



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/15405/2013
OA/15409/2013
OA/15408/2013
OA/15407/2013

THE IMMIGRATION ACTS

Heard at Field House
On 1 July 2014

Determination Promulgated
On 10 July 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE G A BLACK

Between

MR ABDUL RASHID KHAN (FIRST APPELLANT)
MRS SARWET JAHAN (SECOND APPELLANT)
MS EMAN ARSHAD (THIRD APPELLANT)
MS SHAFaq RASHID KHAN (FOURTH APPELLANT)

(ANONYMITY ORDER NOT MADE)

and

ENTRY CLEARANCE OFFICER - ISLAMABAD

Appellants

Respondent

Representation:

For the Appellants: No representation
For the Respondent: Mr P Duffy (Home office presenting officer)

DETERMINATION AND REASONS

1. The claimants are members of the same family and are all citizens of Pakistan. They sought entry clearance as family members of an EEA national. This matter comes before me for consideration as to whether or not there was a material error of law in the determination by First-tier Tribunal Judge Newberry (FTJ) who allowed the

appeals in his /her determination promulgated on 8 May 2014. The Secretary of State is the appellants in these proceedings and for ease of reference I shall refer to the parties as the Secretary of State and the claimants.

Background

2. The claimants made applications to visit the sponsor, Mr Rao Muhammad Ali Khan who was married to Maria Ali Khan an EEA national from Poland. The application was supported by copies of passports, bank statements in the name of the sponsor Mr Muhammad Khan and accounts for HB Services International Limited a company in which the sponsor and his wife are directors.
3. In reasons for refusal dated 25 June 2013 the Secretary of State refused the applications under Regulation 12 of the Immigration (EEA) Regulations 2006. Specifically the Entry Clearance Officer found no evidence of the claimed relationship with the sponsor and/or evidence of financial dependence. The same reason was given in each of the refusal decisions. In a review dated 21 November 2013 the Entry Clearance Manager took into account documents submitted with the application together with documents submitted with the appeal. He was not satisfied that the sponsor qualified as an EEA national; he is a national of Pakistan and a family member of an EEA national and he has a residency card. The evidence of financial dependency was limited and the claimants have not fully addressed the concerns raised by the Entry Clearance Officer.
4. In a determination promulgated on 8 May 2014 Judge Newbury allowed the appeals finding that there was evidence to show that the claimants were related to the sponsor as claimed and were financially dependent on the sponsor who made funds available. [10 &11].

Grounds of Appeal

5. The Secretary of State argued firstly, that the FTJ failed to take into account a material matter namely that the proposed sponsor for the purposes of the application was a Pakistani national who was the spouse of an EEA national who does not qualify as an EEA national under Regulation 12.
6. Secondly, the FTJ failed to correctly apply the provisions in Regulation 12 in that it is the circumstances of the EEA national who should be assessed not those of the sponsor. There was no independent evidence to show the sponsor's wife was earning £1,000 per month and/or that she was exercising treaty rights.

Permission to Appeal

7. First-tier Tribunal Judge Shimmin granted permission on 28 May 2014 concluding that it was arguable that the judge erred in that:

- (1) the sponsor was a Pakistani national and spouse of an EEA national; the ECM states that the sponsor does not qualify as an EEA national; the judge made no finding on this matter;
- (2) the judge failed to correctly apply the provisions of Regulation 12. He assessed the circumstances of the non-EEA national and not the EEA national; the evidence was insufficient to support the finding in respect of the EEA national and the claimants failed to establish dependency on the EEA national.

The error of law Hearing

8. Mr Duffy relied on the grounds of the appeal. It was accepted that the sponsor was the spouse of an EEA national and that he himself had a residence card that recognised that the EEA national was exercising treaty rights. He accepted Regulation 7(1)(a-c) (2006 Regulations) a “family member” included the spouse of an EEA national. The issue concerning the Secretary of State was the judge’s failure to consider evidence to show that Treaty Rights were being exercised and his failure to engage with evidence to show the EEA national was a qualified person.
9. Mr Rao Muhammad Ali Khan, sponsor, attended the hearing . He submitted that the Tribunal Judge had taken into account the evidence of accounts showing that his wife Mrs Khan, the EEA national, was exercising Treaty Rights as a self-employed person. He submitted that he adduced evidence to meet the concerns raised in the Reasons for Refusal Letter and Entry Clearance Manager’s review. Should it be necessary he would be able to submit further evidence such as documentation concerning taxation from HMRC.
10. Mr Duffy responded that there was no independent evidence to confirm Mrs Khan’s self-employment.
11. I indicated to Mr Duffy that the issue of the EEA national being a “qualified person” was not specifically raised in the Reasons for Refusal Letter and the determination made no reference to the issues being raised at the hearing where the sponsor was not legally represented. Mr Duffy accepted that the matter was not specifically raised in either the Reasons for Refusal Letter or by the Entry Clearance Manager. He argued that it was a standard requirement and approach in EEA cases, that the parties must always establish that the EEA national is a qualified person exercising treaty rights. Mr Duffy posed the possibility of an adjournment of the error of law hearing so that the sponsor could produce independent evidence to establish that his wife was a qualified person. I pointed out that this would amount to the introduction of new evidence that was not before the First-tier Tribunal. Mr Khan strongly argued that he had already provided the necessary evidence to meet the

reasons for the refusal and was waiting a long time for his parents to be able to visit him. He did not see that he should now be required to produce more evidence.

12. At the end of the hearing I reserved my decision. I indicated that having taken the views of both Mr Duffy and Mr Khan that I would carefully consider how to proceed in the event that I found there to be an error of law in the determination, and that at this stage all options were open.

Discussion and Decision

13. I am satisfied that there was no material error of law in the judge's determination. The Secretary of State raised two concerns in the Reasons for Refusal Letter, firstly evidence of the relationships as between the sponsor (Mr Rao Khan) and the claimants and secondly, evidence of dependency by the claimants on the sponsor. There were no other issues raised in the reasons for refusal. Mr Khan attended the hearing prepared to meet the concerns raised in the refusal notices and repeated in the Entry Clearance Manager's review. I find that the Tribunal Judge proceeded to determine the appeal having regard to those two specific concerns. There is no indication in the reasons for refusal or in the determination that the issue of whether or not the EEA national was a qualified person was raised. This is the issue that Mr Duffy now seeks to pursue. He concedes that the sponsor as the spouse of an EEA national who himself has a residence card, comes within the definition of a family member in accordance with Regulations 7. In effect Mr Duffy conceded that the reasons given in the entry clearance review were wrong and in contradiction with the EEA Regulations.
14. I am satisfied that throughout it has always been the position that the EEA national has been named as Mrs Maria Ali Khan and that the claimants are related to her husband who himself is a family member of an EEA national with a residence card. As such the Regulations allow for applications to be made in these circumstances. **(Ihemedu(OFM's - meaning) Nigeria 2011 UKUT 00340 (IAC))** In the event that there were concerns as to whether or not the EEA national was exercising treaty rights and was a qualified person, I find that this was a matter that requires to be specifically raised to enable the claimant to address those concerns in grounds of appeal. I find that that it was not raised in this particular case. I find no reference to this issue in the Reasons for Refusal Letter. In the Secretary of State's grounds of appeal it appears to be referred to in a somewhat roundabout way.
15. Mr Duffy made no application to amend his grounds of appeal. It is evident that Mr Duffy was aware of the difficulties in pursuing the appeal on the grounds concerning the definition of a family member and I take the view that his case has been argued on a different basis because the original grounds have no substance.
16. I am satisfied that the determination is sound and that the judge reached a decision that was open to him on the evidence before him and that he appropriately and

correctly engaged with the issues raised by the Secretary of State and addressed by the sponsor at the hearing. The FTJ found the sponsor's evidence to be credible and accepted the evidence of the employment and income of the EEA national [9] and found evidence that the claimants were dependent on the sponsor [9-11]. (**Jia Migrationsverket case C-1/05 & Lu 15.2.07**).

17. I find no material error of law in the determination of the First tier Tribunal, which shall stand. The appeal is dismissed. I direct that the Entry Clearance officer do issue an EEA family permit in accordance with Regulation 12.

Signed

Date 9.7.2014

Deputy Upper Tribunal Judge G A Black

TO THE RESPONDENT
FEE AWARD

The First-tier Tribunal Judge made a fee award for £140 for each appellant which I uphold.

Signed

Date 9.7.2014

Deputy Upper Tribunal Judge G A Black