



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

Appeal Number: IA/42733/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 7 December 2015**

**Decision and Reasons  
Promulgated  
On 13 January 2016**

**Before**

**DEPUTY JUDGE OF THE UPPER TRIBUNAL ARCHER**

**Between**

**MR JOY DUSHAINTHAN XAVIER**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Ms Jamila Hassan, Counsel, instructed by Jacobs and Co.  
For the Respondent: Ms N Willcocks-Briscoe, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. This appeal is not subject to an anonymity order by the First-tier Tribunal pursuant to rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. Neither party has invited me to make an anonymity order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) and I have not done so.
2. The appellant appeals against the decision of the First-tier Tribunal (Judge Barker) dismissing the appellant's appeal against a decision taken on 6

October 2014 to refuse the appellant's application for an EEA residence card.

### **Introduction**

3. The appellant is a citizen of Sri Lanka born in 1987. The EEA sponsor is his aunt who is a citizen of Sweden (since 1990) exercising treaty rights in the UK. The appellant entered the UK in 2009 as a student and plans to become a chartered accountant, having graduated from Anglia Ruskin University.
4. The Secretary of State accepted the respondent's identity and nationality but concluded that he had not provided any evidence of dependency upon the EEA sponsor prior to his arrival in the UK. There were numerous bank transfer receipts and cheques but no evidence that the appellant had received the funds and the majority of the receipts were remitted by MTC who was not the EEA sponsor, thus not evidencing that the appellant was dependent upon the EEA sponsor. The appellant entered the UK as a student rather than a dependent of an EEA national and did not state that he was dependent on the EEA sponsor when he applied for his student visa.

### **The Appeal**

5. The appellant appealed to the First-tier Tribunal and attended an oral hearing at Hatton Cross on 7 May 2015. He was represented by Ms Jegarajah, Counsel. The First-tier Tribunal found that some money had been sent to Sri Lanka over a long period of time but money continued to be sent in similar amounts after the appellant came to the UK. Any support sent was for the family and not specifically for the appellant. The judge was not satisfied that there was continuous support for the appellant personally over the period or that the appellant and the EEA sponsor were members of the same household prior to her leaving Sri Lanka in 1990. The judge did accept that the appellant was living in the same household as the EEA sponsor as at the date of hearing. The appellant did not meet the definition of an extended family member under regulation 8 of the Immigration (European Economic Area) Regulations 2006.

### **The Appeal to the Upper Tribunal**

6. The appellant sought permission to appeal to the Upper Tribunal on the basis that the First-tier Tribunal had erred in law. The judge erred in law by requiring evidence that the money was personally received by the appellant when he was a minor until 2005. The simple fact was that the family had been supported by the EEA sponsor for many years and the appellant was part of the family.
7. Permission to appeal was granted by First-tier Tribunal Judge Landes on 17 August 2015. It was arguable that the judge did not give adequate reasons or that it was irrational to reject the application on the basis that the

money had been sent to the appellant's family rather than to the appellant personally. The judge made no findings on whether the money sent to Sri Lanka was needed in order to meet the essential needs of the family including the appellant.

8. In a rule 24 response dated 28 August 2015 the respondent submitted that the only evidence that the money was sent for the benefit of the appellant was the oral evidence of the EEA sponsor and the judge found that the parties were not living together before the EEA sponsor left Sri Lanka. The findings were not perverse or unreasoned. The grounds amounted to no more than a disagreement with valid findings made by the judge.
9. Thus, the appeal came before me

### **Discussion**

10. Ms Hassan submitted that the judge had accepted that the appellant was part of the EEA sponsor's household in the UK and that money went to Sri Lanka. The money was used for rent and living expenses. The appellant clearly benefited from the money transfers. He did not have to be the personal recipient of the funds. There were now new documents to prove that the EEA sponsor was a member of the same household from 1984 to 1990. The judge failed to give the EEA sponsor an opportunity to explain the circumstances. The sponsor lived in the UK from 2003 and sent money through agencies and people going to Sri Lanka, thereby saving costs.
11. Ms Willcocks-Briscoe submitted that the judge referred to specific periods in paragraph 28 of the decision; the judge only accepted evidence of remittances in the 1990s and 2000. The judge did not accept the documents about the relevant period of financial dependence. The money was being sent to various individuals including the appellant's brother but not specifically for the appellant. It is not the judge's role to cross-examine witnesses and to elicit evidence. Ms Willcocks-Briscoe accepted that the judge did not use the term "essential living needs".
12. I reject any criticism of the judge on the basis that the EEA sponsor was not given adequate opportunity to present evidence or that there is any requirement for the judge to elicit evidence from witnesses where the appellant is represented by Counsel. It is also fair to say that that the decision is comprehensive in many aspects. However, I am satisfied that the judge has materially erred in law for the reasons set out below.
13. The judge accepted at paragraph 28 of the decision that money had been sent to the appellant's family but rejected the accuracy of a schedule submitted by the appellant. The judge accepted at paragraph 29 that some money had been sent to Sri Lanka over the years and that was over a long period of time. The judge then found that any support sent would appear to be for the family and not specifically for the appellant or that there was continuous support personally for the appellant. Taken as a whole, I find that the judge's findings in relation to money sent to Sri

Lanka are wholly unclear and there is no finding as to whether the money sent was for the essential needs of the appellant. As a matter of common sense, if the family were dependent upon the money sent by the EEA sponsor then so was the appellant.

14. Dependency was considered by the Upper Tribunal in Reyes (EEA Regs: dependency) [2013] UKUT 00314 (IAC). At paragraph 19; the test of dependency is a purely factual test. 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 of the factual circumstances, bearing in mind the underlying need to maintain unity of the family. There is a need for a wide-ranging fact-specific approach.
15. Applying those principles to this appeal, I find that there is an absence of clear findings of fact regarding dependency. There is no requirement for the funds to be remitted to the appellant personally. There must be a holistic examination of relevant factors, including whether the funds were sent to meet the essential needs of the family, the appellant being a minor family member. I find that the judge has failed to adequately assess dependency and has imposed an inappropriate additional hurdle; namely the requirement for the funds to be personally remitted to the appellant.
16. Thus, the First-tier Tribunal's decision to dismiss the appellant's appeal under the EEA Regulations involved the making of an error of law and its decision cannot stand.

### **Decision**

17. Both representatives invited me to order a rehearing in the First-tier Tribunal if I set aside the judge's decision. Bearing in mind paragraph 7.2 of the *Senior President's Practice Statements* I consider that an appropriate course of action. I find that the errors of law infect the decision as a whole and therefore the re-hearing will be de novo with all issues to be considered again by the First-tier Tribunal.
18. Consequently, I set aside the decision of the First-tier Tribunal. I order the appeal to be heard again in the First-Tier Tribunal to be determined de novo by a judge other than the previous First-tier judge. Any further evidence regarding membership of the household in Sri Lanka must be submitted to the First-tier Tribunal.

Signed



Date 12 January 2016

Judge Archer  
Deputy Judge of the Upper Tribunal