



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: EA/01247/2020

**THE IMMIGRATION ACTS**

**Heard at Cardiff Civil Justice Centre**

**On 13 January 2022**

**Remotely By Microsoft Teams**

**Decision & Reasons  
Promulgated**

**On 09 March 2022**

**Before**

**UPPER TRIBUNAL JUDGE GRUBB**

**Between**

**ERNEST BOAH**

**and**

**ENTRY CLEARANCE OFFICER - LIVERPOOL**

Appellant

Respondent

**Representation:**

For the Appellant: Ms M Agyei, the sponsor

For the Respondent: Mr C Bates, Senior Home Office Presenting Officer

**DECISION AND REASONS**

**Introduction**

1. The appellant is a citizen of Ghana who was born on 4 January 1991.
2. On 12 December 2019, the appellant made an application for a family permit as an “extended family member” of an EEA national in the UK under reg 12 of the Immigration (EEA) Regulations 2016 (SI 2016/1052 as amended) (the “EEA Regulations”). The appellant claimed that the

sponsor, Ms Mercy Agyei, who is an Italian national, was his aunt and he was dependent upon her.

3. On 8 January 2020, the Entry Clearance Officer (“ECO”) refused the appellant’s application. The ECO was not satisfied that the appellant and sponsor were related as they claimed. Further, the ECO was not satisfied that the appellant was financially dependent upon the sponsor since she came to the UK on 5 July 2016.
4. On 6 April 2020, the Entry Clearance Manager (“ECM”) maintained the ECO’s decision to refuse the appellant a family permit.

### **The Appeal to the First-tier Tribunal**

5. The appellant appealed to the First-tier Tribunal. That appeal was heard remotely on 5 March 2021. The appellant was not legally represented but the sponsor acted on his behalf and gave oral evidence.
6. In a decision sent on 15 March 2021, Judge Andrew dismissed the appellant’s appeal. She accepted, as had the ECO, that the appellant was the nephew of the sponsor on the basis of DNA reports that were submitted after the ECO’s decision. However, the judge did not accept that the appellant had established that he was dependent upon the sponsor as required by reg 8(2) of the EEA Regulations and had not, therefore, established that he was the sponsor’s extended family member.

### **The Appeal to the Upper Tribunal**

7. The appellant sought permission to appeal to the Upper Tribunal on the basis that the judge had erred in reaching her adverse finding in relation to dependency as she had focused unduly upon the absence of supporting documentation and the appellant had provided (through the sponsor) a number of money transfer receipts demonstrating that the sponsor financially supported the appellant.
8. On 12 May 2021, the First-tier Tribunal (Judge Keane) granted the appellant permission to appeal on the basis that the judge had impermissibly imposed a requirement that the appellant provide documentary evidence which the respondent expected to see in order to establish dependency.
9. Following the grant of permission, the sponsor provided an additional document by way of written submissions in support of the grounds. Further, as transpired at the hearing before me, in December 2021 the sponsor sent to the Upper Tribunal additional documentation, in particular further receipts for money transfers which, although it is not entirely clear, covered the period February 2020 to December 2021.
10. The appeal was listed for a remote hearing at the Cardiff Civil Justice Centre on 13 January 2022. I was based in court. The sponsor and Mr Bates, who represented the respondent, joined the hearing remotely by

Microsoft Teams. In addition, the sponsor was supported by her daughter who was present on the link with the sponsor. Further, an interpreter in the Twi language joined the hearing remotely and translated for the sponsor.

### **The Judge's Decision**

11. The judge accepted that the appellant and sponsor were related as claimed and the sole issue was whether he had established that he was dependent upon the sponsor.
12. The sponsor gave oral evidence before the judge which is summarised at para 5 of her determination:
  - “5. ... she told me that the appellant has his father and siblings in Ghana but he does not live with them. He does see his father but the sponsor was unable to say how often this was. They don't live together as there is nowhere for the appellant to sleep so the sponsor has rented a place for him. The appellant's father does not work and is in a difficult financial position. Although the appellant is around 30 years old he is not working either. He has looked for work but because he did not really go to school it's difficult for him to work. He spends most of his time at home or he goes to church. The sponsor spends £100 per month, some of which is for rent and some for food. Sometimes she sends more, when there's an emergency. The £100 covers food but not electricity – if the appellant tells the sponsor he has a bill then she sends more. She could not send documents relating to the bills because he is renting a room in a house and the bills are not in his name. She does not know she should send documents as this is not mentioned in the refusal.”
13. In addition, the sponsor submitted a number of money transfer receipts for 2017, 2018 and 2019, the last of these being 29 November 2019. These disclosed payments made by the sponsor to the appellant.
14. In her submissions, the Presenting Officer submitted that the money receipts were not sufficient to show dependency by the sponsor. He had family in Ghana and there was a lack of documentary evidence. There was also no evidence concerning his outgoings and there was no up-to-date evidence beyond the last receipt for 29 November 2019.
15. In response to that, the sponsor accepted that she had sent receipts up to 2019 but that she had other documents that proved she was sending money beyond that. She said she had sponsored him since she had come to the UK and she did not know that she had to provide bills. She accepted that the appellant's father was in Ghana and that he had siblings in Ghana but she had taken responsibility for him. She told the judge that she had other documents to support his claim.
16. In paras 9-17, the judge set out the ECO's reasons for refusing the family permit and also the ECM's reasons for maintaining that decision. Those included that the appellant had not provided supporting evidence, in particular of his family's circumstances, income and expenditure sufficient to establish that the sponsor was meeting his “essential living needs”.

17. At para 12, the judge noted that the sponsor and appellant could not have had any doubt as to what was required to show dependency.

18. At para 14, the judge dealt with a rental agreement contained in the bundle as follows:

“At page 19 of the Bundle I have an agreement for the renting of ‘self-contained’. This confirms that a payment has been made to the sponsor to cover rent for two years. It is also apparent that the appellant is to pay the utility bills. I then have a renewal of that agreement at page 20 of the Bundle. This makes no reference as to who has paid the advance rental.”

19. Then at para 15, the judge dealt with the money transfer receipts as follows:

“This is followed by a number of money transfer receipts for 2017, [2]018 [and] 2019, the last of those being 29 November 2019. Accordingly, save for the assertions of the sponsor I have nothing at all before me to show that she has continued to make payments to the appellant after that date”.

20. Then, at 16 the judge added:

“Further, I have no evidence at all before me, again save for the sponsor’s assertions, as to what the money she sends is used for, what the circumstances of the appellant are, what the appellant’s essential needs are and how these have been paid for.”

21. Then at para 17 the judge reached the following conclusion:

“Accordingly, and on the evidence that is before me, I have no alternative but to dismiss the appeal. The appellant has not shown, on the evidence that is before me, that he is dependent on the sponsor for his essential needs.”

## **Discussion**

22. In order to establish ‘dependency’ under the EEA Regulations, the appellant had to establish on a balance of probabilities that the sponsor was providing sources to meet his ‘basic needs’. In Lim v ECO, Manila [2015] EWCA Civ 1383, Elias LJ (with whom McCombe and Ryder LJ agreed) summarised what was required as follows 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. ...”.

23. The reference to the case of Reyes, is to the decision of the CJEU in Reyes v Migrationsverket (C-423/12) [2014] QB 1140. Elias LJ summarised that case at [24]-[25] as follows:

“24. The case concerned a 25-year-old Philippine national who said that she had been unable to find work in the Philippines. She was financially supported by her mother, who had become a German citizen, and her mother's cohabiting partner, a Norwegian citizen, who both resided in Sweden. The first question in the reference by the Swedish court was, in essence, whether, in order to be regarded as dependent and so fall within the concept of family member, a direct descendant had to show that he had tried without success to find employment in his country of origin or to obtain a subsistence allowance or some other means of supporting himself. Both the Advocate General and the Court held that this was not necessary, which was of course entirely in accordance with the earlier authorities. The Advocate General summarised his conclusions as follows (paragraph 69):

‘On a proper construction of Article 2(2)(c) of Directive 2004/38/EC of [the Citizens Directive] ... any member of the family of a Union citizen who, for whatever reason, proves unable to support himself in his country of origin and in fact finds himself in such a situation of dependence that the material support provided by the Union citizen is necessary for his subsistence, is to be considered to be a 'dependant'. As regards members of the nuclear family deemed to be dependants, such a situation must really exist and may be proved by any means.’

So the reason why the party cannot support himself or herself is irrelevant; the fact that he or she cannot do so is critical. This is inconsistent with the notion that dependency is established merely from the fact that material support is provided. The court essentially adopted the same approach, it said this:

‘20. In that regard, it must be noted that, in order for a direct descendant, who is 21 years old or older, of a Union citizen to be regarded as being a 'dependant' of that citizen within the meaning of Article 2(2)(c) of Directive 2004/38, the existence of a situation of real dependence must be established (see, to that effect, *Jia*, paragraph 42).

21. That dependent status is the result of a factual situation characterised by the fact that material support for that family member is provided by the Union citizen who has exercised his right of free movement or by his spouse (see, to that effect, *Jia*, paragraph 35).

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 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.

26. The requirement for such additional evidence, which is not easy to provide in practice, as the Advocate General noted in point 60 of his Opinion, is likely to make it excessively difficult for that descendant to obtain the right of residence in the host Member State, while the facts described in paragraph 24 of this judgment already show that a real dependence exists. Accordingly, that requirement is likely to deprive Articles 2(2)(c) and 7 of Directive 2004/38 of their proper effect.

27. Furthermore, it is not excluded that that requirement obliges that descendant to take more complicated steps, such as trying to obtain various certificates stating that he has not found any work or obtained any social allowance, than that of obtaining a document of the competent authority of the State of origin or the State from which the applicant came attesting to the existence of a situation of dependence. The Court has already held that such a document cannot constitute a condition for the issue of a residence permit (Jia paragraph 42).'

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. For example, paragraph 20 refers to the existence of "a situation of real dependence" which must be established; paragraph 22 is even more striking and refers to the need for material support in the state of origin of the descendant "who is not in a position to support himself"; and paragraph 24 requires that financial support must be "necessary" for the putative dependant to support himself in the state of origin. It is also pertinent to note that in paragraph 22, in the context of considering the Citizens Directive, the court specifically approved the test adopted in Jia at paragraph 37, namely that:

'The need for material support must exist in the State of origin of those relatives or the State whence they came at the time when they apply to join the Community national.'

24. The sponsor referred me to the decision in Reyes to support her contention that the judge had been wrong to rely upon the absence of documentation. That submission is perhaps derived from what the CJEU said in [26]-[27] of its decision quoted by Elias LJ at [24] above. Whilst the CJEU recognised that it would be unrealistic (and probably improper) for a decision-maker to require a document from the country of origin attesting to the dependence of the individual seeking entry to the other Member State, nothing in that decision prevents a decision-maker (including a court or Tribunal) taking into account, where appropriate, the absence of supporting financial documentation in determining whether an individual has established on a balance of probabilities that they are dependent upon the EU national. What, perhaps, Reyes does highlight is that a decision maker cannot require documentation and, in effect, conclude that dependency has not been established simply because of its absence. All the evidence, oral, documentary or otherwise, must be considered as a whole in reaching what Elias LJ said in Lim at [32] is "a simple matter of fact".
25. Mr Bates, on behalf of the ECO submitted that the judge had been entitled to find, that in the absence of documentation postdating 29 November 2019 and without evidence (presumably in the form of documentation) as

to the appellant's income, expenditure, etc., she was entitled to find that the appellant had not established that the sponsor provided for his "essential living needs". He submitted that it was clear from both the ECO and ECM's decisions that the absence of documentation was a significant factor in reaching the adverse finding in relation to dependency.

26. Mr Bates also placed reliance upon the fact that the sponsor in her evidence had accepted that the appellant had a father and siblings in Ghana although the appellant did not live with his father who had limited accommodation.
27. Mr Bates submitted that the judge's expression in para 17 of her decision that she had "no alternative but to dismiss the appeal" was not a reflection of the outcome dictated by absence of the documentary evidence *per se* but, having taken all the evidence into account, she had no alternative but to dismiss the appeal.
28. Overall, I do not accept Mr Bates' submissions that the judge did not err in law.
29. There is no doubt that the judge correctly considered whether the appellant had established on a balance of probabilities whether the sponsor was meeting his "essential needs" in determining whether or not dependency had been established.
30. The absence of documentation was an important feature of the judge's reasoning in paras 9-17 of her decision. The sponsor maintained before me that she was unaware of the need to provide further documentation beyond that provided to the ECO. I have no doubt as to the genuineness of that statement having listened to the sponsor explain the position during the hearing. However, it is the case that both the ECO and ECM's decisions do focus upon the absence of supporting documentation.
31. Before the judge, the sponsor responded during the course of the submissions that she had additional receipts and documentation relevant to the appeal. That would appear to be borne out by the documents which, she said had been previously sent to the Upper Tribunal following the First-tier Tribunal hearing, and which were e-mailed to me (and to Mr Bates) during the hearing. They include money transfer receipts covering the period February 2020 to December 2021. The sponsor told me that the gap between November 2019 and February 2020 was because she sent money to Ghana through individuals.
32. I raised with Mr Bates during his submissions the fact that the sponsor had said during her submissions before the FtTJ that she had further relevant documentation. Mr Bates acknowledged that the sponsor may not have appreciated evidence was needed to be provided up to the date of the hearing before the judge. He also accepted that, it appeared from the judge's decision, that the sponsor having raised the issue that she had further documents, this had not been considered by the judge. As I have

said, the appellant was not legally represented and the sponsor (undoubtedly doing her best for the appellant) was representing him at the hearing. She is, clearly, not a lawyer or, it would appear, a person who has any background legal knowledge.

33. In my judgment, when the sponsor pointed out to the judge that she had additional documentation that might support the appellant's claim, the judge had a legal obligation to consider whether it was fair to proceed to reach a decision (including taking into account the absence of such documentation) without giving the sponsor an opportunity to produce that evidence whether by adjourning the hearing or, possibly, permitting the sponsor to submit that evidence post-hearing to the judge and the respondent and giving, in the latter circumstances, the respondent an opportunity, if he wished, to comment on any additional documents. The judge did not, so far as can be seen from her decision, consider the issue of how to proceed and, in my judgment, the judge's failure to do so was a procedural irregularity amounting to unfairness. This is particularly so given that the absence of this documentation was a significant factor in the judge's reasoning leading to an adverse finding in relation to dependency. That additional documentation might, at least, have supported the sponsor's evidence that she provided funds to the appellant over a longer period of time from 2017 until the date of the hearing.
34. Of course, the fact that monies were provided by the sponsor did not, as the case law indicates, necessarily establish that the money was required to meet the "essential needs" of the appellant. Though, the longer the period of time the payments were made, the more pressing might be the inference that the appellant actually needed the money to live.
35. Whilst it would undoubtedly have been of assistance to the appellant's case if evidence (perhaps in documentary form) had been provided by him as to his means and expenditure, such documentation is not a prerequisite to establishing a dependency on the basis of an individual's "essential needs" being met. There may be other evidence which, if accepted, in itself could support a positive finding on that issue. Here, the sponsor did give oral evidence concerning the appellant's circumstances, including that he was not working, that she sent £100 per month which paid for his rent and for some food. There was also documentary evidence that the sponsor was both responsible, and had in fact, covered the appellant's rent for a two year period. The judge referred to this evidence at paras 5 and 14 of her decision respectively. It is unclear to me whether the judge accepted the sponsor's oral evidence or, indeed, the documentary evidence that the sponsor had covered the sponsor's rent for two years - which it would be difficult to gainsay was part of his "essential needs". I do not say that the judge had to accept this evidence, in itself, established on a balance of probabilities that the sponsor met the "essential needs" of the appellant in the absence of documentation, but it was relevant evidence that had to be taken into account in the round, together with the absence of documentation. But, in order to reach a proper finding on dependency, the judge had to make clear findings whether he accepted



what the appellant was saying and the apparent import of the rental agreement. In failing to do so, the judge erred in law by not giving adequate reasons for her findings based upon all the evidence.

36. For these reasons, the judge's adverse finding in relation to the issue of dependency cannot be sustained. The judge's decision contains a material error of law and I set it aside.

### **Decision**

37. The decision of the First-tier Tribunal to dismiss the appellant's appeal involved the making of an error of law. That decision cannot stand and is set aside.
38. The respondent accepts (as did the judge) that the appellant and sponsor are related as claimed. The only live issue is, therefore, "dependency" under the EEA Regulations. Fresh factual findings must be made in respect of dependency and that may well involve further oral evidence from the sponsor and any additional evidence, including any up-to-date documentary evidence concerning money transfers made by the sponsor to the appellant.
39. Given the extent of fact-finding required, and that further additional oral and documentary evidence is likely, I consider the appropriate disposal of this appeal is to remit it to the First-tier Tribunal to remake the decision.
40. The finding in relation to the appellant's relationship with the sponsor is preserved. The sole issue will be one of "dependency".
41. Accordingly, the appeal is remitted to the First-tier Tribunal to remake the decision by a judge other than Judge Andrew.

Signed

**Andrew Grubb**

Judge of the Upper Tribunal  
18 January 2022