Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/09056/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision promulgated**
on 11 January 2019	**on 18 February 2019**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

AFTAB ALBERT
(anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Muquit, instructed by Farani Taylor Solicitors.
For the Respondent: Mr T Linsday, Senior Home Office Presenting Officer.

ERROR OF LAW FINDING AND REASONS

1. The appellant appeals with permission a decision of First-Tier Tribunal Judge Wyman promulgated on the 16 August 2018 in which the Judge dismissed the appellant's appeal against the refusal of the respondent to issue him a Residence Card as confirmation of a right to reside in the United Kingdom as the stepson of an EEA national exercising treaty rights in the UK.

Background

2. The appellant, a citizen of Pakistan born on 3 June 1988, entered the United Kingdom lawfully with leave as a Tier 4 (General) Student granted on 4 September 2013. The appellant's leave was curtailed but he was subsequently granted leave to remain in the same capacity until 23 June 2017. On that date the appellant sought a Residence Card as the dependent family member of an EEA national, an application refused by the Secretary of State on 1 November 2017.
3. The EEA national is a Ms [B], a Belgian national who has been employed since 2010 as a Market Development Representative in the UK. The appellant's father Mr [AJ] married the sponsor in the United Kingdom on 14 April 1998, but he died on 16 July 2006. The appellant claims to be solely dependent upon his sponsor since she and his father married.
4. The Secretary of State's case is that the appellant had not provided adequate evidence to prove he is a dependent direct family member of an EEA national. It was accepted the appellant had provided sufficient evidence show he is living with his EEA sponsor but claimed he had not provided evidence of money transfers or other evidence to show he is currently reliant on his stepmother beyond residing in the same household.
5. The Judge sets out findings of fact from [48] of the decision under challenge which can be summarised as follows:

    a. The respondent accepts the appellant has provided sufficient evidence to show he was living with his EEA sponsor but claims he had not provided further evidence to show current reliance on his stepmother beyond residing in the same household [49].
    b. Before coming to the United Kingdom the appellant lived with his mother and siblings in Pakistan [50].
    c. The EEA national sponsor owned the house in which the appellant lived in Pakistan since 1996 until his departure from the United Kingdom in 2013. The Judge finds the appellant was dependent upon the EEA sponsor for accommodation during this period [51].
    d. There is more limited evidence of sponsorship from the EEA national to the appellant during the years he lived in Pakistan, it being acknowledged there were no money transfers slips or bank statement showing regular deposits; the explanation being that when people travel to Pakistan they will bring cash but there was no evidence to confirm this [52].
    e. In the appellant's interview on 4 September 2013 he stated he was working as a Senior Telesales Representative and claims to have no family in the United Kingdom [53].
    f. The appellant has explained that he thought this meant blood relations of which the EEA national is not. The Judge thought the appellant could have added further information stating he had a stepmother in the United Kingdom [54].

g. The Judge was satisfied the appellant would have been dependent upon the EEA national when he was a minor or shortly after the death of his father, but it could not be found he was dependent on the EEA national for support, with the exception of accommodation, for all the time he was in Pakistan [55].
h. Since the appellant arrived in the United Kingdom the Judge accepts the EEA national paid the appellant's university fees although he was also receiving money from some other friends as evidenced from bank statements [56].
i. The Judge accepts the appellant has been living in accommodation provided by the EEA national since he came to the UK [57].
j. In 2018 there have been no regular transfers of funds from the EEA national the appellant's account for which was explained by the fact the EEA national used to give the appellant cash in hand [58].
k. The appellant has completed his degree studies in the United Kingdom but has made no attempt to find employment. The appellant indicates he wishes to study for an MBA, but no evidence was provided of any courses considered or applications made. It was found to be unclear as to why he needed an MBA for any future work or employment given his total lack of employment history in the United Kingdom [59].
l. The appellant is 30 years old, not a minor or child. In many households' young adults would have completed their education many years ago and been in regular employment [60].
m. At [61] the Judge finds "*I therefore find that dependency is not genuine but fabricated. The appellant is an able-bodied man who is well able to work and does not need to rely on his stepmother for support. He came to the United Kingdom to complete his degree which she is successfully done.*"
n. The Judge finds the appellant is in a position where he can support himself, he speaks fluent English, has a degree but has chosen not to obtain relevant work experience. It is found the appellant could support himself to meet his basic needs.

6. The appellant sought permission to appeal arguing the Judge misapplied the ratio of cases relied upon in the decision for the reasons stated in the grounds. Permission to appeal was granted by another judge of the First-Tier Tribunal on 12 October 2018; the operative part of the grant being in the following terms:

> "3. The ground appears to be arguable. Despite setting out a number of relevant legal authorities, the Judge arguably misdirected herself. At [59] – [62], she found that the claimed dependency was fabricated because the Appellant "*is an able-bodied man who is well able to work…*" She had earlier opined that in "*many households, young adults would have completed their education many years ago and been in regular employment.*" This suggested that the Judge had had regard to irrelevant factors (namely, the fact that the Appellant could obtain work but have chosen not to do so) and not applied the correct test (whether the Appellant required the material support of his

stepmother in order to meet his essential needs, per SM (India) v ECO [2009] EWCA Civ 1426 approving Centre Publique d'Aide Social de Courcelles v Lebon [1987] ECR 2811 and Jia Migrationsverket Case C-1/05)."

Error of law

7. Regulation 7 of the Immigration (EEA) Regulations 2016 sets out the definition of a "Family member":

> "(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 - (i) under 21; or (ii) dependants of A's, 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; (2) where A is a student residing in the United Kingdom otherwise than under regulation 13 (initial right of residence) a person is not a family member of A under paragraph (1)(b) or (c) unless – (a) in the case of paragraph (1)(b),the person is the dependent child of A or of A's spouse or civil partner; or (b) A also falls within one of the other categories of qualified person mentioned in regulation 6 (1). (3) A person ("B) who is an extended family member and has been issued with an EEA family permit, a registration certificate or a residence card must be treated as a family member of A provided – (a) B continues to satisfy the conditions in regulation 8(2),(3)(4) or (5); and (b) the EEA family permit, registration certificate or residence card remains in force. (4) A must be an EEA national unless regulation 9 applies (family members of British citizens)."

8. It is not disputed the relevant category is regulation 7(1)(b)(ii) as the dependent of the EEA national.
9. In *Jia Migrationsverket Case C -1/05* the European Court considered "dependence" under Article 1(1)(d) of Directive 73/148/EEC and said this was to be interpreted to the effect that "dependent on them" meant that members of the family of an EU national established in another member state within the meaning of Article 43 of the EC Treaty, needed the material support of that EU 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 had come at the time when they applied to join the EU national. The Court said that Article 6(b) of the Directive was to be interpreted as meaning that proof of the need for material support might be adduced by any appropriate means, while a mere undertaking by the EU national or his or her spouse to support the family members concerned need not be regarded as establishing the existence of the family member's situation of real dependence.
10. In *Bigia & Others [2009] EWCA Civ 79* at paragraph 24 Maurice Kay LJ said that where the question of whether someone is a "family member" depends on a test of dependency, that test is as per paragraph 43 of the ECJ's judgement in *Jia*. In essence members of the family of a Union citizen needed the material support of that Union citizen or his or her spouse in order to meet their essential needs.

11. In *Moneke (EEA – OFMs) Nigeria [2011] UKUT 00341(IAC) (Blake J)* at para 41 the Tribunal accepted that the definition of dependency was 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." At paragraph 42 the Tribunal went on "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.
12. The Judge refers to *ECO Manilla v Lim [2015] EWCA Civ 1383* in which an appellant sought entry, as the family member of an EU national. The appellant had savings and a retirement fund in excess of £55,000 and she owned her own home in Malaysia valued at £80,000. The appellant's daughter, married to the EU national, sent her £450 per quarter which she used to meet her expenses without spending any capital. Applying *Reyes v Migrationsverket (Case C- 423/12)* it was held that it was not enough to show that the financial support was in fact provided by the EU citizen to a family member; the family member must need that support in order to meet her basic needs; there needed to exist a situation of real dependence; receipt of support was a necessary condition of dependency, but not a sufficient condition; and it was necessary to determine that the family member was dependent in the sense of being in need of assistance even though it was irrelevant why she was dependent. If, as here, the family member could support herself, there was no dependency even though she was given financial support from the EU citizen.
13. The issue raised by the appellant in the grounds is the Judge's treatment of what has been found to be a dependency of choice. In *Lim* the claimant, who had sufficient savings to meet her own needs but chose instead to rely on financial support from a related EU citizen, could not be regarded as being dependent on her relative and was not therefore a family member within the meaning of Article 2.2 of Directive 2004/38/EC ("the Citizens Directive"). The jurisprudence has expressly approved dependency of choice in the form of choosing not to take up employment see *Centre Publique d'Aide Social de Courcelles v Lebon [1987] ECR 2811* ("Lebon") at [22].

14. In *Maria Pedro v SSWP [2009] EWCA Civ 1358* the Court of Appeal confirmed that dependency could be of choice and did not have to be of necessity.
15. In *SM(India) v ECO and OQ and NQ (India) v ECO [2009] EWCA Civ 1426* the Tribunal was not satisfied that the claimants were dependent on their sponsor as there was no evidence that they could not obtain work and no evidence that they had made enquiries about employment in India. The Court of Appeal said that the test on dependency was to be found in *Lebon* (Case 316.850 as read with *Jia* (case C-1/05) and in so far as the decision in *AP and FP (India)* decided that the latter had effectively overruled the former, it was wrongly decided and should not be followed. There was nothing in the decision in *Jia* to suggest that any doubt had been cast on the proposition that there was no need "to raise the question whether the person concerned was able to support himself by taking up paid employment". The fact that the claimants had not obtained work or even tried to obtain work in India was not relevant for the purposes of the Directive. The test is whether an applicant requires the 'material' support of the EU citizen in order to meet his 'essential' needs. The question of whether he could support himself rather than by having to rely on the EU citizen is irrelevant.
16. The finding of the Judge at [61] that the dependency is not genuine but fabricated is a finding that dependency has been established. Mr Linsday argued that the appellant was not truly dependent as he had worked in Pakistan and his own evidence was that he had received substantial sums from other sources in addition to the help provided by the EEA national sponsor in the past. Whilst this may be historically correct and whilst the appellant may be able to secure employment with the qualifications he has obtained, this submission challenges the motive which is not relevant unless it is a case in which there is evidence of an abuse of treaty rights. It was not suggested however that the finding by the Judge that the dependency 'was not genuine but fabricated' was an assertion that there was a breach of treaty rights and there is no evidence to support any such submission.
17. I find this is a case in which the Judge has erred in law in a manner material to the decision to dismiss the appeal. Whilst the Judge may have adopted what she saw as a common-sense approach which is theoretically plausible, the question the Judge was required to ask was whether the appellant required the material support of the EEA national in order to meet his essential needs. It was clearly made out on the facts before the First-Tier Tribunal that this test had been satisfied. It may have appeared to the Judge to be a dependency of choice but that is arguably irrelevant in light of the case law and absence of any suggestion of a breach or abuse of community law.
18. I set the decision of the Judge aside.
19. I proceed to remake the decision by allowing the appeal on the basis the evidence supported the finding the appellant is a dependent family member of the EEA sponsor who requires the financial assistance provided to enable him to meet his essential needs.

Decision

20. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remake the decision as follows. This appeal is allowed.**

Anonymity.

21. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed…….
Upper Tribunal Judge Hanson

Dated the 11 January 2019