Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/02134/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On the 3rd October 2018	**On the 10th October 2018**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

MAURONE CALAZANS RIBEIRO
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: In person
For the Respondent: Mr S. Walker, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Brazil born on 18 June 1979. He appeals with permission against the decision of First-tier Tribunal Judge Roots, who in a decision promulgated on 31 May 2018 dismissed his appeal against the decision of the Respondent made on 24 January 2018 to refuse his application for a

residence card as a family member of an EEA national. The case was heard on the papers as requested by the applicant.

2. On 10 November 2017 he made an application for a residence card to confirm that he was a family member of an EEA national exercising treaty rights in the United Kingdom.

3. On 24 January 2018 the Respondent refused that application for the following reasons;

    - the application was considered under Regulation 7 of the Immigration (EEA) Regulations 2016

    - However the Respondent considered that the Appellant had not provided adequate evidence to show that he qualified for a right to reside as a family member of his EEA sponsor. He had applied for a residence card as a direct family member of a Portuguese national, Marcelina Ribeiro and submitted a Brazilian birth certificate as evidence of the relationship. However as he was over the age of 21 years old he is not automatically issued on the basis of the relationship to the EEA national sponsor. Once the direct family member reaches the age of 21, they must submit evidence to prove that they are dependent upon their EEA national sponsor in the UK.

    - In the application form it was stated that the Appellant was the carer of his mother since she suffered a stroke. That was acknowledged along with a letter from the clinic stating that the sponsor/affected eyesight however the sponsor has remained employed and self-employed. If the applicant was a carer for the EEA national sponsor and that she was dependent upon him, she would be receiving disability living allowance as temporarily incapacitated.

    - The applicant has submitted no evidence to show that he was dependent upon the EEA national sponsor as required by the EEA regulations. The only document submitted in the applicant's name showing him living at the same property is the EEA national sponsor was a tenancy agreement showing the applicant and sponsor as tenants of 18 B Road NW10. Bank statements submitted for the EEA sponsor did not show evidence that she supported him financially through bank transfers. He had submitted insufficient evidence of dependency and the application has been refused on this basis.

4. The Appellant lodged an appeal on 4 March 2018 (in it he applied for an extension of time because he the sponsor did not get the decision until mid-February 2018 having been evicted by the landlord on 30 January 2018).

5. In the grounds he stated that he had provided all relevant evidence in support and that although he was over 21 years of age, his mother depended on him and he had provided care for her since she had suffered a stroke and that he had been

dependent on her to stay in the United Kingdom to give her full dedication and care. She is working a few hours part time as an employee to exercise her rights in the UK under the EEA regulations.

6. The appeal came before Judge Roots on the papers on 2 May 2018.

7. The judge noted at [5] that he was not provided with any Respondent's bundle

8. The Appellant provided a letter dated 9 April 2018 and some supporting documents.

9. The judge at [7] set out that the burden of proof was on the Appellant to show on the balance of probabilities that he was dependent on his mother and that there was no definition of dependence in the Regulations it was a question of fact. The judge's findings set out at paragraph 8 – 11 in which the judge found that the Appellant had not demonstrated that he was dependent on his mother. The reasons given were as follows:

   (1) There is no statement from his mother setting out income and how she supports her son did not clear what had total income is.

   (2) The payslip provided for her suggest she normally earns about £490 per month; the pasted of December 2017 show that she'd received total pay of £2775 to date in that tax year the Appellant has provided no cogent explanation or evidence as to how she support to people on that income.

   (3) The judge placed no great weight on the reference of disability living allowance.

   (4) The judge consider the letter of 9 April 2018 and the documents attached. It is for the Appellant to show dependency. The judge set out the Appellant's case that he was also a carer for his mother. The judge observed "Whilst I have considered the documents provided it is not for me to put together the Appellant's case him – he has to present the evidence that he is dependent on his mother. I cannot see any clear statement of any specific sums which is mother gives him to support him, out of her apparently very low income. There is no witness statement from the Appellant, or even a clear statement in a letter, setting out how his basic needs are met. I accept that there appears to be evidence suggesting that they live together, but that is not sufficient to establish dependency."

10. The Appellant sought permission to appeal that decision. The Appellant drafted his own grounds and they appear to state as follows. His application for a residence card was at the dependent of his mother on the grounds that his mother strictly required the personal care on serious health grounds as well as psychological and economically. The judge decided only on the grounds of financial dependency rather than a relative who strictly requires the personal care

of. He cites the application form pages 28 – 29 and 40 – 42 and 74 – 75 submitted to the Home Office and he chose "a relative who strictly requires the personal care of the EEA national on serious health grounds." He states his application was based on that option and evidence was sent to support the application. The Respondent did not provide a bundle of evidence but the Appellant states he sent a statutory declaration in which the sponsor mentioned the grounds of dependency and her long-term illness. This original document went missing it has been sent to the Home Office. He stated that the application was submitted based on the dependency of his sponsor who strictly required his personal care on her serious health grounds. In addition his sponsor is also dependent on me economically but had not been to carry out any jobs in the United Kingdom. Dependency is mutual and reciprocal. He stated "I am sending new evidence to prove that she has exercise activities as an employee and self-employed to support this dependency financially too. We are still in low-income and receiving housing benefit and working tax credit under her name only because I do not have a passport".

11. Permission to appeal that decision was granted by first-tier Tribunal judge Hollingworth. The reasons given were as follows:-

> "The judge has referred to not having been provided with any Respondent's bundle. The case was decided on the papers. An Appellant is entitled to presume that the Respondent's bundle would be provided to the judge. The judge referred to paragraph 6 of the decision to that which the Appellant provided. Given the approach explained in the permission application it is arguable that the scope for interpretation differed and that in any event available evidence had not been provided to the judge. In the circumstances and fairness can have been seen to have arisen. It was not possible for the judge to clarify the extent of the available evidence."

12. At the hearing before the Tribunal the Appellant appeared in person and represented himself. I ensured that he understood the nature of the proceedings and he was assisted by the court interpreter who I am satisfied understood the Appellant and vice versa. In the earlier part of this decision I have summarised the grounds upon which the Appellant relied (in the form of a letter dated 10 June 2018) in addition he had provided a letter dated 14 September 2018 which provided further detail of his circumstances and that of his mother. In that letter it made reference to having made a first application refused by the Home Office on 20 February 2015. It was asserted that there had been problems in receiving the adverse refusal decision and only did so from the person who was assisting him in December 2016. The Appellant claimed to have arrived in the United Kingdom on 24 May 2014 by way of a tourist visa stamp. The chronology is not entirely clear from the letter. The letter also made reference to the decision letter and that the application for a residence card as a dependent of his mother was submitted

to the Respondent on the grounds that his mother required personal care on serious health grounds and that the judge had only considered financial dependency. He also made reference to sending further new evidence relating to the issues including that of dependency and filed some witness statements.

13. Mr Walker appeared on behalf of the Respondent. In his submissions he accepted that the FTTJ had not taken account of all of the documentation which the Appellant had sought to rely on or the particular basis upon which the application had been made and that there had been procedural unfairness as a result.

14. I find the Respondent's concession to be appropriately made, and in the circumstances, I give only summary reasons for finding that the decision of the First-tier Tribunal involved the making of a material error of law such that it is necessary to set aside the decision.

15. Paragraph 24 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 includes the requirement for the Respondent to provide the First-tier Tribunal with specified documents in relation to the decision under appeal, which was not complied with by the Respondent in the present case as set out in the decision at paragraph 5. Whilst acknowledged there was no bundle of documents from the Respondent, no further consideration was given as to whether the case should be adjourned for this to be obtained (and see Cvetkovs (visa - no file produced - directions) Latvia [2011] UKUT 00212). Whilst the judge had some documentation (see paragraph 10), it is not apparent that all the documentation upon which the Appellant relied had been put before the First-tier Tribunal. The judge made reference to their being a lack of evidence in respect of the Appellant's mother and the Appellant has made reference to a statutory declaration that she had made. Mr Walker accepted that not all of the documentation that the Appellant sought rely upon had been before the First-tier Tribunal and in those circumstances accepts that there was procedural unfairness.

16. Whilst the appeal was originally heard on the papers, the Appellant now seeks an oral hearing by which further evidence will be given including that of witnesses. The grounds also attached what he described as "fresh evidence" which he would wish to be considered and has confirmed that whilst he has provided a short statement, that he will provide a fuller chronology setting out his case to enable the Tribunal to properly consider the issues. This was a difficulty before the First Tier Tribunal as set out at paragraph 10.

17. I am therefore satisfied that there has been a material error of law which has led to the Tribunal not deciding the disputed facts in this appeal. I therefore set aside the decision of the judge in its entirety. I have taken into account paragraph 7.2 of the practice statements for the Immigration and Asylum Cis of the First-tier Tribunal and the Upper Tribunal which recognises that it may not be possible for

the Upper Tribunal shall proceed to remake the decision when it is satisfied that (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunities that party's case to be put to and considered by the First-tier Tribunal; or (b) the nature or extent of any judicial fact-finding which is necessary in order for the decision in the appeal to be remade is such that, having regard to the overriding objective 2, it is appropriate to remit the case of the First-tier Tribunal. Having exercised my discretion and by considering the practice statement, the case falls within (a) given that there was a procedural unfairness and also under (b) given that the court will now hear oral evidence from the Appellant and witnesses and therefore I am satisfied that the appropriate course is to remit the case to the First-tier Tribunal for a fresh hearing.

Decision:

The decision of the First-tier Tribunal did involve the making of an error on a point of law and the appeal is allowed; the decision of the First-tier Tribunal shall be set aside and remitted to the First-tier Tribunal for a further hearing.

Signed Date: 4/10/2018
Upper Tribunal Judge Reeds