



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/11192/2016

THE IMMIGRATION ACTS

Heard at Field House
On 12th November 2019

Decision & Reasons Promulgated
On 20th November 2019

Before

UPPER TRIBUNAL JUDGE COKER

Between

ROSALIO POS GARCIA

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Childs, instructed by MPB Solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant was granted permission to appeal on the grounds that it was arguable First-tier Tribunal Judge Herlihy erred in law in her decision promulgated on 17th April 2019 dismissing his appeal against a decision of the respondent refusing, on 14th March 2015, to issue him with a residence card pursuant to Regulation 8 Immigration (European Economic Area) Regulations 2006. The respondent had concluded the appellant was not a dependant and/or member of the household of an EEA sponsor and nor was she satisfied that the appellant was dependant on the EEA sponsor immediately prior to entering the UK, or that the EEA sponsor was a

Qualified person. Before the First-tier Tribunal the respondent accepted the sponsor was a Qualifying Person and that the appellant was residing with her. The appellant confirmed he was not relying on a claim that he had ever been a member of the sponsor's household outside the UK.

Background

2. The appellant is a citizen of Guatemala, born 4th June 1999. He lived with his mother, and after her marriage to his stepfather in 2002, with them and his two half siblings in Guatemala until aged 16 (2015). In 2004 the appellant's aunt, his sponsor, moved to Spain. On 9th July 2011 she moved to the UK and began working in the UK in June 2012; she acquired permanent residence in June 2017. The appellant entered the UK as a visitor on 9th February 2016. His first application for a residence card was refused in January 2016. His second application was refused on 2nd September 2016. The substantive appeal against that decision eventually came before the First-tier Tribunal on 29th March 2019.
3. The First-tier Tribunal judge made findings as follows:
 - 6.3. ...in determining whether a family member is dependent it is necessary to establish if an applicant needs the financial support from the EEA sponsor in order to meet his essential needs and is not directed at achieving a certain level of income. ...It is claimed by the appellant and the sponsor that he was dependent upon the sponsor to meet all his essential needs because his mother and stepfather could not afford to support him together with his half siblings.
....
 - 6.10. I find that there is evidence of financial support towards the appellant's family but I am not satisfied that the evidence before me establishes that the monies remitted by the sponsor was sent for the purpose of meeting the Appellant's essential needs. At the time the money was remitted to the mother and I do not find it credible that it can be claimed that this money was remitted exclusively for the benefit of the Appellant and not for the benefit of all the appellant's family members. If the sponsor was genuinely remitting money's to meet the Appellant's essential needs it is not credible that the level of support fell so dramatically in 2014 when she sent only £200. There is no objective evidence to show that funds remitted were expended on the Appellant. I note that there is evidence that the Appellant met his tuition fees but there is no evidence that these were funded by the sponsor.
 - 6.11. The case law clearly shows that it is not enough simply to show that financial support is in fact provided by the EU citizen to the family member but that the family member must establish that he needs this support from his or her relatives in order to meet his or her basic needs. There was no evidence before me as to what level of income the Appellant required to meet his essential needs. Obviously as a minor the Appellant could not meet his own essential needs but at the time he was living with his family supported by his stepfather who was working to support the entire family and I find that the Appellant's basic needs would have been met as where [sic] those of other members of his family by his stepfather. I do not find it credible as claimed that the sponsor was only meeting the basic needs of the Appellant and not providing additional financial support to the entire family.
 - 6.12. I also note that in the oral evidence from the Appellant and his aunt that it was acknowledged that the sponsor sometimes sends money to the Appellant's mother for the benefit of other family members including her mother; the sponsor also said that she had sent money for expenses and that the money was to buy things for the Appellant and so he could be happy. I am satisfied that the sponsor

was providing financial assistance to the Appellant's family in Guatemala and also assisting other members of her family but I do not find that the Appellant was dependant in Guatemala on his aunt, the EEA national to meet all his financial needs.

- 6.13. I am not satisfied that this establishes that the appellant was financially dependent upon the EEA sponsor for all his essential needs before the Appellant came to the United Kingdom. In considering the totality of the evidence and I am not satisfied that the Appellant has established that he is a dependent of the EEA national pursuant to Regulation 8 of the EEA Regulations.
4. Permission to appeal was sought and granted on the grounds that it was arguable the First-tier Tribunal judge had erred in law by finding that the appellant "was required to be financially dependent upon the EEA national for all his essential needs.... there is no requirement as to the minimum amount of material support provided so long as such dependency is genuine." The appellant submitted that the judge's finding that there was no evidence before her as to the level of income required by the appellant to meet his essential needs was erroneous given the evidence that the family were living rent free, his food was shared with the family but he depended upon the sponsor for his medical and school fees. The appellant also sought permission on the grounds that it was arguable, in the alternative, that dependency can be of choice rather than necessity and the reason for dependency is irrelevant; the reason the sponsor chose the appellant as the recipient of funds was irrelevant.

Discussion

5. Ms Childs submission that the judge applied the incorrect test in that she sought evidence that the totality of the appellant's essential needs were being met by his aunt is misconceived. Although the judge referred to "all" essential needs in 6.12, this was a summary of her consideration. In the earlier paragraphs of her findings it is clear that she is not requiring the totality of needs to be met by the sponsor. She refers (6.3) to whether that financial support provided by the sponsor was in order to meet his financial needs. The use of the word "all" in the manner suggested by Ms Childs is not reflected in the analysis by the judge of the evidence before her. The judge accepts that the sponsor is providing some financial assistance but makes clear that there is a dearth of evidence that stepfather's income was such that the appellant's needs whether partially or in full could not be met by him or were not being met by him. She draws attention to the funds sent to Guatemala over the years and makes a finding which is open to her that the sums sent in February 2015 were to enable the appellant to travel to the UK. She draws attention to the very low level of funds sent in 2014 and makes a finding that was open to her that if the sponsor was remitting money for the appellant's essential needs it was not credible that the sums sent would fall so dramatically. The judge accepts that the appellant's school fees were paid but does not accept they were paid by the sponsor. My attention was not drawn to the date of payment of the school fees and the date of remittance which might have provided some support for the submission made. Objection is made by Ms Childs to the judge stating that there was "no evidence" that the school fees were funded by the sponsor because, she submits, the sponsor gave evidence to that effect. The judge

does not in terms assert the sponsor is lying; she refers to the sponsor's evidence but refers to the lack of objective evidence. The decision has to be read as a whole, not taking sentences out of context.

6. Ms Childs submits that the factual findings made by the judge are tainted by her misunderstanding of the test. I do not agree. The judge has considered the remittances carefully in the context of the sponsor's evidence and to whom they were sent. There is a lack of evidence of the stepfather's income and what the other remittances were spent on if, as claimed, they were additional to that sent for the appellant's needs. The evidence that the family in Guatemala do not pay rent does not amount to evidence that there was evidence as to the level of income required to meet the appellant's needs. If anything, that no rent is paid and there is no evidence of the stepfather's income bolsters the findings of the judge that the sponsor's remittances were not utilised to assist in the meeting of the appellant's needs. It cannot be successfully made out that the judge was considering a scenario that required the totality of funds remitted were expended on the appellant's needs. Nor, when reading the decision as a whole can it be concluded that the judge was under the misapprehension that the whole of the appellant's needs were to be met through the sponsor's remittances.

7. Paragraph 32 of *Lim v ECO (Manila)* [2015] EWCA Civ 1383 reads as follows:

In my judgment, the critical question is whether the claimant is in fact in a position to support himself or not, and *Reyes* now makes that clear beyond doubt, in my view. That is a simple matter of fact. If he can support himself, there is no dependency, even if he is given financial material support by the EU citizen. Those additional resources are not necessary to enable him to meet his basic needs. If, on the other hand, he cannot support himself from his own resources, the court will not ask why that is the case, save perhaps where there is an abuse of rights. The fact that he chooses not to get a job and become self-supporting is irrelevant. It follows that on the facts of this case, there was no dependency. The appellant had the funds to support herself. She was financially independent and did not need the additional resources for the purpose of meeting her basic needs.

8. Ms Childs submits that the question of choice, in the alternative, is relevant. Whilst choice is indeed relevant (see *Lim*) as paragraph 32 of *Lim* makes plain, if a person can support himself there is no dependency even if he is given financial material support by the union citizen. If a person cannot support himself from his own resources, the decision maker does not ask the reason for that save where there is an abuse of rights. In this case, the appellant is a minor but there was inadequate evidence to support the proposition that the appellant's mother and step-father were not supporting him or that a decision had been taken that the step-father's income (whatever that is) was not going to be used for the appellant.
9. The evidence before the judge was insufficient to support the claim that the appellant was dependent upon the sponsor for any or all of his needs to be met. The evidence before the First-tier Tribunal judge did not support the proposition that were it not for the sponsor, the appellant's schooling and medical fees would not or could not be met or that the appellant's mother

and stepfather had taken a decision that despite having sufficient funds they would not provide them. The evidence as to what other family money there was and what the family expenditure was in relation to that income was not there.

10. The burden is on the appellant and he did not show, as found by the First-tier Tribunal judge, that the sponsor's remittances were required or that the remittances went to meeting his needs.

Conclusions:

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

I do not set aside the decision.

Date 18th November 2019

A handwritten signature in black ink, appearing to read 'Jme Coker', written in a cursive style.

Upper Tribunal Judge Coker