Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: EA/06179/2016**

THE IMMIGRATION ACTS

Heard at Bradford	**Sent to parties on:**
On 24 November 2017	**On 14 December 2017**

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

AMIT HASAN CHOWDHURY

(ANONYMITY NOT DIRECTED)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: No legal representative
For the Respondent: Mrs R Pettersen (Senior Home Presenting Officer)

DECISION AND REASONS

1. This is the claimant's appeal to the Upper Tribunal from a decision of the First-tier Tribunal (hereinafter "the tribunal") whereupon it allowed his appeal against the entry clearance officer's decision of 4 May 2016 refusing an EEA family permit.

2. There had been an earlier unsuccessful application for an EEA family permit. Indeed the claimant had appealed the unfavourable (from his perspective) decision and that had resulted in the dismissal of his appeal for reasons set out in a written determination which had been sent to the parties on 7 September 2015. I shall say a little more about that below.

3. As to the application which has ultimately led to this appeal before the Upper Tribunal, the basis for it was the claimant's claimed dependence upon his UK based sponsor. The application had been considered under regulation 8 of the Immigration (European Economic Area) Regulations 2006 but had been refused because the entry clearance officer was not satisfied that the claimant was wholly or mainly financially dependent upon the sponsor.

4. The claimant appealed and his appeal was heard on 20 July 2017. At the hearing the claimant (who is resident in Bangladesh and could not therefore be in attendance) was represented by Counsel. His sponsor provided oral evidence. The entry clearance officer was not represented.

5. The tribunal allowed the claimant's appeal. The principal reasoning behind that was that it had found the sponsor to be a credible witness and it concluded that the claimant was his extended family member. It found (uncontroversially) that the sponsor is a Spanish national exercising treaty rights in the UK. It accepted that the claimant is dependent upon his UK based sponsor. The tribunal's written decision was sent to the parties on 1 August 2017. There is no reference in the written reasons to the previous unsuccessful application and appeal.

6. The Secretary of State asked for permission to appeal to the Upper Tribunal. There were two grounds of appeal. The first ground was to the effect that, in fact, the claimant did not have a right of appeal to the tribunal at all. Reliance was placed upon the decision of the Upper Tribunal in Sala (2016) UKUT 00411 (IAC). The second ground was to the effect that the tribunal had erred in failing to take, as its starting point, the findings and conclusions which had been reached in the previous tribunal decision which had resulted in the dismissal of the claimant's appeal.

7. Permission was granted and the granting judge said this:

> "It is arguable, as set out in the grounds, that the judge's approach to this appeal was flawed. Arguably the starting point should have been the adverse findings of fact made by Judge Cope in the appellant's previous appeal – but there appears to be no reference to them in the decision. All the grounds may be argued."

8. There followed a hearing before the Upper Tribunal (before me) so that it could be decided whether or not the tribunal had erred in law and, if so, what should flow from that. Directions made provision for any necessary remaking of the decision to be undertaken, if appropriate, at the same hearing. Before me the sponsor represented the claimant (the claimant no longer having legal representation) and Mrs Pettersen represented the entry clearance officer. I am grateful to each of them.

9. As to the first ground of appeal Mrs Pettersen withdrew it. Accordingly, I need say no more about it. But Mrs Pettersen pursued the second ground and, although this was unstated, she was essentially relying upon the principles set out in the well-known decision in Devaseelan (second

appeals – ECHR – extra – territorial effect) Sri Lanka (2002) UKIAT 00702. The sponsor argued that whilst there had perhaps been insufficient evidence before the previous tribunal there had been enough evidence at the most recent hearing. He pointed out that the most recent decision of the tribunal had been in relation to a fresh application. The suggestion was, I think, that since a fresh application had been made any previous adjudication history ought not to be irrelevant.

10. I decided to set aside the tribunal's decision. I noted that the tribunal had not been given a copy of the earlier appeal decision and that that might, to some extent, be the fault of the Secretary of State who had not fielded a presenting officer in order to take the point. But the previous decision was specifically referred to in the entry clearance officer's decision notice. Given that that is perhaps the single most important document in the appeal, it is reasonable to suppose that the tribunal would have read it and been aware of it. In those circumstances, notwithstanding any failings on the part of the Secretary of State, it was incumbent upon the tribunal to at least address the fact that there was in existence a previous tribunal decision and, if it did not think it appropriate to adjourn and direct its production, to have explained why not. It did not do that. It did, therefore, err in law.

11. Having set aside the tribunal's decision, and having informed the parties that I was doing so, I invited views as to whether I should go on to remake the decision in the Upper Tribunal or whether I should remit. Mrs Pettersen took a neutral stance but the sponsor actively urged me to proceed to remake the decision myself at the same hearing. In those circumstances I decided to do so. I felt in a position to do so because I had the documents which had been before the tribunal, I had the previous appeal decision and I had the opportunity of hearing oral evidence from the sponsor.

12. Matters did, indeed, proceed to remaking and I heard evidence from the sponsor and submissions from him and from Mrs Pettersen. I shall refer to what was said at the hearing, where necessary or appropriate, in explaining the decision I have reached.

13. First of all, it is necessary to return to Devaseelan. Put simply, following Devaseelan, the findings and conclusions of the earlier tribunal will represent my starting point but not necessarily my end point. As already indicated the earlier tribunal decision (the one made by Judge Cope) concerned the same appellant, the same sponsor and indeed the same sort of application. As to the question of whether or not the appellant was dependent on the sponsor for the purposes of the EEA Regulations, the tribunal said this:

> " 54. I suppose as a minimum essential needs of a person in the country of origin would encompass food and accommodation; however certain levels or aspects of lifestyle may not fall within essential needs – although it may be something of a westernised concept, an example could be if the person not only has their principal home but also a holiday home.
>
> 55. It is clear from the jurisprudence that there must be a rigorous examination of the evidence relating to a claim to dependency for the purposes of *inter alia* r.8 (2) of the EEA Regulations – see for instance paragraph 38 of **Moneke**.
>
> 56. As such it is incumbent on him and the Sponsor to identify exactly what the essential needs of the Appellant actually are, and how it is that the Sponsor's financial remittances are meeting those needs.
>
> 57. There was quite simply no evidence supplied with the application for an EEA family permit to address this aspect of the case. All that the Sponsor said in his letter was that he had been supporting the Appellant financially for his daily needs. However no details were given as to what those needs were.

58. At paragraph 42 of their decision in **Moneke** the Tribunal underlined the need for documentary evidence at least in part in order that an appropriate assessment of dependency can be carried out.

59. Miss Bishop in her cross-examination asked the Sponsor what the Appellant used the money for. He said that it was used for him to live and to buy food, for general expenses and paying bills, and that the Appellant pays rent. However when she then asked the Sponsor who the Appellant paid rent to, he replied that it was their house and therefore he did not take any rent. Miss Bishop asked him why he said that the Appellant had been paying rent, and he said again that he was not taking any money from him.

60. I note that there has been there was no explanation given by the Sponsor as to why he should have contradicted himself in this way in his oral evidence to me. In my judgement this does raise significant questions about the credibility of what he has said about the Appellant's dependency upon him.

61. Related to this are the questions as to what the Appellant does in Bangladesh and why it is that he is dependent on the Sponsor. Whilst the case law makes it clear that there need be no reason for dependency and that it can be one of choice, the Upper Tribunal in **Moneke** made the point that there may need to be particular scrutiny of a claim to long-standing dependency made by someone who otherwise might be considered to be in a position to support themselves.

62. Here there has been no explanation put forward by the Appellant or by the Sponsor as to why it is that he is dependent on financial support, as opposed to whether he needs to be so dependent.

63. It does seem to me that the lack of an explanation as to why the Appellant is financially dependent on the Sponsor is a factor which goes to establishing whether or not in fact he is actually dependent upon him.

64. Furthermore the lack of satisfactory evidence about the financial and other situation of the Appellant in Bangladesh means that it is not actually possible to identify what his essential needs are, and thus assess whether he is dependent on the Sponsor to meet them.

65. This leads on to the question as to the amounts of money that the Sponsor has said that he sends to the Appellant in Bangladesh.

66. In his letter in support of the application for an EEA family permit the Sponsor had said that he had been supporting the Appellant financially for his daily needs. Included in the documents sent with that application were a number of money transfer receipts.

67. The Sponsor in his witness statement dated 2nd June 2015 said that he had maintained regular contact with the Appellant and that he regularly sent him money; he again referred to the money transfer receipts which had been submitted to the Respondent as showing that the Appellant was dependent upon him.

68. Leaving aside for the moment the money transfer receipts, it was only during the course of oral evidence that the Sponsor gave details as to the amounts that he was providing to the Appellant by way of financial support. He said that sometimes he would send a big amount every few months or if it was a small amount then he would send it often. When I asked him to clarify this statement, he said that £400 or £500 was a big amount whereas up to £100 was a small amount.

69. The Sponsor went on to say that the Appellant did not have any other financial support. Although she was ill and his father had passed away, the Sponsor did not provide any financial support for the Appellant's mother because he could not afford it and someone else was supporting her.

70. I am bound to say that I find this situation very surprising indeed. I am aware from having heard so many appeals from Bangladesh of the family structure and cultural and social obligations that there are upon the younger generation to support the older generation, particularly later in life.

71. The Sponsor has said that the Appellant's mother effectively brought him up after his own mother died when he was small – at paragraph 4 of his statement he described her as a motherly figure to him; he also said that the Appellant's father had died years ago, that the Appellant was an only child, and that they [the Appellant and his mother] were struggling financially.

72. Given this situation I simply do not find it credible that the Sponsor would not have been also providing financial support for the Appellant's mother even if it was in conjunction with someone else – all the more so when he explicitly linked his responsibility to support the Appellant with the fact that his aunty [the Appellant's mother] brought him up.

73. In addition there is a further significant difficulty with the evidence about the money that the Sponsor has sent to Bangladesh.

74. In her evidence-in-chief Miss Rasoul asked the Sponsor whether the money transfer receipts were all the money that he had sent to the Appellant. Rather than answering this question directly, he said that some of it was for him and that he was trying to buy some land.

75. Perhaps not surprisingly Miss Bishop took up this point during the course of her cross-examination. She went through various of the sums of money sent to the Appellant as shown in the money transfer receipts. He said that he was buying some land for himself; when Miss Bishop asked the Sponsor whether the Appellant was purchasing land on his behalf he said that it was for [the Sponsor]. Crucially he went on to say in answer to the question as to whether all the money was for the land he said that he thought so; when he paid the Appellant a big amount of money then he would tell him to take some for himself.

76. The problem then that there seems to me to be for the Appellant and the Sponsor is that there is simply not the evidence to show that the money that has been sent by from this country is actually for the Appellant himself as opposed to buying the Sponsor's land, let alone that it is to meet the Appellant's essential needs.

77. Whilst therefore I consider that it is possible that the Appellant is financially dependent upon the Sponsor to meet his essential needs in Bangladesh, because of the difficulties with the evidence in this case I am not satisfied that it has been shown to be more likely than not that this is so – and it is of course to this standard of proof that he has to establish his entitlement to an EEA family permit.

78. It appears that it is only the question of dependency which is at issue in the appeal before me, there being no suggestion that the Appellant is or has been a member of the Sponsor's household in Bangladesh.

79. In any event there is quite simply no evidence, apart from the rather confusing reference to the house in Bangladesh being 'our house' to show that the Sponsor does own property in Bangladesh; and of course he has not lived in that country since he went to Spain in 1999 when he was only 16 – and it seems that the house at that stage in fact belonged to the Appellant's mother and father.

80. As such then I do not see how the Appellant could be a member of the Sponsor's household in Bangladesh.

81. The final matter that I do need to deal with is the issue of dependency not being confined simply to financial support.

82. However there is nothing before me to show that there are other forms of support provided by the Sponsor to the Appellant, such as social or psychological support. I note that some telephone records been provided apparently showing regular communication by the Sponsor to the telephone number which is said to be that of the Appellant; however the existence of telephone communication does not without more establish any kind of social or other support or dependency."

83. Looking at the evidence as a whole in this case I am not satisfied that the Appellant has shown that it is more likely than not that he is dependent upon the Sponsor whether wholly or in part to meet his essential needs in Bangladesh.

84. On this basis then the appeal must be dismissed."

14. That represented a most careful and thorough analysis as to how matters stood as at 2 September 2014 which was the date of the decision then under appeal.

15. It is clear from the above passage that Judge Cope had considerable concerns regarding the credibility of the sponsor (see in particular paragraph 60 and the passage from paragraph 70 to 72. I can find nothing in the material before me relating to the current application and appeal and nothing in what the sponsor had to say which would suggest that those carefully reasoned concerns no longer apply or that the tribunal was wrong. Despite the sponsor's vague reference to there now being sufficient evidence, I cannot find any evidence capable of touching upon those specific credibility concerns. They are not properly addressed in the sponsor's witness statement of 20 July 2017.

16. Further, I found the sponsor's oral evidence before me to be unreliable. At one point he told me that the claimant had no siblings but then said he does have a married sister. He was vague as to the claimant's previous education in Bangladesh despite claiming that it was he (the sponsor) who had been financing it. He was vague as to how the money was spent which he claimed to be sending to the claimant.

17. There was no evidence emanating from the claimant himself. I appreciate, of course, that he lives in Bangladesh. But nevertheless, although the claimant is no longer represented by UK based solicitors now, he was so represented before the tribunal. It is asserted that he is dependent upon his sponsor and it would not have been difficult, perhaps with the sponsor's assistance, for some form of statement of have been obtained from him explaining, for example, how he comes to be dependent upon his sponsor and how the money said to be sent for his benefit is used to meet his needs. Nothing of that sort has been provided.

18. In the circumstances I would conclude that there is nothing before me to suggest that my assessment as to the sponsor's credibility should be any different from that of Judge Cope following Devaseelan principles. But even if it were not for that, I would not have found the evidence before me, even if looking at it entirely afresh, as being persuasive. It is simply too vague. The burden of proof does rest upon the claimant. In my judgment, with respect to the element of dependency, he has not fulfilled it.

19. In remaking the decision, therefore, my having set aside the tribunal's decision, I dismiss the claimant's appeal against the entry clearance officer's decision of 4 May 2016.

Decision

The decision of the First-tier Tribunal involved the making of an error of law and is set aside.

In remaking the decision I dismiss the claimant's appeal against the entry clearance officer's decision of 4 May 2016.

I make no anonymity direction. None was sought and none has been made before.

Signed: Date: 13 December 2017

Upper Tribunal Judge Hemingway

TO THE RESPONDENT
FEE AWARD

I make no fee award.

Signed: Date: 13 December 2017

Upper Tribunal Judge Hemingway