



IAC-AH-SC/FH-CK-V2

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

Appeal Number: EA/03664/2019

THE IMMIGRATION ACTS

**Heard at Field House
On 4 November 2020**

**Decision & Reasons
Promulgated
On 18 January 2021**

Before

**UPPER TRIBUNAL JUDGE ALLEN
DEPUTY UPPER TRIBUNAL JUDGE KEITH**

Between

**MD TANWIR UL ISLAM CHOWDHURY
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Z Malik, instructed by Samuel Ross Solicitors
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Bangladesh. He appealed to the First-tier Tribunal against the respondent's decision of 21 July 2018 refusing his application for a residence card under Regulation 8 of the Immigration (European Economic Area) Regulations 2016.
2. The judge noted, at paragraph 9 of his decision, that the burden of proof was on the appellant, on the balance of probabilities. The essential issue before the judge was whether there had been shown to have existed a relationship of dependency or household membership when the appellant lived in Bangladesh, prior to coming to the United Kingdom in 2011. The sponsor is his cousin and is a citizen of the Netherlands. The appellant had lived in Bangladesh until 2006 and then lived in Cyprus until 2009,

and thereafter returned to Bangladesh until he came to the United Kingdom in 2011.

3. The judge set out and considered the guidance of the Upper Tribunal in Reyes [2013] UKUT 00314 (IAC) and also the guidance from the Court of Justice in Rahman [2012] CJEU Case - 83/11.
4. There was a complication, though not one which featured materially in argument before the judge, that there were two identical applications by the appellant, the first of which was refused on the date to which we have referred above and the second on 9 July 2019. In the latter refusal the issue of the relationship between the sponsor and the appellant was conceded. In the former, the decision under challenge, there was no allegation that false documents had been provided. The judge referred at paragraph 13 of his decision to the respondent having determined that the bank statements provided by the appellant from the Islami Bank Bangladesh Limited were fraudulent and said he would return to that issue below, but in fact it does not appear that he gave any further consideration to the point.
5. At paragraph 26 the judge identified the key question, that of whether prior to coming to the United Kingdom the appellant was dependent on the sponsor. He went on to describe the evidence as being less than compelling, addressing the Islami Bank statements, which were not before him and the failure by the appellant to obtain copies from the bank. At paragraph 28 of his decision, having considered the evidence of the three witnesses, he observed that the sponsor had failed to provide any documentary evidence of cash withdrawals to give cash to the appellant or of the money transfers and there was no evidence to support the sponsor's contention that a number of people had travelled from the Netherlands to Bangladesh to give money to the appellant.
6. The judge went on at paragraph 29 to observe discrepancies in the evidence and remarked, having considered the evidence over living arrangements at 1995, that the position when the appellant was in Cyprus was even less convincing. As a consequence he dismissed the appeal.
7. The appellant sought and was granted permission to appeal against the judge's decision.
8. Before us Mr Malik relied on his skeleton argument and made four brief and relevant points. The first concerned the standard of proof. The reference by the judge at paragraph 27 to "less than compelling" and at paragraph 29 to "less convincing" ... indicated that the correct standard of proof had not been applied. There was no burden on the appellant to show that the evidence was compelling.
9. The second ground contended that there was an emphasis on the need for documentary proof made by the judge in particular at paragraphs 27 and 28, remarking on such matters as the absence of documentary evidence of cash withdrawals, and the indication was that it was necessary to

provide documentary evidence to succeed, contrary to the guidance in Reyes.

10. Mr Malik's third point was with regard to paragraph 29 of the judge's decision. The judge had referred to evidence being contradictory and unconvincing but did not say why. The evidence was set out at paragraphs 12 to 17. The judge had not identified the inconsistencies in the evidence but made a bare statement without adequate reasons.
11. The fourth ground concerned the way in which the judge had assessed the dependency requirement. He had referred at paragraph 29 to "real material dependency" and it was unclear what that meant and it was clear that the appellant did not have to show a dependency on the sponsor to meet all or most of his needs.
12. In his submissions Mr Tufan argued the use of the word "convincing" was a means of writing and there was nothing to say that the correct standard had not been applied. The judge had to be convinced. He had not applied a higher standard. It could however be read in that way. There was an issue of no evidence from the bank and also with reference to A7 at 5 to 6 which omitted reference to the application on 31 October 2012 which was refused on 25 September 2013 on the basis of producing false bank documents. In this regard Mr Tufan argued that weight should be attached to the guidance in Moneke [2011] UKUT 00430 ((IAC) and the need for appellants to provide sufficient evidence and that was lacking in this case.
13. In Moneke it had been said that if documentary proof could be provided then it should be. It also addressed gaps in the evidence, as in this case.
14. With regard to the issue of reasoning, the reasoning of the judge was clear. He had referred to Reyes but the test was settled earlier in Lim [2015] EWCA Civ 1383 which referred to Reyes at paragraphs 25 and 32. If the appellant could support himself there was no dependency. It was unclear what amounts the appellant needed and no schedule had been provided. The judge had referred to the right test in a roundabout way. The Regulation was discretionary for the Secretary of State and the provision of documents went against the appellant. There was no material error of law.
15. By way of reply Mr Malik argued that the language used by the judge did not apply the correct standard of proof. The 2012 refusal was not a point the Secretary of State had taken and it was not open to her to take that point now. There was no evidence of any false documents submitted by the appellant. As regards the argument made by Mr Tufan concerning bare assertions, there were none. There were three witness statements with statements of truth and all had given oral evidence. The judge had to say why he found it contradictory and consistent. The quotation from the Secretary of State's guidance set out at paragraph 7 of Mr Malik's skeleton was correct and properly to be applied.

16. After consideration we stated that the appeal would be allowed to the extent that it would be remitted to the First-tier Tribunal for a full rehearing and that we would give our reasons later. This we now do.
17. We see force in all of the points made by Mr Malik. Describing the evidence as being less than compelling did not conform to the correct standard of proof earlier set out by the judge. Certainly, evidence that does not satisfy the balance of probabilities of test will be less than compelling, but the use of such a phrase leaves it entirely unclear how far short of less than compelling the evidence was. Evidence can be less than compelling but falls short of a higher standard than the balance of probabilities. In our view the judge clearly erred in law in this respect.
18. Having cited Reyes, we consider the judge did not properly apply that guidance to the issue of the kind of evidence required. Undue weight was placed, at paragraphs 27 and 28 and 29 on the absence of documentary evidence and the judge failed to consider the matter holistically as the guidance in Reyes urges.
19. We also agree that the judge did not adequately reason his conclusion that the oral evidence was contradictory and unconvincing. That evidence had been set out. The judge did not make clear findings on that evidence and therefore did not demonstrate in what ways the evidence was contradictory and unconvincing. We find an error of law in that regard also.
20. The final ground in our view is also one of significance. The judge found there was no real material dependency and it is unclear, as Mr Malik argued, what is meant by that phrase. The respondent's guidance, as set out in Mr Malik's skeleton, makes it clear that the correct position is as follows "The applicant does not need to be dependent on the EEA national to meet all or most of their essential needs". The judge's conclusion failed to take account of that guidance and placed, as noted above, an excessive emphasis on the receipt of financial assistance from the sponsor and there is an absence of the necessary holistic assessment.
21. As a consequence, as noted above, we find material errors of law in the judge's decision such that it is set aside in its entirety and we direct that it be reheard at Taylor House before a judge other than Judge Brewer.

No anonymity direction is made.



Signed
Upper Tribunal Judge Allen

Date 23 November 2020