



Neutral Citation Number: [2021] EWCA Civ 1220

Case No: C9/2020/1554

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/08/2021

Before :

LADY JUSTICE MACUR
LORD JUSTICE STUART-SMITH
and
SIR STEPHEN RICHARDS

Between :

MOSNU AHMED CHOWDHURY
- and -
SECRETARY OF STATE FOR THE HOME
DEPARTMENT

Appellant

Respondent

Mr Ramby De Mello and Mr Tony Muman (instructed by J H Wilson Solicitors) for the
Appellant
Ms Julia Smyth (instructed by **Government Legal Department** for **The Secretary of State**)

Hearing date: 20 July 2021

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be on Monday 9 August 2021 at 10am.

Macur LJ:

Introduction

1. This appeal challenges the decision of the Upper Tribunal (Immigration and Asylum Chamber) ('UTIAC') on 29th April 2020 that the Appellant was not an extended family member as defined in regulation 8(2) of the Immigration (European Economic Area) Regulations 2006 ('the 2006 Regulations'). The sole issue in the appeal concerns the interpretation of the words '*and continues to be dependent upon*' in regulation 8(2)(c).
2. This appeal falls to be determined by reference to the statutory provisions in force on 31 December 2020. Article 10(2) of the Withdrawal Agreement signed on 19 October 2019, provides that persons falling within Article 3(2)(a) of the Directive (see below), whose residence was facilitated by the host state in accordance with its national legislation before the end of the transition period in accordance with Article 3(2), retain their right of residence in the host state, provided that they continue to reside in the host state. This also applies to those who applied before the end of the transition period, and whose residence is facilitated thereafter: (Article 10(3)).

Legislative framework

3. Directive 2004/38/EC of the European Parliament and of the Council ("the Directive") was enacted with a view to remedying the piecemeal approach to the 'primary and individual' right of a Union citizen to move and reside freely within the territory of the Member States. Recitals 5 and 6 of the Directive are pertinent to this appeal, concerning the right of the family members, and other dependents of the Union citizen, also to exercise those rights. So far as they are relevant, they provide:

"(5) The right of all Union citizens to move and reside freely within the territory of the Member States should,be also granted to their family members..."

"(6) In order to maintain the unity of the family in a broader sense ... the situation of those persons who are not included in the definition of family members under this Directive, and who therefore do not enjoy an automatic right of entry and residence in the host Member State, should be examined by the host Member State on the basis of its own national legislation, in order to decide whether entry and residence could be granted to such persons, taking into consideration their relationship with the Union citizen or any other circumstances, such as their financial or physical dependence on the Union citizen."

4. Article 2(2) of the Directive defines 'direct family members' to be: the spouse; the partner of a registered partnership according to the law of the host member State; direct descendants who are under the age of 21 or are dependants and those of the spouse or partner; and dependent direct relatives in the ascending line and those of the spouse or partner. This article is implemented by regulation 7 of the 2006 Regulations. (See below).
5. Article 3(2) of the Directive extends the field of 'beneficiaries' who may be considered eligible to exercise this right and provides, so far as relevant to this appeal, that:

“(2) Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:

(a) Any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence ...

The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people.”

6. Article 3(2) of the Directive is implemented in the United Kingdom (‘UK’) by regulation 8 of the 2006 Regulations, which defines an extended family member as:

“(1)... a person who is not a family member of an EEA national under regulation 7(1)(a), (b) or (c) and who satisfies the conditions in paragraph (2), (3), (4) or (5).

(2) A person satisfies the condition in this paragraph if the person is a relative of an EEA national, his spouse or his civil partner and—

(a) the person is residing in [a country other than the United Kingdom] and is dependent upon the EEA national or is a member of his household;

(b) the person satisfied the condition in paragraph (a), and is accompanying the EEA national to the United Kingdom or wishes to join him there; or

(c) the person satisfied the condition in paragraph (a), has joined the EEA national in the United Kingdom and continues to be dependent upon him or to be a member of his household.”

7. Sub-paragraphs (3), (4) and (5) to paragraph 8 are irrelevant to the appeal.

8. Regulation 7 defines the persons who shall be treated as family members of another person in the same terms as article 2(2) of the Directive, and in addition, save in relation to extended family members of student EEA nationals, to include:

“(3)a person who is an extended family member and has been issued with an EEA family permit, a registration certificate or a residence card shall be treated as the family member of the relevant EEA national for as long as he continues to satisfy the conditions in regulation 8(2), (3), (4) or (5) in relation to that EEA national and the permit, certificate or card has not ceased to be valid or been revoked.”

9. Regulation 17(4) confers a discretion on the Secretary of State to issue a residence card to an extended family member if various further conditions are met.

Factual and procedural background

10. The Appellant is a national of Bangladesh who was born on 25 October 1989 and arrived in the UK on 28th February 2011 with entry clearance as a Tier 4 (Student) Migrant. His entry clearance was cancelled when his sponsoring college withdrew their sponsorship, concerned by his inability to speak English. His appeal against this decision was dismissed by the First Tier Tribunal ('FTT') on 17th April 2011 but he remained living illegally in the UK. In June 2011 he was treated by the Respondent as an absconder.
11. On 26 January 2016 the Appellant applied for a residence card claiming to be an extended family member of his great-uncle, an EEA national, in accordance with regulation 8(2)(a) and (c). On 2nd August 2016 the Respondent refused his application on two grounds. Firstly, she was not satisfied that the Appellant was related to the EEA national as claimed. Secondly, she was not satisfied that he had provided sufficient evidence that he was a dependent of the EEA national, either in Bangladesh or in the UK.
12. The Appellant's appeal against the Respondent's decision was dismissed by the FTT on 29th October 2018. The FTT judge was satisfied that the Appellant was part of his great-uncle's household in Bangladesh until the Appellant's departure for the UK in 2011, and that he had been dependent upon his great-uncle. However, there was no documentary evidence of any financial support from, or other dependency upon, his great uncle between 2011 and December 2014/February 2015 when the Appellant was said to have joined his great-uncle's household in the UK. The Appellant and his great-uncle were '*[n]oticeably silent*' about where the Appellant was living during these years, and the answers given by the great uncle under cross-examination as to the support he was providing the Appellant were '*vague and unsupported*'.
13. Permission to appeal the FTT decision was initially refused by the UTIAC but was granted as the result of proceedings for judicial review. The UTIAC heard the substantive appeal on 16th March 2020.
14. The UTIAC decision on the appeal was dated 29th April 2020. The UTIAC determined that it was necessary to interpret the phrase "and continues to be dependent" in regulation 8(2)(c) in the context of the purpose of the Directive. The member state's obligations in respect of extended family members were clearly more restricted than in the case of family members falling within article 2 of the Directive. Member states had a wide discretion as regards the selection of factors to be taken into account and were entitled to lay down particular requirements as to the nature and duration of the dependence in order to satisfy themselves that the dependency was genuine and stable. It was clear from *Rahman v Secretary of State for the Home Department* [2013] QB 249 that '*at least one facet of stable family ties, is economic dependence*'. If all that was required was for an applicant to '*establish past dependency*' to satisfy the condition in reg 8(2)(a), and present dependency or membership of the EEA national's household to satisfy reg 8(2)(c), then the 2006 Regulations '*would have used the words 'and is dependent...' rather than the words 'and continues to be dependent' in Regulation 8(2)(c)*'. In other words, the Appellant's construction rendered the words '*and continues to be*' superfluous. The language used in regulation 8(2)(c) did not admit the possibility of a broken

dependency. This interpretation did not undermine the objective of the Directive which is not one of family reunion. Applying that reasoning to the circumstances of this case, the UTIAC dismissed the appeal and upheld the decision of FTT finding the Appellant was not an extended family member as defined in Regulation 8(2)(c) of the 2006 Regulations.

Submissions in this Appeal

15. Mr de Mello on behalf of the Appellant repeats the submissions that he made before the UTIAC. The overarching submission is that regulation 8(2)(c) must be construed against the background and objective of the Directive. Correctly interpreted in this fashion, regulation 8(2), read as a whole, simply requires that a dependency is established to have existed in the extended family member's country of origin and is to be resumed upon joining the EEA national in, or accompanying them to, the UK. He submits that this interpretation is 'consistent' with CJEU law in the absence of any direct authority on the point.
16. On this interpretation an applicant does not cease to be an 'extended family member' just because they cease to be dependent on an EEA national for a finite period of time. Dependency need not be one of necessity. The assessment that is to be made should be in terms of the dependency being "genuine and stable". (See *Rahman* at paragraph [38]). There is a need for flexibility of approach. It is not a mathematical exercise but an assessment of family ties.
17. He makes the following points in support of his submission.
 - i) The Advocate General in *Rahman* at paragraph [99] of his opinion acknowledged the fact of a 'shifting dependency'.
 - ii) The Grand Chamber's judgment in *Rahman* does not endorse the need for continued dependency as is clear in paragraphs [32] and [38] by reference to the need to "maintain the unity of the family in the broader sense" and a dependence which is "genuine and stable".
 - iii) The *Communication from the Commission to the European Parliament and the Council (2009) 313*, ('the Communication') informs the purpose of Article 3(2) and states in [2.1.4].

"The Directive does not lay down any requirement as to the minimum duration of the dependency or the amount of material support provided, as long as the dependency is genuine and structural in character."
 - iv) Regulation 8(2)(c) of the 2006 Regulations must be interpreted in light of the principles to be derived from Recital 6 of the Directive and Article 7 of the Charter of Fundamental Rights of the European Union ('Article 7 CFEU'), which corresponds to Article 8 ECHR and protects the right to respect for private and family life (*SM v Entry Clearance Officer* [2019] 1 WLR 5505).
18. Ms Smyth, on behalf of the Respondent, argues the case on a different basis to that argued in the FTT and UTIAC with the leave of this Court. Her primary submission

is that the issue in this appeal has been conclusively resolved by the decision of the Grand Chamber in *Rahman*.

19. She submits that the relevant questions referred for the Grand Chamber's preliminary ruling so far as this appeal is concerned are numbers 5 and 6. Namely:

“(5) Can a member state impose particular requirements as to the nature or duration of dependency referred to in article 3(2) ... so as to prevent such dependency being contrived or unnecessary to enable a non-national to be admitted to or continue to reside in its territory?”

“(6) Must the dependency on which the other family member relies in order to be admitted to the member state continue for a period or indefinitely in the host state for a residence card to be issued or renewed.”

Question 5 concerned imposing requirements on dependency in the country from which the person has come, while question 6 asked about the imposition of a requirement as to the continuation of the dependency in the host member state.

20. The Grand Chamber's answer to question 5 was that the member state could, in the exercise of their discretion, impose particular requirements relating to the nature and duration of dependence, providing that they were consistent with the wording of Article 3(2) and did not deprive that provision of its effectiveness. (Question 5) The answer to question 6 was

“45 ... that the question whether issue of the residence card referred to in article 10 of Directive 2004/38 may be conditional on the requirement that the situation of dependence for the purposes of article 3(2)(a) of that Directive has endured in the host member state does not fall within the scope of the Directive.”

21. Therefore, Ms Smyth argues, the question of endurance - or continuity - is a matter for domestic law.

22. The only logical and sensible interpretation of regulation 8(2)(c) is that it requires continuous dependency from the time it commenced in the country from which the extended family member travelled to the UK and endures. “Continues to be dependent” is in the present tense. To interpret regulation 8(2)(c) in the way contended for on behalf of the Appellant is to replace that phrase with “is, at the point of application”. This runs counter to the indication in regulation 7(3) that the extended family member will only be treated as a family member of the EEA national so long as they fulfil the conditions in regulation 8(2) - (5).

23. Alternatively, to the extent that EU law applies at all, the UTIAC was right to conclude that EU law did not require the Appellant to be treated as an extended family member in circumstances where he had not been dependent upon his great-uncle for a period of around four years from the point of his arrival in the UK. Article 3(2) of the Directive does not seek to protect family life in general but confers rights only on those who can demonstrate ‘*stable family ties...falling within specific factual circumstances*’. (See [32] of *Rahman*). The key factual criterion which must be present is dependency and ‘there is no EU imperative for treating a person as an extended family member where there has been a very substantial break in their

dependency'. There is no basis to conclude that refusal to grant a right of residence in cases where there has not been a continuous dependency has any meaningful effect on the exercise of free movement rights.

24. If EU law is not engaged, then Article 7 CFEU does not apply at all. If it is engaged, it is well-established that family life for the purposes of Article 7 CFEU, will only exist between adult siblings, or adult children and their parents, in exceptional circumstances (*Kugathas v SSHD* [2003] EWCA Civ 31). There are no such exceptional circumstances in this Appellant's case.

Discussion and conclusions

25. This Court has previously assumed the need for ongoing dependency (see *Aladeselu v SSHD* [2013] EWCA Civ 144, *Oboh v Home Secretary* [2014] 1WLR 1680, *Latayan v SSHD* [2020] EWCA Civ 191) when determining other points of law arising from the Directive and the 2006 Regulations but has never been called upon to address the point specifically. It is obviously an important question, and one with far reaching implications beyond the facts of this case. Nevertheless, I think it is an issue that is correctly and readily resolved by reference to national law, in accordance with what was said by the Grand Chamber in *Rahman*. I also agree with Ms Smyth that Mr de Mello's submissions cannot prevail by reference to either domestic or EU law.
26. It appears to me that the answer given by the Grand Chamber in *Rahman* to question 6, as indicated above, makes clear that subject to any successful challenge that regulation 8(2) undermines the effectiveness of article 3(2) of the Directive, the determination of whether the conditions of dependency have been fulfilled is a matter for domestic law. This accords with the recitals and article 3(2)(a) of the Directive, to which I refer above.
27. If that be so, I read the words "and continues to be" in regulation 8(2)(c), when seen in the chronological context of the primary condition in regulation 8(2)(a), "residing in a country other than the UK and *is* dependent upon" (emphasis provided), as speaking to a persisting state of affairs. This is the plain and natural meaning of the words. The condition in regulation 8(2)(a) defines the starting point. The condition in regulation 8(2)(c) the necessary duration.
28. This interpretation is consistent with regulation 7(3), reproduced in paragraph [8] above.
29. I am prepared to accept that 'resumes' can be used as a synonym for 'continues' in the appropriate context. However, in the context of regulations 8(2) and 7(3) the meaning of 'resumes' without any qualification as to time, for which Mr de Mello contends, would be to strain the verb beyond any sensible construction. What is more, I note that his submissions nevertheless seek to invoke a quality of stability that he says is evidenced by the historic dependency required by regulation 8(2)(a). The adjective 'stable' denotes a durable condition or state of affairs, not an intermittent one separated by a period of time other than could reasonably be adjudicated to be *de minimis*.

30. I do not regard this literal interpretation of regulation 8(2)(c) in accordance with domestic law to be incompatible with the Appellant's, or his great uncle's, Article 8 ECHR Rights. '*Relationships between adults...would not necessarily acquire the protection of Article 8 of the Convention without evidence of further elements of dependency, involving more than the normal emotional ties.*' (See *S v United Kingdom* (1984) 40 DR 196 at 198, approved in *Kugathas v SSHD* [2003] EWCA Civ 31). The Appellant was not financially or physically dependent upon his great uncle between 2011 and 2014/15, and the nature of their contact during this period is not evidenced.
31. If I am wrong in my reliance on domestic law to resolve the issue in this case, I would nevertheless reach the same conclusion on the construction of the words 'continues to be dependent' upon application of EU law.
32. Contemplating the prospect that Mr de Mello's arguments amount to a challenge to the legitimacy of the Regulations, I would observe that it seems to me to be reasonable and rational to assess the commencement and duration of dependency or household membership as an indication of the genuine assumption of responsibility by the EEA national for a member of his extended family, and to negate any question of contrivance to subvert national border controls. This is a legitimate objective. The requirement "respects the principle of effectiveness" of the Directive and does not require persons otherwise falling within the scope of the provision to meet such unlikely conditions, for example 20 years dependency, as to remove the realistic possibility of obtaining rights of entry and residence. (See paragraph [105] of the Advocate General's opinion in *Rahman*).
33. I am fortified in this view by the decision of this Court in *Oboh*. That case concerned the necessity of an applicant to establish a dependency "in the country from which they have come" in article 3(2) of the Directive. The applicants submitted that regulation 8 does not properly transpose article 3(2) of the Directive. This Court disagreed and found that regulation 8 of the 2006 Regulations did accord with the plain and natural meaning of the words of the Directive in defining the scope of article 3(2).
34. More specifically, Mr de Mello argues that the 2006 Regulations must be interpreted with the objective of the Directive in mind. Whilst this is uncontroversial in any examination of the interpretation and application of the 2006 Regulations in accordance with EU law, it seems to me that his submissions rely upon his extension of the objective beyond that endorsed by the Directive and recognised by the case law.
35. The Directive aims to codify and review existing Community instruments to remedy a 'piecemeal approach' to the right of free movement and residence and facilitating the exercise of that right. (See Recitals 3 and 4). The primary objective of the Directive is to promote the right of free movement of EEA nationals subject to limitations and conditions of public policy, public health, and public security. (See Recital 1). Family reunification is a corollary to the exercise of that right. It is axiomatic that an EEA national would not be 'free' to exercise the right of free movement absent consideration of their family circumstances and domestic responsibilities. Consequently Recital 5 of the Directive provides for the right to be granted to a 'family member', as subsequently defined in article 2. Recital 6

concerns the ‘family in the broader sense’ and calls for an examination by the member state “*on the basis of its own national legislation*” taking into consideration their relationship with the EEA national or any other circumstances such as financial or physical dependence. However, that is not to say that the objective is one of family reunification, rather it is to enable free movement.

36. The Communication upon which Mr de Mello relies, and which provides “guidance for the better transposition and application” of the Directive, adds little if anything to recital 6 of the Directive. I would observe that that part of the Communication upon which he relies in support of the principle that the Directive does not lay down any requirement as to the minimum duration of the dependency or the amount of material support provided, as long as the dependency is genuine and structural in character, refers to the status of dependent ‘family members’. Even assuming its relevance in the case of ‘other dependent family members’, the Communication corroborates the right of the member state to differentiate between the two categories of family members, as regards their respective rights of entry and residence. It also confirms that ‘emotional dependence’ is not to be taken into account (*Zhu and Chen* [2005] QB 325 [84].)
37. Recital 6 is already reflected in article 3(2): the host state shall “*in accordance with its national legislation facilitate entry and residence*” of the other family members subject to “*an extensive examination of their personal circumstances.*” Family unity in the broader sense may therefore be promoted but the circumstances of an extended family member is expressly made subject to scrutiny according to national law.
38. In *Rahman* the Grand Chamber highlighted the difference between direct family and extended family members, noting that article 3(2) of the Directive conferred ‘a certain advantage, compared with applications for entry and residence of other nationals of third states’, but it did not require every such application to be granted. It held that the applicant would be entitled to a judicial review of whether the national legislation and its application have remained within the limits of the discretion set by the Directive. The decision would be ‘founded on an extensive examination of [the applicant’s] personal circumstances’. In accordance with recital (6) in the Preamble to the Directive, it would be necessary to take account of the various factors that may be relevant in the particular case ‘such as the extent of economic or physical dependence and the degree of relationship’ between the family member and the relevant EEA citizen.
39. As indicated above, I do not find Mr de Mello’s submissions to adequately engage with the judgment in *Rahman* in the context of the circumstances of this case. In that he relies upon paragraphs [32] and [38] of the judgment, it is to highlight the point that, as follows from recital 6, the objective is “to maintain the unity of the family in the broader sense” and that the dependence is “genuine and stable”. However, read as a whole, paragraph [32] defines a dependant as one
- “32... who nevertheless *maintain* close and stable family ties with a Union citizen *on account of specific factual circumstances*, such as economic dependence, being a member of the household or serious health grounds.” (emphasis again provided)
40. I do not interpret this to engage the possibility of an intermittent dependency. Mr de Mello’s citation of *Reyes v Migrationsverket* [2014] QB 1140 in support of such an

interpretation, fails to acknowledge the variance between direct family and extended family members in this regard. It does however, I think, reveal his reading of the objective of the Directive to be skewed towards family reunification regardless of contemporaneous indications of dependency, or lack of it, although EU law clearly recognises that emotional familial ties will not suffice. (See the Communication above).

41. Paragraph [38] of the judgment in *Rahman* takes the matter no further forward. The Grand Chamber confirm the discretion of member states to specify requirements of a genuine and stable dependency not brought about with the sole objective of subverting immigration law. As indicated above, I do not consider the elements of consistency and continuity to be unreasonable requirements of a dependency in this context.
42. Mr de Mello's arguments in this case appear to have much in common with those advanced on behalf of the applicants in *Oboh* in that they amount to a submission that the difference in context between family members and beneficiaries as defined in articles 2 and 3 respectively of the Directive does not require a narrow definition of the threshold required to bring a person within article 3(2) nor therefore for it to be necessary to distinguish the nature and extent of the dependency. Beatson LJ giving the judgment of the Court in *Oboh* conceded that the '*inclusion of dependants makes the rationale of the policy less clearly focused*' but the '*emphasis*' of the Directive is on the elimination of obstacles of the Treaty rights of the Union citizen and the Court '*failed to see why a failure to accord preferential treatment to a dependent should constitute a disincentive to the EU national to set up residence in the host member state.*' The judgment unequivocally confirmed that the policy of the Directive is not one of family reunion. (See also *Metock v Minister of Justice, Equality and Law Reform* [2009] QB 318.)
43. Also, as was the case for the applicants in *Oboh*, Mr de Mello can draw no support from the Advocate General's opinion in *Rahman* at paragraph [99]. Dealing with this submission this Court in *Oboh*, regarded the Directive to '*set the limits in the category of other family members who qualify for the preferential treatment*' in clear terms, and to correspond to that prescribed in regulation 8 of the implementing 2006 Regulations. It was intended to lay down a rule of general application. Exceptional cases would bring other legal principles into play, amongst them article 8 of the European Convention. There was no need to give the article a '*wider reading*' in order to comply with the underlying policy of the Directive, since it was unable to identify any policy which called for such and was '*permissible under established rules of interpretation in EU law.*'
44. In this case, reading the paragraph as a whole delivers a further blow to the reliance placed upon it by Mr de Mello, for the Advocate General stated that:

'If the dependency existed at the time of settlement in the host member state, but has been interrupted since then, the condition laid down by article 3(2) of Directive 2004/38 will not be satisfied.'
45. Finally, I agree with Ms Smyth that Article 7 CFEU does not assist the Appellant in this case for the reasons I indicate in paragraph [30] above. In his written submissions Mr de Mello cites Case C-325/05 *Ismael Derin v Landkreis Darmstadt-*

Dieberg as support for his argument that Article 7 requires a resumed cohabitation with or dependency upon the EEA national to be recognised as a continuing dependency, but that case concerned a family member who had joined his parents in the member state when a child and not an extended family member in the Appellant's circumstances. Mr de Mello's claim that this principle is re-affirmed as applicable to an extended family member in the case of *SM (Algeria) v Entry Clearance Officer* [2019] 1 WLR 5505 is somewhat ambitious. The case concerned a child adopted under the Kafala system. As the Advocate General concluded, automatic recognition in article 2(2) of the Directive would pose fewer difficulties, but the mechanism available whereby his entry could be considered in accordance with Article 3(2) respected his right to family life. The Grand Chamber determined that Article 7 must be read in conjunction with the obligation to take into consideration the best interests of the child. A competent national authority implementing the obligation to facilitate entry and residence would make a balanced and reasonable assessment of all the current and relevant circumstances in the case including the best interest of the child, including the age of the child when placed in the Kafala system, the time during which he lived with his guardians since placement and the closeness of the personal relationship that had developed. The unusual facts of that dependency bear no resemblance to the Appellant's case. The Appellant's circumstances considered objectively do not merit the conclusion that there is a 'genuine and stable' family life at stake.

46. For these reasons, if my Lords agree, I would dismiss the appeal.

Stuart-Smith LJ:

I agree.

Sir Stephen Richards:

I also agree.