



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

Appeal Number: UI-2021-001552
EA/03797/2020

THE IMMIGRATION ACTS

**Heard at Birmingham CJC
On 8 September 2022**

**Decision & Reasons Promulgated
On 12 October 2022**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

AHMED ALI BAROW
(Anonymity direction not made)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: No appearance.

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

DECISION AND REASONS

- 1.** The appellant appeals with permission a decision of First-tier Tribunal Judge Parkes ('the Judge') promulgated on 24th December 2021 in which the Judge dismissed the appellant's appeal against the refusal of an application for a residence card as a family member of an EEA national exercising treaty rights in the United Kingdom.

2. Notice of the date, time and venue of the hearing was served upon the appellant on the 26 July 2022 to the last notified address for service, by email.
3. There was no attendance on behalf of the appellant by the UK based sponsor, a representative, or family member.
4. I am satisfied there has been valid service of the notice of hearing upon all the parties. No explanation has been provided for the absence, no application has been made for an adjournment which has been granted, or any indication given that the hearing will not proceed. I am satisfied in all the circumstances that the interests of justice do not require this error of law hearing to be adjourned and that is appropriate in all the circumstances to proceed with the hearing in the absence of any attendance on behalf of the appellant.

Error of law

5. The refusal of the EEA Family Permit is dated 30 June 2020. This records that the appellant applied for a family permit as a dependent direct family member of an EEA national. As the application was made before the relevant date under the Withdrawal Agreement it was considered under regulations 6 and 7 of the Immigration (EEA) Regulations 2016 ('the Regulations').
6. The Entry Clearance Officer ('ECO') was not satisfied that the evidence provided with the application was sufficient to demonstrate that the sponsor was self-employed, as alleged, was not satisfied the evidence produced established the sponsor was a qualified person i.e. an EEA national exercising treaty rights in the UK in accordance with regulation 6 of the Regulations.
7. The ECO noted the application was as a dependent direct family member in accordance with regulation 7 requiring the applicant to establish financial dependency. In relation to this it is written:

You state that you are financially dependent on your sponsor. It is noted from your sponsor's bank statements that they receive public funds, namely Child and Working Tax Credits from the Department of Work and Pensions (DWP). Child and Working Tax Credits are means tested benefits which are assessed according to a household's income and the household make up. This means the DWP have assessed your sponsor's circumstances and awarded them public funds due to their low income and their dependent household. These funds have been awarded to assist your sponsor in meeting their own essential needs and the needs of their own household in the United Kingdom. Therefore, I am not satisfied that your sponsor is currently able to support you financially will be able to continue to support you should you arrive in the United Kingdom.

After considering these factors, there is a risk that if you did arrive in the United Kingdom that you may become a burden on the public funds system of this country.

On the evidence submitted in support of your application and on the balance of probability, I am not satisfied that your sponsor is a qualified person currently exercising Treaty rights in the United Kingdom or that

you are financially dependent on your sponsor as claimed. I am therefore not satisfied that you are a family member in accordance with Regulation 7 of the Immigration (European Economic Area) Regulations 2016.

I therefore refuse your EEA Family Permit application because I am not satisfied that you meet all of the requirements of regulation 12 (see ECGs 2.23) of the Immigration (European Economic Area) Regulations 2016.

- 8.** The appellant lodged an appeal alleging the decision maker failed to consider all the evidence submitted with the application, repeating the appellant's claim that the sponsor (who is the appellant's son-in-law) is a qualified person who had now provided his tax returns for the year ending April 2020 to confirm he continues to be self-employed. The grounds of appeal assert the decision maker accepted dependency and assert the claim the sponsor was unable to support the appellant financially is against the weight of evidence and that, in any event, the decision maker failed to apply the correct test for dependency in line with the EEA Regulations and case law, that there was no mention in the decision that the appellant had received funds from the sponsor which could be used for her essential needs, that money transfer receipts had been provided demonstrating the sponsor had been sending funds to the appellant for the appellant's exclusive daily essential needs and upkeep. The grounds also argue the decision maker failed to consider the appellant's rights under Article 8 ECHR.
- 9.** The Judge refers to the documentary evidence made available at the hearing which was comprised of a 54 page Home Office bundle and an appellant's bundle including witness statements and 90 pages of supporting evidence and a separate bundle containing the notice of grounds of appeal and the refusal notice of some 36 pages. The Judge noted there was no representative in attendance on behalf of the ECO.
- 10.** The Judge sets out his findings of fact from [8]. It is noted it was claimed the sponsor sends the appellant \$200 a month with extra funds for medical treatment.
- 11.** The Judge noted the evidence relating to the appellant's medical condition at [pages 18 - 26] which indicated he suffered a stroke in April 2021. The Judge records at [10] that he put to the appellant's representative the question of whether the appellant's medical needs will be a burden upon the State to which it was stated the appellant's medical and community care needs will be provided by the Sponsor. The appellant's claim was that as the current carer was no longer available long-term to the appellant, a citizen of Somalia born on 1 January 1995, it was appropriate for the appellant to be able to join the sponsor and his daughter in the UK.
- 12.** The Judge notes at [11] updated evidence of the sponsor's self employment and income, bank statements, and savings at [87 - 89] showing a long period of support which was still continuing.
- 13.** From [14] the Judge writes:
 14. The Sponsor's finances are not particularly good. His income to 31/3/2020 was £9492 which is about £791 a month. The

accountant's letter of 27 July 2021, page 73, gives his net profit for the last financial year as £8016, £668 a month, which is a significant reduction from the year before. From the tenancy agreement supplied his rent is £700 a month (page 34 to 36). The Halifax bank statements, pages 80 to 86, were almost permanently overdrawn although his wife's Lloyds Bank statement, page 89, did show a better balance of over £1,000 and more in credit. However, that only covered October 2021 and the longer position was not shown.

15. It is not clear how the Sponsor's finances actually work. His earnings do not cover his rent and in addition there will be utility bills, Council Tax, food and the like. The Sponsor's wife, the Appellant's daughter's financial contribution is not clear as the evidence overall is incomplete. The Sponsor is entitled to benefits which are means tested and bring his family income to a suitable level but that is not generous and is based on the U.K.'s cost of living and their calculated needs.
16. How the Sponsor is able to remit \$200 a month and pay for additional medical expenses is not clear, still less is it clear how the Appellant will be supported when in the UK. In the circumstances I find that I cannot be satisfied on the balance of probabilities that the Appellant is genuinely dependent on the Sponsor and accordingly he does not meet the provisions of the EEA Regulations 2016.

- 14.** The appellant's grounds of appeal challenge the decision of the Judge and allege the Judge erred in failing to take adequate account of the legal position at the date of the hearing, erred when assessing the evidence at the date of application and at the hearing, failed to consider the appeal in line with the correct standard of the balance of probabilities, and made findings at [16] which are said to be against the evidence including statements provided by the appellant and his spouse, and evidence of financial dependency that commenced in 2018. It is claimed the Judge failed to acknowledge the family circumstances and note that money transfers were being drawn directly from the Sponsor's bank account and that the Judge erred when assessing how the Sponsor was able to send funds when the evidence was before him. The grounds also assert the Judge failed to consider the impact of COVID-19 on the sponsor as a self-employed taxi driver and that from September 2021 there has been a significant increase in his income. The grounds also argue that \$200 a month will be saved if the appellant arrives in the United Kingdom and that together with the appellant's wife's savings there was sufficient evidence before the Judge which had not been attached appropriate weight. The grounds argue the weight of evidence before the Judge was that the funds were sent to the appellant for his sole use to cover essential living needs and that as there are no adverse findings against the sponsor's credibility his claim should not have been rejected without proper explanation. It is also argued the Judge failed to question the sponsor but then went on to find negatively against him and argued the finding at [16] is against the weight of the

evidence and that the Judge has acted unfairly in not giving the sponsor the opportunity to address his concerns. The grounds argue the finding at [16] is speculative.

- 15.** Permission to appeal was granted by another judge of the First-tier Tribunal on the basis is set to be arguable that the Judge erred in law in failing to consider the evidence concerning the sponsor's income referred to in paragraph 2(d) of the grounds of challenge, pages 72 - 85 of the Appellant's bundle.

Discussion

- 16.** Regulation 7 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;
- 17.** It does not appear to be disputed by the Judge that the sponsor is an EEA citizen exercising treaty rights in the UK or that the appellant's daughter is his spouse. The remaining issue pursuant to regulation 7(1)(c) is that of dependency.
- 18.** The 'dependency test' has been long established in case law. 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.
- 19.** 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.

20. In 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.

21. The guidance to caseworkers considering applications of this nature published on 21 February 2020 contains the following:

Dependency

A child aged 21 or over and any relatives in the ascending family line must prove they are dependent on the EEA national sponsor or their spouse or civil partner. 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. This follows from the Court of Appeal judgment in Pedro v Secretary of State for Work and Pensions [2009] EWCA Civ 1358 (14 December 2009).

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. Proof of dependency The applicant must provide proof of their dependency. This can include:
 - bank or building society statements
 - evidence of money transfers
 - evidence of living in the same household if applicable

- other evidence to show their EEA national sponsor has enough money to support them and the applicant is reliant on them for this.

These are illustrative examples and other documentation may be provided which satisfies this requirement.

No valid proof of dependency provided.

If the applicant cannot provide valid proof to show they are currently dependent on their EEA national sponsor or the sponsor's spouse or civil partner, the application must be refused. For examples of how to apply the 4 stage test see: Example scenarios of the qualifying conditions 4 stage test.

Refusing for public policy, public security or public health reasons

Before issuing a registration certificate or a residence card, you must be certain there are no reasons to refuse on the grounds of public policy, public security or public health.

- 22.** There is clear reference in the guidance to the need for the EEA national to show sufficient funds to support the applicant and that the applicant is reliant upon those funds for their essential needs. This is therefore a two factor test.
- 23.** It was not disputed by the Judge that the appellant has suffered a stroke as there is clearly evidence to this effect. The cost of a stroke victim to the NHS can be about £45,409 in the first 12 months with further costs of £24,778 in subsequent years according to Stroke UK.
- 24.** The Judge's core finding is that the evidence was not at all clear in relation to how the sponsor was able to afford to provide the claimed funds whilst the appellant was in Somalia or how he will be able to afford to meet the appellant's needs if he came to the United Kingdom, including health needs. On that basis the concerns of the ECO in relation to the impact on the public purse or public services were not shown before the Judge to be in any way irrational.
- 25.** The evidence provided in the appeal bundle, was a snapshot of a limited period of time. Mr Bates also submitted that a lot of the evidence provided related to a period after the UK had left the European Union. The comment in the grounds that had the evidence been considered by the Judge a different decision may have arisen is not made out.
- 26.** Proceedings within the First-tier Tribunal are adversarial and there was no need for the Judge to put his concerns to the sponsor prior to making a decision. This is not a case in which deception is alleged but a case in which it was argued that the material provided did not satisfy the relevant regulation. No procedural unfairness is made out.
- 27.** The appellant has failed to establish that the Judge did not consider the evidence as a whole with the required degree of anxious scrutiny. A reading of the determination and the material in the appellant's bundle shows he clearly did. There is no requirement by the Judge to

set out each and every aspect of the evidence provided the same is taken into account. The findings are adequately reasoned.

- 28. The comment the Judge made no adverse findings in relation to what is claimed regarding the appellant's circumstances may be the case, but that does not mean there is material error in the decision of the Judge on the basis on which that decision was made which is clearly set out at [14 - 16] of the decision under challenge.
- 29. Disagreeing with the weight the judge gave to the evidence does not establish legal error, material or otherwise.
- 30. Whilst the appellant would prefer a more favourable outcome to enable him to come to the United Kingdom, the grounds fail to establish material legal error in the Judge's decision sufficient to warrant the Upper Tribunal interfering any further in this matter.

Decision

- 31. There is no material error of law in the Immigration Judge's decision. The determination shall stand.**

Anonymity.

- 32. The First-tier Tribunal made no order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. I make no order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Upper Tribunal Judge Hanson

Dated 8 September 2022