



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM CHAMBER**

Case No: UI-2022-004610  
UI-2022-004611  
First-tier Tribunal No: EA/15830/2021  
EA/15831/2021

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:  
On 6 August 2023**

**Before**

**UPPER TRIBUNAL JUDGE HANSON**

**Between**

**SANTOKH SINGH  
SUKHDISH KAUR  
(NO ANONYMITY ORDER MADE)**

Appellants

**and**

**AN ENTRY CLEARANCE OFFICER**

Respondent

**Representation:**

For the Appellant: Ms Jasbinder Chopra, instructed by Justmount & Co Solicitors.

For the Respondent: Mr Lawson, a Senior Home Office Presenting Officer (via Microsoft Teams as a result of the national rail strike).

**Heard at Birmingham Civil Justice Centre on 20 July 2023**

**DECISION AND REASONS**

1. The appellants', citizens of India, appeal with permission a decision of First-tier Tribunal Judge Row (the Judge'), dated 4 July 2022, who dismissed their appeals against the refusal by an Entry Clearance Officer (ECO) of their applications made under the EU Settlement Scheme (EUSS) for Family Permits to enable them to join their family in the UK.
2. The applications were made as dependant family members of an EU national exercising treaty right in the UK, namely their daughter in law Joanna Brodziak, a citizen of Poland.
3. In the determination promulgated on 4 July 2022 the Judge wrote:

Consideration of Evidence and Findings

6. To demonstrate that HSG was their son the appellants had produced a birth certificate said to be of HSG. It is page 18 of the respondent's bundle. The birth certificate did not give the name of the child and therefore could not identify HSG as their son.

7. The appellants have produced further documents to demonstrate the relationship.
8. Mr HSG said that the custom in the Sikh religion was not to name a child until 40 days after its birth. He produced an article, appellants' bundle page 5, which confirmed that this is the case.
9. The article does not altogether help the appellants. This is because whilst it does explain the naming ceremony it states that this can cause delays in the registration of births. In other words, registration can be delayed until after the naming of the child. It does not explain why the birth was registered without giving a name or why the birth was not re-registered later when the child was named.
10. The appellants have produced other evidence. They have provided statements which say that they are the parents of HSG. HSG and his wife, the sponsor, both say that the appellants are the parents of HSG.
11. Three passports of HSG have been produced. These are dated 2010, 2017, and 2019. These passports name the appellants as his parents.
12. There was a further complication because in 2019 HSG changed his name to add the surname Ghotra. The last passport reflects this.
13. There are school documents which name the appellants as the parents of Hardeep Singh. There is a ration card which names them as his parents. There are other passports said to be of HSG's brothers which name the appellants as their parents.
14. All these documents give support to the evidence of the appellants, the sponsor, and HSG that the appellants are the parents of HSG.
15. The information in the passports will however be based on information provided by HSG. It could not have been the birth certificate.
16. All these documents must be seen in the light of the respondent's Country Background Note India Version 1.00 January 2019 which, at paragraph 6.41, indicates that false documents, including education records, can be easily obtained in India, and that even genuine documents, such as a passport, may be obtained easily using fraudulent information. It is apparently a problem in India.
17. I do not imply that the appellants have used false documents. There is no evidence of that. It is just that these documents must be looked at with circumspection.
18. The issue could have been easily resolved. The appellants and HSG could have obtained DNA evidence to conclusively demonstrate their relationship. The absence of this DNA evidence was touched upon by HSG in his witness statement, at page 6 paragraph 7 appellants' bundle. He gave further evidence of this at the hearing.
19. His explanation was that he had arranged for a firm called DDC to provide DNA tests in October 2021. He had been quoted £874 for the preparation of the test and paid a £250 deposit. He was able to produce on his telephone a screenshot which indicated that this was the case. I did not see the screenshot but counsel read out the information and I have no doubt that it is correct.
20. HSG was then told by DDC that unless he had a letter from a court or a Home Office letter a test would not be recognized. They could prepare an unofficial report but this would be of no evidential use. Because of that he cancelled the tests and obtained a refund of part of the £250 he had paid. He did not proceed with the obtaining of DNA evidence.
21. That explanation does not bear scrutiny. There is no requirement for a court order or a letter from the Home Office in order to produce a DNA report. These are routinely carried out. All that would be required would be for a reputable firm to be instructed, suitable identification provided, the appropriate safeguards for continuity of evidence to be provided, and DNA tests would be produced which would have conclusively resolved the issue one way or the other.
22. Another explanation for the failure to obtain DNA evidence would be that the appellants and HSG knew that the evidence would not support their case and were not prepared to spend £874 to demonstrate that.
23. Whatever the reason was, this evidence has not been obtained.
24. The burden of proof is upon the appellants. It is for them to establish the relationship. The birth certificate does not. The other documents and oral evidence might, but do not necessarily do so. DNA evidence would have been conclusive and have resolved the issue long ago. The appellants and HSD did not obtain it.
25. On the evidence before me the appellants have not established that they are the parents of HSG. They may be, but on the evidence currently provided they have not

demonstrated that to the required standard of proof. For that reason their appeals must fail and both appeals are dismissed.

4. The significance of the issue of paternity discussed by the Judge is that the above appellants claim to be the parents of their son who it was claimed is marriage to the EU national. The connection with the EU national is therefore asserted to be as dependent in-laws.
5. The appellant sought permission to appeal which was refused by another judge of the First-tier Tribunal but renewed to the Upper Tribunal.
6. Permission to appeal was granted by Upper Tribunal Judge O'Callaghan on 7 November 2022 in the following terms:

1. The appellants seek an EUSS family permit as the dependent parents-in-law of their EEA citizen sponsor. The respondent was not able to confirm on the evidence provided that the appellants were the parents of the sponsor's husband, and so the appellants could not establish that they were family members.

2. The First-tier Tribunal dismissed the appeal, observing that the appellants had not provided DNA test result evidence establishing their claimed relationship with the sponsor's husband. As this preliminary requirement was not established, there was no consideration of dependency.

3. The appellants rely upon undated grounds of appeal filed by their legal representatives, Justmount & Co Solicitors, 7-C Highgate Business Centre, Ladypool Road, Sparkbrook, Birmingham, B12 8LD. Reliance upon DNA test results that postdate the First-tier Tribunal's decision.

4. There is no engagement by Justmount & Co with the required procedure established by rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008, and, in particular, the grounds do not address as to why the Upper Tribunal must have regard to such evidence where there has been unreasonable delay in producing that evidence. I observe that reasons were given before the First-tier Tribunal in June 2022 for not securing DNA evidence which were not accepted by the Judge

5. A further complication is that whilst the grounds assert that the DNA test results were attached to the notice of appeal, they have not been placed before me nor have they been located by HMCTS staff to date.

6. However, on its face, Justmount & Co assert that favourable DNA test results have been secured that go to the core of the respondent's refusal of the applications in October 2021. I proceed at this time on the basis that Justmount & Co are aware of their professional obligations to the Upper Tribunal and would not have made the assertion without considering the document. It is implicit within the grounds of appeal that an error of fact as to the relationship between the appellants and the sponsor's husband establishes a material error of law. In the circumstances, it is appropriate to grant permission to appeal.

#### Directions

7. I direct: (i) The appellants are to file and serve the DNA test results referred to at paragraph 3 of the undated grounds of appeal no later than 14 days after the sending of this decision.

#### Discussion and analysis

7. The Secretary of State opposes the appeal. In a Rule 24 response dated 21 February 2023 it is written:

Re: Secretary of State's response to the grounds of appeal under Rule 24. Santokh Singh India 15 July 1962

1. The respondent to this appeal is the Secretary of State for the Home Department. Documents relating to this appeal should be sent to the Secretary of State for the Home Department, at the above address.
  2. The respondent opposes the appellant's appeal. In summary, the respondent will submit inter alia that the judge of the First-tier Tribunal directed himself appropriately.
  3. The Respondent appears not to have been provided with the DNA reports referred to in the Appellants grounds.
  4. The Respondent however respectfully submits that even if the grounds had been received, it is not accepted that DNA reports produced after the First Tier Tribunal Hearing establish that the Judge erred in law by concluding that there was a lack of evidence of relationship as claimed.
8. Ms Chopra relied upon two main points. The first is an assertion the Judge erred in law when stating the appellants' documents must be looked at with circumspection by reference to the CPIN and its statement that false documents could be easily obtained in India. It was argued the Judge failed to give sufficient or adequate reasons, placing too much weight on the CPIN in circumstances in which no allegation of false documents had been raised by the respondent. It is also argued the Judge had committed a procedural unfairness in not applying the 'Surendran guidelines.
9. The second point is that it was argued the Judge had materially erred in placing excessive weight on the absence of any DNA evidence. Reference is made to the Home Office DNA Policy Guidance dated 16 March 2020 in which it is stated that officials must not require DNA evidence and that where an applicant chose not to provide clear DNA evidence no negative inference could be drawn from that. It is argued the Judge's approach the question of DNA evidence was unreasonable and onerous to the appellants. Whilst it would generally be conclusive it was not required or mandated by the rules or regulations. It is also asserted the Judge erred at [22] in speculating that the reason for not providing DNA evidence was that it would not support the appellant's case.
10. The starting point in assessing this appeal is to go back and look at the reasons why the applications were refused by the ECO. In the refusal it is written:

You have stated that the family relationship of the EEA citizen sponsor to yourself is dependant parent in law. As evidence of this relationship you have provided a birth certificate, your sponsors marriage certificate.

However, there were a number of inconsistencies with this evidence. I note that the birth certificate submitted (and translation) does not contain the name of the child. Therefore, I have not been able to establish who this document belongs to. Further to this as there is no birth certificate which name you as the parent of your sponsors spouse, I have not been able to confirm your relationship to your sponsor.

I am not satisfied, based on the evidence you have provided in isolation, that you are a 'family member of a relevant EEA Citizen'. Your application is refused.

11. In relation to the first issue, as noted above, the issue of paternity was clearly a large as the ECO was not satisfied that the appellants had proved that they were the family members of the relevant EU national.
12. There is no merit in the submission the Judge erred in placing weight upon the CPIN in circumstances in which there is no allegation false documents, especially as the Judge makes a finding at [17] that he does not imply the appellants have used false documents. It was open to the Judge to consider the evidence as was

found necessary in the circumstances. This is normally referred to as considering the material with the required degree of anxious scrutiny.

13. The CPIN is a document in the public domain and although the appellants complain about the Judge's reference to that document nothing has been provided to show the Judge's concerns, set out at [16], are not findings properly open to the Judge. Judges in the immigration and asylum jurisdiction, due to the volume of work produced, have considerable experience dealing with countries outside the UK. India is a country from which numerous claims arise, some in which the issue of false documents arises.
14. The reference to the Surendran guidelines is without merit. They apply where a Home Office representative does not appear and provides guidance on the approach that should be adopted by a judge in such circumstances, if there are issues that require clarification. This is because it is accepted it is not for a judge to "descend into the arena" and to start cross-examining an individual appellant. Before this Judge, there was a Presenting Officer. The Judge was entitled to hear the evidence given, listen to questions put in cross examination and the replies, and consider all of the evidence before coming to a reasoned conclusion. That is what this Judge did. I find no material legal error made out on the first point taken against the Judge.
15. The second point, on the face of it, seeks to challenge the Judge's findings in relation to the lack of appropriate evidence to prove the relationship is as claimed.
16. In accordance with Judge O'Callaghan's direction the DNA test results referred to in the grounds of appeal have now been provided. The letter from Cellmark is dated 6 September 2022. It is clear that the application for the tests was not made until early August 2022, after the Judge's decision had been handed down. The claimed relationship between Santokh Singh and Hardeep Singh Ghotra is supported by the results, as father and son, as is the claimed relationship between Sukhdish Kaur and Hardeep Singh Ghotra, as mother and son. As Hardeep Singh Ghotra is married to the EU national sponsor the relationship of the appellants to her as 'in-laws' is established. The difficulty in this appeal is that this evidence only came into existence after the decision had been handed down.
17. The Judge does referred to enquiries being made prior to the hearing in [19] of the decision under challenge as set out above. The Judge notes at [20] that company concerned required further information, claiming otherwise their tests results would not be recognised.
18. The argument in the grounds that because Home Office guidance to caseworkers' states officials must not require DNA tests the Judge referring to them meant he somehow had erred in law, is without merit. Ms Chopra provided a copy of the DNA policy guidance, version 4.0, published on 16 March 2020. Specific reference was made to page 7 entitled "DNA evidence: can't be required" this section explains that officials must not require applicants to provide DNA evidence. The section does stated that if DNA evidence has been provided it can be considered.
19. The determination shows the comment by the Judge that there was no DNA evidence at the date of the appeal is factually correct. It is now known that the comment by the Judge at [22] as to the reason why there was no such evidence is incorrect and a comment made without any evidential foundation, but even if an error of fact is established on this point it is not made out it is material.
20. The Judge accurately sums up the position at [24]. The Judge did not accept the evidence that had been made available was sufficient to discharge the required evidential burden of proof. The Judge properly notes that other evidence might have made a difference but that no such evidence was made available.
21. Judge O'Callaghan refers to procedural issues in relation to how the appellants are now seeking to rely upon the fresh DNA evidence. The direction at [7] that the appellants are to file and serve the DNA test results is not a grant of permission to

rely upon the evidence pursuant to rule 15(2A) of the Upper Tribunal Procedure Rules. The Judge specifically notes that the DNA evidence, although referred to in the undated grounds of appeal, had not been provided.

22. Ms Chopra was asked whether she was making a formal application to produce the DNA evidence orally, which she confirmed she was. Mr Lawson objected to its introduction at this stage when the issue being considered was whether the Judge erred in law in a manner material to the decision to dismiss the appeal on the evidence that was available to him.
23. Reference was made during the course of the hearing to the recent guidance provided by the Upper Tribunal in Akter [2021] UKUT 00272, an appeal heard by UTIAC's former President Mr Justice Lane and Vice President of the Upper Tribunal, Mr Ockelton. The head note the decision reads:

(1) GM (Sri Lanka) v Secretary of State for the Home Department [2019] EWCA Civ 1630 is not authority for the proposition that an appellate court or tribunal has a free-standing duty, derived from section 6 of the Human Rights Act 1998 (public authority not to act incompatibly with ECHR right), to disturb a decision of a lower tribunal. The jurisdiction of the appellate court or tribunal is governed by sections 12 and 14 of the Tribunals, Courts and Enforcement Act 2007, which depends on the lower tribunal having made an error of law before its decision can be disturbed on appeal.

(2) A party who wishes to submit that a decision of a tribunal which is otherwise free from legal error should be disturbed on appeal on the basis identified by Carnwath LJ in E and R v Secretary of State for the Home Department [2004] EWCA Civ 49 should do so clearly, when seeking permission to appeal on that basis.

(3) In deciding whether the principles in Ladd v Marshall [1954] 1 WLR 1489, as applied by E & R, should be modified in exceptional circumstances, the ability to make fresh submissions to the Secretary of State, pursuant to paragraph 353 of the immigration rules, is highly material to the question of whether those principles should be diluted.

24. It cannot be an error for a Judge not to consider evidence that he and she was unaware of, either because it had not been brought to the Judge's attention or because it did not exist at the date of the hearing. The argument that as the DNA results are now available the appeal should be allowed, Ms Chopra's stated position, ignores the fact that the Upper Tribunal cannot interfere in the decision and substitute a decision unless material legal error has been found in the decision of Judge Row.
25. It is asserted the Judge made an error of fact when concluding that there was insufficient evidence to prove the relationship between the appellants and the EU national sponsor. I find on the evidence considered by the Judge such a claim to have no merit. The Judge was entitled to conclude, as is set out in the determination. It has not been shown that finding is outside the range of those reasonably available to the Judge on the evidence.
26. Mr Lawson referred to the case of R (Iran) and the guidance given therein in relation to when an error of fact will amount to an error of law. In E and R the Court of Appeal said that "a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law, at least in those statutory contexts where the parties share an interest in cooperating to achieve the correct result. Asylum law is undoubtedly such an area." The Court of Appeal set out their view on the requirements for a finding of unfairness as follows:
- i) there must have been a mistake as to an existing fact including a mistake as to the availability of evidence on a particular fact;
  - ii) the fact evidence must have been established, and objectively verifiable;

- iii) the appellant (or his advisers) must not have been responsible for the mistake; and
- iv) the mistake was to play the material (not necessarily decisive) part in the Adjudicator's reasoning.

27. Considering these four criteria, the Judge does not make a mistake of fact when concluding that the evidence did not establish that the relationship with the EU national was as claimed. It did not. The suggested mistake of fact is that the Judge did not accept the appellants were the parents of the person married to EU national. In relation to this particular fact the grounds do not establish, by objectively verifiable evidence, the Judge's finding in relation to the lack of evidence sufficient to discharge the burden of proof is incorrect. In relation to the claim that the appellants are the parents of their son, that has now been established by the DNA evidence which is objectively verifiable.
28. In relation to the third criteria, the appellants or their advisers are responsible for the failure to provide sufficient evidence to discharge the burden of proof in relation to the issue of relationship. The Judge specifically refers in the determination to the fact it would have been relatively easy for the appellants to have obtained DNA evidence yet it had not been obtained and submitted. Responsibility for that, even though the appellants did attempt to obtain DNA evidence unsuccessfully, must be the responsibility of either the appellants or their advisers.
29. If the alleged mistake is the Judge's finding there was insufficient evidence, this has not been shown to be factually incorrect. In terms of the DNA evidence now made available, that does show that a finding that the relationship was not as claimed was material to the reasoning, but as stated, that evidence was not available. That is the Judge's finding.
30. Akhtar also refers to decision in *Ladd v Marshall* [1954] 1 WLR 1489. In that case it was found it cannot be an error for a Judge not to consider evidence that he and she was unaware of, either because it had not been brought to the Judge's attention or did not exist, and a tribunal should not normally admit fresh evidence unless (i) it could not have been previously obtained with due diligence for use at the earlier hearing (ii) would probably have had an important influence on the result, and (iii) was apparently credible. On the facts of this appeal, the first element of the test is not satisfied with due diligence for use before the Judge.
31. It is not made out the wider interests of justice required the DNA evidence to be admitted or for legal error to be found on the basis of the result of the same.
32. As recognised in *Akhtar*, a headnote (3), that in deciding whether the *Ladd v Marshall* principles as applied by E & R should be modified in exceptional circumstances the ability to make fresh submissions are highly material to the question of whether those principles should be diluted.
33. Mr Lawson was asked whether, now the DNA results are available, it is possible for a further application to be made. He confirmed a fresh application could be made under the EU SS supported by the evidence now available.
34. In summary, I do not find it is contrary to the interests of justice not to admit the DNA results at this stage. It is post-hearing and post-promulgation evidence and no justifiable reason for disturbing the Judge's findings on the basis of evidence that was not before the Judges and did not exist that time has been made out. I do not find legal error in the Judge's assessment of the evidence and the conclusion based on that assessment that there was insufficient evidence to discharge the burden of proof to enable the appellants to prove what was alleged, concerning the relationship, is true. I find no legal error material to the decision to dismiss the appeal made out. Accordingly the Upper Tribunal has no jurisdiction to interfere further in relation to this matter.

35. As an aside, no more, there was discussion at the hearing in relation to the issues at large. The application had been made as dependent in-laws of the EU national. That required the appellants to prove two points, namely the familial relationship with EU national and also that they are dependent for their essential needs upon the EU national. The ECO only dealt with the first of these points and concluded that as the relationship had not been proved the application should be rejected. Ms Chopra submitted that if I find the relationship proved I should allow the appeal. I do not agree. The appeal could be allowed to the extent it was remitted to the ECO for the issue of dependency to be established. To allow it outright solely on the basis of the relationship ignores the second element of the test. One cannot infer or imply from the wording of the refusal that the issue of dependency was accepted. I accept that in the alternative the ECO could have dealt with both matters but there is no legal obligation upon he or she to do so in light of the reasons why the application was refused.

**36. Notice of Decision**

No material legal error is made out in the decision of the First-tier Tribunal. The determination shall stand.

**C J Hanson**

Judge of the Upper Tribunal  
Immigration and Asylum Chamber

**24 July 2023**