



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/42659/2014

THE IMMIGRATION ACTS

Heard at Field House
On 8 December 2015

Decision & Reasons Promulgated
On 4 January 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR AZLAN ALI MIR
(ANONYMITY DIRECTION NOT MADE)

Respondent/Claimant

Representation:

For the Appellant: Ms A Holmes, Specialist Appeals Team
For the Respondent/Claimant: Mr M Biggs, Counsel instructed by M-R Solicitors

DECISION AND REASONS

1. The Secretary of State appeals to the Upper Tribunal from the decision of the First-tier Tribunal (Judge Oakley sitting at Hatton Cross on 7 May 2015) allowing the claimant's appeal against the decision of the Secretary of State to refuse to issue him a residence card as confirmation of his right to reside in the United Kingdom as an extended family member of Mr Saqib Farook, a Dutch national, whose relationship to

the claimant, a citizen of Pakistan, was said to be that of a maternal uncle. The First-tier Tribunal did not make an anonymity direction, and I do not consider the claimant requires anonymity for these proceedings in the Upper Tribunal.

The Reasons for Granting Permission to Appeal

2. On 21 August 2015 Upper Tribunal Judge Goldstein granted the Secretary of State permission to appeal on all grounds raised. His reasoning was as follows:
 2. I am persuaded that this application demonstrates that the First-tier Tribunal Judge may have made an error of law in failing to give adequate reasons for his findings on material matters and raises arguable issues as to whether the judge was entitled in law to reach the conclusions that he did for reasons given.
 3. A losing party is entitled to know and understand the reasons given why he/she has lost and whilst brevity has its place in the writing of determinations it can never be at the expense, as arguably here, of clear and adequate reasoning."

Relevant Background

3. The claimant's date of birth is 14 April 1990. He entered the United Kingdom as a student on 22 May 2011, and he applied for a residence card on 7 August 2014. His application was refused on a number of grounds. For present purposes it is only necessary to refer to three of them. He had not provided any evidence or any sufficient evidence of his EEA family member's current economic activity in the United Kingdom as a self-employed person. He had failed to submit any evidence of work carried out such as recent invoices and statements, audited accounts, business bank statements clearly showing payments received or any advertisements that his EEA family member may have made in order to generate work. The evidence that he had provided suggested that the sponsor had merely showed an interest in becoming self-employed; it did not prove that he was economically active.
4. He had not provided sufficient evidence of his dependency on his EEA national sponsor whilst residing in Pakistan. He had provided five A4 Western Union transfer receipts ranging from 20 November 2009 to 27 April 2011 as evidence of his dependency. But not only did these documents state "agents' copy" on the bottom, they were full A4 size, which was not expected of Western Union receipts. Additionally, the quality of the documents provoked questions regarding their legitimacy. It was clear the documents may have been self-printed. He had not provided any evidence that he had received the amount of money stated in each of the transfer receipts.
5. When he entered the United Kingdom as a student on 22 May 2011, he had not entered as the dependant of an EEA national, nor did he state that he was dependent "on the EEA national" on his visa application. It was therefore concluded that he was not dependent on his EEA national sponsor upon entering the United Kingdom as required under Regulation 8(2A).

The Hearing before, and the Decision of, the First-tier Tribunal

6. Both parties were legally represented before Judge Oakley, and the judge received oral evidence from the claimant and the sponsor. In his subsequent decision, the judge set out his findings of fact at paragraphs [13] to [19], and his conclusions at paragraphs [20] to [26]. The paragraphs which are of particular relevance to this appeal are reproduced below.
 17. The Sponsor claims that in the last 2 years he has not earned enough to pay any tax and whilst no self-assessment tax assessment has been produced he confirmed that he understood that this had been filed by his accountants.
 18. The Appellant before he left Pakistan was living with his mother and father, one brother and one sister. He has two further sisters who are married and have left home. The Appellant's father used to work as a subcontractor to the Pakistan Post Office but he left that employment due to ill health 12 years ago and does not receive a pension. The family are supported by the Appellant's other brother who works as a shoemaker.
 19. The Appellant's uncle chose to support the Appellant while he was living with his family in Pakistan as he wanted him to complete his education and sent money for him that purpose and it was not for the remainder of the family.

THE IMMIGRATION RULES

Conclusions

20. Applying the relevant law to the established facts firstly I would say that overall I found both the evidence given by the Appellant and his uncle to be credible and I found them both to be open and credible witnesses.
21. I will of all first deal with the relationship of the Appellant with the Sponsor and I am satisfied from inspection of the original birth certificates that have been produced that the Appellant's mother is the sister of the Sponsor and that therefore the Appellant and the Sponsor are related as nephew and uncle as claimed.
22. I then turn to the issue of dependency when the Appellant was living in Pakistan and I am satisfied that the Sponsor did provide funds for the Appellant to enable him to complete his education as well as to support him whilst he was living at home and so that he was not a further burden on the family who in later years have been supported by the Appellant's brother who works as a shoemaker.
23. I am also satisfied that throughout the time that the Appellant has lived in the United Kingdom after his arrival as a student he has lived with his uncle and has been supported by him. They both share a joint bank account and in addition the Appellant holds his own bank account in to which money is paid from time to time by the Sponsor.
24. I am also satisfied that the Sponsor is actively employed as a self-employed caterer. It would certainly appear that whilst his business may have been conducted since 2011/2012 that has been in quite an embryo state for a year or so but that now this is generating more work for the Sponsor and producing a

larger cash flow and up to the present time the business has not generated sufficient cash for which the Sponsor has had to pay tax although he has paid self-employed national insurance stamps in 2014.

The Application for Permission to Appeal

7. Mr Tufan of the Specialist Appeals Team settled the Secretary of State's application for permission to appeal. He submitted that the judge's so called findings of fact and conclusions were either completely unreasoned or at best inadequately reasoned. They were also devoid of adequate analysis.
8. The first point raised in the refusal letter was the lack of evidence of the sponsor's economic activity. It was not clear how the judge arrived at the conclusion that the sponsor was actively employed as a self-employed caterer when the sponsor claimed in the past two years he had not earned enough money to pay any tax. The judge also did not explain how the claimant could be dependent on the sponsor in such circumstances. The decision was also silent on the issue raised in the refusal letter of the sponsor not making regular national insurance contributions.
9. With regard to the issue of prior dependency, the judge simply stated at paragraph 22 that he was satisfied, and it was not clear how the judge arrived at this conclusion. Mr Tufan referred to **Moneke [2011] UKUT 430** where a Presidential panel decreed that in determining appeals regarding OFM applications made in-country, Immigration Judges should scrutinise with some care the supporting evidence, in order to satisfy themselves that the burden of proof demonstrating eligibility had been discharged.
10. Even if the decision was one which could be legally sustained, the judge could not have allowed the appeal outright under the EEA Regulations. The most the judge could do was to remit the matter for the Secretary of State to exercise her discretion under Regulation 17(4).

The Error of Law Hearing

11. At the hearing before me to determine whether an error of law was made out, Mr Biggs accepted that Regulation 17(4) applied, but he did not accept that **Ihemedu (OFMs - Meaning) Nigeria [2011] UKUT 340** had been correctly decided. By allowing the appeal outright, the judge did not prevent the Secretary of State from exercising her discretion under Regulation 17(4).
12. On the principal error of law challenge, he invited me to note that it was not a challenge on perversity grounds, but on the ground that the judge's finding of prior and present dependency was inadequately reasoned.
13. He accepted that the paragraphs headed "Findings of Fact" were completely devoid of any reasoning. He submitted that in truth they were not findings of fact, but a summary of the oral evidence given by the claimant and the sponsor which the judge went on to find was credible at paragraph [20].

14. He accepted that the finding of prior dependency at paragraph [22] was not supported by any reasoning in the paragraph itself, but he submitted that adequate reasons for underpinning the finding at paragraph [22] were to be found in paragraphs [18] and [19].
15. Mr Biggs accepted the judge had not engaged with various issues raised in the refusal letter, including the fact that the appellant had not entered the United Kingdom as a dependant of Mr Farook. But he submitted that it was not necessary for the judge to address every point raised in the refusal letter.
16. Having carefully listened to the submissions on both sides, I ruled that an error of law was made out such that the decision should be set aside in its entirety and re-made. I gave my reasons for so finding in short form, and I undertook to provide written reasons in due course.
17. The parties were in agreement that none of the findings of fact made by First-tier Tribunal Judge Oakley should stand, and that the appeal should be remitted to the First-tier Tribunal for a de novo hearing.

Reasons for Finding an Error of Law

18. The fact that the claimant had not sought to enter the United Kingdom as the extended family member of Mr Farook, but had only asserted a dependency relationship some three years after he had entered the United Kingdom as a student, meant that he had to provide cogent evidence that he was entitled to a residence card as an OFM; and there was a corresponding duty on the judge to consider the evidence relied upon with considerable care, particularly the evidence of prior dependency.
19. This is highlighted in the two Upper Tribunal decisions cited by Mr Tufan in the application for permission to appeal.
20. In **Ihemedu (OFMs - meaning) Nigeria [2011] UKUT 00340 (IAC)** Senior Immigration Judge Storey, as he then was, gave the following guidance which is quoted at sub-paragraph 2 of the head note:

An important consideration in the context of an OFM/extended family member case is that if a claimant had come to the UK without applying for a family permit from abroad ..., this will mean that the UK authorities have been prevented from conducting the extensive examination of the individual's personal circumstances envisaged by Reg 12(3) and in the course of such an examination check the documentation submitted. If an applicant chooses not to apply from abroad for a family permit under Reg 12 of the 2006 Regulations, thereby denying the UK authorities an opportunity to check documentation in the country concerned, *he cannot expect any relaxation in the burden of proof that applies to him when seeking to establish an EEA right (my emphasis).*

21. In the same case, Judge Storey noted at paragraph [4] that Article 10(2)(e) of the Citizens Directive stipulated that in cases falling under Article 3(2)(a), which deals with OFMs, applicants must produce "a document issued by the relevant authority

in the country of origin or country from which they are arriving certifying that they are dependants or members of the household of the union citizen ...”.

22. The same observation was made in **Moneke (EEA - OFMs) Nigeria [2011] UKUT 00341 (IAC)** at paragraph [42]:

We note further that Article 10(2)(e) of the Citizens Directive contemplates documentary evidence. Whether dependency could ever be proved by oral testimony alone is not something that we have to decide in this case, but Article 10(2)(e) does suggest that the responsibility is on the applicant to satisfy the Secretary of State by *cogent evidence that is in part documented* (my emphasis) and can be tested as to whether the level of material support, its duration and its impact upon the applicant combined together meet the material definition of dependency.

23. The judge’s finding on prior dependency is completely devoid of reasoning, and the judge has not engaged at all with the concern raised in the refusal letter as to the reliability of the documentary evidence relied upon. I accept that the finding of prior dependency in paragraph [22] is underpinned by the findings of fact made in paragraphs [18] and [19]. But the judge has not given any reason for making these findings in favour of the claimant. It is not enough for the judge simply to say that he found the evidence of the claimant and the sponsor to be credible, particularly when some of the evidence given by the sponsor cast doubt on his ability to have provided funding for the claimant in Pakistan in the period 2009 to 2011.
24. The reasoning of the judge on the other disputed issues is also inadequate, with the arguable exception of the judge’s reasoning on the discrete issue of whether the claimant is related to the sponsor as alleged. However, Mr Biggs did not invite me to preserve the judge’s finding on this discrete issue, and I do not consider it would be safe to do so.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law, such that it should be set aside and re-made.

As directed at the hearing, this appeal is remitted to the First-tier Tribunal at Taylor House for a de novo hearing before any judge apart from Judge Oakley, and none of the findings of fact made by the previous Tribunal shall be preserved.

No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge Monson