Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/14432/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 16 April 2019	**On 26 April 2019**

Before

THE HON. MR JUSTICE ANDREW BAKER
(sitting as an Upper Tribunal Judge)

UPPER TRIBUNAL JUDGE LINDSLEY

Between

FATIMA BINTE ABDUL KAIYUM
(No Anonymity Order Made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Slatter, instructed by Waterstone Solicitors
For the Respondent: Mr I Jarvis, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is now 25 years old. She is a citizen of Bangladesh, born there in November 1993. Her mother, Humayra Nargis, was also born in Bangladesh and

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has retained her Bangladeshi citizenship, but she is also now an Italian citizen and she is living and working in London.

2. The appellant appealed to the First-tier Tribunal against a refusal in December 2016 of her application for a residence card. The basis of the application was that the appellant, as she claimed, was the dependent child aged over 21 of her mother, an EEA national exercising Treaty rights by working in the UK.

3. The only contentious issue in the appeal was whether the appellant was dependent on her mother. Following a hearing on 26 March 2018, First-tier Tribunal Judge Widdup held that the appellant had not discharged the burden of proof of her claimed dependency on her mother. The judge said, at [37] in the Decision, that "*There is a lack of clear evidence as to what the Appellant's essential living costs are and a lack of evidence about her spending. Her income is about £40pw more than that of her mother. Taking all these factors into account I am not satisfied that the Appellant is financially dependent on her mother.*"

4. The First-tier Tribunal Decision states that it was promulgated on 29 March 2018, but the appellant says she did not receive it until after becoming alerted to its existence in November 2018 when a Certificate of Application granted in May 2018 that enabled her to work here while her appeal was pending was not renewed. Her application to the First-tier Tribunal for permission to appeal was then made in January 2019. The First-tier Tribunal refused permission to appeal, but permission was granted on the papers on 12 March 2019 by Upper Tribunal Judge Grubb, who concluded that since the appellant was accepted as truthful in her evidence, "*it is arguable that the judge has reached [an] irrational or inadequately reasoned finding that she is not dependent on her mother for at least some of her essential needs and so is dependent.*"

5. The grant of permission involves the grant of any extension of time the appellant required, albeit UTJ Grubb did not address that issue separately in the permission decision. The matter thus came before us to determine whether the First-tier Tribunal erred in law.

Context – Dependency

6. FtTJ Widdup was correct to understand that the burden of proof of dependency was on the appellant. As the respondent's Guidance confirms for Home Office decision-makers considering such cases, so far as material:

   i. "*A child aged 21 or over … must prove they are dependent on the EEA national sponsor … .*"

   ii. "*Where dependency is necessary, the family member does not need to be living or have lived in an EEA state where the EEA national sponsor also lives or has lived. Their dependency on the EEA national sponsor does not need to have existed before they came to the UK.*"

iii. *"… if the applicant cannot meet their essential living needs without the financial support of the EEA national, they must be considered dependent even if they also receive financial support of income somewhere else.*
You do not need to consider the reasons why the applicant needs the financial support or whether they are able to support themselves by working.
Essential needs include accommodation, utilities and food. Dependency will normally be shown by financial documents that show money being sent by the sponsor to the applicant.
If the applicant is receiving support from the EEA national as well as others, they must show that the support from the EEA national is supporting their essential needs.
The applicant does not need to be dependent on the EEA national to meet all or most of their essential needs. For example, an applicant can still be considered dependent if they receive a pension to cover half of their essential needs and money from the relevant EEA national to cover the other half."

7. The Judge made the following basic findings:

- at [12], that the appellant's mother had net earnings of about £750 per month (£175 per week – although later, at [34], he said they were only £165 per week), and received housing benefit, child benefit and child tax credits;
- at [18]-[19], that the appellant's father, who it seems is still married to her mother, was living in Rome, not as part of the household in London, although he visited from time to time and sent money to support his family (some £2,000 had been sent during Q1 2018, for example);
- at [30]-[31], that the appellant was earning £156 per week, net, from an employment with ISS, plus c.£50 per week gross from private tuition;
- at [13] and [20], that the appellant was living with her mother rent free, her mother paying rent of £2,100 per month plus utilities bills and doing the shopping (which we take to mean paying for food and household essentials).

8. The Judge was correct, therefore, to find that the appellant's earned income was a little higher than her mother's, although he may have overstated the difference slightly at c.£40 per week, as that did not involve any adjustment of the private tuition fees to net earnings, and in any event if £175 rather than £165 was the correct figure for her mother's net weekly earnings. (We assume the Judge's calculation was: £156 + £50 - £165 = £41.)

Submissions – Error of Law

9. Points of detail were raised in the Grounds of Appeal, as to the possible error by the Judge in mixing gross and net figures in considering the appellant's earnings, as to the cost of utilities and council tax for the household, and as to what evidence there was of direct financial support being given to the appellant by her mother.

10. But as Mr Slatter accepted, appearing for the appellant before us, the key issue is how the provision of accommodation to the appellant by her mother, rent free,

was treated in the Decision below. The other points, whether individually or in combination, could never take the appellant far enough to overturn the conclusion that she had not established dependency. As the Judge noted, at [14] and [33], the appellant's own evidence was that, in general, she used her earnings for clothes, make up, travel (Oyster card) and 'pocket money' and, in addition, she had paid her own legal fees. All that "*suggests that she has surplus income because she is not having to pay rent and other household expenses*".

11. The Judge reasoned, at [34], that "*That does not mean that she is dependent on her mother.*"; and at [35], that if one sixth of the rent was 'attributed' to the appellant (c.£80 per week), as suggested on behalf of the respondent (because it was a household of six), then on her own evidence as to her earnings she could afford that and still have enough to cover her other essential needs. In the appellant's Grounds, it was argued that the Judge should have treated the appellant as responsible for 50% of the rent, since she and her mother were the only adults in the household, the others being her mother's minor children. No detailed calculation is needed to see that the appellant could not afford £1,050 per month in rent, let alone that amount in rent plus utilities and other essentials. Therefore, the conclusion that the appellant had not proved her dependency was flawed by an incorrect treatment of accommodation costs. In oral argument, Mr Slatter focused not so much on a notional 'split' of the rent, but on whether the appellant depended on her mother for the provision of accommodation. The Judge failed to ask that question, resting instead on a finding (in effect) that the appellant could afford a modest contribution to her mother's rent if her mother asked for one.

12. For the respondent, Mr Jarvis fairly did not seek to defend the Judge's use of a notional one sixth rental responsibility. He contended, however, that the Judge was entitled, overall, to find that no real dependency had been established, given that (as the Judge said at [35]) in truth "*The accommodation is largely paid for out of housing benefit*".

Conclusions – Error of Law

13. We agree with Mr Slatter that, in substance, the Judge asked and answered the wrong question, namely whether the appellant, if required, could afford a modest contribution towards her mother's rental costs. Finding that she could do so, and cover her other essential needs, from her earned income, was erroneously treated as negativing dependency.

14. In reality, the appellant's evidence, and that of her mother's, accepted as truthful by the Judge, corroborated by the supporting evidence of her earnings and the household outgoings, amply demonstrated that the appellant did in fact depend on her mother for, at least, providing a roof over her head and was in no position, financially, to set up on her own. That should have been accepted as proving dependency, subject to the point raised by Mr Jarvis (paragraph 12 above).

15. As to that point, however, it does not negative the appellant's dependency on her mother. Rather, it suggests a dependency of the appellant's mother on benefits to

which she is entitled, and support from her husband, because of her very modest earnings, for the maintaining of the household she maintains here, one aspect of which is continuing to provide a home for the appellant beyond the age of 21. Mr Jarvis was disposed to accept that if the entitlement to benefits supporting the family were seen as 'flowing through' the appellant's mother, then it was not possible to resist the conclusion that the Decision is flawed. In our judgment, that is the correct way to view the availability of benefits enabling the appellant's mother to maintain the family home; and the Decision is indeed flawed.

Re-Making

16. It will be clear already, from paragraphs 14-15 above, that in our judgment, the question that needed to be asked in this case permitted of only one answer, on the evidence submitted by the appellant, given that no credibility concern arose. The appellant's appeal to the First-tier Tribunal was well-founded and should have been allowed. We therefore now re-make the Decision, substituting for it a decision allowing that appeal.

Decision:

1. The decision of the First-tier Tribunal dismissing the appellant's appeal on the basis that she had not established her claimed dependency on her mother involved an error on a point of law.

2. We therefore set aside that decision.

3. This appeal is therefore allowed and we re-make the decision of the First-tier Tribunal, substituting for it a decision allowing the appellant's appeal.

Signed: *Andrew Baker* Date: 16 April 2019
The Hon. Mr Justice Andrew Baker