Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/03103/2020

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On: 17 December 2021	**On: 19 January 2022**

Before

UPPER TRIBUNAL JUDGE KAMARA

Between

Kanishka Chathuranga Nissanka Arachchi Appuhami
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr D Bazini, counsel instructed by Jein Solicitors
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge Minhas, promulgated on 10 May 2021. Permission to appeal was granted by Upper Tribunal Judge Sheridan on 21 September 2021.

Anonymity

2. No direction has been made previously, and there is no obvious reason for one now.

Background

3. On a number of occasions between 2018 and 2019, the appellant applied for a residence card as the extended family member of his cousin, Mr Nuwan Prasad Sudagala Arachchige, an Italian national. The penultimate application was refused without a right of appeal on 24 June 2019 because the appellant failed to provide evidence of his dependency on his cousin either previously or since the appellant had entered the United Kingdom. The appellant subsequently reapplied for a residence card.

4. The Secretary of State refused the last such application on 17 March 2020, and it is this decision which is the subject of this appeal. Like the earlier decisions, the respondent noted that the appellant had made use of the NHS and worked in the UK while having no right to do so. The respondent concluded that the appellant was clearly not dependent upon his relative in the UK. As for prior dependency, the respondent considered the savings books relied upon by the appellant but concluded that there was a lack of evidence as to who made the payments. Reference was also made to the appellant's finances which include a letter from his mother stating that he can access her funds of 1.5 million Sri Lankan rupees and a fixed deposit certificate in his own name for 2.2 million Sri Lankan rupees. Consequently, the respondent did not accept that the appellant had been solely reliant upon his sponsor since entering the UK. In addition, no further evidence had been provided since the refusal letter dated 24 June 2019. The respondent stated that no consideration had been given to the other requirements to be satisfied under regulation 8 of the Immigration (European Economic Area) Regulations 2016.

The decision of the First-tier Tribunal

5. At the hearing before the First-tier Tribunal, the judge heard that the appellant arrived in the UK as a student in 2009 and worked for 20 hours a week with the remainder of his financial needs being met by his mother from money sent or given to her by the EEA sponsor who was resident in Italy before coming to the UK in 2014. The judge concluded that the appellant had no prior dependency on the sponsor but accepted that he had been dependent upon him since 2015, after the appellant's right to work in the UK ended.

The grounds of appeal

6. In the grounds of appeal, it was argued that the minor discrepancies remarked upon by the judge were not discrepancies at all, that she was wrong to reject the credibility of the witnesses on this basis and that the alleged discrepancies were immaterial as the judge found that the appellant was presently dependent upon the sponsor. It was also argued that the judge failed to weigh up all the material evidence, that her

findings were confused and contradictory and there was a distortion of the evidence.

7. Permission to appeal was granted on the basis sought.

8. The respondent's Rule 24 response did not appear on the case file.

The hearing

9. At the outset, Mr Clarke conceded that there was an error of law and gave an overview of the Rule 24 response. The latter being that it was open to the judge to determine that parts of the evidence did not adequately show that the money received met the appellant's essential needs or establish dependency. He agreed with what was said at [11] of the grounds about the judge's failure to take into account all material evidence before rejecting the appellant's evidence. Mr Clarke's view was that this was not a material error, relying on *Chowdhury* [2021] EWCA Civ 1220, as it appeared that there may be a break in the claimed dependency. In addition, there were two other revenue streams in that the appellant's father was working in Sri Lanka and the sponsor's father was working in Italy and sending money to the appellant's family in Sri Lanka. If the appellant was unable to provide evidence of what the three revenue streams were used for, he could not demonstrate dependency.

10. Mr Bazini relied on the grounds of appeal, expanding where necessary. He asked me to note the implication at [21] of the decision that the judge accepted the evidence of dependency prior to 2009. He also emphasised the judge's failure to record that the appellant had explained why his mother's letter had been written in English and criticised the exclusion of this evidence, which he argued was sufficient to get the appellant home on the prior dependency point. With regard to the income streams point, Mr Bazini argued that the judge had not considered this because she had rejected the evidence of the sponsor's financial support. It was only if she had accepted the evidence on the latter point, that the issue of alternative income streams became relevant. On the suggestion that there was a break in dependency, Mr Bazini explained that the appearance of a gap came about because the judge rejected the evidence relating to the years 2009-2014 when the appellant was a student in the UK but had accepted that he was part of the sponsor's household thereafter.

11. At the end of the hearing, I concluded that the First-tier Tribunal judge made a material error of law and, after some discussion, set aside the decision in its entirety. My reasons are expressed below.

Decision on error of law

12. The judge rejected the evidence of the appellant and the sponsor solely owing to "minor inconsistencies" in their evidence. At [21], the judge states that "taken together, I find they cause doubt on the credibility of the Appellant and the Sponsor and I find I cannot rely on their evidence. As

such I look to the independent evidence before me to consider dependency." Firstly, it is debateable whether the evidence considered to be inconsistent actually is such, for all the reasons set out in paragraphs 4-10 of the grounds. Secondly, it is not in contention that the judge erred in basing her rejection of the factual basis of the appellant's case on one factor alone.

13. At the very least, the judge ought to have considered the evidence of money transfers over many years along with the alleged discrepancies before coming to a settled position on credibility.

14. This is a material error because any gap in the appellant's dependency was not caused by a cessation in financial support but owing to the judge's rejection of the evidence including that contained in the letter from the appellant's mother. The said letter, dated 21 March 2019, goes into some detail regarding how the funds sent by the sponsor from Italy were used on the appellant's behalf. In addition, the judge did not accept that the appellant received cash from the sponsor from 2014 to 2015 because she had already rejected all the evidence of the appellant and sponsor at [21]. Oddly, the judge had no difficulty accepting that the appellant was part of the sponsor's household from 2015 onwards [30] and having found this, she ought to have looked at the earlier periods of claimed dependency in light of that finding. I conclude that it cannot be said that without these errors, the outcome of the appeal would have been the same.

15. In deciding whether to retain the matter for remaking in the Upper Tribunal, I was mindful of statement 7 of the Senior President's Practice Statements of 10 February 2010. Taking into consideration the nature and extent of the findings to be made as well as that the appellant has yet to have an adequate consideration of his appeal at the First-tier Tribunal, I reached the conclusion that it would be unfair to deprive him of such consideration.

Decision

The making of the decision of the First-tier Tribunal did involve the making of an error of on a point of law.

The decision of the First-tier Tribunal is set aside.

The appeal is remitted, de novo, to the First-tier Tribunal to be reheard at Hatton Cross, with a time estimate of 3 hours by any judge except First-tier Tribunal Judge Minhas.

Signed: T Kamara Date: 30 December 2021

Upper Tribunal Judge Kamara