



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/00244/2020 (V)

THE IMMIGRATION ACTS

Heard at Field House
On 7 October 2021

Decision & Reasons Promulgated
On 18 November 2021

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

BELAL KHAN KHAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Ahmed, Counsel instructed by Abbott & Co Solicitors

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

DECISION AND REASONS

1. This has been a remote hearing to which both parties have consented. The form of remote hearing was video by Microsoft Teams (V). A face to face hearing was not held because it was considered not practicable and all issues could be determined in a remote hearing. I did not experience any difficulties, and neither party expressed any concern, with the process.

Background

2. On 26 July 2019 the appellant, a citizen of Afghanistan born on 23 June 1998, applied for a residence card to confirm his status as a family member of an EEA national under the Immigration (EEA) Regulations 2016 (“the 2016 Regulations”). The family member in question is his father (“the sponsor”).
3. The sponsor is a British citizen who is originally from Afghanistan. In 2015 he moved to Ireland where he exercised Treaty Rights as an EEA national. Whilst in Ireland, his wife and children (including the appellant) joined him from Afghanistan. In 2016 the sponsor and his family (including the appellant) moved to the UK.
4. Following their arrival in the UK, the sponsor’s wife and children applied for residence cards under the 2016 Regulations on the basis of being family members of the sponsor. All of them apart from the appellant were issued with residence cards. The reason the appellant was treated differently to his siblings was that he was over 21 and therefore, unlike his siblings, it was necessary for him to demonstrate that he was a dependent of the sponsor. The respondent, in her decision dated 23 December 2019, stated that she was not satisfied that the appellant was supported by or dependent on the sponsor. This was the sole reason given for refusing to issue the appellant with a residence card.
5. The appellant appealed to the First-tier Tribunal where his appeal came before - and was dismissed by - Judge of the First-tier Tribunal French. The appellant appealed to the Upper Tribunal, where, in a decision promulgated on 5 March 2021 (a copy of which is appended to this decision), Upper Tribunal Judge Pitt set aside the decision of the First-tier Tribunal and directed that the decision would be remade in the Upper Tribunal. The appeal now comes before me for the decision of the First-tier Tribunal to be remade.

Issues in Dispute and Legal Framework

6. Although the 2016 Regulations were revoked on 31 December 2020 by the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations (SI 2020/1309) (“EEA Transitional Regs”) and the Immigration, Nationality and Asylum (EU Exit) Regulations (SI 2019/745), the relevant parts of the 2016 Regulations are preserved in Schedule 3 of the EEA Transitional Regs. I therefore consider this appeal under the 2016 Regulations.
7. The sole issue in dispute is whether the appellant is dependent on the sponsor pursuant to regulation 7(1)(b)(ii).
8. The applicable law and legal framework is set out in paragraphs 5 – 8 of Upper Tribunal Judge Pitt’s decision, where she states:
 5. There was agreement that this case turned on whether the appellant could show that he met the provisions of Regulation 7 of the Immigration (European Economic Area) Regulations 2016:

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;

As the appellant was over 21 he had to show that he was a “dependent” of his father, the EEA national.

6. The Upper Tribunal provides guidance on how to approach the assessment of dependency in Reyes EEA (Regs: dependency) [2013] UKUT 00314 (IAC). Paragraph 19 of Reyes sets out:

“19. 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.”

7. When formulating that guidance, the Upper Tribunal referred to paragraph 36 of Jia v Migrationsverket C-1/05 [2007] QB 545 which indicated:

“There is no need to determine the reasons for recourse to that support or to raise the question whether the person concerned is able to support himself by taking up paid employment.”

8. The respondent’s guidance on the assessment of dependency (“Direct Family members of European Economic Area (EEA) nationals”, Version 9.0, 21 February 2020) indicates that:

“Essential needs

You must consider the following:

- does the applicant need financial support to meet their essential needs from the EEA national, their spouse or civil partner

- 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 or 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 financial 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 relevant 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.”

The Evidence

9. The appellant submitted several documents which indicate that he has the same address as the sponsor. These include a bank statement, letter from Yorkshire Water and GP letter.
10. The appellant submitted two (extremely brief) witness statements, dated 20 February 2020 and 30 September 2021. He also relies on (equally brief) witness statements by the sponsor with the same dates. In addition, he relies on brief witness statement by his mother and a family friend, both dated 30 September 2021.
11. The appellant’s father did not attend the hearing. Mr Ahmed stated that this was because he had a job interview. The appellant and his mother made themselves available for cross-examination and were cross examined by Mr Melvin.
12. The oral evidence of the appellant and his mother was consistent and can be summarised as follows:
 - (a) The entire family (comprising of 11 people) live together in the same household.
 - (b) All expenses of the household (including food and utilities) are paid for by the sponsor.
 - (c) The sponsor is not working due to the Covid-19 pandemic and he (and the family) depend on benefits of approximately £1600 a month.
 - (d) The sponsor occasionally gives cash to the appellant on the (rare) occasions he goes out to meet friends.
 - (e) The reason the Yorkshire Water account is in the appellant’s name is that they thought it would be helpful for identification purposes to have bills sent to the

appellant. However, the sponsor pays for the water (along with all other utilities).

13. Mr Melvin raised, during cross-examination, several aspects of the evidence that appeared either inconsistent or surprising. These were:
 - (a) Mr Melvin asked the appellant why he has a premium bank account charging £13 a month. The appellant's answer was that he was unable to obtain another account.
 - (b) Mr Melvin noted that the appellant had only submitted one bank statement. The appellant's response was that he did not know he needed to submit more than one.
 - (c) Mr Melvin asked the appellant about a payment showing on his bank statement of £54.62 to the mobile provider, Three. The appellant stated that this was not a monthly charge but rather was a payment he was required to make in order to maintain access to his SIM card.
 - (d) Mr Melvin noted that there is a credit of £70 on the bank statement and asked the appellant to explain this. The appellant stated that it was a loan from a friend in order to pay the money owed to Three.
 - (e) Mr Melvin asked the appellant and his mother to explain the contradiction between paragraph 5 of the appellant's witness statement of 30 September 2021, where the appellant states that his older brothers and sister work part time and help financially, and the oral evidence given by the appellant and his mother that none of his siblings work. The appellant's (and his mother's) response was the same, which is that none of the siblings work (or have worked).

Submissions

14. Mr Melvin submitted that the sponsor had not given an adequate explanation for non-attendance and therefore I should place no (or reduced) weight on his evidence.
15. Mr Melvin argued that there was insufficient evidence to establish that the appellant is dependent on the sponsor. He argued that the evidence indicates that the appellant has a substantial monthly phone bill, pays the family's water bill, and has a premium bank account charging £13 a month. He argued that this level of expenditure is inconsistent with the circumstances the appellant sought to portray of a large family relying solely on benefits, and therefore the appellant's account should not be believed. He highlighted the inconsistency between the appellant's witness statement stating that his siblings work and provide financial support and his (and his mother's) oral evidence stating that they do not work. He also argued that the appellant had failed to corroborate his claim to have borrowed £70 from a friend.
16. Mr Ahmed's submissions, in summary, were that the appellant and his mother were credible witnesses and that dependency is established because the appellant lives with his father who provides for his basic needs such as food.

Analysis

17. I agree with Mr Melvin that the sponsor failed to adequately explain his absence, and that this should affect the weight given to his written evidence. I have reached my conclusion without giving any weight to his evidence.
18. I also agree with Mr Melvin that there is an inconsistency between what the appellant said in writing (that his siblings work and contribute financially) and what he and his mother said at the hearing (that they do not work, and the family is entirely dependent on the benefits received by the sponsor). I also agree with Mr Melvin that it is difficult to understand why the appellant would have a premium bank account and pay so much for his phone if the family's economic circumstances are as difficult as he claims. However, notwithstanding these concerns about the appellant's evidence, I accept the core of what he and his mother said about the appellant's accommodation and the family finances. Their oral evidence on these issues was consistent and given in a straightforward manner. I am satisfied that, on the balance of probabilities, they were truthful on these core issues. I therefore find as a fact that:
- (a) the appellant lives as part of the sponsor's household; and
 - (b) the sponsor (through the benefits he receives) pays for the appellant's accommodation (including utilities) and food.
19. It follows from these findings of fact that the appellant is dependent on the sponsor for the purposes of regulation 7(1)(b)(ii). It may be that the appellant could contribute more to the family finances (or even live independently) but that is not the test. The test of dependency, as explained in *Reyes*, is a factual test where it is necessary to examine the facts as they are, not as they could be, and the core of the evidence of the appellant and his mother, which I accept, is that all of the appellant's essential needs (accommodation, utilities and food) are met by the sponsor. I am therefore satisfied that the appellant is a family member of the sponsor under regulation 7 of the 2016 Regulations.
20. As a failure to satisfy regulation 7(1)(b)(ii) was the only reason the respondent refused the appellant's application for a residence card, I allow the appeal.

Notice of decision

21. I allow the appeal under the 2016 Regulations.

Directions to the appellant's solicitors

22. On 13 May Upper Tribunal Judge Pitt adjourned the hearing and gave directions ("the May Directions") which, inter alia, required the solicitor with conduct of the case for the appellant to provide a witness statement addressing six specific questions (set out in paragraph 4 of the May Directions). On 26 July 2021 an unsigned

response was received from the appellant's solicitors. This response fails to address all but one of the questions in paragraph 4 of the May Directions and is not in the form of a signed witness statement, as required. At the hearing I directed the appellant's solicitor (who was present) to provide a complete response to paragraph 4 of the May Directions within 14 days. Accordingly, a witness statement by the appellant's solicitor specifically addressing each of the six questions in paragraph 4 of the May Directions must be as directed at the hearing. Responsibility for complying with this direction lies with the appellant's solicitor, not the appellant. The appellant's solicitor is reminded of the possible consequence of non-compliance, which is set out in paragraph 3 of Upper Tribunal Judge Pitt's directions of 12 July 2021.

Signed

D. Sheridan

Upper Tribunal Judge Sheridan

Date: 18 October 2021



Upper Tribunal
(Immigration and Asylum Chamber)

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Respondent

Representation:

For the Appellant: Mr Ahmed, Counsel, instructed by Abbott & Co Solicitors

For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision issued on 11 March 2020 of First-tier Tribunal Judge French which dismissed the appeal of Mr Khan against the decision of the respondent dated 23 December 2019 which refused to issue a residence card showing his status as the family member of an EEA national exercising Treaty Rights.
2. The appellant is a national of Afghanistan. He was born on 23 June 1998.

3. The appellant's father came to the UK in 2000 and obtained leave to remain here, subsequently being granted British nationality. In 2015 he exercised his Treaty Rights as an EEA national and went to work in Ireland. Whilst he was there his wife and children, including the appellant, joined him. Ireland accepted that the family all qualified for EEA family permits. The family lived in Ireland for approximately a year before being coming to the UK in 2016.
4. On 26 July 2019, the appellant, his mother and his siblings applied for residence cards showing their status in the UK as the dependants of an EEA national who had been exercising Treaty Rights in Ireland. The appellant's mother and his siblings were all granted residence permits but the appellant, by that time over the age of 21, was refused a residence permit on 23 December 2019. The appellant appealed, hence these proceedings.
5. There was agreement that this case turned on whether the appellant could show that he met the provisions of Regulation 7 of the Immigration (European Economic Area) Regulations 2016:
 - 7.— (1) In these Regulations, “family member” means, in relation to a person (“A”)—
 - (a) A's spouse or civil partner;
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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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9. The respondent did not accept that the appellant had shown that he met the provisions of Regulation 7 because there was "currently insufficient evidence to show that you are financially dependent upon your British sponsor".
10. The First-tier Tribunal agreed with the respondent, concluding in paragraph 8 that the appellant "was not financially dependent on the sponsor for his 'essential needs'".
11. The grounds of appeal maintained that the judge did not follow the principles set out in Reyes and Jia. The findings that had been made focussed almost exclusively on "a

bare calculation of financial dependency” and on whether the appellant could be expected to support himself, not whether he was, in fact, dependent on his father. There was no “holistic examination of a number of factors including financial, physical and social conditions”. There had been no attention to the “nature of the relationship concerned” or reference to the “underlying objective of maintaining the unity of the family”.

12. It was my conclusion that the grounds had merit. The First-tier Tribunal made findings on whether the appellant could be said to be dependent in paragraphs 7 and 8 of the decision. There was no reference in those paragraphs or elsewhere in the decision to Reyes or Jia or to the legal principles set out above that had to be applied in the assessment of dependency. The findings focus on why it was not credible that the appellant had been unable to find work and support himself, the conclusion reached being that he “was working and had his own source of income”. The appellant could be expected to work in his father’s business and, if he did not, the judge stated that he “needed to understand why he was not working elsewhere”. The appellant was “a man of 21 with no physical or mental impairments” and it was not accepted that “a ‘lack of ID’ precluded his being able to work”. This approach is incompatible with the principles in Reyes, Jia and the respondent’s guidance as to the reasons for dependency not being a relevant factor and there being “no need to determine the reasons for recourse to that support or to raise the question whether the person concerned is able to support himself by taking up paid employment.”
13. Further, having concluded that the appellant was working, there was no consideration of whether the appellant was still dependent on his father for his essential needs. It was not disputed that the appellant was accommodated by his father, for example. Following the respondent’s guidance, the judge still had to assess whether the income the judge considered that he was earning still required supplementing with support from his father in order for his essential needs to be met. The focus on whether the appellant could be expected to work and whether he was working also meant that the holistic assessment that was required, as identified in Reyes, with consideration given to “financial, physical and social conditions” was not conducted.
14. I therefore found that the decision disclosed an error of law because of the incorrect legal approach to the assessment of dependency such that it had to be set aside to be remade.
15. There were other matters that also undermined the decision of the First-tier Tribunal. The judge stated at the outset of paragraph 7 that he had assessed credibility first in order to decide what weight to place on the evidence. He indicated that “there are some significant inconsistencies in the evidence before me”. The first of these inconsistencies concerned the number of children in the family where the sponsor had referred in his statement to having nine children but the documents showed only eight children in the family. The judge also noted that some of the children were born between 2003 and 2008 and nothing showed that the father had travelled to Afghanistan at that time and nothing showed that his wife had left Afghanistan. The

judge was questioning the parentage of some of the children of the family, therefore. The identity of the family had never been questioned by the respondent, however. On the contrary, the respondent accepted the identities of the siblings, granting them all a residence card. The Irish authorities also accepted them, issuing family permits. Further, nothing shows that the perceived inconsistency as to the number of children in the family or the parentage of the children was put to the appellant or his father at the hearing, the decision setting out a record of their oral evidence in paragraphs 2 and 3. Where these were serious allegations which had never been raised before and the evidence indicated that the respondent and the Irish authorities had accepted the identities of the family, fairness required that these concerns be put to the appellant and his father at the hearing before an adverse credibility finding was made but nothing suggests that this was done.

16. For all of these reasons, it was my view that the decision disclosed a material error on a point of law such that it had to be set aside to be remade.
17. The parties were in agreement that the remaking of the appeal should take place in the Upper Tribunal and that also appeared to me to be the correct disposal.

Notice of Decision

18. The decision of the First-tier Tribunal discloses an error on a point of law and is set aside to be remade.
19. The decision will be remade in the Upper Tribunal.

Signed: *S Pitt*
Upper Tribunal Judge Pitt

Date: 2 March 2021