Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number:
UI-2022-002665 EA/52596/2021
UI-2022-006302 EA/52604/2021
UI-2022-006299 EA/52605/2021
UI-2022-006301 EA/52608/2021

IA/10425/2021 & Others

THE IMMIGRATION ACTS

Heard at Field House IAC
On the 14th October 2022

Decision & Reasons Promulgated
On the 06 February 2023

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

FOUZIA FARZANA
GHULAM DASTGEER
HAFSAH DASTGEER
HUZAIFA DASTGEER
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellants: Mr E K Mahmood, Nationwide Law Associates
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The first appellant appeals against the decision of First-tier Tribunal Judge Shakespeare ("the judge") promulgated on 28th March 2022. The judge dismissed the appellant's appeal against the Secretary of State's decision to refuse their application dated 30th December 2020 for family permits to join Mr Naeem Sajid Hussain Begum, the brother of the first appellant and a Spanish national living in the UK exercising his treaty rights. The appellants (wife, husband and children) applied as extended family members under the Immigration (European Economic Area) Regulations 2016. The respondent refused to issue them with EEA family permits on 29th May 2021.

2. Initially the respondent did not accept the appellants were related to the sponsor as claimed, but also considered that the appellants were not dependent on the sponsor because they had not provided sufficient evidence of their financial and other circumstances. The respondent upheld the decision in a review, undated, which covered all four appellants.

3. The appellants asserted that the decisions were not in accordance with the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations").

4. The judge accepted that the applications were made prior to 31st December 2020 and as such the relevant provisions were the EEA Regulations.

5. The judge in the decision set out the relevant parts of the EEA Regulations, in particular Regulation 8 Extended Family Members:

> *"8. (1) In these Regulations 'extended family member' means a person who is not a family member of an EEA national under regulation 7(1)(a), (b) or (c) and who satisfies a condition in paragraph (1A), 1, (2), (3), (4) or (5).*
>
> *(2) The condition in this paragraph is that the person is–*
>
> *(a) a relative of an EEA national; and*
>
> *(b) residing in a country other than the United Kingdom and is dependent upon the EEA national or is a member of the EEA national's household; and either–*
>
> *(i) is accompanying the EEA national to the United Kingdom or wants to join the EEA national in the United Kingdom; or*
>
> *(ii) has joined the EEA national in the United Kingdom and continues to be dependent upon the EEA*

national, or to be a member of the EEA national's household."

6. The judge also directed himself in relation to the test for dependency and referred to the fact that the appellants "require the material support of the EEA national or his or her spouse in order to meet their essential needs" (**Jia Migrationsverket Case C–1/05**. The judge made a series of findings from [17] onwards including accepting that the familial relationship. The judge at [24] and [25] said this:

> *"24. The difficulty for the Appellants is that the Second Appellant is working. He has provided three payslips which show he earns 9,450 SAR per month as a Floor Manager for Thanaz Cosmetics. When I asked the Sponsor about this at the hearing he said that the Second Appellant had been working for this company for a long time. That leaves a discrepancy of 4,450 SAR per month. Leaving aside the money spent on 'other ends and ends', which does not in my judgment constitute essential needs, there is a shortfall in the income of 3,450 SAR (equivalent to around £180) per month. The Appellants claim that this is met by the financial support of the Sponsor.*
>
> *25. I accept therefore that there is a shortfall between the Second Appellant's income and the family's monthly expenditure on day to day essentials. However, in my judgment, the bulk (nearly 70%) of the family's expenses are met from the wages of the Second Appellant. That is a much larger proportion than the example given in the Respondent's guidance, where 50% of an applicant's needs are met from the support of the Sponsor. Furthermore, I note that there is no evidence before me on the financial circumstances of the First or Fourth Appellant, in particular whether they are in receipt of any income. The Fourth Appellant is 20 years old and might therefore be expected to find a job if he is not in education, which is not addressed in the documents or the witness statements (which simply state that the Appellants are dependent on the Sponsor). I am therefore not persuaded that the Appellants have demonstrated to the balance of probabilities that they require the material support of the Sponsor to meet their essential needs".* [my emphasis].

7. The grounds for permission to appeal stated that the judge at [21] identified that the respondent's guidance regarding extended family members confirmed that the applicant did not need to be dependent on the EEA national to meet all or most of their essential needs. It was submitted the judge made an error of law while interpreting those guidelines and did not understand that the dependant did not need to be dependent on the EEA national for all or most of their essential needs. The

judge had wrongly applied that guidance and to that end noted that 70% of the appellants' own essential needs were covered by his earnings.

8. Furthermore, the judge needed to calculate the yearly earning of the appellant and his yearly expenditure in order to reach the decision on whether the appellants' essential needs were 50% covered by his own earnings.

9. The appellant's yearly expenditure was 172,000 SAR (14,400 x 12) and the appellants' yearly earnings were 85,400 SAR, therefore the sponsor was covering 50.34% of the essential needs which is more than half.

10. The judge also made an error in relation to calculating the monthly expenditure of the appellants. The total monthly expenditure was 14,400 not 13,900 SAR.

11. In [25] the judge stated that no evidence had been put before the learned judge regarding the financial circumstances of the first and fourth appellant, but the ECO had not raised any objection with regards to the financial circumstances of the first appellant Fouzia Farzana, therefore there was no need to produce any evidence of earning. In any event if the learned judge had any concerns, he had the opportunity to question with regards to the financial circumstances of the first appellant. The judge did not question the sponsor and "if you are not going to ask, you are not going to get the information".

12. With regards to the fourth appellant the judge did not ask any questions to the sponsor with regards to the financial circumstances of the fourth appellant. The ECO did not raise any issue with regards to the fourth appellant's financial circumstances.

13. Finally, at no stage did the Entry Clearance Officer state that the expenditure of the appellants was less than 50% provided by the sponsor and therefore he refused the applications. The ECO in his refusal letter states that the appellants had failed to provide evidence that they were dependent upon the sponsor which was a clearly different reasoning.

14. There were material errors of law in the decision.

The Hearing

15. Mr Mahmood submitted that the judge accepted almost everything in terms of the finances of the family but then concluded in error that the dependency had to be 50%. First the judge had allocated the wrong figure in the expenses for shoes and clothing, it was not 300 but in fact 800 SAR, and he needed to make a calculation on a full year earning but did not do so. On the calculation of the appellants the sponsor contributed over 50% to the appellants' essential needs. The judge accepted that money was sent on a regular basis.

16. Mr Mahmood submitted that the only income for the family was that of the husband. He confirmed that there was no statement from the wife as she formed part of the household and so there was no need for a separate statement. The third appellant was at school, and the fourth appellant was a student.

17. Mr Avery submitted that the issue was dependency. The judge gave himself an appropriate direction in terms of the law and the question was whether as a matter of fact there was dependency on the sponsor. There may have been minor quibbles on the way the judge calculated but there were only three pay slips provided. The question was whether the appellants met the requirements of the Regulations? The burden of proof is on the appellants to show they were dependent, and the question of dependency was very clearly raised by the Entry Clearance Officer.

18. It is clear from the case law that it is a question of fact, and it was correct to say that in this instance the bulk of the funding was from the family themselves, the remittances were not for essential needs. The judge pointed that there were family members he might be expected to be earning, but their position was not covered by the evidence and on that basis alone the decision was sustainable.

19. Mr Mahmood submitted that Mr Avery had made a presumption and the entry clearance should have highlighted that there was no evidence of the wife and should have pointed that out and the judge had made no reference to that during the hearing at which he attended which was unfair.

Analysis

20. As Elias LJ set out in **Siew Liam Lim v Secretary of State [2015] EWCA Civ 1383** at [32] in relation to dependency:

> *"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. It follows that on the facts of this case, there was no dependency. The appellant had the funds to support herself. She was financially independent and did not need the additional resources for the purpose of meeting her basic needs"*.

21. In **Singh v Secretary of State [2022] EWCA 1054** Birss LJ outlined the relevant principles in relation to dependency from [18] to [22], including

that the evidence required to show dependency did not need to take any prescribed form but nonetheless reiterated that 'proof' of the need for material support by be adduced by any appropriate means. In other words, it is still a requirement at the outset that proof of the need for material support be shown. Birss LJ added

> *"21. Finally, on the nature of the question the court has to answer when assessing these matters, I refer to two short passages, starting with the judgment of Lord Justice Sullivan in* ***SM (India) v ECO (Mumbai)*** *as follows:*
>
> > "*28. In reality, people's circumstances, their lives and their lifestyles are not always quite so straightforward, and any attempt to draw a bright line between determining whether an applicant has a need for material support to meet his "essential needs" and where there is recourse to support, it being unnecessary to determine the reasons for that recourse, is best considered not on the basis of hypothetical examples but on a case-by-case basis, with the benefit of clear and sufficient factual findings by the AIT.*"
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> *22. This reflects the CJEU's words in* ***Rahman****:*
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> > "*23. It is incumbent upon the competent authority, when undertaking that examination of the applicant's personal circumstances, to take account of the various factors that may be relevant in the particular case.*"

22. The judge acknowledged that on the figures as presented by the appellants (and I note only three pay slips were provided) there appeared to be a "shortfall in income of 3,450 SAR equivalent to around £180 per month. On the calculation of the appellants themselves as presented by Mr Mahmood at court before me, it was assessed that the sponsor provided over 50% of the "essential needs". The judge stated, however, that "the appellants claim that this [shortfall] is met by the financial support of the sponsor". The judge thus accepted that there appeared to be a shortfall but not only was the bulk of the family's expenses met from the wages of the second appellant, but he added at [25] as cited above,

> *"F<u>urthermore</u> I note there is no evidence before me on the financial circumstances of the first or fourth appellant in particular whether they are in receipt of any income".*

As can be seen from the citations above, the claimants must *need* the support. The question at large was the income of the wife and the adult child dependent. Without this, the size of the claimed shortfall, whether 30% or 50% does not assist.

23. I do not accept that this issue was not raised by the Entry Clearance Officer and was not in issue before the judge. In the decision letter by the Entry Clearance Officer to the first appellant it specifically states:

> *"In your application you have stated that you are financially dependent on your sponsor. I note that you have provided a number of money transfer remittance receipts from your sponsor dated between 02 January 2020 and 24 April 2021. In addition to these receipts, I would also expect to see documents which demonstrate your own family circumstances,* ***income****, expenditures and evidence of financial position that prove that, without the financial support of your sponsor, your essential living needs could not be met. The documents provided in support of your application do not demonstrate this. I am therefore not satisfied that you are financially dependent on your sponsor as stated"*. [my emphasis].

24. The issue of the income of the appellants was squarely put in the frame and not addressed. Putting aside the issue of the adult child, there was no witness statement from the first appellant as acknowledged by Mr Mahmood. Nor was there a statement from the fourth appellant. There is a brief statement from the second appellant referring to his income, but he says nothing about the income of the remaining appellants, particularly the first appellant. In her application form in relation for employment she merely stated, "I have not worked in any of the jobs listed above", there was no further detail.

25. Even if accepted that the fourth appellant was a student, that does not confirm that person is not working and it is trite law that the burden of proof is on the appellants to show that they are dependent, and the issue was specifically raised in the Entry Clearance Officer's letter. Nor does it address the issues surrounding the first appellant. It was open to the judge to take the point of financial circumstances at [25] which he did. Regardless of the elements of expenditure set out, and the percentage said to be paid by the sponsor, the underlying point made is that there was insufficient evidence to show that the appellants were indeed dependent on the sponsor because of absence of detail in the evidence in relation to financial circumstances, particularly of the first appellant (the wife). As can be seen from above, mere remittances do not necessarily show dependence for essential needs. The appellants needed to *show* that they needed the material support for their essential needs. They may have demonstrated in detail what their material *needs* were but in the absence of a full picture of *income* and further detail in that regard, which was raised by the ECO but remained absent, it was open to the judge to take the approach he did. It is the case that the appellant does not need to show they cannot work before claiming dependency, but the judge did not state that. In this case there simply was no information in relation to the income of the remaining appellants. Even if the judge miscalculated the contribution of the percentage of the remittances to the appellants, in the light of the lacuna in the evidence (and there were three adults in the frame) this was not a material error.

26. As set out in **Singh** [2022] at [19]

> *'In this jurisdiction the Court of Appeal in ECO Manilla v Lim [2015] EWCA Civ 1383 held that dependency will not be established simply by providing financial support to a family member who can support themselves. Similar observations were made in SM (India) v ECO (Mumbai) [2009] EWCA Civ 1426, where this court said that:*
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> > "*24. …the fact some financial provision was made and that [the applicants] were accommodated in the family home would not be sufficient in themselves to establish dependency for the purposes of the Directive.*"

27. The judge was entitled to find therefore that he was not persuaded that the appellants had demonstrated on the balance of probabilities that they required the material support of the sponsor to meet their essential needs.

28. The grounds also contend that the judge should have asked about the status of the wife and the fourth appellant. As I have indicated, the appellants were aware of the case against them from the refusal letter of the ECO and there was no procedural error or unfairness on the part of the judge for failing to raise this further. The matter was put squarely in the refusal letter in relation to all the appellants who were legally represented. As such, I find there is no material error of law, and the decision shall stand.

No anonymity direction is made.

Signed Helen Rimington Date 23rd November 2022

Upper Tribunal Judge Rimington