Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: EA/01060/2020 (V)
EA/01032/2020 (V)

THE IMMIGRATION ACTS

Heard at Field House via Microsoft Teams	**Decision & Reasons Promulgated**
On 2nd September 2021	**On 14th December 2021**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

MRS SAMSUL MAFADHA MOHAMMADU RAFEEK
MR MAHMOODU ALIM ABDULLA
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Ms M Chowdhury, Counsel
For the Respondent: Mr Chris Avery, Home Office Presenting Officer

DECISION AND REASONS

The appellants appeal against a decision of First-tier Tribunal Judge Siddall promulgated on 19th March 2021 dismissing their appeal against the respondent's decision to refuse them EEA family permits under Regulation 7 of Immigration (European Economic Area) Regulations 2016.

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The appellants are married, and nationals of Sri Lanka and their EEA national sponsor is their daughter-in-law, who is married to the appellants' son, Mr Abdulla. The sponsors are stated to support the appellants, who on 28th November 2019 applied for an EEA family permit as direct family members but the applications were refused on 18th December 2019. The matter came before Judge Siddall (following a CMR before Judge Rastogi) and their appeal was dismissed.

The grounds for permission to appeal were as follows: Ground (i) the judge applied the incorrect regulation 8 rather than regulation 7 (ii) the judge did not take into account that the appellants had sent documentation to the Entry Clearance Officer which had not been produced and the loss of the money transfer receipts was treated unfairly (iii) the judge failed to follow established case law on how post application evidence should be treated.

Ground 1

The grounds stated the judge made several incorrect references to extended family members which had an impact on how she assessed the financial relationship between the appellants and sponsor, who shared a direct family relationship. For example, at paragraph 1 the judge stated that the appellants brought their appeal on the basis of extended family members of their daughter-in-law. That was incorrect. The original decision acknowledged that the appellants applied for EEA family permits under the Immigration (European Economic Area) Regulations 2016. This was repeated at paragraph 2 when she set out Regulation 8 of the EEA Regulations, finding that Regulation 8(2) was not met. She approached the case on the basis of extended family member.

In the respondent's review decision it was accepted that the only point of contention between the parties was whether the appellants were dependent upon the sponsor. There are two distinct Regulations that deal with direct family members and the Home Office publishes two different guidance documents in relation to each Regulation. It was submitted that by consistently referring to Regulation 8 throughout the decision the judge clearly had in mind the financial dependency that needs to be proved in an EFM case and all the findings were made in relation to Regulation 8.

At the hearing before me Ms Chowdhury submitted that the test for dependency was a different and lesser test than the one found in Regulation 8.

Mr Avery argued that the tests were in fact the same and in particular, Mr Avery referred to paragraph 32 of **Lim v Entry Clearance Officer Manila [2015] EWCA Civ 1383**.

I note that Ms Chowdhury in the grounds of appeal acknowledged that the only point of contention between the parties was whether the appellants were dependent upon the sponsor.

The Court of Appeal in **Lim** dealt specifically with Regulation 7(1)(c) setting out at paragraph 8

“8. The relevant regulation in issue is Regulation 7(1)(c). It provides that:

‘... for the purposes of these Regulations the following persons shall be treated as the family members of another person ...

(c) dependent direct relatives [my underling] in his ascending line or that of his spouse or his civil partner.’

This essentially reflects the language in Article 2.2(d) of the Citizens Directive”

The court noted that the test for dependency had been considered on a number of occasions by the Court of Justice of the European Union. In particular, **Lim** referred to paragraph 14 **Jia v Migrationsverket (KC/1/05), [2007] QB 545**. As noted, this case considered what it meant when saying that someone was dependent on his or her relatives, in particular in relation to Regulation 7. At paragraphs 15, 16 and 17 the court in Lim had this to say:

‘The Advocate General concluded that:

"... the concept of 'dependence' refers to the situation in which a relative of a citizen of the Union is economically dependent on that citizen of the union to attain the minimum level of subsistence in the country where he is normally resident, not being the member state where he is seeking to reside, and that that situation is structural in character."

16. The court reached a similar conclusion. It referred to Lebon and then summarised the relevant principles as follows:

"35. According to the case law of the Court of Justice, the status of 'dependent' family member is the result of a factual situation characterised by the fact that material support for that family member is provided by the Community national who has exercised his right of free movement or by his spouse: see, in relation to article 10 of Regulation No 1612/68 and article 1 of Council Directive 90/364/EEC of 28 June 1990 on the right of residence, Centre public d'aide sociale de Courcelles v Lebon (Case 316/85) [1987] ECR 2811, para 22, and Chen v Secretary of State for the Home Department (Case C-200/02) [2005] QB 325, para 43, respectively).
36. The court has also held that the status of dependent family member does not presuppose the existence of a right to maintenance, otherwise that status would depend on national legislation, which varies from one state to another: Lebon's case, para 21). According to the court, there is no need to determine the reasons for recourse to that support or to raise the question whether the person concerned is able to support himself by taking up paid employment. That interpretation is dictated in particular by the principle according to

which the provisions establishing the free movement of workers, which constitute one of the foundations of the Community, must be construed broadly: Lebon's case, paras 22 and 23.
37. In order to determine whether the relatives in the ascending line of the spouse of a Community national are dependent on the latter, the host member state must assess whether, having regard to their financial and social conditions, they are not in a position to support themselves. The need for material support must exist in the state of origin of those relatives or the state whence they came at the time when they apply to join the Community national."

17. *The court then answered the two further questions in the following way:*

"43. In those circumstances, the answer to question 2(a) and (b) must be that article 1(1)(d) of Directive 73/148 is to be interpreted to the effect that 'dependent on them' means that members of the family of a Community national established in another member state within the meaning of article 43 EC need the material support of that Community 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 have come at the time when they apply to join the Community national. Article 6(b) of that Directive must be interpreted as meaning that proof of the need for material support may be adduced by any appropriate means, while a mere undertaking from the Community national or his or her spouse to support the family members concerned need not be regarded as establishing the existence of the family members' situation of real dependence."

Reyes (EEA Regs: dependency) [2013] UKUT 314, concerned with dependency also considered Regulation 7 of the Immigration (European Economic Area) Regulations 2006 and stated at paragraph 18 that:

> *"Other Family Members (OFMs) under Regulation 8/Article 3.2 sheds further light on the court's approach to the meaning of dependency. Dependency had to be genuine, not contrived and that its interpretation had to be informed by the principle of effectiveness."*

In sum, the test for dependency is the same in both Regulation 7 and Regulation 8.

The Home Office guidance in relation to Regulations 7 and 8 does not take the matter further. The Home Office guidance Free Movement Rights: direct family members of European Economic Area (EEA) nationals Version 9 published on 21st February 2020 states in relation to dependency:

> *"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."*

The Home Office guidance on Free Movement Rights: extended family members of EEA nationals Version 7 published on 27th March 2019 confirmed that there should be dependency or membership of household outside the UK but this is not the issue in this case and indeed this states "the applicant does not need to be dependent on the EEA national to meet all or most of their essential needs", which suggests if the appellant is comparing guidance the test under Regulation 7 is more stringent, which cannot have been intended.

Albeit that the judge did address the wrong regulation the point of contention between the parties rendered the error immaterial. Even if, as held in **Moneke (EEA – OFMs) Nigeria** [2011] UKUT 00341(IAC) which stated '*By contrast with Article 2(2) family members, an OFM must show qualification as such before arrival in the United Kingdom and the application to join the EEA national who is resident here' and the point of assessment was different, t*he judge, as can be seen from the analysis below, considered the question of dependency beyond the application point, and found that it was not made out that the appellants' essential needs were being financially currently met. This is shown by referring to the evidence 'subsequently' to meet their essential needs at paragraph 25. As the judge states at paragraph 24 '*the appeal form however reiterates the statement that the appellant are not dependent upon the sponsor for their 'living' and describes them as 'self sufficient'.*

Thus even if it were argued that the timing for the need for dependency as per **Moneke** was incorrectly applied and, thus, the cut off point for consideration of dependency was as at the date of the hearing, that would not assist the appellants.

Ground 2

Ground 2 asserted that Judge Siddall's conclusion [17] in relation to the lost money transfer receipts was unfair in the light of the evidence provided. At paragraph 17 the judge recorded that prior to 2019 the appellants' sponsor and spouse made payments to them mainly via money transfers and these had been provided to the Entry Clearance Officer but not returned to the appellants and were not in the respondent's bundle. It was the respondent's position that only one receipt was provided to show a transfer on 1st December 2019, just after the application for entry clearance had been made. The judge identified at paragraph 22 that there were four money receipts contained in the appellants' bundle, the first of which was dated 18th September 2019, (also 23rd October, 12 November and 1st December) but was not prepared to accept that *earlier* money transfers had been simply lost, noting that the respondent had identified only one money transfer in the decision letter.

The judge took into account that there was a money transfer from 18th September 2019 but was not prepared to accept that the appellants had established that it was more likely than not that they were receiving funds by money transfer prior the 18th September 2019. The application was made on 28th November 2019.

The grounds of appeal stated that at the CMR the sponsor's position was that most of the documents were sent with the original application and this was apparently confirmed by the Home Office Presenting Officer when stating that "the majority of those documents are not included within the respondent's bundle".

In my view, however, this does not identify what was or was not within the bundle and goes no way to undermining the judge's conclusions set out above on this which the judge was entitled to make. Ms Chowdhury confirmed at the hearing before me that the appellants had not retained copies of these documents. These were thus not provided. That three more documents were included in the appellant's bundle, one of which post-dated the application, does not necessarily lead to the conclusion that there were more documents which predated 18th September. It was not the case that the judge ignored the documentation before her.

It was open to the judge to conclude that the respondent had received one money transfer but more importantly that the appellants had not established that they had been receiving funds prior to 18th September 2019. The onus is on the appellants to prove their case on the balance of probabilities The appellants would have known what documentation was in the respondent's bundle as there was a direction to serve it on them by 20th January 2021 and the hearing was on 11th March 2021. It was open to them to attempt to obtain further copies in the meantime. Indeed a direction at the CMR permitted the appellants to file further evidence. I find no procedural unfairness by the judge who complied with the overriding objective and gave sound reasoning for her approach. The judge gave reasoning at paragraph 22 that the evidence was unclear (and see below).

Ground 3

Ground 3 stated that the judge did not follow established case law on how post-application evidence was to be treated but I note that at paragraph 22 the judge correctly identified that the court was "able to take into account evidence of payments made since the application was lodged" and clearly found that "the picture which the evidence presents is a regular payment starting only after the respondent rejected the application on the grounds amongst others that financial dependence had not been established". It is not the case that the judge directed herself contrary to **Boodhoo and Another (EEA Regs: relevant evidence)**; **Boodhoo and Serano v Secretary of State for the Home Department [2013] UKUT 346 (IAC) [2013] UKUT 346**. She was clearly aware that the Tribunal has power to consider any evidence which it thinks relevant to the substance of the decision.

It was noted that the appellants had produced evidence of money transfers from 2020 and 2021 postdating the application but in the context of her findings, which were open to her, the judge was entitled to conclude that there was no such dependency.

The judge noted that there was no evidence from the person said to have been the friend delivering money to his parents from 2014 (paragraph 22) and found:

> *"22. The source of deposits made into the First Appellant's passbook is not clear. Whilst a number of bank statements have been produced, these do not clearly demonstrate payments leaving the account of the Sponsor and Mr Abdullah and arriving in the accounts of the Appellants or providing funds which they have been able to access. Mr Abdullah has stated for example that his brothers have a debit card on one of his accounts in Sri Lanka which they can access in order to provide money to the Appellants. However he has also said that he sometimes pays his brothers for work they have done for him. This evidence therefore does not provide detail in relation to the support provided to his parents."*

The judge also stated the following:

> *"22. The clearest evidence provided as to payments made which have been received by the Appellants is probably contained in the email sent to the tribunal by the Sponsor on the morning of the hearing where she sets out fifteen separate transactions, the first of which occurred on 10 December 2020. As agreed by the parties, I am able to take into account evidence of payments made since the application was lodged. I have considered whether evidence of payments made in 2020 and 2021 makes it more likely than not that there was financial dependence at the date of the application. I find on the balance of probabilities that with the exception of the four money transfers made just prior to the application being made, the picture which the evidence presents is of regular payments starting only after the Respondents rejected the application on the grounds (amongst others) that financial dependence had not been established."*

<u>In the alternative</u>, the judge stated at paragraph 23: "I am not satisfied in any event that even where there is evidence of funds being transferred, the purpose of the payments has been to meet the essential needs of the appellants." That was the central point that Mr Avery made. As the judge pointed out, in relation to each transaction referred to in her email of 11th March the sponsor referred to the equivalent page of the bundle or to an attached bank statement for evidence of receipt of those payments by the appellant. As the judge stated:

> *"In a number of these cases the intended ultimate beneficiary appears to have been a person called Rameez. In one case, as confirmed by Mr Abdullah, the funds provided are for the purchase of a goat for slaughtering to celebrate the birth of his daughter rather than for the expenses of the appellants."*

Critically, the judge found that in relation to the application the appellants had clearly stated that they were not financially dependent upon the sponsor.

The sponsor explained that she was confused as they considered themselves to be dependent on her son but as the judge pointed out, this did not fit with her evidence that payments were being made out of 'family money' which would include both sponsor and her husband, the appellant's son.

Ms Chowdhury at the hearing before me referred to the bundle of evidence, which she stated did clarify what they meant when they completed the form. She stated that the appellants did correct the misunderstanding. On considering the appellants' bundle, the witness statement of the sponsor stated at paragraph 8 "we have supported his parents in Sri Lanka financially by sending them money" and at paragraph 9 of the witness statement the appellants' son stated, "my wife and I have been supporting my parents financially from 2014". As the judge rightly stated, "there is no evidence from the appellants to clarify what they meant when they completed the form" and they had failed to correct the misunderstanding in their grounds of appeal, which reiterated the statement that "the appellants are not dependent on the sponsor for their 'living'" and describes them as "self-sufficient".

It is crystal-clear that the question in the Visa Application Forms "do you rely on Nikoleta Abdulla for financial support?" the answer is "no".

In the light of this, I am not persuaded that the judge, albeit confused over Regulations 7 and 8, made a material error in law when considering dependency. She found that the appellants had not shown overall that their essential needs were funded by the sponsor and their son.

Therefore, the First-tier Tribunal decision shall stand.

Notice of Decision

The appeal remains dismissed.

No anonymity direction is made.

Signed Helen Rimington Date 1st October 2021

Upper Tribunal Judge Rimington