Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/04773/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12 July 2019	**On 22 July 2019**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

NAZIR RIAZ
(anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mrs Imamovic instructed by Wright Justice Solicitors.
For the Respondent: Miss Fijiwala Senior Home Office Presenting Officer.

ERROR OF LAW FINDING AND REASONS

1. The appellant appeals with permission a decision of First-Tier Tribunal Judge M Robertson promulgated on 25 March 2019 in which the Judge dismissed the appellant's appeal under the Immigration (EEA) Regulations 2016.

Background

2. The appellant is a female citizen of Pakistan born on 1 January 1939 who entered the UK in 2005 as a family visitor. A number of applications for leave to remain have since been made all of which have been refused. On 6 January 2018 the appellant applied for a residence card pursuant to regulation 9 of the EEA Regulations as a family member in the ascending line of Bilal Qureshi, a British national who had exercised treaty rights in Ireland.

3. The Judge sets out her findings from [20] of the decision on the basis of which it is found at [21]:

> "21. On the evidence, in the round, on the balance of probabilities, I find that the Irish authorities accepted that the sponsor was exercising treaty rights on the basis of documentary evidence provided, and issued a residence permit to the sponsor and to the appellant as a family member. There is sufficient evidence before me in the appellants bundle as to work and residence to establish that the sponsor did work and live in Ireland, that family members visited him there, rather than him making trips back to the UK, and that his move was genuine. I find therefore that on return to the UK, the sponsor had the same rights as an EEA national under the EEA Regs."

4. The Judge thereafter considered the question of entitlement to a residence card on the basis the sponsor is a qualified person in the United Kingdom having provided evidence of employment here. The Judge notes the appellant is a family member in the ascending line as provided for in regulation 7(1)(c), although regulation 7(1)(c) also requires the appellant to establish that she is a dependent direct relative of the sponsor.

5. The Judge was concerned about the evidence given regarding who lived with the appellant which was found to be confused for the reasons set out at [24], leading to Judge to make the followings findings at [25 – 26]:

> "25. Much of the evidence seemed rehearsed; either Mr A Qureshi lived with the Sponsor or their mother. The evidence was very confused and it is difficult to see why there would be such confusion if they visit regularly and are involved in the care of the Appellant. Either the Sponsor lived with their mother at [~] Court or, as his mother initially stated, he lived next door but he came round every day. Although I have some correspondence to the Sponsor at [~] Court, it is not unknown for people to use postal addresses which are other than the address at which they reside; the documentary evidence alone would not confirm that the Sponsor lived at [~] Court. There is no evidence from Paradigm Housing Association as to who is the named tenant/s was/were of [~] Court, who is permitted to reside in it or who pays the rent on it and this is evidence that was reasonably available to them (**TK (Burundi)**). Although all witnesses stated that it was the Sponsor that the Appellant was

> primarily dependent on financially, there was no evidence that he even paid the rent on [~] Court, let alone the other bills, and again, this was evidence that was reasonably available to them. It may well be that it is Mr A Qureshi that the Appellant lives with, supported by all the family members. There simply was insufficient evidence before me from which I could find that in order for her essential needs to be met, the Appellant needed the material support of the Sponsor (*Bigia*). I cannot, on the evidence before me, in the round, find that the Appellant is dependent on the sponsor.
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> 26. Whilst I accept that it is established that the Sponsor is to be treated as an EEA national exercising Treaty rights in the UK, the Appellant's appeal is dismissed because she does not meet the dependency test in Reg 7(1)(c)."

6. The appellant sought permission to appeal which was granted by another judge of the First-Tier Tribunal, the operative part of the grant being in the following terms:

> "3. In a reasoned determination, the Judge was entitled to probe the appellant's residential circumstances. She was entitled to question the inconsistencies in the evidence and make findings that the evidence appeared rehearsed. She was entitled to consider the financial circumstances and did not attach undue weight to whether the appellant was receiving financial assistance. The Judge acknowledged the appellant's status in Ireland, but she was entitled to make her own findings on the evidence available to her at the hearing. However, the witness statements and oral evidence do deal with the care the appellant is given by the sponsor and further comment is made in the GP letter which was not referred to in the Judge's decision. The Judge has arguably erred in law by not addressing this evidence and whether or how it affects her assessment of dependency. This is an arguable error of law."

7. There is no Rule 24 response filed by the respondent.

Error of law

8. A Rule 15(2A) application has been filed by the appellant's representatives containing a number of additional documents. It was accepted on the appellant's behalf that such would only be relevant if an error of law was found and therefore this evidence was not considered at this stage of the proceedings.

9. Reliance is placed upon the grounds of challenge which are in the following terms:

> "3. The Judge has erred in the following ways:
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> *(a)* Failing to take into account a material matter: IJ firstly, placed significant reliance on whether the appellant's family members 'other than' the sponsor live with her or not at paragraph 24, the witnesses confirmed that the appellant and the sponsor

reside together. The inconsistent evidence of where other family members other than Mr Bilal Qureshi reside does not automatically reflect on the consistent evidence of all the witnesses that *he resides with his mother.* The assessment therefore ignores consistent oral evidence on the material issue of whether or not she resides with her sponsor.

IJ, secondly, finds at paragraph 25 that the appellant has not produced evidence of financial assistance. There is no requirement in the EEA regulations akin to Appendix FM-SE to produce specific evidence. ***Amos v Sec of State for the Home Department [2011] EWCA Civ 552 (12 May 2011)*** paragraph 38 – 40. IJ had evidence of the witnesses and the oral evidence of the appellant and the sponsor. IJ finds that they have said 'consistently' at court that the appellant is financially supported by the sponsor. There were a number of witnesses and their consistent evidence was not given weight cumulatively. There is no reason given by the IJ either why their testimony is not accepted on this point in respect of financial assistance.

(b) Failing to take into account a material matter: IJ places significant weight therefore on whether or not the appellant lives with the sponsor and is financially assisting her to the exclusion of *other relevant factors.* IJ fails to properly assess the dependency holistically and by reference to the appellants particular facts including her *'practical and emotional dependency'.* It is established law that she does not have to be 'wholly or mainly dependent' on the sponsor and that 'essential living needs' must be assessed as per her particular 'financial, physical and social conditions'. In *Reyes v Secretary of State for the Home Department (EEA Regs: dependency) [2013] UKUT 314 (19 June 2013)* the court makes this clear, by summarising the essence of dependency at paragraph 19 in accordance to the case law of Jia v Migrationsverket C-1/05 [2007] OB 545 at [35]–[37], the following:

> *"19. From the above, we glean four key things. First, the test of dependency is a purely factual test. Second, the Court envisages that 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 dependency 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 dependency based on an examination of all the factual circumstances, bearing in mind the underlying objective of maintaining the unity of the dependency. It seems to us that the need for a wide-ranging fact-specific approach is indeed enjoined by the Court of Appeal in SM (India): see in particular Sullivan LJ's observations that [27]-[28]."*

IJ has failed to give any consideration in her assessment to the appellant's physical/practical and emotional dependency. This includes the medical condition (at the hearing was in a wheelchair and had been for a year), age (80 years of age) and no employment/no savings or resources financially of her own, loss of her husband in 2010. The IJ had oral evidence that the appellant had been emotionally helped after her husband passed away by her sponsors, the practical support she gets due to her medical conditions from her son (the sponsor) and his wife including cooking, cleaning, washing/bathing, ensuring she attends appointments, give her medication, using her wheelchair and getting about. The IJ had a letter from the appellant's GP at ab page 193 – 194 which she does not give any consideration to in her assessment on dependency.

There was no proper consideration of dependency with those factors reflecting on her social/physical and emotional dependency and the focus was on financial/residence by the IJ. It fails to assess dependency holistically and with those relevant aspects being considered and or reasons given why they are not accepted.

Failing to take into account a material matter: IJ found that the appellant had been recognised as a 'family member' while she had been in Ireland at paragraph 21. In her assessment under regulation 9 therefore IJ had accepted the evidence of the Irish authorities, both that the appellant was a 'family member' for the purposes of regulation 9 and equally that the residence in Ireland was genuine. In the assessment at paragraph 25 IJ however does not take this into consideration. IJ does not take account, consideration or give weight that she had been recognised as a family member in Ireland at this junction. This is informative of the current dependency assessment because the appellant could only be recognised as a family member if she was dependent, as IJ identifies under regulation 7(1)(c) EEA Regulations 2016, and her personal circumstances namely medical conditions have not reduced but increased dependency to the extent that the appellant is now in a wheelchair. The previous dependency in Ireland is informative of the current dependency.

4. The above constitute errors on points of law and permission to appeal should be granted."_

10. Dealing with this last point first, the Judge accepted that the appellant is a family member of her EEA national sponsor son, but the specific wording of the regulations required the appellant to establish that she is the dependent family member. Whatever may have been in the position in Ireland the appeal arises as a result of a fresh application having been made by the appellant to the authorities in the UK seeking a residence card as recognition of her current entitlement to reside in this country. Whatever may have been the decision of the Irish authorities based upon the situation appertaining in Ireland it is not determinative of the issues before the Judge. These were matters that were clearly taken into account by the Judge in any event.

11. Any suggestion the Judge failed to consider the evidence that was provided is not made out. It is not legal error for a judge not to set out

each and every aspect of the evidence made available provided the same has been considered. In this appeal the Judge clearly took into account the medical evidence as the description in the determination of the appellant's medical condition could only have come from this source.

12. In *Jia Migrationsverket Case C -1/05* the European Court considered "dependence" under Article 1(1)(d) of Directive 73/148/EEC and said this was to be interpreted to the effect that "dependent on them" meant that members of the family of an EU national established in another member state within the meaning of Article 43 of the EC Treaty, needed the material support of that EU national, or his or her spouse, in order to meet their essential needs in the state of origin of those family members or the state from which they had come at the time when they applied to join the EU national. The Court said that Article 6(b) of the Directive was to be interpreted as meaning that proof of the need for material support might be adduced by any appropriate means, while a mere undertaking by the EU national or his or her spouse to support the family members concerned need not be regarded as establishing the existence of the family member's situation of real dependence.

13. In *Bigia & Others [2009] EWCA Civ 79,* at paragraph 24, Maurice Kay LJ said that where the question of whether someone is a "family member" depends on a test of dependency, that test is as per paragraph 43 of the ECJ's judgement in Jia. In essence members of the family of a Union citizen needed the material support of that Union citizen or his or her spouse in order to meet their essential needs.

14. In *ECO Manilla v Lim [2015] EWCA Civ 1383,* a case relied upon by Ms Fijiwala, the appellant sought entry, as the family member of an EU national. Applying Reyes v Migrationsverket (Case C- 423/12) it was held that it was not enough to show that the financial support was in fact provided by the EU citizen to a family member; the family member must need that support in order to meet her basic needs; there needed to exist a situation of real dependence; receipt of support was a necessary condition of dependency, but not a sufficient condition; and it was necessary to determine that the family member was dependent in the sense of being in need of assistance even though it was irrelevant why she was dependent.

15. The assertion the Judge failed to adopt a holistic approach to the evidence has no arguable merit. The fact the witnesses may have said the same thing, if this is the basis of the claim of 'consistency', does not establish arguable legal error per se. The assertion on the appellant's behalf that because consistent evidence had been given the Judge has erred in law is, in reality, a challenge to the weight given by the Judge to the evidence she was able to consider.

16. The Judge was clearly aware of the proper test to be applied. Whilst it is accepted that a number of witnesses telling the truth will be consistent

the Judge at [25] does not accept this is the likely explanation but that much of the evidence had been rehearsed. It is important to read to paragraph 24 (I-X) in full to understand the concerns in the Judge's mind. This is not a decision based upon focusing upon one aspect to the exclusion of other aspects but one in which there were aspects that were not made out before the Judge. The dependency must be upon the EEA national or his spouse and the Judge's conclusion there was insufficient evidence to find that in order for her essential needs to be met the appellant needed the material support of the sponsor has not been shown to be a finding outside the range of those reasonably available to the Judge on the evidence. Such material support may be being provided by other family members such as Mr A Qureshi but he is not the EEA national.

17. Disagreement with the Judge's findings and desire for a more favourable outcome does not establish legal error material to the Judge's decision. The evidence was considered including that in relation to financial, emotional, and physical dependency, adequate reasons have been given for the findings made, and it has not been shown the weight the Judge attributed to the evidence is in any way irrational or outside the range the Judge was entitled to find on the evidence. The Judge had the benefit of both seeing and hearing oral evidence being given by the witnesses.

18. In terms of the way forward; it was confirmed there is no removal direction in force in relation to the appellant and the witness statements forming part of the rule 15(2A) application deal with what is claimed to be the arrangement for the appellant with much greater clarity than did the evidence considered by the Judge. It may therefore be, in all the circumstances, that a fresh application supported by better quality evidence explaining the appellant's position and dependency upon Mr B Qureshi and/or his spouse to meet the appellant's essential needs may maximise chances of success. That is, however, a matter for the appellant.

19. Having considered the evidence provided, the Judge's decision arrived at having had the benefit of seeing and hearing oral evidence being given, and the appellant's challenge to the same, I find the appellant has failed to establish arguable legal error material to the decision to dismiss the appeal sufficient to warrant a grant of permission to appeal to the Upper Tribunal.

Decision

20. **There is no material error of law in the Immigration Judge's decision. The determination shall stand.**

Anonymity.

21. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Upper Tribunal Judge Hanson

Dated the 15 July 2019