



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM**  
**CHAMBER**

**Case No: UI-2022-003006**  
**First-tier Tribunal No:**  
**EA/08720/2021**

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**  
**On the 08 June 2023**

**Before**

**UPPER TRIBUNAL JUDGE MANDALIA**

**Between**

**Hena Elyaskhil**  
**(NO ANONYMITY DIRECTION MADE)**

Appellant

**and**

**Secretary of State for the Home Department**

Respondent

**Representation:**

For the Appellant: No appearance by or on behalf of the appellant  
For the Respondent: Mr P Lawson, Senior Home Office Presenting Officer

**Heard at Birmingham Civil Justice Centre on 1 June 2023**

**DECISION AND REASONS**

1. The appellant is a national of Afghanistan. On 29 December 2020 she made an application for an EEA residence permit to join her sponsor in the United Kingdom, as the extended family member of an EEA national. The appellant's sponsor is the appellant's brother, Mr Shabir Ahmad, a Belgian national. The application was refused by the respondent for reasons set out in a decision dated 8<sup>th</sup> April 2021. In summary, the respondent was not satisfied the appellant is dependent on her sponsor. The respondent considered the evidence relied upon by the appellant, including evidence of money remittances, but was not satisfied the appellant is financially dependent on her sponsor to meet her essential living needs. The respondent was therefore not satisfied that the appellant is an extended family member in accordance with Regulation(s) 8(2) of the Immigration (European Economic Area) Regulations 2016.

2. The respondent also noted that the sponsor was sponsoring the appellant and at least four additional members of her family. They were named in the application made by the appellant as Noor Aqa Elyaskhil (born May 1966), Riazagul Elyaskhil (born August 1970), Munir Ahmad Elyaskhil (born March 2000) and Noorin Yousofzai (born March 2001). It appears from the DNA evidence that has been provided that Noor Aqa Elyaskhil is the father of the appellant, Munir Ahmad Elyaskhil and Noorin Yousofzai.
3. The appellant's appeal against the respondent's decision dated 8<sup>th</sup> April 2021 was listed for hearing on 4 March 2022. There was no attendance at the hearing by or on behalf of the appellant. Neither was the respondent represented. The appeal was dismissed by First-tier Tribunal Judge Hawden-Beal for reasons set out in a decision promulgated on 11 March 2022.
4. It is unfortunate that Judge Hawden-Beal was not provided with any information about the decisions made in respect of the other applicants, who appear for all intents and purposes to be a family unit. At paragraph [10] of the decision Judge Hawden-Beal properly notes; *"...I have no idea as to whether the other dependents were successful in their applications and therefore have only considered the position of the appellant..."*. If there were linked appeals by those other dependents it is not clear why this appeal was separated and heard on its own.
5. Be that as it may, at paragraph [17] the judge referred to the evidence before the Tribunal of money sent to "Munir Ahmad Noor Aqa" in September 2018, September 2019, November and December 2019 and September 2020 from Antwerp and from November 2020 to February 2021 from the UK. The judge referred to the DNA evidence and said Munir Ahmad Noor Aqa is the father of the sponsor and the appellant. The Judge noted there is evidence to show that the appellant and Munir Aqa live at the same address. In fact it seems Noor Aqa Elyaskhil is the appellant's father and Munir Ahmad Elyaskhil is the appellant's brother. Their mother is Riazagul Elyaskhil.
6. Judge Hawden-Beal noted at paragraph [18] of the decision that there is evidence of regular remittances between September 2020 and February 2021 *"..which would indicate that the family did require support from the sponsor.."*. However, at paragraph [19], the Judge said she cannot be satisfied that the appellant has continued to be dependent upon the sponsor from February 2021 to date because there is no evidence of any further monies being sent to the appellant or to her father for her benefit after February 2021. At paragraph [20] she concluded:

"Therefore, albeit that I am satisfied that she was dependent when she made the application, I am not satisfied that that dependency is continuing and I find that she has not discharged the burden of proof and therefore am satisfied that the decision of the respondent appealed against is in accordance with the applicable EEA regulations."
7. The appellant applied for permission to appeal to the Upper Tribunal. Permission was granted by First-tier Bulpitt on 10 June 2022. He said:

“2. The grounds assert that the Judge erred by failing to have regard to documents that were submitted with the notice of appeal. This ground of appeal is misconceived. It is based on a misunderstanding of [8] of the Judge’s decision which was simply setting out why the respondent refused the original application and was not explaining the Judge’s reasoning for dismissing the appeal. In fact the Judge makes clear at [4] and at [17] that she has considered the documents submitted with the notice of appeal. This ground has no merit.

3. Because the appellant is unrepresented I have gone on to consider the Judge’s decision in case it reveals an obvious arguable error of law and am satisfied that it does. The reason given for refusing the appeal is that the Court of Appeal decision in CHOWDHURY [2021 EWCA Civ 1220 imposed on the appellant a requirement to prove that she remained dependant on the sponsor at the date of the hearing. This is arguably a misunderstanding of CHOWDHURY which was dealing with a different factual situation where the appellant was living in the United Kingdom and had to prove that having joined the sponsor in the United Kingdom continued to be dependant upon the sponsor. This is not the appellant’s situation.”

8. The appellant was not represented at the hearing before me. Her sponsor did not attend the hearing. On 31 May 2023, the Tribunal had received an email from the appellant claiming her sponsor had developed food poisoning and would be unable to attend the hearing. I was invited to adjourn the hearing to a later date. In the absence of further information or anything to support the claim made by the appellant from the sponsor, I declined to adjourn the matter. When that was communicated to the appellant, the appellant responded by email asking the Tribunal to proceed with the hearing without the appellant or the sponsor. The appellant also informed the Tribunal that her brother, namely Munir Ahmad Elyashkil (born March 2000) had succeeded in his appeal (Appeal No: EA/12848/2021). A copy of that decision was provided.
9. Before me, Mr Lawson conceded the decision of First-tier Tribunal Judge Hawden-Beal is vitiated by a material error of law and should be set aside. He concedes the judge erred in relying upon the decision of the Court of Appeal in Choudhry v SSHD. That decision was concerned with the requirement in Regulation 8(2)(ii) in circumstances where the applicant had already joined the EEA national in the UK. In such a case the applicant was required to show they ‘continue to be dependent on the EEA national. In Chowdhury, the appellant was a Bangladeshi national who had been living illegally in the UK since 2011. In 2016, he applied for a residence card, claiming to be an extended family member of his great uncle. Here the appellant remains in Afghanistan and the issue is whether she is dependent upon the EEA national.
10. I accept the concession made by Mr Lawson is properly made. I should also add that it is not enough for the appellant to establish that remittances have been sent, even regularly. In Lim – ECO (Manila) [2015] EWCA Civ 1383 Lord Justice Elias, with whom McCombe LJ, and Ryder LJ agreed, said, at [25], it is not enough simply to show that financial support is in fact provided by the EU citizen to a family member. The family member must need the support from his or her relatives in order to meet

his or her basic needs. The correct test was set out at paragraph [32] of the decision. The critical question is whether the individual is in fact in a position to support themselves. That is a simple matter of fact. If they can support themselves, there is no dependency, even if he/she is given financial material support by the EU citizen. Those additional resources are not necessary to enable them to meet their basic needs. Whether the appellant is dependent on the sponsor was therefore a factual question for the judge to assess on the evidence before the Tribunal. The burden rested upon the appellant.

11. I am satisfied the decision of First-tier Tribunal Judge Hawden-Beal is vitiated by a material error of law and must be set aside.
12. As to disposal, in the ordinary course of events, there is no reason why the decision should not be remade by the Upper Tribunal in accordance with the relevant practice direction. However, the most appropriate course here is for this appeal to be remitted to the First-tier Tribunal for hearing afresh with no findings preserved. I have taken that unusual course because of what I consider to be an unsatisfactory state of affairs.
13. The appellant had previously drawn to the Upper Tribunal's attention the fact that she had been informed that she is listed as an appellant along with 5 linked appeals listed before the FtT in respect of other family members on 10<sup>th</sup> July 2023 (EA/08775/2021, EA/08839/2021, EA/12722/2021, EA/08845/2021, EA/08672/2021). I can only assume those appeals relate to the applications that were made by some of the other members of the family that I have listed in paragraph [2] of this decision. It seems there may now also have been a decision regarding another member of the extended family, Mr Munir Ahmed Elyashkil (Appeal No. EA/12848/2021). As this is a family unit and the evidence relied upon is likely to be common in the linked appeals, it is entirely appropriate that the linked appeals are determined by one judge, at the same time.
14. In the circumstances, this appeal should now be heard in the First-tier Tribunal with the linked appeals that are listed for hearing on 10<sup>th</sup> July 2023.

### **Notice of Decision**

15. The decision of First-tier Tribunal Judge Hawden-Beale is set aside.
16. This appeal is remitted for hearing afresh before the First-tier Tribunal with no findings preserved. The appeal should be listed for hearing together with the linked appeals, which appear to have been allocated the following appeal numbers; EA/08775/2021, EA/08839/2021, EA/12722/2021, EA/08845/2021, and EA/08672/2021.

**V. Mandalia**  
**Upper Tribunal Judge Mandalia**

**Case No: UI-2022-003006**  
**First-tier Tribunal No: EA/08720/2021**

Judge of the Upper Tribunal  
Immigration and Asylum Chamber

**2 June 2023**