Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/04612/2017 (V)
EA/04769/2018 (V)

THE IMMIGRATION ACTS

Heard at Field House via Skype for Business	**Decision & Reasons Promulgated**
On Friday 5 March 2021	**On Thursday 18 March 2021**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

LIMBANO MARIN MARIN

Appellant

-and-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Not attending nor represented
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

BACKGROUND

1. The Appellant appeals against the decision of First-tier Tribunal Judge Hussain promulgated on 15 February 2019 ("the Decision"). By the Decision, the Judge dismissed the Appellant's linked appeals challenging the Respondent's decisions dated 28 March 2017 ("the 2017 decision") and 14 May 2018 ("the 2018 decision") respectively refusing applications made by the Appellant for a residence card/ family permit to remain with or join his son and daughter-in-law in the UK. The application and

decisions were made under the Immigration (European Economic Area) Regulations. 2016 ("the EEA Regulations").

2. The Appellant is a national of Ecuador. He claims to be entitled to come to or remain in the UK as the dependent family member (father) of a family member (spouse) of an EEA national exercising Treaty rights. His son, Mr Jorge Luis Marin Arias ("the Sponsor") married a Colombian woman with Spanish nationality ("the EEA national") in 2013. It appears however from the Sponsor's statement that the basis of his status is that he was granted indefinite leave to remain in 2015 "under the Legacy backlog scheme" as he was a failed asylum seeker.

3. The Appellant was previously in the UK. It appears that he was sentenced to a term of imprisonment for using a false instrument. He was also in immigration detention it appears because he had no right to be in the UK. The Appellant made a series of applications in 2013 and 2014 to remain based on his relationship with his son and daughter-in-law which were all refused. He previously appealed the decisions leading to a determination of First-tier Tribunal Judge Oxlade on 14 August 2014 dismissing the appeal. The Appellant was subsequently removed and now lives, as I understand it, in Ecuador.

4. As the Judge observed in the Decision, the Respondent's reason for refusing the residence permit in the 2017 decision is "woefully inadequate in explaining the basis of the appellant's application". The only issue identified in the 2017 decision for refusing that application is that the Appellant has not shown dependency on the Sponsor or the EEA national. That was the issue also in the earlier appeal. The Judge at [7] and [8] of the Decision sets out Judge Oxlade's conclusion that the Appellant had failed to provide evidence of dependency. Judge Hussain determined that there was "no good reason why [he] should depart from the findings of Judge Oxlade" and accordingly found, in relation to the 2017 decision that the Appellant was not dependent on the Sponsor and the EEA national.

5. The Respondent's reasons for refusal in the 2018 decision are that the EEA national is not exercising Treaty rights as her employment is not genuine and effective. She was not therefore considered to be a qualified person within the EEA Regulations. The Respondent also took issue with the Appellant's claimed relationship with the Sponsor and finally also was not satisfied that the Appellant was in any event dependent on the Sponsor.

6. Judge Hussain, applying the findings of Judge Oxlade, concluded that the Appellant and the Sponsor were related as claimed. Judge Hussain considered the evidence regarding the EEA national's employment but concluded that there was no sufficient evidence of effective exercise of Treaty rights. In the course of his consideration of the evidence, the Judge stated at [17] of the Decision that "the appellant's appeal being against Entry Clearance, the Tribunal's consideration of fact must be limited to the date of decision which in this case was taken on 14 May 2018."

7. The Appellant's grounds are not numbered but can be summarised as follows:

(1) Although Judge Hussain was entitled to take as his starting point the findings of Judge Oxlade (applying the guidance in Devaseelan). Judge Hussain has however erred by treating those findings as determinative rather than only as a starting point and has failed to take into account the further evidence of dependency;
(2) The Judge has failed to make reasoned findings about the credibility of the evidence taken from the Sponsor and the EEA national;
(3) The Judge has failed to take into account relevant case-law, namely the cases of Reyes (EEA Regs: dependency) [2013] UKUT 00314 (IAC) and Lim v ECO, Manila [2015] EWCA Civ 1383.

8. The application for permission to appeal to the First-tier Tribunal was made out of time. In a decision dated 21 September 2020, First-tier Tribunal Judge O'Brien refused to extend time and therefore did not admit the application.

9. On renewal of the application to this Tribunal, permission to appeal was granted by Upper Tribunal Judge Lane on 10 November 2020 on the basis that it was "arguable that the Tribunal erred as regards the date at which it assessed the evidence of the sponsor's financial circumstances". Judge Lane gave permission for all grounds to be argued.

10. Judge Lane also gave directions for the error of law to be determined at a remote hearing absent objection from the parties. The Appellant's solicitors replied by e-mail dated 4 January 2021 indicating that they had no objection to the hearing being held remotely. The Respondent by e-mail dated 7 January 2021 similarly voiced no objection.

11. At the start of the hearing, there was no appearance by the Appellant, the Sponsor or any legal representative on their behalf. Enquiries made of Thoree & Co solicitors who are on the record as acting indicated that the Appellant (or possibly the Sponsor) had e-mailed the Tribunal on 26 February asking that the error of law issue be determined on the papers. No such e-mail appears to have been received. The solicitor was asked to send a copy of it but that has not been received either. In light of the notification of the content of that communication to the Tribunal clerk, however, and since the Appellant had not asked for an adjournment and was content for the matter to proceed in his absence, I determined that it was not in the interests of justice to defer the hearing.

12. I heard brief oral submissions from Ms Everett. She correctly and fairly conceded that there was an error made by Judge Hussain in relation to the relevant date of consideration of the evidence at [17] of the Decision. However, she pointed out that the basis for the Judge's dismissal of the appeal was that the EEA national was not genuinely and effectively exercising Treaty rights rather than that the Appellant was not dependent on the Sponsor and the EEA national (at least so far as the 2018 decision was concerned). As such, the grounds dealing with the dependency issue had no relevance. If the EEA national is not a qualified person, then the Sponsor is not a

family member of a qualified person and the Appellant, whether dependent on the Sponsor and the EEA national or not, is not entitled to a family permit.

13. Ms Everett was unable to make any submissions in relation to whether the Judge's error makes any difference to the outcome as she did not have sight of the Appellant's bundle of evidence. It did not appear that there was any electronic copy of that bundle. She therefore invited me to consider for myself whether there is any evidence in the Appellant's bundle which casts doubt on the Judge's conclusion in relation to earnings and the effectiveness of the employment of the EEA national. That is the course I have followed in the discussion which follows.

14. The matter comes before me to determine whether the Decision contains an error of law and, if I so conclude, to either re-make the decision or remit the appeal to the First-tier Tribunal to do so.

DISCUSSION AND CONCLUSIONS

15. The grounds of appeal against the Decision focus on the Judge's findings as to dependency. As I have already explained, whether or not those findings were open to the Judge is irrelevant if the Judge was entitled to conclude that the EEA national was not exercising Treaty rights. For that reason, I begin with the Judge's reasoning in relation to the 2018 decision. That section of the Decision is also the reason that permission to appeal was granted based on what the Respondent accepts is an error in relation to the date of assessment of the evidence.

16. I therefore begin by setting out the extract from the Decision which contains the Judge's findings in relation to exercise of Treaty rights by the EEA national as follows:

> "14. The Entry Clearance Officer in the notice of decision noted that the appellant's Spanish national daughter in law appears to be employed at a company called GLS on a gross salary of £157 per year. That is far below the Primary Earning Threshold which is £157 gross per week equating to £8164 per year. In other words, her earning is so low that any work she does cannot be effective but is marginal or token. This would mean that she is not genuinely exercising treaty rights in the United Kingdom.
> 15. It is a matter of deep regret that the appellant's grounds of appeal do not deal with this issue, nor do the witness statements of his sponsor.
> 16. The only relevant information that I am able to discern from the two statements is that the appellant's Spanish national sponsor commenced work for GLS Cleaning Services in February 2018 and that from June 2018, she is now working for a new employer called Abelian Cleaning Services. Since the family permit application was made on 14 April 2018, I assume that on this date, the Spanish national sponsor was working for GLS Cleaning Ltd. The only evidence that there is of her income for the year 2017/18 is to be found in a P60 which shows her earnings at £253.10 for the employer GLS Cleaning Services Ltd. There are two payslips that support that position.
> 17. Whilst the sponsor may now be employed with another employer earning substantially more, the appellant's appeal being against Entry Clearance, the Tribunal's consideration of facts must be limited to the date of decision which in this case was

> taken on 14 May 2018. The evidence before the Tribunal did not show the sponsor's income to be anything other than what is noted above. In my view income of £253.10 for a whole financial year cannot be said to be demonstrative effective exercise of treaty rights."

17. As is accepted by the Respondent, the Judge was wrong to take the date of his assessment of the evidence as being the date of the Respondent's decision on the basis that the 2018 decision is a refusal of entry clearance. Section 85 Nationality, Immigration and Asylum Act 2002 which previously contained a provision limiting the consideration of evidence in appeals against entry clearance decisions to the date of decision was amended by the Immigration Act 2014. The EEA Regulations apply the current version of Section 85 (see paragraph 36(10) read with paragraph 1 of Schedule 2 to those regulations). The relevant date for the assessment of the evidence is therefore date of hearing.

18. I have considered whether the application of the wrong date for assessment of the evidence makes any difference to the Judge's conclusion. I have concluded that it does. There is a copious amount of evidence in relation to both the Sponsor's and the EEA national's earnings in the Appellant's bundle. That relating to the EEA national appears at [AB/110-234]. Since I understand that the Respondent may not have access currently to the Appellant's bundle, I set out in short summary what that evidence shows:

    Tax year to 5 April 2014: £2085.86 earnt (P60 at [AB/120])
    Tax year to 5 April 2015: £4815.53 earnt (P60 at [AB/117])
    Tax year to 5 April 2016: £1558.61 earnt (P60 at [AB/116])
    Tax year to 5 April 2017: £4247.61 earnt (P60 at [AB/115])
    Tax year to 5 April 2018: £253.10 earnt (P60 at [AB/114])
    Earnings for GSL post 5 April 2018: 15 hours per week at £7.83 per hour (letter at [AB/110]); payslips showing monthly income of £150.52 (July 2018), £463.98 (August 2018) and £591.32 (September 2018) ([AB/119-121])
    Earnings for Abelian post 5 April 2018: 10 hours per week at £7.83 per hour (letter at [AB/198]); £4016.66 gross to 23 December 2018 (payslips at [AB/124-137])

19. The much lower income for the year 2017/18 as referred to by Judge Hussain is probably explained by the fact that the EEA national was on maternity leave from March 2017 to January 2018 and was not entitled to statutory maternity pay (letter and forms at [AB/205-208]). However, at the date of the hearing before Judge Hussain (January 2019) there was evidence that the EEA national was earning approximately £450 per month. Although that would still be below the Primary Earnings Threshold to which the Judge referred, it is nowhere near as low as the figure which the Judge took to be the relevant figure. The EEA national works on a regular part-time basis at an hourly rate which is consistent with the job she does. As the mother of two young children whose husband (the Sponsor) also works, that is a not untypical working pattern. For that reason, I accept that the error made undermines the Judge's conclusion as to effectiveness of exercise of Treaty rights.

20. That though is not the end of the matter as the Judge also found that the Appellant is not dependent on the EEA national and the Sponsor, albeit in this regard in relation to the 2017 decision. Judge Hussain explains his reasoning for dismissing the appeal against the 2017 decision at [6] to [9] of the Decision as follows:

> "6. The only issue before the Tribunal is therefore whether the appellant was dependent when he made his application. In the voluminous bundle produced by the appellant for the purpose of the hearing, there is no independent evidence to establish that he was a dependent on his sponsors. Rather, there is a determination of Judge Oxlade dated 14 August 2014 where this issue was dealt with.
> 7. The determination of Judge Oxlade deals with two questions. The first is whether the appellant's daughter in law was exercising treaty rights and the other was whether he was a dependent. In Paragraph 31, the judge found that the appellant's daughter in law was exercising treaty rights. However, with regard to the appellant's claimed dependency, in Paragraph 312, the judge recorded the following:
>
> > 'The appellant's argument is that after being released from prison and immigration detention, he stopped working as it is illegal to work and so was reliant on his son and the EEA national. His evidence is that he would start work as soon as he is granted a residence card, because he likes to work and to work hard…'
>
> 8. The judge deals with the evidence before him in Paragraph 33-34 of the determination and finds that he is not satisfied that the appellant was a dependent.
> 9. It is now well established law that where an issue has previously been judicially determined, the present judge must take the earlier findings as his starting point. In this case, I do so and I conclude that there is no good reason why I should depart from the findings of Judge Oxlade's. The appellant's present claim to being a dependent is in substance the same as it was before Judge Oxlade. Accordingly, I find that the appellant was not a dependent on his sponsors in this country."

21. Before I turn to consider the grounds of appeal as pleaded (which do challenge this part of the Decision), I point out that the Decision in this regard suffers from the same defect as in relation to the 2018 decision. The Judge appears to have thought that the relevant date for assessing the evidence was at date of application whereas it should have been assessed at date of hearing. In this case, that is sufficient of itself to lead to an error since, as a result of that error, the Judge thought that he needed to consider the position as in 2017 before the Appellant was removed to Ecuador and where, based on the evidence given to the previous Judge, the Appellant had said that he would work in the UK if permitted to do so which might be relevant to the dependency issue (although is not necessarily conclusive: see in that regard the CJEU decision in Flora May Reyes v Migrationsverket [2014] EUECJ C-423/12).

22. Importantly, and no doubt for the same reason, the Judge does not take into account the statements of the EEA national and the Sponsor nor does he take into account the evidence in the form of the Sponsor's bank statements which appear at [AB/236] and following which show a number of transfers termed "Bill payment to L Marin Marin" with the reference "Papi". The failure to consider that evidence is the subject of paragraphs [9] and [12] of the grounds which I accept are for that reason made out.

None of the evidence there mentioned is considered by the Judge because he relied on the wrong date for assessment of the evidence.

23. I turn to consider whether the error can be said to undermine the Judge's findings on the dependency issue. As I have pointed out, the documentary evidence is in the form of the Sponsor's bank statements. Those show (at [AB/236-263]) payments of varying amounts as I have described from the bank statements of the Sponsor apparently to the Appellant in the period June to November 2018.

24. The witness statement of the EEA national states that the Appellant "has always been supported by [her] and [her] husband, his son during the time [she] has known him" ([9] of the statement at [AB/2]). She says that she and the Sponsor paid for the Appellant's rent and food when he was staying with them. That is of course in the past as the Appellant has been returned to Ecuador. In relation to the position at the date of her statement (23 December 2018) she asserts at paragraph [17] without more that the Appellant is dependent on her and her husband.

25. Turning then to the Sponsor's witness statement, he says at paragraph [11] ([AB/5]) that he and the EEA national "are very happy to continue to support [the Appellant] financially for the foreseeable future". It is said that he and the EEA national supported the Appellant until he was removed to Ecuador. He also asserts that they continue to support him. It is said at [19] of the statement that they send somewhere in the order of £250 per month but that this is not a regular amount. The Appellant's need for the financial support is set out at [20] and [21] of the statement as follows:

> "20. My father is currently living in rental accommodation in Ecuador since being removed to Ecuador.
> 21. My father is dependent on me and my wife. We provide him money for all of his expenses and living costs. He buys his food and his necessities with the money we send him."

26. There is no witness statement from the Appellant. It appears to be the case that when the appeal was lodged the solicitors asked for him to be allowed to re-enter in accordance with the EEA Regulations for the purposes of giving evidence in his appeal. I do not know what happened to that application if indeed it was made in the correct form. However, his absence did not prevent him providing a witness statement. It also appears that the application included in the papers on file relates only to the 2017 decision and not the application made for a family permit which might include more evidence as to the Appellant's outgoings. I note that the Appellant told the previous Judge that he would wish to work in the UK if permitted to do so. He is of course not precluded from working in Ecuador but there is no evidence whether he is working and, if not, why not. The Appellant is of working age (aged 54 years).

27. As paragraph [14] of the grounds recognises, the consideration whether there is a dependency of the adult family member on the EEA national and spouse of that EEA national is not whether the adult family member is wholly or mainly dependent

financially but whether he/she is reliant on the funds received from the EEA national and spouse for essential living needs. The grounds assert that "[i]t was the Appellant's evidence that he relied on the support of his son and daughter-in-law for his essential needs". However, that evidence is absent. The question is not whether funds have been provided (which depends on what is made of the bank statements) but whether there is evidence that the Appellant depends on the funds for his living needs in Ecuador.

28. For that reason, a Judge could, on the evidence currently provided, very well reach the conclusion that there is insufficient evidence as to dependency. However, I am unable to say that this would be or is even likely to be the outcome. Much would depend on what another Judge makes of the EEA national's and Sponsor's evidence. For that reason, the error made by Judge Hussain is capable of undermining his conclusions.

29. For the above reasons, I accept that the Decision of Judge Hussain contains errors of law which may affect the outcome. For that reason, I set aside the Decision. Since there has been no consideration of the evidence at the correct date and no findings made on the evidence which was before Judge Hussain due to the errors made as to the date of assessment, this appeal must be considered entirely afresh. For that reason, I consider it appropriate to remit the appeals to the First-tier Tribunal for re-making of the decision.

DECISION

The Decision of First-tier Tribunal Judge Hussain promulgated on 15 February 2019 involves the making of an error on a point of law. I therefore set aside the Decision. I remit the appeals to the First-tier Tribunal for re-hearing before a Judge other than Judge Hussain.

Signed: *L K Smith*

Upper Tribunal Judge Smith

Dated: 10 March 2021