



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: UI-2021-001090  
IA/04632/2021

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 10<sup>th</sup> August 2022**

**Decision & Reasons Promulgated  
On 29<sup>th</sup> September 2022**

**Before**

**UPPER TRIBUNAL JUDGE KEITH**

**Between**

**THE ENTRY CLEARANCE OFFICER**

**and**

**'SK'**

**(ANONYMITY DIRECTION MADE)**

Appellant

Respondent

**Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

*Unless and until a Tribunal or court directs otherwise, the respondent is granted anonymity, because she remains a minor. No report of these proceedings shall directly or indirectly identify her or any member of her family. Failure to comply with this direction could lead to contempt of court proceedings.*

**Representation:**

For the appellant:  
For the respondent:  
represented.

Ms A Nolan, Senior Home Office Presenting Officer  
The Claimant did not attend and was not

**DECISION AND REASONS**

## **Introduction**

1. These are the approved record of the decision and reasons which I gave orally at the end of the hearing on 10<sup>th</sup> August 2022. To avoid confusion, I shall refer to the parties as the Claimant and the Entry Clearance Officer as 'ECO'.
2. This is an appeal by the ECO against the decision of First-tier Tribunal Judge Howorth, (the 'FtT'), promulgated following a decision on the papers on 15<sup>th</sup> October 2021, by which she allowed the Claimant's appeal against the respondent's refusal on 26<sup>th</sup> January 2021 of the Claimant's application for a family permit to join her EEA sponsoring sister-in-law in the UK under the Immigration (EEA) Regulations 2016.
3. In essence, the ECO was concerned that there was insufficient evidence that the sponsor was exercising treaty rights, because of the absence of payslips and was so not a qualified person for the purposes of regulation 6 of the 2016 Regulations. The Claimant also needed to show that she was an extended family member and dependent on the sponsor. The ECO concluded that the sponsor's remittances to the Claimant were not sufficient evidence of pre-entry dependency, particularly where the Claimant had not provided evidence that the sponsor had sufficient financial means to provide for the Claimant's needs, as well as her own needs and those of any other family members who may already be reliant upon her.
4. The ECO did not address any issue of the Claimant becoming a member of the sponsor's household upon entry to the UK. The Claimant appealed against the ECO's decision, and her appeal was decided on the papers. Of note, the Claimant prepared a skeleton argument, and the ECO filed a review in response. Neither specifically submitted that the issues in the ECO's decision were whether the sponsor or the Claimant would be an unreasonable burden on the social assistance system of the UK as per regulation 13(3) of the Regulations, or whether the sponsor was in a position to accommodate the Claimant in her household without causing overcrowding as defined by the Housing Act 1985, such that as per regulation 12(4)(c), it appeared appropriate to the ECO not to issue an EEA family permit. However, the respondent's review document referred to these issues at §5(iv) for the first time. The issue of housing was raised as an 'aside', whilst the issue of the Claimant becoming dependent on the UK taxpayer was raised but had not been so in the ECO's decision. The review document also referred to the EEA sponsor's address differing from that of their spouse's address.

## **The FtT's decision**

5. The FtT made no reference to the apparently new issues raised in the respondent's review and instead focused on the lack of Claimant's dependency on the sponsor, with a brief reference to the review document itself at §7 of her decision. The FtT concluded that the sponsor was a

qualified person as claimed, having been on maternity leave during the relevant period. She noted that the Claimant was a minor child, the regularity of money transfers and the nature of the expenditure by the Claimant, relating to food bills and school fees in India, at §16. The FtT concluded that the Claimant was dependent as claimed on the sponsor and allowed the Claimant's appeal.

### **The grounds of appeal and grant of permission**

6. The ECO raised two grounds of appeal, specifically in relation to regulations 13(3) and 12(4)(c), in relation to whether the FtT had failed to consider the issues of the Claimant being an unreasonable burden on the social security system of the UK or that the sponsor would be unable to accommodate the Claimant in her household without overcrowding. The second ground was that a relevant tenancy agreement had not named the sponsor and the FtT had failed to resolve that discrepancy.
7. First-tier Tribunal Judge Handler refused permission on 30<sup>th</sup> November 2021, on the basis that it was not an arguable error to consider the issue of recourse to public funds under regulation 13, which applied on consideration of the initial right of residence rather than an application for entry clearance by reference to regulation 12. In addition, the FtT had not failed to have regard to regulation 12(4)(c) where this was a discretion of the ECO and not a duty on the FtT. The FtT had also not failed to resolve the issue of an apparent discrepancy in the address of the sponsor and her husband.
8. On renewal of the grounds, Upper Tribunal Judge Rimington granted permission on all grounds, on the basis that the ECO's refusal specifically set out that the Claimant must provide evidence to show that her sponsor had enough money to support her, and the FtT had arguably failed to consider regulation 13(3) in relation to her recourse to public funds. Moreover, the FtT had arguably failed to resolve the discrepancy about claimed cohabitation between the sponsor and her husband, with the lack of the sponsor's name on the tenancy agreement.

### **The hearing before me**

9. On the morning of the hearing, an email dated 25<sup>th</sup> July 2022 was forwarded to me from an email address apparently relating to the sponsor's husband. It stated that, *"I don't need to go to court, as I will not be bringing anyone from India into the UK. I have already spoken to my solicitor regarding this, so can this case be closed."* I did not regard it as appropriate to treat this as a withdrawal of the Claimant's underlying appeal. Moreover, the first appeal I must deal with is the ECO's appeal, which she has a right to be determined. It is also clear that the Claimant has had the opportunity to participate in this appeal and so has not been deprived of a fair hearing. I therefore regarded it as appropriate to proceed with the hearing.

10. Ms Nolan, on behalf of the ECO, emphasised that first, the two issues raised, namely concerns around whether the Claimant would become a burden on the social security system of the UK and also there would be a risk of overcrowding, had specifically been referred to in the review correspondence and had not been resolved in any way by the FtT.
11. Second, in relation to the issue of accommodation, Ms Nolan returned to page [30] of the FtT bundle. Despite assertions of the sponsor as to where she had rented property, the tenancy agreement was not in her name. The FtT's discussion of a marriage certificate referring to that address did not adequately resolve the discrepancy.

### **Discussion and conclusions on error of law**

12. I am satisfied that the FtT materially erred in law. Whilst the FtT referred briefly at §7 to the review document, the ECO was entitled to have resolved the issues around post-entry dependency and household membership without overcrowding, both of which ultimately fed into the concern identified in the refusal decision that the sponsor was unlikely to be financially supporting the Claimant and that upon entry to the UK, the sponsor was unlikely to be able to accommodate the Claimant or financially support her because she did not have the means to do so. These were errors of law such that the FtT's decision is unsafe and cannot stand.

### **Remaking decision**

13. Turning to the question of remaking, I canvassed with Ms Nolan whether, by reference to paragraph 7.2 of the Senior President's Practice Statement, it was appropriate that I retain remaking in the Upper Tribunal or remit the matter back to the First-tier Tribunal. She urged me to remake the appeal today.
14. In light of the email correspondence that has been received and already referred to, there appears to be every indication that the Claimant is not likely to take any further active part in proceedings.
15. It is appropriate in my view that the remaking is retained in the Upper Tribunal. The Claimant has had the opportunity, should she so have wished, to have participated in the hearing today and therefore I regard it as appropriate that I resolve the Claimant's appeal today.

### **Remaking of the appellant's appeal**

16. It is trite law (Dauhoo (EEA Regulations - reg 8(2)) [2012] UKUT 79 (IAC)) that there must be either pre-entry financial dependency or household membership, and that upon entry, the Claimant must either continue to be so dependent or to be a member of the sponsor's household. Moreover, as the ECO made clear in her review document, she has a discretion as to whether to grant initial residence, specifically where she has concerns around the impact on the social security system of the UK. The ECO's

concerns were particularised, as the sponsor appeared to be sponsoring a number of relatives and therefore the Claimant's dependency, post-entry, or post-entry household membership, was not accepted as likely. Current, pre-entry dependency was also disputed.

17. Those issues were clearly raised and identified and I am satisfied that the evidence that has been adduced by the Claimant is not adequate and does not address these specific issues. Whilst it is accepted that the sponsor is a qualifying person and she is on maternity leave and does not lose her qualifying status by virtue of that maternity leave, where, as here, it appears that she is already sponsoring other relatives I accept that the ECO was entitled to refuse the application for a family permit in respect of the Claimant.
18. In the circumstances, the Claimant's appeal under the Regulations fails and is dismissed.

### **Decision on error of law**

19. I conclude that there are material errors, and I must set the FtT's decision aside, without preserved findings.

### **Disposal**

20. With reference to paragraph 7.2 of the Senior President's Practice Statement, given the limited scope of the issues, it was appropriate that the Upper Tribunal to remake the FtT's decision, which has been set aside. I remake the appeal by dismissing the Claimant's appeal under the Immigration (EEA) Regulations.

### **Notice of Decision**

**The decision of the First-tier Tribunal contains material errors of law and I set it aside. I remake the appeal by dismissing the Claimant's appeal under the Immigration (EEA) Regulations 2016.**

**The anonymity directions continue to apply.**

Signed **J. Keith**

Date: 22<sup>nd</sup> August 2022

Upper Tribunal Judge Keith