**Upper Tribunal**
**(Immigration and Asylum Chamber)**

Appeal Numbers: UI-2022-002946 (EA/03229/2021)
UI-2022-002947 (EA/03231/2021)
UI-2022-002948 (EA/03335/2021)

**THE IMMIGRATION ACTS**

**Heard at Field House**
**On 26 September 2022**

**Decision & Reasons Promulgated**
**On 10 November 2022**

**Before**

**UPPER TRIBUNAL JUDGE NORTON-TAYLOR**

**Between**

**UBA HELMI ABDI (FIRST APPELLANT)**
**MAHREZ SHARIF HASSAN (SECOND APPELLANT)**
**DAHIR ELMI ABDI (THIRD APPELLANT)**
**(ANONYMITY DIRECTION NOT MADE)**

Appellants

**and**

**ENTRY CLEARANCE OFFICER**

Respondent

**Representation:**
For the appellant: Ms U Dirie, Counsel, instructed by Wilson Solicitors LLP
For the respondent: Ms N Willocks-Briscoe, Senior Home Office Presenting Officer

## DECISION AND REASONS

### Introduction

**1.** This is an appeal against the decision of First-tier Tribunal Judge J Bartlett ("the judge"), promulgated on 25 February 2022 following a hearing on 21

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February 2022. By that decision, the judge dismissed the appellants' appeals against the respondent's decisions, dated 25 February 2021 (in respect of the first appellant) and 5 December 2020 (in respect of the second and third appellants), refusing their applications for family permits under the Immigration (European Economic Area) Regulations 2016 ("the Regulations").

**2.** The appellants are all citizens of Somalia who have been residing in Kenya at all material times. The first appellant was born in 2002, the second in 2001, and the third in 2020. They applied for family permits under the Regulations in order to join Mr Ashkir Abdi Elmi, a Dutch citizen and the brother of the appellants (hereafter, "the sponsor"). It was asserted that the appellants were dependent on the sponsor for financial support in order to meet their essential living needs.

**3.** In refusing the applications, the respondent concluded that the appellants had failed to demonstrate that they were in fact dependent on the sponsor. It was said that the evidence of remittances from the sponsor was sporadic and that insufficient evidence had been provided as to the family's circumstances.

**4.** The appellants appealed under the Regulations.

## The decision of the First-tier Tribunal

**5.** The respondent was not represented at the hearing which, in this case as in many in which this situation arises, was unhelpful and, at least in part, led to one of the grounds of challenge against the judge's decision.

**6.** Having summarised the evidence and submissions made on the appellants' behalf, both oral and contained in a skeleton argument, the judge began his analysis at [10] with the finding that he was not satisfied that the sponsor had been the source of remitted funds. This finding was effectively repeated at [20].

**7.** The basis of that finding related to an analysis of figures on the sponsor's income and the amounts of money apparently sent to the appellants between March 2020 and April 2021: [11]-[15]. At [18], the judge calculated that the total amount of remittances for the period in question was £5500, whilst the sponsor's total business profit (from work as a taxi driver) amounted to £5627. On those figures, the judge found that the sponsor would have been left with only £127 for the year 2020/2021. At [19], the judge stated that the sponsor would have had "virtually nothing to live on." At [20], the judge noted the existence of other family members who were employed, specifically relatives in the Netherlands and a sister in the United Kingdom. Ultimately, the judge concluded that, "… I am not satisfied that the funds which allegedly come from the sponsor actually do come from the sponsor. In the circumstances, I am not satisfied that the

appellants are financially dependent on the sponsor.” The appeal was accordingly dismissed.

## The grounds of appeal and grant of permission

**8.** Three grounds of appeal were put forward. First, the judge acted unfairly by finding that the remitted funds had not come from the sponsor, when this issue had not been raised in the respondent’s decision letters and, in the absence of a Presenting Officer and any indication/questions from the judge, the concern had not been put to the sponsor at the hearing. Second, the judge failed to have regard to material considerations, specifically the fact that sponsor did not have to pay for his accommodation and that he had previously sponsored his mother and her financial dependency on him had been accepted. Third, the judge failed to make necessary findings relating to whether the appellants were, at least in part, dependent on the sponsor for their essential living needs.

**9.** Permission to appeal was granted by the First-tier Tribunal on all grounds.

## The hearing

**10.** Ms Dirie relied on the grounds of appeal and expanded on them in an appropriate manner. She submitted that, in the absence of a Presenting Officer, the judge should have at least raised a concern about the sponsor’s ability to have sent funds to the appellant’s at the hearing itself before reaching an adverse finding on the issue. As to the second ground, the judge had noted the evidence relating to accommodation costs, but had not seemingly taken this into account. On the issue of dependency and essential living needs, the judge had failed to assess whether the appellants needed the remitted funds for their essential living needs. The question was not whether they were entirely reliant on those funds.

**11.** Ms Willocks-Briscoe submitted that the judge’s decision was sustainable. He had undertaken an assessment of the evidence as a whole, including the figures relied on by the appellants themselves. Having carried out relevant calculations based on those figures, the judge had been entitled to find that the sponsor was not source of any remitted funds. It followed, she submitted, that any funds received by the appellants did not emanate from the EEA national and so there was no relevant dependency for the purposes of the Regulations.

**12.** In reply to Ms Willocks-Briscoe’s submissions and responding to some queries of my own, Ms Dirie acted with commendable professionalism in acknowledging the existence or otherwise of certain evidential matters. She accepted that there was no evidence before the judge of any other sources of income available to the sponsor. She accepted that there had in fact been no other sources of income for him at the relevant time. She also

accepted that the judge had not taken it upon herself to factor in accommodation costs to her calculations where none had applied to the sponsor. Finally, Ms Dirie made the point that the remittance receipts were in the sponsor's name, that none of these documents were said to be forgeries, and it was very unlikely that there would have been a family conspiracy relating to the transfer of funds to the appellants.

**13.** At the end of the hearing I reserved my decision.

## Conclusions on error of law

**14.** Before turning to my analysis of this case I remind myself of the need to show appropriate restraint before interfering with a decision of the First-tier Tribunal, having regard to numerous exhortations to this effect emanating from the Court of Appeal in recent years: see, for example, Lowe [2021] EWCA Civ 62, at paragraphs 29-31, AA (Nigeria) [2020] EWCA Civ 1296; [2020] 4 WLR 145, at paragraph 41, and UT (Sri Lanka) [2019] EWCA Civ 1095, paragraph 19 of which states as follows:

> "19. I start with two preliminary observations about the nature of, and approach to, an appeal to the UT. First, the right of appeal to the UT is "on any point of law arising from a decision made by the [FTT] other than an excluded decision": Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act"), section 11(1) and (2). If the UT finds an error of law, the UT may set aside the decision of the FTT and remake the decision: section 12(1) and (2) of the 2007 Act. If there is no error of law in the FTT's decision, the decision will stand. Secondly, although "error of law" is widely defined, it is not the case that the UT is entitled to remake the decision of the FTT simply because it does not agree with it, or because it thinks it can produce a better one. Thus, the reasons given for considering there to be an error of law really matter. Baroness Hale put it in this way in AH (Sudan) v Secretary of State for the Home Department at [30]:
>
> > "Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently."

**15.** Following from this, I bear in mind the uncontroversial propositions that the judge's decision must be read sensibly and holistically and that I am neither requiring every aspect of the evidence to have been addressed, nor that there be reasons for reasons. Finally, should the need arise, it may be appropriate to consider the underlying materials before the judge in order to better understand his/her reasoning: see, for example, English v Emery Reimbold and Strick Ltd. [2002] EWCA Civ 605; [2002] 1 WLR 2409, at paragraphs 11 and 89.

### *Ground 1*

**16.** My provisional view had been that the fairness challenge had some merit to it. I accept that the respondent's refusal letters did not expressly dispute the fact that the sponsor had sent funds to the appellants. Further, in the absence of a Presenting Officer, judges must act with some caution before appearing to take points against a party which have not been raised previously, or at a hearing.

**17.** In the present case I conclude that it would have been much better if the judge had specifically raised at the hearing any concern with the sponsor's ability to remit funds.

**18.** However, in all the circumstances, I conclude that there was no procedural unfairness on the judge's part such that his decision as a whole should be set aside. My reasons for this are as follows.

**19.** I am satisfied that there was significantly more evidence provided in the course of the appellate proceedings than had been submitted with the family permit applications. Thus, there was additional evidence for the judge to consider which had not been before the original decision-maker.

**20.** The figures analysed by the judge were those put forward by the appellants. There was no controversy as to their accuracy. The £127 figure arrived at by the judge at [18] was plainly open to him. It was equally open to him to find that this was a negligible amount for the sponsor to have had left over for himself over the course of an entire year. The judge's consequent finding that the sponsor was not the source of remitted funds was one which was clearly open to him on the evidence.

**21.** The question then arises; what if the judge's concern had indeed been raised at the hearing? It has been accepted that there was no other evidence before the judge which disclosed any additional sources of income for the sponsor. Indeed, it is also accepted that there were in fact no other sources of income for him at the time. In my judgment, it follows that, even if the judge had raised the issue by way of an indication to Counsel or through questions of his own put to the sponsor, there was nothing by way of material evidence that could have been provided to alter the calculation arrived at, or the conclusion drawn therefrom.

**22.** It has been argued that the judge's reference to other family members at [20] was unfair because, again, the issue was not raised at the hearing. There may be superficial attractiveness to that submission, but on further consideration it does not assist the appellants' case. Factually speaking, the judge was entitled to find that there were indeed other family members and that they were employed. The implication of what the judge said at [20] is that remitted funds may have come from them. Whilst this could be said to be speculative, the core point is the judge's clear finding that the funds did not emanate from the sponsor. In so finding, the judge was rejecting the claim put forward by the appellants.

**23.** In all the circumstances of this case, I conclude that there was no procedural unfairness on the judge's part. Even if there was (by virtue of a failure to raise an issue at the hearing) it could not have made a material difference to the outcome.

### *Ground 2*

**24.** The problem with the second ground of appeal is that the judge did not purport to factor in any accommodation costs for the sponsor when analysing the relevant figures. If he had, this would have been an error, in the absence of any reasons for rejecting the sponsor's evidence that he was living with his mother and sister rent-free.

**25.** In addition, the fact that the sponsor had financially supported his mother was not, in my judgment, a factor which the judge was bound to have expressly addressed in his decision. That the sponsor had been able to financially support his mother did not alter the figures with which the judge was concerned. It is also the case that there appears to have been no clear evidence before the judge to indicate that any funds previously provided to the mother by the sponsor himself had then been 'transferred' over to support the appellants.

**26.** Ground 2 fails.

### *Ground 3*

**27.** I accept that relevant dependency under regulation 8 of the Regulations does not impose a requirement that the recipient of funds is wholly reliant on the EEA national in respect of their essential living needs. A holistic approach must be undertaken: for a recent judgment of the Court of Appeal on this, see Begum [2022] EWCA Civ 1878, [2022] 1 WLR 2297.

**28.** With the in mind, aspect of the appellants' challenge must nonetheless fail. This is because of the judge's sustainable finding that any funds received by the appellants had not emanated from the sponsor (the EEA national) and so the dependency claim fell at the first stage. The judge did not need to go on and engage in an assessment of the purposes for which any funds were used.

## Anonymity

**29.** The First-tier Tribunal made no anonymity direction. It has not been suggested that I should make a direction at this stage and I do not do so.

## Notice of Decision

**30. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law and its decision stands.**

**31. The appeal to the Upper Tribunal is dismissed.**

Signed: H Norton-Taylor Date: 27 September 2022

Upper Tribunal Judge Norton-Taylor