



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

Appeal Number: EA/09969/2016

THE IMMIGRATION ACTS

**Heard at Field House
On 11th January 2018**

**Decision & Reasons
Promulgated
On 15th January 2018**

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

**FAHRIJE BRAHA
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms B Jones of Counsel

For the Respondent: Ms H Aboni, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant appeals against the decision of First-tier Tribunal Judge Obhi promulgated on 31 August 2017, in which the Appellant's appeal against the decision to refuse her application for an EEA Residence Card as a dependent family member dated 2 August 2016 was dismissed.
2. The Appellant is a national of Kosovo, born on 2 July 1954, who first came to the United Kingdom on 11 February 2015 as a family visitor. In January 2016, she applied to the Respondent for an EEA Residence Card on the

basis that she was financially and emotionally dependent on her son, Arsim (the “Sponsor”), a Dutch national who has been residing in the United Kingdom since 2015 and with whom she lived.

3. The Respondent refused the application on 2 August 2016 for three reasons. First, the Respondent was not satisfied that the Appellant was financially dependent on the Sponsor; secondly, she was not satisfied that the Appellant was living with her Sponsor; and finally, she did not accept that the Sponsor was a qualified person under Regulation 6 of the Immigration (European Economic Area) Regulations 2006 (the “EEA Regulations”).
4. Judge Obhi dismissed the appeal in a decision promulgated on 31 August 2017 under the EEA Regulations. In the findings of fact section in the decision, Judge Obhi refers to it being easier to obtain an EEA Residence Card as the dependent of a relative exercising treaty rights in the United Kingdom than it is to apply as the elderly dependent relative of a British national under the Immigration Rules. In paragraph 20 the Judge goes on to state that on an objective view, she found the Appellant’s motivation for moving in with her younger son, the Sponsor, rather than remaining living with her elder son, a British national, was that difference between the application routes for a lawful basis to remain in the United Kingdom.
5. The Judge went on to consider the wider family circumstances, the need for care and assistance and motivation behind which of the Appellant’s sons purchased or lived in what property. The key conclusions are set out in paragraphs 23 and 24 which it is necessary to set out in full as follows:

“23. I have considered all the evidence and I find that the appellant is supported by both of her sons and not by the younger son alone. I find that she has been primarily supported by Afrim Braha who appears to have an established business in the UK, and what appears to be a successful business as he’s been able to offer employment to his brother to enable his brother to relocate to the UK as an EEA national working in the UK. Afrim lives in a small house in which his mother was also living, but he, with his brother has purchased a bigger house. It is not clear to me why the younger brother has moved into the bigger house – as the needs of the older brother would appear to be greater with his wife and three children, than the younger brother who only has one child. I find that the family are trying to present a picture in which the younger son is the one who is providing for their mother in an attempt to bypass the requirements of the Immigration Rules which are more stringent than the test under the EEA Regulations. I am not satisfied that the appellant is wholly or mainly dependent on her younger son. I accept that at the present time he provides her with a roof over her head, in-house which is jointly owned and partly subsidised by his older brother and that his wife assists by taking her mother-in-law to her hospital appointments, but in turn the appellant provides childcare for the

couple, which would otherwise have to be paid for to enable the younger son's wife to work.

24. It is impossible for me to make any findings in relation to who is the major contributory to the support given to the appellant without seeing bank statements and business accounts for both the brothers over a significantly longer period of time. Based on the information that I have, and on a balance of probabilities, I find that the appellant is not mainly or wholly dependent on the EEA national. Betty contributes to her care but is in situation is supported by his British national brother."

The appeal

6. The Appellant appeals on two grounds. First, that the First-tier Tribunal Judge failed to apply the correct test in respect of dependency, as set out in Lim v Entry Clearance Officer, Manila [2015] EWCA Civ 1383 and erred in failing to accept that this had been established despite finding that the Appellant was living with the Sponsor. It is not necessary for a person to be mainly or wholly dependent on an EEA national, the question is whether a person is being supported in their essential needs. Secondly, the Judge has, in paragraph 23 of the decision, essentially found an abuse of rights in this application, but one which was not raised by the Respondent in the reasons for refusal letter and in any event, in such circumstances, the burden of proof would fall on the Respondent to establish it, rather than on the Appellant as set out in paragraph 9 of the decision.
7. Permission to appeal was granted by Judge Simpson on 20 November 2017 on all grounds.
8. In her rule 24 response, the Respondent stated that the judge appropriately directed herself as to the issue of dependency and made findings that were open to her that the Appellant was in fact mainly dependent on her British Citizen son and not on the Sponsor. The Respondent also accepted that the abuse of rights point was raised by the Judge but that she provided cogent reasons for her findings that point.
9. At the oral hearing, Ms Jones on behalf of the Appellant referred to what she said was a clear finding of fact that the Appellant was dependent on the Sponsor due to the fact that she was accommodated by him, which stands regardless of whether she was in receipt of any contribution, directly or indirectly, from her other son. The question to be answered in accordance with Lim is whether a person's essential needs are met by an EEA national and there is no requirement for an EEA national to mainly or wholly meet such needs.
10. Further, Ms Jones expanded upon the ground of appeal in relation to abuse of rights to recast this as more of a procedural fairness point which had not been raised by the Respondent in the reasons for refusal. In any event, it was submitted that if the Appellant did choose to live with the Sponsor rather than her British Citizen son, it would not be an abuse of

rights and further for this to have been established the burden of proof was on the Respondent.

11. Ms Jones also sought permission to amend the grounds of appeal, for permission to be granted and an error of law to be found on a third ground of appeal. The ground was that even if the First-tier Tribunal was not satisfied that the Appellant met the requirements of Regulation 7 of the EEA Regulations, it should have been considered in the alternative as to whether she satisfied the conditions as an extended family member who had been dependent on the Sponsor outside of the United Kingdom and accommodated and/or financially supported by him in the United Kingdom. It was suggested that this was a Robinson obvious point in all of the circumstances and in particular because there was evidence of prior money transfers.
12. In response, Ms Aboni submitted that the Judge had appropriately directed herself and made findings which were open to her on the evidence, also that adequate reasons were given for those findings. It was stated that there had been no clear finding that there was an abuse of rights in this case and the appeal was in any event properly dismissed on the facts because there was no finding that the Appellant was mainly or wholly dependent on the Sponsor. As such there was no material error of law in the decision.
13. The application to amend the grounds of appeal was resisted on the basis that there was no such argument put before the First-tier Tribunal and it could not be an error of law not to consider it in such circumstances.

Findings and reasons

14. In the decision, Judge Obhi sets out the main provisions of the EEA Regulations, “so that the appeal can be seen in context”. This includes a reference to the definition of family members in Regulation 7 but not any reference to the requirement of dependency or what that means. The Judge does not therefore specifically direct herself as to the applicable legal framework on the specific issue of dependency, which is the only issue that she goes on to determine. The Respondent’s submission that the Judge properly directed herself can not be accepted when there was no such direction at all.
15. A person can fall within Regulation 7 of the EEA Regulations as a family member if, under (1)(c) they are a dependent direct relative in the ascending line of the EEA national, his spouse or civil partner. There is no further definition of ‘dependent’ in the Regulations themselves, the meaning of which has been explained in case law. Dependency is a factual question to be answered and has been described as whether a person is provided with ‘material support’ by an EEA national (see the European Court of Justice’s decision in Centre Publique d’Aide Social de Courcelles v Lebon [1987] ECR 2811) and whether such material support is to meet their ‘essential needs’ (see the Court of Appeal’s decision in Pedro

v Secretary of State for Work and Pensions [2009] EWCA Civ 1358). There is no need for dependence to be due to necessity, subject to there being no abuse of rights, it could be by choice that a person does not, for example, take up paid employment, sell property or use savings and the reason for dependency does not matter (see Pedro and the analysis of the Upper Tribunal in Lim).

16. The Respondent's guidance "Free Movement Rights: direct family members of European Economic Area (EEA) nationals" summarises these points in relation to essential needs and proof of dependency as follows:

Essential needs

You must consider the following:

- *does the applicant need financial support to meet their essential needs from the EEA national, their spouse or civil partner*
- *if the applicant cannot meet their essential living needs without the financial support of the EEA national, they must be considered dependent even if they also receive financial support or income somewhere else.*

You do not need to consider the reasons why the applicant needs the financial support or whether they are able to support themselves by working.

Essential needs include accommodation, utilities and food. Dependency will normally be shown by financial documents that show money being sent by the sponsor to the applicant.

If the applicant is receiving financial support from the EEA national as well as others, they must show that the support from the EEA national is supporting their essential needs.

The applicant does not need to be dependent on the relevant EEA national to meet all or most of their essential needs. For example an applicant can still be considered dependent if they receive a pension to cover half of their essential needs and money from the relevant EEA national to cover the other half.

Proof of dependency

The applicant must provide proof of their dependency. This can include:

- *bank or building society statements*
- *evidence of money transfers*
- *evidence of living in the same household if applicable*
- *other evidence to show their EEA national sponsor has enough money to support them and the applicant is reliant on them for this*

These are illustrative examples and the other documentation may be provided which satisfies this requirement.

17. There is no requirement that a person is 'mainly or wholly dependent on the EEA national' as required by Judge Obhi in paragraph 24 of the decision. The application of such a requirement was an error of law. As above, an applicant only needs to establish that he or she is receiving material support for their essential needs from the EEA national for a finding of dependency to be made.
18. Further, I find that Judge Obhi erred in law in finding that the applicant was seeking to bypass the requirements of the Immigration Rules by presenting a picture that the Sponsor was providing for her, rather than her elder son who was a British Citizen as that was the easier route by which to remain in the United Kingdom unlawfully. That essentially amounts to a finding that there is an abuse of rights without that point having been raised or relied upon by the Respondent, without any direction as to the legal test or the correct burden of proof (which is on the Respondent, not on the Appellant as it is to establish entitlement to an EEA Residence Card). Although the appeal appears to have been dismissed on the issue of dependency (albeit on the wrong legal test for the reasons set out above), the abuse of rights point runs through the findings of fact and appears to have significantly influenced the decision, which in the circumstances is an error of law. The findings of fact (paragraph 20) begin by reference to the different tests for a dependent relative under the EEA Regulations compared to the Immigration Rules and motivation for the Appellant's claimed family situation is questioned repeatedly throughout the findings despite not being relevant to the question of dependency.
19. For these reasons, the making of the decision of the First-tier Tribunal did involve the making of a material error of law and as such it is necessary to set aside the decision.
20. The findings of the First-tier Tribunal in relation to dependency are not entirely clear in the decision under appeal (and there are no findings at all on whether the EEA national is a qualified person under Regulation 6 of the EEA Regulations which was also not accepted by the Respondent). Although it is accepted that the Appellant is being accommodated by the Sponsor, the logic and motivation for that was questioned. Further, there is a finding, contrary to the Appellant's case, that the accommodation is partly subsidised by the Sponsor's brother, albeit no reasons are given as to why the Sponsor's evidence on this was rejected, other than indirectly on the basis that the Sponsor was previously employed by his brother. Further, the Judge also states that it was impossible for her to make findings as to which of the Appellant's sons provided the majority of support to her but then concludes, without further reasons, that the Appellant is not mainly or wholly dependent on an EEA national. For these reasons, this is not a suitable case in which the decision can be remade by the Upper Tribunal on the existing findings and the appeal must therefore be remitted to the First-tier Tribunal for a de novo hearing.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of a material error of law. As such it is necessary to set aside the decision.

I set aside the decision of the First-tier Tribunal and remit the appeal for a de novo hearing before the First-tier Tribunal.

No anonymity direction is made.

Signed
2018



Date 11th January

Upper Tribunal Judge Jackson