Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: EA/04702/2020**

THE IMMIGRATION ACTS

Heard at Birmingham CJC	**Decision & Reasons Promulgated**
On 29 March 2022	**On the 19 April 2022**

Before

UPPER TRIBUNAL JUDGE HANSON
DEPUTY UPPER TRIBUNAL JUDGE SHEPHERD

Between

ELI KORMEGAH
(Anonymity direction not made)

Appellant

and

AN ENTRY CLEARANCE OFFICER (DH)

Respondent

On the papers

DECISION AND REASONS

1. The appellant appeals with permission a decision of First-tier Tribunal Judge Samimi ('the Judge') promulgated on 16 February 2021 in which the Judge dismissed the appeal against the refusal by an Entry Clearance Officer (ECO) of an application for an EEA Family Permit as the extended family member of an EEA national exercising treaty rights in the United Kingdom. The date of the impugned decision is 9 September 2020.
2. The appellant is a citizen of Ghana born on 2 June 1992.
3. The ECO noted the appellant had applied to join an uncle, an Italian national, in the UK and that as part of the documentary evidence relied upon by the appellant he had provided two Ghanaian birth certificates

for himself and his mother, produced on 16 June 1992 and 12 March 1968 respectively. In rejecting this evidence the ECO writes:

- The Ghanaian birth certificates both contain features that were not introduced by the authorities of your country until 2009. You have not provided any evidence of birth certificates in the format used at the times of both yours and your mother's births, which would be expected as both of the supplied documents state that your births were registered within one month of the event.
- As the supplied documents contain features that did not start to appear until after the documents were purportedly produced, this office cannot be satisfied of their validity and so cannot accept them as evidence of your relationship to your sponsor.
- On that basis I am not satisfied you are have provided valid evidence you are the 'family member' of the EEA national sponsor and your application fails to meet the requirements of regulation 8 of the Immigration (European Economic Area) Regulations 2016.

I therefore refuse your EEA Family Permit application because I am not satisfied that you meet all the requirements of regulation 12 (see ECGs EUN2.23) of the Immigration (European Economic Area) Regulations 2016.

4. The decision was reviewed by the Sheffield Appeal Review Team who were satisfied that the correct legal provisions had been considered and that further evidence had been sent in with the appeal, but that it did not address the reasons for refusal, resulting in the decision of the ECO being upheld.

5. The Judge sets out findings of fact from [8] of the decision under challenge, the key points of which can be summarised in the following terms:

a) The respondent has not specified as to what aspects of the birth certificates undermine their authenticity [9].
b) No valid or specific reasons have been provided to substantiate the respondent's assertion that the birth certificates are not valid or that they have not been issued in accordance with the law. The respondent has not satisfied the burden of proof in supporting the allegation that the birth certificate submitted on the appellant's behalf were not issued in accordance with the law in Ghana [10].
c) Whilst the appellant's witness statement claims the UK based sponsor is related to his biological mother and siblings from the same father the digital bundles did not include any evidence of the appellant's mother's relationship with the EEA sponsor [11].
d) Whilst there is evidence in the digital file of money transfer receipts to corroborate the sponsor's and appellant's assertions that some form of financial support has been provided, it was not found that there was any independent evidence to support the claim that the appellant had been financially dependent upon the sponsor since his mother passed away in 2008 [12].
e) Whilst there are copies of money transfer receipts covering the period 2015 – 2020 there is no evidence to support the sponsor's assertion that he has been financially supporting the appellant in

the way that he has described since the appellant's mother passed away in 2008.

f) Only two entry/exit stamps in 2015 and 2016 were seen and there was no evidence to support the claim that the sponsor travels to Ghana in order to visit the appellant. The Judge was not satisfied the evidence relied upon was sufficient to demonstrate the extent of emotional and psychological support and dependency claimed by the appellant and sponsor [13].
g) Whilst the appellant and sponsor refer to regular financial support paid by the sponsor to the appellant, and while some copies of money transfer receipts as evidence of transfer of funds have been seen, neither the appellant's digital bundle or the sponsor's digital bundle contain copies of money transfer receipts or independent witness statements to support the statement that the appellant was financially supported by the EEA sponsor, from the time of his mother's death [14].
h) It was not found that the appellant had satisfied the burden of proof in showing prior dependency upon the EEA sponsor [14].
i) The Judge does not find there is any reason why the appellant who is over eighteen and is employed should continue to be financially dependent on the EEA sponsor and chooses to live in accommodation provided by the EEA sponsor out of choice rather than necessity [14].
j) The Judge does not accept the evidence supports the statement by the sponsor and appellant of current or previous dependence upon him as his extended family member and did not demonstrate present or prior dependency on the EEA sponsor [14].

6. The appellant sought permission to appeal on grounds that could be better pleaded, but which raise, inter-alia, the following criticisms of the decision:

a) The failure of the Judge to properly consider the evidence filed in support of the appeal in relation to both the Judges reference to digital bundles and a failure to consider the evidence relied upon by the appellant sent to the First-tier Tribunal in paper bundles.
b) Criticism of the Judge's handling of the money transfer receipts, claiming the Judge did not require any further independent witness evidence to support the appellant's statements regarding payment of the same.
c) In considering prior dependency of the appellant on the EEA sponsor as the appellant was not in the UK but outside the UK and had applied for an EEA family permit which did not require him to show prior dependency.
d) The Judge erred in finding there was no reason why the appellant, who was over eighteen and employed, and should continue to be financially dependent.
e) The finding the appellant relied upon the EEA sponsor's assistance out of choice but not necessity was not based on evidence as the

appellant had provided an income and expenditure schedule which the Judge had not properly assessed, showing the appellant needed the support of EEA sponsor in order to meet his essential everyday living needs.

f) The Judge's findings are contradictory. At [13] the Judge finds the appellant's bundle contains money transfer receipts for 2015 – 2020 whilst also claiming there were no money transfer receipts to support the sponsor's assertion he had been financially supporting the appellant in the way that he had described.

g) The respondent's guidance on EEA (EFM) only required an applicant to provide money transfer receipts which had been provided.

h) Disagreement with the Judge's finding that there was insufficient evidence to support the statement that the appellant had been financially dependent.

7. Permission to appeal was granted by another judge of the First-tier Tribunal on the basis that "*In an otherwise careful and concise decision it is nonetheless arguable that the judge materially erred as the decision refers to digital bundles whereas the grounds maintained that the appellant's evidence was submitted in paper bundles. The decision therefore leaves open the prospect that there was evidence that was not seen by the judge and so was not considered".*

8. The Secretary of State has filed a Rule 24 response dated 7 December 2021 in which it is accepted that if the appellant filed evidence which was not taken into account by the Judge then the respondent would accept there was procedural unfairness, but notes that at the date of the drafting of that document whether this had occurred was "far from clear". The letter continues:

> 7. The FtTJ may not be using the term 'digital' as a term of art, but rather the method by which the evidence has been delivered to him. It is noteworthy the FtTJ uses the term 'digital bundles' at [11] and 'digital file' at [12] interchangeably.
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> 8. It will be submitted at the crux of this appeal is whether the Appellant has discharged *their* burden of proof.
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> 9. Clearly the FtTJ is of the view that notwithstanding the documents relied upon, they were insufficient so as to underpin finding(s) past and present dependency and/or membership of a household for the purposes of Regulation 8(2) of the I (EEA) Regulations 2016.
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> 10. In the absence of the Appellant's evidence it is not possible to draw a conclusion but the FtTJ appears to consider much of the evidence that the Appellant relies upon in their grounds of appeal, such as the money remittance slips and witness statements. Notably, the Appellant takes no issue with FtTJ's handling of other documents before him such as the Birth Certificates which formed the basis for the favourable findings.
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> 11. Accordingly, you will be invited to consider whether the grounds of appeal are in fact telling you what the FtTJ should have made of that evidence, not why he materially erred in law in respect of his handling of that evidence to that extent are mere disagreement with findings open to the Judge on the evidence.

12. In summary, the respondent will submit inter-alia that the judge of the First-tier Tribunal directed himself appropriately.

9. The appeal was listed for an oral Error of Law hearing before the above panel at the Birmingham CJC and appropriate notices sent to the parties. The appellant's representative contacted the Upper Tribunal indicating they had been instructed not to attend the hearing, that the UK based sponsor was not intending to appear either, and asking for the matter to be dealt with on the papers. In light of the assigned Senior Home Office Presenting Officer confirming on the day he had no objection to the Upper Tribunal proceeding in this way we have considered the merits of the challenge on the basis of the documentation available to us.

Error of law

10. We remind ourselves of the important guidance handed down by the Court of Appeal that an appellate court must not interfere in a decision of a judge below without good reason. The power of the Upper Tribunal to set aside a decision of the First-tier Tribunal and to proceed to remake the decision only arises in law if it is found that the tribunal below has made a genuine error of law that is material to the decision under challenge.

11. In this appeal the decision is the decision to dismiss the appellant's appeal against the refusal of the ECO to grant him a family permit.

12. Permission to appeal was granted on the basis it was said to be arguable when reading the grounds of challenge that a procedural unfairness had occurred in that the appellant provided bundles of evidence in the traditional paper format whereas the Judge was referring to digital evidence.

13. The Judge was asked to consider the merits of the appeal on the papers and did not have the benefit of oral evidence or submissions being made available. It is also clear from considering the physical file that this appeal was determined and case managed in the manner in which the majority, if not all of the appeals of the First-tier Tribunal are now dealt with, which is virtually.

14. There is a memorandum on the file produced following the grant of permission to appeal to the Upper Tribunal stating "This Granted Decision has a Virtual File Only. The Virtual File is located at Castle Park Virtual Hearing Hold".

15. The Judge would have been allocated this case and sent the material that was available digitally. That is the reason for the reference by the Judge to the evidence being considered by the use of the terminology noted in the decision under challenge.

16. It does not mean that the Judge did not consider the evidence the appellant provided. Documents submitted in paper form are scanned on receipt and loaded onto the virtual file which then become accessible to the allocated judge, or any legal officer involved in the case. Visits to a First-tier Tribunal Hearing Centre since the current system was

introduced will show judges sitting in court with their laptops rather than with paper files or bundles of evidence as previously occurred.

17. The fact such evidence did exist and was scanned and available to the Judge is confirmed by the steps taken following the grant of permission to appeal. As a result of decisions made elsewhere the case management systems employed by the First-tier Tribunal and by the Upper Tribunal are not the same. They are in fact incompatible. This means that in cases such as this, which would have been case managed within the Upper Tribunal prior to the software solution to this issue which has recently been implemented, it was necessary to print off the content of the digital file comprised of the scanned paper documents sent to the First-tier Tribunal. We have therefore been able to see a paper version of the documents that were before the Judge. That includes three bundles, the first being the respondents bundle of 60 pages, the second bundle sent undercover of a letter from Currington & Co, Legal Services who are the appellant's representatives, dated 12 September 2020 of some 282 pages, and the third bundle, sent by the representatives under cover of a letter of 4 September 2020 of what appears to be 340 pages.

18. We find the terminology used by the Judge by reference to the electronic/virtual nature of the evidence discloses no error of law. In fact the terminology used supports the position of the respondent that it shows the Judge did consider the evidence provided in the format one would have expected it to have been received in light of current First-tier practice.

19. In relation to the question of whether having received that evidence the Judge considered it with the required degree of anxious scrutiny, it is clear that the Judge made a positive finding in the appellant's favour in relation to the birth certificates which is not challenged in the grounds.

20. The test in an appeal of this nature is not whether remittances were sent by the EEA sponsor to the appellant in Ghana. The Judge noted that money transfer receipts have been provided and does not claim otherwise. The Judge makes a specific finding that the evidence did not support the contention of the appellant that such support had been provided to him since the death of his mother.

21. The Judge accepts there are money transfer receipts between 2015 - 2020 but it must be remembered that with families where members have moved overseas the tradition of sending remittances back to those in their home area is a long-established practice. The Judge was clearly aware that the appellant was required to prove that the payments that were sent by the sponsor where necessary to enable the appellant to meet his essential needs.

22. We do not accept it is made out that the Judge did not consider the evidence with the required degree of anxious scrutiny. The Judge was not required to set out reference to each and every piece of the evidence which, as the summary of the content of the paper bundles we have received shows, would have resulted in an unnecessarily lengthy determination.

23. The Judge was entitled to consider the question of dependency in all forms especially as the ECO had refused the application on the basis of relationship without considering dependency, making the Judge the primary decision-maker on this issue. The Judge was right to consider whether it had been established on the evidence that the appellant had proved past dependency. The conclusion it had not been proved has not been shown to be a finding outside the range of those available to the Judge on the evidence. The challenge in the grounds that the appellant was not required to establish past dependency has no arguable merit as there is a requirement for continuous dependency – see Chowdhury (Extended family members: dependency) [2020] UKUT 188 (IAC) which was upheld by the Court of Appeal in Chowdhury v Secretary of State for the Home Department [2021] EWCA Civ 1220.

24. Whilst the grounds referred to the guidance provided to ECO's as to the type of evidence that would be expected to be provided to establish their entitlement to a family permit, that is no more than guidance. The question before the Judge was not whether the appellant had provided material that satisfied the guidance but whether the material that had been provided was sufficient to show the appellant had satisfied the required legal test. The Judge finds it did not.

25. We agree with the appellant that the Judge has fallen into legal error in part, although we do not find such error material. We refer specifically to a section of [14] of the decision under challenge. Midway through that sentence the Judge writes "*I do not find the Appellant has satisfied the burden of proof in showing he prior dependency on the EEA Sponsor".* The actual finding is of a failure to show past or current dependency. That finding is in accordance with the evidence and legally sustainable. In the following sentence, however, the Judge writes *"Even, if the Appellant does receive funds from the EEA Sponsor and chooses to continue to live in accommodation provided by the EEA Sponsor, this does not mean that he is financially dependent on the EEA Sponsor out of necessity but rather out of choice".* It is settled law that the motive for a person being dependent is not material. The Judges primary finding is, however, that the appellant had not established that the funds provided were necessary to meet his essential needs, not that this had been established but that the appeal failed over motive. That is an important distinction.

26. The appellant argues that he proved evidence of dependency by production of an income and outgoings schedule. We have considered this document which is at page 152 of the bundle provided undercover of the letter of 4 December 2020 in which the appellant claims to receive money from the EEA sponsor of 3800 Ghanian Cedi (GHC) per month to which he adds his income from his employment of 1658.50 GHC totalling 5458.50 per month. There is a list of expenditure showing food payments of 1600, rent 800, clothing 500, transport 900, electricity 400, medical 350, TV licence 200, water 300, and 'others' 400, totalling 5450GHC per month. The difficulty faced by the Judges if one looks through the documentary evidence provided is that there is insufficient evidence to corroborate the claimed expenditure or to

establish what has been claimed as being regularly spent is as frequent as claimed, or that it relates to essential items. The appellant is, effectively, arguing that the Judge should have taken this evidence at face value without seeking any further corroboration or questioning whether what was being claimed had been established. It has not been made out that the Judge erred in law in considering the evidence as a whole, considering what weight could be given to that evidence, and then assessing whether on the basis of the weight that could be given, the requisite burden had been discharged.

27. On the question of whether the Judge considered the material provided it is clear at the start of [12] that the Judge specifically refers to figures that appear within the income and expenditure schedule. It also appears that the appellant claimed that he lives in rent-free accommodation provided by the EEA sponsor, yet the income and outgoing schedule includes a provision for payment of rent by the appellant.

28. We do not find it made out that the Judge has been shown to have erred in law as a result of procedural unfairness or for any other reason relied upon by the appellant. Whilst the appellant disagrees with the weight the Judge gave to certain aspects of the evidence and desires a more favourable outcome to enable him to come to the United Kingdom, that does not establish arguable legal error material to the decision.

29. As noted above, one aspect of the determination is infected by legal error, but we do not consider, having considered the decision as a whole, that the appellant has established the overall decision to dismiss the appeal is outside the range of findings reasonably open to the Judge of the evidence.

30. As no material legal error has been established we dismiss the appeal.

Decision

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

Anonymity.

32. The First-tier Tribunal made no order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

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

Signed…….
Upper Tribunal Judge Hanson

Dated 31 March 2022