



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

Case No: UI-2022-005410

First-tier Tribunal No:  
EA/03142/2021

**THE IMMIGRATION ACTS**

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

**Before**

**UPPER TRIBUNAL JUDGE RINTOUL**

**Between**

**Mr Muhammad Azam  
(NO ANONYMITY ORDER MADE)**

Appellant

**and**

**The Secretary of State for the Home Department**

Respondent

**Representation:**

For the Appellant: Mr M Murphy, instructed by City Solicitors Limited Trading  
as Farani Taylor Solicitors

For the Respondent: Ms A Nolan, Home Office Presenting Officer

**Heard at Field House on 28 June 2023**

**DECISION AND REASONS**

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge Easterman, promulgated on 26 July 2021, dismissing his appeal against the decision of the Secretary of State to refuse him a family permit under the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations").

**The Appellant's Case**

2. The appellant is a citizen of Pakistan. His younger brother, Mr Jovinda, is a citizen of Italy who lives and works in the United Kingdom. The appellant

states that he is dependent on his brother (“the sponsor”) who provides the appellant regular remittances which he uses for his needs and is dependent on him. On that basis he is an extended family member of the sponsor, pursuant to Regulation 8(2) of the EEA Regulations and for that reason to an EEA family permit.

3. The Secretary of State was not satisfied that the appellant was entitled to a family permit given insufficient evidence to show that the sponsor was in the United Kingdom or travelling with him.

### **The Appeal before the First-tier Tribunal**

4. The judge heard evidence from the sponsor and his wife and Ms Naseem, the appellant’s sister. A further witness, Ms Bano, gave evidence but was not cross-examined.
5. The judge also heard submissions from representatives for both parties and had before him bundles provided by both the appellant and the respondent. It is to be noted also that the judge had previously issued a note and directions in this case in which had had observed:

“The Tribunal will generally expect to see a full statement from both sponsor and claimed dependant, giving a clear picture of each of their financial positions. The appellant should not rely, on documents previously sent to the respondent necessarily being forwarded to the Tribunal. And they would be well-advised to produce all they seek to rely on in their own bundle.”

6. The judge found that:
  - (i) the appellant was related to the sponsor as claimed, although he found the sponsor’s evidence difficult to rely upon, it was nonetheless corroborated by Ms Naseem and additional documents;
  - (ii) while the sponsor had been sending two relations in Pakistan over a long time, it was unclear what the money was used for and what other money was available to the appellant in Pakistan and while he was working and earning money from land, that might not be enough to keep him, his mother, his wife and the three children [49] but the issue was whether the appellant was dependent on his money, not if the entire family is dependent thereon;
  - (iii) while the appellant might be able to support himself, but be unable to support his mother, wife and children, only the appellant was cited as the extended family member and he could not properly consider whether there was a dependency in the absence of the evidence that he had referred to in his directions [50];
  - (iv) in the absence of knowing what money is earned in Pakistan, what the living costs and how much that money sent in support is devoted to the appellant rather than other family members, he could not conclude whether the appellant was a dependant [51] and that the

appellant and his representatives should be aware that this was an issue [52] as notified in the directions;

- (v) in the past it might be that the appellant was unable to make a witness statement, those representing him should have been aware that there would need to be some clarification and on the totality evidence the appellant had not discharge the burden of proof. [54]

7. The appellant sought permission to appeal on the grounds that the judge had erred:-

- (i) in dismissing the appeal on the basis of lack of evidence relating to dependency, this had not been raised by the Entry Clearance Officer;
- (ii) in acting in a procedurally unfair way by dismissing the appeal on a narrow basis, that the money transfers were not specific enough to distinguish between money given to the appellant, specifically money given for the purposes of assisting family, that challenge being procedurally unfair;
- (iii) further, and in any event, as he was in a position to make findings, that the house was owned by the appellant and that the income he derived from farming was estimated to be some \$2,000 and unlikely enough to be able to support him;
- (iv) in not taking into account that the witness statements and all those taken together was consistent that the evidence that the appellant relied on his brother for a meeting at least part of his essential living expenses, it being unnecessary to make a further differentiation of everyday household expenses into specific funds;
- (v) in failing to consider in the alternative, given the evidence that the sponsor owned the house in Pakistan, where the appellant was a member of the sponsor's household.

8. On 23 May 2023 Upper Tribunal Judge Reeds granted permission stating:

“When considering the issue of dependency, it is arguable that having accepted that the sponsor provided evidence of money transfers over a period of years (see the evidence of money transfers 2017 - 2018, and 2020 - 2021) and that the money from the appellant's own resources were insufficient ( see paragraph [49] ) that to seek to distinguish between the appellant and the other family members failed to take account of the evidence that appeared to suggest that the appellant lived with his family members as a family unit.”

9. The judge did, however, consider that there was no arguable unfairness in considering the issue of dependency in the light of the directions given prior to the hearing but whether it was procedurally unfair to decide the appeal on a narrow basis and the issue not raised by that direction was arguable.

## **The Hearing Before the Upper Tribunal**

10. Mr Murphy submitted that the issues in the case came down to two: whether “essential needs” could include the expenditure that an individual had to make to support, for example, children or other dependants, submitting that there was no relevant case law on that point. He submitted that what amounts to an individual’s essential needs is case specific and that the judge had in this case erred in considering that what was relevant was the individual’s essential needs. Further, that was not a permissible interpretation, or, was then the directions given had not been specific to allow the appellant fully to prepare his case.
11. Ms Nolan submitted that the judge had properly applied the law and that the direction given by the judge had been sufficiently clear for which the appellant was to meet the burden, which he had not done. She submitted it was sufficiently clear from the decision that the judge had found that the evidence was so lacking that the appellant had not satisfied the burden.

## **The Law**

12. The EEA Regulations were revoked in their entirety on 31 December 2020 by paragraph 2(2) of Schedule 1(1) to the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020. They are, however, preserved for certain purposes by The Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations (SI 2020 1309), (“the EEA Transitional Regulations”) which sets out those provisions which are preserved for the purposes of applications pending as at 23.00 on 31 December 2020. By operation of reg.3 this includes regs. 12, 17, 18, 19 and 20 of the EEA Regulations for the purposes of considering applications made but still pending at 31 December 2020. It follows from this that the EEA Regulations that the judge had to consider were those in place as at 31 December 2020, subject to the amendments set out in paragraph 6, Schedule 3. There is no material change here.
13. I bear in mind what was said by the Supreme Court in HA (Iraq) [2022] UKSC 22 at paragraph 72. It is for the appellant to show that there were some serious flaws in the judgment that calls for a change to the result of a rehearing. It is also important to bear in mind that this is an experienced judge sitting in a specialist Tribunal. His decision deserves to be accepted unless it is quite clear that she has misdirected herself and I am enjoined not to rush to find misdirections where I might have reached different conclusions or expressed myself differently. Nor should I assume that the Tribunal misdirected itself simply because it does not set out every step in its reasoning.
14. The core question for the judge was whether the appellant had shown that he is dependent on the sponsor. The Court of Appeal gave guidance

on this most recently in Latayan v SSHD [2020] EWCA Civ 191, in particular that [23] to [24],

23. Dependency entails a situation of real dependence in which the family member, having regard to their financial and social conditions, is not in a position to support themselves and needs the material support of the Community national or his or her spouse or registered partner in order to meet their essential needs: *Jia v Migrationsverket* Case C-1/05; [2007] QB 545 at [37 and 42-43] and *Reyes v Migrationsverket* Case C-423/12; [2014] QB 1140 at [20-24]. As the Upper Tribunal noted in the unrelated case of *Reyes v SSHD (EEA Regs: dependency)* [2013] UKUT 00314 (IAC), dependency is a question of fact. The Tribunal continued (in reliance on *Jia* and on the decision of this court in *SM (India) v Entry Clearance Officer (Mumbai)* [2009] EWCA (Civ) 1426):

"19. ... questions of dependency must not be reduced to a bare calculation of financial dependency but should be construed broadly to involve a holistic examination of a number of factors, including financial, physical and social conditions, so as to establish whether there is dependence that is genuine. The essential focus has to be on the nature of the relationship concerned and on whether it is one characterised by a situation of dependence based on an examination of all the factual circumstances, bearing in mind the underlying objective of maintaining the unity of the family."

Further, at [22]

"... Whilst it is for an appellant to discharge the burden of proof resting on him to show dependency, and this will normally require production of relevant documentary evidence, oral evidence can suffice if not found wanting. ..."

24. As to the approach to evidence, guidance was given by the Upper Tribunal in *Moneke and others (EEA - OFMs) Nigeria* [2011] UKUT 341 (IAC):

"41. Nevertheless dependency is not the same as mere receipt of some financial assistance from the sponsor. As the Court of Appeal made plain in SM (India) (above) dependency means dependency in the sense used by the Court of Justice in the case of Lebon [1987] ECR 2811. For present purposes we accept that the definition of dependency is accurately captured by the current UKBA ECIs which read as follows at ch.5.12:

*"In determining if a family member or extended family member is dependent (i.e. financially dependent) on the relevant EEA national for the purposes of the EEA Regulations:*

*Financial dependency should be interpreted as meaning that the person needs financial support from the EEA national or his/ her spouse/civil partner in order to meet his/her **essential needs** - not in order to have a certain level of income.*

*Provided a person would not be able to meet his/her essential living needs without the financial support of the EEA national, s/he should be considered dependent on that national. In those circumstances, it does not matter that the applicant may in addition receive financial support / income from other sources.*

*There is no need to determine the reasons for recourse to the financial support provided by the EEA national or to consider whether the applicant is able to support him/herself by taking up paid employment.*

*The person does not need to be living or have lived in an EEA state which the EEA national sponsor also lives or has lived."*

42. We of course accept (and as the ECJs reflect) that dependency does not have to be "necessary" in the sense of the Immigration Rules, that is to say an able bodied person who chooses to rely for his essential needs on material support of the sponsor may be entitled to do so even if he could meet those needs from his or her economic activity: see SM (India). Nevertheless where, as in these cases, able bodied people of mature years claim to have always been dependent upon remittances from a sponsor, that may invite particular close scrutiny as to why this should be the case. We note further that Article 10(2)(e) of the Citizens Directive contemplates documentary evidence. Whether dependency can ever be proved by oral testimony alone is not something that we have to decide in this case, but Article 10(2)(e) does suggest that the responsibility is on the applicant to satisfy Secretary of State by cogent evidence that is in part documented and can be tested as to whether the level of material support, its duration and its impact upon the applicant combined together meet the material definition of dependency.

43. Where there is a dispute as to dependency (as there was in the present case) immigration judges should therefore carefully evaluate all the material to see whether the applicant has satisfied them of these matters."

15. It is apparent from the above that an absence of documentary evidence may be problematic.
16. It is important to bear in mind also that what is being dealt with here are "extended family members" or in the director "other family members" and that the rights conferred on third country nationals such as the appellant are not autonomous rights but rights to exercise freedom of movement by union citizens. The purpose and justification of those rights, in particular rights for entry and residence of family members of a union citizen are based on the fact that refusal to allow them would be such as to interfere with their freedom of movement by discouraging that EU citizen for exercising rights for entry and residence into a member state.
17. It is not arguable that the judge erred as is averred in ground (i). It was for the appellant to satisfy the judge that he was a dependent. There was no concession on this issue by the respondent, and the appellant had sufficient notice of the issue through the service of the directions. If, as is now submitted, there was a procedural error, then the place and time to raise it was at the hearing, not after the event when the appellant has lost his appeal. Similarly, that was the time and place to raise any procedural objections of the sort now raised as ground (ii), insofar as it is argued that the grounds were not sufficiently precise, and it needs to be recalled that the burden was on the appellant to demonstrate dependency and where it is evident from the decision [47] to [48] that there was discussion of the directions prior to evidence being given.
18. It is notable that there is no effective challenge to the findings that the oral evidence of Mr Jovinda was unreliable.

19. Mr Murphy submitted that often, assessing an individual's needs (and thus if they are a dependant) where that person is responsible for children and a has a partner who does not work, may be difficult. He submitted that providing for that unit could be part of that person's essential needs.
20. While that may well be so, it still remains for the applicant to demonstrate what those essential needs are, and in that context it is reasonable to expect evidence of income and expenditure, with what is essential being identified.
21. It is sufficiently clear from the direction from the judge set out above requiring an "clear picture of each of their financial positions" encompasses that situation regarding expenditure and income.
22. It is to be recalled in this case that there was a lack of detail as to expenditure. No figures or details are given in the witness statements; there is no witness statement from the appellant and for good reasons the judge found the evidence of Mr Jovinda to be unreliable. That is important, bearing in mind what was held in Moneke and others (EEA Regulations - OFMs) Nigeria at [42].
23. Has then the judge misdirected himself [49] when he said the issue is whether the appellant is dependant on the money transferred? I consider that he did not. What he was, in effect asking, was whether the evidence adduced was sufficient to show that the appellant required the money to meet his essential needs; and, it must be recalled it was for the appellant to show what those needs were. The judge found, for adequate and sustainable reasons, that the appellant had not shown that he required the funds from the sponsor to meet his essential needs, and had not shown what those needs were.
24. What is written at [50] is not part of the judge's reasoning. Rather, it is an aside, explaining what the evidential difficulties were, due to the lack of proper evidence as to the appellant's essential needs, even if they did extend to supporting his family. If, as he now says, the appellant's essential needs includes what he has to lay out to support his wife, children and mother, then he should have said so and provided evidence of it.
25. With respect to ground (iii), it is not arguable, given his assessment of the oral evidence, that the judge erred in not reaching a finding that the appellant owned the house, but in any event, the grounds do not establish why that was material to assessing his needs, given the paucity of the evidence. It was not for the judge to speculate.
26. As to ground (iv), again, this misses the point that it was for the appellant to show he was a dependent, and the judge was not bound by the policy cited.
27. There is no merit in ground (v). The grounds fail to identify that this was an issue put to the judge, nor that he was under any duty to a consider an

alternative submission not put to him, given it was for the appellant to prove his case. Further, and in any event, the grounds fail to identify properly any evidential basis on which it could be shown that the appellant is a member of the sponsor's household.

28. The reality is he did not prove his case, and the judge reached a conclusion which was manifestly open to him on the very poor evidence.
29. Accordingly, for these reasons, I am not satisfied the decision of the First-tier Tribunal would make him in error of law and I uphold it.

**Notice of Decision**

- (1) The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold it.

Signed

Date: 25 July 2023

Jeremy K H Rintoul  
Judge of the Upper Tribunal