Upper Tribunal
(Immigration and Asylum Chamber)

Reyes (EEA Regs: dependency) [2013] UKUT 00314 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 24 September 2012, 25 April 2013	.....

Before

UPPER TRIBUNAL JUDGE STOREY

UPPER TRIBUNAL JUDGE REEDS

Between

TOMMY BUSTAMANTE DELOS REYES

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Ms R Akhtar instructed by Equalisers Limited (24 September 2012 only)

For the Respondent: Ms F Saunders, (24 September 2012), Mr P Deller (25 April 2013) Home Office Presenting Officers

1. The mere fact that a person is in the United Kingdom without lawful permission to work does not mean that he or she is to be considered as meeting the test of dependency under the Immigration (European Economic Area) Regulations 2006.

2. Whether a person qualifies as a dependent under the Regulations is to be determined at the date of decision on the basis of evidence produced to the respondent or, on appeal, the date of hearing on the basis of evidence produced to the tribunal.

DETERMINATION AND REASONS

1. This case concerns a person seeking to rely on regulation 7(1)(c) of the Immigration (European Economic Area) Regulations 2006 (hereafter “the 2006 Regulations”) as a dependent direct relative. It raises two issues in particular: (1) whether such a person’s dependency can be deduced from the fact that he is (or was for a relevant period) in the United Kingdom unlawfully; (2) whether if such a

person is able to show dependency at the date of application, he is entitled to qualify under regulation 7(1)(c) even though he is no longer dependent by the time of the decision made on his application.

2. The appellant is a citizen of the Philippines. He came to the UK as a visitor in January 2006. Despite refusal later that year of applications by him to stay as a dependent relative of a British citizen, Mr S (the husband of his daughter Josephine), he remained in the UK unlawfully. On 6 September 2011 he applied for a residence card as the dependent relative of Mr Mathieu, a French national said to be exercising European Economic Area (EEA) rights in the UK. His other daughter, Janet, had married this man in March 2011 which was just over two years after she had arrived in the UK as a student. On 1 November 2011 the respondent made a decision to refuse to issue a residence card as confirmation of a right of residence under EU law as the father-in-law daughter's husband. The respondent refused on two counts: that the appellant had not shown she was dependent on either his daughter or her husband since he arrived in the UK in January 2006; and that she had not produced sufficient evidence to show that the EEA son-in-law was a qualified person. The respondent's refusal identified as the two bases for refusal: regulation 8 and 4 of the 2006 Regulations. These Regulations we should mention were amended most recently by the Immigration (European Economic Area) (Amendment) Regulations 2012/1547 on July 16, 2012, but none of the amendments affect the provisions at issue in this case.

3. One other matter we should mention at this point is that not long after the applicant applied for a residence card the respondent sent him a letter dated 20 September 2011 headed "Certificate of Application", noting his application, confirming that "we will make a decision on the application as soon as we can" and stating that: "Your client is permitted to accept offers of employment in the United Kingdom, or to continue employment in the United Kingdom, whilst the application is under consideration". The document included a "Note for employers" confirming the fact that the appellant was authorised to accept offers of employment. As will be explained below, the Tribunal did not know the precise date this letter was sent until late in the day, but it makes the chronology clearer if we mention it at this stge.

4. The appellant's appeal came before First-tier Tribunal Judge Hussain on 16 December 2011. He heard evidence from the appellant, his daughter, Janet, and his son in-law. The judge correctly observed that the respondent had been wrong to base her refusal on regulation 8 of the 2006 Regulations, which relates to extended family members or (to use the terminology of Article 3 of Directive 2004/38/ECJ or "Citizenship Directive") "Other Family members" or "OFMs". By virtue of being a family member in the ascending line of the spouse of an EEA national, the appellant should have been considered under regulation 7(1)(c) which covers "dependent direct relatives in his ascending line or that of his spouse or his civil partner".

5. The judge also considered that on the basis of further evidence provided by the appellant he had shown that his son-in-law was a qualified person, and that he was a family member of such a person. The judge nevertheless dismissed the appeal because, like the respondent, he was not satisfied that the appellant had shown he had ever been dependent on either his daughter or son-in-law.

6. At [26]-[29] the judge stated:

"26. My attention has been drawn to the Home Office's approach to the use of dependency for the purpose of the EEA Regulations. This is to be found at 5.1.2 of the relevant part of the Immigration Service Directorate's Instructions. This provides that:

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Financial dependency should be interpreted as meaning that the person needs financial support from the EEA national and his/her spouse/civil partner in order to meet his/her essential needs – not in order to have a certain level of income.

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Provided a person would not be able to meet his/her essential needs without the financial support of the EEA national, she/he should be considered dependent on that national. In those circumstances, it does not matter that the applicant may additionally receive financial support/income from other sources."

27. It is the appellant's and that of his daughter Janet's evidence that since about December 2009 he has been living with her and her husband at their address in Southsea in Portsmouth. No evidence was given as to when Janet and her husband been cohabiting although I note that their marriage took place only on 26 March 2011 following which she was given a Residence Document on 6 July 2011. The appellant's own evidence suggested that he did some occasional work such as cleaning if the opportunity arose. However it is regrettable that no evidence of that marriage was placed before the Tribunal. Significantly, no objective evidence was placed before the Tribunal that since December 2009 the appellant has resided with his daughter Janet or her husband. Given the uncertainty over the appellant's own income and given the absence of documentary proof that he actually resided with Janet and her husband, I have considerable doubts as to whether they were the main source of his income. The Home Office approach appears to suggest that what is required to establish is whether the EEA national or his partner have provided the appellant's essential needs. In this case, it was claimed that Janet and her husband provided the appellant with accommodation as well as food. Whilst I appreciate that they may not be able to provide objective evidence that they have paid for his food I am surprised that no documentary evidence was adduced to show that in fact they lived together as a member of his household.

28. My doubts as to whether the appellant has indeed been dependent in the sense described above on his daughter and her husband also rose from the speed which he appears to have taken up paid employment since being issued with a letter by the Home Office authorising him to work.

29. In any event, it seems to me that as at the date of the hearing the appellant was no longer financially dependent on his daughter and her husband. Their evidence was that the appellant has had to move out to an address so that he can be nearer to his place of employment. For the appellant to rent his own accommodation near his place of work suggests that he must be earning sufficiently to make it financially viable for him to live away from home. Whilst no evidence of his actual earnings was provided, the inference I draw is that he is earning sufficient to provide for himself. In those circumstances I am not satisfied that the appellant's daughter and her husband have been or are responsible for providing his essential needs."

7. We should straightaway observe that the judge was incorrect to cite the relevant Home Office instructions as "Immigration Service Directorate instructions"; they are in fact, the "European Casework Instructions".

Submissions on error of law

8. At the hearing in September we heard submissions from the parties as to whether the First-tier Tribunal judge had erred in law.

9. The grounds raised several points. The first challenged the judge's findings of fact. It was said that the respondent was not represented and the evidence of the appellant and his daughter and son-in-law was unchallenged; that at the hearing the judge had not raised any concerns about the credibility and truth of the witnesses; and that the judge made no findings that the witnesses were not credible. In amplifying this point Ms Akhtar argued that the judge's assessment of whether the appellant had been living with Janet and her EEA national husband in the past was flawed. The judge said there was "no objective evidence ... placed before the Tribunal" which wrongly implied, she submitted, that the evidence of the three witnesses was not in itself capable of establishing the objective truth. At the very least, she said, the judge's findings of fact on material matters were insufficiently clear.

10. The second main point of challenge was that in finding that the appellant was not dependent the judge had applied the wrong legal test. He had applied the equivalent of a "wholly or mainly dependent" test familiar from the Immigration Rules, but incorrect under EU law as enunciated in leading cases.

11. A third point of challenge was that the judge wrongly failed to deduce the fact of the appellant's dependency from his immigration status in the UK (prior to 20 September 2011 when he was given permission to work). As set out in [7] of the grounds the argument was that:

"The appellant is an overstayer. He had no right to work in the UK. It therefore follows that he must have been dependent upon someone for his 'essential needs'. The unchallenged evidence is that the appellant lived with his daughter and son-in-law since December 2009. He relied upon them for accommodation, food and other essential items."

12. A fourth point focused on the implications of the judge's finding that the appellant stood to fail in any event (even if it were accepted he had previously been dependent on his daughter and her husband) because, as we have already noted, on 20 September 2011, i.e. a date in between the date he had applied for a residence card and the date of hearing before the judge (December 2011), (1) he had been given permission to work in the UK whilst his application was pending; and (2) he had commenced very soon after working in a self-employed capacity cleaning in a care home which specialises in rehabilitation (certainly by December 2011). Because this job was in Hildenborough in Kent, it was stated that he had taken a room nearby although his main address was still that of his daughter and son-in-law in Portsmouth. The judge had found (at [29]) that at the date of hearing, by virtue of this employment, the appellant was not (or no longer) financially dependent on his daughter and son-in-law.

13. By way of challenge to this finding [9] of the grounds argued as follows:

"If the dismissal of the appeal is upheld then the appellant will immediately become totally dependent upon his son-in-law and daughter and will be in a position to make a new application for a residence card. He would then be given permission to work and it would be a farcical situation if he then falls outside the Directive because he is supporting himself as a result of such work. There would be a constant yo-yo of application and refusal. It must be that the relevant date for dependency is the date of application."

14. It was also argued in the same context that the judge was wrong anyway to draw an inference that the appellant was "earning sufficient to provide for himself" despite stating that "no evidence of his actual earnings was provided". It was further contended that the evidence that the appellant was still using his daughter and son-in-law's home as his main address was evidence of continuing reliance on them for living essentials.

15. On behalf of the respondent Ms Saunders submitted that we should find the judge's findings of fact sustainable and the other grounds lacking in cogency. Although she accepted that the judge may have erred in seemingly applying a "wholly or mainly dependent" test of dependency familiar under the Immigration Rules, she contended that this had not resulted in any material error.

Relevant Law

16. Before proceeding to set out why we proceeded to find that the First-tier Tribunal judge had erred in law, it will assist to set out the relevant law. Article 2 of the Directive 2004/EC/38, the Citizenship Directive, specifies that:

"For the purposes of this Directive:

1) "Union citizen" means any person having the nationality of a Member State;

2) "Family member" means:

(a) the spouse;

(b) the partner with whom the Union citizen has contracted a registered partnership…

(c) the direct descendants who are under the age of 21 or are dependents and those of the spouse or partner as defined in point (b);

(d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b)".

17. The corresponding parts of regulation 7 provide that:

"(1) Subject to paragraph (2), for the purposes of thee Regulations the following persons shall be treated as the family member of another person –

…

(c) dependent direct relatives in his ascending line or that of his spouse or civil partner;…"

18. As regards the meaning of dependency within Article 2 of the Directive and regulation 7 of the 2006 Regulations, the Upper Tribunal has set out the relevant criteria in Moneke (EEA – OFMs) Nigeria [2011] UKUT 00341 (IAC), drawing on Court of Justice cases such as Lebon C-316/85 [1987] ECR 2811 and Jia v Migrationsverket Case C-1/05; and Court of Appeal cases such as Pedro [2004] EWCA Civ 1358 and SM (India) v Entry Clearance Officer (Mumbai) [2009] EWCA Civ 1426. In Moneke at [41] it was noted that "dependency is not the same as mere receipt of some financial assistance from the sponsor. As the Court of Appeal made plain in SM (India)… dependency means dependency in the sense used by the Court of Justice in the case of Lebon …" There is also now the Court of Justice ruling in the case of Secretary of State for the Home Department v Islam & Anor [2012] EUECJ C-83/11 (made in response to the order of reference by the Upper Tribunal in the case of MR and Others (EEA extended family members) Bangladesh [2010] UKUT 449 (IAC)) which, although being concerned not with regulation 7/Article 2.2 family members (such as we are concerned with here) but "Other Family Members (OFMs) under regulation 8/Article 3.2, sheds further light on the Court's approach to the meaning of dependency. The Court made clear that dependency had to be genuine, not contrived and that its interpretation had to be informed by the principle of effectiveness. In Jia v Migrationsverket C-1/05 [2007] QB 545 at [35]-[37] the Court of Justice summarised its understanding of the meaning of dependency as follows:

“ 35. According to the case law of the Court of Justice, the status of "dependent" family member is the result of a factual situation characterised by the fact that material support for that family member is provided by the Community national who has exercised his right of free movement or his spouse: see… Lebon …and… Chen …

36. The court has also held that the status of dependent family member does not presuppose the existence of a right of maintenance, otherwise that status would depend on national legislation, which varies from one case to another: Lebon's case…there is no need to determine the reasons for recourse to that support or to raise the question whether the person concerned is able to support himself by taking up paid employment. That interpretation is dictated in particular by the principle according to which the provisions establishing the free movement of workers, which constitute one of the foundations of the Community, must be construed broadly: Lebon's case…

37. In order to determine whether the relatives in the ascending line of the spouse of a Community national are dependent on the latter, the host Member State must assess whether, having regard to their financial and social conditions, they are not in a position to support themselves…”

19 **.** From the above, we glean four key things. First, the test of dependency is a purely factual test. Second, the Court envisages that 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. It seems to us that the need for a wide-ranging fact-specific approach is indeed enjoined by the Court of Appeal in SM (India): see in particular Sullivan LJ’s observations at [27]-[28]. Third, it is clear from the wording of both Article 2.2 and regulation 7(1) that the test is one of present, not past dependency. Both provisions employ the present tense (Article 2.2(b) and (c) refer to family members who “are dependants” or who are “dependent”; regulation 7(c) refers to “dependent direct relatives…”). Fourth (and this may have relevance to what is understood by present dependency), interpretation of the meaning of the term must be such as not to deprive that provision of its effectiveness.

Our decision on error of law

20. On 28 February 2013 we sent to the parties our decision finding that there was an error of law on the part of the First-tier Tribunal judge necessitating that we set aside his decision. Our reasons were essentially as set out below.

Significance of lacking lawful permission to work

21. We dealt first with the third ground of challenge, which contended that the judge should have deduced the fact of the appellant’s dependency (at least up until 20 September 2011, when he was granted permission to work) from his immigration status in the UK and the fact that until latterly he had no permission to work. We saw no merit in this ground. As already highlighted, in EU law the test of dependency is a purely factual test. It is not dependent on a person’s status under national legislation. Whilst the fact that a person is an overstayer without permission to work is clearly a very relevant matter when considering a person’s actual circumstances, it does not of itself establish that he is in a situation of dependence. As already noted, assessment of dependency also involves looking at a person’s circumstances as a whole and what is known about how their essential needs are met.

Here there may be a wide range of factors to consider. The matter of whether a person is physically and mentally able to work may be relevant. So may be the matter of whether a person has worked even if it is unlawful for them to have done so: the phenomenon of persons working in breach of conditions is regrettably still all too common. Another factor, emphasised by the Court of Justice in Islam and Others (albeit in the different context of OFMs under Article 3.2) concerns whether the need for the dependency is genuine. It can happen that such persons have assets of their own sufficient to cover all their essential needs. On the other hand, even if a person works in breach of conditions he or she may not earn enough from employment to cover their essential needs.

Findings of fact regarding dependency

22. We then reverted to the first two grounds of challenge, which concerned the integrity of the judge's findings of fact. We found these grounds made out for several reasons. First, the judge heard evidence from the appellant and his daughter and son-in-law and made no adverse comment regarding it. The judge's only adverse comment concerned the lack of independent documentary evidence. So far as it went, the evidence of all three was consistent and plausible. The judge did not suggest that the appellant had a source of income of his own. Although far from being determinative (see above) the fact that he had no lawful permission to work was another consideration. There was nothing to suggest he had accommodation of his own. 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. Second, the judge proceeded on the basis that the appellant had as a matter of law to show dependency going back to the time he began living with Janet and her partner, i.e. December 2009. That was incorrect. Although his circumstances going back to December 2009 were relevant to the assessment of dependency, the appellant was not entitled as a matter of law to rely on any dependency prior to the date on which Janet had married her partner, i.e. prior to 26 March 2011; before then the appellant did not come within the terms of either Article 2.2(c) or regulation 7(1)(c). Third, at one point, contrary to established principles, the judge appeared to treat dependency as merely a matter of financial dependency. Fourth, the judge himself appeared only to reject that Janet and her husband were the main source of the appellant's income, not that they were a partial source ("I have considerable doubts as to whether they [Janet and her husband] were the main source of [the appellant's] income"). This links to the second ground of appeal. The statement just quoted from [29] of the determination betrays the application of incorrect legal criteria. As the case law makes clear, in the context of EU law on family members the test of dependency is not whether a person is wholly or mainly dependent, but whether he or she is reliant on others for essential living needs.

23. Having stated that the above errors meant that the judge materially erred in law necessitating that his decision be set aside, we then considered whether we were in a position to re-make the decision without further ado. It seemed to us that we were significantly hampered by lack of evidence from the appellant as the nature of the work he has begun in a care home in Kent. Whilst he and his daughter and son-in-law had referred during the hearing before the judge to him still using their address as his main address and still living with them when he was not working, we did not know enough about the full circumstances to ascertain whether that was credible. Also, up to this point in time we did not know the precise date on which the appellant was granted permission to work and we considered we needed the respondent to supply that information. Accordingly we issued directions relating to such further evidence and adjourned the hearing for a date to be fixed in the near future so as to hear from the appellant and his daughter Janet and his son-in-law. So far as concerns the directions addressed to the appellant, these required - to be produced within 14 days of the date fixed

for further hearing: (i) details of the appellant's self-employment in a care home in Kent including when it commenced, how many hours he has worked there per week, how he has been paid; what have been his earnings; and what has been his tax position; (ii) details of his accommodation in Kent (including tenancy agreement) and how much he paid for it and its size; (iii) and details of the appellant's visits back to his daughter Janet and his son-in-law's home since he began work in the care home in Kent.

Our re-making of the decision

24. The date for a hearing at which the Tribunal would re-make its decision was fixed for 25 April 2013. At the hearing there was no appearance from the appellant or anyone on his behalf, nor had any explanation for such absence being sent to the Upper Tribunal. Efforts by Tribunal administration to contact the appellant and his representatives were unsuccessful. Nor had there being any compliance with the above directions. For the respondent Mr Deller appeared and apologised for the respondent's failure to produce evidence of the date when the respondent had given the appellant permission to work.

25. Having considered the matter, we decided to exercise our discretion to proceed with the further hearing in the absence of one of the parties. The importance so far as the Upper Tribunal was concerned of receiving further documentary evidence from the appellant and having a further opportunity to hear from the appellant and his witnesses could not have been made clearer.

26. We then heard submissions from Mr Deller which were to the effect that (i) as regards his past and present position as a claimed dependent he would understand why the Tribunal might choose to regard the appellant's past dependency up until the time he got a job in Kent as already established; (ii) so far as concerns his situation since then, the appellant had simply failed to avail himself of the opportunity afforded to furnish material evidence and this failure to provide evidence made a significant difference. Mr Deller did not seek to disagree with anything said by the Tribunal in its error of law decision but expressed his hope that the Tribunal would seek to clarify the issue of whether the relevant date for deciding dependency was the date of decision or, upon appeal, the date of hearing.

27. Having heard from Mr Deller we pointed out that we still required the respondent to reply to our earlier direction that she furnish evidence of the date when the appellant was granted permission to work. We also pointed out that it was not clear to us whether the decision of the respondent to grant the appellant permission to work in advance of any decision being made on his application for a residence card reflected Home Office policy or was specific to this case. We gave an oral direction relating to these two matters and Mr Deller undertook to respond within a fixed period. In the event due to an injury Mr Deller was not able to respond until early in June. We have already noted that his response confirmed that the appellant was granted permission to work on 20 September 2011 and he produced to us the actual letter sent to the appellant, headed "Certificate of Application". As regards the policy dimension, Mr Deller's response was as follows:

"I have approval to say that:

"Nothing in the Directive or the Regulations specifies that a certificate of application must contain confirmation of the right to work, pending processing of their application for a document confirming their EEA right of residence. It is current practice in the Home Office, however, to afford this opportunity in a certificate of application so as to facilitate a person's access to employment whilst

their application is being processed. The possibility for abuse is one of which we are aware and we are considering what can be done about this issue".

28. It will be apparent from the terms of our error lf law decision that we considered the First-tier judge erred in the reasons he gave for finding the appellant and his witnesses lacking in credibility as regards the appellant's past and present situation as a dependent. However, it is equally apparent that so far as concerned our own assessment of the facts we required further evidence concerning his situation once he had got a job in Kent and we fixed another hearing in order to afford an opportunity for that evidence to be further explored.

29. In light of the failure of the appellant to comply with directions and the failure of him and his witnesses to attend the further hearing, we have some doubts about their claims regarding his situation of dependency prior to getting a job in Kent, but given that we confined our further directions at the end of the first hearing to production of further evidence relating to his situation once he had got a job and flat in Kent, we consider that in fairness we should proceed on the basis that the appellant has established past dependency from the date of his daughter Janet's marriage up until the date he got his job in Kent. (We do not know the precise date when he began this job but on 14 December 2011 his solicitors submitted a statement from him which refers to it and we also know he began it soon after he got permission to work in September 2011.)

30. However, our directions made very clear that we had concerns about the situation from that date onwards and we must now take stock of the appellant's non-compliance with them. The evidence of the appellant and his witnesses at the hearing and in written form was that after he secured this job he continued to live with them at weekends and to regard their house as his principal residence and they continued to meet his essential needs. Yet despite the Tribunal making very clear its concern to see documentary evidence relating to the appellant's work and flat, he has failed to produce any. Second, despite being informed that the Tribunal had directed a further hearing, the appellant and his witnesses failed to attend.Thereby he has denied himself the opportunity afforded to substantiate his claim to have continued to be a dependent. In light of these considerations we find that the appellant has failed to discharge the burden on him of showing that he continued to be dependent on his son-in-law after he got a job in Kent circa December 2011.

The relevance of dependency at the date of application

31. Given our preparedness to deal with the appellant's case on the basis that he was a dependent on his son-in-law until he got a job in Kent, it is necessary for us to address the submissions made about this matter by Miss Akhtar at the first hearing which were in effect that the appellant was entitled to succeed on the basis that he had shown he was a dependent at the date of application: see [13] above.

32. We are unable to accept that a person is entitled to succeed under regulation 7 if able to show dependency at the date of application but not at the date of decision.

33. As already noted, the test of dependency as found in regulation 7 (and also in regulation 8) is expressed in the present tense: see [19] above. As a result the appellant would only have been entitled to succeed in his application to the respondent if he had been able to show on the basis of evidence produced to the respondent that he was dependent as at the date of decision.

34. How is the position affected once a person has been refused by the respondent and lodges an appeal? In our view, the relevant date for deciding whether he met the requirements must then become the date of hearing. As a result of our finding that the First-tier Tribunal judge's decision was

set aside and our giving directions making clear that the appellant was required to produce further evidence of his situation once he had got a job in Kent, the relevant date for deciding whether the requirements of regulation 7 are met becomes the date of hearing before us. The 2006 Regulations expressly apply to EEA appeals the provisions of s.85(4) of the Nationality, Immigration and Asylum Act 2002: see paragraph 1 of Schedule 1.

35. Hence, even accepting that the appellant was a dependent at the date of application, the evidence, as at the date of hearing before us, was insufficient to satisfy us that the appellant had remained a dependent after he got a job in Kent circa December 2013.

36. We have considered whether our decision on this appeal should be altered by the fact that following the appellant's application for a residence card the respondent granted him permission to work. In our judgement this fact cannot make a material difference. The 20 September 2011 letter sent to him make abundantly clear that such permission was distinct from and did not amount to a decision on his application for a residence card: it stated that "we will make a decision on the application as soon as we can" and that the permission was given "whilst [your] application is under consideration".

37. For the above reasons:

The First-tier Tribunal judge erred in law and his decision has been set aside.

The decision we re-make is to dismiss the appellant's appeal.

Signed Date

Upper Tribunal Judge Storey