Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/04624/2019 (V)

THE IMMIGRATION ACTS

Heard at Field House via Skype	**Decision & Reasons Promulgated**
On 23rd November 2020	**On 21st January 2021**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

MR NDUE GJONI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Collins, Counsel, Zoi Bilderberg Law Practice
For the Respondent: Ms Julie Isherwood, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals, with permission, against the decision of the First-tier Tribunal dated 14th January 2020 dismissing the appellant's appeal against the Secretary of State's decision. The appellant's application for a residence card as an extended family member based on his EEA rights under Regulation 8 of the Immigration

(European Economic Area) Regulations 2016 was refused by the Secretary of State on 20th August 2019.

2. The appellant appealed on the following grounds:-

Ground 1

First-tier Tribunal Judge Clark failed to direct her mind and apply the burden and standard of proof relevant to the EEA appeal.

At paragraph 21 of the decision the judge stated, "I do not find the appellant has substantiated his claim on a balance of probabilities and I dismiss it."

It was contended that this paragraph was merely a closing paragraph and it is normally expected that the judge should set out at the beginning of the decision that he/she had expressly directed his or her mind to the burden and standard of proof before going on to consider the facts in conjunction with the applicable law and this was a fundamental error. It was further contended that the judge had materially erred in law in failing to set out the legal test in terms of Regulation 8 of the 2016 Regulations and it is unclear which parts of Regulation 8 Judge Clarke referred her mind to.

Ground 2

Judge Clarke had criticised the fact that the date of the tenancy agreement (15th November 2015) had been written on the tenancy agreement by hand by the signature of the property manager. It was entirely in the hands of the property manager as to what was written on the document. It was contended that the judge's criticism of the evidence was unjustified and amounted to a material error of law.

Ground 3

At paragraph 8 of the decision the judge stated that the evidence of the payment of rent was contradictory in that the bank statements of the sponsor, the appellant's sister-in-law, recorded rent payments whereas the appellant's brother stated in evidence that he paid the rent. It was contended that the judge's criticism was without justification and failed to understand the evidence given at the hearing that the payment of the rent was paid by the sponsor and by the appellant's brother. It was contended that the payment of the rent could have been made in cash as per the appellant's brother and also by bank transfer as by the sponsor and the judge was wrong to fail to address that payments for rent in cash could have been and were paid as well as by bank transfer.

Ground 4

The judge stated at paragraph 11 that what was missing was documentary evidence to place the appellant at the address given the gaps in rent being paid.

It was contended, however that the judge failed to address her mind to the fact that the person had no status in the United Kingdom and would have no documentary evidence to show him at that address. For the judge to make a finding that there was a requirement of documentary evidence of the appellant living at the address has placed too high an evidential burden on the Appellant and unrealistic burden.

Ground 5

The judge stated at paragraph 13,

> *"I find it implausible that a landlord would accept another adult to live in the property and not be named as a tenant and there is no letter from the landlord to confirm such permission and the explanation is implausible because the purpose of the tenancy agreement amongst other things is for the landlord to lawfully evict the adults residing in the property."*

However, the judge failed to understand basic immigration law that the appellant had no status in order to hold a tenancy agreement and was forbidden in law to do so under Section 21(1) and (2) of the 2014 Act from holding any residential tenancy. Secondly, the judge failed to understand the legal consequences of a landlord giving a tenancy to such a person who had no legal status in the United Kingdom. The landlord could be served with a penalty notice of up £3,000 under Section 23 of the 2014 Act. Hence it was an error for the judge to find that the explanation by the appellant was implausible because he had no documents and because there was no letter from the landlord to confirm his residence. Contrary to the views expressed by the judge it was contended that the explanation by the appellant was entirely and fundamentally sound.

Ground 6

The judge found at paragraph 15,

> *"I do not find the appellant has shown he has ever lived in the same household as the sponsor. The godfather has told me that he has provided money for the appellant and I find he has not shown there are not alternatives for him to reside in, either with family or friends or alone elsewhere."*

The judge had materially erred in law in finding "I do not find the appellant has shown he has ever lived in the same household as the sponsor." Such a finding was contrary to the evidence provided and the weight of the evidence provided by the appellant and his witnesses. It was considered it was not for the appellant to show that there are alternatives for him to reside either with family or friends or alone elsewhere and such an issue had not been raised by the appellant in his evidence.

Ground 7

Further or in the alternative at paragraph 19 of the decision the judge made the following finding,

> *"I find the sponsor has very occasionally given a small sum of money, and not enough to show that she has been maintaining him. The brother has assisted the appellant financially, and the godfather and uncle may also have assisted but the appellant has not shown how else he has been maintaining himself."*

It was contended that the judge had materially erred in that he had failed to show that she had directed herself properly or applied the law in respect of the issue of "maintenance" in accordance with the terms of Regulation 8.

Submissions

3. At the start of the hearing Mr Collins had some difficulty in connecting to the Tribunal but managed to join using the Skype link. He relied on his written grounds of appeal and emphasised in relation to ground 4 that the appellant could not be on the tenancy agreement because of the penalties on landlords and the judge had relied on the points made under that ground. Grounds 4 and 5 were linked. Ground 1 was a minor point but in the overall reading the judge did not appear to have directed herself to the burden and standard of proof by setting out the same at the outset of the decision. In relation to ground 3 the judge did not consider the evidence given. At ground 6 he said that there was evidence that Mr Gjoni was living in the household of the brother and sister. This was not challenged in the reasons for refusal letter. At ground 7 it is clear that it is a dependency issue not maintenance. Some money was paid by the sponsor to the appellant although it was accepted that the sponsor and brother did not marry until 2017 however, there was no definition of what relative was under Regulation 8.

4. Ms Isherwood maintained there was no error of law. The judge applied the correct standard of proof. There was no legal basis to say that the brother of a boyfriend and girlfriend were family members. This brother married an EEA national after the appellant came to the UK and there was no evidence of prior dependency and therefore the appellant could not meet the Regulations.

5. The judge did not simply rely on the tenancy agreement. The judge noted the travel history of the sponsor, that the appellant never formed part of the household out of the UK and looking at the dates they could not succeed. At paragraph 8 the judge was looking at the bank statements and rejected that the rent was paid for the appellant. There were contradictions in the evidence identified at paragraph 8. At paragraph 9 the judge looked at the evidence and found it did not support the claim that the appellant had met the EEA Regulations; simply the judge had found that the rent had not been paid consistently. There was missing evidence, gaps in the rent and no name on the tenancy agreement.

6. Mr Collins rejoindered that the relevant test was a dependency not maintenance and that the EEA national contributed to money sent to the appellant in Albania cited at paragraphs 16 and 17. There was no finding under Regulation 8(2)(a) but that was not challenged. There was no concern about being a relative of the appellant.

Analysis

7. The Immigration (European Economic Area) Regulations 2016 have now been revoked by The Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 Schedule 1(1) paragraph 2(2) (December 31, 2020. Revocation, however, has effect subject to savings specified in The Citizens' Rights (Restrictions of Rights of Entry and Residence) (EU Exit) Regulations 2020, Regulation 2 and Schedule 1 and The Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020 Regulations ("The Transitional Provisions").

8. Schedule 3 paragraph 5 of the Transitional Provisions deals with existing appeal rights and appeals and as this appeal was extant prior to commencement day, I consider that I retain jurisdiction. Regulation 8 of the 2016 Regulations is specified in Schedule 3, paragraph 6 of the Transitional Provisions.

Existing appeal rights and appeals

5. *– (1) Subject to sub-paragraph (4), the provisions of the EEA Regulations 2016 specified in paragraph 6 continue to apply –*

(a)to any appeal which has been brought under the Immigration (European Economic Area) Regulations 2006 and has not been finally determined before commencement day,

(b)to any appeal which has been brought under the EEA Regulations 2016 and has not been finally determined before commencement day,

(c)in respect of an EEA decision, within the meaning of the EEA Regulations 2016, taken before commencement day, or

(d)in respect of an EEA decision, within the meaning of the EEA Regulations 2016 as they continue in effect by virtue of these Regulations or the Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020, which is taken on or after commencement day.

(2) For the purposes of paragraph (1) –

(a)an appeal is not to be treated as finally determined while a further appeal may be brought and, if such a further appeal is brought, the original appeal is not to be treated as finally determined until the further appeal is determined, withdrawn or abandoned; and

(b)an appeal is not to be treated as abandoned solely because the appellant leaves the United Kingdom.

(3) The revocation of the EEA Regulations 2016 does not affect the application of the Immigration (European Economic Area) Regulations 2006 to an appeal that falls within paragraph 3(1) of Schedule 4 to the EEA Regulations 2016.

9. Prior to revocation Regulation 8 of the 2016 Regulations (so far as relevant) read as follows:

"Extended family member"

8.– (1) In these Regulations "extended family member" means a person who is not a family member of an EEA national under regulation 7(1)(a), (b) or (c) and who satisfies a condition in paragraph (1A),(2), (3), (4) or (5).

(1A) …

(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.

(3) …

(4) …

(5)…

(6) In these Regulations, "relevant EEA national" means, in relation to an extended family member –

(a)referred to in paragraph (2), (3) or (4), the EEA national to whom the extended family member is related;

(b)referred to in paragraph (5), the EEA national who is the durable partner of the extended family member.

(7) In paragraphs (2), (3) and (4), "relative of an EEA national" includes a relative of the spouse or civil partner of an EEA national....

(8) Where an extensive examination of the personal circumstances of the applicant is required under these Regulations, it must include examination of the following –

(a)the best interests of the applicant, particularly where the applicant is a child;

(b)the character and conduct of the applicant; and

(c)whether an EEA national would be deterred from exercising their free movement rights if the application was refused.

10. In relation to ground 1, it is not arguable that the judge misdirected herself in relation to the burden and standard of proof evidence. It is noted that at paragraph 21 at the close of the decision the judge stated, "I do not find the appellant has substantiated his claim on a balance of probabilities and I dismiss it" but a careful reading of the decision shows that the judge had the relevant standard and burden of proof which is that it is for the appellant to prove his case on the balance of probabilities.

11. As confirmed in **Latayan v Secretary of State for the Home Department [2020] EWCA Civ 191** dependency is a question of fact and **Latayan** cited the relevant case of **SM (India) v Entry Clearance Officer (Mumbai) [2009] EWCA Civ 1426** at paragraph 23 as follows:

> *"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."*
>
> *Further, at [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. ..."*

12. **Latayan** also confirmed the guidance given by the Upper Tribunal in **Moneke and Others (EEA – OFM) Nigeria [2011] UKUT 341**.

> *"24. As to the approach to evidence, guidance was given by the Upper Tribunal in Moneke and others (EEA – OFMs) 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 in the sense used by the Court of Justice in the case of Lebon [1987] ECR 2811. For the 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."

13. **Fatima and Others v Secretary of State for the Home Department [2019] EWCA Civ 124** held at paragraph 26 that

> *"The dependency has to be on the relevant union citizen. That is clearly and correctly transposed into the domestic law by Regulation 8(2)(c) of the 2006 Regulations."*

14. Mr Collins referred to the reasons for refusal letter as not challenging aspects of Regulation 8, but the clear reason given for the application being refused was the reference to Regulation 8(2). Further within the decision letter from the Secretary of State, there is a challenge to the "adequate evidence" that was provided that the appellant was

> "*Dependent upon and/or residing with your EEA or Swiss national sponsor prior to entering the United Kingdom and that since you entered the United Kingdom you have continued to be dependent upon and/or residing with your sponsor*."

15. That makes the critical question plain.

16. The judge made a clear finding at paragraph 6 that, "*The appellant never formed a part of the household of the sponsor out of the UK*" and further at paragraphs 16 and 17 the judge stated that she then moved onto the issue of dependency. Quite clearly at paragraph 16 the judge rejected the contention that the brother had sent money to the appellant in cash because of the contradiction in the evidence. Crucially the judge rejected, for sound reasoning, that the appellant had shown that, at that relevant time, the EEA national had provided support.

17. At that time and prior to his entry to the UK in 2015, the appellant was not a relative of the EEA national.

18. In particular, when considering dependency, at paragraph 17 the judge states, that the appellant did not know the provenance of the funds afforded him when abroad (i.e., whether they came from the EEA national or not) and this was when the brother and his partner were not married. Additionally, the brother stated he gave money but as indicated, '*200 to 300 Euros and not too often'*. The EEA national confirmed that it was the brother who would send the appellant money and when asked if she contributed, the judge recorded as follows that she replied in relation to her contributions that 'it was mostly the brother

> "*The <u>total amount</u> she gave was 100 Euros and not in big sums and she was unable to answer about the brother giving money to the uncle if she was not present."*

19. At paragraph 18 of the decision the judge recorded, when asked about money given here in the UK the EEA national, as the judge found,

> "*She was asked if the appellant had asked her for money and she hesitated a long time and said she could not say, and then added if it was an emergency and say 3 to 5 times, she has given some money in an emergency and only very small sums"*

20. In essence the judge found that the

> *'sponsor has very, occasionally given a very small sum of money and not enough to show she has been maintaining him'.*

21. The judge pointed out at paragraph 16 that there were contradictions in the evidence pertaining to funds given during the time when the applicant was abroad. While the brother stated in relation to that time that he gave the appellant 200 Euros to 300 Euros and not too often when he needed the money, by contrast the appellant said he received 100 Euros to 200 month in cash.

22. The judge also clearly looked at the question of the relationship and stated at [17] that,

> "*The sponsor said the brother was her boyfriend then and not her husband, and that the brother used to send the appellant money*".

The judge recorded,

> *"She was asked if she contributed towards the money and answered that she would, but it was mostly the brother", "She said he sent 100 to 200 Albanian lek and she gave the money to the brother in Euros. The total [my underlining] amount she gave was 100 Euros, and not in big sums and she was unable to answer about the brother giving money to the uncle if she was not present".*

23. As the judge stated at paragraph 19,

> *"I find the sponsor has very occasionally given a very small sum of money and not enough to show she has been maintaining him. I find the brother has assisted the appellant financially, and the godfather and uncle may also have assisted, but the appellant has not shown how else he has been maintaining himself."*

In accordance with the assessment of dependency, the evidence given by the appellant in relation to his existence prior to entry to the UK does not support his contention that he was dependent on an EEA national for his essential needs prior to his advent to the United Kingdom or that he was a member of the EEA national's household prior to the marriage of his brother. It is clear, and the judge made a specific finding at paragraph 7, that the brother did not marry the sponsor until 2017 and he had already entered the United Kingdom in 2015.

24. As Rule 24 pointed out and for the reasons given above, that was fatal to the appeal. The reasons for refusal letter were reliant on Regulation 8 as a whole and I am not persuaded that the judge went outside the remit particularly as this was not challenged in the grounds of appeal.

25. Grounds 2 to 4 relate to the property let but also to a period of time after the applicant came to the UK (prior to which appellant had not shown either he lived in a household of or was dependent on an EEA national). Notwithstanding, it was open to the judge to make the observations on the letter and tenancy agreement at paragraph 7. In particular the judge found the rent had not been paid in a consistent manner from 2015 and it was open to the judge to find that there was an

inconsistency between the evidence of the EEA national and appellant's brother as to who paid the rent rather than both of them. It is not that the judge misunderstood the evidence. It was open to the judge to find that there was a lack of documentary evidence to place the appellant at the address claimed. In that context, the judge did not find that the limited utility bills were of assistance. Mere disagreement about the weight to be accorded to the evidence, which is a matter for the judge, should not be characterised as an error of law, **Herrera v SSHD** [2018] EWCA Civ 412.

26. Grounds 5 to 6 argue that the judge should have taken into account that the appellant was unable to go on the tenancy document because he was in the UK illegally and the landlord would suffer penalties, but the European Economic Area Regulations were said to be declaratory and it is the appellant's contention that he was not in the United Kingdom illegally. His grounds of appeal to the First-tier Tribunal state that he is 'a bona fide family member'.

27. Further it was open to the judge, when the evidence had been submitted that the landlord was aware of the appellant's presence, to state at paragraph 13, that it was implausible that the landlord "Would accept another adult to live in the property and not be named as a tenant and there is no letter from the landlord to confer such permission", and further "The explanation is implausible because the purpose of the tenancy agreement amongst other things is for the landlord to lawfully evict the adults residing in the property".

28. The grounds criticise the judge for failing to understand the legal consequences of giving a tenancy to someone with no status and it is argued that the judge did not understand the penalties afforded to landlords who give a tenancy to someone with no legal status. It does not, however, appear to be appreciated that the landlord's control of a property is a very significant factor and thus the judge's reasoning that it was implausible that a Landlord would accept another adult living in the property and not being named on the tenancy agreement was unarguably sound.

29. The Immigration (European Economic Area) Regulations 2016 did not dictate the nature of the evidence to be provided and the weight to be placed on the existence or indeed lack of existence of evidence is a matter for the judge. To suggest as the grounds do that the judge should be prevented from finding that the requirement for documentary evidence to show the appellant lived at the address placed too high and unrealistic an evidential burden on the Appellant, is not an attractive argument nor sustainable. Mere assertion of a fact will not suffice. The burden of proof is on the appellant to show that he lived in that property and on the basis of the inadequate and contradictory evidence of the appellant and his witnesses, it was open to the judge to find there was nothing to place the appellant at that property at the relevant time save for some utility bills which do not prove residence in the circumstances.

30. As the judge stated some of the rent payments were made by bank transfer but at paragraph 20

> *"Only £500 odd ever went out of his the brother's account which suggested the rent of one room only for him and the sponsor. I have not been provided with recent bank statements and in particular anything to show the rent being paid on the new property and the appellant is not named on the council tax. There is no letter from the landlord either to confirm his residence."*

31. It was open to the judge to criticise the lack of documentary evidence.

32. Mr Collins submitted that the judge incorrectly referred to maintenance as opposed to dependency but having taken a holistic approach in relation to the consideration of the property, the missing documentary evidence and the gaps in rent being paid, the reference to maintenance does not show the judge has not misdirected himself/herself. Indeed, in respect of the critical period of time when the appellant was outside the UK the evidence was so limited and contradictory that the grounds do not begin to undermine the decision.

33. In relation to ground 7, any such the reference to the appellant showing alternative accommodation is not material to the decision because the crucial point is that the judge stated that 'I do not find the appellant has shown he has ever lived in the same same household as the sponsor'. This includes when the appellant was in Albania. It was never contended that the appellant lived in the household of the EEA national prior to his entry to the UK and on the facts as found such a finding in relation to current dependency or household is not material.

34. The findings made by the judge were sufficiently and adequately reasoned and, on the findings, which remain unchallenged, the judge demonstrated that the appellant simply had not fulfilled the conditions of Regulation 8 of the Immigration (European Economic Area) Regulations 2016.

35. There has been no material error of law and the appeal remains dismissed.

Signed *Helen Rimington* Date 11th January 2021

Upper Tribunal Judge Rimington