IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2023-001624
UI-2023-001625
First-tier Tribunal Nos: EA/07263/2022
EA/07265/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 12 September 2023

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

TANVEER ELLAHI
ZAHIDA PARVEEN
(NO ANONYMITY ORDER MADE)

Appellants

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Tony Muman, instructed by the Legal Rights Partnership
For the Respondent: Edward Terrell, Senior Presenting Officer

Heard at Field House on 24 August 2023

DECISION AND REASONS

1. The appellants appeal, with the permission of First-tier Tribunal Judge Chinweze, against the decision of First-tier Tribunal Judge Parkes. By his decision of 13 March 2023, Judge Parkes ("the judge") dismissed the appellants' appeals against the respondent's refusal of their applications for entry clearance under Appendix EU FP of the Immigration Rules.

Background

2. The appellants are Pakistani nationals who were born on 25 September 1952 and 1 January 1955 respectively. The first appellant is the husband of the second.

3. On 8 February 2022, the appellants made online applications for entry clearance to join their daughter in the United Kingdom. She is Rabia Saad, a Belgian national who was born on 20 October 1987. She has status under the EU

Settlement Scheme. She lives in the UK with her husband, who is also a Belgian national.

4. The appellants' online applications were accompanied by a helpful letter from their solicitors. That letter set out the familial relationship between the appellants and the sponsor. It was said that the appellants were dependent on the sponsor; she had been remitting money to them using Remitly and by sending cash to Pakistan with friends and relatives who were travelling there. The letter stated that the appellants relied 'solely on the funds that they receive from the sponsor'.

5. The applications were refused by the respondent on 21 July 2022. She was not satisfied that the appellants had provided adequate evidence to show that they were dependent on the sponsor. She noted that the appellants had 'provided evidence that the sponsor has been supporting [them] financially from July 2019 to February 2022' but she observed that the appellants had 'not provided any evidence of [their] domestic circumstances in Pakistan'. Without that evidence, the respondent did not accept that the appellants were unable to meet their essential living needs without support from the sponsor.

The Appeal to the First-tier Tribunal

6. The appellants appealed to the First-tier Tribunal. Their solicitors filed and served a bundle of 165 pages for the hearing. The appeal was heard by the judge, sitting in Birmingham, on 1 March 2023. The appellants were represented by Mr Muman of counsel, as they were before me. The respondent was represented by a Presenting Officer (not Mr Terrell). The judge heard oral evidence from the sponsor and submissions from the advocates before reserving his decision.

7. In his reserved decision, the judge accepted that the sponsor was sending money to the appellants in Pakistan but he did not accept that they were dependent on the sponsor to meet their essential needs. He considered the evidence to be lacking in that respect and he considered the absence of evidence to be surprising, given the basis of the refusal and the fact that the first appellant is a retired shopkeeper who 'would have been aware the importance of record keeping and paperwork'.

The Appeal to the Upper Tribunal

8. The appellants sought permission to appeal. The four concise grounds were settled by Mr Muman. They are as follows:

   (i) The judge misunderstood the case before him, both in respect of the respondent's stance and the sponsor's gender.

   (ii) The judge had erred in law in focussing on the absence of evidence of past dependency to the exclusion of evidence which showed present dependency.

   (iii) The judge erred in his implicit rejection of the sponsor's evidence, given that it had not been challenged by the Presenting Officer.

(iv) The judge's conclusion as to dependency was irrational in all the circumstances.

9. In granting permission, Judge Chinweze found ground one to be arguable. He observed that, if the respondent's stance had been as asserted in the grounds, the judge had erred in dismissing the appeal on the basis of maters which were not in dispute.

10. I should explain that the crux of ground one was that the respondent had modified her stance on the day of the hearing before the FtT. It was no longer submitted that the money sent to the appellants was not for their essential needs. The narrow submission made was, instead, that an applicant must provide evidence as at the date of application to show their dependency, and that the appellants had failed to do so. I have taken that summary of the respondent's position before the judge from [6] of Mr Muman's grounds of appeal to the Upper Tribunal.

Submissions

11. I indicated to the parties at the outset of the hearing that I had been the judge who had given listing instructions in this appeal. In doing so, I had instructed the staff at Field House to contact the staff at the FtT in Birmingham to obtain any recording that had been made of the proceedings before the judge. That had been provided on a CD and I asked the advocates whether I was to be invited by either of them to listen to that recording. A related matter also arose. Given that Mr Muman was counsel before the FtT, I was concerned to ensure that he would not be placed in the untenable position of giving evidence as to what had occurred before the judge: *BW (witness statements by advocates) Afghanistan* [2014] UKUT 00568 (IAC) refers.

12. I am grateful to Mr Muman and Mr Terrell for their combined efforts to resolve this issue practically. Mr Muman had his notebook from the hearing and was able to show Mr Terrell his notes. For his part, Mr Terrell was able to access the post-hearing minute completed by the Presenting Officer. Under the sub-heading "Submissions", the minute states as follows:

> Refusal due to dependency:
>
> The S has been supporting her parents financially from 1 July 2019 to Feb 2022.
>
> The requirement is that:
> where the date of application is on or after 1 July 2021, the joining family member applicant must in all cases provide evidence of their dependency as at the date of application – HO Policy : EU Settlement Scheme Family permit and Travel permit (publishing.service.gov.uk) page 65.
>
> To keep the issue narrow - So we know that A's made an application on 8th February 2022
>
> However at the time of application – S had only provided 5 money transfers from
> March 2021 to Feb 2022.

However – S has now provided evidence which shows money being transferred
consistently in 2022 – and prior to the application date of 8 Feb 2022 – there are some money transfers but the large gaps have been explained by the S who herself was in Pak and as such gave money and there is supporting letters from friends who also took money in cash – this is not disputed.

There's no large gaps – overall money transfers are consistent.

What the issue is – in line with Jia money being sent should be used to meet their
essential needs.

Page 7 (1 AB) of S's W/S – S provides a breakdown of what her parents needs are
and what the money she sends are being used for : food, electricity, gas, clothes,
mobile phones, travel, medical and other expenses.

Issue is the evidence provided –

Gas – July 2022 – page 48 of 2AB

Electricity – Aug 2022 – page 50 of 2AB
30 Sep 2022 – page 51 of 2AB

Phone Bill - 03 Aug 2022 – page 55 AB

Various medical receipts from:
Medical receipt - July 2022 – page 57
Medical receipt – Oct 2022 – page 56

^ All dated after the application date.

No evidence provided to show that albeit the money transfers that they were being used to meet their essential living needs.

As such R maintains its position that A's were dependant on A at the time of application,

Balance of prob – as such will allow the T to draw the appropriate inference.

13. Having studied Mr Muman's notes and the Presenting Officer's minute, the advocates agreed that it was not necessary to listen to the recording of the proceedings and Mr Muman was content that he did not need to appear as a witness rather than an advocate. It was agreed that the *only* submission made by the Presenting Officer was that the appellants could not succeed because the evidence was insufficient to show that they were dependent on the sponsor *at the date of application.* Mr Terrell accepted, therefore, that the Presenting Officer had not submitted that the evidence was insufficient to show that the appellants were dependent on the sponsor *at the date of the hearing*.

14. In his further submissions for the appellant, Mr Muman submitted that the judge had erred in considering whether the appellants were dependent on the sponsor at the date of hearing when this was not a matter issue between the parties. It was notable that the Presenting Officer had not submitted that the sponsor's evidence was incredible in any way and she had clearly given evidence about post-decision dependency. There had been an implicit concession made, therefore, and it was not appropriate for the judge to go behind that. The judge had in any event erred in considering whether there was dependency for an extended period. Mr Muman did not wish to develop any additional submissions on the remaining grounds, which all 'fed in' to ground one.

15. Mr Terrell submitted that there had been no 'active concession' by the Presenting Officer about the circumstances at the date of the hearing. Mr Muman had submitted that there was an implicit concession but there was no such thing; silence did not amount to a concession. The judge was placed in a difficult position by the stance adopted by the Presenting Officer; she had made a single submission which the judge had seemingly resolved against her but it remained incumbent on him to make findings of fact. The appellants were not surprised by the judge considering the issue of dependency. It had formed the basis of the refusal and it was the issue which they had come prepared to address, both in the evidence adduced and in Mr Muman's skeleton argument. Mr Terrell accepted that there were arguments which could be made on both sides but, on balance, he opposed the suggestion that there was a procedural impropriety in the decision of the judge.

16. I asked Mr Terrell for submissions on the correctness of the Presenting Officer's submission. He reminded me that the appellants had only two grounds of appeal available to them. As to the first, which was in relation to the residence scheme immigration rules, the Presenting Officer had been correct to submit that the appellants had to show dependency at the date of the respondent's decision. As to the second, which was in relation to the Withdrawal Agreement, the position was not so clear cut but it was certainly not correct, he accepted, to focus only on the date of application in considering that ground of appeal.

17. Mr Muman replied briefly. He agreed with Mr Terrell's submissions on the Immigration Rules and with the submission that the position in relation to the Withdrawal Agreement was not clear. He invited me to remit the appeal to the FtT but he queried whether there might be a benefit in the Upper Tribunal giving guidance on this issue.

18. I reserved my decision.

Analysis

19. Mr Terrell submitted at one point in his excellent and measured submissions that the situation before the FtT was 'somewhat messy'. I agree. One conventional and straightforward ground of refusal had been raised by the ECO, who did not accept that the appellants relied upon the money sent to them in order to meet their essential living needs. The Presenting Officer seemingly said nothing about that issue in her submissions, preferring to raise a new legal issue; that the appellants were required to establish dependency at the date of the application.

20. It is not in dispute that this 'date of application' submission was made to the judge. Mr Muman recorded it in his notes and the Presenting Officer recorded it clearly in her minute. The submission was not recorded by the judge, however, nor was it resolved by him. As I have recorded above, it was agreed before me that the Presenting Officer was at least partly correct in that submission. It seems that the judge resolved it against the respondent, although he gave no reasons for coming to that apparent conclusion.

21. That left the judge in a difficult position, as Mr Terrell submitted. The Presenting Officer had seemingly said nothing at all about the position at the date of the hearing and had chosen not to challenge anything said by the sponsor about what had happened since the ECO's decision. As the Presenting Officer recorded in her minute, she did not dispute the assertion that the sponsor had been to Pakistan and had provided the appellants with money whilst she was there. It seems that she might have been prepared to accept that this money, and the other money which had been remitted, was indeed used to meet the essential needs of the appellants. As Mr Terrell noted, however, there was no express concession on that critical point.

22. What was the judge to do in these circumstances? It would to my mind have been open to the judge to conclude that the respondent's submission on the law was wrong and that because she had made no submission on the facts at the date of the hearing, the appellants were entitled to succeed. What he was not entitled as a matter of procedural fairness to do was to consider that issue for himself when the respondent had said nothing about it. Proceedings before the FtT(IAC) are adversarial, as the Court of Appeal has explained in *JK (DRC) v SSHD* [2007] EWCA Civ 831 and other authorities. If no challenge was made to the sponsor's evidence about dependency at the date of the hearing, and no submissions were made on that point by the Presenting Officer, it was not possible for Mr Muman to respond to the case against him. It might of course have been open to the judge to raise his own concerns with the advocates, on the basis that he might resolve the single question of law against the respondent. But there is no suggestion on either side that he did that; he rolled up his sleeves and considered the evidence for himself. In the unusual circumstances which unfolded at the hearing, I do not consider that it was procedurally fair for him to do so.

23. I have not lost sight of Mr Terrell's attractively made submission that the appellants could not have been surprised that the judge considered the evidence before him and reached a decision upon it. He submitted that they had come to the hearing to discharge the burden of proving that they were dependent on the sponsor and they had merely failed to do so. From that point of view, Mr Terrell submitted, there had been no procedural unfairness despite the chicane constructed by the Presenting Officer.

24. On reflection, I am not able to accept that submission. The appellants had adduced evidence and argument before the judge which they had not relied upon before the ECO. The ECO had expressed various concerns about the evidence which was available to her but the respondent had not, via the Presenting Officer, expressed any concerns about the later evidence, other than to say that it should not be considered because it was not relevant to the issue. The fact that the appellants had marshalled evidence and argument about the ECO's decision does not mean that they had a fair opportunity to respond to the matters which were ultimately held against them by the judge.

25. In the circumstances, I am persuaded that the decision of the judge was vitiated by procedural impropriety and that it should be set aside on that account. I need not consider the remaining grounds, which were in any event said to 'feed in' to the principal complaint made in the first ground.

26. As to relief, there are two competing considerations at stake. The first is that a procedurally unfair hearing is in law no hearing at all, and such a holding ordinarily results in remittal. The second is that this case potentially provides an opportunity for the Upper Tribunal to consider the important question of the evidence which might be taken into account in an appeal such as this. In my judgment, it is the first of those considerations which should prevail, for the simple reason that there are many cases before the Upper Tribunal involving refusals under the Residence Scheme Immigration Rules and there will be other vehicles for consideration of the issue. The priority must therefore be to do justice in the individual cases of these appellants by remitting the appeals to the FtT for a fair hearing. To do so reflects the guidance given in *Begum (remaking or remittal) Bangladesh* [2023] UKUT 46 (IAC).

Notice of Decision

The decision of the FtT is set aside. The appeal is remitted to the FtT for hearing afresh before a judge other than Judge Parkes.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

24 August 2023