



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: EA/03275/2017

**THE IMMIGRATION ACTS**

Heard at Field House  
On 28 February 2019

Decision & Reasons Promulgated  
On 15 March 2019

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

MRS VICTORI BOMBAJ  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Ms K Reid, Counsel instructed by BMAP

For the Respondent: Mr T Lindsay, Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellant is a citizen of Albania. Her date of birth is 1 January 1965. On 11 July 2016 she made an application for a residence card pursuant to the Immigration (European Economic Area) Regulations 2006. The application was refused by the Respondent on 10 March 2017.
2. It was not accepted that the Appellant received regular financial support from the Sponsor, her son, a citizen of Greece residing in the UK. She claimed to receive £400.00 per month from him. The Respondent did not accept this.

3. The Appellant appealed against the Respondent's decision. Her appeal was dismissed by First-tier Tribunal (FTT) Judge M R Oliver on 20 June 2018, following a hearing on 27 April 2018. Permission was granted by Upper Tribunal Judge Bruce on 26 December 2018. Thus, the matter came before me to decide whether the FTT erred.

*The hearing before the FTT*

4. At the hearing the judge heard evidence from the Appellant who adopted her witness statement as her evidence-in-chief. The Appellant is married to a Greek national. Her sons Sandri and Sajmon are Greek nationals. They lived in Albania until 2003 when they moved to Greece. They resided together in Greece. She was issued with a Greek residence permit whilst in Greece as the family member of her son. Her husband came to the UK in 2015. He became very ill. She and her son Sandri came here on 30 December 2015 to join her husband. She was granted entry clearance as a visitor for six months. Sandri has been working in the UK since March 2016. She could not open a bank account because she had no leave here and because the Secretary of State had her passport. She did not work and had no means to support herself. Her husband has gangrene. He is unable to work. They have a small house in Albania. This is used to store furniture. In Greece she and her husband worked. He cannot work here because of his poor health. The family lives together here. Sandri supports the Appellant. He gives here cash and pays the household bills. She does not work here and has no means of support other than that she receives from him.
5. Sandri gave evidence adopting his witness statement as his evidence-in-chief. He confirmed that the family lives together and that he has been financially supporting his mother since they moved to Greece from Albania. This support continues. He is exercising treaty rights here in the UK. In cross-examination he stated that his parents had their own bank account in Greece. He spent the first three months of his time in the UK looking after his father. He is not aware how long his father will need medical treatment. His family abandoned the property they were renting in Greece. Any possessions they have have been sent to Albania to be stored in the family home there.
7. The Appellant's daughter-in-law, Erjola, gave evidence and adopted her witness statement as evidence-in-chief.
8. At the hearing the Respondent did not challenge that the Appellant's son was exercising treaty rights. The position of the Respondent was that dependency was artificial. It was argued that it was necessary to determine that a family member is dependent in the sense of being in need of the assistance and Lim v ECO Manila [2015] EWCA Civ 1383 was relied upon. It was submitted by the Presenting Officer that the authorities clearly established that it is irrelevant why a family member is dependent, but they do not establish that dependency is determined by the mere fact that the EU national makes resources available to the dependent relative. The critical question is whether a family member is as a matter of fact in a position to support

herself or not. If she can support herself there is no dependency, even if she is given financial material support by the EU citizen.

*The findings of the FTT*

9. The judge made the following findings at paragraph 13:-

“I find that the circumstantial picture presented of the appellant’s situation has been misleading and contrived. It was even suggested that the appellant was dependent on her son when the family moved to Greece. At that time her son was aged 10 and she agreed in evidence that she had been working in Greece as well as her husband. I have been given no information about the appellant’s own financial circumstances or those of her apparently ill husband. I am told that the appellant not only has resident status in Greece but also her own property, together with its furnishings, in Albania I find that the evidence of all three witnesses lacks credibility and that the moving of some bills to the appellant’s son was an entirely artificial move to try to create a cosmetic effect to enhance the application.”

*The Grounds of Appeal*

10. The grounds of appeal assert that the judge erred in finding that evidence was contrived. The authorities establish that dependency of choice is still dependency within the Regulations. The judge did not find that there was no evidence of dependency in this case, but rather that it was contrived. It was not in dispute that the Sponsor and the Appellant were residing in the same household and the bills and costs of running the household were being met by the Sponsor and the Appellant’s other son. The judge’s reason for finding dependency contrived was that prior to moving to the UK the Appellant was working and able to support herself financially. However, there was coherent evidence that the Appellant chose to move to the UK because her husband had fallen ill whilst here. The judge failed to properly consider this. Had the Appellant’s husband not fallen ill they would have remained in Greece.
9. In oral submissions, Ms Reid stated that whilst the judge may have found that some of the evidence was contrived, it does not mean that there was no dependency. There was no evidence that the Appellant had another source of income. Whilst they have a house in Albania, there was no evidence of income from this property. They had supported themselves in Greece but are not able to do so here. It was unchallenged that the Appellant’s husband was too unwell to work and to return to Greece. It was not challenged that the Appellant and her husband had worked in Greece and supported themselves there and that neither was working here. What was challenged according to Ms Reid was not dependency but whether there was a need for dependency. Mr Lindsay stated that there was no challenge to the credibility findings of the judge. There was no evidence about the Appellant or her husband’s financial circumstances. His understanding of the decision is that the judge did not accept dependency. Whilst he accepted that the Appellant’s son was paying some of the bills, this did not establish dependency. The Appellant had failed to establish that payments were made to meet her essential needs. She failed to

establish that there were insufficient resources from elsewhere. The judge did not accept that the witnesses were credible and did not accept the evidence.

### The Case Law

10. The relevant law relied on by the parties was Lim v Entry Clearance Officer Manila [2015] EWCA Civ 1383 where the Court of Appeal found as follows in relation to the decision in Pedro v Secretary of State for Work and Pensions [2009] EWCA Civ 135 and Goldring LJ's observations in respect of dependency:-

"I respectfully do not accept that these observations of Goldring LJ made good Upper Tribunal Judge Storey's conclusion. Receipt of support is a necessary but not sufficient condition. It is still necessary to determine that a family member is dependent in the sense of being in need of the assistance. I accept that the authorities clearly establish that it is irrelevant why he or she is dependent, whether because he has given his money away or because he is unwilling to work (save possibly where an abuse of rights can be established), but paragraph 62 in Pedro does not establish that dependency is determined by the mere fact that the EU national makes resources available to the dependent relative."

11. The court went on to state at paragraph 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."

12. Mr Lindsay relied on Reyes (EEA Regs: dependency) [2013] UKUT 314 where the head note reads at paragraph 1:-

*"The mere fact that a person is in the United Kingdom without lawful permission to work does not mean that he or she is to be considered as meeting the test of dependency under the Immigration (European Economic Area) Regulations 2006."*

13. Ms Reid drew my attention to paragraph 21 of that decision which reads as follows:-

"We dealt first with the third ground of challenge, which contended that the judge should have deduced the fact of the Appellant's dependency (at least up until 20 September 2011, when he was granted permission to work) from his immigration status in the UK and the fact that until latterly he had no permission to work. We saw no merit in this ground. As already highlighted, in EU law the test of dependency is a purely factual test. It is not dependent on a person's status under national legislation. Whilst the fact that a person is an overstayer

without permission to work is clearly a very relevant matter when considering a person's actual circumstances, it does not of itself establish that he is in a situation of dependence. As already noted, assessment of dependency also involves looking at a person's circumstances as a whole and what is known about how their essential needs are met. Here there may be a wide range of factors to consider. The matter of whether a person is physically and mentally able to work may be relevant. So may be the matter of whether a person has worked even if it is unlawful for them to have done so: the phenomenon of persons working in breach of conditions is regrettably still all too common. Another factor, emphasised by the Court of Justice in Islam and Others (albeit in the different context of OFMs under Article 3.2) concerns whether the need for the dependency is genuine. It can happen that such persons have assets of their own sufficient to cover all their essential needs. On the other hand, even if a person works in breach of conditions he or she may not earn enough from employment to cover their essential needs."

### Error of Law

14. The way in which this case was presented before the FTT did not assist the judge to understand the chronology and the factual matrix. The witness statements are insufficiently detailed. It is not entirely clear that those preparing the Appellant's case were aware of the material issues. However, I conclude that the judge materially erred.
15. The judge accepted that there were a number of bills in the Appellant's son's name. They included utilities and rent. I am satisfied that the judge found some dependency, but he did not consider the extent of it. It is not entirely clear what he meant by the picture having been "contrived." If the judge meant by this that dependency was not real in the sense that the Appellant could either work here or return to Greece and work, this was not a finding open to him. If he meant that the evidence of dependency was not real because the Appellant failed to establish that she did not have alternative means, this is problematic because he failed to consider material matters. Whilst I accept that there were genuine credibility issues with the evidence, there was no suggestion by the Respondent that the Appellant or her husband were working here. There was no challenge to the fact that the family were living together here in the UK. There was no challenge to the husband being unwell and unable to work. It was accepted that there were significant outgoings in the Sponsor's name. There was no challenge at the hearing to the Sponsor working and exercising treaty rights here. Whilst the Appellant's evidence was that she had a home in Albania, it was never suggested that she had any income from this property, moreover income that was capable of meeting any of her needs. There was no suggestion that the property could be liquidated which would obviate the need for dependency. The judge found that there was no information about the Appellant's own financial circumstances or those of her husband. However, it is difficult to envisage what information he was evidence he expected to see. The Appellant was in some difficulty in that she was expected to prove a negative; namely that she has no other source of income. In my view the judge materially erred because he failed to consider the whole picture. He attached weight to the circumstances pertaining

before the family came here, when the Appellant was working without appreciating the reason for the change in circumstances.

16. For all the above reasons I set aside the decision to dismiss the Appellant's appeal. Both parties agreed that I could go on and remake the hearing without the need to hear further evidence. They were satisfied that there was no need to make further submissions having addressed me in some detail in respect of the error of law issue.

Conclusions

17. The Appellant has established on the balance of probabilities that she is dependent on the support of her Sponsor for her essential needs. Whilst she exaggerated her evidence before the FTT relating to dependency prior to coming to the UK, there is no reason to conclude that evidence of dependency since her arrival here was fabricated. I appreciate that because the Appellant is unable to work this is insufficient to establish dependency; however, it is a matter which can be considered. The Appellant's unchallenged evidence is that she is here in the UK because of her husband's ill-health and he is unable to work. I reasonably infer from this that he does not receive an income. It was not suggested otherwise by the Respondent. It is entirely credible that the Appellant has not been able to open a bank account here in the UK and does not have documentary evidence to establish that she does not have an alternative source of support. I am satisfied that she does not have an alternative income. The evidence of the witnesses was consistent on this point. I am satisfied that she is dependent on the support given to her by the Sponsor which is necessary to pay for her basic essential needs in the absence of another source of income. There is evidence the Sponsor pays utilities and rent and there is no reason to disbelieve that she is given cash by him, in the light of the absence of income from alternative sources.
18. I find on the evidence that was before the FTT that the Appellant has established dependency which is sufficient to discharge the burden of proof. I go on and remake the appeal allowing the Appellant's appeal under the EEA Regulations.
19. No anonymity direction is made.

Signed *Joanna McWilliam*

Date 13 March 2019

Upper Tribunal Judge McWilliam