



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Numbers: IA/32975/2013  
IA/33018/2013  
IA/33034/2013

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 13 February 2014**

**Determination Promulgated  
On 16 May 2014**

**Before**

**UPPER TRIBUNAL JUDGE CONWAY**

**Between**

**OLEKSANDRA SVINTSITSKA  
VICTOR KHIBOVSKYY  
PAVLO KHIBOVSKYY  
(NO ANONYMITY DIRECTIONS MADE)**

**Appellants**

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Respondent**

**Representation:**

For the Appellants: Mr Kosarenko  
For the Respondent: Mr Melvin

## DETERMINATION AND REASONS

1. The Appellants are citizens of Ukraine born in 1967, 1966 and 2008 respectively. They are wife, husband and son.
2. The history appears to be that the second Appellant Mr Khibovskyy claimed to have entered the UK illegally in 2003, that his partner, the first Appellant, did so in 2004, also illegally. Their son, the third Appellant, was born in the UK. In June 2001 they made an application for leave to remain on human rights grounds. The basis of the application was their son's medical condition. The application was refused in September 2012 with no right of appeal.
3. The current application made on 11 January 2013 was for a residence card on the basis of family links to Mr Genadijs Sklars, a Latvian national claiming to be exercising treaty rights in the UK. The link is that Mr Sklars' wife, Iuliia, is Mrs Svintsitska's daughter. The Appellants are thus the EEA Sponsor's mother-in-law, her partner and their child. The Sponsor married Iuliia Svintsitska in 2011 with Iuliia being granted a residence permit valid until February 2017.
4. On 19 July 2013 a decision was taken to refuse the applications for residence cards under the Immigration (European Economic Area) Regulations 2006 on the basis that the Sponsor had failed to provide sufficient evidence that he was exercising treaty rights in the UK. In particular, that he was making national insurance contributions; paying the correct tax; HMRC documents were copies; there were no recent invoices or audited accounts, business bank statements or advertisements.
5. They appealed asking that the matter be dealt with 'on papers'. A bundle of documents dated 9 November 2013 was submitted.
6. In a determination promulgated on 18 December 2013 Judge of the First-tier Tribunal Parkes dismissed the appeals under the EEA Regulations and on human rights grounds. He appeared to find Mrs Svintsitska be a family member of the Sponsor and the other Appellants to be extended family members (OFM). Going on to consider the financial evidence he noted two Barclays statements but concluded that entries did not tally with the Sponsor's earnings. He also considered evidence from an accountant, noting a letter which stated Mr Sklars' monthly gross income to be £2,381. A P60 for the tax year to April 2013 showed pay of only £7,020.
7. The judge accepted that there was some evidence of payments from the Sponsor to the Appellants but it was *'difficult to see where this money comes from given the low level of his taxable income, and it would have to be out of taxable income that the Appellants were being supported'* [11].
8. The judge then went on to say that the c £7,000 the Sponsor earned had to support four adults and two children:- *'Economically active the Sponsor may be but his finances are clearly inadequate to support the numbers claimed'* [12]. He concluded that the Appellants were not dependent. Having noted there was no application under the

Immigration Rules, either Appendix FM or paragraph 276 ADE, he dismissed the appeals under the EEA Regulations and having considered human rights, under Articles 3 and 8.

9. They sought permission to appeal which was granted on 6 January 2014. The grounds, reiterated at the error of law hearing by Mr Kosarenko, were in essence, first, the decision to refuse was predicated only on the assertion that the Appellants had not provided adequate evidence that their EEA national Sponsor was exercising treaty rights. The issue of dependency was not raised in the refusal letter. As a matter of fairness this should have been put to the Appellants by the judge, at least by their being invited to make written submissions.
10. Second, while the judge correctly noted that the EEA national Sponsor's basic annual salary was fairly low (£7,000) he failed to give consideration to evidence from the accountant that with other income from dividends it was nearer £30,000. Such was relevant to the issue of dependency.
11. Mr Melvin's submission was that the judge was entitled on the evidence before him to conclude that if the EEA national Sponsor was a qualified person there was insufficient evidence to show dependency on him, in particular, there was little evidence of money transfers.
12. Mr Melvin noted that the Respondent did not raise dependency as an issue. The decision was that the EEA national Sponsor was not economically active and thus not a qualified person. If that was correct any issue of dependency was irrelevant, so it was not strictly necessary for the Respondent to consider that as a separate matter.
13. In considering this matter, as indicated, the Appellants opted for their appeals to be determined without an oral hearing which they were perfectly entitled to do. I do not see that there was any obligation on the judge to invite written submissions on the issue of dependency, such being an issue which the Appellants must have been aware (particularly as they have been represented throughout) required to be considered by the judge were he to find, as he was urged to find, that the EEA national was a qualified person, and notwithstanding this point not having been raised in the decision to refuse.
14. The judge in my view did, however, err on another matter. He took the view that the Sponsor's evidence of income was too low such that the Appellants could not be shown to be dependent on him. He failed however to have regard to evidence which was before him that through sources in addition to his basic salary his income was substantially greater. Such had relevance in considering dependency. Also dependency is not just a matter of financial support. It is a holistic assessment to include social and emotional support. Although the judge claimed to have had regard to **Reyes (EEA Regulations: dependency) [2013] UKUT 314** he made reference only to financial dependency and gave no consideration to other forms of dependency which might have been applicable.
15. I considered that in failing to have regard to material evidence the judge erred.

16. I set aside the determination in respect of the EEA Regulations decisions and proceeded to remake them.
17. There was no oral evidence. In submissions Mr Melvin maintained the refusal. The evidence that the EEA national is a qualified person was unsatisfactory. Even if he is, there was a lack of evidence to show his support for the Appellants and over what time scale. He queried whether the limited evidence of money transfers had been purely for the application. He noted that the Appellants had apparently been in the UK illegally. Their history to the birth of their child in 2008 and from then until the application was unclear. Dependency was not shown.
18. Mr Kosarenko's submission was that the bank statements showed credits from the EEA national Sponsor. The accountant's letter showed that the EEA national has a substantial income. There was no assertion that the letter was false. The bank statement of Mr Khibovskyy did not show any other cash entering his account. The dependency was not just financial. The third Appellant child who is seriously disabled is reliant on the emotional support not only of his parents but of the EEA national Sponsor.
19. In considering this matter the only issue is whether the Appellants can succeed under the EEA Regulations. No challenge was made to the First-tier Judge's decision to dismiss the appeals under Articles 3 and 8 of ECHR.
20. With regard to the Regulations, it seems to me that the relevant paragraphs are 7 and 8. Regulation 7 covers family members:

*'7.(1) ... the following persons shall be treated as the family members of another person -*

*(c) dependent direct relatives in his ascending line or that of his spouse ...'*
21. It was not in dispute that the first Appellant Mrs Svintsitska, being the mother of the EEA national's spouse was potentially a family member under that regulation being a direct relative in the ascending line of the EEA national's spouse.
22. The case put before me by Mr Kosarenko was that Mrs Svintsitska's husband and child, the first and third Appellants, could not be considered as family members under Regulation 7 but as OFMs under regulation 8. I note that the First-tier Judge found them to be OFMs under regulation 8.
23. I agree that Mr Viktor Khibovsky, the second Appellant, who is described in the statements as Mrs Svintsitska's 'partner,' is not a direct relative in the ascending line of the spouse of the EEA national and thus cannot come within regulation 7. Nor was it suggested can their child.

24. Regulation 8 - (1) states:

*'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 the conditions in paragraph (2), [(3), (4) or (5)].*

(2) *A person satisfies the condition in this paragraph if the person is a relative of an EEA national, his spouse ... and -*

(a) *the person is residing in a country other than the United Kingdom in which the EEA national also resides and is dependent upon the EEA national or is a member of his household;*

...

(c) *the person satisfied the condition in paragraph (a), has joined the EEA national in the United Kingdom and continues to be dependent upon him or to be a member of his household.'*

25. There being no evidence of any dependency or membership of the EEA national's household in a country other than the UK (*per* 8 (2)(a)) it seemed to me that the second and third Appellants ( Mr Khibovskyy and the child, Pavlo) could not be OFMs and their cases could not succeed under the Regulations. Mr Kosarenko agreed.

26. Thus the relevant Appellant is Mrs Svintsitska, the first Appellant, under Regulation 7. It is clear that she is the mother of the spouse of an EEA national. The EEA national Mr Sklars needs, first, to establish that he is a qualified person (*per* regulation 6). I find that he. There is a copy of a P60 tax form for year to 5 April 2013. It states his employer's name to be PDS Service Ltd and his gross salary to be £7,020. I can see no reason why I cannot rely on the contents of that document. There are also copies of pay slips indicating monthly payments of £585 which indeed equates to an annual salary of £7,020.

27. I note a letter from Efficient Tax Accountants (8 November 2013) which states that Mr Sklars is the sole director and shareholder of PDS Service Ltd. On top of his basic salary he is eligible for dividends. His monthly gross earnings amount to an average of £2,381 for the previous twelve months. A schedule (1 November 2012 - 31 October 2013) shows gross dividends of £21,466 in addition to his salary of £7,109. The problem I find with the evidence of a much larger income than is stated in his P60 is that it is not reflected in any income tax documentation.

28. I noted an online income tax return (2012-13) with financial details which included total income received of £28,551 which after personal allowance showed total income on which tax was due of £20,446. The problem is that the tax return is headed 'In progress - your tax return is 90% complete'. It is in within judicial knowledge that on completion and submission of an online tax return confirmation of receipt is quickly

given by HMRC by way of a multi digit reference number. Written documentation including tax code and any liability follows from HMRC. There is simply no documentation whatsoever from HMRC confirming that the tax return was submitted with the consequent income tax liabilities due to Mr Sklars. He was in attendance at the hearing. He returned after the hearing and sought to lodge a handwritten note of a multi digit number stating that it was the confirmation reference number of the submitted tax return. The hearing having finished I declined to accept it. In any event it does not alter the position in respect of a lack of any documentation from HMRC.

29. I find, accordingly, that I cannot place reliance on the contents of the letter from the accountants. I am not satisfied, on the balance of probabilities, that Mr Sklars has income of more than £7,020 a year gross.
30. The next issue having found that the EEA national is a qualified person is dependency. It is the dependency of Mrs Svintsitska the first Appellant as a family member on the EEA national Sponsor. This is a question of fact. In **María Pedro v SSWP [2009] EWCA Civ 1358** which was lodged on behalf of the Appellants the Court of Appeal confirmed that dependency could be a choice and did not have to be of necessity. Such was also confirmed in **Lim (EEA - dependency) [2013] UKUT 437. Reyes** (above) stated (at [19]), that *'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'*.
31. In this case the issue is dependency of Mrs Svintsitska on the EEA national Mr Sklars. I have found the evidence of Mr Sklars' finances to be very limited, around £7,000 which is to support his wife and child as well as it is claimed, the Appellants. There is no evidence of payments to them prior to February 2013 despite their having apparently been in the UK since 2003/2004. Such does not support the claim of financial dependency. I agree with Mr Melvin that the timing suggests that they were made for the purpose of the application. There is a Barclays account of the second Appellant Mr Khibovskyy showing a credit from Mr Sklars of £600 (1 February 2013), £400 (5 February 2013) and £400 (6 February 2013). A further statement shows two payments, one for £150 (26 April 2013) and £850 (1 May 2013). In addition for the resumed hearing there are payments to Mr Khibovskyy's account from PDS Services on 27 December 2013 (£375) and on 6 January 2014 (£375). I cannot see how with his very limited income and his family responsibilities Mr Sklars can afford to meet such payments. I do not find that the payments genuinely reflect support for Mrs Svintsitska and the other Appellants. They do not satisfy me that they are financially dependent on him. Nor is there any evidence that she, an adult in apparently good health is dependent on Mr Sklars physically, socially, emotionally or on any other basis.
32. It was claimed that the third Appellant, the child Pavlo, who is disabled, is emotionally dependent on the EEA national Sponsor. The problem is that the child,

as Mr Kosarenko accepted, does not come within the Regulations (regulation 7 or 8). So any dependency on his part is not relevant. The same applies to Mr Khibovskyy.

33. There is simply no adequate evidence of dependency on the EEA national Sponsor by the first Appellant. Her appeal fails under the EEA Regulations. The appeals of the second and third Appellants also fail under the Regulations for the reasons given. As indicated no challenge was taken to the first-tier Tribunal decision dismissing the appeals under ECHR.

### **Decision**

The decision of the First-tier Tribunal contained a material error of law. Its decision is set aside and remade as follows:

The appeals are dismissed under the EEA Regulations.

The appeals are dismissed on human rights grounds (ECHR)

No anonymity directions are made.

Signed

Date

Upper Tribunal Judge Conway