



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-002524

First-tier Tribunal No: EA/07307/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 2 November 2023

Before

UPPER TRIBUNAL JUDGE KOPIECZEK
DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

JAHAN ZAIB
(NO ANONYMITY ORDER MADE)

Appellant

and

Entry Clearance Officer

Respondent

Representation:

For the Appellant: No legal representation

For the Respondent: Ms A Ahmed (Senior Home Office Presenting Officer)

Heard at Field House on 23 August 2023

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Garratt, promulgated on 21st February 2022, following a consideration 'on the papers' at Manchester Piccadilly on 17th February 2022. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before us.

The Appellant

2. The Appellant is a male, a citizen of Pakistan, and was born on 10th September 1998. He appealed against the decision of the Respondent dated 26th March 2021, refusing his application for an EEA family permit, in order to accompany his EEA Sponsor, Sheroz Khan, a French citizen, to the United Kingdom as the dependent extended family member of his EEA Sponsor.

The Appellant's Claim

3. The Appellant's claim is that he is dependent upon his Sponsor, who is his cousin. He maintains that his father died in 2000 and there is a death certificate. At the time the Appellant was just 2 years of age and his grandfather brought him up, but then he died in 2017, and there is a death certificate for him as well. The way that the Appellant puts his case is that he could not get a job after his grandfather's death. His mother was uneducated so she also was unable to get any employment. This is why his sponsoring cousin had to support him. It was he who offered him financial support. He would send monies for both the Appellant and his mother's daily living expenses. The Sponsor also provided them both with accommodation.
4. To prove his claim, the Appellant provided documentary evidence in the form of money transfer receipts, bank statements in his name, a tenancy agreement, employment letter, and Sponsor's payslips. He maintains that there is proof of funding by the Sponsor of nearly four years. Whilst from April 2021, the Appellant received his Sponsor's remittances as bank transfers, prior to that period, they were received in cash, which was then deposited in the Appellant's bank account. The Appellant also has shopping receipts to show outgoings and monthly expenditure. To prove that he has been unemployed, he provided a document from the Federal Board of Revenue in Pakistan. There was also a land ownership deed translated into English confirming that he lived in property owned by his cousin, Mr Sheroz Khan.

The Judge's Findings

5. In rejecting the Appellant's appeal, the judge referred to a Entry Clearance Manager's ("ECM") review which, as the judge explained, showed that "the sponsor has insufficient funds from his earnings in UK to meet his claimed payments ..." (paragraph 14). Although the Appellant had claimed that his sponsoring cousin also had a property in France, which provided a source of income to him, the judge concluded that,

"my study of the documentation provided is insufficient to enable me to conclude, on a balance of probabilities, that the sponsor actually owns the property in question in France or that his income from that property is regular or adequate to meet the claimed obligations, in the form of monthly payments to the appellant" (paragraph 14).

Moreover, "the production of one rental receipt for October 2021 is insufficient for me to make any conclusion about a regular source of income for the sponsor" (paragraph 15). The judge observed that, "There are also no bank statements for the sponsor to enable me to make conclusions about his total income or his pay from claimed employment in UK" (paragraph 16). In the end, the judge could only conclude that, "The absence of reliable evidence to show the sponsor's actual financial position covering both income and outgoings does not enable me to conclude that the appellant has shown that his sponsor is, actually, supporting him for his essential needs ..." (paragraph 17). The appeal was dismissed.

Grounds of Application

6. The grounds of appeal state that the Appellant had not been given an opportunity to respond to the Respondent's bundle because it had only been submitted a day before the hearing in breach of express directions. The grounds

also stated that the Appellant did not receive the ECM's review and therefore had no chance to respond to it.

7. At first instance, on 3rd May 2022, the First-tier Tribunal rejected the application for permission to appeal, on the basis that the appeal before Judge Garratt had been determined on the papers. The Sponsor had been unable to show that he could afford to send the Appellant the amounts of money that he was claiming, and also unable to show that he was receiving income from the property in France as claimed. Accordingly, the judge made his findings on the documents submitted by the Appellant. Therefore, the fact that the Respondent's bundle, while submitted only the day before the hearing, was not available to the Appellant as well, would have made no material difference to these findings. Second, as far as the ECM review was concerned, the Appellant would have been aware of the issues in the appeal, as these were set out in the Entry Clearance Officer's refusal, and so he would have had the opportunity to respond to the relevant issues well in time in any event.
8. On 2nd September 2022, however, the Upper Tribunal granted permission, on the grounds that, although Judge Garratt would not have been aware of the fact that the Respondent's bundle, having been served late, was not before the Appellant, it was arguable that there had been a procedural unfairness because the contents of both featured in the judge's reasoning. In fact, the ECM review had also not been provided to the Appellant.

Submissions

9. At the hearing before us on 23rd August 2023, we heard Ms Ahmed, the Senior Home Office Presenting Officer first. This was in fairness to the Appellant, who was not present before us, as he remained in Pakistan. Mr Sheroz Khan, the Sponsor, was in attendance, and he was assisted by Mr M Khan, an Urdu interpreter. We thought it best that he should hear from the Respondent first so that he could be assisted in taking a note of the issues before this Tribunal, since what we were concerned with was whether there was an error of law in the judge's decision.
10. Ms Ahmed submitted that she herself still did not have a copy of the ECM review. We indicated that we also did not. It was not included in the bundle of papers before us from either side. Ms Ahmed agreed, however, that it had not been served upon the Appellant so that he did not get the chance to respond to the ECM review. However, her submission before us was that there was no obligation upon the Respondent to serve an ECM review on an Appellant. In any event, the Appellant would have been aware of the issues in the appeal. In addition to that, this is an appeal which the Appellant would have lost anyway.
11. Ms Ahmed then went on to explain that in accordance with the directions given, the Bundle should have been submitted by the Respondent on 20th January 2022. She could confirm that it was served on the Appellant on 22nd January 2022. On 16th February 2022 it was then served on the Appellant again. On top of that the Appellant would not have succeeded in any event. This is because in the determination, whilst the judge observes that, "the respondent has drawn the conclusion in the review, that the sponsor has insufficient funds from his earnings in UK to meet his claimed payments to the sponsor, the appellant has explained that the sponsor also has a source of income from his property in France", and this was not accepted by the judge. The judge himself had gone on to say that, "However, my study of the documentation provided is insufficient to enable me

to conclude, on a balance of probabilities, that the sponsor actually owns the property in question in France or that his income from that property is regular or adequate ..." (at paragraph 14).

12. For his part, Mr Sheroz Khan, the Sponsor, explained that no Bundle was received in January 2022, although he could confirm that the Bundle on 16th February 2022 was received by the Appellant by email. However, he went on to say that there was not enough time to respond to it.

Error of Law

13. We are satisfied that the making of the decision by the judge below involved the making of an error on a point of law, although this would not have been known to the judge, as he considered the appeal on the papers, and would not have been alive to the question whether the Appellant had received the ECM's Review. The judge does take the ECM Review into account although it was a document to which the Appellant was not privy.
14. The judge refers to a document entitled the "Appellant's Explanation of Case" (at paragraphs 7 to 10). However, he also gives detailed consideration to the ECM Review, which he notes was undated (at paragraphs 3 to 6). As the judge observes, "In the review, the respondent stated that the appellant's evidence had been considered but the refusal decision was maintained", and goes on to add that, "That was because the sponsor's payslips (pages 115-119 of the appellant's bundle) showed a payment of national insurance but there was no indication of his national insurance number". It was further noted in the ECM Review, the judge said, that if the Sponsor's monthly net pay was £1012.31, and his rent was £950, this meant that he only had a surplus of £62 per month in his income "to meet the payments claimed to be made to support the appellant" (paragraph 5).
15. We conclude that as a matter of procedural fairness, the Appellant should have had the opportunity to respond to this and to be able to contest what was being asserted in the ECM Review. The fact that the judge had under his "conclusions and reasons" section formed the view that "my study of the documentation provided is insufficient to enable me to conclude" in favour of the Appellant does not detract from the fact that this very sentence is preceded by the Respondent's own conclusion "in the review, that the sponsor has insufficient funds" (paragraph 14). It seems to us inevitable that the judge's overall assessment was informed by the contents of the ECM's review, which the appellant had not had the opportunity to contest.

Notice of Decision

16. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. The appeal is remitted to the First-tier Tribunal, for a hearing *de novo* with no findings of fact preserved, to be determined by a judge other than Judge Garratt.
17. In remitting the appeal to the First-tier Tribunal we have regard to the Senior President's Practice Statement at paragraph 7.2.(b) and that the nature or extent of any judicial fact-finding which is necessary in order for the decision in the appeal to be remade is such that, having regard to the overriding objective in Rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008, it is appropriate to remit the case to the First-tier Tribunal.

Satvinder S. Juss

Judge of the Upper Tribunal
Immigration and Asylum Chamber

18th September 2023