



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/38989/2014
IA/38991/2014

THE IMMIGRATION ACTS

Heard at Field House
On 27th January 2016

Decision & Reasons Promulgated
On 1st February 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE RAMSHAW

Between

MR YASIR HALEEM SULEHRIA

MR KASHIF ALI

(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No attendance

For the Respondent: Ms A Fijiwala, a Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal by the appellants against a decision of the First-tier Tribunal dismissing their appeals. The appellants' claims are almost identical and the respondent refused their claims on almost identical terms. Their appeals were heard jointly before the First-tier Tribunal. The appellants each appealed against a decision taken on 16 September 2014 refusing their applications for a European

Economic Area residence card as confirmation of a right of residence under European Community law as the dependant cousin of a European Economic Area National exercising treaty rights in the UK.

Background Facts

2. The first appellant is a citizen of Pakistan who was born on 26 December 1983. The second appellant is also a citizen of Pakistan. He was born on 14 July 1985. The first appellant entered the UK on a student visa in October 2010. His leave was curtailed in May 2011. In July 2013 he sought leave to remain under Article 8. The respondent refused his application. The second appellant entered the UK on 4 March 2011 on a student visa. On 9 May 2011 his leave was curtailed. On 3 August 2012 he applied for leave to remain under Article 8. That application was refused by the respondent. On 14 July 2014 both appellants applied for an European Economic Area ('EEA') residence card as confirmation of a right of residence under European Community law as the dependant cousin of an European Economic Area National (Mr Hassan Butt) exercising treaty rights in the UK. Those applications were refused because the respondent was not satisfied that the appellants had provided sufficient evidence to demonstrate that they were dependent on Mr Butt prior to entering the United Kingdom and, as the appellants entered the UK on student visas, the respondent considered that they did not enter the UK in order to remain dependent on their EEA family member as required under regulation 8(2) of the Immigration (EEA) Regulations 2006 (the '2006 Regulations'). The respondent considered that the appellants had failed to provide sufficient evidence that they were dependent upon and were residing with the sponsor prior to entering the United Kingdom and that since entering the United Kingdom have continued to be dependent upon and were residing with the sponsor.

The Appeal to the First-tier Tribunal

3. The appellants appealed to the First-tier Tribunal. In a determination promulgated on 27 July 2015, Judge Mayall dismissed the appellants' appeals. The First-tier Tribunal found that there was no reliable evidence that the appellants were either members of the sponsor's household or that he was financially supporting them before they arrived in the UK. The judge did not consider that he was satisfied either that they had been dependent upon the sponsor since they arrived in the UK.

The Appeal to the Upper Tribunal

4. The appellants sought permission to appeal to the Upper Tribunal. On 19 November 2015 First-tier Tribunal Judge Grant-Hutchison granted the appellants permission to appeal. The grounds of appeal suggest it is arguable that a) the judge has misdirected himself by attaching very little weight to the contents of the witness statements before him because the appellants had opted for a paper hearing which is their choice and b) for making no findings on the evidence

produced to show that they were dependent on their sponsor before the arrival in the UK. Thus, the appeal came before me.

The hearing before the Upper Tribunal

5. The appellants did not attend the hearing. They sent a letter, signed on 22 January 2016, requesting that the Upper Tribunal decide their case on the papers as, owing to a death in the family, they could not attend. The indicated that they wanted the tribunal to apply the case of **Dauhoo (European Economic Area Regulations - Regulation 8(2)) Mauritius [2012] UKUT 79 (IAC)** to their claim. They also asserted that the First-tier Tribunal judge was not entitled to consider the income of the sponsor. I proceeded to hear the appeal in the absence of the appellants on the basis of this request.

Summary of the Submissions

6. The grounds of appeal assert that the First-tier Tribunal judge has failed to put weight on evidence provided on that basis that it was a paper hearing. The appellants are entitled to pursue their appeals by paper or oral hearing. The appellants' and sponsor's witness statements must be given proper weight as they contain a statement of truth. Witness statements were not the only evidence in this matter. The appellants referred to the recent cases of ETS (TOEIC) cases where Immigration officer's statements are given full weight without cross-examination. It is asserted that non-acceptance of statements is against fairness.
7. It is asserted that proof of remittances and cohabitation were produced but the judge did not admit them. This is not a points-based decision. It is rather an appeal under Regulations 2006 which allows parties to admit new evidence after the date of decision.
8. The grounds submit that the judge focuses on the income of the sponsor but it is clear from recent case law that there is no threshold of income specific to the residence card application. A residence card application must not be based on the necessity of the applicant for a level of dependency on a sponsor as determined in case **Reyes v Migrationsverket (Directive 2004/38/EC) Case C-423/12**.
9. It is submitted that at paragraph 21 the judge refused to accept dependency in the UK although there is a bundle of evidence of dependency and cohabitation and the only issue was dependency back home. The appellant relies on the test applied in the case of **Oboh & Ors v Secretary of State for the Home Department [2013] EWCA Civ 1525**.
10. The respondent served a rule 24 (of the Tribunal Procedure (Upper Tribunal) Rules 2008) response. It is submitted in the response that, taking an all-round view and holistic approach, it is clear that what the judge was stating at paragraph 14 is that the appellants have voluntarily declined to take full advantage of the appellate system and thus forfeited the opportunity to address many of the credibility issues in this appeal. The judge found he was unable to attach much

weight to the witness statements. This finding cannot be looked at in isolation but also with the other adverse findings at paragraphs 15 to 21 of the determination. The respondent asserts that the grounds have no merit and merely disagree with the adverse outcome of the appeal. The judge considered all the evidence and came to a conclusion based on that evidence.

11. Ms Fijiwala relied on the Rule 24 response. She submitted that it was a matter for the judge as to what weight to attach to the witness statements. By analogy she argued that at an oral hearing if a witness did not turn up to be cross examined a judge would be entitled to attach little weight to the witness statement. With regard to the second ground of appeal she submitted that the judge did admit the evidence of the remittances. The problem was that she could not ascertain the date on them. There was no evidence placing the appellants and the sponsor at the same property in Pakistan. Regarding the third ground of appeal she submitted that the income in paragraph 18 referred to by the judge was not a consideration of a minimum threshold but was a consideration of evidence to support the claim to dependency on the sponsor. She submitted that there was no evidence in support of dependency in 2015.

Relevant Legislative provisions

12. Regulation 8 of the 2006 Regulations provides:

"Extended family members". At Regulation 8(2) provides:

"(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 in which the EEA national also resides 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."

Discussion

13. In order to satisfy the requirement that they are an extended family member the appellants in this case must show prior dependency or membership of the sponsor's household in Pakistan and either dependency or membership of the sponsor's household in the UK. As set out in **Dauhoo (EEA Regulations – reg 8(2)) [2012] UKUT 00079 (IAC) ('Dauhoo')**:

"10. ... Under the reg 8(2) scheme, a person can succeed in establishing that he or she is an "extended family member" in any one of four different ways,

each of which requires proving a relevant connection both prior to arrival in the UK and in the UK:

- i. prior dependency and present dependency
- ii. prior membership of a household and present membership of a household
- iii. prior dependency and present membership of a household;
- iv. prior membership of a household and present dependency.

11. It is not necessary, therefore, to show prior and present connection in the same capacity: dependency- dependency or household membership- household membership, i.e. (i) or (ii) above. A person may also qualify if able to show (iii) or (iv)."

14. The basis of the appellants' claim was that they were financially dependent on the sponsor whilst they were living in Pakistan and that they are living in the UK as a member of the sponsor's household and are financially dependent on the sponsor. They potentially fall within the category identified as i) and/or iii) of the categories identified in **Dauhoo**. The respondent was not satisfied that the appellants met any of the categories. The reasons for refusal letter sets out, *'For the reasons stated above you have failed to provide sufficient evidence that you were dependent upon and or residing with your sponsor prior to entering the UK and that since you entered the UK you have continued to be dependent upon and residing with you sponsor'*
15. In relation to ground one the judge considered all the evidence that was available. The judge clearly considered the evidence contained in the witness statements as he set out in some detail the evidence contained in the witness statements of both appellants and the sponsor in paragraphs 6-12 of the decision. When assessing what weight should be placed upon the witness statements the judge took into consideration that the credibility of the appellants with regard to dependency was very much in issue. It is quite correct that the appellants are entitled to pursue their appeals by paper. However, as set out in **SM (Iraq) [2004] UKIAT 00279**, if doubts have been raised about the credibility of certain evidence, and the facts related by that evidence are not supported by other evidence, the position may be that the fact finder remains in doubt if an appellant does not attend to give evidence. I accept the submission made by the respondent that what the judge was stating at paragraph 14 is that the appellants have voluntarily declined to take full advantage of the appellate system and thus forfeited the opportunity to address the credibility issues in this appeal. The judge was not placing little weight merely because the appellants had opted for a paper hearing. The judge considered that credibility was in issue. In the circumstances the judge was entitled to place very little weight on the witness statements.
16. The appellants did not attend the hearing before this Tribunal and again have not availed themselves of the opportunity to address these issues.
17. In relation to ground two the judge did admit the remittances into evidence. The appellants' case was that they were financially dependent on the sponsor and

members of his household. The judge was unable to ascertain the date on any of the remittances because of the poor quality of the copies. This was the only documentary evidence submitted by the appellants in relation to financial dependency in Pakistan. This was a core issue in the appeal. The respondent had raised the issue of insufficiency of evidence in the reasons for refusal letter. Unless the appellants could prove financial dependence prior to coming to the UK the appeal could not have succeeded.

18. The appellants rely on **Reyes v Migrationsverket (Directive 2004/38/EC) Case C-423/12 ('Reyes')**. In that case the court held:

“20 In that regard, it must be noted that, in order for a direct descendant, who is 21 years old or older, of a Union citizen to be regarded as being a 'dependant' of that citizen within the meaning of Article 2(2)(c) of Directive 2004/38, the existence of a situation of real dependence must be established (see, to that effect, Jia, paragraph 42).

21 That dependent status is the result of a factual situation characterised by the fact that material support for that family member is provided by the Union citizen who has exercised his right of free movement or by his spouse (see, to that effect, Jia, paragraph 35).

22 In order to determine the existence of such dependence, the host Member State must assess whether, having regard to his financial and social conditions, the direct descendant, who is 21 years old or older, of a Union citizen, is not in a position to support himself. The need for material support must exist in the State of origin of that descendant or the State whence he came at the time when he applies to join that citizen (see, to that effect, Jia, paragraph 37).”

19. In **Jia Migrationsverket Case C -1/05**, as referred to in **Reyes**, the European Court considered:

“43 In those circumstances, the answer to Question 2(a) and (b) must be that Article 1(1)(d) of Directive 73/148 is to be interpreted to the effect that dependent on them means that members of the family of a Community national established in another Member State ... need the material support of that Community national ... in order to meet their essential needs in the State of origin ...”

20. The ratio from those judgments is that the appellants were required to prove that there was 'a situation of real dependence', that they needed the financial assistance in 'order to meet their essential needs'. Even if the 2 isolated remittances in respect of each appellant were legible to the judge it is very doubtful that they would have been sufficient to establish real dependence. In this case the judge was bound, given that the appellants had opted for the appeal to be decided on the papers, to find that the appellants had not provided the evidence required to prove financial dependence by the appellants on the sponsor when they were in Pakistan.

21. The third ground contends that the judge erred by considering the income of the sponsor. In the sponsor's witness statements he asserts that he paid for the appellants' tuition fees and that they are fully dependent on him for accommodation and maintenance. In his affidavit of sponsorship he asserts that the appellants are currently living with him and that he bears all their expenses including tuition fees, living, accommodation and all other expenses. In support of the financial dependency in the UK the appellants submitted evidence of their and the sponsor's bank accounts. They also submitted evidence of the sponsor's income for his self-employment. The applications for the residence permits were based on the sponsor exercising treaty rights as a self-employed person. In order to consider the veracity of the claim that the appellants are both financially dependant on the sponsor the sponsor's declared earnings from his self-employment are a relevant factor. The judge was not imposing a minimum income. He took into account the fact that the sponsor made only a net profit of £6,720 in the tax year ending 2014 when considering whether or not the appellants' had provided sufficient evidence to demonstrate that they were dependant financially on the sponsor. This was a relevant consideration and went directly to the credibility of the assertion that the appellants are both financially dependent on the sponsor.
22. In relation to ground four it was asserted that the judge refused to accept dependency in the UK although there is a bundle of evidence of dependency and cohabitation and the only issue was dependency back home. The appellants rely on the case of **Oboh & Ors v Secretary of State for the Home Department [2013] EWCA Civ 1525**. That case concerned the sole question as to whether the appellants can bring themselves within Article 3(2)(a) of the 2004 Directive where the dependency on the EU citizen or membership of his or her household arose only after their arrival in the United Kingdom. It was not the appellants' case that their dependency arose only after arrival in the UK. It is not clear on what basis the appellants rely on this case. The issue of dependency in the UK was in dispute, as set out above, as the respondent did not accept that the appellants were dependent on the sponsor as set out in the reasons for refusal letter. On the evidence available the judge was entitled to arrive at a conclusion that the appellants had not satisfied him that they were dependent on the sponsor as set out in paragraph 21 above.
23. For the above reasons I find that there was no material error of law in the decision of the First-tier Tribunal.
24. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

Decision

25. There was no material error of law in the decision of the First-tier Tribunal. The appellants' appeals are dismissed. The respondent's decision stands.

Signed P M Ramshaw

Date 30 January 2016

Deputy Upper Tribunal Judge Ramshaw