Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: EA/00483/2018
EA/00486/2018

THE IMMIGRATION ACTS

Heard at: Field House	**Decision & Reasons Promulgated**
On: 18 February 2019	**On: 27 February 2019**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

NAYYAB IKRAM
SAQLAIN IKRAM

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Z Jafferji, instructed by Syeds Law Office Solicitors
For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants appeal, with permission, against the decision of the First-tier Tribunal dismissing their appeals against the respondent's decisions to refuse to issue them with EEA family permits under the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations") as the sister-in-law and brother-in-law of the EEA national sponsor.

2. The appellants, sister and brother, are citizens of Pakistan. They applied on 15 June 2017 for an EEA family permit to join the sponsor, Jolanta Iwona

Mikulska, a Polish national. The appellants' applications were refused on 30 November 2017 on the grounds that there was no evidence to show that the EEA national was exercising treaty rights in the UK since the evidence supplied indicated that she was no longer in employment. The appellants' applications were refused under regulations 6 and 12 of the EEA Regulations.

3. The appellants appealed against that decision. In their grounds of appeal they referred to the First-tier Tribunal decision of 21 March 2017 in the appeal of Mrs Shamshad Kausar and the decision of 16 October 2017 in the appeal of Chaudhury Mohammed Ikram, the parents of Sibtain Ikram who was married to the EEA national sponsor. Both appeals were allowed on the grounds that the appellants were dependant upon the EEA national sponsor and were entitled to residence cards under the EEA Regulations as her family members. The grounds also asserted that the EEA sponsor was currently a qualified person but also had permanent residence in the UK and, as such, the appellants were entitled to family permits to join the sponsor upon whom they were entirely dependent under regulation 14(2).

4. In an entry clearance manager review on 20 July 2018 the respondent considered again that the appellants had failed to submit evidence that their EEA national sponsor was currently exercising treaty rights in the UK. It was not accepted that the appellants were family members for the purposes of regulation 14(2), even if permanent residence was as claimed.

5. The appellants' appeal was heard by First-tier Tribunal Judge James on 11 September 2018. Judge James considered herself to be bound by the Tribunal's previous findings subject to later evidence, in accordance with Devaseelan [2002] UKIAT 00702. She noted that the EEA national sponsor had never attended any of the previous hearings and that Sibtain Ikram had previously confirmed that he did not pay any money to his siblings in Pakistan. The judge did not find the evidence of the EEA national sponsor's employment to be reliable, she did not accept that she was an employee or self-employed and she did not accept that the EEA national was exercising treaty rights in the UK. The judge considered that there was no evidence to show that the appellants were dependent upon the EEA national sponsor. The judge concluded that the appellants could not meet the requirements of the EEA Regulations and she dismissed the appeals.

6. The appellants sought permission to appeal that decision to the Upper Tribunal on the grounds that the judge had erred by finding there to be a legal requirement for the EEA national to be a qualified person when it had been accepted she had acquired permanent residence and that the judge had raised concerns not previously raised by the respondent thus depriving the appellants of a fair hearing. The grounds asserted further that the judge had misunderstood the evidence.

7. Permission was granted on 15 November 2018.

8. In his rule 24 response the respondent requested that the appeal be struck out for want of jurisdiction as there was no right of appeal under the 2016 Regulations for extended family members.

Appeal hearing and submissions

9. At the hearing before me, Mr Jafferji confirmed my understanding that the Secretary of State was reviewing his position in regard to the question of a right of appeal for extended family members under the EEA Regulations 2016, further to the judgment in Secretary of State for the Home Department v Banger (Citizenship of the European Union - Right of Union citizens to move and reside freely within the territory of the European Union - Judgment) [2018] EUECJ C-89/17. Ms Cunha was unaware of any such review and her instructions were to maintain that there was no valid appeal. In the circumstances, and given that the respondent had not made any cross-appeal challenging the Tribunal's jurisdiction, I decided to proceed with the appeal on the assumption that the Tribunal had jurisdiction in the matter, albeit that the 2016 Regulations stated otherwise and on the understanding that that issue may be revisited following any such review.

10. In his submissions, Mr Jafferji clarified that there were two grounds of appeal. The first ground was that there was clear evidence that the EEA national sponsor was residing in the United Kingdom in accordance with the EEA Regulations. She had permanent residence and did not need to show that she was a qualified person, but there was evidence of her exercising treaty rights in any event. The judge had therefore erred by finding that she was not a qualified person and finding that the appellants could not meet the Regulations on that basis. The second ground was that the judge had raised the issue of dependency when that had not been a matter raised in the respondent's decision. As this was a papers appeal, it was incumbent upon the judge to give notice to the parties of any other issues she intended to consider. In any event the judge had applied the wrong test, at [24], in considering the issue of dependency by requiring the appellants to show that their "full basic needs" were met by the sponsor, rather than their basic needs. Furthermore, the judge had misunderstood the evidence. She had relied upon the passage in the decision in Sibtain Ikram's father's appeal, at [20], that the sponsor did not send money to the appellants, his siblings, whereas it had always been the case that the money was sent to their parents for all the family. Further, the decision in the mother's appeal found that she was dependent upon her son and that an increase in the money sent to her was for the sponsor's siblings' college fees. Since the appellants were dependent upon their mother and their mother was dependant upon the sponsor, it followed that the appellants were dependent upon the sponsor. None of that was considered by the judge.

11. Ms Cunha submitted that any error raised in the first ground was immaterial because of the judge's findings on dependency. The judge applied the correct test. There was limited evidence in relation to dependency before the judge. The question of the lack of evidence of the EEA national exercising treaty rights was relevant to the question of dependency as there was no evidence of her income and the P45 showed that she had ceased employment.

The EEA sponsor had never attended any of the appeals. Ms Cunha relied on the judgment in Pedro v Secretary of State for Work and Pensions [2009] EWCA Civ 1358 in submitting that the judge was entitled to consider the factual dependency, as the sponsor was not in the direct ascending or descending line.

12. In response Mr Jafferji referred me to the evidence which had been before the judge of remittances from the EEA national herself and from her husband, the appellants' brother. That evidence had been rejected by the judge because it was photocopied, whereas the Tribunals considering the previous appeals of the appellants' parents had accepted the evidence of remittances as credible.

Discussion

13. As Mr Jafferji properly submitted, there is no requirement in the EEA Regulations for the EEA national sponsor to be a qualified person: regulation 12 requires that the EEA national "*is residing in the United Kingdom in accordance with these Regulations*" and that is satisfied by the EEA national having permanent residence under the Regulations. In so far as the judge may have considered that the appellants failed to meet the requirements of the EEA Regulations due to the lack of evidence of the EEA national exercising treaty rights, I agree with Mr Jafferji that that was an error of law. However it seems to me that the judge's consideration of the EEA national exercising treaty rights and working in the UK was in the context of the consideration of dependency and that there was accordingly no such error. In any event, even if the judge had made such an error, I do not consider that it was material given her finding that there was no dependency between the appellants and the EEA national sponsor.

14. It was Mr Jafferji's submission that the judge was not entitled to consider the matter of dependency as it did not form part of the reasons for refusal. However, whilst there was no direct reference to the question of dependency in the reasons letter, the refusal was on the basis that the appellants did not meet the requirements of regulation 12. The burden of proof therefore lay upon the appellants to show that they did meet the requirements of regulation 12 and those requirements necessarily included a requirement that the appellants were dependent upon the EEA national in order to be considered as her extended family members, as the judge noted at [12]. In any event, the issue of dependency was raised by the appellants themselves in the grounds of appeal, as the judge recorded at [8], and the appellants could hardly be said to have been taken by surprise by the fact that the judge addressed the matter in her decision. The fact that the appeal was determined on the papers did not place any burden upon the judge to provide the appellants with a further opportunity to respond to matters raised at the hearing. On the contrary it was the choice of the appellants to have a papers determination of the appeal rather than an oral hearing at which the sponsors could have attended and responded to any concerns arising. Accordingly I do not consider that any unfairness arose in that respect, as the grounds assert.

15. Neither do I agree with Mr Jafferji that the judge applied the wrong test when considering dependency or that by using the word "full", next to "basic

needs" at [24], she considered that there had to be demonstrated anything over and above the appellants' basic needs being met by the sponsors. It is clear from the judge's findings at [22] that she applied the correct test.

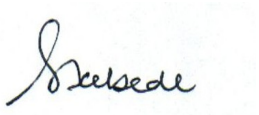
16. The further points raised by Mr Jafferji were that the judge had misinterpreted or misunderstood the evidence and had failed to take into account the positive findings made in the allowed appeals of Sibtain Ikram's parents. However the judge had regard to the decisions of the Tribunals in those appeals. She specifically referred to the appeals at [9] and [10]. I do not accept that the judge took findings from those decisions out of context or "cherry picked", as the grounds of appeal assert. The evidence recorded at [20] of the father's appeal was as the judge stated, namely that Sibtain Ikram's siblings in Pakistan did not need him or his wife to send them money. The judge also noted the lack of evidence to confirm the claim in the mother's appeal before Judge Andrew that the sponsors paid the appellants' educational costs. The judge was fully aware that Judge Mailer and Judge Andrew had found that dependency was established between the sponsors and Sibtain Ikram's parents. However she was also aware of concerns expressed by Judge Andrew about Sibtain Ikram's evidence and she referred to inconsistencies between Sibtain Ikram's evidence before Judge Andrew and his evidence before previous judges. The judge was fully entitled to take those concerns into account when considering the weight to be accorded to those decisions and the impact they had on the appellants' claims of dependency.

17. Further, the judge had full regard to the evidence of money transfers, to which Mr Jafferji referred me, and made adverse findings on that evidence at [24]. She commented at [22] on the lack of evidence to support the claim that the EEA national paid for the appellants' studies and basic needs and commented on the fact that the EEA national had never appeared at any of the appeals. All of those matters were relevant to the judge's consideration of the appeal and she was unarguably entitled to accord them the weight that she did. There was no requirement on the judge to conclude that, because previous Tribunals had found the parents to be dependent upon the sponsors, it was inevitably the case that the appellants were dependent upon their parents and thus dependent upon the sponsors. That was effectively the submission made by Mr Jafferji. The judge gave full and proper reasons for rejecting that claim.

18. For all of these reasons, and in light of the judge's properly justified concerns, the judge was fully entitled to reach the adverse conclusions that she did. There was no unfairness sin her approach and there were no errors of law in her findings and conclusions. The appellants' grounds are not made out. I uphold the judge's decision.

DECISION

19. The making of the decision of the First-tier Tribunal did not involve an error on a point of law. I do not set aside the decision. The decision to dismiss the appeal stands.

Signed: 
Upper Tribunal Judge Kebede

Dated: 19 February 2019