IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2022-000969
UI-2022-000970

First-tier Tribunal Nos:
EA/03661/2020 & EA/03658/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 8th of January 2025

Before

UPPER TRIBUNAL JUDGE RINTOUL
UPPER TRIBUNAL JUDGE MANDALIA

Between

SIDRAH KHALID
SAMRAH KHALID
(NO ANONYMITY ORDER MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr S McTaggart, instructed by Chauhan Solicitors
For the Respondent: Ms R Arif, Senior Home Office Presenting Officer

Heard at Royal Courts of Justice (Belfast) on 19 November 2024

DECISION AND REASONS

1. The appellants appeal with permission against a decision of First-tier Tribunal Judge S T Fox promulgated on 22 November 2021, dismissing their appeal against decisions of the Secretary of State made on 29 June 2020 to refuse them residence cards as the extended family members of a European Economic Area national exercising treaty rights in the United Kingdom. These appeals were brought under the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations").

2. The appellants are sisters. They were born in 1986 and 1990 respectively. It is their case that they have been financially dependent on their brother, Mr Awais Ali Khalid, an Irish citizen on whom they have been financially dependent since 2015 and have been members of his household in the United Kingdom since 2019. The appellants' parents live with them and the sponsor, having been granted family permits in 2019.

3. The applications giving rise to the decisions under appeal were made on 20 December 2019. The Secretary of State accepted that the appellants are related to the sponsor as claimed but was not satisfied on the basis of the evidence that they were dependent on or residing with the sponsor prior to entering the United Kingdom and, had continued to be dependent on or residing with him. This was on the basis of a lack of evidence. As dependency had not been proven, the Secretary of State did not consider whether the other requirements which need to be met, including whether the sponsor was exercising treaty rights as a qualified person, were met.

4. The respondent was not represented at the appeal before the First-tier Tribunal.

5. In his decision, the judge concluded at [15] that the sponsor had been exercising treaty rights in the United Kingdom from July 2020 noting at [19], that he had produced tax returns and bank statements in connection with his employment. The judge concluded at [21] that the financial records could not demonstrate that the sponsor was exercising treaty rights when the appellants first claimed to have arrived in the United Kingdom, his earning records only commencing in July 2020. He found at [24] that the appellants had remained in Malta for approximately a year until they travelled overland to the United Kingdom.

6. The judge accepted that some payments were made to the appellants on a regular basis, those documents dating in and around 2018 but that there were no documents to confirm what living expenses they had to meet. He noted the evidence at [28] that the sponsor pays for everything for the appellants but that there was little evidence to demonstrate dependency and a full explanation was required. The judge noted also at [30] that the appellants appeared to be entirely self-sufficient whilst in Malta, there being no claim by the sponsor of him sending money to them there, which cast doubts on the claim to be dependent on him.

7. The appellants sought permission to appeal on the grounds that the judge had erred in concluding that the sponsor was not exercising treaty rights until July 2020 as the appeal papers included the sponsor's tax return for the tax year April 2019 to April 2020 showing income from self-employment for that period and thus he was a qualified person at the date of application for residence cards in August 2019 and December 2019.

8. The appellants also sought permission to appeal on the grounds that the judge had erred in:-

   (i) his assessment of dependency

(ii) relying on the mistaken fact that the appellants had resided in Malta for a period of a year when in fact they had been there for less than a month

(iii) requiring an explanation at [28] as to financial arrangements which could and should have been asked at the hearing;

(iv) failing to appreciate that the dependency of choice was sufficient;

(v) stressing a lack of sufficient documentation while attaching no weight to the witness and oral evidence as to the necessary expenses which were met;

(vi) reaching impermissible conclusions as to whether the sponsor was a qualifying person;

(vii) failing to consider whether the appellants were, if not dependent on the sponsor, they were part of his household which was a sufficient basis to entitle them to residence cards.

9. We heard submissions from both representatives. Mr McTaggart relied on the grounds of appeal submitting also that there were other worrying errors in the judge's decision including a reference to submissions from the respondent who had not been present at [17], and that the judge had failed properly to approach the case within the framework set out in Dauhoo (EEA Regulations – reg 8(2)) [2012] UKUT 79. This, it was submitted, was further illustrated by the failure to note that dependency can be of choice and that membership of a household is sufficient. Further, the judge had failed to note the evidence that the appellants were not getting any income and thus must be dependent on the sponsor, a fact which, by the time of the hearing in November 2021, had been the case of three years; the money available to them was set out in the application forms which were in the bundle.

10. Ms Arif submitted that the judge had properly directed himself at [7] and [8] and that the findings of fact were open to him. She submitted that on the evidence, even had the judge realised that the appellants had lived in Malta for only a month, was a sufficient basis on which the judge was entitled to find that they had not been dependent.

11. At the end of the hearing we rose briefly to discuss the matter and returned to announce that we had concluded that the decision of the First-tier Tribunal involved the making of an error of law and we would set it aside. Having heard submissions, we indicated that the matter would be remitted to the First-tier Tribunal.

12. We remind ourselves that an Appellate Tribunal should be wary of setting aside a decision of the First-tier Tribunal, particularly in relation to findings of fact bearing in mind that the First-tier Tribunal heard all of the evidence. We are, however, satisfied that in this case the judge made errors of fact

which, for the reasons set out below, materially affected the outcome of the decision.

13. The judge erred [20] in finding that the only evidence of income dated from July 2020. That is not correct. There was in the evidence before him a tax return showing income flowing from April 2019. The judge further erred in stating at [21] that at the date of the applications there was no evidence that the sponsor was a qualified person. Again, this is simply incorrect. A further error was made by the judge with respect to how long the appellants had lived in Malta. We accept that, as is set out in their passports and the other documentary evidence, that they were in Malta for somewhat less than a month. That is significant.

14. There is a qualitative difference between being on one's own for less than a month and, as the judge appeared to believe, the appellants being self-sufficient for over a year. It is evident from his findings that he placed significant weight on that in assessing the evidence. Further, as Mr McTaggart submitted, as can be seen from [30], the judge said "While in Malta the Appellants do not claim to be in need of the sponsor's financial support. He makes no claim of sending money to them. They appeared to be entirely self-sufficient while there. This in turn casts doubt over the claim to be dependent upon the sponsor".

15. We consider that these errors of fact are material. They infect the judge's assessment of the evidence put before him as to the level of dependency prior to their arrival in the United Kingdom and we accept also that there is a failure to consider whether they were members of the same household which is a criterion capable of demonstrating continued dependency within the terms of Regulation 8. We note also that it had been accepted by a previous Tribunal that there was dependency between the parents and the sponsor which is a matter relevant to the assessment of the position of the appellants had they been separated from the parents for only a short time as appears to be the case. Accordingly, for these reasons, we are satisfied the decision of the First-tier Tribunal involved the making of an error of law and we set it aside.

16. Given the lapse of time since this matter was before the First-tier Tribunal and the extent to which further fact-finding will be necessary, we are satisfied that it will be appropriate to remit this case to the First-tier Tribunal to be heard afresh by a judge other than Judge S T Fox.

Notice of Decision

1 The decision of the First-tier Tribunal involved the making of an error of law and we set it aside.

2 We remit the decision to the First-tier Tribunal for a fresh decision on all issues. For the avoidance of doubt, none of the findings of Judge Fox are preserved.

Signed

Date: 24 December 2024

Jeremy K H Rintoul
Judge of the Upper Tribunal