Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/08333/2021
& IA/08280/2021
[EA/51880/2021 & EA/51879/2021]; (UI-2022-000573 & UI-2021-001598)

THE IMMIGRATION ACTS

Heard at Bradford IAC	**Decision & Reasons Promulgated**
On 4 May 2022	**On 24 June 2022**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

ENTRY CLEARANCE OFFICER

Appellant

AND

KI and SH

Respondents

Representation:
For the Appellant: Ms Z. Young, Senior Presenting Officer
For the Respondent: Mr C. Holmes, Counsel instructed on behalf of the respondents

DECISION AND REASONS

Anonymity :

1. The First-tier Tribunal did not make an anonymity order. The views of the advocates on this issue were sought at the hearing which I have taken into account. Having done so I consider that it is appropriate to make such an order. There is no dispute between the parties that an anonymity direction should be made in the light of their status as minors. The starting point for consideration of such a direction in this Chamber of the Upper Tribunal, as

in all courts and tribunals, is open justice. On the other side of the balance, there are the interests of the children who are involved in these proceedings which require protection and having taken that into account, and in light of the submissions made that the decision concerns the circumstances of minors overseas I accept the submission made by both parties that the public interest is outweighed. I therefore make an anonymity direction as follows:

2. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, [the appellants are granted anonymity. No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant (and/or other person) without that individual's express consent. Failure to comply with this order could amount to a contempt of court.

Introduction:

3. The Entry Clearance Officer appeals with permission against the decision of the First-tier Tribunal (Judge Kelly) who allowed their appeals against the decisions made to refuse their applications for a family permit as dependent extended family members of an EEA national in a decision promulgated on 6 December 2021.

4. Whilst this is an appeal bought by the Entry Clearance Officer, for sake of convenience I intend to refer to the parties as they were before the FtT.

The background:

5. The background is set out in the decision of the FtTJ and the evidence in the bundle. The FtTJ set out that the following facts did not seem to be disputed. The appellants are nationals of Somalia and are minors. They applied for an EEA family permit as dependant (extended family members) of the sponsor, their Aunt, a national of Finland, resident in the United Kingdom and who has pre-settled status under the provisions of the European Union Settled Status scheme ("EUSS").

6. The appellants are orphans. The first appellant is the daughter of the sponsor's late brother and the second appellant the daughter of her late sister. Following the death of their parents, the appellant's lived with a neighbour in Somalia. However, they moved in 2020 to their current rented accommodation in Ethiopia where they live alone. The sponsor is a citizen of Finland. She has been granted limited leave to remain in the United Kingdom until the 1st October 2024 under European Union Settlement Scheme.

7. The applications were refused in two decisions taken on 28 May 2021 in identical terms. The decisions are replicated in the FtTJ's decision as follows:

"In order to meet the relevant EEA Regulations, you must demonstrate that you are a dependent relative of your EEA sponsor and that your EEA sponsor is a qualified person. Financial dependence should be interpreted as meaning that the family member needs the financial support of the EEA national or his or her spouse/ civil partner in order to meet the family member's essential needs in the country where they are present and that the sponsor will be able to support the applicant once in the UK.

On your application you state that your sponsor has resided in the UK since 03 July 2016 and that you are financially dependent on them. As evidence of this you have provided 3 money transfer remittance receipts from your sponsor to you, however, it is noted that these transfers are dated immediately prior to your application (within the last 4 months). Unfortunately, this limited amount of evidence in isolation does not prove that you are financially dependent on your sponsor. I would expect to see substantial evidence of this over a prolonged period, considering the length of time your sponsor has been resident in the United Kingdom.

I also note that you have provided 21 other money transfer receipts, however, as these do not list you as the beneficiary and you have provided no evidence that you have access to the transferred funds, they cannot be used as evidence of your claimed dependency.

The act of transferring money is not in itself evidence that it is needed by the recipient. In addition to money transfer receipts, this office would also expect to see evidence which fully details yours and your family's circumstances. Your income, expenditure and evidence of your financial position which would prove that without the financial support of your sponsor your essential living needs could not be met.

You have not provided evidence which fully details your circumstances, income and expenditure and evidence of your financial position, including any other be satisfied that any funds that your sponsor sends to you is your only or main source of income and used to meet your essential living needs.

You have submitted a Council Tax Bill which show that your sponsor receives a reduction in their Council Tax liability from Council Tax Support. This indicates that your sponsor requires support in meeting the cost of their council tax liability. It is, therefore, reasonable to suggest that they are not in a financial position to support you too.

On the evidence submitted in support of your application and on the balance of probability, I am not satisfied that you are dependent on your sponsor. I therefore not satisfied that you are a family member in accordance with the Immigration (European Economic Area) Regulations 2016.

Your sponsor claims to be employed and exercising their treaty rights as a worker. In support of this you have submitted payslips for the months up to August 2020. I note on each of the payslips the method of pay is BACS, but you have failed to evidence their pay reaching their bank account and as such I cannot be satisfied that their employment is genuine.

In light of the above absence your application fails to meet the requirements of regulation 6 of the Immigration (European Economic Area) Regulations 2016 and as such falls for refusal."

The decision of the FtTJ:

8. The appellants appealed and the appeal came before the FtT on the 2 December 2021. In a decision promulgated on 6 December 2021 the FtTJ allowed their appeals. His assessment is set out at paragraphs 15-19 and reproduced below:

> "Analysis
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> 15.The respondent was of necessity obliged to consider the question of whether the appellants had discharged the burden of proving that they were dependent upon the sponsor for their essential living needs by reference solely to the twenty-one money transfer receipts that they had provided in support of their applications. By contrast, I have had the benefit of hearing oral testimony from the sponsor who I found to be a plausible, accurate, and credible witness of truth.
>
> 16.The sponsor's explanation for why the appellants' dependency upon her is not documented prior to 2020 is that up until that time they were living with a neighbour in Somalia to whom she would send maintenance payments via friends who were travelling there as visitors. However, in 2020 the sponsor told the appellants to move to Ethiopia where she arranged for them to live in rented accommodation pending the processing of their applications to join her in the United Kingdom. From that point onwards, she sent them money via money transfers from which they paid the rent and met their other essential living expenses. I find that to be a plausible explanation for the lack of historic money transfers.
>
> 17.Contrary to what is asserted by the respondent in refusing the applications, one or other (and sometimes both) of the appellants are named in the money transfer receipts. The sponsor plausibly explains that the reason why only one appellant is named in some of the receipts was due to the fact that the money transfer company would originally not permit both to be named. It did not in any event matter which of them was named beneficiary given that it was sent to them for the purpose of defraying their essential joint living expenditure. I accept that explanation.
>
> 18.The sponsor's contract of employment shows that she is employed as a carer by 'X'. The sponsor claimed at the hearing that she earned £1,300 a month, net of all deductions. This is significantly more than the £934.96 shown on her most recent payslip dated the 30thApril 2020, which is now some 18 months' old. The sponsor's explanation for this increase was that she now works 'overtime'. It would obviously have been preferable had the sponsor provided up-to-date payslips to support this claim. However, given that I have otherwise found the sponsor to be an honest and truthful witness, I accept her account of her current earnings without supporting documentary evidence. I am in any event satisfied that she was in a position to send the appellants the equivalent of around £150 a month as is shown on the money transfer receipts.
>
> 19.Given the evidence mentioned in the previous paragraph, together with the fact that she has now been recognised as a "qualified person" for the purpose of granting her pre-settled status under the European Union Settlement Scheme, I am satisfied that the sponsor has at all material times been living in the United Kingdom in accordance with the 2016 Regulations".

9. FtTJ Kelly therefore allowed the appeals.

<u>The appeal before the Upper Tribunal:</u>

10. The respondent sought permission to appeal on 2 grounds.

11. The written grounds of challenge are as follows:

Ground One – Failure to provide reasons/adequate reasons

12. It is submitted that the First Tier Tribunal Judge (FtTJ) has erred in law by allowing this family permit under the EEA regulations 2016.

> At [18] the FtTJ noted the following; 'The sponsor's contract of employment shows that she is employed as a carer by 'x'. The sponsor claimed at the hearing that she earned £1,300 a month, net of all deductions. This is significantly more than the £934.96 shown on her most recent payslip dated the 30th April 2020, which is now some 18 months' old. The sponsor's explanation for this increase was that she now works 'overtime'. It would obviously have been preferable had the sponsor provided up-to-date payslips to support this claim. However, given that I have otherwise found the sponsor to be an honest and truthful witness, I accept her account of her current earnings without supporting documentary evidence".

13. It is submitted that this cannot be taken into consideration without evidence, such that the FtTJ has failed to adequately reason his decision.

14. Ground Two – Failing to take into account and/or resolve conflicts of fact or opinion on material matters.

15. The FtTJ was satisfied that the sponsor was in a position to send the appellants the equivalent of around £150 a month. However to support the appellants in addition is not a sustainable practice especially as the cost of supporting the appellants in the UK will be significantly higher.

16. The FtTJ has also failed to reference the proposed accommodation. It is submitted that conditions, such as how many rooms in the property, how many people living there etc has not been resolved. No consideration from the FtTJ that once the appellants are in the UK, they can be supported without significant recourse to the UK's social assistance system. Relevant paragraphs are Regulation 13 (3), public funds and 12 (4)(c) accommodation -'in all the circumstances 'With reference to the case of Ihemedu (OFMs – meaning) Nigeria [2011] UKUT 00340(IAC)'There needs to be extensive examination of individual circumstances, an exercise which could be conducted only by the Entry Clearance Officer' .

17. It is submitted in the grounds that the FtTJ failed to adequately resolve whether the appellants would be maintained without recourse to public funds, whether the accommodation proposed will be suitable, no evidence of the financial background of the sponsor nor evidence of monies received by the appellants. As such the Judge has erred in law and the decision should be set aside

18. Permission to appeal was issued and on 8 February 2022 permission was granted by FtTJ Veloso for the following reasons:

> "The grounds argue that the judge erred in 1: failing to give adequate reasons for finding that the appellants meet the requirements of Regulation 8 of the EEA Regulations 2016 and 2: failing to make detailed findings about the proposed

> accommodation in the United Kingdom and the EEA National Sponsor's ability to support the appellants without significant recourse to public funds.
>
> It is arguable that the judge erred in law in failing to refer to and consider the appellant's 39-page supplementary bundle, uploaded on 29 November 2021, which contents were capable of making a material difference to the outcome or fairness of the proceedings.
>
> There is an arguable error of law."

19. Subsequently, the Tribunal listed the hearing to enable oral submissions to be given by each of the parties. The hearing took place on 4 May 2022 as a face to face hearing where I heard submissions from each of the advocates.

The submissions:

20. I first heard from Ms Young who relied upon the grounds which she amplified in the oral submissions. In respect of ground 2 Ms Young submitted that ground 2 asserted that the judge had failed to consider issues of accommodation and public funds. However, having looked at the decision letter and also the respondent's review, neither matters were raised as issues. Furthermore, whilst ground 2 refers to the issue of discretion citing the decision of Ihemedu that is of the ECO and not the FtTJ and therefore she submitted that it would be improper to criticise the judge. She therefore informed the tribunal that she would not be advancing ground 2.

21. Dealing with ground 1, Ms Young submitted that the judge had failed to give adequate reasons by reference to paragraph 18 of his decision as quoted in the grounds. She submitted that the point made in the grounds was that the judge should not have taken into account the oral evidence of the sponsor relating to her income without any documentary evidence. She submitted this was where the supplementary bundle became relevant and that where the judge had stated at paragraph 18 that her most recent payslip was that of April 2020 and was 18 months old and the observation made that it would have been preferable if the sponsor had provided up-to-date payslips, was factually incorrect. The supplementary bundle which appeared to have been uploaded on 29 November 2021 was available. The documents in the supplementary bundle did not show earnings of £1300 as the amounts varied some over £1000 and some under. The judge did not have regard to this evidence in his overall considerations.

22. Ms Young submitted that the wage slips at pages 2 to 13 dated from December 2020- October 2021 and therefore the judge was incorrect to say that the last payslip was April 2020, and the judge should have considered those documents and not taken the sponsor's evidence at face value. She conceded that she did not know what questions were asked in evidence but there was no reference to overtime on the sponsor's payslips. She therefore submitted that the documents should have been considered and the failure to do so amounted to a material error of law by

accepting oral evidence of the sponsor's earnings which was relevant to the overall decision on whether the sponsor was a qualified person.

23. Mr Holmes, Counsel who appeared on behalf of the appellants relied upon the Rule 24 response dated 26 March 2022 and expanded on those matters set out.

24. In his oral submissions Mr Holmes submitted that the grounds were characterised as a "reasons challenge" but on any closer scrutiny it could not possibly be described as a "reasons challenge" as the grounds in fact did not challenge any of the judge's reasoning but stated that the judge was barred from considering the oral evidence in the absence of documentary evidence. He submitted that this was plainly incorrect, and the judge was bound to consider all of the evidence which included the oral evidence. Thus he submitted the absence of documentary evidence was irrelevant provided the judge gave sufficient reasons for his overall decision.

25. He submitted that the grounds now advanced by Ms Young had changed and that she now submitted that the judge was in error by not considering the supplementary bundle. He submitted that it was difficult to see how the Secretary of State could benefit from a failure to take into account evidence that was in favour of the appellants. He submitted that if the judge had seen the evidence it was fanciful to suggest that his conclusion would have shifted. When looking at the payslips with the exception of 1 of them they are all above £1000 and the average is £1100. What the judge had set out in his assessment was not inconsistent with those payslips and in fact the last one it was in the region of £1300 which is what the sponsor had said in her oral evidence to the judge, which he had accepted.

26. The point taken about the payslips failing to state on their face that the sponsor undertook overtime, whilst they did not use the term "overtime" the sponsor was employed on a zero based contract (as evidenced at page 18 of the bundle) and looking at the payslips themselves they show different hours for each month.

27. In summary he submitted that whichever payslips the tribunal considered, whether 2020 or the later payslips, it is possible to see that the amount of income varied according to the hours worked and whether the payments use the word "overtime" or not was wholly irrelevant. He submitted the appeal should be dismissed.

28. At the conclusion of the hearing I reserved my decision which I now give. I am grateful to both advocates for the assistance they have given to the Tribunal.

Decision on error of law:

29. The Immigration (European Economic Area) Regulations 2016 have now been revoked by The Immigration and Social Security Co-ordination

(EU Withdrawal) Act 2020 Schedule 1(1) paragraph 2(2) (December 31, 2020. Revocation, however, has effect subject to savings specified in The Citizens' Rights (Restrictions of Rights of Entry and Residence) (EU Exit) Regulations 2020, Regulation 2 and Schedule 1 and The Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020 Regulations ("The Transitional Provisions").

30. Schedule 3 paragraph 5 of the Transitional Provisions deals with existing appeal rights and appeals and as this appeal was extant prior to commencement day, and it is not argued by either party that the tribunal does not have jurisdiction to consider the appeal.

31. There are 2 grounds of challenge advanced on behalf of the respondent which were set out in a written document as reproduced above. As recorded earlier, Ms Young on behalf of the respondent indicated that she did not seek to advance ground 2 for the reasons that she gave. Ms Young was entirely right not to advance that ground of challenge. The written grounds asserted that the judge failed to take into account or failed to resolve a conflict of facts on material matters and identified those 2 material matters as failing to reference or consider the proposed accommodation and secondly, failing to deal with the issue of public funds. Neither of those issues were raised in the decision letter. Whilst the decision letter is not akin to a pleading, it sets out the reasons given for the refusal of the application and the issues in dispute can be readily seen. Prior to the hearing the respondent set out in a review document a summary of the issues that the FtTJ was required to consider. They were summarised as follows:

> "Schedule of issues :(i)Whether the Appellants (hereafter known as "A's") are dependent upon the Sponsor in order to meet the requirements under regulation 8 and 12.
>
> Additional Issue:(ii)Whether the Sponsor (hereafter known as "S") is employed and exercising treaty rights in the UK as a worker."

32. In addition the review document stated that the respondent relied upon the decision letter. As can be seen from the review document, it did not raise issues relating to accommodation or public funds. It has not been demonstrated that those issues were raised before the FtTJ. It cannot be an error of law for a judge not to deal with issues that had not been raised at the hearing. Having considered his decision in the context of the material before him, I am satisfied that ground 2 pays no regard to the issues that in fact were ventilated before the tribunal.

33. Dealing with ground 1, the grounds advanced do not demonstrate any error of law in the decision of FtTJ Kelly. It is submitted on behalf of the respondent that the finding made at paragraph 18 of his decision, which dealt with the sponsor's income and thus the issue of whether she was a qualified person under the Regulations, was not open to the judge because

he should not have relied upon the oral evidence in the absence of documentary evidence.

34. There is no merit in that submission. The decision should be read as a whole and in the earlier paragraphs from paragraphs [15 – 17], the FtTJ set out his reasoning on the issue of financial support provided by the sponsor to both appellants and the issue of dependency. He recorded at paragraph [15] when undertaking an analysis of the matters raised in the decision letter that "By contrast, I have had the benefit of hearing oral testimony from the sponsor who I found to be a plausible, accurate, and credible witness of truth".

35. At paragraph 16 the FtTJ set out why he accepted the sponsor's evidence relating to dependency prior to 2020. At paragraph [17] he made a finding that contrary to what the respondent stated that only 1 of the appellants had been named in the financial remittances, he set out that some of the money transfers were in the joint names of the appellants or one or other of them. The judge set out why he found the evidence of the sponsor to be plausible as to why only one appellant was named in some of the receipts. At paragraph [18], the judge then addressed the issue of whether the sponsor was a "qualified person". It was not an error of law for the judge to accept the oral evidence of a witness on an issue in the absence of documentary evidence. It must be recognised that the judge had the opportunity of both hearing and seeing the witness give evidence and for her evidence to be the subject of cross examination. He also had the earlier payslips which had been produced. He was therefore best placed to reach a conclusion on the credibility of the witness. Furthermore, as Mr Holmes submits the FtTJ had the sponsor's payslips alongside the contract of employment. Whilst the judge stated that the sponsor's oral evidence was that she had earned more than was reflected in her last payslip (which the judge referred to as April 2020) it was entirely open the judge to accept the sponsor's oral evidence on the increase in her salary given that he had found her to be an honest and truthful witness on other issues.

36. As set out in the relevant jurisprudence and recently in the decision of Latayan v SSHD [2020] EWCA Civ 191, dependency is a question of fact. In that decision, at paragraph 23 the court cited the decision of SM (India) v ECO (Mumbai) [2009] EWCA Civ 1426 as follows:

> "19. ... 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."

Further, at [22].

> "... Whilst it is for an appellant to discharge the burden of proof resting on him to show dependency, and this will normally require production of relevant documentary evidence, oral evidence can suffice if not found wanting. ..."

37. Whilst the reference above relates to the issue of dependency, I see no reason why it also would not apply to other relevant issues to be determined. It is plain from reading the decision of Judge Kelly that he found her oral evidence to be sufficient when taken in conjunction with the evidence given when viewed as a whole.

38. The grounds make no reference to paragraph [19] which also was part of the FtTJ's analysis on the issue of whether the sponsor was a "qualified person" under the Regulations. The judge was also entitled to place weight on the fact that the sponsor had been recognised as a "qualified person" for the purposes of granting her pre-settled status under the EUSS as the judge set out at paragraph 19.

39. Consequently, there is no error of law in the FtTJ accepting the sponsor's oral evidence when reaching his overall conclusion that he was satisfied that the sponsor was a "qualified person" under the Regulations.

40. Ms Young made a second submission which was not raised in the grounds but appeared to have its basis in the grant of permission. She submitted that the FtTJ made a material error of law because it was factually incorrect to state that the sponsor's last payslip was April 2020 when in fact there was evidence in the supplementary bundle which provided up-to-date payslips for December 2022 October 2021. She submitted that the judge was an error in not considering this evidence.

41. It is unclear to me why the later evidence, which not only included later payslips but also bank statements which demonstrated BACS payments into the sponsor's account which accorded with the amounts on the payslips, was not referred to. It may be because the material was uploaded close to the hearing date on the 29 November, but it was on the system before the hearing on the 2 December and before the decision was promulgated. Nonetheless I accept the submission made by Mr Holmes that it is difficult to see how the respondent would benefit from a failure to take account of evidence that was favourable to the appellants and in fact supported the oral evidence that she had given as recounted at paragraph [18].

42. Ms Young submitted that the materiality of the error was that the later payslips did not support the sponsor's oral evidence that she received the increased sum or that she worked overtime. Again the submission fails to adequately take account of the documents, if they were in fact before the FTT. The payslips set out at pages 2-15 are consistent with the oral

evidence of the sponsor and demonstrate that they are all in excess of the figure given for her last payslip. Furthermore the last payslip of 31 October 2021, which was the payslip that the sponsor was referring to in her oral evidence was in fact £1311 and again was consistent with the oral evidence accepted by the FtTJ.

43. Equally there is no merit in the submission that the payslips did not support her oral evidence that the increase was due to overtime. Whilst the payslips did not state "overtime" on the face of the documents, as Mr Holmes submits, the appellant had provided evidence that she was employed on a "zero hours contract" (page 18 of the bundle) and the payslips show differing hours on them consistent with that.

44. Consequently the FtTJ made no material error of law at paragraph 18 for the reasons that I have set out above. FtTJ Kelly was entitled to accept the oral evidence of the sponsor concerning her income as set out at paragraph 18 and his reasoning when taken with paragraph 19 was sufficient and adequate reasoning to support the conclusion reached that he had found the sponsor to be a qualified person under the EU Regulations.

45. Even if I were to accept that there was a factual error concerning later payslips, the later evidence in fact supported his earlier reasoning.

46. For those reasons, the decision of the FtTJ did not involve the making of an error on a point of law. The decision of FtTJ Kelly to allow the appeals shall stand.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law, and the decision made by Judge Kelly to allow the appeals shall stand.

Signed Upper Tribunal Judge Reeds

Dated: 4 May 2022