Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/06381/2017

THE IMMIGRATION ACTS

Heard at: Field House	**Decision & Reasons Promulgated**
On: 18 December 2018	**On 9 January 2019**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

EDEMILDA CRUVINEL DE AVILA

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Bellara, instructed by Western Solicitors
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Following a grant of permission to appeal against the decision of the First-tier Tribunal dismissing the appellant's appeal against the respondent's decision of 4 July 2017 refusing to issue her with a permanent residence card under the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations"), it was found, at an error of law hearing on 5 October 2018, that the First-tier Tribunal had made errors of law in its decision. The decision was accordingly set aside.

2. The appellant, born on 6 August 1963, is a citizen of Brazil. She entered the UK on 14 October 2005 with her daughter, an Italian national, and was granted a residence card as a

dependent parent of her daughter on 11 August 2011. The residence card was valid until 11 August 2016.

3. On 3 June 2016 the appellant applied for a permanent residence card on the basis of her continuous dependence upon her EEA national daughter. Her application was refused on 6 December 2016 as it was not accepted that she was dependent upon her daughter since the documents she had submitted showed that she was working and that she was in receipt of housing benefit and therefore responsible for the rent of her accommodation, and that her bank statements showed no evidence of money transfers from her sponsor. The respondent considered the appellant's application failed to meet the requirements of regulation 7(1)(c) of the EEA Regulations 2006 as the dependent direct relative of her daughter in the ascending line.

4. The appellant submitted a further application for a permanent residence card on 6 January 2017, in which it was explained that her employment was only part-time and was to enable her to save for her retirement, but that she was entirely dependent upon her daughter and her daughter's husband. Her daughter had given her cash and therefore her bank account did not show transfers. The housing benefit had only been in her name as her daughter was a minor at the time and in any event she had paid back overpayment of housing benefit to the council. She had always lived with her daughter in the UK and was financially and emotionally dependent upon her.

5. The appellant's application was refused on 4 July 2017 under the 2016 EEA Regulations. The respondent noted that the appellant had been in receipt of housing benefit and therefore dependent upon the State. The respondent was unable to ascertain from the documentation the appellant had produced whether the rent and utility costs of her accommodation were maintained by herself or her daughter and could not be satisfied from those documents or her sponsor's bank statements that she was dependent upon her daughter and had been so for a continuous period of five years.

6. The appellant appealed against that decision. Her appeal was heard by Judge Povey in the First-tier Tribunal on 20 February 2018. The judge was satisfied that the appellant had always resided with the sponsor in the UK. However the judge was concerned that the issue of the appellant's part-time employment had only been raised in cross-examination by the presenting officer, and had not been referred to in any of the documentary evidence or in examination in chief. He heard oral evidence from the appellant and her daughter about her income from employment which the appellant said that she had been saving for future grandchildren. The judge accepted the sponsor's evidence that her mother earned £700 a month for 16 hours work a week. He considered that that was higher than the national living wage and the primary earnings threshold and that her income was therefore sufficient to meet her basic needs. As such he considered that she earned sufficient to support herself and that she was therefore not dependent upon her daughter and had not been so for five continuous years. The judge referred to the appellant's lack of candour in regard to her employment and income and concluded that she did not meet the requirements for permanent residence. He dismissed the appeal.

7. The appellant sought, and was granted, permission to appeal to the Upper Tribunal. At an error of law hearing on 5 October 2018, I found errors of law in the judge's decision and set it aside, as follows:

> "9. At the error of law hearing, Mr Bellara submitted that the judge had erred by saying he was taken by surprise in regard to the appellant's employment and that the parties had not been candid, when there had been evidence of the employment before him. The judge had failed to consider the appellant's explanation for working and had undertaken a forensic assessment of the appellant's earnings without giving her an opportunity to address the matter.
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> 10. Mr Walker considered that the author of the Rule 24 had not had all the information before her and he conceded that the judge had been unfair in his comments about the appellant's candidness when there was evidence of her employment before him. He agreed that the judge had materially erred in law.
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> 11. In the circumstances I set aside the judge's decision. Whilst the grounds referred to a lack of credibility findings, it seemed to me that the main issue was the assessment of dependency on the basis of the legal definition and the relevant financial thresholds, with no issue being taken as to the credibility of the parties. The judge's adverse findings arising from the appellant's failure to disclose that she was employed was clearly wrong, as the evidence of her employment was before him. Mr Walker accepted that there were no credibility issues.
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> 12. It was agreed by all parties that the most appropriate course was for the decision to be re-made in the Upper Tribunal on the sole issue of dependency, at a resumed hearing for which skeleton arguments could be produced and submissions made on the relevant matters."

8. The appeal then came before me again on 18 December 2018. Although I had made directions, in my error of law decision, for the parties to file a skeleton argument addressing the legal and financial implications of the appellant's employment on the question of dependency for the purposes of regulation 7 of the EEA Regulations, neither party had produced a skeleton argument. I would comment that it is highly unsatisfactory that the directions had been ignored.

9. In any event, the appeal proceeded and both parties made submissions.

10. Mr Bellara advised me that the appellant was no longer working and that her P45 would be produced to confirm that (the P45 was produced subsequent to the hearing), although he accepted that the Tribunal had to consider the question of dependency over a five year period. Mr Bellara relied upon the case of Lim v Entry Clearance Officer Manila [2015] EWCA Civ 1383 which set out the test for dependency, namely that there had to be a real dependency. He submitted that there was a real dependency in this case as the appellant had lived under the same roof as her daughter for a number of years. She had undertaken part-time work only to keep herself occupied. She had worked in a Brazilian shop in Willesden. Her monthly income had fluctuated between £500 and £700 depending on the hours of work. There should not be a forensic examination of the appellant's income but it was more relevant to consider that she still required material support from her daughter. All the bills were paid by the sponsor and her husband. The appellant's part-time work had not put her in a position where she was financially independent and

the fact that she had chosen to work should not be held against her. There was no evidence to suggest that the income was adequate to accommodate herself and manage with daily living expenses. Mr Bellara relied on the case of Reyes v Secretary of State for the Home Department (EEA Regs: dependency) [2013] UKUT 314 in submitting that it was necessary to take a holistic approach, considering the appellant's length of residence with her daughter and the fact she still needed material support from her daughter.

11. Mr Avery relied on [32] of Lim which he submitted summed up this case. The appellant was able to support herself and did not need the support of her daughter for her essential needs.

12. Mr Bellara reiterated the points previously made in response.

Consideration and discussion

13. Both parties relied on relevant caselaw in assessing the question of dependence. In the case of Reyes [2013] UKUT 314 the Upper Tribunal made the following comments at [19] of its decision:

> "From the above, we glean four key things. First, the test of dependency is a purely factual test. Second, the Court envisages that questions of dependency must not be reduced to a bare calculation of financial dependency but should be construed broadly to involve a holistic examination of a number of factors, including financial, physical and social conditions, so as to establish whether there is dependence that is genuine. The essential focus has to be on the nature of the relationship concerned and on whether it is one characterised by a situation of dependence based on an examination of all the factual circumstances, bearing in mind the underlying objective of maintaining the unity of the family. It seems to us that the need for a wide-ranging fact-specific approach is indeed enjoined by the Court of Appeal in SM (India): see in particular Sullivan LJ's observations at [27]-[28]. Third, it is clear from the wording of both Article 2.2 and regulation 7(1) that the test is one of present, not past dependency. Both provisions employ the present tense (Article 2.2(b) and (c) refer to family members who "are dependants" or who are "dependent"; regulation 7(c) refers to "dependent direct relatives…"). Fourth (and this may have relevance to what is understood by present dependency), interpretation of the meaning of the term must be such as not to deprive that provision of its effectiveness. "
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> and at [22]:
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> "As the case law makes clear, in the context of EU law on family members the test of dependency is not whether a person is wholly or mainly dependent, but whether he or she is reliant on others for essential living needs."

14. In Reyes (Judgment of the Court) [2014] EUECJ C-423/12, the CJEU found as follows:

> "22 In order to determine the existence of such dependence, the host Member State must assess whether, having regard to his financial and social conditions, the direct descendant, who is 21 years old or older, of a Union citizen, is not in a position to support himself. The need for material support must exist in the State of origin of that

descendant or the State whence he came at the time when he applies to join that citizen (see, to that effect, *Jia*, paragraph 37).

23 However, there is no need to determine the reasons for that dependence or therefore for the recourse to that support. That interpretation is dictated in particular by the principle according to which the provisions, such as Directive 2004/38, establishing the free movement of Union citizens, which constitute one of the foundations of the European Union, must be construed broadly (see, to that effect, *Jia*, paragraph 36 and the case-law cited).

24 The fact that, in circumstances such as those in question in the main proceedings, a Union citizen regularly, for a significant period, pays a sum of money to that descendant, necessary in order for him to support himself in the State of origin, is such as to show that the descendant is in a real situation of dependence vis-à-vis that citizen.

25 In those circumstances, that descendant cannot be required, in addition, to establish that he has tried without success to find work or obtain subsistence support from the authorities of his country of origin and/or otherwise tried to support himself."

15. In Lim, the Court of Appeal provided at [25]:

"In my judgment, this makes it unambiguously clear that it is not enough simply to show that financial support is in fact provided by the EU citizen to the family member. There are numerous references in these paragraphs which are only consistent with a notion that the family member must need this support from his or her relatives in order to meet his or her basic needs."

and at [32]:

"In my judgment, the critical question is whether the claimant is in fact in a position to support himself or not, and Reyes now makes that clear beyond doubt, in my view. That is a simple matter of fact. If he can support himself, there is no dependency, even if he is given financial material support by the EU citizen. Those additional resources are not necessary to enable him to meet his basic needs. If, on the other hand, he cannot support himself from his own resources, the court will not ask why that is the case, save perhaps where there is an abuse of rights. The fact that he chooses not to get a job and become self-supporting is irrelevant. It follows that on the facts of this case, there was no dependency. The appellant had the funds to support herself. She was financially independent and did not need the additional resources for the purpose of meeting her basic needs."

16. What can be derived from the above is that the test of dependency is a purely factual test, that it must not be reduced to a bare calculation of financial dependency but should involve a holistic examination, and that a critical question is whether the applicant can support herself and meet her essential needs without the additional support of the EEA national.

17. Applying those principles to the appellant's case it seems to me that she is able to establish the required dependency. Mr Avery's submission was that [32] of Lim provided the answer to the appellant's case and that she was very capable of supporting herself. However a potential ability to support oneself was not the determinative factor according to the cases to which I have referred and, indeed, the Court of Appeal in Lim endorsed contrary observations made in previous caselaw, as referred to at [20], with reference to

[27] of SM (India) v Entry Clearance Officer (Mumbai) [2009] EWCA Civ 1426, that dependency could arise in a case where an applicant who could work and earn money decided not to. Although the issue concerned a person who was not working, albeit capable of working, rather than a person such as the appellant who was actually working, it seems to me that a holistic approach is nevertheless required.

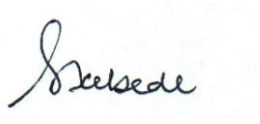
18. The facts are that the appellant has always lived with her daughter, an EEA national, since they came to the UK when her daughter was a minor. The documentary evidence confirms the accounts given by the appellant, her daughter and her son-in-law that all bills and expenses, including rent, gas, electricity and water, are paid for by the appellant's daughter and her husband. The appellant has provided a response to the respondent's concerns in regard to a prior receipt of housing benefit in her name, namely that at the time the benefit was claimed her daughter was unable to be the named recipient as she was a minor and the benefit subsequently ceased when her daughter commenced employment, with overpayments made in error being repaid. The appellant has also explained the discrepancy as to the date when she moved to the property at Appleby Close in 2013 and it is not in dispute that she has always lived with her daughter and subsequently her daughter and son-in-law. Although there is no earlier evidence of a transfer of funds from the sponsor to the appellant, I accept the oral evidence that cash payments were made and that the appellant's expenses have always been met by her daughter and son-in-law.

19. As for the question of the appellant's employment, it is particularly relevant to note that she has produced evidence of employment since 2009 and was therefore in employment at the time the respondent issued her with a residence card as the family member of an EEA national in August 2011. Although I have not seen evidence of that residence card, it is not in dispute that it was issued to the appellant on 11 August 2011. Accordingly the respondent was previously satisfied that the appellant was dependent upon her EEA national sponsor despite being in employment. Judge Povey, in the First-tier Tribunal, proceeded on the basis that the appellant's employment commenced after the residence card was issued, at [18] of his decision, and took that as a factor against her, whereas that appears to have been a mistaken view. Accordingly, whilst it is the case that the appellant has been in receipt of an income from part-time employment, I accept that that was not sufficient to meet her basic needs in terms of accommodation, food and utilities and that she was therefore not in a position to support herself.

20. In the circumstances, taking a holistic view in the context of the relevant authorities, and considering the level of the appellant's income from employment, I am satisfied on balance that she has demonstrated the required dependency for the purposes of the EEA Regulations so as to be considered as the family member of her daughter, an EEA national exercising treaty rights in the UK. I am satisfied that that has been demonstrated for a continuous period of five years and that the appellant has therefore acquired a right of permanent residence in the UK as a result. I therefore allow the appeal under the EEA Regulations.

DECISION

21. The original Tribunal was found to have made an error of law. I re-make the decision by allowing the appeal under the EEA Regulations.

Signed  Date: 20 December 2018

Upper Tribunal Judge Kebede