



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/35725/2014

THE IMMIGRATION ACTS

Heard at Field House
On 6 July 2016

Decision & Reasons Promulgated
On 19 July 2016

Before
UPPER TRIBUNAL JUDGE C J HANSON
DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

WAQAS MANSHA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr R Singer, Counsel instructed by Liberty Legal Solicitors
For the Respondent: Mr I Jarvis, Home Office Presenting Officer

DECISION AND REASONS

1. The respondent refused to grant the appellant a residence card as an extended family member of an EEA national. The appellant appealed to the First-tier Tribunal ("FtT"). In a decision promulgated on 6 July 2015, FtT Judge Brown dismissed the appeal. The appellant now appeals that decision.

Background

2. The appellant is a citizen of Pakistan born on 5 April 1984. He entered the UK on 26 August 2006 on a student visa.
3. The EEA family member sponsoring the appellant is a cousin with Norwegian citizenship who entered the UK in December 2013 (hereinafter “the sponsor”).
4. On 6 August 2014 the appellant applied for a residence card as confirmation of a right to reside in the UK as an extended family member of the sponsor. The application was rejected by the respondent on the basis that the appellant had not established he had been dependent on or a household member of the sponsor either before or after entering the UK and therefore that the requirements of Regulation 8(2) of the Immigration (EEA) Regulations 2006 (“the 2006 Regulations”) were not satisfied.

Regulation 8(2) of the 2006 Regulations

5. This appeal concerns the application and interpretation of Regulation 8(2) of the 2006 Regulations. This states as follows:

8(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.

Decision of the First-tier Tribunal

6. Having heard oral evidence from the sponsor and appellant and considered the documentary evidence before the Tribunal, including receipts of money transfers from the sponsor to the appellant, the judge concluded that:
 - (a) Between 2002 and 2006, whilst the appellant was a student at the University of the Punjab in Pakistan, he was financially dependent on the sponsor.
 - (b) Between August 2006 and December 2013, whilst the appellant, but not the sponsor, was living in the UK, the appellant was neither dependent on nor a household member of the sponsor.
 - (c) The appellant is currently a household member of the sponsor.
7. As there was a gap of several years between the past dependency and the present household membership, the judge found that the appellant was not a family member of the sponsor within the meaning of Regulation 8(2).

Grounds of appeal

8. There are two grounds of appeal. The first ground concerns the judge's finding that the appellant was not dependent on the sponsor between 2006 and 2013. The grounds submit that the judge's approach to the evidence in respect of this period was flawed. In particular, it is submitted that he overlooked the appellant's and sponsor's evidence and relied solely on the documentary evidence in the form of remittance receipts.
9. The second ground of appeal argues that the judge misconstrued Regulation 8(2) by finding that it imposed the requirement of an unbroken period of continuous dependency/household membership.

Submissions

10. At the error of law hearing, Mr Singer, on behalf of the appellant, focused on the second ground; that is, the proper construction of Regulation 8(2). He argued that Regulation 8(2) does not require there be continuity between past and present dependency/household membership. He submitted that, following Dauhoo (EEA Regulations 8(2)) [2012] UKUT 79, it is sufficient for an applicant to demonstrate that he was dependent on or a household member of an EEA national whilst residing outside the UK (prior connection) and that he is currently dependent on or a household member of an EEA national (present connection). He contended that by requiring there to be continuity between the past and present connection, the judge was effectively imposing an additional requirement on the appellant.
11. Mr Singer illustrated his argument by suggesting that if the draftsman of the 2006 Regulations had intended there to be a requirement of uninterrupted continuity that would have been reflected in the wording, which, for example, could have stipulated that the applicant must be "continuously dependent on the sponsor throughout".
12. He also argued that a requirement of continuity would undermine the purpose of the 2006 Regulations. As applicants and sponsors can enter the UK at different times, there will inevitably be gaps in the provision of financial support or household membership. Regulation 8(2) should not be given an interpretation the consequence of which would exclude individuals in such circumstances from the definition of an extended family member.
13. In respect of the first ground, Mr Singer argued that the judge erred by effectively requiring there to be corroborative documentary evidence of the claimed financial support. He also submitted that the judge ought to have assessed the witnesses' credibility and considered the matter in the round. If the judge found the appellant and sponsor to be credible in relation to their evidence as to dependency/household membership before 2006 and after 2013, that should have been factored into the judge's assessment of the appellant and sponsor's credibility on the question of whether there was dependency between those two dates.

14. Mr Singer, relying on Lim (EEA-dependency) [2013] UKUT 00437 (IAC), also submitted that the judge erred in law by rejecting the claimed dependency between 2010 and 2012. His argument was that the judge mistakenly found that for dependency to arise it was necessary for the appellant to show he was wholly or mainly dependent on the sponsor. Mr Singer contended that, following Lim, the transfers between 2010 and 2012 for which there was documentary evidence were sufficient to substantiate there being dependency.
15. Mr Jarvis, on behalf the respondent, argued that Mr Singer's reliance on Dauhoo was misplaced. Dauhoo concerned an entirely different issue: that of whether, under Regulation 8(2), it is necessary to show an applicant's prior and present connection to the sponsor was in the same category. That case did not address, and therefore does not assist in resolving, the question of whether Regulation 8(2) imposes a requirement of continuity between the prior and present connection.
16. Mr Jarvis argued that the wording of Regulation 8(2)(c) is clear that the dependency or household membership must be continuing.
17. He acknowledged that dependency should be given a holistic meaning but did not accept that it could cover a seven year gap. He made reference to the underlying purpose of the Regulation, which is to facilitate EEA citizens exercising Treaty Rights and submitted that in this case there had been no hindrance to the sponsor's exercise of those rights.

Consideration

18. The appellant submitted, in support of his claim, evidence of money transfers to him from the sponsor. These showed several transfers between 2002 and 2006; none in 2007, 2008 and 2009; and four in the period between 2010 and 2014.
19. The appellant's explanation for the absence of documentary evidence covering the period between 2007 and 2010 was that remittance receipts were not retained as he never anticipated they would one day be required. Having heard oral evidence from the appellant and sponsor, the judge reached the conclusion that the appellant's explanation for the lack of receipts was unsatisfactory.
20. The judge did not, as argued by Mr Singer, reject the appellant's account because of an absence of corroboration. Rather, the judge, in assessing the evidence before him, took into account, and attached considerable weight to, the absence of documents he would have expected to see. There was no error of law in so doing. See, for example, TK (Burundi) [2009] EWCA Civ 40 at [16] ("Where evidence to support an account given by a party is or should readily be available, a Judge is, in my view, plainly entitled to take into account the failure to provide that evidence and any explanations for that failure.")
21. The test of whether the appellant was dependent on the sponsor between 2006 and 2013 is a purely factual one based on an examination of all of the factual circumstances. See Reyes (EEA Regs: dependency) [2013] UKUT 314 (IAC). It is clear

from the decision that the judge has considered, in detail, the evidence before him concerning the relationship between the appellant and sponsor. With respect to the transfers to the appellant between 2010 and 2013, which were never more than £300 a year and were made at the time the appellant was living in Greater London, the judge was entitled to conclude that the payments amounted to no more than some financial assistance and were not in themselves evidence of dependency. Contrary to the argument made by Mr Singer, there is no inconsistency between this finding and comment in Lim at paragraph [24] that *"If a person requires material support for essential needs in part, that is sufficient [for dependency to arise]"*

22. It was a matter for the judge to determine how much weight to attach to the appellant's and sponsor's evidence, as well as to the absence of documentary evidence. No material evidence was overlooked and we are satisfied that the judge, who carried out a wide ranging and fact specific assessment of the appellant's circumstances, made a finding about dependency between 2006 and 2013 that was open to him for the reasons he gave.
23. The second ground of appeal concerns interpretation of the word "continues" in Regulation 8(2)(c).
24. In order to meet the definition of an extended family member under 8(2)(c) three conditions must be satisfied.
 - i. The first condition is that the applicant must have been dependent on or a household member of the EEA national before coming to the UK (that is, he must have satisfied the condition in Regulation 8(2)(a)). The judge found that up until the date the appellant moved to the UK he was dependent on the sponsor. It is not in dispute that the appellant was able to satisfy this condition.
 - ii. The second condition is that the applicant must have joined the EEA national in the UK. The term "has joined" in 8(2)(c) can apply irrespective of the order in which an applicant and his EEA national sponsor enter the UK (see Aladeselu [2013] EWCA Civ 144). In this case, even though the sponsor arrived in the UK seven years after the appellant, it has been accepted - and is not in dispute - that the appellant has joined the sponsor for the purposes of Regulation 8(2)(c).
 - iii. The third condition is that the applicant "continues to be dependent upon [the EEA national] or to be a member of his household".
25. The word "continues" is not defined in the EEA Regulations. Apart from Dauhoo (discussed below), the parties have not identified, and we are not aware of, any cases which have considered how "continues" should be interpreted.
26. In Dauhoo the Upper Tribunal considered the meaning of "continues" and found that it does not denote that:

“...a person can only meet the requirement to show present dependency if that is a “continued dependency” and, likewise, that a person can only meet the requirement to show present membership of an EEA national ‘s household if that is a “continued membership”

27. The analysis in Dauhoo is not of assistance in the present case as it concerns the specific issue of whether continuity of dependency/household membership must be of the same category or whether there can be continuity between past dependency and present household membership, or vice versa. Dauhoo does not address the question before us, which is whether Regulation 8(2)(c) can be satisfied if there was an intervening period between the past and present dependency/household membership in which there was neither dependency or household membership.
28. The plain and natural meaning of “continues” is to persist or carry on with a state of affairs that is already in existence. A state of affairs does not “continue” if it ceases and then, at a later date, commences again. In such circumstances, the state of affairs can be said to have re-started, but it is not continuing.
29. Applying the ordinary meaning of “continues” to Regulation 8(2)(c) leads to the conclusion that, in order to satisfy the conditions therein, there must be continuity between the prior household membership/dependency and the present household membership/dependency. If there is an intervening period between two distinct periods in which there is neither dependency nor household membership, 8(2)(c) will not be satisfied.
30. Mr Singer argued that if continuity was required by Regulation 8(2)(c) more specific wording would have been used in order to give clarity. We do not accept this argument. Whilst there are arguably better formulations of wording than “continues to be” to convey that there must be continuity between the past and present dependency/household membership, the word “continues”, given its ordinary meaning, makes clear that continuity is required. Had the drafters intention been to not require continuity, the words “continues to be” would have been omitted from 8(2)(c) and replaced with the word “is”.
31. Whether dependency or household membership is found to “continue” is a factual question, which should be determined using the same approach as that used when considering whether there is dependency. That approach, as explained in Reyes, is a holistic one where a broad examination is undertaken of a number of factors, including financial, physical and social conditions, and

“where the essential focus is 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.”
32. Mr Singer argued that requiring continuity between past and present dependency/household membership would be contrary to the intention of the 2006 Regulations because there may be interruptions in financial transfers at the time the EEA national is settling down in the UK and such interruptions should not result in

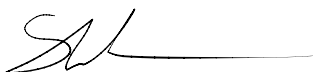
an applicant falling outside the definition of an extended family member. The difficulty with Mr Singer's argument is that whether there is continuity is a fact specific question involving consideration of all the relevant factors. Interruptions in financial transfers, particularly if they can be explained by pressures on the EEA national arising from the circumstances of adapting to his new country of residence, would not necessarily mean that dependency/household membership had not continued. Indeed, in some cases, when the relationship between the applicant and EEA national is considered holistically, dependency/household membership may be found to "continue" even though there are prolonged periods where there are no financial transfers. Every case will need to be determined on its own facts, having regard to the specific and particular circumstances, and taking into account the underlying objective of maintaining family unity.

33. In this case, it is clear from the factual findings of the judge, which we have accepted, that the appellant, after arriving in the UK, did not continue to be dependent on the sponsor. Rather, he commenced a lengthy period in which he was not dependent on or a household member of the sponsor. Only several years later, when the sponsor moved to the UK, did he become a member of his household. There is a clear demarcation between a period of prior dependency (2002 – 2006), a period without any dependency or household membership (2006-2013) and a period of household membership (2013 to the present).
34. In these circumstances, where there is a clear absence of continuity for a substantial duration between two distinct periods of dependency or household membership, the requirements of Regulation 8(2)(c) are not satisfied. Accordingly, we find that the judge was entitled to conclude that the appellant is not an extended family member of the sponsor.

Decision

35. The appeal is dismissed.
36. The decision of the First-tier Tribunal did not involve the making of a material error of law and shall stand.
37. No anonymity direction is made.

Signed



Deputy Upper Tribunal Judge Sheridan

Dated: 19 July 2016