Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/01326/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 1 August 2014	**On 18 September 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

MR RAVINDER PAL SINGH

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Appearances:

For the Appellant: Ms N Foster, Counsel
For the Respondent: Mr S Whitewell, a Home Office Presenting Officer

DETERMINATION AND REASONS FOR FINDING AN ERROR OF LAW

Introduction

1. The appellant appeals to the Upper Tribunal with permission from Mr Mark Davies, a judge of the First-tier Tribunal, granted on 4 June 2014. Judge of First-tier Tribunal Wyman decided on 6 May 2014 to allow his appeal on the grounds that the appellant met the requirements for the issue of a residence card under the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations").

2. This is the respondent's appeal but I will refer to the parties by their designations before the First-tier Tribunal as "appellant" and "respondent" even though their roles are reversed before this Tribunal.

Background

3. The appellant entered the UK on 23 January 2010 as a Tier 4 (General) Student with a visa valid between 26 December 2009 and 1 February 2011. On 19 January 2011 he sought further leave to remain ("FLTR") on the grounds that he wished to remain as a Tier 4 General Student. This was granted for the period 18 February 2011 until 30 August 2012. On 9 August 2013 the appellant sought a residence card as the extended family member of an EEA national, namely Rajinder Singh Thind, a German national born on 20 March 1968. The appellant claims that Mr Thind is his uncle.

4. The appellant, who is an Indian national born on 1 May 1986, was unsuccessful in his application and subsequently appealed the refusal which is dated 20 December 2013. His appeal notice dated 2 January 2014. Unfortunately, my copy of the grounds of appeal is blank but according to paragraph 11 of the determination of the First-tier Tribunal, the appellant claimed that he was dependent on his uncle, who had been working for Nijar Dairies Limited since 2003 and was present and settled within the UK.

Proceedings before the Upper Tribunal

5. Following the hearing on 23 April 2014 the determination was promulgated on 8 May 2014. The respondent gave notice of appeal to the Upper Tribunal on 14 May 2014. In her grounds she points out that there were no money transfer slips, no letters from any university stating that the sponsor paid the appellant's fees or even a letter from the sponsor's mother. There was no prior dependency by the appellant on his sponsor whilst in India. There appeared to be no adequate receipts for medical fees. The evidential basis on which the First-tier Tribunal had found there to be dependency in India on the appellant's uncle was lacking and there was no credible explanation to explain the gap in the documentation. For these reasons the respondent was not satisfied that the appellant met the requirements of the 2006 Regulations and sought leave to appeal to the Upper Tribunal.

6. Judge of the First-tier Tribunal Davies gave permission because the determination which had been promulgated showed inconsistent findings by the judge indicating that she had not given the matter her most anxious scrutiny. The grounds disclosed arguable errors of law which required consideration at a hearing before the Upper Tribunal.

7. Standard directions were sent out indicating that the Upper Tribunal would not consider evidence which was not before the First-tier Tribunal unless it had specifically decided to admit such evidence.

The Hearing

8. At the hearing I heard submissions by both representatives which I kept a note of on the Record of Proceedings which is attached to the Tribunal file. The issue that emerged from the submissions was: whether the appellant had established his dependency on his uncle whilst living in India? Mr Whitwell began by explaining that if the Immigration Judge wanted to accept oral evidence in the absence of documentary evidence clear reasons should have been given for doing so. The Immigration Judge had observed at paragraph 51 of her determination that it would have been "extremely helpful" to have received proper documentary evidence such as transfer slips and other documents. However, this had not been received. All the appellant's medical and university fees had apparently been paid from 2004-2007 but no documents had been supplied to confirm those facts.

9. Ms Foster pointed out however that the dearth of documentary evidence, although undisputed, did not undermine the appellant's essential case. The appellant had been supported by his uncle in India in the form of medical treatment and assistance with his education. The appellant and his sponsor, Mr Thind gave evidence. There was also medical evidence about the appellant's condition which tended to corroborate his account. The Immigration Judge had not said that documents were essential for the appellant's case to succeed, merely that it would have been helpful to see such documents. It was also pointed out that the key issue raised by the refusal letter related to the continuance of the dependency not whether the dependency had existed in the first place. The purpose of producing a bundle of documents may have included showing dependency as at the date of the hearing. In any event, by the date of the hearing prior dependency of the appellant on the sponsor was in issue. The Immigration Judge had found that up to 2006 the appellant's expenditure had been met by his uncle. The appellant's serious medical condition had to be paid for by someone and it seems to have been paid for by his uncle. The appellant was in essential need but it did not matter that he had derived financial support from other sources as well.

10. The respondent stated that the Immigration Judge had not indicated that the absence of documentation represented no bar to her making a reasoned decision. On the contrary, paragraph 51 of her determination appeared to indicate that those documents were potentially important.

11. At the end of the hearing I reserved my decision as to whether or not there was a material error of law.

Discussion

12. The appellant claims that he established a dependency on his uncle whilst in India which continued in the UK. Accordingly, he relies on paragraph 8(2) (c) of the 2006 Regulations as quoted in paragraph 14 of the determination. I am informed that the version quoted in the determination changed on 2 June 2011 but not in a material way. In any event, the appellant has the burden of showing that he has joined an EEA national in the UK and "continues to be dependent upon him ..."

13. The principal criticism of the Immigration Judge is not that she got the law wrong but that she was insufficiently critical in her analysis of the evidence in reaching the conclusion that the appellant satisfied the requirements of Regulation 8. The point is also taken that the Immigration Judge failed to give adequate reasons for her decision against the respondent.

14. At this point I observe that the Immigration Judge pointed out at paragraph 48 in her determination that the respondent, presumably at the hearing, acknowledged that there was a dependency between the appellant and his EEA uncle in the UK. This is at first sight surprising given that the refusal letter dated 20 December 2013 expressly states to the contrary. Nevertheless, assuming this concession was made, the burden remained on the appellant to prove that he was dependent on the sponsor whilst he lived in India.

15. According to the case of **Barundi [2009] EWCA Civ 40** the Court of Appeal pointed out that the absence of supporting evidence in this type of claim may be important when weighing up whether a dependency had in fact been established.

16. I bear in mind when considering the issue of dependency that the test for dependency under the 2006 Regulations is less onerous than would be the case were the application determined under the Immigration Rules, where an applicant must show that he is "wholly or mainly dependent" on the sponsor.

Conclusions

17. Even after taking into account the less onerous test for "dependency" under the 2006 Regulations as contrasted with the Immigration Rules, there appears to be an inadequate weighing up of the evidence in this case by the Immigration Judge before she reached her conclusion that the respondent's decision to refuse to issue a residence card was contrary to the 2006 Regulations. It appears that there was a complete lack of documentary evidence supporting any dependency between the sponsor and the appellant whilst the latter lived in India. The Immigration Judge found that the appellant had been dependent on his father for a number of items up to the date of his death in 2009. I note that the appellant came to the UK in 2010, although he did not make the present application until 2013. It seems from paragraph 51 of the determination that no documentary evidence was provided to support any expenditure, including that on university fees and medical treatment

(the items referred to at paragraph 53 of the determination). It would have been possible for the Immigration Judge to fill in the gaps left by the absence of documentary evidence on the basis of the oral evidence. It is a powerful point in the appellant's favour that there were two oral witnesses, the appellant and the sponsor. However, there does not appear to have been any adequate analysis of the oral evidence and I doubt that the oral evidence was sufficient to fill in these gaps. The absence of detail is quite striking.

18. It seems in the end that the Immigration Judge decided the case adversely to the respondent based on assertions rather than clearly analysing the evidence. Had she done the latter she would have found that there was an absence of any documentary evidence to support a dependency whilst the appellant lived in India. The position may have been otherwise whilst the appellant was living in the UK, although it seems that the documentary evidence supplied in relation to that period of residence was also unsatisfactory. The Immigration Judge did find that the sponsor had travelled to India every year and had given £200 to £300 to his Indian relations. That is a fact-finding which stands. However, this is insufficient by itself to support the conclusion that the appellant was dependent on the sponsor whilst he lived in India, particularly in view of the finding that the appellant's father paid for many of the day-to-day items of the family whilst he was alive.

19. For these reasons, I find that the decision of the First-tier Tribunal does contain a material error of law.

My Decision

20. The decision of the First-tier Tribunal contains a material error of law so that it has to be set aside. I substitute the decision of this Tribunal which is that the appeal against the respondent's adverse decision is dismissed.

Signed Date

Deputy Upper Tribunal Judge Hanbury