



Neutral Citation Number: [2022] EWCA Civ 1054

Case No: CA-2022-000082

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM Immigration and Asylum Chamber Upper Tribunal
Upper Tribunal Judge Hanson
EA/06442/2019

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/07/2022

Before :

LORD JUSTICE SINGH
LORD JUSTICE MALES
and
LORD JUSTICE BIRSS

Between :

SHAWINDER SINGH	<u>Appellant</u>
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	<u>Respondent</u>

Mr Gordon Lee and Ms Eva Doerr (instructed by MRG Solicitors) for the Appellant
Mr Tom Tabori (instructed by the Treasury Solicitor) for the Respondent

Hearing dates: 5 July 2022

Approved Judgment

Lord Justice Birss :

1. Before 2021, relatives of a European Economic Area (EEA) national resident in the UK could apply for an EEA residence card, which enabled them to live and work in the UK for five years. There were several criteria to be fulfilled. One of those criteria was dependency on the EEA national to meet their essential needs. The question on this appeal concerns that criterion, and the basis on which it is to be assessed.
2. The appellant is a citizen of India, born on 3 February 1991 and resident in the UK since June 2012. The respondent was responsible for considering applications for EEA Residence Cards in accordance with Regulation 8 of the Immigration (European Economic Area) Regulations 2016 until they were replaced with EU Settlement Scheme cards. EEA Residence Cards enabled non-EEA nationals living in the UK as family members of a resident EEA national to live and work in the UK for up to five years. The EEA national living in the UK would act as the applicant's sponsor; in this case, the appellant's sponsor was his uncle.
3. The case arises out of the respondent's refusal to grant an EEA Residence Card to the appellant on 15 November 2019, that being the fifth such unsuccessful application made by the appellant since his Tier 4 Student visa expired in December 2014. The reason given for the refusal was that the appellant had failed to provide adequate evidence that he was dependent upon his uncle prior to entering the UK.

Appeal to First Tier Tribunal ('FTT')

4. The appellant's appeal against the respondent's refusal was heard by the FTT on 28 September 2020. The appellant's primary submission before the FTT was that the oral evidence heard during the hearing was sufficient for the appellant to demonstrate his dependency on his uncle. The appellant's case was about what had taken place in India in 2009-2012. That was the period just before the appellant entered the UK, when he was between about 18 and 21 years old. The particular focus of the appellant's case was that he had been dependent on his uncle for food and accommodation (see FTT paragraph 9). The respondent submitted that the evidence was insufficient to demonstrate dependency both immediately before, and after, the appellant entered the UK.
5. The FTT dismissed the appellant's appeal on 12 October 2020. Their findings were as follows:

“27. The land owned by the appellant's father was worked by him and the appellant to generate income and provided funds to maintain the family. The income was supplemented by the sponsor but there is insufficient evidence to demonstrate there was any meaningful dependency on the money by the appellant. Any additional benefit to the appellant was solely in respect of supporting his education.

28. We are not satisfied from the evidence placed before us that, on a balance of probabilities, the appellant was dependent on his sponsor for financial support in respect of his essential needs nor that he was part of the sponsor's household in India.”

6. Although I will come back to this below, it is worth stating at this stage that what the FTT is doing in these paragraphs is rejecting on the evidence the case advanced to them, focussed as it was on dependency for essential needs like food and accommodation. The last sentence of paragraph 27 draws a contrast with meaningful dependency and something else, which the FTT accepted had taken place, which was that some money from the uncle in this period had supported the appellant's education. There was no suggestion made to the FTT that whatever that education had been, his uncle's support for it demonstrated dependency or, to put it another way, no suggestion that this education, whatever it was, amounted to an essential need. One would have to speculate, but the appellant's age at the relevant time might well explain why no suggestion of that kind was made to the FTT.
7. Nevertheless the appellant then sought and obtained permission from the FTT to appeal to the Upper Tribunal, on the basis that there was an arguable misdirection in law over whether the education formed part of an Applicant's essential needs.

Appeal to Upper Tribunal

8. The Upper Tribunal found the FTT had made no material error of law, and accordingly dismissed the appeal on 18 March 2021. The key part of the decision is as follows:

“25. The core finding of the Panel is that the appellant had not established that he [*required*] the material support of the EEA national sponsor in order to meet his essential needs, which included his education. Indeed, as the reason given by the appellant for such support was due to the love his uncle felt for him the Panel finding that it had not been established on the evidence that the appellant needed the financial support of the EEA national in order to meet his essential needs is a finding within the range of those reasonably available to the Panel.”

[an obvious typo is corrected]

9. The Upper Tribunal also addressed a point on whether essential needs and dependency are to be determined on a 'global' or 'singular' basis. The former was described as requiring “a person to establish that such assistance is required to meet all of their needs as a whole”, and the latter as only needing the individual “to show they have received funds from the EEA national to meet one of their essential needs... indicating a singular requirement”. The UT found that this was the core question on the appeal and that the FTT correctly applied a global approach (paragraphs 23-24).
10. Permission to appeal to this court was refused by the UT. However, permission was later granted by the Court of Appeal on two grounds:
 - i) whether or not education is an essential need for the purpose of dependency; and
 - ii) whether or not a 'global' or 'singular' approach is to be applied in assessing dependency.

Submissions on this appeal

11. Both the appellant and respondent agreed that, in principle, education may or may not be an essential need. It is capable of being one but that is not necessarily so.
12. On the facts of the present case, however, the appellant submitted that the FTT failed to grapple with the question of whether education constituted part of the appellant's essential needs, or his dependency in relation to it, and the Upper Tribunal accordingly erred in upholding that decision. The respondent argued that this ground of appeal wrongly targets the question of 'essential needs', rather than dependency. Focusing on the latter, the respondent contends that the appellant failed to show specifically why the education he received was an essential need, or how he was dependent on his sponsor in relation to it, and this is why it was described by the FTT as an 'additional benefit'.
13. In relation to the second ground of appeal, by the time of the hearing, the appellant and respondent were in agreement that the global and singular tests are in fact the same, and the former will therefore typically subsume the latter. The respondent further added that the global test better reflects the realities of life and submitted that the Upper Tribunal should not have described the choice between tests as a 'core matter' because it had not actually fallen for consideration in the FTT.

Requirements when applying for an EEA Residence card

14. As I have already explained, it is no longer possible to apply for an EEA residence card. However, what follows is the legislation in force at the time when the appellant made his initial application.
15. The origin of EEA residence cards lies with Directive 2004/38/EC ('the Directive'). Article 3(2)(a) of the Directive reads:

“2. Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:

(a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;

...

The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people.”

16. Directive 2004/38/EC was transposed in the UK at the material time by the Immigration (European Economic Area) Regulations 2016. Of particular relevance in this case is Regulation 8 which, on the date the appellant's application was determined, read:

“(1) In these Regulations “extended family member” means a person who is not a family member of an EEA national under regulation 7(1)(a), (b) or (c) and who satisfies a condition in paragraph (1A), (2), (3), (4) or (5).

(2) The condition in this paragraph is that the person is—

(a) a relative of an EEA national; and

(b) residing in a country other than the United Kingdom and is dependent upon the EEA national or is a member of the EEA national’s household; and either—

(i) is accompanying the EEA national to the United Kingdom or wants to join the EEA national in the United Kingdom; or

(ii) has joined the EEA national in the United Kingdom and continues to be dependent upon the EEA national, or to be a member of the EEA national’s household.”

17. The timing and meaning of ‘dependency’ in Article 3 of the Directive has been before the Court of Justice of the European Union (CJEU). In **Rahman** [2012] CJEU Case-83/11, the Grand Chamber ruled on the former, holding that:

“35. ... the situation of dependence must exist in the country from which the family member concerned comes, at the very least at the time when he applies to join the Union citizen on whom he is dependent”.

18. **Jia v Migrationsverket** [2007] CJEU Case C-1/05 examined the meaning of that ‘dependence’ under the Directive’s predecessor (Directive 73/148/EEC) and held that the term means that material support is needed to meet the applicant’s ‘essential needs’ in their state of origin, or in the state from which they had come at the time when they applied to join the EU national. The evidence required to show such dependency does not need to take any prescribed form:

“43....Proof of the need for material support may be adduced by any appropriate means, while a mere undertaking from the Community national or his or her spouse to support the family members concerned need not be regarded as establishing the existence of the family members’ situation of real dependence.”

19. In this jurisdiction the Court of Appeal in **ECO Manilla v Lim** [2015] EWCA Civ 1383 held that dependency will not be established simply by providing financial support to a family member who can support themselves. Similar observations were made in **SM (India) v ECO (Mumbai)** [2009] EWCA Civ 1426, where this court said that:

“24. ...the fact some financial provision was made and that [the applicants] were accommodated in the family home would not be sufficient in themselves to establish dependency for the purposes of the Directive.”

20. As I explained above, the present appeal concerns the FTT's decision that the appellant had failed to prove his dependency on his sponsor regarding his essential needs, including his education.

21. Finally, on the nature of the question the court has to answer when assessing these matters, I refer to two short passages, starting with the judgment of Lord Justice Sullivan in *SM (India) v ECO (Mumbai)* as follows:

“28. In reality, people's circumstances, their lives and their lifestyles are not always quite so straightforward, and any attempt to draw a bright line between determining whether an applicant has a need for material support to meet his “essential needs” and where there is recourse to support, it being unnecessary to determine the reasons for that recourse, is best considered not on the basis of hypothetical examples but on a case-by-case basis, with the benefit of clear and sufficient factual findings by the AIT.”

22. This reflects the CJEU's words in *Rahman*:

“23. It is incumbent upon the competent authority, when undertaking that examination of the applicant's personal circumstances, to take account of the various factors that may be relevant in the particular case.”

Ground 1 - Education as an essential need

23. The question whether education is in general capable of constituting an essential need was not before the FTT nor is it in issue before us now, given that both parties agree that education is, in principle, capable of constituting an essential need but may not always be so. I agree. This is not the occasion to conduct a wide ranging examination of the position of education in the assessment of essential needs.

24. The true issue arising from the first ground of appeal is in fact a narrow question whether the FTT erred, having regard to their finding that the appellant's uncle had provided some support for the appellant's education, in holding that the appellant was not dependent on the respondent to meet his essential needs.

25. In the FTT's conclusion at paragraph 27 (quoted in full above) the term “additional benefit” is used to characterise the uncle's support for the appellant's education. The appellant's case on this finding came down to the following. The FTT had found as a fact that the appellant's uncle had supported the appellant's education financially. Education was (or at least could be) an essential need. Paragraph 27 was unclear but seemed to be a finding that there was indeed support for the essential need of education but it was erroneously discounted either as an additional benefit or because education was not recognised as an essential need. The respondent submitted that the term “additional benefit” meant that the FTT was finding there was no dependency relating to education on the uncle, rather than making any finding about the essential nature (or not) of education. The respondent also submitted that it would make no difference if the FTT had in fact decided that the appellant's education was not an ‘essential need’, because only the question of dependency was before the FTT.

26. I have explained paragraph 27 of the FTT's decision already. The puzzles raised by the arguments on appeal only arise if one forgets that the appellant never suggested to the FTT that the education he was undertaking in the relevant period was part of his essential needs. The point on which the appellant failed before the FTT was to establish dependency in relation to food and accommodation. Those were the essential needs relied on. In that context the reference in paragraph 27 to the support for the appellant's education as an additional benefit and irrelevant, makes sense.
27. The real question at the heart of the first ground of appeal is whether the FTT erred in law in reaching its decision. There is no error of that (or any other) kind. The FTT correctly identified the applicable law, rightly understood the relevant burden and standard of proof, assessed the evidence and came to appropriate conclusions on the primary facts, and reached a rational conclusion on the issues overall, plainly open on all the material. This ground must be dismissed.

Ground 2 - a global or singular assessment

28. The second ground of appeal simply does not arise in this case, nor did it in fact arise on appeal from the FTT to the UT in the first place, although I do not blame the UT at all for addressing it given the way the matter had been presented.
29. The UT's decision on this is at paragraphs 23-24. I do not believe the approach in those paragraphs is a helpful way of looking at the matter and they should not be followed in future. The relevant legal principles are those set out in the passage I have quoted above from *Rahman* at paragraph 23, further explained by Sullivan LJ in *SM (India) v ECO (Mumbai)* at paragraph 28. To the extent paragraphs 23 and 24 are in accordance with those principles then they add nothing, while if they differ then they are wrong.

Conclusion

30. I would dismiss this appeal.

Lord Justice Males:

31. I agree.

Lord Justice Singh:

32. I also agree.