Upper Tribunal

(Immigration and Asylum Chamber) **Appeal number: EA/04458/2019 (V)**

THE IMMIGRATION ACTS

Heard Remotely at Manchester CJC	**Decision & Reasons Promulgated**
On 5 November 2020	**On 10 November 2020**

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

SYED AQUEEL HAIDER SHAH

(ANONYMITY ORDER NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the appellant: Ms S Sher, instructed by Farani Taylor Solicitors

For the Respondent: Mr A Tan, Senior Presenting Officer

DECISION AND REASONS (P)

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was video by Skype (V). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote

hearing. At the conclusion of the hearing I reserved my decisions and reasons, which I now give. The order made is described at the end of these reasons.

1. The appellant, who is a Pakistani national with date of birth given as 19.7.85, has appealed with permission to the Upper Tribunal against the decision of the First-tier Tribunal promulgated 21.1.20, dismissing his appeal against the decision of the Secretary of State, dated 6.8.19, to refuse his application made on 26.4.19 for an EEA Residence Card as confirmation of a right to reside in the UK as an extended family member (EFM) of his sponsoring cousin and brother-in-law, Mr Abbas Gul Syed (AS), a German national exercising Treaty rights in the UK, pursuant to the Immigration (EEA) Regulations 2016, as amended (the Regulations).

2. Permission to appeal to the Upper Tribunal was refused by the First-tier Tribunal on 29.5.20. However, when the application was renewed to the Upper Tribunal, Upper Tribunal Judge Lindsley granted permission on 4.8.20, considering it arguable that although the judge understood and identified the correct standard of proof, and accepted as genuine the money transfer receipts for the period 2005 to 2007, referenced at [11] of the decision, the First-tier Tribunal nevertheless erred in law "*for failing to set out the test for dependency under Regulation 8(2), and has failed to show it had directed itself correctly as to the standard required when considering the evidence of dependency*."

3. The respondent accepted that the sponsor has been exercising Treaty rights in the UK, confirmed by the grant of permanent residence status in 2017, and that the appellant is related to the sponsor as claimed. However, the respondent did not accept that there was sufficient evidence of dependency on the sponsor since the appellant entered the UK in 2010. Whilst there was evidence that the appellant had been living with the sponsor since 2017 and the sponsor's bank statements for that year evidence some financial support made to the appellant, the statements for 2012-2014 inclusive did not show any such financial support and there was no evidence of support between 2010 and 2012. Whilst some money transfer slips had been provided for the years 2005 to 2007, there was no evidence that the appellant received these funds and, more significantly, no evidence of any money transfers in the three years immediately prior to the appellant entering the UK in 2010. In the circumstances, the application was refused for insufficiency of evidence.

4. I have carefully considered the decision of the First-tier Tribunal in the light of the submissions and the grounds of application for permission to appeal to the Upper Tribunal.

5. In summary, the grounds as drafted and as advanced in oral submissions by Ms Sher, assert that the sole basis for dismissing the appeal was the supposed insufficiency of evidence of dependency by the appellant on the sponsor (AS). It is submitted that the First-tier Tribunal Judge failed to give weight to evidence of money transfers to Pakistan as evidence of dependency and that

the First-tier Tribunal erred in requiring a higher degree of dependency than required under regulation 8(2). Ms Sher submitted that the acceptance of the 9 money transfers to Pakistan were sufficient to establish dependency. In essence, the grounds attempt to rely on the quantity of evidence ('sufficient amount"), and suggest that the judge erroneously required a "higher scale of dependency" in order for Regulation 8 to be satisfied.

6. Reliance is also placed on the respondent's guidance on EFMs, V 7.0 published on 27.3.19, which states that "*the applicant does not need to be dependent on the EEA national to meet all or most of their essential needs. For example, an applicant is considered dependent if they receive a pension which covers half their essential needs and money from their EEA national sponsor which covers the other half*."

7. Ms Sher submitted that the judge not only applied a heighten test for 'dependency' than was required under the Regulations and case law, but that the judge was wrong to conclude that dependency was not established. She accepted that there was limited documentary evidence but pointed to the written and oral evidence of the appellant and the sponsor that the dependency existed prior to the appellant coming to the UK and continued thereafter in the UK.

8. Regulation 8(2) provides as follows:

> **"Extended family member"**
>
> **8.** - (2) The condition in this paragraph is that the person is—
>
> (a) a relative of an EEA national; and
>
> (b) residing in a country other than the United Kingdom and is dependent upon the EEA national or is a member of the EEA national's household; and either—
>
> (i) is accompanying the EEA national to the United Kingdom or wants to join the EEA national in the United Kingdom; or
>
> (ii) has joined the EEA national in the United Kingdom and continues to be dependent upon the EEA national, or to be a member of the EEA national's household."

9. In Dauhoo (EEA Regulations – reg 8(2)) [2012] UKUT 79 (IAC), the Upper Tribunal held that a person can succeed in establishing that he or she is an "extended family member" in any one of four different ways, each of which requires proving a relevant connection both prior to arrival in the UK and in the UK:

   i. prior dependency and present dependency;

   ii. prior membership of a household and present membership of a household;

   iii. prior dependency and present membership of a household;

   iv. prior membership of a household and present dependency.

10. It is not necessary to show prior and present connection in the same capacity: i.e. dependency–dependency or household membership-household membership ((i) or (ii) above is sufficient. A person may also qualify if able to show (iii) or (iv). In effect, to qualify as an EFM, the appellant has to demonstrate one of the four permutations set out above of prior dependency or household and present dependency or household.

11. It is also important to point out the use of the word "continues" in Regulation 8(2). The appellant must continue to be either dependent or a member of the household, as held in the Upper Tribunal's recent decision in Chowdhury (Extended family members: dependency) [2020] UKUT 00188 (IAC), "*The words "and continues to be dependent" in regulation 8(2)(c) of the Immigration (European Economic Area) Regulation 2006, properly characterised, require an applicant to establish that there has not been a break in their dependency on the EEA national sponsor.*"

12. The appellant obtained entry to the UK in February 2010 on a Tier 4 student visa, valid to September 2011. He claims to have lived with the sponsor since arriving in the UK and that even before he arrived in the UK, the sponsor supported him financially, regularly sending money to Pakistan for food and education from 2005 onwards. It is alleged that money was sent by a money transfer service, or with friends visiting Pakistan, or in person when the sponsor himself visited Pakistan.

13. Although he came to the UK as a student, the college the appellant attended was closed by the Home Office some 8 months after his arrival. There is no evidence of any further study or the obtaining of any qualifications. The obvious inference to be drawn is that the appellant had no interest in studying and simply took advantage of being in the UK as long as he could. An application to renew his student leave in 2011 was refused and his subsequent appeal dismissed. He remained as an illegal overstayer until detained in December 2016, when he applied for international protection, a claim later withdrawn.

14. In January 2017, he applied for an EEA Residence Card as an EFM but this was refused and his application for permission to pursue judicial review of that decision was also refused. Further Residence Card applications made in November 2017 and July 2018 were also refused. In all, including the application to which this appeal relates, he has unsuccessfully made six Residence Card applications, apparently all refused for failure to demonstrate dependency on the sponsor.

15. He claims that during this period he was "mostly" staying with the sponsor in Hornchurch but also at times lived with friends in Swindon. The evidence of his whereabouts and activity has been left rather vague but that is not material to the outcome of the appeal.

16. It is clear that at [2] of the decision the judge made a correct self-direction as to the burden and standard of proof; repeated at [18] of the decision. It is also clear from the evidence summarised in the decision that the appeal turned on the issue of dependency and the credibility of the claim to have been and continue to be dependent on the sponsor. In assessing credibility, the judge considered the various explanations for the failure to provide with the several previous applications the financial documentation now relied on.

17. At [19] of the decision, the First-tier Tribunal Judge first considered the documentary evidence for the period between 2005 and the appellant's arrival in the UK in 2010, throughout which period the sponsor claimed to have supported him. The judge accepted the validity of the documents but concluded that the limited number of such transfers of relative modest amounts over the time period was insufficient to demonstrate dependency. I am satisfied that was a finding open to the judge on the evidence. Weight to be given to evidence is a matter for the judge. Little weight was appropriately given to the various written attestations from friends and family who did not give evidence. Despite the respondent having pointed in the refusal decision to the three-year gap between the last transfer and the appellant's arrival in the UK, it remained the case that there was no satisfactory evidence of financial support during that period. In the circumstances, it is hardly surprising that the judge found the appellant failed to prove that he was dependent on the sponsor between 2005 and 2010.

18. At [20] of the decision, the judge carefully analysed the evidence of dependency in the period after the appellant arrived in the UK, identifying gaps in the disorganised and incomplete evidence. At [21] the judge concluded that there was no documentary evidence to confirm that the sponsor supported the appellant prior to April 2017 or that they even lived together prior to March 2017. There was no evidence of a regular pattern of support with bank payments occasional and variable in amounts.

19. Having considered the impugned decision and the way in which the judge carefully assessed the documentary evidence and the explanations of the appellant and the sponsor, I am satisfied that the judge was entitled to conclude that the evidence of dependency was incomplete and inadequate, insufficient to discharge the burden of proof. In reality, there was, as Mr Tan pointed out, a 10-year gap in credible evidence of dependency on the sponsor, the period between 2007 and 2017. Mr Tan submitted that in the premises it was impossible for the appellant to demonstrate prior dependency and that he continued to be dependent on the sponsor after coming to the UK. I entirely agree with Mr Tan's submission; I cannot see how continuing dependency can be established on the evidence sufficient to discharge the burden of proof on the appellant.

20. Whilst the judge has been criticised for failing to set out the test of dependency under Regulation 8(2), it is clear that on the facts of this case as found by the

judge, the appellant could not have met in any event any of the four alternative permutations of dependency/household membership. In this case, as stated above and in Ms Sher's submissions, the key issue was dependency prior to entering the UK. Whilst arguably the evidence demonstrated some limited financial support in earlier years, relatively small sums, there was at least a three-year gap in the supporting evidence for the period between 2007 and 2010, so that the appellant could not be said to be dependent on the sponsor at the point of or for three years prior to entering the UK, even if he could meet the dependency or household membership requirement since arrival and be said to continue to be dependent on the sponsor; on the facts of this case there was nothing to be continued. Further, the evidence of dependency up and until 2017 was woefully inadequate.

21. It follows that the appeal was doomed to the same fate as the previous five applications and, in essence, for the same reasons. The appellant is not an Extended Family Member because he has failed to discharge the burden of demonstrating he was dependent on the sponsor in one of the ways permitted under Regulation 8.

22. In the circumstances and for the reasons set out above, I find no material error of law in the decision of the First-tier Tribunal so that it must be set aside.

Decision

The appeal of the appellant to the Upper Tribunal is dismissed.

The decision of the First-tier Tribunal stands and the appeal remains dismissed.

I make no order for costs.

Signed: *DMW Pickup*

Upper Tribunal Judge Pickup

Date: 5 November 2020