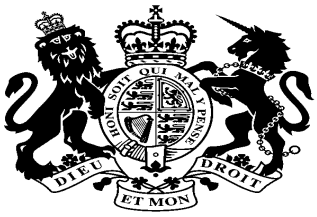

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: EA/01243/2019
& EA/01245/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 14 August 2019	**On 22 August 2019**

Before:

UPPER TRIBUNAL JUDGE GILL

Between

Dr Ejas Anvar Abdul Rahman
Dr Naslun Sithara Nazir Ahmed — Appellants
(ANONYMITY ORDER NOT MADE)

And

The Secretary of State for the Home Department — Respondent

Representation:
For the appellants: Ms K. Tobin, of Counsel, instructed by Sriharans Solicitors.
For the respondent: Mr S Kotas, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants, nationals of India born (respectively) on 18 September 1987 and 17 February 1988, appeal against the decision (promulgated on 16 May 2019) of Judge of the First-tier Tribunal C J Woolley, dismissing their appeals against the respondent's decisions of 26 February 2019 refusing their applications of 14 December 2018 for permanent residence cards as dependent relatives of Mr Abdul Rahman, a British citizen (the "sponsor"). The applications were refused by the respondent under the Immigration (European Economic Area) Regulations 2016 (the "2016 Regulations").

2. The first appellant, who is the sponsor's son, applied for a permanent residence card as a family member of the sponsor under regulations 7 and 15. The second appellant, who is the first appellant's wife, applied for a permanent residence card as an extended family member of the sponsor under regulations 8 and 15.

3. The appellants entered the United Kingdom on 21 October 2013. On 27 March 2014, they were each issued with residence cards on the basis that the sponsor had exercised his Treaty rights in the Republic of Ireland between 12 August 2012 and 19 October 2013 when he returned to the United Kingdom and it was accepted that the appellants were financially dependent on their father/father-in-law at that time.

4. As the sponsor was a British citizen, he could not be regarded as an "EEA national" under regulations 7 or 8 of the 2016 Regulations unless regulation 9 was satisfied. Regulation 9 was amended by regulation 3(5) of the Immigration (European Economic Area Nationals) (EU Exit) Regulations 2019 (the "2019 Amendment") so as to include applications by extended family members as well as family members of British citizens. The effect of the amendment taken together with the fact that the respondent had accepted that the sponsor had exercised Treaty rights in Ireland, was that he was to be regarded as an "EEA national" for the purposes of regulation 7 (in the case of the first appellant) and 8 (in the case of the second appellant) of the 2016 Regulations. These aspects of regulations 7 and 8 were therefore satisfied.

5. However, the judge said that the second appellant could not succeed in her appeal because he considered that regulation 9 did not apply to extended family members (paras 32-37). In that regard, he was referring to regulation 9 as it existed immediately before its amendment by the 2019 Amendment. It appears that he was not aware of the amendment. Although he raised this issue at the hearing (para 18), it appears that counsel for the appellants did not draw his attention to the 2019 Amendment. He plainly erred in this respect in view of the amendment of regulation 9 by the 2019 Amendment.

6. The judge's error in this regard is the subject of ground 1. His error is not material if he did not err in law in reaching his alternative finding (para 37) that the second appellant had not shown that she was dependent on the sponsor.

7. I note, at this point, that, before the judge, reliance was not placed on the second appellant being a member of the sponsor's household, nor was this relied upon in the grounds or at the hearing before me.

8. Regulations 7, 8 and 15, insofar as relevant to the issues, provide as follows:

> **7.- "Family member"**
>
> (3) A person ("B") who is an extended family member and has been issued with an EEA family permit, a registration certificate or a residence card must be treated as a family member of A, provided—
>
> (a) B continues to satisfy the conditions in regulation 8(1A), 8(2), (3), (4) or (5); and
>
> (b) the EEA family permit, registration certificate or residence card remains in force.

8.- "Extended family member"

(1) 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 a condition in paragraph (1A), (2), (3), (4) or (5).

(1A) The condition in this paragraph is that the person— …

(2) The condition in this paragraph is that the person is—

(a) a relative of an EEA national; and

(b) residing in a country other than the United Kingdom and is dependent upon the EEA national or is a member of the EEA national's household; and either—

(i) is accompanying the EEA national to the United Kingdom or wants to join the EEA national in the United Kingdom; or

(ii) has joined the EEA national in the United Kingdom and continues to be dependent upon the EEA national, or to be a member of the EEA national's household.

(3) …

(4) …

(5) …

(6) In these Regulations, *"relevant EEA national"* means, …

(7) In paragraphs (2), (3) and (4), *"relative of an EEA national"* includes a relative of the spouse or civil partner of an EEA national.

15.- Right of permanent residence

(1) The following persons acquire the right to reside in the United Kingdom permanently—

(b) a family member of an EEA national who is not an EEA national but who has resided in the United Kingdom with the EEA national in accordance with these Regulations for a continuous period of five years;

9. In order to succeed in his appeal, the first appellant had to show:

(i) that he was a "family member" within the meaning of regulation 7(1)(b). As he was over the age of 21 years, this means that he had to show that he was dependent on the sponsor; and

(ii) that he had resided in the United Kingdom with the sponsor in accordance with the 2016 Regulations for a continuous period of 5 years, as required by regulation 15(1)(b).

This means that he had to establish that he was dependent on the sponsor for a continuous of 5 years.

10. On the second appellant's case before the judge, she had to show that she was dependent on the sponsor and continued to be dependent on the sponsor (regulation 8(2)(b)). If this was established, then she was to be treated as a family member, pursuant to regulation 7(3), with the result that she too needed to establish that she

had been dependent on the sponsor for a continuous period of 5 years in order to establish, as required by regulation 15(1)(b), that she had resided in accordance with the 2016 regulations for a continuous period of five years.

11. It follows that the key issue before the judge in each of these appeals was whether the first appellant/second appellant was dependent on the sponsor for a continuous period of 5 years.

12. The judge dismissed the appellants' appeals because he found that the first appellant had not shown that he was dependent on the sponsor (paras 29 and 31), nor had the second appellant (para 37).

13. The case advanced before the judge and in the grounds was different from the case advanced by Ms Tobin before me in oral submissions. Ground 2 relied upon the Upper Tribunal's decision in Lim (EEA dependency) Malaysia [2013] UKUT 437 (IAC). In his response under rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (the "UT Rules"), Mr Kotas drew attention to the Court of Appeal's judgment in Lim v Entry Clearance Officer (ECO), Manila [2015] EWCA Civ 1383 which overturned the Upper Tribunal's decision in Lim. It is clear from the Court of Appeal's judgment in Lim that it is not enough simply to show that financial support was in fact provided by the EEA national to the family member/extended family member. It is necessary for the family member/extended family member to show that he/she needs this support from the EEA national in order to meet his or her basic needs.

14. At the hearing before me, Ms Tobin did not (and correctly so, in my view) place reliance upon any claimed financial dependency on the part of the appellants on the sponsor. It is clear from the judge's findings that they had each failed to show that they needed the sponsor's financial contributions in order to meet their basic needs.

15. The case as advanced before me was that the provision of childcare by the sponsor was *itself* sufficient. Ms Tobin submitted that, as it was clear that the judge had accepted that the sponsor provided childcare to the appellants' child, it was irrelevant whether they could afford to obtain childcare from an alternative source by paying for it.

16. In this regard, Ms Tobin asked me to take into account the fact that the judge had allowed the appeal of the first appellant's sister, Miss Nazeela Nilofer Abdul Rahman (EA/01247/2019), a national of India born on 13 June 1992. Miss Rahman was the third appellant before the judge. She is the sponsor's daughter. The sponsor had also provided childcare to her child.

17. Miss Rahman arrived in the United Kingdom on 19 October 2013. She too was issued with a residence card on 27 March 2014 on the same basis as the appellants were issued with their residence cards on 27 March 2014, i.e. that the sponsor had exercised his Treaty rights in Ireland and it was accepted that she was financially dependent on her father at that time. Miss Rahman also applied on 14 December 2018 for a permanent residence card as a family member of the sponsor. Her application was also refused on 26 February 2019 and she appealed.

18. The judge allowed Miss Rahman's appeal, finding: (i) that she had shown that she had been continuously dependent on the sponsor for a continuous period of five years; and (ii) that she had therefore shown that she had resided for a continuous period of five years, as required by regulation 15, and that she was therefore entitled to a permanent residence card under regulation 19. The respondent did not challenge the judge's decision to allow her appeal and subsequently granted her leave.

19. There is therefore no appeal before the Upper Tribunal in Miss Rahman's case. However, the fact that her appeal was allowed was relied upon by Ms Tobin in submissions before me.

The judge's decision

20. The judge directed himself on relevant case-law on the issue of dependency in considerable detail, referring to Jia v Migrationsverket [2007] QB 545, Reyes (EEA Regs: dependency) [2013] UKUT 00314 (IAC), the judgment of the European Court of Justice in Reyes [2014] EUECJ C-423/12, and the Upper Tribunal's decision in Lim.

21. In summary, the judge found that, whilst the sponsor's income had gone down and he was frequently overdrawn, the first appellant, who earned more than four times as much as the sponsor, and the second appellant had built up considerable assets, the second appellant having a bank balance of over £40,000 (para 28). The house they all lived in was in the names of the first and second appellants. The first and second appellants could afford to pay for the childcare that the sponsor provided to their child. The sponsor lives in the first appellant's house (para 29). The second appellant owns the house the sponsor lives in (para 37). The judge said that, whilst it might be argued that the second appellant was a member of the sponsor's household, he found that this contention could not be made because the sponsor was a member of her and her husband's household and not the other way round (para 37).

22. The judge gave his reasons at paras 27-31 (in respect of the first appellant) and para 37 (in respect of the second appellant). Since the judge's decision to allow the appeal of Miss Rahman was relied upon by Ms Tobin, it is relevant to set out paras 38-41 where he gave his reasons for allowing her appeal. At para 42, the judge set out his "Global conclusion". These paragraphs read as follows:

> "**The first appellant**
>
> 27. The first appellant is now aged 31. He is a medical doctor working for the NHS and has been doing so since August 2016. In his application form he states that he was dependent on the sponsor until this date. He now earns taxable pay of £3781, which amounts to net pay of £2669.15 a month. He and his wife (the second appellant) own the house in which all the family live. He makes the mortgage payments of around £1,550 a month. I observe that in the application it is stated that the mortgage is paid by the first appellant and the sponsor, but this is not the case. The sponsor confirmed in evidence that he does not pay the mortgage. The first appellant pays fuel and insurance for his car which comes to £310 monthly, and also electricity of £60 monthly. After payment of the mortgage, tax, insurance and bills he has around £660 a month for food and other incidental expenses.

28. The income of the first appellant exceeds that of the sponsor by a considerable margin (he earns over four times as much). The sponsor's income has in fact gone down from £13,000 a year in 2015 to around £7000 - £8000 a year. He had contributed £15,000 to the cost of the house which was a gift/loan from the sponsor's siblings. The sponsor pays the car loan of £369 for the first appellant, and the food and grocery expenses for the household. He maintained that the appellants were still dependent on him. The sponsor is frequently overdrawn on his bank account (e.g. on 8th June 2018 he was overdrawn to the extent of £973.30 which is close to his limit). In contrast the first and second appellants have built up considerable assets (the second appellant does not contribute in a major way to the household but has a bank balance of over £40,000).

29. As the ECJ confirmed in Reyes, the test is whether the applicant has established a situation of 'real' dependence. Or as the Upper Tribunal put it in **Reyes**, has the appellant shown that he is reliant on others for essential living needs. Applying the case law to the facts that have been established, I find that the first appellant has not shown that he is a dependant of the sponsor. The reality is that he is not in a situation of real dependence on the sponsor. The sponsor lives in the first appellant's house. I find that the first appellant does not need the sponsor to pay for his car loan and that he can quite well afford to pay for this himself. Similarly he could afford to pay for all the household bills and groceries himself. He has a child but he and his wife work in different hospitals and can either look after the child themselves while the other is working, and when this is not possible could afford the childcare costs themselves. The Upper Tribunal in **Reyes** stressed that the provision must not be interpreted so as to deprive the provision of its effectiveness. On a holistic assessment of all the factors the Sponsor is dependent on the first appellant, and not the other way round. The true situation cannot be disguised by the artificial contrivance of him paying the car loan and grocery bills (and going well into his overdraft to do so) when the first appellant is well able to afford to pay these and all the bills for the household. The first appellant is fully in a position to support himself, as the ECJ in **Reyes** clarified was the test.

30. The grounds of appeal invited me to also consider whether the first appellant was an extended family member of the Sponsor. Mr Dolan did not seek to advance this argument to me, and sought only to rely on the first appellant's position as a family member. I discuss the position of extended family members in this appeal below, but at this point make it clear for the reasons I find below that the first appellant could not in any event qualify as an extended family member under Regulations 7 and 9.

31. I find therefore that the first appellant has not shown that he is dependent on the British Citizen Sponsor. His appeal in respect of a Permanent Residence card must therefore fail under the Regulations.

The second appellant

37. I find therefore that the second appellant cannot succeed in her appeal, as she has not shown that she is a family member of the Sponsor. If I had decided this issue differently I would nevertheless have found that she was not dependent on the sponsor. She too is an NHS medical doctor and earning accordingly (her payslip of 14.12.18 shows total gross pay to date of £31,320). She has an accumulated bank balance of some £40,000. Her husband pays the mortgage for the house which they jointly own. She is not in any real dependency on the Sponsor. She is fully able to support herself.

She and her husband can manage the childcare themselves, or afford to pay for it when they cannot. It might be argued that she remains part of the Sponsor's household (applying Regulation 8(2)(b)(ii)) but I find that this contention cannot be made. She owns the house in which the Sponsor resides, and he is a member of her and her husband's household and not the other way round. In addition the Sponsor is not, and never has been, an EEA national. I was referred to the decision in **Dauhoo** but this is of no application to the first and second appellants as they cannot qualify under Regulation 7(3) as extended family members. My primary finding remains that she does not qualify under Regulation 7(3) and 9. Her appeal in respect of the refusal to issue a permanent residence card must therefore fail under the 2016 Regulations.

[Miss Rahman]

38. [Miss Rahman] is not employed. I accept that she has always lived with the sponsor, and that she derived rights under Regulation 9 from him when he exercised treaty rights in Ireland. The respondent has pointed to the fact that she was earning an income between 2015 and 2016: some £1500 a month from Farah Medical and then £233-289 a week from GI Group. This income has now come to an end. Dependency can be by choice (as held by the Upper Tribunal in **Lim**), and the ECJ in **Reyes** held that the prospects of a person obtaining employment do not affect the question of dependency. As **Lim** also made clear a person does not need to be wholly or even mainly dependent on a Sponsor - if a person requires material support for essential needs in part that is sufficient.

39. [Miss Rahman], I accept, relies on the sponsor for her food and groceries. The fact that she is also dependent on the first appellant for her housing does not affect this reliance. She is also dependent on her sponsor for childcare, and as she does not earn anything at present I accept that she cannot afford to pay for childcare and that she is reliant on the Sponsor for this. I find that she has established a real dependency on her sponsor. She is not fully in a position to support herself.

40. Under Regulation 15 she must show that this dependency has lasted throughout the five years so as to qualify for a permanent residence card. Mr Dolan submitted that the amounts of money she earned were never enough for her to fully support herself and that she was always dependent on the sponsor even when she was earning. I find that these submissions were well made. When she was earning the sponsor was living in rented accommodation and I accept that in that time (despite the names on the utility bills) that he was paying a larger amount towards household expenses and bills as his income was larger. His evidence is that he has always paid for food and groceries. Even when she was earning I accept that [Miss Rahman] was partially dependent on the Sponsor for her needs as her income was never enough to meet all her requirements. Hers was a situation of real dependence based on all the factual circumstances. She has never fully been in a position to support herself. I find therefore that she has shown that she has been continuously dependent on the sponsor for a continuous period of five years.

41. [Miss Rahman's] appeal therefore succeeds under Regulation 15 as she has resided in accordance with the Regulations for a continuous period of five years, and she is entitled to a permanent residence card under Regulation 19.

Global conclusion

42. Taking into account the factors I have discussed above, the first and second appellants are not entitled to a permanent residence card under Regulation 19 of the 2016 Regulations. The first appellant has not shown a real dependence on the sponsor and the second appellant is excluded from consideration as a family member. [Miss Rahman] has however shown a real dependence for a continuous period of 5 years and therefore is eligible for consideration under Regulations 15 and entitled to succeed under Regulation 19 (permanent residence card). As Mr Dolan confirmed, the issue of any entitlement under Regulation 18 (residence card) is not subject of this appeal. If it were I would nevertheless have to make a finding that neither the first or second appellant was entitled to a residence card under Regulation 18. The first appellant cannot show that he is a family member under Regulation 7 as he is not dependent on the sponsor, and the second appellant cannot show that she is either a Family member under Regulation 7, or that she is a relative of an EEA national under Regulation 8, because the Sponsor cannot in respect of her be regarded as an EEA national under Regulation 9."

The grounds

23. There were three grounds. I have already described ground 1 at paras 4-6 above. Whilst grounds 2 and 3 contend that the judge erred in reaching his finding that the appellants were not dependent on the sponsor, the principal focus of the two grounds was on the evidence as to financial dependency, although they refer also to the fact that the sponsor provides some childcare to the appellants.

24. Ms Tobin informed me that in light of the Court of Appeal's judgment in Lim, she could not argue that there was financial dependency between each of the appellants and the sponsor.

25. In view of the fact that Ms Tobin abandoned reliance upon any financial dependency, no useful purpose would be served by summarising grounds 2 and 3.

26. The appellant's sole ground, as advanced before me, was that the provision of childcare by the sponsor was *itself* sufficient to establish the required dependency. As stated above, Ms Tobin submitted that, as it was clear that the judge had accepted that the sponsor provided childcare to the appellants' son, it was irrelevant whether they could afford to obtain childcare from an alternative source by paying for it.

27. Ms Tobin submitted that the sponsor's provision of childcare fell within the scope of the Regulations. She relied upon the fact that the final sentence of para 18 of the Court of Appeal's judgment in Lim which said that the Court in Jia "*does not use the language of economic independence*".

28. Ms Tobin submitted that, although the judge had considered the sponsor's provision of childcare, he had only considered it in the context of whether there was financial dependency. In saying that the appellants could pay afford to for childcare, the judge had missed the point, i.e. whether the provision of childcare was itself sufficient. She submitted that, if the appellants were dependent on the sponsor for childcare, then

they are dependent on the sponsor irrespective of whether they could afford to pay for childcare themselves.

29. I drew Ms Tobin's attention to the penultimate sentence of para 29 where the judge said, in effect, that financial dependency had been artificially contrived. Ms Tobin submitted that there was nothing to suggest that the sponsor's provision of childcare was artificially contrived. She asked me to take into account that Miss Rahman's appeal was allowed. She was not employed. The judge found that her financial dependency was established. She too had relied upon the sponsor to provide her with childcare. The judge did not find that her reliance upon the sponsor for childcare had been artificially contrived.

30. Mr Kotas submitted that the case advanced before me was entirely different from the case advanced before the judge and that the appellants were effectively re-litigating their appeals in order to respond to the Court of Appeal's judgment in Lim. On this basis alone, he submitted that the judge had not erred in law. He took me through the witness statements of the appellants and asked me to note that nothing was said about the sponsor's provision of childcare in the appellants' witness statements.

31. in any event, Mr Kotas submitted that Ms Tobin was attempting to draw a distinction which did not exist. The Court of Appeal's judgment was a complete answer. It was clear from the judge's reasoning at para 29 that, even in relation to childcare, the appellants were not dependent upon the sponsor. The appellants are able to provide their own childcare or pay for it to be provided.

32. In response, Ms Tobin accepted that the appellants' witness statements did not mention the sponsor's provision of childcare. However, they gave oral evidence about it, although she accepted that financial dependency was pursued before the judge but it was not now pursued.

33. Ms Tobin submitted that the judge had erred in failing to consider whether the appellants were dependent upon the sponsor's provision of childcare. He failed to consider whether dependency other than economic dependency could be relied upon to meet the requirement of dependency. Ms Tobin informed me that, as far as she was aware, there was no authority on the question whether dependency that was not financial could suffice for the purposes of the 2016 Regulations and that my decision on the issue would be the first case dealing with the point.

34. I asked Ms Tobin how the judge could be said to have erred in law if there was no authority on the point and he had not been asked to consider the issue. Ms Tobin submitted that the judge erred by failing to consider the final sentence of para 18 of the Court of Appeal's judgment, albeit that she accepted that he was not referred to the Court of Appeal's judgment but to the Upper Tribunal's decision in Lim which was overturned by the Court of Appeal. Ms Tobin accepted that her submissions would mean that a lot of being asked of the judge but it was open to him to have reached the conclusion that provision of childcare by the sponsor was sufficient in itself for the required dependency to be established.

35. Although Ms Tobin said, at the commencement of the hearing, that she wished to apply to amend her grounds, I was of the view that she did not need to make an application to amend her grounds, given that the grounds do refer to childcare being

provided by the sponsor to the appellants. Although it was not argued in the grounds that the provision of childcare was in itself sufficient, I considered (on reflection, perhaps generously) that it was open to the appellants to abandon reliance upon financial dependency and rely instead on the provision of childcare alone, without amending their grounds. Mr Kotas said that he did not wish to contend that an application for permission to amend the grounds was necessary.

36. I reserved my decision.

Assessment

37. I have concluded that the judge's error, as explained at paras 4-6 above, is not material for four independent reasons, each of which is determinative of each of the appeals before me.

38. Firstly, it is accepted that the case as advanced before me was a different case from that advanced on the appellants' behalf before the judge. Before the judge, the appellants contended that they were financially dependent on the sponsor. His provision of childcare to their child was relied upon as part of their financial dependency. They now make a different case, that the provision of non-financial support in the form of the said childcare is itself sufficient for the purposes of regulations 7, 8 and 15. Ms Tobin accepted that the case as advanced before me was not the case advanced before the judge. I therefore agree with Mr Kotas that the appellants are seeking to re-litigate their appeals. The judge cannot be said to have erred in law by failing to consider a case that was not put to him.

39. Secondly, Ms Tobin submitted that the judge erred by failing to consider the final sentence of para 18 of the Court of Appeal's judgment in Lim and whether that suggested that non-financial dependency was itself sufficient. She submitted that, if he had considered the issue, it was open to him to have reached the conclusion that it was sufficient.

40. In my view, Ms Tobin was clutching at straws. The Robinson obvious principle (derived from R v. SSHD, ex parte Robinson [1998] QB 929) does not apply, not least because the principle that she hopes to draw from the single sentence in para 18 of the Court of Appeal's judgment in Lim is not an established principle, as she accepted. Not only was this a point that has not been established, the judge was not even referred to the Court of Appeal's judgment in Lim, let alone para 18 of that judgment. Instead, he was referred to the Upper Tribunal's decision in Lim which was overturned by the Court of Appeal on appeal. If the appellants wished to rely upon the proposition, in reliance upon the final sentence of para 18 of the Court of Appeal's judgment in Lim, that non-financial support may be sufficient in itself to establish the required dependency, it was incumbent upon them to raise that issue before the judge.

41. I therefore have no hesitation in rejecting the contention that the judge erred in law by failing to consider, of his own volition, whether the final sentence of para 18 of the Court of Appeal's judgment in Lim opened the possibility of non-financial support being sufficient in itself and, if so, whether the appellants had established that the childcare the sponsor provided to their child was sufficient in itself to enable them to establish the required dependency.

42. Thirdly, I agree with Mr Kotas that the Court of Appeal's judgment in Lim is the complete answer to the appellants' case as now advanced, in any event. Pursuant to Lim, the appellants have to show that they need the childcare that the sponsor provides. It is clear from the judge's findings and reasoning that the appellants can either look after their child themselves or when this is not possible, they can each afford the childcare costs themselves (para 29 of his decision in relation to the first appellant and para 37 in relation to the second appellant). Ms Tobin's submission that, if childcare is provided by the sponsor, it is unnecessary to consider whether the appellants need the sponsor to provide the childcare is simply wrong and contrary to the Court of Appeal's judgment in Lim.

43. Ms Tobin relied upon the fact that the judge had allowed the appeal of Miss Rahman and that the sponsor had also provided her with childcare. In my view, this simply ignores the fact that her circumstances were entirely different. This is because the judge found that, as she was not earning at the date of the hearing before him, she was dependent on the sponsor for childcare as she could not afford to pay for it (para 39). In contrast, and as I have said, the judge found that the appellants can each either look after their child themselves or when this is not possible, they can each afford the childcare costs themselves (para 29 of his decision).

44. It therefore has not been shown that the judge erred in law in reaching his finding that the appellants had not shown that they were dependent on the sponsor.

45. Fourthly, and finally, the courts will not permit EU law to be abused. In O & B v Minister voor Imigratie, Integratie en asiel (C-456/12, 12 March 2014), the Court of Justice of the European Union (CJEU) defined abuse as an intention to artificially create a situation to take advantage of EU rules. In Lim, Elias LJ said, at para 32:

> "32. In my judgment, the critical question is whether the claimant is in fact in a position to support himself or not, and Reyes now makes that clear beyond doubt, in my view. That is a simple matter of fact. If he can support himself, there is no dependency, even if he is given financial material support by the EU citizen. Those additional resources are not necessary to enable him to meet his basic needs. If, on the other hand, he cannot support himself from his own resources, the court will not ask why that is the case, save perhaps where there is an abuse of rights. The fact that he chooses not to get a job and become self-supporting is irrelevant. It follows that on the facts of this case, there was no dependency. The appellant had the funds to support herself. She was financially independent and did not need the additional resources for the purpose of meeting her basic needs."
>
> (My emphasis)

46. Although Elias LJ mentioned abuse of rights in the context of someone who has established dependency, it does not follow that where there is such an abuse of rights in a case where the applicant has not succeeded in establishing dependency, it is irrelevant. It can be relevant, in an appropriate case, for example, as an additional reason why an applicant/appellant cannot succeed.

47. In the instant case, it is clear from the judge's reasoning, inter alia, that: (i) the income of the first appellant exceeded that of the sponsor by a considerable margin; the first appellant earned over four times as much as the sponsor; (ii) the sponsor's income had gone down and he was frequently overdrawn on his bank account, at

times close to his overdraft limit; (iii) in contrast, the first and second appellants had built up considerable assets, the second appellant having a bank balance of over £40,000; (iv) the sponsor was living in a house owned by the first and second appellants; (v) on a holistic assessment of all of the factors, the sponsor was dependent on the first appellant and not the other way around; and (vi) the circumstances had been artificially contrived by the sponsor paying for the first appellant's car loan and the grocery bills and going well into his overdraft to do so.

48. In my judgment, it is clear, from the judge's reasoning as a whole and, in particular, the penultimate sentence of para 29, that the appellants' circumstances had been artificially contrived in an attempt to bring them within the 2016 Regulations. In my judgment, this is an additional reason, independent of the three reasons I have already given, why the appellants could not have succeeded in their appeals before the judge and why they cannot succeed in their appeals before the Upper Tribunal.

49. As I have said at para 7 above, reliance was not placed on the second appellant being a member of the sponsor's household. In any event, the judge considered that issue at para 37 and said that the position was that the sponsor was a member of the first and second appellants' household and not the other way around.

50. For the reasons given above, the error that the judge made in relation to regulation 9, as explained at paras 4-6 above, is not material.

51. I therefore dismiss the appeals of the appellants.

Decision

The decision of Judge of the First-tier Tribunal Woolley did not involve the making of any error of law sufficient for it to be set aside.

Signed Date: 18 August 2019
Upper Tribunal Judge Gill