IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003018

First-tier Tribunal No: EA/02881/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 9th of November 2023

Before

UPPER TRIBUNAL JUDGE RIMINGTON
DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

MISS JENNIFER AMENZE UWAIFO
(NO ANONYMITY ORDER MADE)

Appellant

and

AN ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mr Agho, instructed by Bridges Solicitors
For the Respondent: Mr Parvar, Senior Home Office Presenting Officer

Heard at Field House on 25 October 2023

DECISION AND REASONS

Background

1. The appellant is a citizen of Nigeria born on 19 April 1983. She appeals against the decision of First-tier Tribunal Judge Black ("the judge") who in a decision promulgated on 28 February 2022, following a hearing on 22 February 2022, dismissed the appellant's appeal.

2. The appellant had appealed to the First-tier Tribunal (where she was referred to as the 'first appellant') against a decision of the respondent Entry Clearance Officer dated 11 January 2021 refusing to issue the appellant a family permit as the family member of a relevant EEA citizen, pursuant to Appendix EU (Family Permit) ('EU(FP)') of the Immigration Rules. The appellant's four children had also appealed to the First-tier Tribunal at the same time, having also been refused entry clearance.

3. The respondent had refused the (first) appellant's application for entry clearance and those of her four children in summary on the following grounds:

   (1) It was not accepted that the appellant was the daughter of the sponsor; she had not provided an original birth certificate. The birth certificates of her children had been issued recently and their relationship to the sponsor was not accepted.

   (2) It had not been accepted on the limited evidence that the appellant was dependent on the EEA sponsor.

4. The appellant's application and that of her four children had been sponsored by her mother, a Spanish citizen, who is also the grandmother of the appellant's four children.

5. At the hearing before the First-tier Tribunal, the Presenting Officer conceded in the context of DNA evidence produced for the appeal hearing, that the appellant and her four children were all related to the sponsor as claimed. Therefore, the Presenting Officer confirmed that the decisions in relation to the appellant's four children were withdrawn. The Presenting Officer before the First-tier Tribunal confirmed that there was no requirement, in respect of the criteria in Appendix EU(FP) for the grant of family permits, for the grandchildren of the sponsor to show dependency on the sponsor. However, it was common ground that the appellant, as the adult child over the age of 21 of the sponsor, was required to demonstrate dependency.

6. The judge therefore considered the remaining appeal before her, of the first appellant before the First-tier Tribunal and the issue of dependency. The judge, having carried out a detailed analysis of the evidence before her from paragraphs [17] to [38] concluded at [39] that there were a number of anomalies in the evidence which she was unable to find wholly reliable. Whilst the judge accepted that the sponsor had transferred some funds to the first appellant over the years since 2018, taken overall the judge was not satisfied that the evidence was sufficiently cogent for a finding that the sponsor had been and was still providing real and effective financial or other support to the appellant to meet her essential needs.

Grounds of Appeal

7. The appellant appealed with permission on the grounds that it was contended (in summary) that:

   (1) The judge had erred in stating, at [37] that the evidence of the first appellant's essential needs was limited and that she found her list of expenses to be questionable in the context of the alleged payment of annual rent by the sponsor. The grounds referred to the appellant's witness statement and argued that the first appellant's schedule of expenses met the requirements under the Immigration Rules Appendix EU(FP) and argued that the judge's position was contrary to the law and evidence before her.

   (2) The judge erred in finding at [38] that there was no documentary evidence of communications between the sponsor and the appellant, it being submitted on a balance of probabilities it was unlikely that the sponsor and the first appellant, who was the sponsor's only daughter, would not be in

routine communication and that evidence of communication was not a requirement under the Immigration Rules Appendix EU (FP).

(3) Although the judge found at [38] that the sponsor had transferred some funds, the judge went on to find that it had not been established that the sponsor was providing real, effective financial or other support to the first appellant to meet her essential needs. It was submitted that the judge erred, as the Immigration Rules required the appellant to prove that she "cannot or for the relevant period could not, meet their essential living needs (in whole or in part) without the financial or other material support of the relevant EEA citizen".

(4) It was argued the judge erred at [41] in her consideration of Section 55 in relation to the appellant's children and it was argued that the judge failed to determine the impact of separation and appreciate the cost implications and impracticality of the first appellant having to apply to join her children after their arrival given that the respondent had withdrawn the decisions refusing the appellant's children entry clearance.

8. Permission to appeal to the Upper Tribunal was granted by the First-tier Tribunal, on 16 May 2022. The permission judge was of the view that given the judge's finding at [39] that the sponsor had transferred some funds to the first appellant over the years since 2018, it was arguable that some of these funds would have been sent to meet at least part of the appellant's essential living needs or that the appellant, being the only child of the sponsor, would require the financial or material support of her mother for these needs. The permission judge also considered it arguable there was an error of law in relation to the judge's consideration of Section 55, Borders, Citizenship and Immigration Act 2009 ('section 55'). Although it was acknowledged that section 55 only applies to children in the UK, the provisions provide guidance in relation to the spirit of the duty to be applied to children overseas. The permission judge noted that there was no indication that the children did not intend to exercise their right to join their grandmother in the UK and therefore it was arguable that inadequate consideration had been given to the fact that the appellant lived with her children and now would be separated by their prospective departure to the UK.

Rule 24

9. The respondent submitted a Rule 24 response dated 19 July 2022. At paragraph 3 it was not accepted that the best interests of the appellant's two eldest sons were engaged as they were no longer minors. It was accepted that there may have been an error in relation to the duty of the younger children.

(a) At paragraph 4 of the Rule 24 response the respondent stated as follows:

"It is difficult to imagine how the appellants children could be dependent on their Grandmother, who was an EU (sic) exercising treaty rights in the UK at the relevant time without the appellant also being dependent on the EU citizen".

10. In an email received by the Upper Tribunal on 24 October 2023 the Senior Presenting Officer sought to withdraw the concession made in the Rule 24 response on the basis that it should not have been made and that it was an error and based on a misunderstanding: the appellant's children did not have to demonstrate dependency and the decisions in the appeals before the First-tier

Tribunal of the appellant's four children were not withdrawn on the basis of dependency. The issue of the children's dependency was not before or decided by the First-tier Tribunal Judge.

Hearing

11. The matter came before us. We heard from the parties, initially in relation to the purported withdrawal of the concession, with Mr Parvar confirming that it was always the Home Office's position that the appellant needed to prove dependency but that the appellant's children, the sponsor's grandchildren, were not subject to that requirement as they were then all under 21 and therefore the observation made in the Rule 24 response was illogical.

12. Mr Agho on behalf of the appellant relied on paragraph [33] of the judge's decision and reasons, in which the judge set out that the sponsor had sent funds to one or more of the appellant's children which Mr Agho submitted was the reason why the Rule 24 had conceded the dependency issue.

13. We did not agree with Mr Agho's interpretation. The judge was not making findings on dependency in relation to the appellant's children, either at [33] or otherwise. The judge had set out the evidence before her in relation to claimed dependency of the appellant on the sponsor and then set out the difficulties with that evidence in her findings, which did not accept that there was any dependency in the appellant's case.

14. It is difficult to see how in that context, including where the judge was expressly not considering the cases of the appellant's children and had, at [12], treated the respondent's decisions in the cases of the four children of the appellant as withdrawn, the judge could have been said to have made findings at [33] or otherwise, that the children were dependent on the sponsor. Similarly, we did not agree that the respondent could have properly drawn such an inference from the judge's findings.

15. We considered the guidance including in **NR (Jamaica) v SSDH [2009] EWCA Civ 856** and made a preliminary decision at the hearing that the purported concession in terms of paragraph 4 of the Rule 24 response dependency issue was withdrawn due to its narrow terms and that the issue of the children's dependency was clearly not before the First-tier Tribunal Judge. We were satisfied that the appellant was not prejudiced by the Upper Tribunal proceeding in light of the withdrawn concession, including that the purported concession was in our view based on a mistake of fact by the author of the Rule 24 and such was unrelated to the grounds of appeal before us.

16. We heard submissions from both representatives on the substantive grounds and reserved our decision.

Discussion

17. We have reminded ourselves of the authorities which set out the distinction between errors of fact and errors of law and which emphasise the importance of an appellate tribunal exercising judicial restraint when reviewing findings of fact reached by first instance judges. This was summarised by Lewison LJ in **Volpi & Anor v Volpi [2022] EWCA Civ 464** at [2] as follows:

“i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.

ii) The adverb "plainly" does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.

iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.

iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.

v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.

vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract.”

18. In the earlier case of **Fage UK Ltd. v Chobani UK Ltd. [2014] EWCA Civ 5** at [114]: the Court of Appeal similarly advised appropriate restraint in the approach to first instance decisions:

“i. *The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.*
ii. The trial is not a dress rehearsal. It is the first and last night of the show.
iii. Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.
iv. In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.
v. The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).
vi. Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done.”

Ground 1

19. The judge correctly directed herself at [36] including in relation to the relevant authorities and that the family member must need that support in order to meet their basic needs including that in **Reyes v Migrationsverket (Case C-423/12)** it was held it was not enough to show that financial support was in fact provided by the EU citizen to a family member.

20. Although receipt of such support was a necessary condition of dependence, it was not a sufficient condition and it was necessary to determine that the family member was dependent in the sense of being in need of assistance, even though it was irrelevant why they were dependent. If, as in **ECO Manila v Lim [2015] EWCA Civ 1383**, the family member could support themselves, there was no dependency even though they were given financial support from the EU citizen.

21. We take into account that those findings and the judge's interpretation of the legal authorities was not challenged before us. It was for the appellant to demonstrate on the balance of probabilities that she satisfied the relevant requirements of the Immigration Rules.

22. The judge set out a comprehensive analysis of the evidence and provided adequate and sustainable reasons. The judge properly directed herself in limiting her consideration of the claimed dependency from July 2018 when the sponsor was granted Spanish citizenship.

23. The judge went on to consider the evidence of the appellant's claimed essential needs, provided at paragraph 18 of her witness statement, and found the evidence to be 'very limited' and lacking in detail. It was not a case of the judge not considering the list of claimed essential needs. The judge acknowledged this evidence and reached findings that were open to her.

24. Paragraph 18 of the appellant's witness statement contained a short list of what the appellant detailed to be her essential needs (feeding, school fees, medicine, transport, other expenses, and rent). The judge was finding, in terms, that there was no further detail provided in respect of each of those alleged essential needs. That was a finding properly open to the judge, including in the context of the judge's unchallenged findings at [20] that the appellant's witness statement was not capable of challenge by way of oral examination and therefore the judge attached little evidential weight. In addition, the judge noted that it appeared to have been drafted for the appellant with a sentence appearing to refer to the sponsor rather than the appellant. Again, those findings were unchallenged before us.

25. The judge also identified a number of anomalies with the evidence, including, at [21] where the judge noted that there were various receipts for payment of rent a year in advance. However, the appellant's witness statement referred to the sponsor giving the appellant about £250-300 per month, of which part was said to be spent on 'rent'.

26. The judge was entitled to find that this was a significant conflict in the evidence, given that the receipts purported to establish that the rent was being paid annually in advance by the sponsor and not monthly by the first appellant. This was evidence submitted by the appellant and the anomalies were plain. The judge's approach to the evidence of essential needs was properly reasoned. No error of law has been made out in respect of Ground 1.

Ground 2

27. The second ground argued that the judge erred in requiring documentary evidence of communication between the appellant and her daughter because it was argued that as they were mother and daughter, it was unlikely that they would not be in communication. It was further argued that evidence of communication is not a requirement under the relevant Immigration Rules.

28. The judge expressly accepted, at [38], that the appellant were mother and daughter. However, she noted that they had not lived together for over twenty years. The judge was entitled to have regard to that and to the lack of any evidence of communication, which pointed to a considerable level of independence, when assessing whether the appellant was dependent on the sponsor as claimed, for her financial needs, particularly bearing in mind the assessment is a holistic one.

29. Whilst the judge might perhaps have better expressed her finding, at [38], that she was unable to find that the appellant was emotionally dependent on the sponsor, any error is not material, as it does not impact on the judge's core findings that the appellant had failed to demonstrate that the appellant was in receipt of material support from the sponsor to meet her essential needs in whole or in part. Ground 2 is not made out.

Ground 3

30. The judge's findings were properly reasoned, and it was open to her to find as she did, that she was unable to find the appellant's evidence wholly reliable. Although the judge accepted at [39] that the sponsor had transferred some funds to the first appellant over the years since 2018, the judge made clear findings that the evidence was not sufficiently cogent for a finding that the sponsor had been and was providing real and effective financial or other support to the appellant to meet her essential needs.

31. Although Mr Agho relied on the Immigration Rules and the fact that it was sufficient for an applicant to be reliant in whole or **in part** (our emphasis) on the sponsor, the judge was very clear that the provision of financial support in itself was insufficient if, as the judge found in this case, the appellant had not demonstrated that those funds were necessary for the person's (in this case the appellant's) essential needs. There was no misdirection in law. In accepting that some funds had been transferred to the appellant, the judge did not accept that the appellant was reliant, either in whole or in part on the sponsor.

32. Whilst the judge stated at [38] that the appellant was 'living independently, albeit with some financial support from her mother' this has to be considered holistically (rather than 'island hopping' as the appellant's representative was asking us to do) in the context of the judge's overall findings, that such support was not required to meet the appellant's essential needs.

33. The judge had also taken into account that the respondent had identified the paucity of evidence in the refusal of entry clearance and the appellant had not adduced more cogent and coherent evidence on this issue where she had an opportunity to do so. The judge considered that the sponsor claimed that she had not been able to obtain evidence of transfers from Spain due to having left that country. As the judge pointed out, this did not explain the very limited evidence of transfers from the UK. Nor did it explain the anomalies in the documentary evidence relating to payment of the first appellant's rent (see paragraphs 25 and 26 above).

34. Ground three amounts to no more than a disagreement with the judge's cogent findings. There is no error of law disclosed in the judge's comprehensive reasoning. Grounds one to three are not made out.

Ground 4

35. Ground 4 argued that the judge erred in her consideration of section 55. Although the respondent's Rule 24 response indicated that there may have been an error in respect of the appellant's two younger children, Mr Parvar submitted that any error was not material.

36. Mr Agho made submissions on the foreseeability of the appellant's children moving to the UK and submitted that the judge erred in not considering the children's best interests in this context.

37. We take into account that section 55 does not apply to children outside of the UK although it was common ground before us that the spirit of the Section 55 duty is a relevant consideration. The judge at the beginning of her decision, at paragraph [7], had summarised the appellant's grounds of appeal, Mr Agho's oral submissions and the skeleton argument. This included, at 7(k), the contention that this was a family unity and that it was in the best interests of the children, whom it was submitted would be given entry clearance under Appendix EU(FP), to live in the UK with their mother and their grandmother.

38. Contrary to the grounds therefore, the judge was fully aware of the arguments being made on behalf of the appellant and the context in which she should consider section 55.

39. The judge at [41] undertook a detailed consideration of the section 55 issue including noting the submissions on behalf of the appellant, that section 55 "would be engaged were the first appellant not issued a family permit". The judge made a clear finding that she did not accept this argument. In our view the grounds of appeal are a mere disagreement with that finding.

40. The judge went on at [41] to set out her reasons for reaching that conclusion. In so far as a consideration of the spirit of the section 55 duty was required, the judge had to consider the best interests of the children as they were at the date of hearing (when only the two youngest children were still minors) when the appellant and her four children were still living together in Nigeria. The judge however, was clearly aware that the refusal decisions in the children's cases had been withdrawn and that they would be granted entry clearance and could therefore decide to move to the UK if they wished.

41. The judge properly directed herself that best interests were a primary consideration but went on to set out that the mere fact of the children being permitted to enter the UK was not sufficient for a finding that it would be in their best interests to do so. It was the judge's finding that it was in the best interests of the children, who are Nigerian citizens, to remain with their mother in the country where they had grown up and where they lived in reasonable circumstances there. The judge considered that the children had access to education and healthcare, that they were emotionally dependent on their mother who was able to care for the children and had the benefit of some financial support from her own mother.

42. The judge was essentially considering that it was a matter of choice as to where the children lived. No error is disclosed in the judge's properly reasoned conclusion that there was no evidence that the children's continued residence in Nigeria with their mother, would cause any significant detrimental impact on their welfare or wellbeing.

43. It was a finding open to the judge that at the date of the hearing it was in their best interests to remain with their mother in Nigeria. Ground 4 is not made out.

Decision

44. The decision of the First-tier Tribunal does not contain an error of law and shall stand. The appellant's appeal is dismissed.

M M Hutchinson

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

6 November 2023