



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: EA/02596/2018

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 13<sup>th</sup> June 2019**

**Decision & Reasons Promulgated  
On 23<sup>rd</sup> July 2019**

**Before**

**UPPER TRIBUNAL JUDGE JACKSON**

**Between**

**ANOOP KAIRON  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**And**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr T Khan of Counsel, instructed by Sahota & Sahota Solicitors

For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellant appeals, with permission, against the decision of First-tier Tribunal Judge Watson promulgated on 6 September 2018, in which the Appellant's appeal against the decision to refuse his application for an EEA Residence Card as the dependent family member of an EEA national dated 7 March 2018 was dismissed.
2. The Appellant is a national of India, born on 10 January 1987, who first entered the United Kingdom on 13 September 2011 as the dependent of

his wife, who was in the United Kingdom as a Tier 4 (General) Student, with leave to remain as such until 2015. The Appellant and his wife had a son 4 April 2013 in the United Kingdom. In 2016, the Appellant's father (the "EEA Sponsor"), a German national, moved to the United Kingdom, started work and lived together with the Appellant, his wife and child.

3. The Respondent refused the application the basis that it was not accepted that the Appellant resided with the EEA Sponsor, noted that the documents provided were nearly 2 years old and there was insufficient evidence of financial support to meet the Appellant's essential needs; such that it was not accepted that the Appellant was dependent on his EEA sponsor.
4. Judge Watson dismissed the appeal in a decision promulgated on 6 September 2018 on the basis that the Appellant had not shown that he was the dependent family member of the EEA Sponsor. The legal position was set out by the First-tier Tribunal in paragraphs 4 to 7 of the decision, within which it is recognised that the sole issue in this appeal was dependency. In relation to that, the following was said:

*"5. The appellant has to establish dependency upon his sponsor as at the date of the hearing. This must be a genuine financial dependency and not a contrived one for the purposes of obtaining immigration status. The appellant must show that he needed and received material support from the EEA national in order to meet his basic needs.*

*6. The appellant had to show that he receives financial support from his father, that the support is material and that the support is for the basic necessities of life. It is not necessarily relevant that there are alternative sources of support available either in the country of origin or in the UK, but such may be relevant to the findings of fact on the genuine nature of the claimed dependency."*

5. The First-tier Tribunal summarised the documentary and oral evidence before it in paragraphs 14 to 35 of the decision, which included commentary on the consistency of the evidence, whether it supported a finding of dependency or not and as to the credibility of the Appellant and the Sponsor. The findings of fact then followed in paragraph 36 and onwards, with the main findings and reasons as follows:

*"36. I find that the appellant has not shown on the balance of probabilities that he was dependent upon the sponsor for the daily necessities of life whilst in India or in the UK. There has been little evidence of money sent out prior to the date of the application, and the amounts sent have been irregular and not sufficient to be the sole means of support as claimed. The sponsor has given oral evidence inconsistent with the information provided in the form by the appellant himself and inconsistent with the documents provided. The sponsor states*

*that he has visited India in 2016, yet the financial information provided by the employer does not reflect a two-month period of absence and the money going into the account remains the same. The appellant was previously supporting himself and his family from wages and confirmed that he was making savings up to when his visa was curtailed. It is only after this point that the sponsor arrives in the UK and takes, according to him, a job paying considerably less than he was earning in Germany. I find that the claimed support is entirely contrived to found a basis of stay in the UK. I find on the balance of probabilities that the appellant is able and has supported himself throughout recent years. I find that the evidence given by the sponsor and appellant was so inconsistent as to the sponsor's working arrangements that I cannot find a balance of probabilities that the sponsor is earning the money claimed. I further find that the documented transfer of payments made in 2018 was contrived to support the appellants application and is not evidence of genuine dependency but was provided to gain an immigration advantage. This application has nothing to do with enabling the freedom of movement and labour of an EEA citizen, namely Mr M Kairon who moved to the UK after his son and his family to join them when they were already in the UK overstaying a visa.*

*37. I find that the family lived together at ... But that this is not due to the appellants dependency needs. This is a family arrangement and no doubt is of benefit to all of them. There is however no dependency apart from a contrived one for immigration reasons."*

### **The appeal**

6. The Appellant appeals on the following grounds. First, that the First-tier Tribunal applied the wrong test for dependency. Secondly, that there was improper consideration of the evidence by the First-tier Tribunal. Thirdly, the decision of the First-tier Tribunal contained factual mistakes and inconsistent findings. Fourthly, that the First-tier Tribunal included in its reasons, matters which were not put to the Appellant and/or the Sponsor which was procedurally unfair. Finally, there were problems with interpretation of the Sponsor's evidence which were raised at the time with First-tier Tribunal, but not properly taken into account when adverse credibility findings were made against the Sponsor.
7. On behalf of the Appellant, Counsel relied on the written grounds of appeal, amplifying them in oral submissions and focusing on the correct legal test for dependency.
8. On behalf of the Appellant, it was submitted that the First-tier Tribunal erred in law in the test applied for dependency for the purposes of obtaining an EEA Residence Card. First, the First-tier Tribunal considered only financial dependency and failed in accordance with Jia v

Migrationsverket C-1/05 [2007] QB 545 and Reyes (EEA Regs: dependency) [2013] UKUT 00314 (IAC) to make a holistic assessment, including financial, physical and social matters to establish a genuine relationship of dependency.

9. Secondly, the First-tier Tribunal erred in considering whether there was dependency in the past, including when the Appellant was in India and when the EEA Sponsor was in Germany, whereas the test is only on present dependency.
10. Thirdly, the First-tier Tribunal required the Appellant to show that he both needed and received material support from the EEA Sponsor and considered that alternative sources of support may be relevant to findings as to whether there was a genuine dependency not. This applies a two-pronged approach, contrary to the case law, which requires a single question of whether the Appellant is in receipt of financial support to meet his essential needs. It is not necessary in that assessment to determine why a person needs financial support, or whether there are alternative means of support and it is not necessary for a person to be solely financially dependent on an EEA national.
11. It was accepted that the First-tier Tribunal's requirement in paragraph 6 of the decision that support must be material, was not a misdirection in law, simply reflecting that support must be more than de minimis.
12. Overall, it was submitted on behalf of the Appellant that the approach of the First-tier Tribunal to the issue of dependency deprived him of a fair and balanced assessment of the evidence. This included a failure to approach the matter holistically and also a failure to take into account the evidence that the EEA Sponsor paid for accommodation, utilities and food for the whole family, in addition to giving the Appellant direct financial support, primarily in the form of cash.
13. As to claimed factual errors in the decision of the First-tier Tribunal, it was submitted that there was simply a miscalculation in paragraph 18 of the decision as the Sponsor was paid on a four weekly, not monthly basis, such that his total earnings did reflect his claimed income. In paragraph 13 of the decision, the Sponsor was not asked about whether he was given holiday pay whilst in India in 2016, to account for continuing payments during this period. In relation to inconsistency, the findings of the First-tier Tribunal that the family all live together, with the EEA Sponsor providing the accommodation, itself shows a situation of dependency meeting essential needs of the Appellant.
14. Finally, Counsel for the Appellant maintained the ground of appeal that there were interpretation difficulties during the EEA Sponsor's evidence which were not properly taken into account by the First-tier Tribunal when making adverse credibility findings but accepted that no statement had been made by the Counsel appearing before the First-tier Tribunal as this was thought to be unnecessary. Instead, paragraph 21 of the written

grounds of appeal was relied upon, which claimed that it became clear during the Sponsor's evidence that what the Sponsor was saying was not being correctly translated from Punjabi into English and that concerns were immediately raised with the judge. It is said that essential parts of this EEA Sponsor's evidence was either being completely left out or misinterpreted it is that some attempts were made to rectify position but it was all unsatisfactory and submissions had to be made asking for allowance to be made for the fact the evidence had been interpreted poorly.

15. On behalf of the Respondent, Mr Tufan relied upon the Court of Appeal's decision in Lim v Entry Clearance Officer, Manila [2015] EWCA Civ 1383 as to the correct test for dependency, set out in paragraph 32 as follows:

*"In my judgement, 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. ..."*

16. In the present appeal, it was submitted that financial support had been given to the Appellant, but it was not necessary to meet his basic needs and therefore the appeal was bound to fail. The First-tier Tribunal made clear findings that the Appellant is able to support himself as he has done in previous years and adverse credibility findings were made throughout the decision. For example, there was a discrepancy in the evidence as to the Sponsor's work in the United Kingdom (paragraph 15); that the total wages paid did not equate to claimed monthly earnings (paragraph 18); that there was no explanation for a sudden decrease in rent paid (paragraph 19); that the bank statements showed normal usage of the account while the Appellant claimed to be in India (paragraph 21); that the Appellant had declared himself eligible to vote in the United Kingdom (paragraph 22); the lack of evidence of any long-standing financial dependency (paragraph 25); and that the Appellant had outstanding debts with the NHS (paragraph 27).
17. However, applying the test in Lim, Mr Tufan accepted that if there was evidence of financial dependency, it would be accepted that the Appellant meets the requirements of the Immigration (European Economic Area) Regulations 2016, such that the decision of the First-tier Tribunal should be set aside and the decision could be remade on the papers. On behalf of the Appellant, it was submitted that the appeal may need to be remitted to the First-tier Tribunal as further evidence may be necessary to determine the appeal if the decision is set aside.

## **Findings and reasons**

18. I find that the First-tier Tribunal materially erred in law in its approach to the question of dependency for the purposes of Regulation 7 of the Immigration (European Economic Area) Regulations 2016 both in the self-direction given as to the legal position in paragraphs 5 and 6 of the decision, and apparent throughout the decision in terms of the findings made in relation to the sole issue of dependency. This is particularly so where there has been no allegation by the Respondent that there has been an abuse of rights, nor any lack of genuineness of dependency which could be relevant to the issue to be determined.
19. The approach of the First-tier Tribunal to include in its determination of the primary issue reference to past support and dependency, to exclude wider considerations of the nature of the relationship between the Appellant and the EEA Sponsor and to require the Appellant to identify a need for financial support which could not otherwise be met (as it found it had been in the past through employment and savings), in particular by reference to previous self-support in the United Kingdom were all errors of law which are material to the outcome of the appeal. The correct legal test is summarised succinctly in paragraph 32 of Lim, and in detail in Reyes, as set out above, and it is clear that that was not the approach taken by the First-tier Tribunal in the present appeal. For these reasons, it is necessary to set aside the decision of the First-tier Tribunal and for the appeal to be determined afresh in accordance with the correct test.
20. As to the grounds of appeal in relation to claimed factual errors, these points add little of substance to the primary ground of appeal as to the approach in law to the sole issue in this appeal, that of dependency. The claimed factual errors only go to the assessment of credibility of the EEA Sponsor in the present case, which is not ultimately material to the outcome of the appeal if the correct legal test is applied, particularly given the acceptance recorded at the outset of the decision of the First-tier Tribunal that the EEA Sponsor is a qualified person under Regulation 6 of the Immigration (European Economic Area) Regulations 2016. The same response is equally applicable to the grounds of appeal in relation to procedural fairness and reliance upon matters not put to the witnesses.
21. As to the grounds of appeal in relation to inconsistent findings of fact, primarily the finding in relation to the family living together, that is effectively part and parcel of the error of law already identified as to the correct approach to the issue of dependency and is a factual finding which should have been taken into account if the correct legal test had been applied.
22. In relation to the final ground of appeal about interpretation, I find no error of law in the decision of the First-tier Tribunal. In paragraph 3 of the decision under appeal, it is recorded that at one point in hearing the representative raised an issue with the interpretation. The answer was

repeated and the representative confirmed at the end of the hearing that she had no other issues to raise with regard to interpretation. The record of proceedings available on the file is consistent with what is contained in the decision, confirming that it was only one point of concern in relation to interpretation.

23. The matters raised in the written grounds of appeal are not consistent with the record of proceedings decision, nor are they supported, as would be expected and required in support of such an allegation, by a written witness statement by Counsel appearing for the Appellant before the First-tier Tribunal, see in particular BW (witness statements by advocates) Afghanistan [2014] UKUT 00568 (IAC) and Ortega (remittal; bias; parental relationship) [2018] UKUT 298.
24. In these circumstances, the written grounds of appeal are not made out and the sole instance of concern over interpretation was resolved during the course of the oral hearing. There is therefore no error of law in the adverse credibility findings reached by the First-tier Tribunal on the basis of oral evidence of the EEA Sponsor when no further instances of problems with interpretation which are said to have unfairly contributed to the findings have been properly identified. In any event, the outcome of the appeal does not turn on this point.
25. As above, it is necessary to set aside the decision of the First-tier Tribunal because it involved the making of a material error of law in the assessment of dependency. Although it was suggested by Counsel for the Appellant that further evidence may be required to remake the decision, there was no specific submission about what further evidence or findings of fact would be required to remake the decision in accordance with the correct legal test.
26. Contained in the bundle before the First-tier Tribunal were detailed written statements from the Appellant, his wife and the EEA Sponsor and there is a record of proceedings of the oral evidence of both the Appellant and the EEA Sponsor; together with an extensive bundle of documents containing a tenancy agreement, utility and other bills, bank statements, payslips and letters in relation to the EEA Sponsor's employment and various other correspondence addressed to the Appellant his wife and the EEA Sponsor. The evidence is set out in some detail in paragraphs 14 to 34 of the decision of the First-tier Tribunal and there is no further evidence required to remake the decision on appeal, either documentary or witness evidence. I therefore go on to remake the decision under appeal as follows.
27. As above, the sole issue in this appeal is whether the Appellant is dependent on his EEA Sponsor, which is a factual question, as set out in Lim. The question is whether the Appellant is in fact in a position to support himself and on the facts of this case I find that he is not. There is no suggestion by the Respondent or in the evidence before the Tribunal that the Appellant, or his wife, has any current (or in fact has recently had)

source of income available to support themselves for their essential daily needs. Although it is not necessary to consider the reason for this or whether they could support themselves, it is clear from the facts of the case that they are unable to do so because they have no permission to work in the United Kingdom following the curtailment of leave to remain in 2015.

28. The Appellant, his wife and son are living together with the EEA Sponsor in the United Kingdom and the documentary evidence shows that it is the EEA Sponsor who is primarily financially responsible for the accommodation and daily living expenses. The EEA Sponsor pays rent for the property on a monthly basis and it is irrelevant for the purposes of this appeal that the rent payments have reduced from the initial tenancy agreement. The EEA Sponsor is also responsible for utility bills at the accommodation. There are bills in the Appellant's name for virgin media and sky, although it is the EEA Sponsor's evidence that he provides the money for these bills to be paid out of the Appellant's account. In any event, the Appellant does not need to be solely financially dependent on the EEA Sponsor and even if the Appellant was paying for some of the bills at the property, that would not detract from or alter a finding of financial support being given by the EEA Sponsor for the Appellant's essential needs.
29. In addition, the EEA Sponsor's bank statements also show payments for other basic necessities of life, including food, sundry items, clothing and items for a young child. The bank statements also show transfers of money to the Appellant from the EEA Sponsor and a history previously of transfers of money to the Appellant's wife from the EEA Sponsor.
30. The written evidence from the Appellant, his wife and the EEA Sponsor detail a close relationship between all of the family members, including the young child, the nature of which has not been directly or substantively challenged by the Respondent.
31. In all of the circumstances, considering the evidence as a whole I find that the Appellant has established, on the balance of probabilities, that he is the dependent family member of the EEA Sponsor. The Appellant is presently unable to support himself and is in receipt of financial support, both directly and indirectly through the provision of accommodation, food, clothing and so on, for his and his family's basic needs. The Respondent has not submitted that there is any abuse of rights in this case and it is accepted that the EEA Sponsor is a qualified person who is genuinely exercising treaty rights in the United Kingdom. It is not therefore relevant to question why the Appellant cannot support himself from his own resources, nor was it necessary to consider whether the Appellant has consistently been dependent on the EEA Sponsor in the past or not. For these reasons I allow the Appellant's appeal as he satisfies the requirements of Regulation 7 of the Immigration (European Economic Area) Regulations 2016 and therefore the requirements for an EEA Residence Card as a dependent family member.



**Notice of Decision**

The making of the decision of the First-tier Tribunal did involve the making of a material error of law. As such it is necessary to set aside the decision.

I set aside the decision of the First-tier Tribunal and remake it as follows.

The appeal is allowed under the Immigration (European Economic Area) Regulations 2016.

No anonymity direction is made.

Signed



Date

15<sup>th</sup> July 2019

Upper Tribunal Judge Jackson