



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005818
First-tier Tribunal No:
EA/53189/2021
IA/13161/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 22 August 2023

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

Ismailur Rahman Sabbir
(NO ANONYMITY DIRECTION MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Mr S Spurling, instructed by Lloyds Clifford Solicitors
For the Respondent: Mr N Wain, Senior Home Office Presenting Officer

Heard at Field House on 14 April 2023

DECISION AND REASONS

1. The appellant is a national of Bangladesh. On 31 December 2020 he made an application for an EEA Family Permit as the extended family member of Mr Rasha Miah, his paternal cousin, under the Immigration (European Economic Area) Regulations 2016. The application was refused by the respondent for reasons set out in a decision dated 8 February 2021. The respondent was not satisfied that on the basis of the evidence provided in support of the application, the appellant is dependent upon the sponsor as claimed.

2. The appellant's appeal against that decision was dismissed by First-tier Tribunal Judge Shepherd for reasons set out in a decision dated 26 August 2022. The only issue in the appeal was whether the appellant is dependent on the sponsor. Judge Shepherd was not satisfied the appellant is dependent on his paternal cousin as required.
3. The appellant claims the decision of Judge Shepherd is vitiated by material errors of law. Four grounds of appeal are advanced. In summary, first, the appellant claims Judge Shepherd applied the wrong test for dependency. The appellant claims the judge incorrectly asked herself whether money sent by the sponsor was "sufficient to cover" (all of) the Appellant's outgoings or needs. The appellant claims it is well-established that a sponsor need not cover all of the family member's living costs in order for that family member to be considered dependent. Second, the appellant claims Judge Shepherd failed to take relevant evidence into account. It is said the judge failed to take into account the sponsor's oral evidence about the appellant's living costs, based on his first-hand knowledge from his trip to Bangladesh in January 2022, and wholly ignored the objective evidence that was highlighted in the appellant's skeleton argument about living costs in Bangladesh. Third, the appellant claims the finding made by Judge Shepherd that there was insufficient evidence for the appellant to discharge the burden of proof in relation to dependency, was perverse and/or irrational in the face of the evidence before the Tribunal, including the oral evidence of the sponsor. Finally, the appellant claims Judge Shepherd took irrelevant considerations into account. The appellant claims the precise timeline of when the sponsor and other family members began providing financial support, years before that, is not relevant to the question of current dependency.
4. The appellant lodged an out of time appeal with the First-tier Tribunal. Permission to appeal out of time was refused by First-tier Tribunal Judge Saffer on 7 November 2022. He said:

"The application is 10 days out of time. That is not de minimis. The reason for the delay, lack of funding, is a very poor excuse given he had 28 days from promulgation to secure funding. In any event, the grounds are weak as even if they are correct regarding the very minor issues asserted, there is nothing in the grounds. The Judge applied the correct standard of proof and made findings on all issues that were available on the evidence. The grounds are simply a disagreement with the decision."
5. The application for permission to appeal was renewed to the Upper Tribunal. The applicant again explained that the delay in the application for permission to appeal was caused by difficulties in the appellant

securing funds for the application. Permission to appeal was granted by Upper Tribunal Judge Pickup on 24 January 2023. He said:

“3. ... looking at [51] of the decision in the context of the whole, it is arguable that the judge applied an incorrect test of dependency. The appellant does not need to be dependent on the sponsor for all or even most of their essential needs, but the support must be necessary to meet essential needs.

4. It may be that the other findings render this error immaterial to the outcome of the appeal, but it is at least arguable and should be explored further before the Upper Tribunal. For that reason, permission is granted. To avoid difficulties, permission is granted on all grounds.”

6. The respondent has filed a rule 24 response dated 23 February 2023. The appeal is opposed. The respondent notes First-tier Tribunal Judge Saffer had refused permission to appeal out of time. The renewed application to the Upper Tribunal should therefore have been considered under Rule 21(7) of The Tribunal Procedure (Upper Tribunal) Rules 2008. The Upper Tribunal must only admit the application if the Upper Tribunal considers that it is in the interests of justice for it to do so (Rule 21(7)(b)). The respondent states Judge Pickup failed to address whether it is in the interests of justice to admit the appeal, and that should be addressed as a preliminary matter.

The preliminary matter

7. Mr Spurling referred to the application for an extension of time as set out in the grounds of appeal which provide an explanation for the delay in filing an appeal on time. Mr Spurling accepts Judge Pickup did not address Rule 21(7)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008, but, he submits, Judge Pickup clearly considered there to be some merit to the appellant’s claim that Judge Shepherd applied an incorrect test of dependency that warrants further consideration by the Upper Tribunal. He submits it is in the interests of justice for that matter to be considered by the Upper Tribunal.
8. Although I accept the force in the claim made by the respondent in the rule 24 response that Judge Pickup considered the ground concerning the test applied by the Judge to be arguable (but potentially immaterial), in my judgement the appropriate course is for me to confirm that the appeal is admitted. The appellant made his application for an EEA Family Permit under the EEA Regulations 2016 on the last possible day. An application under those regulations is no longer possible. As there is an arguable claim that Judge Shepherd applied the wrong test, it is in my judgment in the interests of justice to admit the appeal for the grounds to be considered by me. The parties are both represented at the hearing before

me and neither Mr Spurling nor Mr Wain suggested that I would not be able to proceed with the hearing as listed, if the preliminary matter is resolved in favour of the appellant and the appeal is admitted. In any event, I heard the parties submissions upon the grounds of appeal that have been advanced and upon which permission was granted by Upper Tribunal Judge Pickup.

The parties submissions

9. Mr Spurling submits the sole issue before the First-tier Tribunal was whether the appellant needs the financial support he receives from the sponsor to meet his essential living needs. The Tribunal was not required to assess what other money he could potentially have, and dependency of choice is permitted. Here, Judge Shepherd was looking at whether the money sent was required to cover the outgoings. At paragraph [45] Judge Shepherd accepted there is no issue with the credibility of the sponsor, who gave evidence that he sends money to the appellant as and when he can. The background material before the Tribunal established that the sums being sent by the sponsor are significant as far as someone living in rural Bangladesh is concerned. Judge Shepherd criticised the evidence of the appellant but erred in paragraph [51] of her decision because she was looking for evidence of what the appellant's outgoings are, and whether the sums sent were sufficient to cover them. The judge said, "*I do not know what the appellant's outgoings actually are*", and so she was looking not simply at the appellant's essential living needs but all his outgoings. The appellant was not required to establish that all his outgoings are covered by the funds sent by way of support. The test is whether the funds remitted are required to meet the essential living costs of the appellant. The appellant lives in rural Bangladesh in his mother's household. The sponsor's evidence was that he was sending the money for the support of the household. Mr Spurling submits the appellant's mother is a conduit for the appellant for whom the money is destined.

10. Mr Spurling submits that if there is any ambiguity as to the test that was applied by the First-tier Tribunal Judge, that ambiguity must be resolved in favour of the appellant. He is entitled to know that the correct test has been applied and all the evidence before the Tribunal has been considered in that light. Judge Shepherd does not, Mr Spurling submits, unambiguously demonstrate that she had the correct test in mind in reaching her decision. Mr Spurling submits that when considering the evidence before the Tribunal, although the production of relevant documentary evidence is helpful, oral evidence can suffice and here the oral evidence of the sponsor as set out in paragraphs [16] and [17] of the

decision was that he had visited the appellant's family in January 2022 and had to pay their rent, bills, food and clothing.

11. In reply, Mr Wain submits the grounds of appeal amount to a disagreement with a decision that was open to Judge Shepherd. He submits that at paragraph [39] of the decision, Judge Shepherd refers to the test as set out in Latayan v SSHD [2020] EWCA Civ 191. He submits that on a proper reading of paragraph [51] of the decision, Judge Shepherd was simply saying that she did not know what the appellant's outgoings are and that must include the costs of his essential living needs. She was not satisfied that the monies sent to the family were therefore required to meet those essential living needs. Mr Wain submits that I should be slow to infer that having directed herself to the appropriate authorities and the test, Judge Shepherd was looking for evidence that all the appellant's outgoings are met from monies sent by the sponsor. He submits Judge Shepherd considered all the evidence that was before the Tribunal in the round. At paragraph [31] she record the claim made on behalf of the appellant relying upon the evidence, including background material to explain the sums sent. At paragraph [44] Judge Shepherd set out her concerns about the evidence before the Tribunal. The judge acknowledged the appellant may not be able to obtain receipts for all items, but as she said, the absence of a bank account is not a good reason for the absence of evidence from the appellant himself as to his income and outgoings as he should know what money he receives and what, approximately, he spends it on. It is only with such evidence that there can be an informed assessment of whether the appellant's essential living needs are met by the money sent by the sponsor.

Decision

12. The appellant claims to be dependent upon his paternal cousin. Mr Rasha Miah attended the hearing of the appeal and gave evidence as set out in paragraphs [13] to [27] of the decision of Judge Shepherd. As Judge Shepherd noted at paragraph [14] of her decision, the evidence of Mr Miah is that the appellant lives with his mother and sister in a two-room house. At paragraph [22] she recorded the evidence that the property is rented, although the sponsor was not sure who by. The rent is said to be paid in cash. The evidence before the Tribunal was that the appellant's family has been supported for some time, initially by the sponsor's father and latterly by the sponsor. At paragraphs [16] and [17] of her decision Judge Shepherd recorded the evidence of the sponsor regarding his visit to Bangladesh in January 2022 and the assistance he provided to the appellant and his family in carrying out repairs and renovations to the property and assistance with the cost of rent, bills, food and clothing. At

paragraph [18], Judge Shepherd noted the evidence of the sponsor that his parents also support the family occasionally particularly on special occasions such as Eid. At paragraph [21] Judge Shepherd refers to the evidence of the sponsor that he is the one who supports the appellant and his family and that the *“support he send is for all of them but mostly for his cousin”* (the appellant).

13. In *Lim - ECO (Manila)* [2015] EWCA Civ 1383 Lord Justice Elias, with whom McCombe LJ, and Ryder LJ agreed, said, at [25], it is not enough simply to show that financial support is in fact provided by the EU citizen to a family member. The family member must need the support from his or her relatives in order to meet his or her basic needs. The correct test was set out at paragraph [32] of the decision. The critical question is whether the individual is in fact in a position to support themselves. That is a simple matter of fact. If they can support themselves, there is no dependency, even if he/she is given financial material support by the EU citizen. Those additional resources are not necessary to enable them to meet their basic needs.
14. As set out in paragraph [39] of Judge Shepherd’s decision, more recently, in *Latayan v SSHD* [2020] EWCA Civ 191, Jackson LJ said:

“23. Dependency entails a situation of real dependence in which the family member, having regard to their financial and social conditions, is not in a position to support themselves and needs the material support of the Community national or his or her spouse or registered partner in order to meet their essential needs: *Jia v Migrationsverket* Case C-1/05; [2007] QB 545 at [37 and 42-43] and *Reyes v Migrationsverket* Case C-423/12; [2014] QB 1140 at [20-24]. As the Upper Tribunal noted in the unrelated case of *Reyes v SSHD* (EEA Regs: dependency) [2013] UKUT 00314 (IAC) , dependency is a question of fact. The Tribunal continued (in reliance on *Jia* and on the decision of this court in *SM (India) v Entry Clearance Officer (Mumbai)* [2009] EWCA (Civ) 1426):

“19. ... questions of dependency must not be reduced to a bare calculation of financial dependency but should be construed broadly to involve a holistic examination of a number of factors, including financial, physical and social conditions, so as to establish whether there is dependence that is genuine. The essential focus has to be on the nature of the relationship concerned and on whether it is one characterised by a situation of dependence based on an examination of all the factual circumstances, bearing in mind the underlying objective of maintaining the unity of the family.”

Further, at [22]

“... Whilst it is for an appellant to discharge the burden of proof resting on him to show dependency, and this will normally require production of relevant documentary evidence, oral evidence can suffice if not found wanting. ...”

15. Whether the appellant is dependent on the sponsor is therefore a factual question for the judge to assess on the evidence before the Tribunal. The burden rested upon the appellant.
16. At paragraph [44] of her decision, Judge Shepherd referred to the evidence set out in the appellant's witness statement. She set out her concerns as to the weight that can properly be attached to that evidence but in any event, she referred to his evidence that his essential needs are accommodation, food, drink, clothing, transport, mobile phone and pocket money. She acknowledged that he may not be able to obtain receipts for all of that expenditure and noted the appellant does not explain how he receives the money in circumstances when it is not sent directly to him. Judge Shepherd had previously noted the living arrangements and at paragraph [44], she noted the money transfer receipts list the appellant's mother as the beneficiary.
17. I reject the claim that at paragraph [51] Judge Shepherd applied the wrong test as to dependency. As I have already noted at paragraph [39] of her decision, Judge Shepherd referred to the relevant passages from the decision of the Court of Appeal in Latayan v SSHD. Contrary to what is said in the grounds of appeal, Judge Shepherd does not say she does not know what all of the appellant's outgoings are. She refers simply to the "appellant's outgoings". The words "all of" are imported into that paragraph by the appellant in the grounds of appeal. In any event, paragraph [51] cannot be read in isolation. When the decision is read as a whole, it is in my judgment clear that Judge Shepherd considered the wide canvass of evidence before the Tribunal and was not looking for evidence of the appellant's total income and expenditure, but for evidence capable of supporting the appellant's claim that the funds transferred by the sponsor to the appellant's mother are to meet the appellant's essential living needs.
18. I accept as Mr Spurling submits; Judge Shepherd found the sponsor to be a credible witness. At paragraph [51] Judge Shepherd considered the evidence before the Tribunal regarding money transfer receipts. She referred to the evidence of the sponsor that he sends what he can afford, and Judge Shepherd found that to be the case, rather than the claim made by the appellant that the sponsor sends the appellant what is actually needed by him.
19. I also reject the appellant's claims that Judge Shepherd failed to take relevant evidence into account. She was clearly mindful of the evidence of the sponsor regarding his visit to Bangladesh and the support he provided to the family. It does not follow that if the sponsor provided the appellant's

family with some financial assistance to improve their living conditions when he visited in January 2022, the appellant has established that other sums remitted to the family by the sponsor are for the appellant's essential living needs. The objective evidence relied upon by the appellant is just that. It is background material but of limited assistance in the fact sensitive consideration that is required.

20. At paragraphs [55] and [56] of her decision, Judge Shepherd said:

“55. Overall, there is simply insufficient information about the situation for me to find that dependency has been proved on balance. It is unfortunate that this is the position when the Appellant appears to have had legal representation when making the application and appeal.

56. I accept that the Sponsor has sent money (being what he can afford) to the Appellant's mother sporadically over several years and that this goes towards that the upkeep of his cousin's family but I cannot take it any further than that. I do not know what the Appellant really does from day to day, how much he spends each month, whether he gets all or just some of the money sent and how much of his outgoings that money covers. I don't know what the Sponsor currently earns nor how much he can afford to send. I don't know what the Appellant does when the money sent is not sufficient or nothing is sent at all which the transfer receipts seem to indicate is a regular occurrence. The Sponsor's answer about what happened in this situation is unclear; he appeared to say he asks people like landlords for credit but the Appellant does not confirm this.”

21. It is clear from the authorities that it is not enough simply to show that financial support is in fact provided by the EU citizen to the family member. Families often send money to each other, even regularly, across international borders and that can be for a whole range of reasons. Here, there is a requirement of dependency to meet essential living needs, not just evidence of regular money transfers or evidence of money transfers over a prolonged period.

22. The findings and conclusions reached by Judge Shepherd are rooted in the evidence. I reject the claim that the findings and conclusions are irrational or perverse. Judge Shepherd was satisfied that there have been transfers of funds, but was not satisfied that the appellant has established that on balance, the funds are necessary to enable the appellant to meet his basic needs. His accommodation is plainly taken care of by the fact that he lives with his mother in rented accommodation. Beyond evidence of money transfers, even over a lengthy period, there a distinct and noticeable absence of any evidence to support the claims made by the appellant that he requires the financial support of his sponsor to meet his essential needs. It was the paucity of the evidence regarding the essential

living needs of the appellant and how they are met, that was of concern to the Judge.

23. I accept a full breakdown of the expenses incurred is not required and that in a cash economy, it will very often be difficult to obtain receipts to substantiate the expenditure, but plainly some breakdown that is supported by cogent evidence to support the claim that essential living needs are met by the money transfers is capable of going a long way to discharging the burden upon an applicant that they need the material support of the Community national in order to meet their essential needs. Here, there was a very broad and vague claim set out by the appellant in his witness statement and the other evidence that was before the Tribunal from the appellant's mother and the sponsor's father. The evidence, Judge Shepherd found, was lacking in circumstances where several members of the same family all live together, and the funds transferred appear to have been provided by way of support for the family generally, rather than to meet the essential living needs of the appellant. Reading the decision as a whole it is clear the judge did have in mind the correct test and the evidence of the appellant.
24. I have reminded myself of what was said in MD (Turkey) v SSHD [2017] EWCA Civ 1958 that adequacy of reasons means no more nor less than that. It is not a counsel of perfection. Still less should it provide an opportunity to undertake a qualitative assessment of the reasons to see if they are wanting, even surprising, on their merits. To identify an error of law there has to be more than a general literary criticism. Although "error of law" is widely defined, the Upper Tribunal is not entitled to find an error of law simply because it does not agree with the decision, or because the Tribunal thinks the decision could be more clearly expressed or another judge can produce a better one. Baroness Hale put it in this way in AH (Sudan) v SSHD at [30]:
- "Appellate courts should not rush to find such misdirection simply because they might have reached a different conclusion on the facts or expressed themselves differently."
25. The decision is to be read looking at the substance of the reasoning and not with a fine-tooth comb in an effort to identify errors. Reading the decision as a whole, it is in my judgement clear there was a paucity of material evidence and it cannot be said that the Judge's analysis of the evidence that was before the Tribunal is irrational or perverse. I am satisfied Judge Shepherd's decision is a sufficiently reasoned decision that was open to her on the evidence.

26. In my judgment, the grounds of appeal do not disclose a material error of law capable of affecting the outcome of the appeal.
27. It follows that I dismiss the appeal.

Notice of Decision

28. There is no material error of law in the decision of FtT Judge Shepherd and it was open to the judge to dismiss the appeal under the EEA Regulations 2016

V. Mandalia
Upper Tribunal Judge Mandalia

Judge of the Upper Tribunal
Immigration and Asylum Chamber

26 July 2023