



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2022-001343

First-tier Tribunal No: EA/03131/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 17 October 2023

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

MUHAMMAD TAUQEER AZAM
(ANONYMITY ORDER NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr Shea, instructed by Whitefield solicitors.

For the Respondent: Mr Diwnycz, Senior Home Office Presenting Officer

Heard at Manchester Civil Justice Centre on 25 October 2022

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge Herwald promulgated on 13 December 2021, in which she dismissed the appellant's appeal against the decision of the respondent made on 3 March 2020 to refuse to issue him with a family permit as the extended family member of an EEA national under the Immigration (European Economic Area) Regulations 2016.
2. Although the UK has now left the EU and the implementation period came to an end at 11PM on 31 December 2020, this appeal was commenced before then. Pursuant to paragraph 5(1)(b) 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, the 2016 Regulations continue to apply to these proceedings.

3. The appellant is a citizen of Pakistan. His brother, Mr Zaheer Azam Akhtar (“the sponsor”), is also now a citizen of Spain. The appellant sought a family permit to joining the sponsor on the basis that he was dependent on the sponsor who was a qualified person, exercising his Treaty Rights in the United Kingdom.
4. The respondent refused the application as she was not satisfied that the appellant was financially dependent on the sponsor. Although it was accepted that he was transferring money to him; and, that he had not shown that the money transferred was necessary to meet his essential living needs. Nor was he satisfied that the sponsor would be in a position to support him in the United Kingdom.
5. When the matter came before the FtT, the judge raised of his own motion the issue of whether the sponsor was a qualified person, concluding that he was not, observing [14 (a)] that that was a point that had to be satisfied as at the date of hearing. He also rejected the claim that the appellant was dependent on the sponsor.
6. The appellant sought permission to appeal to the Upper Tribunal on the basis that the judge had erred:
 - (i) in acting in a procedurally unfair manner by raising the issue of whether the sponsor is a qualified person, that not being a point taken previously by the respondent; and, had he been given the opportunity to do so, he would have adduced evidence to support that contention; and, in doing so, failed to have regard to relevant, recent evidence of payments into the sponsor’s bank account by his employer;
 - (ii) in failing adequately to address the evidence of money transfers;
 - (iii) in making findings as to future dependency which were speculative and contract to the Directive and the EEA Regulations,
7. On 23 June 2022, Upper Tribunal Judge Smith granted permission on all grounds.
8. I heard submission from both representatives which I have taken into account in reaching my decision.
9. I am satisfied that it was procedurally unfair for the judge to raise an issue which was not one taken by the respondent, nor was it clear that the issue of whether the sponsor was employed as at the date of hearing was relevant or not. Nor is it clear that the correct test was applied; that is,

whether at the date of hearing (or indeed at the date of decision) the sponsor was in genuine and effective employment (or self-employment) which was not marginal or ancillary.

10. While there is insufficient material before me to show that, as ought to have been the case, the appellant objected to this issue being raised, I am in all the circumstances satisfied that the raising of such a significant issue without warning, did amount to procedural unfairness.
11. Further, I consider that there is merit in grounds (ii) and (iii), the analysis of which appears to have been infected by the impugned findings as to whether the sponsor is a qualified person.
12. While I note there are findings in respect of future dependency, there are no sufficient findings as to the existence of dependency at the date of hearing. And, the position of other family members needs to be taken into account in the assessment of both issues, insofar as future dependency is relevant.
13. Accordingly, I am satisfied that the decision of the First-tier Tribunal involved the making of an error of law due to substantial procedural unfairness, and that it must be set aside.
14. In the circumstances, I conclude that none of the findings of fact can be sustained, and that the appropriate course of action is to remit the decision to the First-tier Tribunal to be heard by a judge other Judge Herwald as that is the only appropriate remedy.

Addendum

15. Finally, and entirely regrettably, although I gave my decision extempore on 25 October 2022, for reasons which remain unexplained, the recording was not given to the typists to be transcribed nor was it possible to trace it.

Notice of Decision

1. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside. I remit the appeal to the First-tier Tribunal to be made afresh; none of the findings of Judge Herwald are preserved.

Signed

Date: 18 August 2023

Jeremy K H Rintoul
Upper Tribunal Judge Rintoul