Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/05697/2019

THE IMMIGRATION ACTS

Heard remotely via video (Skype for Business)	**Decision & Reasons Promulgated**
On 26 May 2021	**On 10 June 2021**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

WAQAS MUSHTAQ
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the appellant: Mr S Ahmad, legal representative from A1 Immigration Services
For the respondent: Ms A Everett, Senior Home Office Presenting Officer

This decision follows a remote hearing in respect of which there has been no objection by the parties. The form of remote hearing was by video (V), the platform was Microsoft Teams. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

DECISION AND REASONS

1. This is an appeal against the decision of Judge of the First-tier Tribunal Kelly (the judge) who, in a decision promulgated on 20 January 2021, dismissed the appellant's appeal against the decision of the Entry Clearance Officer ("the

respondent") dated 23 September 2019 refusing to issue him an EEA Family Permit pursuant to the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations").

Background

2. The appellant is a national of Pakistan, born on 27 December 1985. Sometime in 2019 he made an application for an EEA Family Permit based on his relationship with Ms Asmat Mushtaq ("sponsor"), an Italian national resident in the United Kingdom and exercising free movement rights under the 'Citizens Directive' (Directive 2004/38/EC). The appellant claimed that the sponsor was his sister and that he was financially dependent upon her to meet his essential needs.

3. The respondent refused to issue the EEA Family Permit. The respondent was not satisfied that the appellant and the sponsor were related as claimed. The respondent was not therefore satisfied that the appellant was an extended family member as understood in reg 8 of the 2016 Regulations. Nor was the respondent satisfied that the appellant was financially dependent on his sponsor. The respondent additionally noted that the sponsor had a husband and "at least four dependent children." She worked 22 hours a week and had a net income of approximately £775 a month. She also received state benefits of £1100-£1400 per month. As the state benefits were means tested the respondent was not satisfied that the sponsor would be able to financially support the appellant and her family once he entered the UK and there was therefore a risk that he may become a burden on the public funds system. The appellant appealed the respondent's decision to the First-tier Tribunal.

The decision of the First-tier Tribunal

4. The judge considered a number of documents prepared by both parties for the hearing. These included a witness statement by the sponsor, copies of the appellant's birth certificate and family registration certificate, money transfer orders, wage slips, Universal Credit Statements and bank statements relating to the sponsor, a report on the available accommodation for the sponsor's home, and a list of the income and expenditure of the sponsor's household in the UK. The respondent was not represented at the hearing. The judge heard oral evidence from the sponsor via an Urdu interpreter.

5. In his decision the judge was satisfied that the appellant was related to the sponsor as claimed, and that the appellant was financially dependent upon the sponsor for his essential needs. No challenge has been raised by the respondent against these findings.

6. The judge nevertheless dismissed the appeal. His reasoning is contained at [18] of his decision.

> "However, the ability of the appellant to fulfil the threshold criteria for extended family membership does not of itself entitle him to a right of free movement if the respondent is able to justify denial of entry (Article 3 of the Citizens Rights Directive 2004/38/EEC, implemented by regulation 12 (5) of the 2016 Regulations, above). The respondent justifies refusal on the ground that there is a risk of the appellant becoming a burden upon public funds. This appears to be a legitimate justification in principle given that the preamble to the Citizens Rights Directive specifically qualifies rights of free movement by reference to a beneficiary not becoming, "an unreasonable burden on the social assistance system of the host member [sic] Member State". Both the appellant's skeleton argument and the sponsor's witness statement seeks to address this issue by drawing attention to the evidence of available earned income from members of the sponsor's household for which means-tested benefits merely provide a supplement. Nevertheless, as an adult exercising a right of residence in the United Kingdom recognised by the grant of an EEA family permit, the appellant would be entitled to receive social assistance benefits in his own right. There is moreover a real risk, indeed likelihood, that he would exercise that entitlement indefinitely. He is aged 35 years and unemployed. There was no evidence to suggest that he has ever been in paid employment or that he has any particular skills or qualifications. Moreover, it is not suggested that permitting the appellant to join the sponsor in the United Kingdom has any relevance to the sponsor's decision to exercise her own right to free movement by residing in the United Kingdom (the underlying purpose of allowing non-EU family members free movement within its territory). I am therefore satisfied that the respondent is justified in refusing the appellant's application to enter as an extended family member of a person exercising European Union Treaty rights in the United Kingdom."

The challenge to the judge's decision and the 'error of law' hearing

7. The appeal grounds contend that the judge was not entitled, on the evidence before him, to conclude that the appellant would possibly become reliant on public funds. There was no evidence before the judge that the appellant would in fact be entitled to any benefits. Nor was the judge entitled to find that there was a "real risk" or "likelihood" that the appellant would exercise any such entitlement indefinitely, particularly in light of the judge's credibility findings and the evidence from the sponsor that she would provide the appellant with all his essential needs when he enters the UK. The judge's conclusions relating to the appellant's employment history and his lack of skills and qualifications were reached without any questions asked of the sponsor relating to said employment history and skills and qualifications. This amounted to a procedural impropriety. Had the sponsor been asked such questions she would have provided evidence concerning the sponsor's qualifications up to Secondary School Intermediate level and his previous employment history.

8. In granting permission to appeal Judge of the First-tier Tribunal Page found it arguable that, if the sponsor was not asked any questions concerning the

appellant's employment history and skills and qualifications, and if these issues were not raised at the hearing, the judge's findings at [18] may not be sustainable.

9. At the outset of the 'error of law' hearing I raised with the representatives my concern as to the legal basis for the judge's assessment at [18]. I indicated to the parties my concern that Article 3 of the Citizens Directive and reg 12 (5) of the 2016 Regulations required a refusal to issue an EEA Family Permit to an extended family member to be accompanied by reasons justifying the refusal, but did not indicate that such an application could be refused on the basis that an applicant may become an unreasonable burden on the social assistance system of the host Member State, and that the preamble of the Citizens Directive (which could only be preamble (16)) noted by the judge was concerned with the expulsion of beneficiaries from a host Member State who became an unreasonable burden on the social assistance system, not with the issuance of a Family Permit.

10. Ms Everett indicated that she had never seen a decision refusing to issue a Family Permit based on the possibility or even likelihood that an applicant would become an unreasonable burden on the UK's social assistance system, and that she had researched the transitional provisions relating to the U.K.'s withdrawal from the EU but could not find any reference to any legal basis that could support such a decision. Mr Ahmed had also conducted his own research and was unable to find any legislative provision or judicial decision entitling the respondent to refuse to issue a Family Permit on the basis that an applicant may become an unreasonable burden on the U.K.'s social assistance system. Both representatives expressed their agreement that the judge was not lawfully entitled to dismiss the appeal for the reasons advanced at [18].

Discussion

11. As accepted by Ms Everett, the respondent was not lawfully entitled to refuse to issue a Family Permit on the basis that the appellant may, in the future, become an unreasonable burden on the UK's social assistance system. There was simply no legislative basis, either in the Citizen's Directive or in the 2016 Regulations, which implements the Citizen's Directive, empowering the respondent to refuse an application on this basis. There is nothing in either Article 3 of the Citizens Directive or reg 12 (5) of the 2016 Regulations that would entitle the respondent to refuse to issue a Family Permit because an applicant may become entitled to social assistance or because the applicant may become an unreasonable burden on the social assistance system. The extensive examination of the personal circumstances of an applicant that must be undertaken is framed in both the Directive and the 2016 Regulations by reference to the relationship between the applicant and the EU national and whether the applicant is or was a member of the EU national's household or is or was dependent on the EU national. The requirement to give reasons

justifying the refusal to issue the Family Permit must be understood in this context and by reference to the same framework.

12. The judge referred to the preamble to the Citizens Directive and stated that this qualified rights of free movement by reference to a beneficiary not becoming "an unreasonable burden" on the social assistance system of the host Member State. The only relevant preamble is preamble (16). This reads:

> 'As long as the beneficiaries of the right of residence do not become an unreasonable burden on the social assistance system of the host Member State they should not be expelled. Therefore, an expulsion measure should not be the automatic consequence of recourse to the social assistance system. The host Member State should examine whether it is a case of temporary difficulties and take into account the duration of residence, the personal circumstances and the amount of aid granted in order to consider whether the beneficiary has become an unreasonable burden on its social assistance system and to proceed to his expulsion. In no case should an expulsion measure be adopted against workers, self-employed persons or job-seekers as defined by the Court of Justice save on grounds of public policy or public security.'

13. It is clear that this preamble relates to expulsion of a beneficiary (in the present case, an extended family member) who is already residing in the UK. It does not relate in any way to an application by someone not in a Member State for a Family Permit.

14. It follows that the respondent was not lawfully entitled to refuse to issue the Family Permit on this particular basis, and that the judge consequently erred on a point of law in dismissing the appeal on this basis. This error is clearly material.

15. Both parties agreed that it was appropriate for me to set the First-tier Tribunal's decision aside and remake the decision myself. Ms Everett agreed that there had been no challenge to the judge's primary findings of fact that the appellant was the sponsor's brother and therefore an extended family member, and that the appellant was dependent on the sponsor to meet his essential needs. In these circumstances I am satisfied that the requirements necessary for a grant of a Family Permit are met. I therefore allow the appeal.

Notice of Decision

The First-tier Tribunal's decision involved the making of an error on a point of law requiring it to be set aside.

I remake the decision allowing the appellant's appeal.

Signed *D.Blum* Date: 26 May 2021

Upper Tribunal Judge Blum