



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2023-005580

First-tier Tribunal No:
IA/10155/2021
EA/52148/2021

THE IMMIGRATION ACTS

**Decision & Reasons Issued:
On 22nd November 2024**

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

**KABIR AHMED
(NO ANONYMITY DIRECTION MADE)**

Appellant

and

Secretary of State for the Home Department

Respondent

REPRESENTATION

For the Appellant: Mr C Holmes, instructed by Whitefield Solicitors
For the Respondent: Mr C Bates, Senior Home Office Presenting Officer

Heard at Birmingham Civil Justice Centre on 28 June 2024

DECISION AND REASONS

INTRODUCTION

1. The appellant is a national of Pakistan. His application for an EEA Family Permit to join his brother, Shabbir Hussain Mirza, as an extended family member of an EEA national was refused by the respondent on 22 June 2021. The appellant's appeal against that decision was heard by FtT Judge

Shanahan on 2 February 2022 and allowed for reasons set out in a decision dated 23 February 2022.

2. The decision of Judge Shanahan was set aside by Upper Tribunal Judge Hanson on 2 November 2022. He directed that the appeal be remitted for hearing afresh before the FtT with no findings preserved. The appeal was heard by FtT Judge Codd on 8 March 2023 and dismissed for reasons set out in a decision promulgated on 5 April 2023.
3. The appellant claims the decision of Judge Codd is vitiated by material errors of law.

THE GROUNDS OF APPEAL

4. The appellant claims Judge Codd placed undue weight on the appellant's circumstances before he lost his employment. The crucial point of time is the appellant's circumstances when he applied to join his sponsor. It was natural that having become unemployed, the appellant was more likely to be dependent on others and that is what happened here. The appellant claims the judge failed to have proper regard to the appellant's evidence that he had previously worked as a sculptor and was struggling to make ends meet when he was employed.
5. The appellant claims the judge's consideration of the position regarding the appellant's mother was irrelevant and had not been raised by the respondent. The appellant's evidence was that the sponsor had sent money to him on a monthly basis and that without that money, he and his family could not have survived. The evidence was that the money sent by the sponsor was used to pay for food, household bills, school fees and to meet essential needs. The appellant's evidence was that the money was sent for his family consisting of his mother, wife and children. The appellant claims the judge ought to have taken judicial notice of the fact that the appellant comes from a village in Pakistan where it is more than likely that women would not be working and will be dependent on their husbands/ sons for financial support. Finally, the appellant claims the judge erred in stating he had seen no evidence to suggest whether the appellant has been able to secure alternative employment. The appellant refers to the decision of the Court of Appeal in *Lim v Entry Clearance Officer (Manila)* [2015] EWCA Civ 1383 in which the Court of Appeal said, at [32], that if an appellant is unable to support himself from his own resources, the court will not ask why that is the case.
6. Permission to appeal was granted by FtT Judge Monaghan on all grounds on 7 June 2023.

THE HEARING OF THE APPEAL BEFORE ME

7. Mr Holmes submits the sole issue in the appeal was the dependency between the two brothers. He submits there are in summary, three grounds of appeal. First, the judge failed to have regard to material matters. Second, the decision is vitiated by procedural fairness because the judge relied upon matters that had not previously been raised by the

respondent. Third, the judge had regard to an irrelevant matter in that the fact that the appellant has not been able to secure alternative employment is irrelevant when considering 'dependency'.

8. As far as the first ground of appeal is concerned, Mr Holmes submits that at paragraph [27] the judge said that there was no information regarding the appellant's position before he lost his job and his income changed. The appellant's evidence set out in his witness statement was that prior to the Covid pandemic, he had a job as a sculptor and that he had always struggled financially and was doing his best to make ends meet. He claimed that he was always reliant upon the financial support of the sponsor to help him meet his living costs. The judge noted, at [22], that in recent times there has been a consistent level of payment from the sponsor to the appellant, "to indicate that the potential for dependency may exist.". Mr Holmes submits the judge failed to have regard to the evidence that before the pandemic the appellant was able to support himself with some support, but that the support required increased during and after the pandemic.
9. Mr Holmes submits that the focus of the second ground of appeal is procedural fairness. At paragraphs [28] and [29] of the decision the judge notes the appellant lives in a household that comprises of the appellant, his mother, his wife and their three children. The judge said that if the appellant is disregarded, the running costs of the property would be met by the appellant's mother and there would be no impact on the appellant's wife and children. Mr Holmes submits the respondent had not claimed that the other members of the household must have their own income so that they would be able to continue to meet their living costs. If this was of concern, the sponsor should have been asked about that during the hearing and given an opportunity to respond. Mr Holmes submits that in any event, the appellant had said in paragraph [6] of his witness statement that without the money sent to him by the sponsor, he and his family could not have survived. His evidence was that the money sent by the sponsor is used for the family to meet their essential living needs.
10. Finally, Mr Holmes submits that at paragraph [34] the judge described the appellant's work as a sculptor to be 'precarious' and said that he had not seen any evidence of whether he has been able to secure alternative employment. In *Lim v Entry Clearance Officer* the Court of Appeal confirmed, Mr Holmes submits, that if an appellant is unable to support himself from his own resources, the Court will not ask why that is the case. Dependency can, according to the authorities, be one of choice. In reaching his decision the judge therefore had regard to an irrelevant consideration.
11. In reply, Mr Bates submits that at paragraph [33] the judge properly recorded that the burden is upon the appellant to explain his circumstances. He submits that in reaching the decision the judge was entitled to have regard to the overall background when considering whether there is dependency for essential living needs. The judge was entitled to note that there is no evidence before the Tribunal regarding the

lead up to the claimed dependency. The property the appellant and his family live in was owned by the appellant's father and is occupied by the appellant, his mother, his wife and their children as the family home. The appellant's mother may well be self sufficient. The appellant's mother will not be joining the appellant and sponsor in the UK, and it was accepted that she is not dependent on the sponsor for her essential living needs. Mr Bates submits the judge approached the appeal on the basis that there is accommodation available to the family and that the appellant's mother is not dependent upon the sponsor. The judge considered the claims made by the appellant but found that there was a lack of evidence to establish dependency for essential needs. At paragraph [34] the judge simply observed, Mr Bates submits, that there was no evidence to establish whether the appellant has been able to secure alternative employment and that the decision must be read as a whole. The judge was not satisfied that the appellant had been candid and had provided full disclosure of his circumstances. The judge concluded, at [35], that the information before the Tribunal was vague and it was difficult to establish the extent to which the appellant's essential living needs are met by the sponsor. Mr Bates submits it was open to the judge to find that the appellant's essential living needs are not met by the sponsor for the reasons given in the decision. Read as a whole, the judge reached a decision that was open to him. There is no material error of law capable of affecting the outcome of the appeal.

DECISION

12. The burden rests upon the appellant to establish his entitlement to an EEA family Permit on a balance of probabilities.
13. In summary, Regulation 8 of the Immigration (European Economic Area) Regulations 2016 required the appellant to first establish that he is the relative of an EEA national. Provided, as here, the relationship is established, there are two separate routes to qualification. The appellant must demonstrate he is either: (i) dependent on the EEA national in a country other than the UK, or (ii) a member of the EEA national's household in a country other than the UK. Here, Judge Codd noted at paragraph [7] of the decision that the sole issue in the appeal is that of dependency. He said that there were two essential factors for the Tribunal to determine; a) whether there are sufficient money transfers to create the potential for financial dependency, and b) whether the appellant is dependent upon such funds to meet his essential living needs.
14. The entitlement to an EEA family permit only accrues if the appellant is 'dependent' on the union citizen. In *Reyes v Migrationsverket* (C-423/12), albeit in the context of a 'Family member', the CJEU confirmed that dependency is a question of fact and the dependency must be genuine, but if it is found that the family members essential needs are met by the material support of an EEA national, there is no need to enquire as to the reasons for the dependency and there is no reason to show emotional dependency.

15. In *Lim - ECO (Manila)* [2015] EWCA Civ 1383 Lord Justice Elias, with whom McCombe LJ, and Ryder LJ agreed, said, at [25], it is not enough simply to show that financial support is in fact provided by the EU citizen to a family member. The family member must need the support from his or her relatives in order to meet his or her basic needs. The correct test was set out at paragraph [32] of the decision. The critical question is whether the individual is in fact in a position to support themselves. That is a simple matter of fact. If they can support themselves, there is no dependency, even if he/she is given financial material support by the EU citizen. Those additional resources are not necessary to enable them to meet their basic needs.

16. In *Latayan v SSHD* [2020] EWCA Civ 191, Jackson LJ said:

“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.

...

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. ...”

17. As to the approach to the evidence, Jackson LJ referred, at [24] to the guidance given in *Moneke and Others (EEA - OFM's) 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 ECIs 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."

18. Whether the appellant is dependent on the sponsor was therefore a factual question for the Tribunal to assess on the evidence before the Tribunal.
19. The appellant made his application on 14 December 2020. The application was refused by the respondent on 22 June 2021. In addition to concerns raised by the respondent regarding the appellant's familial relationship with the sponsor, the respondent noted that the limited evidence provided of money transfers is, in isolation, not sufficient evidence that the appellant requires support to meet his essential needs. The respondent said one would expect to see evidence which fully details the appellant's and his family's circumstances. The respondent would expect evidence of the appellant's income, expenditure and evidence of

his financial position which would prove that without the financial support of the sponsor, his essential living needs could not be met.

20. I reject the claim made by the appellant that Judge Codd placed undue weight on the appellant's circumstances before he lost his job. Judge Codd summarised the appellant's claim at paragraphs [11] to [18] of the decision. He noted, at [11], that the appellant currently lives in a property owned by his late father with his mother, wife and their three children. He noted the appellant worked as a sculptor, an occupation that has its difficulties because the making of sculptures is said to be forbidden in Islam. The judge noted, at [12], the appellant's claim that he has always been dependent upon the sponsor and that as a result of the Covid-19 pandemic, the appellant claims to have ceased work and claims to now be completely dependent upon payments he receives from his family abroad. The judge noted, at [13], the appellant has since April 2021 also been provided with financial support from another brother who lives in Italy.
21. The judge noted, at [16], the evidence before the Tribunal regarding money sent by the sponsor to the appellant:

"The sponsor has provided evidence of one payment in June 2018. One payment in June 2019, 7 payments at monthly intervals in 2020, 9 payments at monthly intervals in 2021, and 12 payments at monthly intervals in 2022."
22. The judge began his consideration of the appeal by noting that although payments are also sent by one of the appellant's other brothers to support him, that is immaterial. He noted it is open to the Tribunal to conclude that dependency exists even it is only 'partial' .
23. It is clear from the evidence set out in paragraph [16] of the decision that there had been an increase in the frequency of payments sent by the sponsor to the appellant, particularly during 2020, 2021 and thereafter. Having considered the evidence before the Tribunal, Judge Codd found, at [22], that the consistency in the pattern of payments began in July 2020 and that is when any dependency arose. He went on to consider whether the payments made by the sponsor to the appellant were being used by the appellant to meet his essential living needs. It was for the appellant to provide cogent evidence as to whether the support provided by the sponsor and the duration of that support meets the material definition of dependency. At paragraph [4] of his witness statement the appellant made a broad claim that being a sculptor does not pay very well in Pakistan. He claimed that he has always struggled financially but was trying his best to make ends meet. The claim made by the appellant in his witness statement that he has always struggled financially but was trying his best to make ends meet, is not to say that the appellant has always relied upon the support of his sponsor to meet his essential living needs. The evidence before the Tribunal was that the sponsor provided evidence of one payment in June 2018 and one payment in June 2019, with more frequent payments in 2020, 2021 and 2022. It was open to the judge to note, at [27], that the evidence before the Tribunal regarding the appellant's

circumstances was incomplete. It is now well established that dependency is not the same as mere receipt of some financial assistance from the sponsor. A clear picture of how the appellant and his family supported themselves both whilst the appellant was working and after he had ceased working was required to enable a proper analysis of whether the funds being received by the appellant were required to meet the appellant's essential living needs. The evidence was not there.

24. I also reject the claim made by the appellant that the question whether the appellant's mother was dependent on the sponsor was irrelevant and not in issue. The respondent had highlighted in the decision to refuse the application that one would expect to see evidence which fully details the appellant's and his family's circumstances. The appellant was therefore on notice that there were concerns regarding the overall evidence about the family's circumstances and how they met their essential living needs. No procedural unfairness arose. The appellant may derive some benefit from the money sent by the sponsor but it is not unusual for members of a family to send money to their family abroad, sometimes at regular intervals. That can be for a variety of reasons, including, as the appellant claims here, to meet their essential living needs. Monies can however also be sent to make the lives of other family members abroad a little more comfortable, or in some cases to give the impression of dependency.
25. The judge accepted the appellant does not need to be solely financially dependent on the sponsor. Even if the appellant and his family were paying for some of their living costs from other sources, that does not mean the appellant is not receiving financial support for his essential needs. However, I reject the claim made in the grounds of appeal that it was obvious that an elderly mother who very likely was not working would be dependent on the sponsor and that given that the appellant was unemployed it was more than likely that she was dependent on the sponsor. The judge recorded at paragraph [11] of the decision that the appellant and his family live in a property owned by his later father. The appellant's mother plainly has an interest in that property and the judge noted, at [31], that the need for accommodation is met by the family living in that property. The judge was entitled to have regard to the absence of other evidence regarding the circumstances of the appellant's wife and mother, their income and whether the appellant's wife works. It would have been erroneous of the judge to take 'judicial notice' as the appellant claims in the grounds of appeal, that the appellant comes from a village in Pakistan, where it is more than likely that women would not be working and will be dependent on their husbands/ sons for financial support. Although a Court or Tribunal may take cognisance of facts which are generally known, without requiring them to be proved, the proposition contended for is far too general and wide. Here, it was for the appellant to provide cogent and reliable evidence of the fact that neither his mother nor his wife have any other sources of income and that they rely solely on support provided by the sponsor. Again, the evidence before the FtT was, as the judge concluded, lacking.

26. The judge noted at [28] that the application made by the appellant is one made in the context where he lived in a household with other family members including his mother. No application is made by the appellant's mother and it would be entirely artificial to disregard the family circumstances as a whole, including the position of the appellant's mother when considering the way in which the family meets its essential living costs and how the money sent by the sponsor feeds into that. Having considered what would happen in the event that the appellant joins his brother in the UK, taking a holistic view of the evidence before the Tribunal, it was open to the judge to find that there is a lack of credible evidence to establish that it is the sponsor who is responsible for the essential living expenses of the appellant and his family.
27. Finally, I reject the appellant's claim that at paragraph [34] of the decision the judge had regard to an irrelevant consideration. I accept, as Mr Bates submits that the judge was making an observation that the appellant's work as a sculptor is one which at best could be described as precarious. That was entirely apt in light of the appellant's evidence regarding the difficulties he experienced as a result of his work. The judge simply observed that in those circumstances, there was no evidence to suggest whether the appellant has been able to secure alternative employment. He was not imposing a requirement that the appellant must establish why he is unable to secure alternative employment so that he can support himself and his family.
28. It is now well established that it is necessary to guard against the temptation to characterise as errors of law what are in truth no more than disagreements about the weight to be given to different factors. It is my judgement clear that in reaching his decision, the judge considered all the evidence before the Tribunal in the round and reached findings and conclusions that were open to him on the evidence. The findings and conclusions reached are neither irrational nor unreasonable.
29. The Upper Tribunal is not entitled to find an error of law simply because it does not agree with the decision, or because the Tribunal thinks the decision could be more clearly expressed or another judge can produce a better one. Baroness Hale put it in this way in *AH (Sudan) v SSHD* at [30]:
- "Appellate courts should not rush to find such misdirection simply because they might have reached a different conclusion on the facts or expressed themselves differently."
30. The judge identified the core issue in this appeal in paragraph [7]. I am satisfied that standing back, the judge's decision was based upon the evidence before the Tribunal. A fact-sensitive analysis of the evidence of dependency was required. At paragraph [35], the judge set out the overall conclusion that even with the partial support provided by the sponsor, the information before the Tribunal is so vague that the appellant has failed to discharge his burden of proof that the appellant's essential needs are met

by the support provided by the sponsor. The judge reached a decision that was open to the Tribunal on the evidence.

31. It follows that I am satisfied that there is no material error of law in the decision of the FtT and I dismiss the appeal.

NOTICE OF DECISION

32. The appeal is dismissed. The decision of FtT Judge Codd stands.

V. Mandalia
Upper Tribunal Judge Mandalia

Judge of the Upper Tribunal
Immigration and Asylum Chamber

30 October 2024