



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

Appeal Number: UI-2022-002736  
[EA/50558/2021]; IA/05137/2021

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 29 September 2022**

**Decision & Reasons Promulgated  
On 17 November 2022**

**Before**

**UPPER TRIBUNAL JUDGE STEPHEN SMITH**

**Between**

**TAHIR ALI  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr L. Youseffian, instructed by Prime Law Solicitors

For the Respondent: Mr T. Melvin, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. This is an appeal against the decision of First-tier Tribunal Judge Khurram (“the judge”) promulgated on 21 April 2022. The judge dismissed an appeal brought by the appellant against a decision of the Secretary of State dated 13 January 2021 to refuse his application dated 3 November 2020 for a residence card as the “extended family member” of an EEA national, under the Immigration (European Economic Area) Regulations 2016 (“the 2016 Regulations”). The appeal before the judge was brought pursuant to regulation 36(1) of the 2016 Regulations.

2. The 2016 Regulations were revoked on 31 December 2020 at 11.00PM. They continue to have effect on a transitional basis in relation to appeals against decisions taken after that time in respect of applications submitted before then: see paragraph 5(1)(d) of schedule 3 to the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020.

### *Factual background*

3. The appellant is a citizen of Pakistan born on 12 April 1987. His brother, Shoaib Ahmad, is an Italian citizen. I shall call him “the sponsor”. The appellant applied for a residence card as the extended family member of the sponsor, under regulation 8 of the 2016 Regulations. He claimed to have been dependent upon his brother while residing with him in Italy from 2016 to 2018, and a member of his household there. The sponsor had moved to the UK in approximately 2018, pursuant to the unchallenged findings of fact reached by the judge. The appellant is presently living with him in the UK. It was common ground before the judge that dependence in the UK has been established (see paragraphs 9 and 21 of the judge’s decision). The only issue was whether the appellant had been dependent upon his brother in Italy, or a member of his household there, prior to his move to the UK. The appellant also claimed to have been dependent upon his brother while living in Pakistan, although that limb of the appellant’s case is not relevant to the issues before this tribunal.
4. The appellant’s case was that he had resided with his brother at an address on *Via Augusto Righi*, in Prato, from his arrival in Italy in September 2016, until the sponsor’s permanent departure for the UK in January 2018. There was a dispute before the judge as to whether the sponsor had moved to the UK in 2016, rather than 2018. Having heard oral evidence (via CVP) from the appellant and the sponsor, the judge found that the sponsor had been back and forth between Italy and UK during that time, before settling here in January 2018: see paragraph 26.
5. The judge outlined some of the documents that were before him and noted, at paragraph 27, that some of the ID documents for the appellant and the sponsor both bore the *Via Augusto* address, although they were not dated at the same time. For example, the appellant’s Pakistan National ID bore the *Via Augusto* address, but was dated 19 July 2018, i.e. *after* the sponsor’s departure for the UK. There were other documents, said to include utility bills for the *Via Augusto* address, but they were not translated. The judge observed that that was a breach of the requirements of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 and found that the untranslated documents were of “limited assistance”. He accepted that some of the purported bills appeared to state the name of the sponsor and featured a range of dates in 2017 and 2018. Some documents had been translated, such as a “Certificate of Family Status” dated 18 November 2019, listing seven persons including the appellant (but not the sponsor) living at the *Via Augusto* address (see paragraph 30).

6. At paragraph 32 the judge reached the following findings:

"I find the Appellant entered Italy in September 2016. However, there is a paucity of evidence, which should have been readily available to confirm the Appellant lived with the sponsor from his arrival in 2016 until the sponsor's departure from Italy in January 2018. The Appellant's Italian and Pakistani ID cards are issued after the sponsor's departure, with no reason given for the earlier cards not having been produced. The purported utility bills are only in the name of the sponsor, whom I am content to find lived at the property from 2016 as indicated by his own Italian and Pakistani ID cards. However, it is telling that the Appellant provides no correspondence in his own name. Similarly, the certificate of family status is dated in November 2019. The undated and untranslated letter headed UniCredit (p319/SHB), in the name of the Appellant and at the Via Augusto property does not materially assist in this respect."

"SHB" means the "stitched hearing bundle" prepared by the CCD electronic file.

7. At paragraph 33, the judge found that the appellant resided at the *Via Augusto* property "at some point after the sponsor left Italy in January 2018 until sometime before his own arrival in the UK on 14 March 2019."

8. At paragraph 34, the judge cited *AA (Algeria) v Secretary of State for the Home Department* [2014] EWCA Civ 1741, in which he said:

"... it was held that although the claimant and his brother had both been members of the same household while living in Algeria, it was clear that it was not his brother's household. To adopt the claimant's submission that it was sufficient for the other family member to have been living while in the country of origin under the same roof as the national of the member state or his spouse would be to depart even further from the plain and natural meaning of the relevant provisions. It would considerably enlarge the obligation in respect of extended family members which was taken by member states of the European Union for no obvious policy reason. As there were young adult siblings living with their parents, 'his' in the phrase 'member of his household' within regulation 8 (2), could not apply to the siblings. This is indicative of an approach that the relationship between the EEA national and the household in question is not just belonging but is one of control or responsibility."

9. The judge added that, even if he had found that the appellant had "resided under the same roof" as the sponsor in Italy, he would not have been satisfied that the appellant had discharged the burden of demonstrating that he was a member of the sponsor's household at that time. This was because there were a number of people who lived at the *Via Augusto* address, according to the Certificate of Family Status. At paragraph 35, the judge said:

"I bear in mind that the appellant was an adult for all material times and lived in a house by his own account with multiple other people,

including two of the sponsor's adult friends. It has not been suggested that the friends also formed part of the household of the sponsor, they are said to have paid their own portion of rent. There is insufficient evidence of the sponsor's control or responsibility in my view for such finding to be made."

10. The judge went on to consider dependence in the alternative. At paragraph 36 he found that there was insufficient evidence to merit a finding that the appellant had been dependent upon the sponsor while living in Italy.

#### *Grounds of appeal*

11. There are two grounds of appeal.
  - 1) The judge's reliance upon *AA (Algeria)* was a material misdirection. The case could be distinguished on its facts and was not authority for the proposition for which the judge relied upon it.
  - 2) The judge failed to take into account material evidence. At page 320 of the SHB there was a document addressed to the appellant at *Via Augusto* which is said to be dated 5 July 2017; that is because . It was incumbent upon the judge expressly to address the significance of that document, since it was plainly at odds with the judge's findings that the appellant did not live at the *Via Augusto* address at the same time as the appellant. I will refer to this document as the "page 320 document".
12. Permission to appeal was granted by First-tier Tribunal Judge Mills who considered that both grounds were arguable.

#### *Submissions*

13. Mr Youseffian addressed ground 2 first. He submitted that the page 320 document demonstrated that the appellant lived at the sponsor's address earlier than the judge found him to have lived there, thus calling into question the findings that the appellant and sponsor were not members of the same household. Since the judge accepted that the appellant and sponsor had lived at the same property at different times, his treatment of the page 320 document was crucial; his failure to address its significance was a material error of law. The document featured the appellant's name, address, and the date. Even though it was not translated into English, those essential details were sufficiently clear to merit express consideration by the judge. The judge had reached a number of positive findings of fact that were consistent with the appellant's case and failed to consider the impact of those findings alongside the significance of the page 320 document.
14. In relation to ground 1, Mr Youseffian submitted that *AA (Algeria)* was clearly distinguishable from the facts of these proceedings. It concerned a dispute as to which EEA national was the "head" of the household, from a

number of possible candidates. No such dispute arose in these proceedings since the sponsor was the only possible EEA national in respect of whom the household could be said to belong, he submitted.

15. At the hearing, Mr Youseffian also sought to challenge the judge's findings concerning dependency. The appellant had not applied for, nor did he enjoy, permission to appeal on that basis. I declined to let Mr Youseffian to pursue his submissions on that issue.
16. For the Secretary of State, Mr Melvin relied on a rule 24 response dated 29 June 2022, which stated that the judge was entitled to find that there had been a "paucity of evidence". The rule 24 notice stated that the judge's approach was consistent with *Sohrab and Others (continued household membership) Pakistan* [2022] UKUT 157 (IAC), which was consistent with the judge's reliance on *AA (Algeria)*. Mr Melvin additionally emphasised that many of the documents before the judge were not translated. The judge did not err by failing to make express findings concerning an untranslated document. Properly understood, the appellant merely disagreed with the judge's findings, but had not demonstrated that they were findings that no reasonable judge could have reached.

#### *Legal framework*

17. When they were fully in force, the 2016 Regulations implemented the UK's EU obligations in relation to the free movement and other residence rights enjoyed EU citizens and their non-EU family members in the UK. The Regulations extended to non-EU citizens of the European Economic Area, namely Iceland, Norway and Lichtenstein, as well as EU citizens; an "EEA national" was defined as a person who is a citizen of an EU Member State, or one of the remaining EEA States. The primary EU legislation upon which the Regulations were based used the terminology "Union citizen"; for present purposes, nothing turns on the differing terminology of "EEA national" and "Union citizen".
18. The Regulations provided for a number of different categories of rights to reside. Under the 2016 Regulations, a person who meets the definition of an "extended family member" contained in regulation 8 enjoys the right to have their residence in the UK facilitated pursuant to an "extensive examination" of their personal circumstances: see regulation 18(5). There are a number of capacities in which a person may be categorised as an extended family member under regulation 8, through satisfying a condition listed in the regulation. Paragraph (2) is relevant for present purposes:

"(2) The condition in this paragraph is that the person is-

(a) a relative of an EEA national; and

(b) residing in a country other than the United Kingdom and is dependent upon the EEA national or is a member of the EEA national's household; and either-

(i) is accompanying the EEA national to the United Kingdom or wants to join the EEA national in the United Kingdom; or

(ii) has joined the EEA national in the United Kingdom and continues to be dependent upon the EEA national, or to be a member of the EEA national's household."

19. There are a number of bases upon which a person may meet the criteria to be an extended family member under regulation 8(2), by reference to their circumstances in the country of origin, and their circumstances in the UK. The four combinations were summarised in *Dauhoo (EEA Regulations - reg 8(2))* [2012] UKUT 79 (IAC) in these terms:

- 1) prior dependency and present dependency;
- 2) prior membership of a household and present membership of a household;
- 3) prior dependency and present membership of a household;
- 4) prior membership of a household and present dependency.

20. Accordingly, it is possible for an extended family member to change what *Dauhoo* termed the "relevant connection" with the EEA national sponsor between that which existed in their country of origin and the status of the connection when in the UK.

### *Discussion*

21. I will commence with ground 2, reflecting the order of Mr Youseffian's submissions.

22. Ground 2 is a challenge to the judge's finding of fact. There are many authorities on the approach of an appellate tribunal or court to reviewing a first instance judge's findings of fact. Time and again, appellate courts and tribunals have returned to judgment of Lewison LJ in *Fage UK Ltd. v Chobani UK Ltd.* [2014] EWCA Civ 5 at paragraph 114:

"114. Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The best known of these cases are: *Biogen Inc v Medeva Plc* [1997] RPC 1; *Piglowska v Piglowski* [1999] 1 WLR 1360; *Datec Electronics Holdings Ltd v United Parcels Service Ltd* [2007] UKHL 23; [2007] 1 WLR 1325 ; *Re B (A Child) (Care Proceedings)* [2013] UKSC 33; [2013] 1 WLR 1911 and most recently and comprehensively *McGraddie v McGraddie* [2013] UKSC 58; [2013] 1 WLR 2477. These are all decisions either of the House of Lords or of the Supreme Court. The reasons for this approach are many. They include

- i. The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.
- ii. The trial is not a dress rehearsal. It is the first and last night of the show.
- iii. Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.
- iv. In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.
- v. The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).
- vi. Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done."

23. In *Perry v Raleys Solicitors* [2019] UKSC 5, Lady Hale PSC said that the appellate constraints concerning first instance findings of fact:

"... may be summarised as requiring a conclusion either that there was no evidence to support a challenged finding of fact, or that the trial judge's finding was one that no reasonable judge could have reached."

24. Mr Youseffian did not advance his case on the basis that the page 320 document was the appellant's 'silver bullet', or that it otherwise led to the irresistible conclusion that the appellant was a member of the appellant's household at the relevant time. Rather his submission was that the document was capable, in principle, of supporting that conclusion to the balance of probabilities standard. The judge would not have been bound to reach that finding, he accepted, but it was incumbent upon him expressly to address and consider a document of this significance.

25. In my judgment, Mr Youseffian's submissions on this ground are in the territory of pure disagreement and do not demonstrate an error of law, for the reasons set out below.

26. First, at paragraph 11 the judge said that he had taken the parties' submissions into account in their entirety. At paragraph 13 he said:

"I can confirm I have had regard to all the documents and a failure to mention specific items should not be taken to mean that they have not been considered."

The First-tier Tribunal is an expert tribunal and should be trusted to do its job. It alone is the judge of the facts: see *Secretary of State for the Home Department v AH Sudan* [2007] UKHL 49 at paragraph 30.

27. Secondly, there is no need for a judge expressly to refer to each and every piece of evidence or submission made. The judge made several references to the appellant's reliance on untranslated documents being unhelpful, and, by contrast, the weight attracted by documents that *were* translated (see, e.g., paragraphs 28, 29 and 32). As the Court of Appeal recently put it in *Volpi v Volpi* [2022] EWCA Civ 464 at paragraph 2(iv):

“iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.”

28. Thirdly, the fact that that Mr Youseffian accepted that the page 320 document does not lead to the irresistible conclusion that the appellant lived at the *Via Augusto* address at the relevant times demonstrates that this ground sits in the territory of disagreement. As the Supreme Court put it in *Henderson v Foxworth Investments Ltd* [\[2014\] UKSC 41](#); [\[2014\] 1 WLR 2600](#) at [62]:

“It does not matter, with whatever degree of certainty, that the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.”

29. The judge's findings were not conclusions that no reasonable judge could have reached. A fatal weakness in this ground of appeal lies in the fact that the page 320 document was not translated. It was, and remains, in Italian. The judge did not know what its translated contents were, and nor do I. Relying on an untranslated document was a breach of rule 12(5)(b) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. This is not simply a question of procedure, or a matter of procedural rigour in relation to which the question of relief from sanctions applies. Rule 12(5)(b) exists precisely to avoid situations like this. The judge cannot be criticised for failing to ascribe significance to a document which, in breach of the tribunal's rules of procedure, was in a language which he did not understand. Even before this tribunal, no translation has been provided: Mr Youseffian invites this tribunal to engage in the very speculation which he sought to criticise the judge for failing to undertake himself. Attempting to ascribe any level of significance to the contents of the page 320 document would have been (and remains) an inherently speculative exercise, which the judge did not err by failing expressly to conduct on the face of his decision. It is not clear whether it is a standalone document or a continuation of the undated document that started at page 319, which the judge did expressly consider at paragraph



32, attempting to glean from it what he could, despite the translation barriers.

30. Fourthly, taking Mr Youseffian's submission at its highest, even if the page 320 document was some form of official document or invoice sent to the appellant at *Via Augusto* on 5 July 2017, it does not undermine the remaining findings reached by the judge. The judge considered the whole sea of evidence and reached findings that, during the period leading to the sponsor's departure for the UK in January 2018, the appellant lived with his parents. The appellant has not expressly challenged those findings. That there may (on Mr Youseffian's submission concerning the page 320 document) be a document that was sent to the appellant at another address during that period does not call the judge's remaining findings as to the location of the appellant's residence into question. It was simply one factor to consider in the "whole sea of evidence".
31. Fifthly, even if the page 320 document *did* demonstrate that the appellant was in residence at *Via Augusto* at the relevant times, that would not demonstrate that he was a member of the sponsor's household at that time, on the judge's remaining and unchallenged findings of fact. This is because, as the judge correctly identified, joint household membership entails more than merely parallel habitation under the same roof. It will be convenient to turn now to ground 1.

#### *Ground 1*

32. The judge relied on *AA (Algeria)* as authority for his finding that the appellant would need to demonstrate that he was a member of *the sponsor's* household, not merely *the same* household. The judge, of course, found at paragraph 35 that there had been a number of young people, in addition to the sponsor's family, who were resident at *Via Augusto*.
33. In *AA (Algeria)*, the Algerian appellant's brother was married to an Italian citizen. Before the Court of Appeal, the primary issue was whether the Algerian appellant could qualify as an extended family member under the predecessor instrument to the 2016 Regulations (the Immigration (European Economic Area Regulations) 2006) on the basis that he was dependent upon his Algerian brother, who was the non-EEA spouse of an EEA national: see paragraph 10. Article 3(2) of Directive 2004/38/EC only made express provision for such dependence (or household membership) to be established in relation to a Union citizen sponsor, whereas its predecessor directive, Directive 73/148/EEC, permitted such other family members merely to establish dependence upon the spouse of a Union citizen: see Art 1(2). The Court considered whether Article 38(3) of Directive 2004/38/EC, which provided that references to the repealed provisions of earlier directives should be construed as a reference to Directive 2004/38/EC, meant that the former, more generous regime contained in Directive 73/148/EEC continued to apply. The court held that it did not (see the discussion concluding at paragraph 28) but considered a

fall-back argument “for completeness” in any event. The fall-back submission was that the appellant and his brother had been members of “the same” household in Algeria, since they had resided under the same roof (“same roof” being the since-abandoned terminology of Directive 73/148/EC, in favour of the terminology of household membership). In rejecting that submission, the Court of Appeal emphasised the requirement to be a member of the primary EEA national sponsor’s household (or dependent upon the EEA sponsor), observing that it would be a departure from the “plain and natural meaning” of the provisions in the Directive merely to enable applicants to be the member of the *same* household as their sponsor, rather than the household *of* their sponsor.

34. Mr Youseffian’s complaint about the judge’s reliance on *AA (Algeria)* is misplaced. The proposition for which the judge relied on *AA (Algeria)* was to establish that the appellant had to be a member of an EEA sponsor’s household, and not simply living in the same building. That proposition was entirely sound.
35. Moreover, as the Secretary of State’s rule 24 notice makes clear, the judge’s approach was consistent with that recently clarified by the Presidential panel in *Sohrab and Others (continued household membership) Pakistan* [2022] UKUT 157 (IAC). At paragraph 47(d), the panel held:

“To be a member of an EEA national’s household requires a sufficient degree of physical and relational proximity to the EEA national through living in the household of which the EEA national is the head, living together as a unit, with a common sense of belonging. There should be a genuine assumption of responsibility by the EEA national for the extended family member. Questions of the commencement of the assumption of responsibility and the duration of dependency or household membership are relevant.”

36. The judge’s approach was entirely consistent with that which was summarised in *Sohrab* at paragraph 47(d). The findings of fact reached by the judge simply did not establish that the appellant was a member of the sponsor’s household at the relevant times, applying the above criteria. Even had the judge impermissibly overlooked the page 320 document, it would not have established that the appellant was a member of the sponsor’s household at the relevant times; it does nothing to demonstrate that there was the required relational and other proximity between the two. The high watermark of Mr Youseffian’s submissions is that the receipt of a single letter in July 2017 (assuming that that is when it was sent) was sufficient to merit a conclusion that the above criteria were met. It was not.

### *Conclusion*

37. The judge reached findings of fact that were open to him on the evidence that he heard, in the manner it was presented. The approach he adopted

was entirely consistent with recent Presidential authority. The grounds of appeal are without merit.

38. This appeal is dismissed.

**Notice of Decision**

The decision of Judge Khurram did not involve the making of an error of law.

The appeal is dismissed.

No anonymity direction is made.

Signed Stephen H Smith

Date 3 October 2022

Upper Tribunal Judge Stephen Smith