



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

Appeal Numbers: UI-2022-004453  
UI-2022-004454  
FtT Appeal Numbers: EA/03386/2021  
EA/03389/2021

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 2 February 2023**

**Decision & Reasons Promulgated  
On 27 March 2023**

**Before**

**UPPER TRIBUNAL JUDGE O'CALLAGHAN**

**Between**

**DALWAT ZADRAN  
JANBANA SHIBIT KHIL  
(ANONYMITY DIRECTION NOT MADE)**

Appellants

**and**

**ENTRY CLEARANCE OFFICER**

Respondent

**Representation:**

For the Appellants: Mr. S Hingora, Counsel, instructed by Adam Bernard  
Solicitors

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

**DECISION AND REASONS**

**Introduction**

1. The appellants appeal with permission against a decision of Judge of the First-tier Tribunal Raikes ('the Judge') dated 8 October 2021.
2. The underlying appeals are concerned with decisions of the respondent, dated 26 January 2020, refusing to issue EEA Family Permits to the appellants under the Immigration (European Economic Area) Regulations 2016 as extended family members of an EEA citizen exercising EEA Treaty rights in this country. The sponsor, Mr. Gulmak Shabak, is a Dutch national. He is the uncle of both appellants, who are a married couple.

### **Background**

3. Both appellants are nationals of Afghanistan who presently reside in Pakistan. Mr. Zadrán is aged 30. Mrs. Khuil is aged 23.
4. Mr. Shabak has resided in the United Kingdom since 2014 and is employed. He provides funds to the appellants, as does his daughter.
5. The appellants submitted their EEA Family Permit applications on 30 November 2020. The applications were refused by separate decisions dated 26 January 2021, with both decisions observing:

'The submitted evidence shows that [the sponsor] works 30 hours per week and from this employment earns a net income of approximately £280 per week. Due to his low income, your sponsor also receives state benefits of over £950 per month, namely Working and Child Tax credits. I am therefore not satisfied that it is sustainable for your sponsor to financially support you, along with his own family in the UK. Therefore, after considering these factors, there is a risk that if you did arrive in the United Kingdom that you may become a burden on the public funds system of this country.

I therefore refuse your EEA Family Permit application because I am not satisfied that you meet all of the requirements of regulation 12 (see ECGs EUN2.23) of the Immigration (European Economic Area) Regulations 2016.'

6. At the hearing, Mr. Melvin was unable to aid me as to the relevance of the reference to 'ECGs EUN2.23'.

### **Law**

7. Regulation 12 of the Immigration (European Economic Area) Regulations 2016, as relevant to this appeal:

12.- (1) An entry clearance officer must issue an EEA family permit to a person who applies for one if the person is a family member of an EEA national and—

- (a) the EEA national—
    - (i) is residing in the United Kingdom in accordance with these Regulations; ... and
  - (b) the family member will be accompanying the EEA national to the United Kingdom or joining the EEA national there.
- ...
- (4) An entry clearance officer may issue an EEA family permit to an extended family member of an EEA national (the relevant EEA national) who applies for one if—
    - (a) the relevant EEA national satisfies the condition in paragraph (1)(a);
    - (b) the extended family member wants to accompany the relevant EEA national to the United Kingdom or to join that EEA national there; and
    - (c) in all the circumstances, it appears to the entry clearance officer appropriate to issue the EEA family permit.
  - (5) Where an entry clearance officer receives an application under paragraph (4) an extensive examination of the personal circumstances of the applicant must be undertaken by the Secretary of State and if the application is refused, the entry clearance officer must give reasons justifying the refusal unless this is contrary to the interests of national security.

### **Hearing before the FtT**

8. The appellants initially requested an oral hearing of their appeal, and accordingly a notice of hearing was issued in April 2021 confirming that the hearing was listed at the First-tier Tribunal sitting in Manchester on 16 September 2021.
9. By a letter dated 8 May 2021, the appellants' then legal representatives, Taj & Taj Law Associates, Burnley, requested that consequent to the Covid-19 pandemic the First-tier Tribunal proceed to consider the appeal on the papers. The letter was received by the First-tier Tribunal on 17 September 2021, the day after the hearing.
10. The appeal was listed as an oral hearing before the Judge. No representative from either party attended the hearing. Enquiries were made, and Taj & Taj Law Associates informed the First-tier Tribunal that

the matter should properly proceed as a paper hearing. The Judge proceeded to consider the appeal in the absence of the parties under rule 25(1)(a) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014.

11. Taj & Taj Law Associates filed an undated 'skeleton arguments' [sic] on behalf of the appellants. The document lacks any paragraph numbering. Much of the document is taken up with reciting regulation 12 of the 2016 Regulations. The appellants' case as advanced by the skeleton argument was that though receiving universal credit, Mr. Shabak was employed and so the benefits received were work related. It was stated that the sponsor's total income was in the region of £1350 per month. Whilst the genuineness of the dependency was addressed, no cogent submission was advanced as to how the appellants would be accommodated or financially provided for upon their entry into this country.
12. Accompanying the skeleton argument were several documents. No index was provided identifying these documents. They are focused upon establishing the familial relationship between the appellants and Mr. Shabak, and as to the dependence of the former upon the latter. Certain documents relate to Mr. Shabak's employment, which was entered into prior to the respondent's decision. As accepted by Mr. Hingora no evidence was filed establishing that the appellants were intending to reside with Mr. Shabak, that he could accommodate them along with his own family or identify the available funds he could provide for the appellants when they were in this country being mindful of the financial requirements owed to his own family.
13. The Judge found:
  - '10. In the first place I do not find that there is any evidence that has been produced which supports the Appellant's [sic] claim that their stated Sponsor has either been providing the Appellants with support or indeed is able to support them were they to come to the UK. The information I have regarding the Appellants and their Sponsor is limited to that contained in the refusal decision only as the appeal forms do not contain any further information. In respect of their representatives, I only have the covering letter requesting an appeal out of time, which was granted. Given that there is nothing provided to address the Respondent's concerns regarding the Sponsor's circumstances, I am not satisfied that he is in a position to support the Appellants as asserted.
  11. As stated, and looking at the matter as a whole and given the lack of documentary evidence produced in respect of their family circumstances, and the position of their EU Sponsor's

circumstances in the UK, I am satisfied that the Appellant and her sponsor have not provided conclusive evidence that they are extended family members and that the Appellants, as stated, would be in a position whereby their Sponsor be able to financially support them and indeed sustain that financial support in the UK particularly given his low income, his reliance on support as a result on public funds in the UK and the lack of information or evidence as to his circumstances here. On this basis I therefore refuse the appeal.

...

14. It is for the Appellant [sic] to show that the Respondent's discretion should have been exercised differently. I am satisfied that the Appellant [sic], on submission of the documentary evidence, has satisfied me that the Respondent's decision was lawful, and I am not persuaded that it should have been exercised differently.'

14. The Judge appears not to have had the skeleton argument or the accompanying documents before her, though as observed above they do not cogently address the underlying rationale for the respondent's adverse exercise of discretion.

### **Grounds of Appeal**

15. The appellants advanced two grounds of appeal in writing.
16. The first ground complains that the Judge went beyond the scope of the decision letter, and erroneously found against the appellants on a matter of which they had no notice.
17. At the hearing, Mr. Hingora identified two separate grounds as being located within the written ground 2: firstly, the respondent had no power in law to refuse the applications on the ground that the appellants may become a burden on the State following their arrival in this country, and secondly, a lack of adequate reasoning.
18. In granting permission to appeal by a decision sent to the parties on 23 November 2022, Upper Tribunal Judge Grubb identified a third ground of appeal arising from assertions made in an attendant extension of time application, namely that the appellants may have been denied a fair hearing by failings of Taj & Taj Law Associates.
19. UTJ Grubb reasoned, *inter alia*:
  - '3. It is arguable, on the basis of Ground 1, that the proceedings were procedural unfair in that the FtT relied on a matter not apparently in dispute and did so in a case where the appeal

was determined 'on the papers' and so the appellants had no opportunity to deal with the matter.

4. I further consider that there is, if established by evidence, arguable unfairness (albeit through no fault of the judge) in that the appellants may have been denied a fair hearing by the (then) representatives failure to file relevant documents and/or the conduct of the proceedings (see, e.g., FP (Iran) v. SSHD [2007] EWCA Civ 13.) **This issue will, in particular, require supporting evidence (see, SV (Alleging misconduct and suppressing evidence) Iran [2005] UKAIT 0016 and BT (Former solicitors' alleged misconduct) Nepal [2004] UKAIT 00311.**
5. I would not exclude consideration of Ground 2 although it may be of less merit.'

### **Discussion**

20. Mr. Melvin filed and served a skeleton argument, dated 1 February 2023.
21. On their face, the decision letters raise no adverse dispute as to the appellants' dependency upon Mr. Shabak whilst residing in Pakistan. Indeed, it is implicit that the appellants are accepted to be extended family members of Mr. Shabak. The refusal is founded upon an exercise of discretion; the appellants' being a burden upon the State if they were to enter this country.
22. I am satisfied that the Judge erred in her finding at para. 11 of her decision that 'I do not find ... that their stated Sponsor has either been providing the Appellants with support ...' It is unsurprising that the appellants did not file evidence as to support provided to them in Pakistan as no adverse issue was taken by the respondent as to their dependency upon Mr. Shabak in that country.
23. Mr. Melvin conceded in respect of ground 1 that the Judge erred in law by finding against the appellants on a matter not raised by the respondent and upon which they had no notice that they were required to address by evidence before the First-tier Tribunal. Mr. Melvin was correct to take this position. Whilst ultimately it is for a judge to decide whether relevant requirements are met, procedural fairness requires that a party be properly placed on notice of judicial concerns where on the face of the challenged decision a party could reasonably identify no dispute as arising on the part of the respondent. Fairness is conducive to the rule of law, and there is an instrumental value in enabling a party to address judicial concerns by contributing relevant information. A party will not be aware of the potential positive impact of contribution if it is unaware of a concern that goes to the core of its case. Consequently, on

the grounds of fairness an adjournment should usually be granted where a party is required to secure additional evidence to address a matter not relied upon by the respondent.

24. However, Mr. Melvin's position, appropriately accepted by Mr. Hingora, was that the error would only be material if the appellants could succeed on one of the other two advanced grounds, because they are required to identify a material error of law in respect of the Judge's consideration of the respondent's exercise of discretion.
25. Turning to ground 2, Mr. Hingora accepted that the challenge to the respondent not enjoying a lawful power to refuse an EEA Family Permit on 'burden to the State' grounds could not be properly pursued at the hearing. The discretionary power possessed by the respondent is established by regulation 12(4)(c) of the 2016 Regulations, transposing article 3(2) of Directive 2004/38, confirming that Member States are not obliged to accord a right of entry and residence to persons who are family members. The Court of Justice noted the discretion in *Secretary of State for the Home Department v. Rahman* (C-83/11) EU:C:2012:519, [2013] Q.B. 249, at [22]-[23].
26. Consequently, acceptance by the respondent that the appellants fall to be considered as extended family members within regulation 12 does not confer any substantive right to residence in this country. Whether to grant an EEA Family Permit is a matter for the respondent's discretion subject to the procedural requirements in regulation 12(5).
27. The attendant lack of reasoning challenge advanced by ground 2 enjoys no merits as advanced in the written document. The Judge provided clear reasons for her decision, namely that there was insufficient evidence placed before her to address the concerns raised by the respondent when exercising her discretion. It is unclear to this Tribunal whether the skeleton argument and accompanying documents were filed with the First-tier Tribunal prior to the Judge's consideration, but at their highest, as explained above, they come nowhere close to addressing the respondent's concerns as to the appellants' financial circumstances upon arrival in this country. The content of the skeleton argument strongly suggests that that the respondent's exercise of discretion was not at the forefront of the legal representatives' mind; rather the appeal was prepared as if it were one where dependency had not been established.
28. Mindful of the difficulties identified above, Mr. Hingora informed me that ground 2 should properly be considered alongside ground 3. It is said on behalf of the appellants that Taj & Taj Legal Associates did not inform them as to the hearing having been listed before the Judge, nor did they give instructions to Taj & Taj Legal Associates that the appeal hearing

proceed on the papers. These are serious allegations as to professional conduct. It is stated that the appellants are in the process of making a complaint with the Solicitors Regulation Authority as to the conduct of Taj & Taj Law Associates, though it is presently unclear to this Tribunal whether the SRA are the relevant regulators.

29. Difficulties arose at the hearing when Mr. Hingora sought to rely upon a 'rule 15(2A)' application, dated 1 February 2023, drafted by him. It soon became apparent at the hearing that the document did not relate to a bundle running to 108 pages filed by the appellants' present representatives with the Upper Tribunal on 27 January 2023, but not in Mr. Melvin's possession. No rule 15(2A) application was made in respect of that bundle, and so no explanation was provided as to the nature of the evidence and why it was not submitted to the First-tier Tribunal. Mr. Hingora did not seek the admittance of the 108-page bundle, confirming that he did not have knowledge of it.
30. Having informed Mr. Hingora that the rule 15(2A) document drafted by him had not been received, and with Mr. Melvin confirming the same, Mr. Hingora forwarded it by email. Reference was made in the document to a witness statement from Mr. Shabak confirming the instructions provided to Taj & Taj Law Associates, documentary evidence as to refund transfers from Taj & Taj Law Associates said to be consequent to an acceptance of poor immigration advice and representation, and an 'audio recording' of a named representative at Taj & Taj Law Associates 'apologising and requesting no further complaint is made'.
31. Mr. Hingora was permitted time to take instructions from his solicitors. On his return to the hearing room, he confirmed that the relevant bundle had not been sent to either the Upper Tribunal or to the respondent. He requested an adjournment to permit steps to be taken to file and serve the bundle. Mr. Melvin opposed the application.
32. Observing rule 5(3) of the Tribunal Procedure (Upper Tribunal) Rules 2008 and noting that an assessment of what is fair is a fact-sensitive one and is not to be judged by the mechanistic application of any particular checklist, I refused the application. I considered it just and fair that the hearing proceed in the absence of documents which were not before the Tribunal. The rule 15(2A) document did not clearly identify the failings by Taj & Taj Law Associates in respect of filing evidence addressing how the appellants would maintain themselves following their arrival in this country without becoming a burden on public funds. As explained above, the focus of Taj & Taj Law Associates was upon establishing dependency, which was not in issue. It is not said that the appellants had at the time relevant evidence addressing the respondent's concerns as to their financial position following their entry



into this country. I note that such concerns are not addressed in the 108-page bundle filed with this Tribunal a few days prior to the hearing. I observe that the appellants and their present legal representatives have been on notice since receipt of UTJ Grubb's grant of permission as to the steps they were required to undertake in respect of evidence if the complaint as to the professional conduct of Taj & Taj Law Associates was to be pursued before this Tribunal. These steps have yet to be undertaken.

33. In the circumstances, the appellants' case advanced by means of ground 3 is properly to be dismissed for want of evidence, and so, accordingly, is ground 2 as the Judge gave cogent and lawful reasons for concluding that the exercise of discretion was lawful in respect of the evidence relied upon by the appellants.
34. It is very unfortunate that in a matter where a serious complaint is made as to the conduct of previous legal representatives, the appellants' present legal representatives may themselves be responsible for serious failings.
35. I take this opportunity to thank both Mr. Hingora and Mr. Melvin for their assistance at the hearing, particularly Mr. Hingora whose patient, considered and skillful submissions were made in difficult circumstances.
36. The appeals are dismissed.

**Notice of decision**

37. The decision of the First-tier Tribunal did not involve the making of a material error of law. The decision sent to the parties on 8 October 2021 is upheld, and the appellants' appeals are dismissed.

Signed: *D O'Callaghan*  
**Upper Tribunal Judge O'Callaghan**

Date: 6 February 2023