Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/03667/2019

THE IMMIGRATION ACTS

Heard at Manchester CJC via Skype.	**Decision & Reasons Promulgated**
On 29 October 2020	**On 5 November 2020**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

BOB
(anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Adewole of Liberty & Co Solicitors.
For the Respondent: Mr A Tan, Senior Home Office Presenting Officer.

ERROR OF LAW FINDING AND REASONS

1. The appellant appeals with permission a decision of First-tier Tribunal Judge Clarke ('the Judge') promulgated on 28 January 2020 in which the Judge dismissed the appellant's appeal against the refusal to grant him a Residence Card as an extended family member of his aunt, an EEA national.

2. The appellant is a citizen of the United States of America born on the 28 October 2003.
3. The Judge refers to the documentary evidence at [4] of the decision under challenge. It is not made out that having made specific reference to this material the Judge then effectively chose to ignore it or not factor it into the decision-making process.
4. Permission to appeal was granted by another judge of the First-tier Tribunal, the operative part of the grant being in the following terms:

> "3. The judge noted in the decision that the Appellant did not give evidence and was not subject to cross-examination and that although he is a minor he had attained the age of 16 and could have given evidence as a vulnerable witness subject to the presidential guidelines. The judge confirmed that the Applicant had not confirmed what the aunt told him. It is arguable that the representatives had a good reason for not calling the Appellant to give evidence bearing in mind the account he had to deal with related to when he was about nine years old and there had been a statement from the grandmother and also the Appellants aunt giving evidence. Although the judge refers to a gap in the evidence there is no reference to the grandmother's statement in the judge's findings of fact. That would be crucial bearing in mind the claim is that the Appellant lived with his grandmother. Part of the evidence is also that the aunt refers to people carrying money to the grandmother. It is arguable that corroboration of the Appellant's evidence need not be required bearing in mind the judge failed to make any findings on the grandmother's signed witness statement. Bearing in mind the age of the Appellant there is an arguable error of law in the manner in which the judge dealt with the evidence. The grounds in the application arguable."

Error of law

5. Article 3(2)(a) of Directive 2004/38 the Citizens Directive requires the host member state to facilitate entry and residence of family members other than spouses, civil partners and direct relatives in the ascending or descending line irrespective of their nationality who, "in the country from which they had come", were dependents or members of the household of the Union Citizen having a primary right of residence.
6. The EEA national is the appellants aunt in relation to whom no issue was raised concerning their relationship. The refusal of the application for the residence card was on the basis the appellant had failed to provide adequate evidence that he was dependent upon his aunt prior to entering the United Kingdom.
7. Guidance on the test for dependency can be derived from relevant case law. In Jia Migrationsverket (Case C -1/05) the European Court considered "dependence" under Article 1(1)(d) of Directive 73/148/EEC and said this was to be interpreted to the effect that "dependent on them" meant that members of the family of an EU

national established in another member state within the meaning of Article 43 of the EC Treaty, needed the material support of that EU national, or his or her spouse, in order to meet their essential needs in the state of origin of those family members or the state from which they had come at the time when they applied to join the EU national. The Court said that Article 6(b) of the Directive was to be interpreted as meaning that proof of the need for material support might be adduced by any appropriate means, while a mere undertaking by the EU national or his or her spouse to support the family members concerned need not be regarded as establishing the existence of the family member's situation of real dependence

8. In Bigia & Others [2009] EWCA Civ 79 at [24] Maurice Kay LJ said that where the question of whether someone is a "family member" depends on a test of dependency, that test is as per paragraph 43 of the ECJ's judgement in Jia. In essence members of the family of a Union citizen needed the material support of that Union citizen or his or her spouse in order to meet their essential needs.
9. In Moneke (EEA – OFMs) (Nigeria) [2011] UKUT 00341(IAC) (Blake J) at para 41 the Tribunal accepted that the definition of dependency was accurately captured by the current UKBA ECIs which read as follows at ch.5.12: "In determining if a family member or extended family member is dependent (i.e. financially dependent) on the relevant EEA national for the purposes of the EEA Regulations: Financial dependency should be interpreted as meaning that the person needs financial support from the EEA national or his/ her spouse/civil partner in order to meet his/her essential needs – not in order to have a certain level of income. Provided a person would not be able to meet his/her essential living needs without the financial support of the EEA national, s/he should be considered dependent on that national. In those circumstances, it does not matter that the applicant may in addition receive financial support / income from other sources. There is no need to determine the reasons for recourse to the financial support provided by the EEA national or to consider whether the applicant is able to support him/herself by taking up paid employment. The person does not need to be living or have lived in an EEA state which the EEA national sponsor also lives or has lived." At paragraph 42 the Tribunal went on "We of course accept (and as the ECIs reflect) that dependency does not have to be "necessary" in the sense of the Immigration Rules, that is to say an able bodied person who chooses to rely for his essential needs on material support of the sponsor may be entitled to do so even if he could meet those needs from his or her economic activity."
10. Much was made of the Judges treatment of the witness statement from the appellant's grandmother in the error of law submissions and pleadings which appears at pages 22-23 of the appellants appeal bundle in the following terms:

    1. I Ms [RA], Benin Republic Citizen of Cotonou, Republic of Benin do hereby state support of my grand son appeal against the decision of the Home Office dated 9 July 2019 as follows.

2. I am a Citizen of the Republic of Benin and I live in Cotonou.
3. The Applicant/Appellant Master [BOB] is my grand-son as he was born to my daughter [GM].
4. My daughter who is the Mother of the Appellant is presently unwell due to mental ill-health and has been so for quite some time now.
5. I confirm that my grand son is presently living with his Aunt (the sponsor) who is a French citizen in the UK since 2013 as she has been the only person supporting him even when he resided in Cotonou with me after his birth.
6. I confirm that his Aunt (the sponsor) has always been sending money to me in Cotonou the UK through families and friends travelling to Cotonou for his upkeep before 2013 before the Auntie took him to the UK to reside with her.
7. I confirm that he does not know his father and the only family who cares for him is the Aunt (the Sponsor) with whom he resides in the UK.
8. I am also able to care for him here in Cotonou as I am suffering from stroke and needed to look after myself.
9. I believe that the decision to refuse his application to stay with his family, in the UK is a breach of their EEA Rights and under Private and Family Life, Article 8 of the ECHR and Section 6 of the Human Rights Acts 1998 and S.55 of the UK Borders Act 2009.
10. He submitted this application for Residence Card in the UK as a family member of an EEA national exercising Treaty Rights in the UK in view of their relationship and the UK immigration laws (including EEA Regulations 2016).
11. I believe also that the decision of the Respondent is against their Human Rights as the same is contrary to S.6 of the Human Rights Acts and S.55 of the UK Borders Citizenship and Nationality Act 2009.
12. The decision to refuse his application will have an adverse impact on the family members in the UK and same is a violation of the UK obligations under the ECHR and a breach of our Private and Family Life as the decisions of the SSHD or violates their Article 8 Right, S.6 of Human Rights and S.55 rights in the UK as a family unit.
13. Decision of the Respondent against him will not be proportionate as it will affect us and cause untold hardship to us and the children in general.
14. I believe that the decision of the Secretary of State should be reversed as same if upheld will violate our rights to Private and Family Life in the UK in line with the decision of the House of Lords in Beoku – Betts -v- SSHD [2008].
15. I urge the Tribunal to allow his appeal.

11. Although the appellant and the grandmother refer to human rights aspects this is not a human rights appeal. It is a refusal of a residence

card which is an appeal against an EEA decision not a decision on human rights grounds. The Court of Appeal ruled that human rights cannot form part of an EEA appeal in Amirteymour [2017] EWCA Civ 353. If the appellant wishes to pursue a Human Rights application one must be made in proper form.

12. The Judge clearly noted the claim that money had been sent to the appellant's grandmother "for her to spend on him" [8], but the Judge was not required to accept such an assertion without more. At [10 – 11] Judge writes:

> "10. There is nothing to show that the EEA national was the provider of funds to support the Appellant. The school reports do not mention her by name, and there are no invoices for fees to her. The only evidence provided does not got to this issue, and simply goes to show they are linked, but that is not an issue before me because it is accepted that they are related as claimed. The aunt refers to people carrying money to the grandmother for the Appellant's upkeep but no names are provided, and no witness attended to confirm the same.
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> 11. I find there is a gap in the evidence, and the Appellant has the burden to substantiate the claim. The Appellant elected not to give evidence himself to further his claim. Whilst I could accept the oral evidence of a witness if there is no other evidence available and explanation for not being able to provide supporting evidence, in this case there is no explanation given as to why, and the appellant failed to answer questions himself. Therefore I dismiss the appeal."

13. As noted by the Judge the appellant was a child when the events relating to his alleged financial support in Benin occurred. The Judge does not dismiss the appeal because the appellant did not give evidence but because the evidence that was provided and relied upon was insufficient to discharge any evidential or legal burden. The test of dependency is set out above which requires it to be established that whatever sums of money were being provided they were sufficient to meet the appellant's essential needs. There is no indication in the evidence of what those essential needs were or to show that the amount of funds that were being received by the grandmother were sufficient to show the appellants essential needs were being met by the EEA national sponsor. It was important for the evidence to be considered as a whole in context when assessing whether the evidence was sufficient to show the dependency test had been met.

14. I accept there is no specific reference to the grandmother's statement, but the assertion made in relation to the same is that it reflects the EEA national sponsor's claim which is mentioned by the Judge. A judge is not required to set out findings in relation to each and every aspect of the evidence provide the same has been considered with the required degree of anxious scrutiny which I find the Judge did in this appeal.

15. The finding the appellant had not discharged the burden upon him to show the respondent's decision is contrary to EU law on the basis the appellant had not established the required element of dependency has not been shown to be a finding outside the range of those reasonably available to the Judge on the evidence.
16. No error of law material to the decision to dismiss the appeal has been made out.

Decision

17. **There is no material error of law in the Immigration Judge's decision. The determination shall stand.**

Anonymity.

18. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

    I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed……
Upper Tribunal Judge Hanson

Dated the 2 November 2020