produce the evidence that he asserts contradicts the SSHD's position, given the late hour at which the Secretary of State disclosed her evidence. However, when further analysed it is clear that the refusal to adjourn the proceedings could not and did not have any material impact on the outcome of the appeal and therefore did not render the proceedings procedurally unfair.
12. First, the issue of whether the appellant has been dependent on his sponsor post his arrival in the UK was only one two issues the First-tier Tribunal was required to determine. The appellant required success on both issues to succeed in his appeal. He was unsuccessful on both limbs and we do not accept that the findings made in relation to the appellant working in a pizza shop post his arrival in the United Kingdom impinged on the adverse findings made in regard to the appellant's claimed pre-arrival dependency on the sponsor.
13. Second, the First-tier Tribunal made clear that even absent the adverse finding on the issue of whether the appellant worked in a pizza shop in the United Kingdom, it would nevertheless have found against him on the issue of post-arrival dependency. This is made clear in the second sentence of paragraph 27, where the Tribunal states "*I find, in any event that there is a lack of credible documentary evidence that the appellant has been maintained by the sponsor since his arrival in the United Kingdom.*" That is a finding that was open to the First-tier Tribunal.
14. In any event, the appellant has now produced the evidence that he says that he would have produced had the hearing before the First-tier Tribunal been adjourned. In our view that evidence is not capable of altering the First-tier Tribunal's conclusion. It does not, contrary to the claim made by the appellant, demonstrate that he was not working in the pizza shop, nor is it capable of demonstrating such.
15. The evidence that the appellant now relies upon is a document authored by Immigration Enforcement and headed "*Objection Outcome Notice (Penalty Reduced) Illegal Working*". It is a notification to the owner of a pizza shop that, although he/she previously incurred a Civil Penalty Charge of £15000 for employing a person who was not entitled to work in the UK, that charge has been reduced to £10000 upon consideration of representations. The person named as the illegal worker in the notice is not the appellant.
16. The appellant asserts that the fact that his name is not on the notice demonstrates that he was not working illegally at the pizza shop. We do not accept that this is the

case. The notice refers to the initial Civil Penalty Notice having been issued on the 8 June 2017. It makes no mention of the 21 April 2017, the date that it is said that the appellant was found 'working' in the pizza shop. The document now produced does not demonstrate a mistake of fact by the First-tier Tribunal, nor is it capable of doing so.

17. In all the circumstances, the failure to adjourn to allow the appellant to produce such evidence has not been demonstrated to have led to procedural unfairness.
18. The second ground of challenge is an attack on the general credibility findings of the First-tier Tribunal which, at the hearing, Mr Khan resolved down to the assertion that the First-tier Tribunal's credibility findings are perverse.
19. We reject this contention and conclude that the First-tier Tribunal's decision contains clear adequately reasoned findings of fact, demonstrates that it took account of all relevant evidence, and is rational in its conclusions.
20. The assertion in the grounds that the First-tier Tribunal erred in failing to take account of Home Office guidance on the assessment of credibility in refugee status cases is unarguable. The Tribunal was not obliged to take account of such guidance, and there is nothing in the decision which suggests that when coming to its conclusions on credibility the First-tier Tribunal took an approach which was not open to it.
21. The grounds make reference to the decision of the Court of Appeal in Mibanga [2005] EWCA Civ 369, which is also entirely irrelevant for the purposes of the instant case and Mr Kahn did not submit to the contrary.
22. The First-tier Tribunal's findings on the issue of pre-arrival dependency are admirably clear. The appellant did not put forward sufficient evidence of dependency pre-arrival to make out his case. We emphasise that it is not only the sending of monies by the sponsor to the appellant, which is a necessary element of dependency, but it must also be demonstrated that such monies were necessary for the appellant to meet his essential living costs. There was simply no evidence on this latter issue before the First-tier Tribunal that could have led to a positive conclusion for the appellant, as the First-tier Tribunal found at [21].
23. We observe, although not a point taken by the First-tier Tribunal, that in his application form for an EEA residence card (which led to the decision under challenge) the appellant was specifically asked (in section 6 thereof) whether he was dependent on his sponsor prior to coming to the United Kingdom. He answered in the negative.
24. In our conclusion, given the available evidence the First-tier Tribunal did not err in concluding as it did on the issue of pre-arrival dependency; indeed, we find that the First-tier Tribunal was bound to come to the conclusion that the appellant had not made out his case on this issue.

25. We finally turn to briefly address the assertion in the grounds that the First-tier Tribunal erred in failing to consider Article 8 ECHR. This is not a point that Mr Khan addressed during the course of his submissions, and he was correct not to do so. Following the Court of Appeal's decisions in TY (Sri Lanka) [2015] EWCA Civ 1223 and Amirteymour [2017] EWCA Civ 353 this ground is wholly unarguable.

**Notice of Decision**

The decision of the First-tier Tribunal stands.

Signed

*Mark O'Connor*

Upper Tribunal Judge O'Connor

Date 17 December 2019