



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

Appeal Number: EA/01862/2020

THE IMMIGRATION ACTS

**Remote Hearing by Skype
On 23rd March 2021**

**Decision & Reasons
Promulgated
On 6th April 2021**

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

ARSHAD HUSSAIN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr I Hussain, Syeds Law Office Solicitors

For the Respondent: Mr M Diwnycz, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Pakistan. He appealed the respondent's decision of 11th February 2020 to refuse to issue an EEA Residence Card as the extended family member of an EEA national exercising treaty rights in the UK in accordance with Regulation 8 of the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations"). The appeal was dismissed, on the papers, by First-tier Tribunal Judge

Suffield-Thompson for reasons set out in a decision promulgated on 30th October 2020.

2. The appellant claims that the conclusion reached by the Judge that the appellant has not established, to the required standard, that he is an extended family member of the sponsor, for the reasons given by the First-tier Tribunal Judge, is irrational. He claims the Judge appears to have misunderstood the claimed relationship between the appellant and the EEA national sponsor. Permission to appeal was granted by First-tier Tribunal Judge Parkes on 30th November 2020.
3. The hearing of the appeal before me on 23rd March 2021 took the form of a remote hearing using skype for business. Neither party objected. The appellant joined the hearing from the offices of his solicitors. Although he was able to see me and the representatives throughout, he was unable to follow the proceedings because his representatives had failed to make any arrangements for an interpreter to assist him. Mr Hussain confirmed that he had spoken to the appellant prior to the hearing and the appellant is happy for the hearing to proceed. The appellant's sponsor had initially joined the hearing remotely, but left part way through. The representatives were able to see and hear me and each other throughout the hearing. I sat at the Birmingham Civil Justice Centre. I was addressed by the representatives in exactly the same way as I would have been if the parties had attended the hearing together. I am satisfied: that no party has been prejudiced; and that, insofar as there has been any restriction on a right or interest, it is justified as necessary and proportionate. I was satisfied that it was in the interests of justice and in accordance with the overriding objective to proceed with a remote hearing because of the present need to take precautions against the spread of Covid-19, and to avoid delay. I was satisfied that a remote hearing would ensure the matter is dealt with fairly and justly in a way that is proportionate to the importance of the case, the complexity of the issues that arise, and the anticipated costs and resources of the

parties. At the end of the hearing I was satisfied that both parties had been able to participate fully in the proceedings.

The background

4. The appellant claims to have arrived in the United Kingdom on 14th July 2011. There is no information before the Tribunal as to the basis upon which the appellant entered the UK. It appears that in May 2014 he was served with an 'IS151A', 'Notice of Removal'. Under cover of a letter dated 30th October 2019, from M&K Solicitors, the appellant made an application for a Residence Card. The covering letter, which is to be found at pages 5 to 8 of the respondent's bundle states, *inter alia*:

"... Our client is the extended family member of the EEA national. Our client is the maternal nephew of his EEA sponsor, namely Mohammad Nazir Khan Zia whom is a Dutch National exercising his treaty rights in the UK as a worker.

Our client has been supported by his uncle for many years. Our client's sponsor used to initial (*sic*) send money to our client in Pakistan and then continued to provide him with financial support when he came to the UK. Once the sponsor was in the UK our client moved in with his uncle who now provide our client with continual financial and accommodation support...."

5. Various documents were provided in support of the application. In her decision dated 11th February 2020, the respondent said:

"You claim that your EEA sponsor is the cousin of your mother. As such, this department would expect to see evidence of your EEA sponsor's parents and birth certificates to demonstrate that your mother shares the same parent as one of your EEA sponsor's parents, however no such evidence has been submitted.

As you have failed to effectively evidence your relationship no further consideration has been given to the other requirements which need to be satisfied under the Regulations including whether your EEA national sponsor is exercising Treaty rights as a qualified person"

The decision of First-tier Tribunal Judge Suffield-Thompson

6. At the appellant's request, the appeal was determined on the papers. Judge Suffield-Thompson noted, at [6], that the appellant had provided a bundle of documents which included the witness statement of the sponsor, a skeleton argument, the sponsor's ID, the birth certificates of both the appellant and sponsor, proof of cohabitation and proof of dependency. The findings and conclusions of the Judge are set out at paragraphs [14] to [16] of the decision.

"14. The appellant made his application for a residence card on the basis that he is an extended family member of the sponsor. In his application form (Respondent's Bundle, page 27) he states that the sponsor is a first cousin of his mother. In the sponsor's statement he initially claims that he is the appellant's "uncle" but then goes on to give a complicated family history which ends with the sponsor stating that:

"this makes the appellant's mother my cousin sister and the appellant nephew "

but at the end of his WS (para.9) the sponsor again states that the appellant is his nephew and not a cousin.

15. The sponsor goes on to explain why he cannot produce any written evidence to show that he is biologically related to the appellant. The EEA Regulations are very clear in that although there is no limit on the distance of the relationship between the EEA national and the extended family member as long as they can provide valid proof of the relationship between them. He suggests (WS, para. 3) that it is open to the Home Office to check with the authorities in Pakistan, but it is the appellant's appeal and therefore it is for him to provide the evidence to support his application and appeal and this is not the role of the Home Office.

16. I accept from the documentation before me that the appellant is living with the sponsor and that there is an element of financial dependency but having considered the written evidence submitted by the appellant I do not find that he is proved, to the required standard, that he is an extended family member of the sponsor. The appeal is dismissed."

The appeal before me

7. At the outset of the hearing before me, Mr Diwnycz acknowledged that culturally, relationships are often described differently. The relationship described in the covering letter to the application appeared to be one of

uncle/nephew, but it appears from the information that was provided by the appellant that the relationship between the EEA national sponsor and the appellant is more aptly described as 'Great Uncle/Great Nephew'. That however is not a concession that the appellant and the EEA sponsor are related as claimed, whether as described in the covering letter to the application or in the documents relied upon by the appellant in support of his appeal. The respondent does not accept that the appellant has established that he is related to the EEA national. It is for the Tribunal to consider whether the evidence relied upon by the appellant to establish that relationship is sufficient to satisfy the Tribunal that the appellant and the EEA national are related as claimed.

8. Having heard briefly from the parties, I informed the parties that I am satisfied that the decision of the First-tier Tribunal Judge is vitiated by a material error of law and must be set aside.
9. At paragraph [14] of the decision, the Judge refers to the evidence of the appellant and his sponsor. It is noted that in his application and the appellant stated that the sponsor is a first cousin of his mother. As a starting point, the EEA sponsor would be an uncle of the appellant. The Judge then refers to the witness statement of the sponsor, who describes himself as the appellant's 'uncle' and the relationship being one of 'uncle/nephew'. In the final sentence, the Judge states: "*... at the end of his WS (para. 9) the sponsor again states that the appellant is his nephew and not a cousin*". Insofar as the judge appears to identify some inconsistency in the evidence set out in the application and witness statement of the sponsor, no inconsistency is apparent. The appellant does not claim to be a cousin of the sponsor but maintains that the sponsor is a first cousin of his mother. It is in my judgement difficult to identify from what is said at paragraphs [14] and [15] of the decision, the reasons for the conclusion reached that the appellant has not proved, to the required standard, that he is an extended family member of the sponsor.

10. I accept it would be open to a judge to conclude that the appellant has not established that he is an extended family member of the sponsor, but here, it appears the judge relies upon an inconsistency, that as I say, is not apparent. The relationship described in the covering letter to the application may be at odds with other evidence before the Tribunal, but Judge Suffield-Thompson fails to refer to the documents that were relied upon by the appellant in support of his appeal. At pages 9 and 10 of the appellant's bundle, the appellant provided copies of the 'Birth Registration Certificates' for the appellant and his sponsor. I note that both of those certificates were issued on 24th August 2019. At pages 11 and 12 of the bundle there is a genogram providing a graphic representation of the claimed relationship, and at page 13, there is what is described as a Relationship Certificate. None of these documents are referred to by Judge Suffield-Thompson in her analysis of the evidence, and although it may have been open to her to conclude that she could attach little or no weight to those documents, she failed to engage with the documents and consider whether they lend any support to the claims made by the appellant.
11. Before me, Mr Hussain submits Judge Suffield-Thompson appears to have found the appellant is living with the sponsor and that there is an element of financial dependency, at paragraph [16] of her decision. That in my judgement is not a finding that can be preserved. The Judge does not set out any reasons for reaching the finding. The test for dependency is a purely factual test that is fact specific and requires an examination of the personal circumstances of the appellant. It requires a holistic examination of several factors, including financial, physical, and social conditions and Judge Suffield Thompson fails to consider adequately or at all whether the appellant was dependent upon the sponsor or a member of his household prior to his arrival in the UK as required by Regulation 8(2). Judge Suffield-Thompson was not assisted in her task by the failure of the appellant and his representatives to file and serve evidence addressing the issues that arise in the appeal. I note

for example, that there was no statement at all from the appellant explaining the family circumstances in Pakistan, how he and his family supported themselves, how the family met their essential living costs, the basis upon which the appellant arrived in the UK or what the appellant has been doing since his arrival in the UK.

12. As to disposal, although the standard directions issued to the parties require the parties to prepare on the basis that if there is an error of law in the decision of the First-tier Tribunal, the Upper Tribunal will go on to remake the decision, I am just persuaded by Mr Hussain that the appeal should be remitted to the First-tier Tribunal for hearing *de novo* with no findings preserved. The respondent had failed to consider the application beyond considering whether the appellant is related to the EEA sponsor as claim. I am surprised that in the absence of any express concession by the respondent that the other requirements are met, the appellant and his representatives failed to turn their minds to the evidence that would be required to establish the entitlement to a Residence Card. I have decided that it is appropriate to remit this appeal back to the First-tier Tribunal, having considered paragraph 7.2 of the Senior President's Practice Statement of 25th September 2012. In my view, in determining the appeal, the nature and extent of any judicial fact-finding necessary will be extensive.
13. For the avoidance of any doubt, although the decision of the respondent focused upon the relationship between the appellant and the EEA national sponsor, and the respondent gave no further consideration to the other requirements which need to be satisfied under the 2016 Regulations, the appellant must proceed upon the basis that it will be for the appellant to establish his entitlement to a Residence Card at the hearing of the appeal and he must assume that no concessions are made by the respondent.

14. The parties will be advised of the date of the First-tier Tribunal hearing in due course.

Notice of Decision

15. The appeal is allowed, and the decision of FtT Judge Suffield-Thompson promulgated on 30th October 2020 is set aside.
16. The appeal is remitted to the FtT for a fresh hearing of the appeal with no findings preserved.

V. Mandalia

Upper Tribunal Judge Mandalia

23rd March 2021