Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: EA/04151/2020**

THE IMMIGRATION ACTS

Heard at Manchester (via Microsoft Teams)	**Decision & Reasons promulgated**
On 11 November 2021	**On 23 November 2021**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

MUHAMMAD FAROOQ KHAN
(Anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Greer instructed by Eric H Smith Solicitors.
For the Respondent: Mr Tan, a Senior Home Office Presenting Officer.

DECISION AND REASONS

1. The appellant appeals with permission a decision of First-tier Tribunal Judge Devlin ('the Judge') promulgated on 19 April 2021 in which the Judge dismissed the appellant's appeal against the refusal of an Entry Clearance Officer (ECO) of his application for an EEA Family Permit as the extended family member of his brother, a Spanish national, exercising treaty rights in the United Kingdom.

Background

2. The ECO was not satisfied the appellant had proved he was financially dependent upon his brother and had not provided any evidence regarding his own financial situation in Pakistan which prohibited an assessment of whether he was wholly or partly dependent on the EEA national to meet his essential needs.

3. Having considered both the documentary and oral evidence the Judge sets out his findings from [40]; in which the Judge deals with each point raised in the ECO's refusal. Having done so the Judge summarises his findings between [108 and 117] in the following terms:

> 108. I now come to look at everything in the round. I acknowledge that the number of money transfer remittance receipts would normally exert a strong positive pull. However, that pull is diminished in the instant case, by reason for the fact that the money transfer receipts begin within six months of the date of application, and that the first money transfer remittance receipt pest-dates (sic) the putative decease of the Appellant's father.
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> 109. The sponsors evidence exerts a positive pull, insofar as it is coherent and internally consistent, and it is not externally inconsistent. However, that pull is diminished, *inter alia,* by the fact that I found his evidence somewhat vague and lacking in clarity, which I found strange for such a highly educated man.
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> 110. In any event, it must be borne in mind that, given his relationship with the Appellant, he cannot be regarded as a truly independent witness. Of course, that does not prevent him from giving wholly truthful testimony, but it does justify approaching his evidence with circumspection, particularly where it seems less than satisfactory (see, *mutatis mutandis, AB (Witness corroboration in asylum appeals) Somalia* [2004] UKAIT 00125, at paragraph 8).
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> 111. I am willing to accept that the document headed "Details of Expenditure" exerts some positive pull. If it was otherwise than what it purports to be, it would imply a significant degree of intervention on the part of the Appellant. However, the document speaks only to expenditure and not to income. Moreover, it is largely unsubstantiated.
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> 112. The positive pull exerted by the Electric Power Company, Electricity Consumer Bills and the letter from Mr Asif Saleem (such as it is) is reduced by the fact that (i) the Bills are addressed to the Appellant's father, even though they all postdate his decease by some considerable time; (ii) there is nothing on the face of them to show that they were paid by the sponsor; and, (iii) the letter refers to the Appellant's school fees having been paid by Abdul Majid Khan, not the sponsor. I bear in mind, of course, the sponsor's explanations for those apparent anomalies. However, I have expressed concerns about his evidence, and I would question why his explanations were uncorroborated.
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> 113. In the particular circumstances of this case, I consider the unexplained failure of the Appellant to produce clear and unequivocal evidence of his father's decease and his employment status, together with affidavits, statements or letters from his family members, to exert a significant negative pull, particularly in light of the evidence that he chose to submit.

114. Looking at everything as a whole, I find that combined positive pull of the considerations that I have outlined above, is insufficient to effectively counteract the negative pull exerted by the other considerations. The consequence is that I cannot be satisfied that it is more likely than not that the Appellant's circumstances in Pakistan are as described to me, or that the Appellant is not in fact in a position to support himself without the support he receives from the sponsor.

115. Thus, despite Mr Holt's careful argument to the contrary, I find that I am not satisfied that the Appellant is a dependent of the relevant EEA national (i.e., the sponsor), for the purposes of regulation 8(2) of the 2016 Regulations. No attempt was made to argue that he was a member of the EEA nationals household - nor, on the evidence before me, could it be.

116. It follows that the Appellant is not an extended family member of an EEA national, the purposes of Regulation 8. Therefore, he does not meet the requirements of regulation 12 (4) for the issuance of an EEA Family Permit.

117. It follows that his appeal under regulation 36 of 30 November 2020, falls to be dismissed.

4. The appellant sought permission to appeal, which was initially refused by another judge of the First-tier Tribunal but granted on a renewed application by the Upper Tribunal on 15 September 2021 for the following reasons:

1. The issue before the First-tier Tribunal was whether the appellant was dependent on his sponsor such as to meet the definition of extended family member and the Immigration (European Economic Area) Regulations 2016. Although the judge took into account a large number of factors, and generally evaluated the evidence with care, I am concerned that the judge appears to have attached significant weight to the failure by the appellant or sponsor to provide evidence of their father's death in 2018. Whilst the judge was entitled to his concern relating to the Electricity Consumer Bills in the father's name, the issue of the father's death, had never previously been raised, and the judge's reliance on this point, arguably deprive the appellant of an opportunity to respond to this concern. It is arguable that this may amount to a procedural impropriety capable of undermining the judge's overall findings.

Error of law

5. Mr Greer, in his submissions, opened by making reference to the fact that this was a case in which the ECO was not legally represented, which presented unique challenges to the Judge who could not advance reasons not taken, but could raise concerns with the parties and was required to ensure there was a fair hearing in any event.

6. Lack of a Presenting Officer representing the Secretary of State or an ECO is not a situation that is not familiar to judges within this area of law. How a judge should conduct a hearing in such circumstances, and in a case where a self represented appellant appears, is set out in what is more commonly referred to as the 'Surrendering guidelines' which are as follows:

ANNEX FROM MNM v SECRETARY OF STATE (IAT (starred appeal) 00TH02423)
THE SURENDRAN GUIDELINES (IAT Appeal No. 21679 heard 02/06/99)

1. Where the Home Office is not represented, we do not consider that a special adjudicator is entitled to treat a decision appealed against as having been withdrawn. The withdrawal of a decision to refuse leave to enter and asylum requires a positive act on the part of the Home Office in the form of a statement in writing that the decision has been withdrawn. In the instant case, and in similar cases, this is not the position. The Home Office, on the contrary, requests that the special adjudicator deals with the appeal on the basis of the contents of the letter of refusal and any other written submissions which the Home Office makes when indicating that it would not be represented.
2. Nor do we consider that the appeal should be allowed simpliciter. The function of the adjudicator is to review the reasons given by the Home Office for refusing asylum within the context of the evidence before him and the submissions made on behalf of the appellant, and then come to his own conclusions as to whether or not the appeal should be allowed or dismissed. In doing so he must, of course, observe the correct burden and standard of proof.
3. Where an adjudicator is aware that the Home Office is not to be represented, he should take particular care to read all the papers in the bundle before him prior to the hearing and, if necessary, in those cases where he has only been informed on the morning of the hearing that the Home Office will not appear, he should consider the advisability of adjourning for the purposes of reading the papers and therefore putting the case further back in his list for the same day.
4. Where matters of credibility are raised in the letter of refusal, the special adjudicator should request the representative to address these matters, particularly in his examination of the appellant or, if the appellant is not giving evidence, in his submissions. Whether or not these matters are addressed by the representative, and whether or not the special adjudicator has himself expressed any particular concern, he is entitled to form his own view as to credibility on the basis of the material before him.
5. Where no matters of credibility are raised in the letter of refusal but, from a reading of the papers, the special adjudicator himself considers that there are matters of credibility arising therefrom, he should similarly point these matters out to the representative and ask that they be dealt with, either in examination of the appellant or in submissions.
6. It is our view that it is not the function of a special adjudicator to adopt an inquisitorial role in cases of this nature. The system pertaining at present is essentially an adversarial system and the special adjudicator is an impartial judge and assessor of the evidence before him. Where the Home Office does not appear the Home Office's argument and basis of refusal, as contained in the letter of refusal, is the Home Office's case purely and simply, subject to any other representations which the Home Office may make to the special adjudicator. It is not the function of the special adjudicator to expand upon that document, nor is it his function to raise matters which are not raised in it, unless these are matters which are apparent to him from a reading of papers, in which case these matters should be drawn to the attention of the appellant's representative who should then be invited to make submissions or call evidence in relation thereto. We would add that this is not necessarily the same function which has to be performed by a special adjudicator where he has refused to adjourn a case in the absence of a representative for the appellant, and the appellant is virtually conducting his own appeal. In such an event, it is the duty of the special adjudicator to give every assistance, which he can give, to the appellant.
7. Where, having received the evidence or submissions in relation to matters which he has drawn to the attention of the representatives, the special adjudicator considers clarification is necessary, then he should be at liberty to ask questions for the purposes of seeking clarification. We would emphasise,

however, that it is not his function to raise matters which a Presenting Officer might have raised in cross-examination had he been present.

8. There might well be matters which are not raised in the letter of refusal which the special adjudicator considers to be relevant and of importance. We have in mind, for example, the question of whether or not, in the event that the special adjudicator concludes that a Convention ground exists, internal flight is relevant, or perhaps, where, from the letter of refusal and the other documents in the file, it appears to the special adjudicator that the question of whether or not the appellant is entitled to Convention protection by reason of the existence of civil war (matters raised by the House of Lords in the case of Adan). Where these are matters which clearly the special adjudicator considers he may well wish to deal with in his determination, then he should raise these with the representative and invite submissions to be made in relation thereto.

9. There are documents which are now available on the Internet and which can be considered to be in the public domain, which may not be included in the bundle before the special adjudicator. We have in mind the US State Department Report, Amnesty Reports and Home Office Country Reports. If the special adjudicator considers that he might well wish to refer to these documents in his determination, then he should so indicate to the representative and invite submissions in relation thereto.

10. We do not consider that a special adjudicator should grant an adjournment except in the most exceptional circumstance and where, in the view of the special adjudicator, matters of concern in the evidence before him cannot be properly addressed by examination of the appellant by his representative or submissions made by that representative. If, during the course of a hearing, it becomes apparent to a special adjudicator that such circumstances have arisen, then he should adjourn the case part heard, require the Home Office to make available a Presenting Officer at the adjourned hearing, and prepare a record of proceedings of the case, which should be submitted to both parties up to the point of the adjournment, and such record to be submitted prior to the adjourned hearing.

7. In Yildizhan [2002] UKIAT 08315 and T (Algeria) [2003] UKIAT 00128 the Tribunal emphasised that the Surendran guidelines were no more than guidelines as to the conduct of hearings in which the Secretary of State was unrepresented. Whether or not they had been followed in a particular appeal the issue for the Tribunal remained that of whether the findings of the Adjudicator were unsafe and unsustainable on the basis that the requirements of natural justice had not been followed by reasons of apparent bias on the part of the Adjudicator.

8. In WN (DRC) [2004] UKIAT 00213 the Tribunal clarified the guidelines on a number of points and, in essence, said that it is not necessary for obvious points on credibility to be put to the appellant, where credibility was generally an issue in the light of the refusal letter or as a result of later evidence. However, the Tribunal said that where the point was important to the decision but it was not obvious, or where credibility had not been raised or did not obviously arise from new material, or where the appellant was unrepresented, it was generally better to raise the points and this could be done by direct questioning of the witness.

9. In ST (Child asylum seekers) Sri Lanka [2013] UKUT 292(IAC) (Blake J) it was held that a judge should alert the advocates where minded to depart from a favourable assessment of credibility made by the

UKBA (as noted by the AIT in WN (Surendran; credibility) DRC [2004] UKIAT 213.)

10. The complaints made by the appellant are summarised in the grounds of appeal at [2] of that document in the following terms:

a) The FTTJ unfairly criticises the Appellant for a failure to produce certain types of evidence, their absence not having been raised prior to the hearing;
b) Whilst the above may be fair in some cases where sufficient notice is given, and where there is a history of deceit, *Moneke* considered, it is unlikely to be a fair approach in the case of the instant type where there is no suggestion of a poor, deceitful immigration history and where no notice is given of the evidential defects.

11. Proceedings in the immigration courts are adversarial by nature and the directions given before any hearing give the parties adequate opportunity to set out their case and the evidence they rely upon in support of the same.

12. In this appeal there was a prehearing review conducted by First-tear Tribunal Judge Dainty on the papers on 17 February 2021. Judge Dainty identified the issues to be determined in the appeal at [7] in the following terms:

It therefore seems that the issues for determination by the Tribunal will be:

(i) Dependency (principle issue);
(ii) Exercise of Treaty rights (not expressly conceded);
(iii) Relationship (not expressly conceded);

13. Judge Dainty then set out 14 specific directions, direction No.2 of which is in the following terms:

2. The Appellant (or the representatives) is to lodge and serve electronically a full paginated bundle (including witness statements) **within 28 days of the date these directions been issued.** This bundle must be a composite bundle containing any material already supplied and all previous determinations relied upon. As well as identifying all the witnesses to be called, the Appellant (or their representative) must provide the name, date of birth, Home Office reference or appeal reference if appropriate it will be helpful for there to be in a statement or letter from the Appellant (and not just the sponsor) addressing the issues raised by the decision and ECM appeal letters.

14. The Appellant was therefore put on notice that he was required to provide all the evidence that he was seeking to rely upon in support of this claim. It must be remembered in this appeal that the appellant was aware of the concerns of the ECO which are clearly set out in the refusal notice and which was upheld by an Entry Clearance Manager (ECM) on review for similar reasons.

15. This is not the case of the Judge going behind a positive finding benefiting the appellant in the refusal letter, but rather the Judge commenting upon the quality of the evidence that had been provided.

16. The ECO refers to a specific time period noted by the Judge at [47 – 48] in the following terms:

> 47. The Respondent noted that "the sponsor [had] resided in the United Kingdom since June 2019) and that the first money transfer remittance receipt was dated "17 September 2019". There is, thus, a gap of three months, during which there is no documentary evidence of support. That is something that the Respondent was entitled to take into account when assessing the Appellant's claim to have been dependent on the sponsor.
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> 48. That, as it seems to me, is all he did.

17. The Judge is criticised for finding at [51] *"It follows that there is a gap of 11 months between the date that the Appellant claims to have become dependent on the sponsor, and the date of the first money remittance receipt, produced by him"* and at [52] *"It is legitimate to ask how the Appellant met his basic needs during that period".* This is not the Judge going to find a concession made by the ECO as to the relevant period of time for which the dependency must be proved. What the Judge did was to identify the reference to the three-month period by the ECO and the significance of the comment at [48] is that the Judge did not find that this was a concession or limitation imposed upon him in relation to the period with which other evidence could be considered. The question in the appeal, as demonstrated by Judge Dainty, has always been whether the appellant is dependent upon the EEA sponsor. Whether a person is dependent is a question of fact.

18. The reasons for the Judge's concerns are shown at [53 – 54] which are in the following terms:

> 53. It is, of course, important to bear in mind that the Appellant has produced a significant number of money remittance receipts, covering the period between 17 September 2019 and 2 February 2021.
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> 54. However, it is also legitimate to have regard to the fact that the money transfer receipts began within six months of the date of application, and that there is no obvious explanation for the lack of evidence of support before that time.

19. The appellant submits that the Judge erred in taking the approach he did; claiming that reliance upon the decision of the Upper Tribunal in *Moneke* was unlawful, leading to the evidential requirements of the Judge in the instant case being unjustified and unfair.

20. Reliance upon Moneke (EEA OFMs – assessment of evidence) Nigeria [2011] UKUT 430 in isolation is wrong for that determination should be read in conjunction with Moneke and others (EEA – OFMs) Nigeria [2011] UKUT 00341 (IAC). The key principle arising from the decisions is that in determining appeals regarding OFM applications Immigration Judges should scrutinise with some care the supporting evidence in order to satisfy themselves that the burden of proof demonstrating eligibility has been discharged. That is precisely what Judge Devlin did in this appeal and the appellant fails to establish that in doing so, the

Judge relied upon an unlawful evidential expectation which was unjustified, or irrational.

21. The particular circumstances in Moneke resulted in it being found that in that case, the Upper Tribunal was not satisfied by the evidence because:

a) There were substantial gaps in the evidence produced by the appellants despite the opportunity afforded to submit further material in the light of our previous decision.
b) The appellants produced no documentary evidence to support their claims:
(i) to have been provided with financial support by their sponsor to meet their essential living needs when the sponsor was in Germany or before that in Nigeria;
(ii) that they lived in the sponsor's household in Nigeria;
(iii) that they were in apprenticeships with nil earnings in Nigeria;
(iv) the amount of material support they needed to meet their essential living needs.
c) The oral evidence was implausible as to material parts and flawed by inconsistencies.
d) Both appellants misrepresented their intentions when seeking to enter as visitors.

22. That decision does not support a proposition that unless a person has a poor or deceitful history and that they have misrepresented their intentions when seeking to enter the United Kingdom the requirement of a decision maker to scrutinise the evidence relied upon to establish if an appellant had proved what was being alleged, did not apply. It is settled law that a person claiming to be entitled to relief under the Immigration Rules or the 2016 Regulations, unless it is specifically stated to the contrary, are required to prove such entitlement.

23. This is not a case in which the Judge was seeking corroboration without which the appeal would be dismissed unlawfully, but one in which the Judge identified the poor quality of the documentary evidence and that given orally. The complaint in the grounds regarding the documents does not answer the specific criticism of the Judge that the sponsor's evidence was 'vague and lacking in detail' which the Judge found surprising given that he is said to be an educated man [69]. It is not unreasonable to assume that if what was claimed existed and that this was known by the sponsor he would have been able to give clear evidence on the point, yet he was not.

24. The assertion the Judge erred in relation to the Surendran guidelines is not made out.

25. In relation to the criticism of the Judge concern the electricity bill, it is not disputed that the bill provided is in the appellant's father's name. It was claimed by the sponsor in his oral evidence that his and the appellant's father had died in 2018 but the Judge was not satisfied that this had been established. I refer to the direction of Judge Dainty in which the appellant was told to file all the evidence he was seeking

to rely upon. The appellant sought to produce a document claiming that it formed part of the outgoings of the property which he was required to meet or contribute to, or which forms of part of the essential needs of the household, which was in the name of another. It was not made out that it was not reasonable for the appellant to have dealt with such a matter of which he or his representatives must have been aware needed answering in the evidence put before the Judge. It is an obvious point, yet no such evidence was provided leaving the Judge to assess the document and the weight he gave to it on the basis set out in the determination.

26. As Mr Tan submitted in his oral submissions, if it is claimed the appellant's father died in 2018 that give rise to the question of how the appellant was able to maintain himself from that point in time. This was a claim that had not been raised previously but which arose at the hearing from the appellant's evidence and so no unfairness arises.

27. In addition to the lack of evidence concerning the death of the father, the Judge specifically refers at [81 – 83] to further concerns in relation to this aspect in the following terms:

> 81. As I noted above, the sponsor claimed that his father had died "in October 2018." However, all of the bills post-dated the sponsor's father's decease. The sponsor sought to explain why the bills remained in his father's name after his decease by saying "we haven't divided the inheritance yet".
> 82. I cannot say that the claim is so contrary to common sense and experience of human behaviour also far-fetched and contrary to reason, as to be incapable of belief. It therefore cannot simply be disregarded as being inherently implausible.
> 83. On the other hand, it is unclear why the fact that the inheritance has not been divided should lead to the Electricity Consumer Bills continuing to be addressed to the sponsor's father, 27 months after his death.
> 84. Moreover, although the Appellant has led the evidence of sponsor, he has not produced any independent evidence in support of the claim that his father died in October 2018.
> 85. Finally, I note that, although the NADRA Family Registration Certificate is dated 2 January 2020, and stamped as having been checked by the Assistant Chief of Protocol on 15 January 2020, it lists the Appellant's father among the family members, and there is nothing on the face of it, to suggest that he was deceased at that time.

28. The Judge's conclusion that [87] that *'on the face of it, the Electricity Consumer Bills suggests that he is still alive, and there is nothing on the face of the NADRA Family Registration Certificate, or elsewhere in the documentary evidence to the contrary'* in relation to the question of whether the appellant's father had died has not been shown to be a finding outside the range of those available to the Judge based upon both the documentary evidence and oral evidence given by the sponsor.

29. The Judge was entitled to comment upon the lack of evidence of income as the test clearly requires a person to prove that they are dependent upon their EEA sponsor to meet their essential needs. Unless those needs have been proved, which they were not in this case, and it established there are insufficient resources to meet those

needs without the assistance of the EEA sponsor, a person will be unable to prove their case; as has occurred in this appeal.

30. In conclusion, this is a very carefully structured determination in which the Judge clearly considered the evidence with the required degree of anxious scrutiny. The grounds fail to establish any merit in their challenge to the decision and fail to establish that the Judge's conclusions are unsafe or infected by material legal error. The Judge's findings are clear and adequately reasoned. The core question of whether the appellant had established the required level of dependency was properly considered by the Judge who concluded the appellant had not discharged the burden upon him to show this was the case. That is a finding open to the Judge on the evidence which is fatal to the appellant's appeal.

31. In light of there being no legal error material to the decision to dismiss the appeal established there is no basis for the Upper Tribunal to interfere any further in this matter.

Decision

32. There is no material error of law in the Immigration Judge's decision. The determination shall stand.

Anonymity.

33. The First-tier Tribunal made no order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed

Upper Tribunal Judge Hanson

Dated 18 November 2021