



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

Appeal Number: IA/43816/2013

THE IMMIGRATION ACTS

Heard at Field House

On 24 September 2014

**Determination
Promulgated**

On 6 October 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

**MISS SHAMENA MUTHUTHAMBY
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Professor Rees, Counsel instructed by Jein Solicitors
For the Respondent: Mr Tufan, Specialist Appeals Team

DETERMINATION AND REASONS

1. The appellant appeals to the Upper Tribunal from the decision of the First-tier Tribunal dismissing her appeal against the decision by the Secretary of State to refuse to issue her with a residence card as confirmation of her

right to reside in the United Kingdom as an extended family member of an EEA national exercising treaty rights here. The First-tier Tribunal did not make an anonymity order, and I do not consider that such an order is required for these proceedings in the Upper Tribunal.

2. The appellant is a national of Sri Lanka, whose date of birth is 15 December 1983. In her application form, she said that her EEA national sponsor was her “cousin brother”, a French national. He had been employed by Compass Group UK & Ireland Ltd since March 2013.
3. On 15 October 2013 the Secretary of State gave her reasons for refusing the application, which was made on 10 August 2013. She had failed to show that she was dependent upon her sponsor prior to her arrival in the United Kingdom. On 11 August 2011 she had been granted leave to remain as a Tier 1 (Post-Study Work) Migrant. Her sponsor had been issued with a registration certificate on 19 May 2006. This showed that she did not enter the UK with her sponsor or soon after. That meant she was not dependent on her EEA sponsor prior to her arrival here.

The Hearing Before, the Decision of, the First-tier Tribunal

4. The appellant’s appeal came before Judge Keane sitting at Taylor House in the First-tier Tribunal on 3 July 2014. Mr Solomon of Counsel appeared on behalf of the appellant, and Miss Jones, Home Office Presenting Officer, appeared on behalf of the respondent. The appellant’s case before Judge Keane was that the sponsor had encouraged her to embark upon a course of study in the United Kingdom. She had entered the United Kingdom as a student, and the sponsor has supported her from the date of her arrival. He had also paid for her college education in Sri Lanka. She had completed a Masters in international finance and accounting, and was currently undertaking an ACCA course.
5. The judge received oral evidence from the appellant and the sponsor, and both these witnesses were cross-examined by Miss Jones.
6. In his closing submissions, Mr Solomon confirmed that no Article 8 claim was being advanced in the alternative. He submitted that past dependency had been established because the sponsor had paid the appellant’s tuition fees in Sri Lanka. He submitted that the core of her account, namely that she had been dependent upon the sponsor whilst she lived in Sri Lanka, was supported by a letter from her uncle which can be found at page 9 of the appellant’s bundle.
7. At paragraph 9 of his subsequent determination, Judge Keane found that the appellant had not been dependent on the sponsor when living in Sri Lanka. He went on to identify the reasons and features of the evidence which had influenced him towards reaching this finding.
8. Firstly, the witnesses’ contentions on this topic were “couched in vague language” and did not condescend to any reasonable level of detail.

Secondly, an important discrepancy was discerned by him in the course of the appellant's cross-examination. The judge set out a verbatim note of the evidence in the Record of Proceedings which contained the relevant exchange of questions and answers. The judge found that the appellant was plainly stating in this sequence of questions and answers that her uncle had supported her during her initial period of study. He found that such evidence could not be reconciled with the vague assertion in paragraph 13 of the appellant's witness statement that the sponsor took care of her college education in Sri Lanka.

9. Thirdly, the documentary evidence did not support the all embracing claims of support which the witnesses were advancing. They were saying that the sponsor had discharged all the cost generated in connection with the appellant's college studies in Sri Lanka. The judge went on to analyse the documentary evidence of remittances contained in the appellant's bundle. He was prepared to find that the sponsor had dispatched two sums of money to the appellant, namely €250 on 9 July 2009, and €275 on 6 September 2009. The documentary evidence did not "encourage" a finding that other remittances had been made, nor did it demonstrate their value.
10. The judge observed that it was for the appellant to establish he had been dependent on the sponsor while she lived in Sri Lanka. Two isolated payments over a period of many years did not suffice to establish dependency. The appellant, according to her oral evidence, was supported for a time by her uncle and was living with her parents. The sponsor's financial assistance, of which he could only find two instances, was "a welcome relief" but it did not and could not amount to a dependency. The appellant had not discharged the burden of proof.

The Application for Permission to Appeal

11. Mr Solomon settled an application for permission to appeal to the Upper Tribunal on the appellant's behalf. Ground 1 was the judge had failed to take adequate or any account of the supporting documents in the appellant's bundle substantiating the appellant's dependency upon the sponsor prior to her arrival in the UK. Ground 2 was that the decision was vitiated by procedural unfairness. Neither the appellant nor the sponsor was asked to quantify the cost discharged by the sponsor. This reason did not feature in the letter of refusal, and was thus not addressed in the witness statements or during examination-in-chief. The witnesses were not cross-examined on quantification. The judge also did not raise the issue at the hearing. It had arisen for the first time in the determination. This was not an obvious matter, and in fairness it should have been raised earlier. The appellant and her sponsor had thus been deprived of a reasonable opportunity to address the judge's concerns on this question.
12. Ground 4 was that the judge had failed to adequately direct himself on the meaning of dependency. This vitiated his ultimate finding, as he reduced the question to a bare calculation of financial dependency. The test was

not whether a person was wholly or mainly dependent, but instead if she was reliant on her sponsor for material support: see **Reyes v Secretary of State for the Home Department (EEA Regs: dependency) [2013] UKUT 314**.

The Grant of Permission to Appeal

13. On 5 August 2013 First-tier Tribunal Judge P J G White granted the appellant permission to appeal. He identified three arguable errors of law. It was arguable that in reaching his conclusion the judge failed to have proper regard to the evidence produced on behalf of the appellant, as adumbrated at ground 1. It was arguable the judge had unfairly held against the appellant and the sponsor vagueness in their evidence when the appellant and sponsor had not been given an opportunity at the hearing to address the concerns of the judge in that regard. Finally, it was arguable that the judge was in error by regarding the issue of dependency as being confined to financial dependency.

The Rule 24 Response

14. On 21 August 2014 Mr Glyn Saunders of the Specialist Appeals Team settled the Rule 24 response on behalf of the respondent opposing the appeal.

The Hearing in the Upper Tribunal

15. At the hearing before me, Professor Rees developed the arguments raised in the grounds of appeal. Mr Tufan adopted the same position as that taken by Mr Saunders in the Rule 24 response.

Discussion

16. The judge did not remind himself that in the context of EU law the test of dependency is not whether a person is wholly or mainly dependent, but whether he or she is reliant on others for essential living needs. In **Reyes**, the Tribunal held at paragraph 19 as follows:

First, the test of dependency is a purely factual test. Second, the court envisages the questions of dependency must not be reduced to a bare calculation of financial dependency but should be construed broadly to involve the holistic examination on a number of factors, including financial, physical and social conditions, so as to establish whether there is dependence that is genuine. The essential focus has to be on the nature of the relationship concerned and whether it is one characterised by a situation of dependence based on examination of all the factual circumstances, bearing in mind the underlying objective of maintaining the unity of the family.

17. I do not however consider that the absence of an express reference to either of the above (either “the essential living needs” test or a self-direction that questions of dependency must not be reduced to a basic

calculation of financial dependency) renders the determination erroneous in law.

18. Firstly, there was no suggestion of emotional or physical dependency. Prior financial dependency was the sole issue. Secondly, there was no specific evidence as to the level of funding allegedly provided by the sponsor to the appellant in Sri Lanka, and how that level of funding compared to the total level of funding that the appellant received in Sri Lanka from all sources.
19. The appellant did not have to show that she was wholly or mainly financially dependent on the sponsor in Sri Lanka. But she still had to show that she was reliant on the sponsor for her essential living needs in Sri Lanka. The reasoning of the judge is just as appropriate to a finding of non-dependency in an EU law context as it is to a finding of non-dependency under the immigration Rules. This was not a case where the evidence led to a potential distinction between a level of financial dependency sufficient to meet the requirements of the Rules, as against a lower level of financial dependency sufficient to meet the requirements of the Regulations 2006. The judge's findings squarely cover dependency as defined by EU law.
20. I do not consider that there was any procedural unfairness in the question of quantification not being flagged up in the course of the hearing. The appellant was represented by solicitors and Counsel, and it was apparent from the refusal decision that prior dependency was disputed. The appellant's legal representatives also knew that the burden of proof rested with the appellant to prove prior dependency. Clearly, if the appellant was able to give specific figures as to the level of financial support allegedly provided by the sponsor in Sri Lanka, this was going to enhance the credibility of the claim. Conversely, the failure to condescend to any detail was obviously going to be less persuasive.
21. Ground 1 makes reference to witness statements from other family members corroborating the core claim of prior dependency. But none of them condescended to any detail, and it was thus open to the judge to attach much greater weight to the lack of primary documentary evidence, in the form of remittances, covering the period when the sponsor is supposed to have paid for the appellant's studies in Sri Lanka from 19 May 2006 onwards.
22. In conclusion, I find that the error of law challenge amounts to no more than an expression of disagreement with findings that were reasonably open to the judge on the evidence and the case that was put before him.

Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

The First-tier Tribunal did not make an anonymity order.

Signed

Date

Deputy Upper Tribunal Judge Monson