



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/01065/2016
EA/01071/2016
EA/01072/2016

THE IMMIGRATION ACTS

Heard at Field House
On 27 January 2018

Decision & Reasons Promulgated
On 3 August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

LEONID HRYHORUK

E

M

(ANONYMITY DIRECTIONS NOT MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Patyma of Counsel, instructed by Kilby Jones Solicitors
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. These are linked appeals against the decisions of First-tier Tribunal Judge Colvin promulgated on 25 October 2017.
2. The Appellants are citizens of Ukraine. The First Appellant (d.o.b. 28 September 1968) is the father of the Second and Third Appellants; the Second Appellant was born on 28

August 2008, and the Third Appellant was born on 11 November 2012. The minor Appellants are the children of the First Appellant's current unmarried partner, Ms Halina Khimeychuk (d.o.b. 22 January 1981), also a national of Ukraine. The First Appellant has an adult son from a previous relationship, Mr Denys Grygoruk¹ (d.o.b. 1 May 1989). Dennis Grygoruk is married to Katryna Lipinska (d.o.b. 13 August 1989), a citizen of Poland. For the purposes of these proceedings Ms Lipinska is the sponsoring EEA national ('the sponsor'). Ms Lipinska is employed as a full-time team member in a KFC franchised restaurant.

3. The First Appellant claims to have entered the UK in April 2003; the Respondent has no record of this, and there have been no applications in respect of his immigration status until the instant applications made on 10 August 2015 for residence cards pursuant to the Immigration (European Economic Area) Regulations. Nonetheless it has not been disputed that he has been resident in the UK for the period claimed. The Second and Third Appellants were born in the UK.
4. The applications for residence cards relied upon the respective Appellants' connections with the sponsor. It was said in the applications that the Appellants all lived in the same house as the sponsor who paid the rent as and when required; other bills were said to be paid by the sponsor and her husband (Mr Grygoruk).
5. However, it is to be noted that it is a feature of these cases that although the First Appellant entered the UK in 2003, and the Second and Third Appellants were born in the UK in 2008 and 2012 respectively, the sponsor did not enter the UK until 8 September 2013. Further, there is on file a letter dated 24 June 2015 from the landlord of the house in which the Appellants currently reside which states that the First Appellant and his partner, Ms Khimeychuk, "*have been living in the property about 11 years, from 2004*". (Respondent's bundle Annex K). On its face it would appear that the on their own case the sponsor joined the household of the First Appellant, his partner and his minor children, having entered into a relationship with the First Appellant's adult son.
6. The applications were refused for reasons set out in a 'reasons for refusal' letter ('RFRL') dated 13 January 2016. Notices of Immigration Decision were issued to the Appellants on the same date.

¹ 'Hryhoruk' and 'Grygoruk' are anglicised versions of the same Cyrillic name. It is unclear in what circumstances the First Appellant's adult son has adopted an anglicised version at slight variance with his father; however, for present purposes nothing turns on this. It is, however, convenient to preserve the variation herein if only as a means of distinguishing between the First Appellant and his adult son.

7. The First Appellant's application was refused with reference to regulation 7(1) of the 2006 Regulations on the basis that it was not accepted that he had demonstrated that he was genuinely dependent upon the sponsor. However, it was accepted that he was a family member of the sponsor, being a direct relative in the ascending line of the sponsor's spouse (regulation 7(1)(c)).
8. The Second and Third Appellants' applications were each refused with reference to regulation 8(2) of the 2006 Regulations: the Respondent was not satisfied that evidence had been provided to demonstrate that either was an extended family member of the sponsor. The Respondent was not satisfied that there had been any prior financial dependency on the sponsor or prior membership of the household (regulation 8(2)), and moreover was not satisfied that there was any dependency on the sponsor whilst in the UK.
9. For completeness I note that the applications for residence cards made on 10 August 2015 included an application by the First Appellant's partner, Ms Khimeychuk. It appears that her application was refused with no right of appeal with reference to regulation 26(3), and accordingly there has been no appeal before the Tribunal by Ms Khimeychuk.
10. In respect of the issue of dependency, the RFRL noted that it appeared that the First Appellant had been resident of the same address since 2004 and had been able to provide for essential needs and accommodation for over 10 years without the supposed more recent assistance of the sponsor; it was also said that there was no evidence that the sponsor had ever been responsible for rent payments. The Respondent also considered that the level of the sponsor's earnings (less than £1000 per month gross) when compared with the monthly rent (£670) did not support the notion that the household was dependent on the sponsor who would need to expend two thirds of her salary just to cover the rent.
11. It seems to me clear enough that in substantial part the reasoning of the RFRL was informed by the fact that on their own case the sponsor appeared to have joined the First Appellant's existing household, and this was considered to undermine substantially the notion of the members of the household being dependent upon the sponsor.
12. The Appellants appealed to the IAC.
13. Judge Colvin determined that the Tribunal had no jurisdiction in respect of the Second and Third Appellants on the basis that they were extended family members ('EFMs')

within the meaning of the Immigration (European Economic Area) Regulations, and in reliance upon the case of **Sala (EFM's: Right of Appeal) [2016] UKUT 00411**.

14. The appeal of the First Appellant was dismissed by Judge Colvin essentially on the basis that it was not accepted that it had been shown that the First Appellant was dependent on the sponsor. Moreover, the Judge considered there to be unreliability in the oral evidence before her such that she was not satisfied that the sponsor and her husband were members of the First Appellant's household.

The grant of permission to appeal to the Upper Tribunal

15. The Appellants applied for permission to appeal to the Upper Tribunal, which was granted on 27 November 2017 by First-tier Tribunal Judge Chohan.
16. As was recognised by the representatives before me, the grant of permission to appeal is problematic. Judge Chohan appears to address herself only to the **Sala** jurisdictional point, which is only relevant to the Second and Third Appellants. Nothing is said overtly in respect of the challenge to the substantive decision in respect of the First Appellant.
17. The matter is further complicated by the circumstance that Ms Patyma frankly - and in my judgement entirely appropriately - acknowledged that the minor Appellants did not have a case to advance under the EEA Regulations with any prospect of success. I acknowledge that this observation was duly and properly made because, within the terms of regulation 8(2), it is impossible for the Second and Third Appellants to assert that there was any prior dependency, or that they were ever prior members of the sponsor's household: they were essentially strangers to the sponsor at least until after she had entered the UK in 2013. (See further below in respect of the eventual disposal of the appeals of the Second and Third Appellants.)
18. The Tribunal was therefore confronted with a position where the grant of permission to appeal expressly addressed only the Second and Third Appellants, but was acknowledged ultimately not to avail them, whilst no decision had seemingly been taken in respect of the First Appellant's application for permission to appeal.
19. Mr Bramble, charitably and expediently, suggested that the wording at paragraph 3 of the grant of permission to appeal - "*There is substance in the grounds seeking permission*" - was potentially wide enough to accommodate a grant of permission on all grounds. I am not confident that that was the intention of Judge Chohan: there is absolutely no reference to any of the other grounds, and certainly nothing to indicate which - if any

- were considered to be arguable, or why. In context the reference to there being “*substance in the grounds*” appears to be an exclusive reference to the **Sala** point, which is the only matter mentioned in both the preceding and following sentences - and there being absolutely no reference whatsoever to any of the other basis of challenge anywhere in the grant of permission to appeal.

20. Nonetheless, I acknowledged Mr Bramble’s suggestion that it would be expedient to deal with all matters globally. In the circumstances I indicated that I would entertain substantive submissions on the claimed errors of law in respect of the First Appellant and thereafter resolve the question of whether permission to appeal should formally be granted or not - and if granted then determine the issue of error of law substantively.

The First Appellant’s Challenge to the Decision of the First-tier Tribunal

21. Three grounds of appeal are raised on behalf of the First Appellant: that the Judge erred in her approach to dependency at the time of the hearing; that the Judge erred in her approach to past dependency; and that the Judge erred in respect of the evidence regarding rent payments.
22. The first ground is pleaded as being raised “*notwithstanding the decision in **Reyes (EEA Regs: dependency) [2013] UKUT 00314 (IAC)***” - which is plainly tantamount to an acknowledgement that the premise of the submission is recognised as running contrary to a prior decision of the Upper Tribunal. It is argued that in evaluating the issue of dependency at the date of the hearing the First-tier Tribunal Judge took into account the First Appellant’s earnings, but failed to recognise or make due adjustment for the fact that his earnings were only achievable by reason of the grant of permission to work in consequence of the application; but for the application and the appeal the First Appellant would not have had permission to work and as such the issue of dependency should have been considered without regard to his current earnings. It was submitted that this approach was consistent with the reasoning of the CJEU in **Reyes v Migrationsverket** (Case C-423/12) (which related to a different applicant/appellant notwithstanding the matching surname).
23. The submission now relied upon was rejected in terms by the Upper Tribunal in **Reyes**: see paragraph 21.
24. Further and in any event, it seems to me that the circumstances the CJEU case of **Reyes** were very different from the instant case, it being concerned with an application for entry by a person dependent upon the sponsor: the *prospective* possibility of becoming independent was to be disregarded.

25. In any event – and more particularly – it was the Judge’s finding herein that the First Appellant had never been dependent on the sponsor. Inherent in this finding is that there was no dependency even when the First Appellant did not have permission to work. It seems to me that the fact that the Judge also made reference to the First Appellant’s present earnings does not undermine the conclusion that there was never a dependency.
26. In such circumstances the prospects of the first ground of challenge are, in my judgement, in the first instance contingent upon there being anything of substance in the other grounds. Even then, in circumstances where it is acknowledged to be inconsistent with the approach identified by the Upper Tribunal, and where the CJEU case relied upon is not directly on point, it is difficult to see that it is a ground with any realistic prospect. Nothing said by Ms Patyma in amplification upon the ground has persuaded me otherwise.
27. The issue of past dependency is the direct subject of the second ground of challenge. However, in my judgement what is pleaded therein is essentially a disagreement with the findings of the First-tier Tribunal Judge.
28. It is pleaded that the Judge “*unduly*” focused on circumstances predating the marriage of Mr Grygoruk to the sponsor (paragraph 13 of the Grounds). However, in oral submissions Ms Patyma acknowledged that there was nothing wrong in principle with the Judge considering the historical economic activity of the First Appellant.
29. It was also pleaded that the Judge had imposed “*an undue requirement*” in respect of supporting documentary evidence (paragraph 14 of the Grounds), in which context reference was made to the Judge’s statement “*no evidence has been submitted to show that the appellant at any time – even before he claims he got financial support [from the sponsor] – defaulted on any payments such as rent or utility bills*” (Decision at paragraph 38). In my judgement it is a nonsense to suggest that this was the Judge imposing a requirement that documentary evidence be provided. This was no more than the Judge observing that there was no suggestion that the First Appellant had ever experienced financial difficulties. Plainly that is an appropriate consideration.
30. I see nothing of substance in the second ground that begins to approximate to a pleading of error of law.

31. For the avoidance of any doubt in considering both the first and second grounds of challenge I have had regard to the decision in **Lim v Entry Clearance Officer, Manila [2013] EWCA Civ 1383** in respect of the meaning of 'dependent': "*...the critical question is whether the claimant is in fact in a position to support himself or not... 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*" (paragraph 32, per Lord Justice Elias). In my judgement the approach of the First-tier Tribunal Judge has been entirely consistent both with **Lim** and with the learning of the Upper Tribunal in **Reyes**.
32. The third ground of appeal argues that the Judge fell into error in consideration of the evidence relating to the mechanism for making rent payments.
33. As Ms Patyma indicated in her oral submissions, the premise of the ground is that there was a broad consistency in the testimonies of the witnesses at the hearing as to how the money of the sponsor and/or her husband found its way to the landlord as payment of rent. It is argued that the Judge misrecorded the evidence in the Decision.
34. Ms Patyma highlights the following:
- (i) In recording the testimony of the sponsor the Judge writes: "*They take the rent money to the bank and her husband pays it and sometimes he pays it directly to the landlord. The money is kept on top of the fridge.*" (paragraph 21).
- (ii) At paragraph 43 the Judge makes the following observations:
- "The [First] appellant in his oral evidence said that his son and the sponsor take cash out of their bank accounts and then he or his partner pays the landlady through HSBC bank with this cash as shown by the receipts submitted. And sometimes they take cash out of their accounts 2 or 3 times in the month so that they make sure that there is enough to pay for the rent at the end of the month. When asked, he said that he does not know why his son does not pay the rent directly himself to the bank. The son, Denys, in his evidence gave the same evidence as his father about withdrawing cash from his or his wife's account which is then given to the appellant for payment of the landlady through the bank. However, when the EEA sponsor was asked the same question she gave a different description as to how the rent is paid. She said that she and Denys take the rent money to the bank and that Denys sometimes pays it directly to the landlord. I consider that such a discrepancy a significant when it comes to the payment of the key essential such as rent."*

35. In the grounds of appeal – drafted by Ms Patyma who also appeared before the First-tier Tribunal – there is an extract from Ms Patyma’s note of evidence which relates to the sponsor’s oral evidence in respect of payment of the rent. Ms Patyma’s note is in these terms:

*“IJ: H [i.e. ‘husband’, Mr Denys Grygoruk] says gives cash towards rent.
We take cash out and we pay.*

IJ: Who pays?

A. We leave money home, whoever has time.

IJ: Could be you, H?

Yes, or my husband.

IJ: Is it either of your to [sic. – perhaps ‘you two’] or they pay it? Witness confused. What is your input?

H pays.

IJ: Does he give money to somebody else who pays landlord?

Sometimes it’s Denys’s father pays, and sometimes it’s Denys. Denys gives money.

IJ: How does he keep money?

On top of the fridge.”

36. I have had the benefit of seeing the Judge’s record of proceedings, the relevant contents of which I shared with the representatives. The relevant passage is in these terms:

“We take the money to the bank. H [i.e. ‘husband’, Mr Denys Grygoruk] pays for it. Sometimes he pays directly to the landlord. We keep on top of fridge.”

37. It seems to me that for the most part the Judge’s record of proceedings matches Counsel’s note: ‘H pays for it’ matches ‘H pays’; ‘Sometimes he pays directly to the landlord’ matches ‘Sometimes it’s Denys’s father pays and sometimes it’s Denys’; ‘We keep on top of fridge’ matches ‘On top of the fridge’.

38. I acknowledge that the sentence ‘We take the money to the bank’ does not have any close replication; however, it is nonetheless broadly consistent with ‘we pay’, and ‘sometimes it’s Denys [who pays]’, and in any event is to be read together with the clarifying subsequent questions and answers.

39. I pause to note that in this context the Grounds also raise as a preliminary point the possibility of the need to obtain a copy of the Judge's record of proceedings, and also the possibility that Ms Patyma might need to file a witness statement (in which case another counsel would need to be instructed to present the appeal). However, given the foregoing it seems to me that Ms Patyma's note of evidence is broadly consistent with the record of proceedings and nothing of substance would be gained by requiring the evidence to be put on a more formal footing.
40. In so far as there is a difference between the record of proceedings and counsel's note of evidence, I have reached the conclusion that it is not necessary to resolve this difference definitively because ultimately, even on counsel's version of events, I am not persuaded that any material error of law is made out.
41. I turn to consider the two limbs of the alleged discrepancy identified by the Judge at paragraph 43: "*[The sponsor] said that she and Denys take the rent money to the bank*", and "*Denys sometimes pays it directly to the landlord*".
42. As I have noted above, it is not clear from counsel's note that the sponsor said in terms that she and her husband took the rent money to the bank. However, even on counsel's note it is apparent that the sponsor gave testimony to the effect that her husband sometimes paid the rent himself – which necessarily would have been either by depositing money at the bank or by giving money directly to the landlord, there being no other means of paying the rent suggested at any point. This aspect of the sponsor's testimony is indeed inconsistent with the Judge's unchallenged summaries of the evidence of the other witnesses: both the First Appellant and his son gave evidence to the effect that it was the First Appellant or his partner who paid the landlady through the bank; cf. "*IJ: Does he give money to somebody else who pays landlord? Sometimes it's Denys's father pays, and sometimes it's Denys.*"
43. It follows that I accept that some criticism of the Judge's approach to the evidence here *may* be appropriate: (I say 'may' on the premise that I am not definitively resolving the tension between the Judge's record of proceedings and counsel's note of evidence, but am considering this issue on the assumed premise that counsel's note is accurate). Nonetheless the Judge was correct to identify that there was a discrepancy in the sponsor's evidence compared to the evidence of the First Appellant and his son, Mr Grygoruk, as to the method of paying the rent.
44. There being such a discrepancy – even if, perhaps, not obviously or sustainably in the exact terms identified by the Judge – I am not persuaded that it was an error of law to characterise such a discrepancy as "*significant*" because it related "*to the payment of [a] key essential such as rent*".

45. Even if it were otherwise, and notwithstanding the Judge's emphasis at paragraph 46 on the discrepancy, I would not conclude that the Judge's error in this regard was material.
46. This is the only aspect of the Judge's evaluation of the evidence in respect of which any sustainable criticism has been levelled. (Again, 'sustainable' on the assumed premise of the accuracy of counsel's note over the record of proceedings.) It is to be noted that the Judge has prepared a detailed Decision which traverses the evidence presented in support of the Appellants in some considerable detail, and with manifest care. Indeed it seems to me that the evidence, and the Judge's other findings, overwhelmingly point in the direction of there being no financial dependency. I am not remotely persuaded that any possible error on the Judge's part with regard to the evidence as to the methodology of paying rent undermines any of the other conclusions in the appeal.
47. In the premises the First Appellant lived in the UK for approximately 10 years before the sponsor arrived – and for even longer before the sponsor married his son (from which date the issue of dependency for the purpose of the application under the Regulations requires to be considered) - and it is acknowledged that hitherto he paid his own rent pursuant to his usual employment as a kitchen fitter (paragraph 17); the Judge found that there was no evidence that the First Appellant had ever got into financial difficulties such that he defaulted on any payments such as rent or utility bills (paragraph 38); the First Appellant was described by a witness as a "*hard-working man*" (paragraph 24); the sponsor did not need to live in the same household as the Appellants having a rent free room available to her in her own father's house – and as such there was no need to consider that she had any obligation to meet the household expenses of the pre-existing family unit that had established itself, and supported itself, well before her arrival in the UK; indeed in this regard the Judge concluded that the sponsor and her husband were not members of the Appellants' household (paragraph 50), and in this context see further the accommodation available to them at the sponsor's father's home (a spare room) in comparison with the necessity to sleep on a sofa bed in the living room at the Appellants' house and make use of wardrobe space in the First Appellant's bedroom whilst keeping their main belongings at the sponsor's father's house (paragraphs 15 and 18). In this latter context necessarily the Judge rejected the credibility of the First Appellant and the witnesses who maintained that they were part of the household.
48. It is adequately clear that the First Appellant, his unmarried partner, and their two children had established themselves as a family unit in rented accommodation that the First Appellant had occupied for approximately a decade, and had been able to support themselves – irrespective of the illegality of their presence in the UK and the

concomitant illegality of any employment taken – without requiring anything by way of assistance from the sponsor. The First Appellant was also able to pay to support his adult son whilst he pursued studies in the UK, and also supported his son when Mr Grygoruk’s immigration status prevented him from working (paragraph 10) – necessarily expenses that the First Appellant no longer has to meet. Beyond a vague assertion as to the increased cost of living there is nothing of substance in any of the evidence before the First-tier Tribunal to suggest that the First Appellant’s family unit was no longer able to meet its essential living costs. Moreover, as the Judge found, the claim as to dependency was expressed in vague and general terms, and supported by only very limited documentary evidence (paragraph 36).

49. In all such circumstances I come to the following conclusions in respect of the First Appellant’s challenge to the decision of the First-tier Tribunal.
50. I find that the first and second grounds of appeal are unarguable, and in themselves would not warrant the grant of permission to appeal. However, the third ground of appeal is arguable and in the circumstances, so far as it is necessary, I grant permission to appeal on this ground. In so doing I do not seek to limit the grant of appeal, and accordingly notwithstanding the reservations as to merit, permission to appeal is granted on all grounds.
51. However, for the reasons explored above, I find that no error of law is revealed in respect of the first two grounds. In so far as there may be a nuanced mistake on the part of the First-tier Tribunal Judge in respect of the testimony of the sponsor as to the method of paying rent, I acknowledge the possibility of a misunderstanding of fact potentially constituting an error of law. However, it seems to me that the Judge was in any event correct to identify that there was a discrepancy in the sponsor’s testimony as to the method of paying rent compared to the testimonies of the First Appellant and his son. In any event I am not persuaded that any such error of law was remotely material to the outcome in the appeal. In my judgement the First-tier Tribunal has reached an entirely sustainable – and frankly far from surprising – conclusion in the appeal.
52. I reject each of the First Appellant’s grounds of challenge

The Second and Third Appellants

53. In respect of the Second and Third Appellants, and further to the discussion above in respect of the grant of permission to appeal, whilst it is common ground that the First-tier Tribunal Judge was in error in finding no jurisdiction, it is also acknowledged by Ms Patyma on their behalves that they cannot succeed in their appeals under the

Regulations. In such circumstances I have given consideration to the possibility of declining to set aside the decision of the First-tier Tribunal pursuant to the discretion under section 12(2) of the Tribunals, Courts and Enforcement Act 2007. However, I consider the better course of action is to set aside the decisions of the First-tier Tribunal Judge in respect of each of the Second and Third Appellants on the basis that there was a material error of law in declining jurisdiction (see **MK v Secretary of State for the Home Department** [2017] EWCA Civ 1755), and proceed to remake the decisions in their appeals.

54. Necessarily in remaking the decisions their appeals are dismissed on the basis of the properly made concession that they are not extended family members within the meaning of the Regulations because of the absence of any relevant prior relationship with the sponsor (regulation 8(2)).

Notice of Decisions

55. The decision of the First-tier Tribunal in respect of the First Appellant contained no material error of law and stands. The appeal of the First Appellant remains dismissed.
56. The decisions of the First-tier Tribunal in respect of the Second and Third Appellants contained material errors of law and are set aside.
57. I remake the decisions in the appeals of the Second and Third Appellants. Each of their appeals is dismissed.
58. No anonymity directions are sought or made.

Signed:

Date: 30 July 2018

Deputy Upper Tribunal Judge I A Lewis