



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2022-006132
UI-2022-006133
First-tier Tribunal Nos: EA/00192/2022
EA/04834/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 17 April 2023

Before

UPPER TRIBUNAL JUDGE KEBEDE
DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

MIKEL SHYTI
(no anonymity order made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Coleman, instructed by House of Immigration Solicitors
For the Respondent: Ms A Nolan, Senior Home Office Presenting Officer

Heard at Field House on 29 March 2023

DECISION AND REASONS

1. The appellant is a national of Albania born on 23 October 1995. He has been granted permission to appeal against a decision of the First-tier Tribunal promulgated on 28 September 2022. That decision arose out of two linked appeals heard by First-tier Tribunal Judge O'Garro on 12 September 2022, both of which were dismissed. Although the grounds seeking permission to appeal and the grant of permission cite both appeal references, it is in fact the decision in only one of the appeals which is challenged before the Upper Tribunal.

2. The first case, UI-2022-006132 (EA/00192/2022), relates to the appellant's appeal against the respondent's decision of 3 November 2021 to refuse his application of 14 July 2021 under the EU Settlement Scheme as the family member of his aunt, Mira Patogu, an Italian citizen. It was conceded on behalf of the appellant before Judge O'Garro that he could not succeed in that appeal as he could not meet the requirements of Appendix EU since he had not held a relevant document prior to 30

December 2020. Mr Coleman confirmed that Judge O'Garro's decision to dismiss the appeal in respect of that decision was not challenged.

3. The second case, UI-2022-006133 (EA/04834/2022), relates to the appellant's appeal against the respondent's decision of 13 March 2021 to refuse his application of 31 December 2020 for a residence card under the Immigration (European Economic Area) Regulations 2016 as the extended family member of his EEA sponsor, Ms Patogu. It is Judge O'Garro's decision to dismiss that appeal which is the subject of the case now before the Upper Tribunal.

4. The appellant claims to have moved from Albania to Italy in 2013, at the age of 17 years, to live with his aunt, Ms Patogu, that his aunt was appointed his legal guardian by an Italian court in 2013 whilst they were all residing in Italy, and that he came to the UK in December 2015 with his aunt and her family. He claimed that his aunt and her family returned to Italy after a few weeks and then came back to the UK in April 2016 to settle here, and that he had been living with her continuously in the UK since that time. He had stayed with his uncle in the interim.

5. The appellant's application for an EEA residence card was refused by the respondent on the grounds that it was considered that he had failed satisfactorily to establish his relationship to, and dependency upon, his EEA national sponsor and had failed to demonstrate that his sponsor was exercising treaty rights in the UK. The respondent did not accept that the appellant had been dependent upon the sponsor either prior to, or since, coming to the UK.

6. Judge O'Garro, in her decision dismissing the appellant's appeal against that decision, accepted that the appellant and sponsor were related as nephew and aunt, that the sponsor was exercising treaty rights in the UK and that the appellant had lived with his aunt in Italy until he came to the UK in December 2015. However the judge found there to be insufficient evidence to demonstrate that the appellant had been living continuously with his aunt from the time he entered the UK until the present and that he was, and had been, dependent upon his aunt in the UK. The judge found there to be no documentary evidence showing that the appellant had lived at the address given for his aunt in 2016 to 2018 and 2020 to 2021 and she noted that the Monzo bank statements in his name which he had submitted for the appeal, which gave his aunt's address, only covered the period February to April 2022 and that the only other evidence of his address was for the year 2019. The judge gave little weight to the evidence of witnesses who had not attended the hearing and found the evidence of those witnesses who had attended, namely the appellant and his aunt and uncle, to be unreliable. That was because they claimed that he was not working and that he was dependent upon his aunt and uncle for his basic necessities, whereas the Monzo bank statements suggested that he had no need to be dependent on his aunt. The judge considered that there was contradictory evidence as to whether or not the appellant had a brother in the UK and concluded from the documentary evidence that the appellant was working and had a brother in the UK with whom he was living, and that he was not living with, or dependent upon, his sponsor.

7. The appellant sought permission to appeal to the Upper Tribunal on the grounds of procedural unfairness, asserting that the judge had acted unfairly by taking issues against him and his witnesses without giving them an opportunity to address those issues.

8. Permission was granted in the First-tier Tribunal by Judge Cox on the following basis:

“2. The Appellant asserts that the Judge did not ask him about any of the issues arising from her consideration of a Monza bank statement, which formed a key part of the judge’s reasoning, when rejecting the Appellant’s credibility. I have seen counsel’s note of the hearing that supports this assertion. In these circumstances, the judge arguably acted unfairly and permission is granted.

3. However, it is noted that the Appellant has not provided any evidence to address the issues raised by the judge and in the absence of any credible evidence, it maybe that the error is not material.”

9. The respondent served a rule 24 reply opposing the appeal. The matter then came before us for a hearing and both parties made submissions. We will address those submissions in our discussion below.

Discussion

10. Mr Coleman submits that the judge acted unfairly in determining the appellant’s appeal because she found the three live witnesses untruthful on the sole basis of issues arising from the Monzo bank statements without giving them an opportunity to address her concerns and provide an explanation; because her findings did not reflect the evidence before her; and because she gave significant weight to a three year old letter from Professor Sharma, a consultant neurologist who had assessed the appellant, without him appearing in person, yet gave no weight to the evidence of the witnesses who had not attended the hearing. He submits that on that basis the appellant did not have a fair hearing and the matter needed to be re-heard afresh.

11. We do not agree that the appellant was unfairly deprived of an opportunity to address issues arising out of his evidence or that the judge acted unfairly in drawing the adverse conclusions that she did from the evidence. The appellant had produced that evidence himself and was relying upon it. The judge was entitled to assess the evidence and consider it in detail and make findings upon it. Whilst it may have been helpful for her to indicate matters which gave rise to concerns, there was no requirement for her to do so. She was not required to invite the witnesses to address each and every issue arising from the documents. The appellant was on notice from the refusal decision that the respondent had concerns about deposits made into his Monese statement. He had the benefit of legal representation at the hearing. It would therefore have come as no surprise to him that there may have been similar concerns about other entries in his bank statements and it was for him to demonstrate how that evidence supported his claim to be dependent upon his sponsor.

12. In any event, even if the judge ought arguably to have raised issues of concern with the appellant but failed to do so, we do not consider that anything material arises from this. Indeed that was the view of Judge Cox when granting permission, where he noted that the appellant had not provided any evidence to address the issues raised by the judge. That appears still to be the case. The judge raised various issues arising from the appellant’s Monzo bank statements at [38] to [43], including concerns about a large unexplained deposit made into the account, three large credits to the account which were not consistent with the amount of financial support it was claimed the sponsor provided to the appellant and which were not in the names of the appellant’s aunt and uncle, payments made to a person with the same name as the appellant’s brother and outgoings which were arguably inconsistent with someone who was not travelling into work. The appellant asserts that it was unfair that he did not have an opportunity to provide an explanation for those items, but he provided no suggestion of what that explanation may be and why the entries in the statements did not entitle

the judge to conclude that they showed he had no need to be dependent upon his aunt.

13. Further, as Ms Nolan submitted, the concerns arising from the Monzo bank statements were not the sole basis for the judge finding the witnesses' evidence to be untruthful. The judge noted inconsistencies arising between the evidence of the witnesses and the documentary evidence: the claim that he did not have a brother in the UK, but the reference in the documents to his brother; the claim that he had not worked in the UK, but the reference in the documents to his employment; the claim that the appellant had lived with his aunt and uncle continuously since coming to the UK, but the lack of evidence of him living at the same address as his aunt and uncle from 2016 to 2018 and from 2020 to 2021. Mr Coleman submitted that the appellant had explained that the brother referred to in the letter from Professor Sharma was in fact his cousin and that it was entirely reasonable for him to refer to his cousin as his brother given that his aunt was his guardian and he lived with his cousin. That may be so, but there remains no explanation for the payments made from the appellant's account to a person of the same name as his brother. Mr Coleman submitted that the witnesses had all confirmed that the appellant had never worked and there was no evidence of any payments in the form of wages in his bank statements. Again, that may be so, but the letter from Professor Sharma unequivocally refers to the appellant as being a bricklayer and going to work at that time. Mr Coleman submitted that it was unfair of the judge to give so much weight to a three-year old letter from someone who had not been present at the hearing, yet gave no weight to the evidence of the witnesses referred to at [36] of her decision because they had not attended. However we agree with Ms Nolan that the two are not comparable. The judge was perfectly entitled to give weight to an independent, professional report from a doctor (Professor Sharma) without him being present at the hearing, and at the same time was entitled to accord no weight to the evidence of friends and family who were not available to be questioned and who were far less likely to be impartial and objective. As for the fact that Professor Sharma's letter was not recent, we agree with Ms Nolan that that was immaterial, since the point made was that the reference to the appellant having been employed in 2019 undermined the claim that he had not had any source of income from employment in the UK and had always been dependent upon his aunt and uncle for his essential living needs.

14. Mr Coleman submitted further that the judge made findings which did not reflect the evidence before her. He submitted that at [45] the judge referred to the appellant and his sponsor having replied "no" to the question of whether he had a brother in the UK, whereas counsel's note of evidence produced by Mr Georget who represented the appellant at the hearing showed that the appellant was never asked that question. However we cannot see how anything material arises out of this, given that the appellant is not now claiming that he had a brother in the UK and, in any event, he was asked about a brother when referred to Professor Sharma's letter. Mr Coleman submitted further that the judge's record of the evidence of the appellant's aunt and uncle, at [42], that "they did not give the appellant much in terms of pocket money" was not an accurate reflection of the evidence actually given, as recorded in counsel's note of evidence, namely that they gave him whatever he needed. However we see no material difference between the two and we note that the evidence had always been that he was given small amounts from his aunt and uncle. Indeed the appellant's own evidence, as recorded in counsel's note of evidence, was that he did not need much money as he lived with his aunt and uncle. As Ms Nolan submitted, the judge was entitled to have regard to larger credits into the appellant's bank account which were not in the names of his aunt and uncle, and which were not consistent with his evidence about his support from his sponsors.

15. For all of these reasons we do not find that the grounds of appeal are made out. We do not accept that there was procedural unfairness in the judge's approach to the evidence and in her adverse credibility findings such as to amount to a material error of law. The appellant was fully aware of the issues he had to address and the respondent's concerns about the documentary evidence submitted with his application and he had ample opportunity to present his case in full to the judge. The judge was perfectly entitled to draw the adverse conclusions that she did from the evidence, and from the absence of relevant evidence. The weight that she gave to the evidence was a matter for her. She reached a decision which was fully and properly open to her. We find no material errors in her decision and we therefore uphold the decision.

Notice of Decision

16. The making of the decision of the First-tier Tribunal did not involve a material error on a point of law requiring it to be set aside. The decision to dismiss the appeals stands.

Signed: S Kebede
Upper Tribunal Judge Kebede

Judge of the Upper Tribunal
Immigration and Asylum Chamber

30 March 2023