Neutral Citation Number: [2023] EWCA Civ 1455

Case No: CA-2023-000373 and CA-2023-000373-B

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
UPPER TRIBUNAL JUDGE NORTON-TAYLOR
UI-2022-002946 (EA-03229/2021)
UI-2022-002947 (EA-03231/2021)
UI-2022-002948 (EA-03335/2021)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/12/2023

Before :

LADY JUSTICE KING
LORD JUSTICE ARNOLD
and
LORD JUSTICE POPPLEWELL

- -

Between :

(1) DAHIR ELMI ABDI **(2) UBAH ELMI ABDI** **(3) MAHREZ SHARIF HASSAN**	**Appellants**
- and -	
ENTRY CLEARANCE OFFICER	**Respondent**

- -
- -

Ronan Toal and **Ubah Dirie** (instructed by **Wilson Solicitors LLP**) for the **Appellants**
Paul Skinner (instructed by the **Government Legal Department**) for the **Respondent**

Hearing date: 29 November 2023

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Approved Judgment

This judgment was handed down remotely at 10.00am on 7 December 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE POPPLEWELL :

Introduction

1. The first and second appellants ('Dahir' and 'Ubah') are brother and sister. They are aged 21 and 22 respectively. The third appellant ('Mahrez') is Ubah's son, now aged 3. They are all nationals of Somalia. They live together in Kenya, their Kenyan visas having expired.

2. Dahir and Ubah's eldest unmarried brother is Ashkir Elmi Abdi ('Ashkir'). He is a national of the Netherlands, having been granted asylum there, and has been, at the material times, living in England. Dahir, Ubah and Mahrez applied for EEA Family Permits to join Ashkir in England. Their applications were refused by the Respondent. They appealed to the First tier Tribunal. In a decision by FtT Judge Bartlett dated 25 February 2022 ('the FtT Decision') their appeal was dismissed. They appealed, with leave, to the Upper Tribunal. By a decision dated 10 November 2022 ('the UT Decision'), Upper Tribunal Judge Norton-Taylor dismissed their appeal. They appeal to this Court with permission from Carr LJ, as she then was.

EEA Family Permits

3. EEA Family Permits are issued under Regulation 12 of the Immigration (European Economic Area) Regulations 2016 SI 2016/1052 ("the Regulations"). Different provisions apply to "family members" and to "extended family members". The appellants do not fall within the definition of family member in Regulation 7 but seek to bring themselves within the definition of extended family member contained in Regulation 8. So far as relevant, this required them to establish that they are a relative of an EEA national, that they were residing in a country other than the UK, and that they were dependent upon the EEA national. There is no dispute that they are relatives of Ashkir and that they are residing outside the UK. The issue which arises is whether in the words of Regulation 8(2)(b) they are "dependent upon the EEA national", i.e. Ashkir. If so, an EEA family permit falls to be granted in accordance with Regulation 12(4) if they want to join Ashkir in the UK.

4. In this context "dependent" means that the applicant needs the material support of that EEA family member to meet their essential living needs: *SM (India) v Entry Clearance Officer (Mumbai)* [2009] EWCA Civ 1426, [2010] Imm AR 351; and C-1/105 *Jia v Migrationsverket* [2007] QB 545. In order to establish dependence, it is not necessary to establish that the EEA family member is the sole source of funds from which the applicant meets essential living needs. The support must be "material", in the sense that without it the applicant could not meet their essential needs. This is recognised in the Home Office guidance published on 27 March 2019 which at page 18 provides:

> "The Applicant does not need to be dependent on the EEA national to meet all or most of their essential needs. For example, an applicant is considered dependent if they received a pension which covers half of their needs and money from their EEA national sponsor which covers the other half."

The Refusal Letters

5. The applications by Ubah and Mahrez were dismissed by the Respondent's refusal letters dated 22 January 2021, each in identical terms ("the Refusal Letters"). The letters accepted that Ashkir was a Dutch national but refused the application on the following two grounds:

> - On your application you state that you are financially dependent on your sponsor. As evidence of this you have provided money transfer remittance receipts from your sponsor to you, however, it is noted that these transfers are dated sporadically from 2019 to 2020. 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.
>
> - I 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.

6. A separate refusal letter was sent to Dahir dated 25 February 2021. This refused the application on the basis that no supporting documents had been provided. That was an error. The FtT treated his appeal as raising the same issues as that of Ubah and Mahrez, and it was agreed before the UT and before us that the same approach should be adopted. For convenience I shall therefore refer to the Refusal Letters as if they applied to all three appellants.

The FtT Decision

7. Before the FtT, the appellants were represented by counsel, Ms Dirie, who was acting pro bono. No one appeared to represent the respondent. The hearing took place via CVP. There were two witness statements from Ashkir, who attended by CVP and gave evidence in accordance with his witness statements, supplemented by a few questions by Ms Dirie. Because the respondent was not represented there was no cross-examination. Judge Bartlett herself asked Ashkir some questions. Ashkir's evidence, as summarised at paragraph 3 of the FtT Decision was as follows:

> "(i) He fled to the Netherlands in 2008 where he was granted asylum and in April 2015 he became a Dutch national. In September 2015 he came to the United Kingdom and has settled status here. He works as a self-employed taxi driver mainly with Uber but also with Bolt;
>
> (ii) He sponsored his mother to come to the United Kingdom in 2019. She obtained an EEA Family Permit and lives with the sponsor;
>
> (iii) He has a younger brother and sister Huseen and Jasmine who have lived in the Netherlands since around 2016. They are both

> married with children of their own. Huseen has five children and Jasmine has three children;
>
> (iv) Jasmine works part time as a cleaner and Huseen works part time as a postman;
>
> (v) He and his mother live with his sister Kin and her family including five children [in the] United Kingdom. He does not pay anything towards his accommodation costs so that he can send as much money as possible to the first two Appellants;
>
> (vi) He is the eldest son of the family and has been supporting his mother and the first and second Appellants since he went to the Netherlands in 2018;
>
> (vii) He made an application for his mother first and then later the Appellants to this appeal because he was told by the Somali community that his applications would be more likely to succeed if they were made one at a time;
>
> (viii) After living for a short time in Kenya in 2018 the first two Appellants returned to Mogadishu. Ubah married in July 2019 and her husband moved into the house. He supported them all because none of them were working. In late 2019 Ubah's husband [ran away] because he was threatened by Al-Shabaab, later threats were made to the first two Appellants and so they decided to apply to come to the United Kingdom;
>
> (ix) The Appellants are currently living undocumented in Kenya. Their rent is equivalent to approximately $270 to $300 pm. They pay around $40pm for utility bills and spend about $250pm on food;
>
> (x) Recently their visas for Kenya expired and about two weeks ago they were stopped by police on the street and asked for their papers. When they could not provide them the police required a bribe of $10."

8. The bundle before the FTT contained receipts evidencing the money transfers said to have been made by Ashkir to Dahir and Ubah between 2019 and 2021, confirming Ashkir's evidence as to the payments made to Dahir and Ubah over that period. The money transfer receipts bore his name and personal details as the transferor. Ms Dirie had helpfully produced in her skeleton argument a table of all those payments.

9. Ms Dirie made submissions on behalf of the appellants. At paragraph 7 of the FtT Decision, Judge Bartlett said that she took the Refusal Letters as being the respondent's submissions.

10. Judge Bartlett concluded at paragraph 10 of the Decision that "I am not satisfied that [Ashkir] is the source of the funds either sent to or used by the appellants for their essential living needs." She explained her reasons for that conclusion in the paragraphs which followed. They were that the bundle included tax returns for Ashkir for 2019 and 2020, and as to 2021: "there is also a tax return in respect of 2021 which may not be complete but

is also accompanied by an accountant's letter confirming the figures." This last set of documents, for the 2020/21 tax year, showed "net business profit also described as total taxable profit of £5627".

11. The Judge then analysed the payments made by Ashkir to Dahir and Ubah during the tax year 2020/21, as set out in the tables in Ms Dirie's skeleton argument, and calculated that in total they amounted to payments of $6,875 and 75,374 Kenyan Shillings. She then used exchange rates to convert those figures into Pounds Sterling and came to a total of £5,500. She compared that with the total business profit of £5,627, and said that that would mean that Ashkir had only £127 for the entire year to meet his own essential living expenses. She went on to say that even if different exchanges rates were used this would not have a material effect on her findings because it would still remain that the amount it is claimed was paid to the appellants would be very close to Ashkir's income and therefore he would have had virtually nothing to live on. On that basis, she concluded that "I am not satisfied that the funds which allegedly came from the sponsor actually came from the sponsor. In the circumstances, I am not satisfied that the appellants are financially dependent on the sponsor."

The Appeal to the Upper Tribunal

12. The appellants appealed to the Upper Tribunal relying on three grounds of appeal, Ground 2 is no longer pursued and can be ignored. Grounds 1 and 3 were that:

    (a) in deciding that Ashkir was not the source of the funds, the FtT Judge made adverse credibility findings against Ashkir without these being put to Ashkir and without them having been relied on by the respondent in its Refusal Letters; it was therefore unfair to rely on this reasoning;

    (b) the Judge failed to make findings as to whether some of the money sent contributed to the appellants' essential living needs.

13. At the hearing before UT Judge Norton-Taylor, Ms Dirie again appeared for the appellants, pro bono. On this occasion the respondent was represented by Ms Willocks-Briscoe, a senior Home Office Presenting Officer.

14. In the UT Decision, the UT Judge concluded that it would have been much better if the FtT Judge had specifically raised at the hearing any concern with Ashkir's ability to remit funds but concluded that there was no procedural unfairness such that the decision should be set aside. His reasons were that there was significantly more evidence provided before the FtT than in the original applications, so that the FtT Judge had to consider additional evidence which had not been before the original decision maker. The FtT Judge's figure of £127 was a finding which was open to her. The question was then what would have happened if the FtT Judge's concern had been raised at the hearing. The UT Judge said that it had been accepted by Ms Dirie at the hearing that there was no evidence before the FtT Judge of any other sources of income available to Ashkir, and that there had in fact been no other sources of income for Ashkir at the relevant time. In those circumstances, the UT Judge concluded that there was no procedural unfairness on the Judge's part, or that even if there was, by virtue of a failure to raise an issue at the hearing, it could not have made a material difference to the outcome. Although he expressed his conclusion in this alternative form, the essence of his reasoning was that the failure to raise the point at the hearing had made no material difference to the outcome.

15. The UT Judge rejected the second ground of appeal on the basis that the FtT Judge's finding was that none of the funds received by the Appellants had emanated from Ashkir, and so the dependency claim fell at the first stage.

The issues in the appeal

16. Two grounds of appeal are advanced on behalf of the appellants:

    (1) Ground 1: the Upper Tribunal erred in law by holding that there had been no or no material procedural unfairness before the FtT notwithstanding that the FtT decided the appeal against the appellants on the basis of a matter that had not been raised by the respondent and of which the FtT gave the appellants no notice.

    (2) Ground 2: the FtT erred in law by failing to determine (a) whether Ashkir contributed to the remittances to the appellants even if he did not provide the whole of the amount remitted and (b) whether the appellants were dependent on that contribution. The Upper Tribunal erred in law by holding that the FtT had not been required to determine those issues.

17. In relation to Ground 1, the respondent advances essentially two points. The first, which is taken by way of a Respondent's Notice, is that there was no evidence before the Upper Tribunal as to what had occurred during the hearing before the FtT, such as the transcript, a recording, a note from the FTT Judge, or a witness statement from Ms Dirie; and that accordingly it was not open to the appellants to submit that the hearing before the FtT was not fair and there was no evidential basis on which the UT Judge could have reached that conclusion. The second answer to Ground 1 put forward by the respondents, in the alternative, is that procedural fairness did not require the FtT Judge to put her doubts as to the credibility of Ashkir to the appellants at the hearing. In relation to Ground 2, the respondent supports the holding by the UT Judge that the FtT Judge found that none of the funds had been sent by Ashkir.

18. In response to the Respondent's Notice, the appellants obtained a transcript of the hearing before the FtT Judge and made an application to this court to rely upon it. The respondent resists that application. At the hearing of the appeal, we allowed the transcript to be put before us *de bene esse*, subject to determining its admissibility in our judgment.

The Respondent's Notice point

19. In my view this is hopeless because it is clear that it was conceded before the UT that the FtT Judge had not raised any concern that Ashkir had not made the payments he said he had made, and had not raised the point comparing the total of payments allegedly made by Ashkir against the profit in the draft tax accounts which formed the ground on which she decided that they had not been. The appellants' contention that those matters had not been raised at the hearing was at the forefront of ground 1. Ground 1 was set out at paragraphs 14 to 16 of the grounds, which asserted unequivocally that the point on which the FtT Judge rested her decision had not been relied on by the respondent and had not been raised at the hearing. This was the central factual premise for the allegation of procedural unfairness.

20. Rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008 ('the UT Rules') provides that a respondent must serve a response to a notice of appeal if the respondent— (a) wishes the Upper Tribunal to uphold the decision for reasons other than those given by the tribunal;

or (b) relies on any grounds on which the respondent was unsuccessful in the proceedings which are the subject of the appeal; and that in other circumstances may do so. The Rules also contain in Rule 2 the overriding objective to deal with cases fairly and justly, which includes dealing with them at proportionate cost and without unnecessary delay. Rule 2(4) requires the parties to help the Upper Tribunal to further the overriding objective. Although the terms of Rule 24 did not make service of a notice mandatory in this case, Rule 2 dictates that one should be served where the notice of appeal contains a complaint as to what happened at the hearing as the factual basis of a ground of appeal. A Rule 24 notice ought then to be served identifying whether that factual basis is in issue, and if so, highlighting the nature of the controversy. Only in that way can any dispute be identified in a way which enables orderly preparations to be made for it to be resolved at the appeal hearing, if necessary by evidence, so as to avoid unnecessary delay and expense. If resolution of any dispute necessitates a witness statement from counsel, that will give rise to particular consequences which may include new counsel being instructed to conduct the appeal: see *BW v Secretary of State for the Home Department* [2014] UKUT 00568 (IAC) at [5]. No such Rule 24 notice was served in response to the grounds of appeal in this case.

21. The assertion that the point had not been raised at the hearing was not only the central premise of the written grounds of appeal but the central premise of the ground advanced orally by Ms Dirie in argument. She must have said so in the course of argument.

22. In those circumstances it was incumbent on Ms Willocks-Briscoe to say whether the factual premise was disputed, not least because Rule 2 of the UT Rules requires the parties to help the UT to further the overriding objective there set out. It is clear enough that Ms Willocks-Briscoe did not do so. That is clear from the terms of the UT Decision, which record her submissions in terms which are inconsistent with any such dispute having been raised, and treat it as an undisputed fact that the point was not raised at the FtT hearing.

23. Mr Skinner submitted that there is a distinction to be drawn between not disputing a matter and making an express concession; and that there was no basis for treating Ms Willocks-Briscoe as having made an express concession. I would accept that in some circumstances there can be a material distinction between not disputing a matter and conceding it, but there is no such distinction to be made on the facts of this case. In the circumstances, Ms Willocks-Briscoe's failure to say that the point was disputed amounted to a concession.

24. Mr Skinner also suggested that it was incumbent on the appellants to adduce evidence in the form of a transcript or a witness statement from Ms Dirie at the permission to appeal stage, or at latest prior to the UT hearing. Had a witness statement been provided, it is said, Ms Dirie would then have had to withdraw and other counsel be instructed. I cannot accept this submission. There would be no conflict between counsel acting as a witness and acting as an advocate unless and until a dispute was identified about what had happened. No doubt there are some cases where what is said to have happened at the FtT hearing is likely to be in dispute and where the evidential basis for rival contentions should be dealt with formally by evidence in the form of a witness statement in the way suggested in *BW*. Where allegations of conduct amounting to apparent bias are made it may often be important both to address exactly what happened and to make an evaluative judgment of its effect, in circumstances where a dispute can be readily anticipated. Sometimes a transcript will not be conclusive. However where, as in this case, the point relied on is simply that a matter was not raised at the hearing, in circumstances where there is no reason to anticipate a dispute, the convenient way of dealing with it is that which was adopted in the present case. Requiring the appellants to apply and pay for a transcript, or Ms Dirie to make a witness

statement, before there was any reason to suspect that the point might be in dispute, would simply have led to additional expense and delay to no useful purpose.

25. Moreover, even if I were wrong that Ms Willock-Briscoe's conduct amounted to conceding the point, I would not accept that there was no evidence before the Upper Tribunal that the point had not been raised at the FtT hearing. There was evidence to that effect in each of two forms. First there was the FtT decision itself, which it is reasonable to suppose would have included in its summary of Ashkir's evidence whatever response he would have made had the point been raised. The absence of any record of a response to the point in the evidence recited in the FtT Decision is persuasive evidence that it was not raised. Secondly the UT had Ms Dirie's statement from the bar as to what had happened. That is evidence upon which a Court is entitled to rely (*Hickman v Berens* [1895] 2 Ch 638). It happens frequently that courts or tribunals sitting on appeal inquire as to what happened below and are told the position by counsel. In the absence of any reason to question what counsel says, the court can proceed on the basis of what they are told by counsel in fulfilment of their professional duty.

26. I would, in any event accede, to the application by the appellants to adduce the transcript in evidence before us, which confirms beyond doubt that the point was not raised at the hearing. Indeed it is clear from that transcript that the FtT Judge led Ms Dirie to believe that the matters in issue which she needed to address in relation to dependency were those set out in the Refusal Letters, which did not involve any dispute about whether Ashkir had made the payments he said he had made.

27. Mr Skinner submitted that this required fulfilment of the familiar criteria laid down in *Ladd v Marshall* [1954] 1 WLR 1489, and that they were not fulfilled in this case. I have some doubt whether a record of what happened at first instance in the form of a transcript attracts the stringency of these criteria; but if it does I would hold that they are fulfilled. Reasonable diligence did not require the transcript to have been obtained before the hearing took place before the Upper Tribunal, and until the Respondent's Notice raised the point the appellants could not reasonably have anticipated that it would be necessary to adduce the transcript to make good their procedural unfairness argument.

Ground 1

28. There is a wealth of authority on the circumstances in which a failure to raise a point at a hearing amounts to procedural unfairness, both generally and in the context of immigration cases. It is only necessary to refer to a few.

29. *HA v Secretary of State for the Home Department (No 2)* [2010] SC 457 [2010] CSIH 28 was a decision of an Extra Division of the Inner House of the Court of Session presided over by Lord Reed (now PSC), who delivered the Opinion. It made a number of general points about procedural fairness in the context of immigration cases, amongst which the following emerge at [4]-[13]. Subject to the procedural rules governing first instance tribunals, the tribunal has power to decide the procedure it adopts, but in doing so must act fairly. What fairness requires is essentially an intuitive judgment which is dependent on the context of the decision; although it is possible to identify a number of general principles, they cannot be applied by rote identically in every situation. An overall judgment must be made in the light of all the circumstances of a particular case. Whether there is procedural unfairness is fact-sensitive. See [4] and [13]. The tribunal may identify an issue which has not been raised by the parties to the proceedings, but it will be unfair, ordinarily at least,

for it to base its decision upon its view of the issue without giving the parties an opportunity to address it upon the matter (see [7]). As an expert body, the tribunal is entitled to reject evidence notwithstanding that the evidence has not been challenged before it. Fairness may, however, require it to disclose its concerns about the evidence so as to afford the parties an opportunity to address them (see [8]). There is, on the other hand no general obligation on the tribunal to give notice to the parties during the hearing of all the matters on which it may relay in reaching its decision (see [10]). Where an applicant can generally be expected to be aware that the tribunal will have to assess their credibility, there will generally be no unfairness in a tribunal proceeding without drawing attention to a point which the applicant could reasonably expect to be plainly relevant to that assessment (at [11]-[12]).

30. In *The Secretary of State for the Home Department v Maheshwaran* [2002] EWCA Civ 173 [2004] 176 Imm AR, Schiemann LJ delivered the judgment of this court. He drew attention to the difficulties often faced by those sitting at first instance in immigration cases. Of relevance to the present appeal are the following observations. There are innumerable decisions which have stressed that the requirements of fairness are very much conditioned by the facts of each case (at [6]). A failure to put to a party a point which is decided against him can be grossly unfair and lead to injustice because he must have a proper opportunity to deal with the point (at [4]). Where much depends on the credibility of a party which has made several inconsistent statements, that party has a forensic problem as to whether to confront them or focus attention elsewhere. Fairness may in some such circumstances require the inconsistencies to be put to the witness but that will not usually be the case. Usually the tribunal can remain silent, especially if the party is represented, and see how the case unfolds (at [5]).

31. Problems often arise as to how the tribunal can avoid giving an appearance of bias where, as has increasingly happened, the respondent is not represented at the hearing and so the usual adversarial testing of the applicant's evidence by cross-examination does not take place. In June 1999, the Immigration Appeal Tribunal gave guidance in what have come to be known as the Surendran Guidelines, given emphasis by the Immigration Appeal Tribunal in *MNM v Secretary of State for the Home Department* [2000] UKIAT 00005. Paragraph 5 of the Surendran Guidelines is of direct application in this case. It provides:

> "5. Where no matters of credibility are raised in the letter of refusal but, from a reading of the papers the special adjudicator himself considers that there are matters of credibility arising therefrom, he should similarly point these out to the representative and ask that they be dealt with, either in examination of the appellant or in submissions."

32. In *WN v Secretary of State for the Home Department* [2004] UKIAT 00213, Ouseley J (President) emphasised that a failure to follow the Surendran Guidelines was not itself conclusive of procedural unfairness. At [34] he said that paragraph 5 needs also to cover the position where no issue of credibility has been raised in the Refusal Letter and yet it may be obvious that further material provided to the adjudicator raises issues of credibility. They should be raised or put to the appellant so that he may answer them, but it does not mean that the hearing is unfair where that does not take place, at least where the appellant is represented. That depends on whether the points are obvious ones going to the appellant's credibility which he could be expected to realise needed addressing in any event, such as inconsistencies with previous statements or a failure to raise a particular matter earlier.

33. The recent decision of the Supreme Court in *TUI UK Ltd v Griffiths* [2023] UKSC 48 re-emphasises the principle that fairness generally requires that if the evidence of a witness is to be rejected, it should be challenged at the hearing so as to give them an opportunity to address the challenge; and that that is a matter of fairness to the witness as well as fairness to the parties, and necessary for the integrity of the court process in enabling the tribunal to reach a sound conclusion: see especially at [42]-[43], [55], and [70]. The rule is subject to certain exceptions and is to be applied flexibly in the circumstances of any individual case in application of the criterion of the overall fairness of the trial ([61]-[69] and [70(vii) and (viii)].

34. Applying those principles, I have little hesitation in concluding that the failure by the FtT Judge to give the appellants and Ashkir an opportunity to address the point on which she decided the case was unfair. The Refusal Letters had not challenged that the payments which Ashkir said he had made to Ubah had been made by him. They were supported by remittance receipts with Ashkir's name and personal details on them. Rather, two points had been made in the Refusal Letters, one being that the number of payments was "sporadic" and the other being a lack of information about the recipient's financial circumstances. Neither of those raised any question about the credibility of Ashkir. The matter requiring to be addressed, so far as his involvement was concerned, was simply the extent of the payments made by him. Although the evidence adduced before the FtT included a greater number of payments than had been advanced in the initial application to the respondent, with similar supporting documentation, there was no reason to anticipate an issue as to whether Ashkir had made them. This was reinforced by the comments of the FtT Judge at the hearing that the issue of dependency in dispute was that identified in the Refusal Letters, which was echoed in para 7 of her Decision that she treated the respondent's submissions as those set out in the Refusal Letters.

35. Mr Skinner submitted that the point which emerged in the FtT Decision as determinative was one which it would have been obvious to those advising the appellants needed to be addressed without any prompting from the tribunal. I cannot agree. The remittance receipts made clear that the money had come from Ashkir. There was no reason to anticipate a focus on how Ashkir had been able to afford to remit the money. Mr Skinner does not suggest that the point the FtT Judge made is sufficient to outweigh the evidence of the documented remittance receipts which evidenced that Ashkir was the sender of the payments. Rather, he submits, in the terms set out at paragraph 39 of his skeleton argument, that "there is no other realistic inference to be drawn other than that the Sponsor was in effect a conduit for others' money, whether directly or by being provided for in kind by others freeing up the money he earned to send to the Appellants, and that any support provided to the Appellants is accordingly not the support *from him*" (emphasis in the original). I shall address below whether this is the inevitable inference, but assuming it to be so, it reinforces the point that it would not have been obvious that the appellants needed to address the source of the monies prior to their despatch by Ashkir. There is, to put it at the lowest, considerable doubt whether as a matter of law the source of the money is of any relevance to the question of dependency: see *Mahad v Entry Clearance Officer* [2009] UKSC 16 [2010] 1 WLR 48 per Lord Brown at [34]-[36] and Lord Kerr at [56], in which using the sponsor as a conduit was held not to affect dependency under the immigration rules. Ashkir's evidence made clear that he was living with his sister's family who charged him no rent in order to enable him to remit funds to the greatest extent possible to the appellants. If it be the case that they were also supporting his other living needs, as is suggested to be one of two inevitable inferences, it does not seem right, at least at first

blush, to describe that as Ashkir acting "as a conduit for others' money": he would be sending his own money.

36. In those circumstances this is not a case in which some obvious inconsistency in the evidence which was being put forward should foreseeably have been addressed without the tribunal specifically raising it.

37. Nor can I accept Mr Skinner's submission that the failure to raise the point had no material impact on the outcome, which was in essence the ground on which the Upper Tribunal dismissed the appeal. The test is a high one. In *SH (Afghanistan) v Secretary of State for the Home Department* [2011] EWCA Civ 1284, this court was concerned with procedural unfairness in failing to grant an adjournment for further expert evidence as to the age of the applicant, and the question arose as to whether the judge had been right to conclude that even if the report had been obtained it was reasonably likely that the decision would have been the same. Moses LJ, giving the judgment of the court, said at [15]:

> "15. The judge, on that issue, concluded that even if that report had been obtained, "it is reasonably likely" that Immigration Judge Froom would have reached the same decision. This was not the correct test. ……..Tribunals, like courts, must set aside a determination reached by the adoption of an unfair procedure unless they are satisfied that it would be pointless to do so because the result would inevitably be the same. Both Simon Brown LJ and Dyson LJ reminded themselves, as all faced with the argument that the result would inevitably be the same must remind themselves, of Megarry J's evocation of the essence of justice in *John v Rees* [1970] Ch 345,402:-
>
> > "It may be that there are some who would decry the importance which the courts attach to the observance of the rules of natural justice. 'When something is obvious," they may say, 'why force everyone to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from the start.' Those who take this view do not, I think, do themselves justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events."

38. The test is whether remission would be pointless because the result would inevitably have been the same.

39. I would not accept that the only inference from the material relied on by the FtT Judge is that asserted by Mr Skinner at paragraph 39 of his skeleton argument, namely that Ashkir was a conduit for others' money directly or by being provided for in kind by others freeing up the money he earned to send to the appellants. We do not have the draft tax return documents for 2020/21 which were before the FtT, but it is not obvious to me that a draft tax return by a self-employed taxi driver giving an operational profit is conclusive of disposable income. His evidence to the FtT Judge was that his gross receipts were of the

order of £5,000 to £6,000 per month, and there are a number of reasons why net receipts in the given tax year, in the form of disposable income, might not match those shown in draft accounts. For example capital allowances on a vehicle purchased prior to the relevant tax period would not diminish his cash flow in that period. Many deductions from income may legitimately be made on a broad brush basis, such as allowances per mile for vehicle expenses, or use of a mobile phone for business purposes. All that is speculation so far as these draft accounts are concerned, but it means that this court cannot say with the necessary degree of certainty that remitting the matter would be pointless because the result would *inevitably* be the same. The outcome will depend upon the explanation given and the facts found, and, quite possibly, the application of disputed issues of law on the relevance of the source of the sponsor's funds and/or living support from others. Resolution of such legal issues is best left until the relevant facts have been found.

40. For these reasons I would allow the appeal on ground 1. Ground 2 does not therefore arise for decision. The parties are agreed that the appropriate form of relief is to remit the matter to the First tier Tribunal.

Postscript

41. By way of postscript, I should make two things clear. First, I am not expressing any view as to whether it formed a proper part of the FtT Judge's role, in adversarial proceedings, to take the point which formed the basis for her Decision when that point had not been taken by the respondent. We are concerned only with the consequences of her having done so. Secondly, Mr Skinner's submissions at times strayed into general propositions which lost sight of the facts of this case, perhaps through an anxiety that if the appeal were allowed, it would have a widespread effect on FtT decisions in immigration cases more generally. However, my conclusions have been reached very much on the facts of this particular case, which illustrates the point emphasised in both *HA* and *Maheshwaran*, that questions of procedural unfairness depends upon the context and are fact-sensitive and case-specific.

Lord Justice Arnold :

42. I agree.

Lady Justice King :

43. I also agree.