IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: EA/07048/2019**
EA/07049/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On the 9 February 2022	**On the 31 March 2022**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

DOMINIC BONSU
LUCY BOATENG
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellants: Mr F Khan, Counsel (Direct Access)
For the Respondent: Mr D Clarke, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellants are citizens of Ghana. The first-named Appellant's date of birth is 4 June 1990. The second-named Appellant's date of birth is 13 December 1993. The Appellants are cousins. Their aunt, Esther Nsiah, (the Sponsor) is an Italian national exercising treaty rights in the UK.

2. The Appellants were granted permission by the First-tier Tribunal (Judge D Brannan) on 18 October 2020 to appeal against the decision of the First-tier Tribunal (Judge Pinder) to dismiss their appeals under the Immigration (European Economic Area) Regulations 2016 (the 2016 Regulations) in a

decision that was promulgated on 30 March 2021, following a hearing (CVP) on 24 February 2021. The matter came before me in order to determine whether the judge erred in law.

The decision of the First-tier Tribunal

3. The Appellants were not legally represented at the hearing before the First-tier Tribunal. The Sponsor attended and gave evidence. The Appellants case was advanced on the basis that they are "extended family members" with reference to reg. 8 of the 2016 EEA Regulations. The relationship between the Appellants and the Sponsor was not in issue. Their case is that they qualify for an EEA family permit because they are dependent on the Sponsor in the United Kingdom and they are members of her household in Ghana.

4. The judge at paras. 22–34 considered the issue of dependency. She made the following findings:-

> "26. I accept that the Appellants have received the remittances from the Sponsor as claimed. However, I am not able to make a finding as to whether this amounts to dependency for their essential needs since I have very little information as to their family and financial circumstances.
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> 27. The witness statements adduced from the Appellants and the Sponsor, both in the main bundle and supplementary bundle, do not give any detail as to why the Appellants became dependent as claimed on the Sponsor and when this may have started. They have asserted that they do not have any other income or support but I have very little documentary evidence in support of this.
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> 28. There is one letter concerning the first Appellant at p. 74 of the main appeal bundle, which confirms that he volunteered as an unpaid teaching assistant from January 2019 until February 2020. However, I do not have any evidence as at the time of the hearing to confirm the Appellants' circumstances other than what is contained in their very brief witness statements. I do not believe that there was evidence of the first Appellant's circumstances in this respect as at the time of the application either.
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> 29. The Sponsor confirmed in her oral evidence that the second Appellant had been undergoing training as a hairdresser and that this was also unpaid. However, I have no written confirmation of this, either from the second Appellant herself nor from where she was or is taking her training. I would have also expected to see written confirmation of any apprenticeship (and its terms) currently undertaken by the second Appellant.
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> 30. The Sponsor also confirmed in evidence that she had been the one who financed the Appellants' education but again, there was no documentary evidence of this in support of either the application or the appeal before me. I understand that the Sponsor or indeed the Appellants may not have kept any receipts issued at the time but there was no attempt before the Respondent or myself to evidence the Sponsor's responsibilities for the Appellants as far as their education is concerned.

31. In an overseas application for family permits as extended family members of an EEA national exercising treaty rights in the UK, I would have expected to see letters from community officials or other relevant persons holding authority in the Appellants' local area to confirm the Appellants' circumstances in addition to the specific items referred to above, wherever possible.

32. I also consider that there is a significant lack of detail concerning the Appellants' own parents. There was no mention of them in their respective statements, and the same applies to the Sponsor's statements. The Appellants are in their late 20s/early 30s and I have very little if any information as to their family background or how they came to be supported by their aunt as claimed.

33. I specifically asked the Sponsor by way of clarification about the Appellants' respective mothers, the Sponsor's sisters. I was told that they did not work and that was why the Appellants came to live with the Sponsor. When I asked whether it was possible for the Appellants to live with their respective mothers, the Sponsor responded that it was not because she did not know their whereabouts. I also asked the Sponsor whether the Appellants were in contact with their respective mothers and the Sponsor confirmed that they were. This very exchange would appear to contradict the Sponsor's initial response that she is not aware of the mothers' whereabouts.

34. In light of the above and the lack of detail in the Appellants' and the Sponsor's respective accounts together with the lack of documentary evidence, I am not in a position to conduct a holistic assessment as required by the summary guidance and case law as extracted above at para 25 and to find that the Appellants have been dependent on the Sponsor and/or remain so dependent so as to satisfy the meaning and requirements of Regulation 8."

The test for dependency

5. The Appellants are extended family members of the Sponsor as defined in reg. 8 (1) of the 2016 Regulations.[1]

6. The Appellants must establish that they are members of the Sponsor's household in Ghana or that they are dependent on the Sponsor in accordance with reg. 8 (2) in order to establish that the SSHD may issue

[1] The 2016 Regulations define an extended family member;-

"Extended family member"

8.- (1) In these Regulations "extended family member" means a person who is not a family member of an EEA national under regulation 7(1)(a), (b) or (c) and who satisfies a condition in paragraph (2), (3), (4) or (5).

(2) The condition in this paragraph is that the person is—

(a) a relative of an EEA national; and

(b) residing in a country other than the United Kingdom and is dependent upon the EEA national or is a member of the EEA national's household; and either—

(i) is accompanying the EEA national to the United Kingdom or wants to join the EEA national in the United Kingdom; or

(ii) has joined the EEA national in the United Kingdom and continues to be dependent upon the EEA national, or to be a member of the EEA national's household.

them with a family permit.[2] The judge did not find that they satisfied either test. The appeal before me concerns the issue of dependency under EU law.

7. In Jia v Migrationsverket C-1/05 [2007] QB 545 at [35] – [37] the Court of Justice summarised its understanding of the meaning of dependency as follows:

> "35. According to the case-law of the Court, 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 (OJ 1990 L 180, p. 26), Lebon, paragraph 22, and Case C-200/02 Zhu and Chen [2004] ECR I-9925, paragraph 43, respectively).
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> 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, paragraph 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, paragraphs 22 and 23).
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> 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."

8. In Lim v Entry Clearance Officer Manila [2015] EWCA Civ 1383 the Court of Appeal considered dependency and the case of Reyes v Migrationsverket 2014/C-423/12, [2014] QB 1140. The following para. specifically concern dependency: -

> "23. I do not, therefore, read Pedro as affecting the appropriate principles to apply in a case of this nature; it does not address the specific question that we have to resolve. In any event, I very much doubt whether it can now stand in light of the third and

[2] The grant of a family permit to an extended family member is discretionary. The 2016 Regulations read:-
Issue of EEA family permit
…
12. (4) An entry clearance officer may issue an EEA family permit to an extended family member of an EEA national (the relevant EEA national) who applies for one if—
(a)the relevant EEA national satisfies the condition in paragraph (1)(a);
(b)the extended family member wants to accompany the relevant EEA national to the United Kingdom or to join that EEA national there; and
(c)in all the circumstances, it appears to the entry clearance officer appropriate to issue the EEA family permit.
(5) Where an entry clearance officer receives an application under paragraph (4) an extensive examination of the personal circumstances of the applicant must be undertaken by the Secretary of State and if the application is refused, the entry clearance officer must give reasons justifying the refusal unless this is contrary to the interests of national security.
(6) An EEA family permit issued under this regulation must be issued free of charge and as soon as possible.
…

most recent decision of the CJEU, namely Reyes v Migrationsverket 2014/C-423/12, [2014] QB 1140. Reyes was concerned with the question whether an EU direct descendant aged 21 or older could be treated as a dependant within the meaning of Article 2.2(c) of the Citizens Directive. The same principles would apply equally to ascendants under paragraph (d).

24. The case concerned a 25-year-old Philippine national who said that she had been unable to find work in the Philippines. She was financially supported by her mother, who had become a German citizen, and her mother's cohabiting partner, a Norwegian citizen, who both resided in Sweden. The first question in the reference by the Swedish court was, in essence, whether, in order to be regarded as dependent and so fall within the concept of family member, a direct descendant had to show that he had tried without success to find employment in his country of origin or to obtain a subsistence allowance or some other means of supporting himself. Both the Advocate General and the Court held that this was not necessary, which was of course entirely in accordance with the earlier authorities. The Advocate General summarised his conclusions as follows (paragraph 69):

> 'On a proper construction of Article 2(2(c) of Directive 2004/38/EC of [the Citizens Directive] ... any member of the family of a Union citizen who, for whatever reason, proves unable to support himself in his country of origin and in fact finds himself in such a situation of dependence that the material support provided by the Union citizen is necessary for his subsistence, is to be considered to be a 'dependant'. As regards members of the nuclear family deemed to be dependants, such a situation must really exist and may be proved by any means.'

So the reason why the party cannot support himself or herself is irrelevant; the fact that he or she cannot do so is critical. This is inconsistent with the notion that dependency is established merely from the fact that material support is provided. The court essentially adopted the same approach, it said this:

> '20. In that regard, it must be noted that, in order for a direct descendant, who is 21 years old or older, of a Union citizen to be regarded as being a 'dependant' of that citizen within the meaning of Article 2(2)(c) of Directive 2004/38, the existence of a situation of real dependence must be established (see, to that effect, Jia, paragraph 42).
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> 21. That dependent status is the result of a factual situation characterised by the fact that material support for that family member is provided by the Union citizen who has exercised his right of free movement or by his spouse (see, to that effect, Jia, paragraph 35).
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> 22. In order to determine the existence of such dependence, the host Member State must assess whether, having regard to his financial and social conditions, the direct descendant who is 21 years old or

older, of a Union citizen, is not in a position to support himself. The need for material support must exist in the State of origin of that descendant or the State whence he came at the time when he applies to join that citizen (see, to that effect, Jia paragraph 37).

23. However, there is no need to determine the reasons for that dependence or therefore for the recourse to that support. That interpretation is dictated in particular by the principle according to which the provisions, such as Directive 2004/38, establishing the free movement of Union citizens, which constitute one of the foundations of the European Union, must be construed broadly (see, to that effect, Jia, paragraph 36 and the case-law cited).

24. The fact that, in circumstances such as those in question in the main proceedings, a Union citizen regularly, for a significant period, pays sum of money to that descendant, necessary in order for him to support himself in the State of origin, is such as to show that the descendant is in a real situation of dependence vis-à-vis that citizen.

25. In those circumstances, that descendant cannot be required, in addition, to establish that he has tried without success to find work or obtain subsistence support from the authorities of his country of origin and/or otherwise tried to support himself.

26. The requirement for such additional evidence, which is not easy to provide in practice, as the Advocate General noted in point 60 of his Opinion, is likely to make it excessively difficult for that descendant to obtain the right of residence in the host Member State, while the facts described in paragraph 24 of this judgment already show that a real dependence exists. Accordingly, that requirement is likely to deprive Articles 2(2)(c) and 7 of Directive 2004/38 of their proper effect.

27. Furthermore, it is not excluded that that requirement obliges that descendant to take more complicated steps, such as trying to obtain various certificates stating that he has not found any work or obtained any social allowance, than that of obtaining a document of the competent authority of the State of origin or the State from which the applicant came attesting to the existence of a situation of dependence. The Court has already held that such a document cannot constitute a condition for the issue of a residence permit (Jia paragraph 42).'

25. In my judgment, this makes it unambiguously clear that it is not enough simply to show that financial support is in fact provided by the EU citizen to the family member. There are numerous references in these paragraphs which are only consistent with a notion that the family member must need this support from his or

her relatives in order to meet his or her basic needs. For example, paragraph 20 refers to the existence of 'a situation of real dependence' which must be established; paragraph 22 is even more striking and refers to the need for material support in the state of origin of the descendant 'who is not in a position to support himself'; and paragraph 24 requires that financial support must be 'necessary' for the putative dependant to support himself in the state of origin. It is also pertinent to note that in paragraph 22, in the context of considering the Citizens Directive, the court specifically approved the test adopted in Jia at paragraph 37, namely that:

> '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.'

32. In my judgment, the critical question is whether the claimant is in fact in a position to support himself or not, and Reyes now makes that clear beyond doubt, in my view. That is a simple matter of fact. If he can support himself, there is no dependency, even if he is given financial material support by the EU citizen. Those additional resources are not necessary to enable him to meet his basic needs. If, on the other hand, he cannot support himself from his own resources, the court will not ask why that is the case, save perhaps where there is an abuse of rights. The fact that he chooses not to get a job and become self-supporting is irrelevant. It follows that on the facts of this case, there was no dependency. The appellant had the funds to support herself. She was financially independent and did not need the additional resources for the purpose of meeting her basic needs."

The grounds of appeal

9. The grounds of appeal assert that the judge erred when he identified the effective date for consideration of the appeal as the date of the hearing. The judge erred because he considered the appeal as though the Appellants were in the United Kingdom. The judge erred when assessing the Sponsor's bank statements because they detailed their financial circumstances in full. The judge did not consider all the evidence in the bundle. The judge made unreasonable assumptions. The judge took into account immaterial matters when considering the Sponsor's parents.

10. At the hearing Mr Khan conceded that there could have been more evidence of dependency forthcoming from the Appellants. However, he submitted that there was sufficient evidence to establish that the Appellants are dependent on the Sponsor for their essential needs. The judge was not entitled to consider reasons for dependency because that is not a material consideration. Mr Clarke submitted that the decision was open to the judge on the evidence.

Conclusions

11. The judge confused the applicable test with reference to Dauhou (EEA Regulations - reg 8 (2) [2012] UKUT 79 because that case sets out the test

applicable in an in country application. In this case the Appellants appealed decisions to refuse entry clearance as extended family members. However, considering the decision, the judge applied the correct test for dependency and in her findings considered dependency at the date of the hearing. Any confusion in respect of Dauhou is not material.

12. Dealing with the issue of dependency the judge set out the relevant law at para. 25. The judge set out the relevant paragraphs of Lim. The judge focused on the test of essential needs (see para. 26). My attention was drawn to para. 27 of the decision of the judge to support that she wrongly considered the reason for dependency. However, what the judge states at para. 27 must be considered in context. In this case the judge did not find that there was dependency. As the judge stated at para. 26, there was insufficient evidence of dependency. The judge did not find that dependency exists but dismissed the appeal in the absence of a reason why the Appellants could not support themselves. Faced with what the judge considered to be insufficient evidence of dependency, she was entitled to consider possible reasons for dependency which may have supported the existence of it.

13. The judge had bank statements which supported that remittances had been made as claimed. Lucy Boateng's bank statement covered a period from 13 March 2020 – 22 September 2020 and showed several remittances during that period. Dominic Bonsu's bank statements covered a period from 2 July 2020 – 23 September 2020 and similarly showed remittances. There was also evidence of remittances from the Sponsor made to Ghana that predate the bank statements. There is evidence of one in 2016, one in 2017 and one in 2018. Bank statements and evidence of remittances are pieces of evidence that a judge would expect to see. In this case, the bank statements covered a short period of time. I am not sure whether there was any evidence establishing the amount of money in sterling sent to the Appellant's during this period and the cost of living in Ghana which might have assisted the judge. (There is no mention of this by the judge and it is not raised in the grounds). There was no evidence from the Appellants that they each had only one bank account. The judge was entitled to ask questions of the Sponsor in order to gain a better understanding of the situation. The witness statements from the Appellants and the Sponsor are skeletal. The case was advanced on the basis that the Appellants are living in the Sponsor's house and they are wholly dependent on her for their needs because they are unemployed. The ECO clearly stated in the refusal letters that evidence concerning the family's financial circumstances was expected. It was open to the judge to find that the evidence relied on for the hearing was not sufficiently detailed and the Appellants had not discharged the burden of proof.

14. The judge had before her limited evidence to support dependency. While the issue for the judge was whether the Appellants at the date of the hearing are dependent on the Sponsor for their essential needs, the judge was reasonably entitled to take into account the evidence of a claimed history of dependency and consider the reasons it came about in order to

determine whether the test was met. The judge was not seeking to establish whether there was a reason why the Appellants could not support themselves, but rather whether their claim to be dependent was grounded in the evidence. The judge was seeking to understand context because she considered the evidence to be limited.

15. The judge had the benefit of hearing the Sponsor give oral evidence. The judge asked questions of the Sponsor (recorded at para 33). While I accept that the ability of the Appellants to live with their mothers in order to avoid dependency on the Sponsor is immaterial, I am satisfied that the judge was trying to understand context and the history of the dependency and whether they were dependent as claimed. The judge was entitled to express concern regarding the answer given by the Sponsor. It is not entirely clear what the judge meant by the lack of evidence from people in authority in Ghana. Perhaps she was thinking of evidence from bank managers or people holding responsible positions within the community who are aware of the Appellants' circumstances. However, I am satisfied that nothing turns on this.

16. Mr Khan specifically stated that irrationality was not raised as a ground of appeal. His submissions amounted to a disagreement with the findings. I find that the judge was entitled on the evidence to conclude that the Appellants had not satisfied the burden of proof. There is no evidence properly identified that the judge did not take into account. The judge took into account the bank statements but found that the evidence as a whole was not sufficient. The judge applied the correct legal test. The findings are grounded in the evidence and adequately reasoned.

17. There is no challenge in respect of the judge's findings in respect of the household test. While Mr Clarke conceded that the judge erred because she applied an erroneous "same" household test which is not correct, this is not an issue raised in the grounds and is, in any event, immaterial because the judge was not satisfied that the house where the Appellants live is the Sponsor's household because she was not satisfied of ownership or that she had even lived there. From the evidence of the Sponsor it is not clear to me when the Sponsor became an Italian national and when she started to exercise treaty rights. In any event, nothing turns on this for the purpose of this application.

18. I conclude that there is no material error of law and the decision of the judge to dismiss the Appellants' appeals is maintained.

Notice of Decision

19. There is no error of law. The Appellants' appeals are dismissed.

Signed Joanna McWilliam Date 22 March 2022
Upper Tribunal Judge McWilliam