



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2021-001239

First-tier Tribunal No: EA/50727/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:

12th October 2023

Before

UPPER TRIBUNAL JUDGE KOPIECZEK
DEPUTY UPPER TRIBUNAL JUDGE WELSH

Between

MR MURAD AHMED
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Patyna of Counsel, instructed by Farani Taylor Solicitors
For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

Heard at Field House on 23 June 2023

DECISION AND REASONS

Introduction

1. The Appellant has been granted permission to appeal the decision of First-tier Tribunal Judge CJ Gumsley (“the Judge”), promulgated on 24 June 2021.
2. No anonymity order was made previously and there is no need for one now.

Factual background

3. The Appellant is a national of Bangladesh (date of birth 12 January 1990). On 25 September 2020, he applied for a residence card pursuant to regulation 8 of the Immigration (European Economic Area) Regulations 2016 (“the 2016 Regulations”). His sponsor, a Spanish national, is his brother-in-law.

4. On 19 November 2020, the Respondent refused his application, on the ground that the Appellant had not demonstrated that he was a member of the household of, or dependent upon, the sponsor. In the Respondent's review document (undated) the Respondent relied on a further ground for refusal, namely that the Appellant arrived in the UK prior to his sponsor acquiring EEA citizenship.
5. The Appellant exercised his right of appeal under regulation 36 of the 2016 Regulations.

Decision of the Judge

6. The Judge dismissed the appeal for the following reasons:
 - (1) the Appellant arrived in the UK prior to the sponsor becoming a Spanish national [37], applying Moneke (EEA - OFMs) Nigeria [2011] UKUT 00341 (IAC);
 - (2) the account of the Appellant and his witnesses about the financial support received from the sponsor and whether such support was needed to meet the Appellant's essential needs was insufficiently credible and reliable [28].

Grounds of appeal and grant of permission

7. The grounds of appeal, filed on 8 July 2021, pleaded that the Judge's approach to the assessment of the evidence of the Appellant and his witnesses is flawed because he:
 - (1) carried out his own research after the conclusion of the appeal, and took into account that research, without giving the parties an opportunity to respond [ground 1];
 - (2) failed to take into account a relevant consideration, namely the Appellant's young age, when drawing conclusions about discrepancies in the evidence [ground 2].
8. The Respondent did not file a rule 24 response.
9. Permission was granted by First-tier Tribunal Judge Grant on 15 November 2021. The grounds upon which permission was granted were not restricted.

Upper Tribunal hearing

Application to amend the grounds of appeal

10. Ms Patyna applied to amend the grounds of appeal, in line with the written application that had been filed by email at 15.06 on 22 June 2023. Ms Patyna submitted that her submissions would be limited to those contained in the skeleton argument drafted by her colleague. The written application pleaded:

"That the Judge erred in finding that the Appellant could not fall within the definition of a dependent family national of an EEA citizen for reasons given by the Upper Tribunal in Moneke (EEA - OFMs) Nigeria [2011] UKUT 341 (IAC). The Judge was wrong to reject the Appellant's submissions to the contrary, as set out in the enclosed written note."

11. In summary, the skeleton argument submitted that the decision in Moneke should not be followed because:

- (1) The conclusion is not supported by reasons.
 - (2) The decision is not the subject of approval or confirmation by a superior court.
 - (3) The decision interprets the 2006 Regulations rather than the 2016 Regulations.
 - (4) "The relevant provisions of domestic law need to be read consistently with the relevant provisions of the Citizens Directive 2004/38/EC".
 - (5) The provisions of the 2016 Regulations should be given a broad, purposive construction. The interpretation in Moneke "would lead to perverse results which would discourage individuals from exercising their treaty rights".
12. Mr Whitwell opposed the application. Relying upon AZ (error of law: jurisdiction; practice) Iran [2018] UKUT 00245 (IAC), he submitted (i) that the application to amend was late, having been submitted less than 24 hours before the hearing and some 18 months after the grant of permission and (ii) it could not be said that the proposed ground had a strong prospect of success.
13. Ms Patyna accepted the chronology and did not seek to put forward any explanation for the delay. She stated that she did not intend to raise any matters not already foreshadowed in the skeleton argument but wished to make oral submissions on the merits of the proposed ground, given its importance in the appeal and because it is a matter of general importance.
14. We remind ourselves of the numerous exhortations of the Court of Appeal and the Upper Tribunal on the need for procedural rigour, for example, R (Talpada) v SSHD [2018] EWCA Civ 841. The case cited by Mr Whitwell, AZ Iran, is another example, though we take into account that this case concerned the test to apply when the permission Judge has identified a ground not raised by the party seeking permission to appeal.
15. We also remind ourselves of the principles to be applied when a party seeks permission to appeal out of time (Mitchell v News Group Newspapers Ltd [2013] EWCA Civ 1537; Denton v White [2014] EWCA Civ 906 and R (Hysaj) v Secretary of State for the Home Department [2014] EWCA Civ 1633).
16. We declined to hear any further submissions on the merits of the ground and refused to grant the application to amend, for the following reasons:
- (1) The delay in making the application to amend the grounds was unconscionable, having been made 18 months after the original grant of permission and less than 24 hours before the error of law hearing.
 - (2) No explanation was provided for the delay and we therefore conclude that there was no good reason.
 - (3) The ground upon which permission was sought is plainly neither meritorious nor one of general public importance such that the interest of justice demand that permission be granted, given the judgment of the Court of Appeal in Begum v SSHD [2021] EWCA Civ 1878 addressed all matters within the skeleton argument accompanying the application to amend the grounds.

Submissions on the grounds

17. We heard oral submissions from both advocates and we address the points they raised during the course of this decision.

Discussion and conclusion

18. The reasons given by the Judge for finding the evidence insufficiently reliable and credible to discharge the burden of proof were:
- (1) There was a significant discrepancy between the evidence of the Appellant and sponsor about the amount of money sent to the family by the sponsor. In reaching this conclusion, the Judge took into account currency converter research he conducted after the hearing [27(ii)].
 - (2) The Appellant's sister gave a different account to that of the sponsor as to how money was provided [27(iii)].
 - (3) No documentary evidence was provided in respect of money said to have been sent by money transfer [27(iii)].
 - (4) There was no detailed evidence from the Appellant or his witnesses as to how the money sent was spent, other than general assertions that it was needed to meet cost of living expenses [27(iii)].
 - (5) There was no detailed evidence about any other sources of income despite the number of members of the family said to be reliant upon funds from the sponsor [27(iii)].
 - (6) There was a significant discrepancy in the evidence of the Appellant and the sponsor as to how much money the sponsor gave the Appellant when the Appellant came to the UK and how the sponsor provided that money [27(iv)].
 - (7) The sponsor and the Appellant's sister failed to mention in their evidence a very significant amount of money that the Appellant stated had been given to him in cash in August 2013 and nor was there any evidence about why this money was given to the Appellant [27(v)].
 - (8) There was a significant discrepancy between the evidence in the witness statement of the Appellant and his oral evidence about the amount of money sent to him by the sponsor between 2010 and 2015, and a further discrepancy between the evidence of the Appellant and the sponsor in this regard.
 - (9) Evidence that the Appellant was working when he came to the UK was revealed for the first time in cross-examination [27(vii)].
 - (10) Evidence from the Appellant about expenditure whilst in the UK led the Judge to conclude that the Appellant did not appear to need any money from any other source to meet his essential needs [27(vii)].
 - (11) The Appellant's evidence about why he needed money from the sponsor on top of his wages was "extremely vague" [27(vii)].
 - (12) The Appellant's account about his lifestyle when he was working and in receipt of financial support from the sponsor was inconsistent.
19. The grounds pleaded that, though the Judge stated he had taken account of the Appellant's young age when assessing the credibility and reliability of his account, he in fact failed to do so. In our view, there is no merit in this ground. As is evident from the reasons given by the Judge, his concerns about the substance of the account of the Appellant and his witnesses related to the whole period during which financial support was said to have been given. Much of this period was at time when the Appellant was an adult. Further, as the Judge rightly

pointed out, if the Appellant had been unable to accurately recall, he could have stated that he did not know or could not remember [27(i)]. There is no error in the Judge's approach.

20. In relation to the conducting of post-hearing research, we remind ourselves of the decision of the Upper Tribunal in EG (post-hearing internet research) Nigeria [2008] UKAIT 00015, Hodge J said at [5]:

"It is, however, most unwise for a Judge to conduct post-hearing research, on the internet or otherwise, into the factual issues which have to be decided in a case. Decisions on factual issues should be made on the basis of the evidence presented on behalf of the parties and such additional evidence as the parties are aware of as being before the Judge. To conduct post-hearing research on the internet and to base conclusions on that research without giving the parties the opportunity to comment on it is wrong. If such research is conducted, and this determination gives absolutely no encouragement to such a process, where an Immigration Judge considers the research may or will affect the decision to be reached, then it will be the Judge's duty to reconvene the hearing and supply copies to the parties, in order that the parties can be invited to make such submissions as they might have on it."

21. Mr Whitwell, quite properly, did not seek to persuade us that the Judge had not erred in carrying out research without giving the parties the opportunity to reply. We find that it was an error of law but the question of materiality remains.
22. We do not consider the error to be material because it is one of many reasons given by the Judge for finding that the Appellant's account, and that of his witnesses, to be insufficiently reliable and credible. His other reasons at [27] are sound.
23. We find the Judge made an error of law in relying on post-decision research but, in the particular circumstances of the case, it has not been shown that the error was a material one.

Notice of Decision

24. The decision of the First-tier Tribunal did not involve the making of a material error on a point of law and so the decision stands.

C E Welsh

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

10 October 2023