Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/04242/2019 (P)

THE IMMIGRATION ACTS

Determined without a hearing pursuant to rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008	**Decision & Reasons Promulgated** On 9 March 2021

Before

UPPER TRIBUNAL JUDGE BLUM

Between

MD ABU KAYES
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Grounds of appeal by Westbrook Law Ltd
For the Respondent: no written representations provided by the respondent

DECISION AND REASONS (P)

1. This is an 'error of law' decision determined without a hearing pursuant to rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008, paragraph 4 of the Practice Direction made by the Senior President of Tribunals: *Pilot Practice Direction: Contingency arrangements in the First-tier Tribunal and the Upper Tribunal* on 19 March 2020, and the Presidential Guidance Note No 1 2020: Arrangements During the Covid-19 Pandemic, as amended on 19 November 2020.

2. The appellant appeals against the decision of Judge of the First-tier Tribunal Andonian ("the judge") who, in a decision promulgated on 27 January 2020, dismissed his appeal against a decision by the respondent dated 31 July 2019 refusing his application for a residence card as confirmation of a right of residence in the UK as an extended family member of an EEA national exercising EEA Treaty rights.

3. The appellant, a national of Bangladesh, entered the UK on 7 April 2012 pursuant to a grant of entry clearance as a student. He was granted further leave to remain but his leave was curtailed on 6 March 2014 because the college he was attending was no longer on the relevant Home Office register. A further application for leave to remain as a student was considered to be void. An application for leave to remain on compassionate grounds made on 15 March 2015 was rejected.

4. On 4 May 2019 the appellant requested a residence card as confirmation of his right to reside in the UK as the extended family member (nephew) of Hafizur Rahman ("the sponsor"), a Portuguese national exercising treaty rights in the UK, with reference to regulations 8(2) and 18(4) of the Immigration (European Economic Area) Regulations 2016. The sponsor, who is the appellant's uncle, went to Portugal in 2004 and claimed to have become a Portuguese national in 2006, although there was no independent evidence of the year in which he obtained his citizenship before the judge. The sponsor came to the UK in 2016. The appellant claimed he had been a dependent on the sponsor since the appellant's father died in 2001. The sponsor had provided the appellant with financial support to enable him to meet his basic needs and they had lived together in the same accommodation since March 2018.

5. The respondent refused to issue the residence card because she did not consider that the appellant had provided sufficient evidence to show that he had been dependent on his sponsor, either outside the UK or since entering. The respondent acknowledged some money transfer receipts from the sponsor to the appellant's mother prior to the appellant entering the UK, and an affidavit from the appellant's mother. The affidavit was not accepted as valid documentary evidence of dependency and the money transfer receipts were said to be insufficient as evidence of dependency because the appellant had been an adult for several years prior to entering the UK (he turned 18 on 1 November 2008) and it was not possible to verify whether the money transferred to the appellant's mother was used to cover his basic living needs. The receipts were also said to be sparse, with several gaps of over a year. There were only 2 money transfer receipts as evidence of dependency between the time the appellant entered the UK and September 2015, both in his mother's name, and although there were 2 money transfer receipts between September 2015 and April 2016 in the appellant's name the amounts were

insufficient to show that the sponsor was covering the appellant's basic living needs during this period. Nor was the respondent satisfied that there was evidence showing that the sponsor supported the appellant or that they resided together from the date that the sponsor entered the UK (said to be 21 June 2016) until October 2017. The appellant appealed to the First-tier Tribunal and his hearing occurred on 10 January 2020.

6. The judge had before him a bundle of documents prepared by the appellant's representatives that contained, inter-alia, statements from the appellant, his sponsor and his mother, bank account details, including those relating to the appellant's mother (covering the period for January 2004 until 1 February 2012) and evidence of money transfer receipts in respect of funds sent by the sponsor to both the appellant and his mother. The judge also heard oral evidence from the appellant and the sponsor.

7. In his decision the judge summarised the evidence from appellant and the sponsor and referred, inter-alia, to money transfer receipts in the appellant's bundle at pages 80 - 113. The judge recorded evidence that the sponsor had sent money to the appellant and his mother to support the family and that the sponsor had also sent money for the appellant's tuition fees and for his maintenance. The judge noted at [18] that money transfers to the appellant and to his mother were not made on a regular monthly basis and that "no credible explanation was given as to why after the appellant had become an adult would money transfers still be sent to the appellant's mother from time to time as well, given that it was the appellant's evidence that the only reason why monies were transferred to his mother in the earlier years was because he was still a minor."

8. At [19] the judge stated that there was no evidence as to what the position was in so far as financial support was concerned between October 2017 and 2018, and that there was no evidence as to the payment for the appellant's accommodation and other expenses such as utilities before the appellant started living with his uncle from 2018. At [20] the judge said there was no evidence that the appellant was being maintained by his uncle until they started living together in 2018. The judge noted the evidence from the sponsor that he had not kept receipts for any financial support given to the appellant since the sponsor entered the UK. At [23] the judge stated that the receipts were insufficient evidence of dependency because the appellant had been an adult for several years prior to entering the UK in 2012 and because there were money transfers sent to the appellant's mother for the appellant even at the time when he was an adult. It could not be verified that the money transferred to the appellant's mother when he became an adult was used to cover the appellant's basic living needs as an adult. The judge noted that there were several monthly gaps in the making of money transfers to the appellant. At

[26] the judge found that the appellant had not provided any evidence with his application to show that he was financially maintained by his sponsor from the time that the sponsor entered the UK on 21 June 2016 until October 2017.

9. At [28], after referring to the case of **Dauhoo (EEA Regulations – reg 8(2)** [2012] UKUT 79 (IAC), the judge did not accept that the receipts provided by the appellant was sufficient evidence of dependency prior to him coming to the UK as he had been an adult for several years and it could not be verified that the money transfers to his mother were used to cover his basic living needs. The receipts were in any event sparse with several gaps of over a year and could not be considered sufficient to show dependency. At [29] the judge found there was no evidence of either financial dependency or dependency on the sponsor's household since the appellant came to the UK in April 2012 and since his sponsor entered the UK in June 2016. There were said to be "no evidence" that the uncle was paying for all the appellant's utility expenses, rent, and other essentials between 2016 and 2018. The judge was not consequently satisfied that the appellant had discharged the burden of proving that he was dependent on his sponsor.

10. At [35] the judge observed that someone had attempted to obliterate the date of '31 October 2017' from a letter that was sent to the appellant in respect of voter registration at the address where his uncle lives. Having noted that the evidence from both the appellant and his uncle was that the began to cohabit in March 2018, the judge found that no credible reason had been given as to why there should be a document addressed to the appellant at that address which was dated 31 October 2017. The judge additionally noted his surprise that utility bills in respect of that residence were addressed to the appellant given that he claimed to be financially dependent on his uncle. The judge found that no credible evidence had been given to him concerning these issues. The judge consequently dismissed the appeal.

11. Permission to appeal to the Upper Tribunal was granted by Upper Tribunal Judge Owens in a decision dated 23 July 2020 but sent on 17 August 2020. I set out the material elements of the grant of permission:

> "It is arguable that the Judge has failed to take into account relevant evidence and failed to give any or adequate reasons for rejecting evidence. The appellant's case is that after the death of his father he and his family was supported at all times by his uncle who moved to Portugal in 2004 and became a Portuguese national in 2008. The evidence of the sponsor and the appellant is that the appellant continued to be supported by the sponsor both prior and after the appellant came to the UK in 2012 as a student and that the sponsor paid for his studies. The sponsor continued to support the appellant

after he arrived in the UK in 2016 and they have lived together since 2018.

The judge repeatedly asserts that there was "no evidence" of financial support of the appellant by his uncle. This is said at [7], [12], [19], [20], [22], [29] and [34]. However this is arguably not the case as both the appellant and the sponsor as well as the appellant's mother provided witness statements in relation to the dependency, the appellant and sponsor gave oral evidence and there was evidence of remittances as well as bank statements. Further the appellant's mother provided evidence of large deposits into her account from the sponsor about the time that the appellant applied for a student visa.

In the circumstances the judge arguably erred in stating that there was "no evidence". The judge arguably failed to take this evidence into account or provide adequate reasons for rejecting it. The judge also at [18] stated that there was "no credible evidence" for why there were gaps in remittances without arguably putting this issue to the appellant. Further the judge at [35] relied on an alteration in a document to question the appellant's credibility without this issue being raised by the respondent and without the issue being raised at the hearing. The appellant was not given an opportunity to address this which is arguably procedurally unfair.

These errors are arguably manifestly material to the outcome of the appeal.

All grounds are arguable.

My provisional view is that the decision is arguably so vitiated by material errors that the decision should be set aside pursuant to section 12 (2) of the Tribunals, Courts and Enforcement Act 2007."

12. Judge Owens then gave the following directions:

"Both parties have 7 days from the date of the sending of these directions in which to make any further submissions in respect of this issue including any indication that consent is given to determine the appeals without any further response. In the absence of any response, I will infer that both parties have consented to the decision being determined without any further response pursuant to rule 22 (C) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Within the same timeframe the parties should also make any submissions on the appropriate method of disposing of the appeal by way of either re-making or remitting including any submissions on the issue of whether there is any objection to re-making the decision by way of a remote hearing."

13. By email sent on 25 August 2020 the appellant's legal representatives indicated that they had not received any submissions from the respondent in response to the directions and reserved their right to respond should any such submissions be made. The appellant

indicated that he was relying on the previous grounds and the grant of permission and submitted that, should a material error be identified and the decision set aside, then the matter should go back to the First-tier Tribunal for a fresh hearing. No submissions have been received from the respondent.

14. Having regard to the overriding interest in rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008 to deal with cases justly and fairly, and having considered the nature and focus of the appellant's challenge to the judge's decision, and having satisfied myself that both parties have been given a fair opportunity of fully advancing their cases, and having regard to the judgment in **JCWI v President of the Upper Tribunal** [2020] EWHC 3103 (Admin), the Upper Tribunal considers it appropriate, in light of the Covid-19 pandemic, to determine the questions (i) whether the judge's decision involved the making of an error of law and, if so, (ii) whether the decision should be set aside, without a hearing pursuant to rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Discussion

15. For the reasons succinctly expressed by Judge Owens in granting permission to appeal, I am persuaded that the judge has erred in law by failing take into account the written and oral assertions by the appellant and his sponsor that the sponsor provided 'material' or 'necessary' financial support to enable the appellant to meet his essential needs, or by rejecting those assertions without providing adequate reasons. At various paragraphs in his decision the judge states that there was "no evidence" in respect of material financial support provided by the sponsor to the appellant. For example, at [19] the judge claimed there was "no evidence" in respect of financial support between October 2017 and 2018, and that there was no evidence as to the payment for the appellant accommodation and other expenses such as utilities after the appellant and his sponsors started living together. Whilst it is correct that there was no independent documentary evidence, there was evidence in the form of the written and oral testimony from the appellant and his uncle. In his statement the sponsor indicated that he had provided money to the appellant since he (the sponsor) came to the UK and before they started cohabiting, but that he had not kept all of the relevant receipts, and that he also gave the appellant cash. These assertions were not inherently implausible, and the judge was obliged to engage with the assertions even if they were not supported by independent evidence. There has however been little or any reasoned assessment by the judge of the assertions, and no satisfactory reasoned explanation for rejecting the truthfulness of the assertions.

16. I am additionally and independently satisfied that the decision was made through a procedurally unfair manner as the judge's conclusion

at [18] that “no credible explanation” had been provided as to why the sponsor continued to send money to the appellant’s mother after he turned 18 without the appellant being given an opportunity to provide an explanation. I’m further additionally and independently satisfied that the concerns expressed by the judge at [35] in respect of the attempted obliteration of the date ‘31 October 2017’ in respect of a letter sent to the appellant concerning voter registration and the fact that the appellant was the addressee in respect of utility bills for the same address were not raised by the respondent and were not identified by the judge as issues of concern at the hearing. The appellant has consequently been deprived of a fair opportunity of providing an explanation for the concerns raised by the judge for the 1st time in his decision.

17. I find for the reasons given that the decision contains mistakes on points of law that require it to be set aside.

18. Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 18 June 2018 a case may be remitted to the First-tier Tribunal if the Upper Tribunal is satisfied that:

    (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or

    (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

19. I have determined that the judge failed to assess material evidence and make sustainable credibility findings in respect of the factual assertions of both the appellant and his sponsor. The appeal will be remitted to the First-tier Tribunal so that a new fact-finding exercise can be undertaken. It will be for the First-tier Tribunal to determine the most appropriate mode of hearing the appeal.

Notice of Decision

The making of the First-tier Tribunal’s decision involved the making of errors on points of law and is set aside.

The case is remitted back to the First-tier Tribunal to be decided afresh by a judge other than judge of the First-tier Tribunal Andonian.

D.Blum 2 March 2021

Signed Date

Upper Tribunal Judge Blum