



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

**Appeal Number: EA/06288/2019
EA/06289/2019
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EA/06291/2019**

THE IMMIGRATION ACTS

**Heard at Field House
On the 9 March 2022**

**Decision & Reasons Promulgated
On the 31st March 2022**

Before

**UPPER TRIBUNAL JUDGE OWENS
DEPUTY UPPER TRIBUNAL JUDGE HALL**

Between

**SHABANA KOUSAR
DUA FATIMA
MUHAMMAD BILAL
FIZA FATIMA
(ANONYMITY DIRECTION NOT MADE)**

Appellants

And

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellants: Mr L Youssefian, Counsel instructed by City Law
Immigration Ltd

For the Respondent: Ms A Ahmed, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The appellants are nationals of Pakistan who appeal against a decision of First-tier Tribunal Judge Hosie (the judge) promulgated on 5 August 2021 following a hearing on 28 June 2021.
2. The first appellant born 22 February 1990 is the mother of the second, third and fourth appellants who are her minor children born 11 October 2012, 28 December 2015 and 20 October 2018 respectively. Their applications for EEA Family Permits were refused on 26 October 2019.
3. The appellants had applied as extended family members of Abdul Rauf (to whom we shall refer as the sponsor) an Italian citizen exercising Treaty Rights in the UK. The sponsor is the brother-in-law of the first appellant and the uncle of the remaining appellants.
4. The husband of the first appellant and father of the remaining appellants is Abdul Sami Nasir who had lived with the family in Pakistan until 2019 when he was issued with an EEA Family Permit as the family member of the sponsor, who is his brother, and Mr Nasir then travelled to the UK leaving the appellants in Pakistan. It was accepted that Mr Nasir had been financially dependent upon the sponsor.
5. The EEA Family Permit applications of the appellants were considered by the respondent with reference to regulations 8 and 12 of the Immigration (European Economic Area) Regulations 2016. It was not accepted that the appellants had proved that they are financially dependent upon the sponsor and for this reason the applications were refused. The refusal decisions were reviewed and maintained by an Entry Clearance Manager on 16 January 2020.
6. The appellants appealed and Judge O'Garro of the First-tier Tribunal allowed their appeals in a decision promulgated on 12 January 2021, it being accepted that they were financially dependent upon the sponsor. This decision was set aside by Upper Tribunal Judge Kekic on 27 April 2021 and the appeals were remitted back to the First-tier Tribunal to be heard afresh.
7. The judge heard oral evidence from the sponsor and Mr Nasir. The judge considered the evidence in the round, and found that the appellants had not discharged the burden of proof and did not meet the requirements of regulations 8 and 12 of the EEA Regulations 2016. The judge did not accept that the appellants had proved that they were financially dependent upon the sponsor, finding that the appellants had not proved that they needed the material support of the sponsor in order to meet their essential needs in Pakistan.

The Application for Permission to Appeal

8. It was contended on behalf of the appellants that the judge had materially erred in law and the decision should be set aside. In summary it was

contended that the judge had been procedurally unfair by posing questions post hearing which had not been put to the witnesses at the hearing, and therefore the witnesses had been given no opportunity to answer those questions or address those issues. It was submitted that the judge had raised affordability in relation to the sponsor maintaining the appellants, which had never been previously raised.

9. It was further contended that the judge had materially erred in law by referring to case law such as Dauhoo [2012] UKUT 79 (IAC) and Chowdhury [2020] UKUT 00188 (IAC) and placing reliance upon this case law which was immaterial to the issues in these appeals.
10. It was claimed that findings made by the judge in relation to the two witnesses were vague and lacking in detail and the findings were unclear.

Permission to Appeal

11. Permission to appeal was granted by First-tier Tribunal Judge Barker who found the judge's approach to the assessment of the evidence as being arguably flawed as she seemed to raise a number of issues for the first time in her decision and reasons, without giving the appellants the opportunity to deal with these issues. There was an arguable lack of clarity in the judge's findings and arguably inadequate detail in the reasons for those findings.

The Upper Tribunal Hearing

12. Mr Youssefian in making oral submissions relied upon the grounds upon which permission to appeal had been granted. Although the case law of Dauhoo and Chowdhury was not relevant in these appeals, it was accepted that it was difficult to show that reference to the case law was a material error, other than to indicate that reliance on that case law demonstrated that the judge was confused about the issue dependency.
13. The main point related to procedural unfairness and we were referred in particular to paragraphs 29 and 32 of the First-tier Tribunal decision. It was submitted that the judge in those paragraphs posed questions which should have been put to the witnesses at the hearing to give them an opportunity to answer. At paragraph 29 the judge records, 'The sponsor has not been transparent about how he provides for his mother and wife and children in addition to his brother, Mr Nasir and the appellants.' It was argued that the sponsor would have been transparent had he been asked how he provided for his family and given the opportunity to explain.
14. It was submitted that affordability had been raised at the hearing, for the first time, and it was unfair not to give the sponsor an opportunity to deal with this. At paragraph 39 the judge does not make a finding as to whether Mr Nasir is in fact employed. Mr Nasir had given evidence that he was unemployed and had produced a P45 but the judge appears not to accept

this evidence without making a specific finding, or explaining why the evidence was not accepted.

15. On behalf of the respondent Ms Ahmed submitted that the judge had not materially erred in law. It was accepted that the case law referred to in the grounds was not relevant to these appeals, but that was not material because the judge had at paragraph 32 correctly found, ' What the appeal turns on is the issue of dependency.'
16. It was accepted that the judge posed some questions in her written decision that were not put to the witnesses, but it was submitted that overall these questions were not significant and not as detrimental as pleaded on behalf of the appellants. It was submitted that at paragraph 40 the judge was entitled to find that, ' Even if I accept that the sponsor sends her money regularly, I am unable to ascertain whether this is for essential needs. I do not know what her husband's financial position is and whether he continues to send her money.'
17. Ms Ahmed submitted that the judge was entitled to have legitimate concerns about the sponsor's lack of transparency about how he provides for his mother, his wife and children, in addition to his brother and the appellants. It was submitted that the decision of the First-tier Tribunal should stand and the appeals should be dismissed.
18. In response Mr Youssefian submitted that the judge should have asked questions of the witnesses if the judge had concerns that some issues had not been addressed, and to fail to give the witnesses the opportunity to deal with those issues was unfair. With reference to the finding about the sponsor's lack of transparency, it was submitted that the sponsor could not be transparent if he was not made aware of issues, and given an opportunity to answer those issues.
19. With reference to paragraph 40 of the First-tier Tribunal decision it was submitted that a schedule had been provided of the essential needs of the appellants and the judge had referred to this at paragraph 14 of the decision, and the judge had not adequately explained why if the sponsor sends money, this was not for the essential needs of the appellants which had been set out in that schedule.

Our Analysis and Conclusions

20. We can deal briefly with the submission that the judge erred by citing case law that is not relevant to these appeals. We agree with the representatives that Dauhoo and Chowdhury are not directly relevant to the issues in these appeals, but the citing of this case law is not a material error of law. The judge demonstrated at paragraph 33 of the decision an awareness of the correct test to be applied when considering financial dependency. We are satisfied that the judge applied the correct test, that being that the appellants needed to prove that they needed the material

support of the sponsor in order to meet at least part of their essential needs in Pakistan.

21. The judge was entitled to ask questions of the witnesses if the evidence was not clear, or clarification was needed, or there was an outstanding issue causing concern that the judge believed had not been addressed. The judge was obliged to give witnesses the opportunity to deal with outstanding issues, by asking questions and giving the witnesses an opportunity to answer. It is procedurally unfair to make findings about issues not raised in the refusal decision, such as affordability, without giving a witness an opportunity to address the outstanding issue.
22. There are examples of the judge posing questions that were not put to the witnesses at paragraphs 29 and 32. At paragraph 29 the judge poses the question as to whether the sponsor continues to support his mother in the UK as he had sponsored her to come to this country in 2017. That is a question that could, and if the judge thought it relevant, should have been put the sponsor at the hearing to give him the opportunity to answer. The judge also poses the question, asking what are the sponsor's financial commitments to his own family? Again the sponsor should have been given an opportunity to answer this. A further question is posed in paragraph 29, the judge noting that the sponsor receives benefits in addition to his salary, and asks whether he gives this money to his wife and children or some of it? This is something that the sponsor could have been asked about, and these questions are material because the judge goes on in paragraph 29 to make the finding about the sponsor not being transparent about how he provides for his mother, his wife and children, in addition to Mr Nasir and the appellants.
23. At paragraph 32 that judge poses the question asking whether the appellants remain in the same house? This is a question that could have been answered if it had been put to either the sponsor or Mr Nasir. The judge makes a factual error in referring to the first appellant as being 21 years of age, at the date of hearing she was in fact 31 years of age although that error is not material but the judge goes on to note that the first appellant has three minor children and asks the question whether they are living alone in the same property they shared with Mr Nasir before he left in 2019 or are they now living with other family members so that they have a male family protector? Again, if the judge believed this to be a relevant issue, it is a question that could have been asked of Mr Nasir.
24. At paragraph 39 the judge makes a finding that it is unclear what money Mr Nasir has for his essential needs, having recorded Mr Nasir's evidence that he is not working. The judge does not explain why it is unclear, and does not make a specific finding as to whether Mr Nasir is working or not. The judge does not explain why the evidence of the sponsor and Mr Nasir to the effect that Mr Nasir is not working is not accepted.
25. At paragraph 40 the judge makes a finding that it is not known what Mr Nasir's financial position is and whether he continues to send his family

money. The judge does not explain why it is not known whether Mr Nasir continues to send money and why his financial position is unknown, as it is not explained why the evidence of the sponsor and Mr Nasir on this point is not accepted.

26. We find that there has been procedural unfairness in that findings have been made on issues without giving the witnesses an opportunity to address those issues, and as explained above, adequate reasons have not been given for not accepting evidence.
27. The decision does disclose material errors of law which make the findings unsafe and the decision must therefore be set aside and remade. On behalf of the appellants it was argued that if a material error of law was found, there should be a remittal to the First-tier Tribunal notwithstanding that there had been a previous remittal. On behalf of the respondent it was argued that the decision could be remade in the Upper Tribunal.
28. Remaking in the Upper Tribunal would constitute the usual approach to determining appeals where an error of law is found unless the effect of the error has deprived a party of a fair hearing before the First-tier Tribunal, or the nature or extent of any judicial fact-finding which is necessary for the decision in the appeal to be remade, is such that it is appropriate to remit the case to the First-tier Tribunal.
29. In this case there was procedural unfairness and the appropriate course is for these appeals to be remitted to be heard afresh by a First-tier Tribunal Judge other than Judge Hosie and Judge O'Garro. No findings are preserved.

Notice of Decision

The decision of the First-tier Tribunal contained a material error of law and is set aside.

The appeals are allowed to the extent that they are remitted to the First-tier Tribunal to be heard afresh.

There has been no application for anonymity and no anonymity direction is made.

Signed



Date 23 March 2022

Deputy Upper Tribunal Judge M A Hall

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