



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: EA/08555/2016

THE IMMIGRATION ACTS

Heard at Field House
On 3 July 2018

Decision & Reasons Promulgated
On 9 July 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE FROOM

Between

MATHANIKA NADARAJAH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Walsh, Counsel

For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. In a decision promulgated on 30 May 2018 I set aside the decision of the First-tier Tribunal because it contained a material error of law. The appeal had to be re-heard. It was not possible to continue to re-make the decision at that hearing due to the absence of an interpreter.
2. The appellant appeals against a decision of the respondent, dated 24 June 2016, refusing to issue her a residence card as the dependent family member of her son, Mr Nadarajah Prahalathan, a French national residing in the UK ("the sponsor"). The

appeal was brought under Regulation 26 of the Immigration (European Economic Area) Regulations 2006 (“the EEA Regulations”).

3. The First-tier Tribunal found the sponsor was exercising his Treaty rights in the UK and that finding has not been disturbed. No issue has been taken over the relationship between the appellant and the sponsor. The remaining issue to be decided is whether the appellant is dependent on the sponsor so as to satisfy the requirement of Regulation 7(1)(c) of the EEA Regulations¹, a provision giving effect in domestic law to Article 2(2)(d) of Directive 2004/38/EC (“the Citizens’ Directive”). If she is dependent, as defined in European law, then she is entitled to a residence card as a family member of the sponsor.
4. At the error of law hearing, it became clear the appellant had not been dependent on the sponsor prior to coming to live with him in the UK, at least as far as her essential living costs were concerned. However, further findings of fact were required as to the situation in the UK because Mr Melvin was concerned that any dependency had been artificially created. I indicated that, if the respondent wished to raise a new issue, such as abuse of rights, this should be notified at the earliest time. Mr Melvin’s written submissions made clear the respondent did not wish to pursue this argument.
5. The appellant and the sponsor gave oral evidence and underwent cross-examination. However, I do not propose to dwell to long on the facts of this appeal, which are largely agreed. The appeal turns on the interpretation of law rather than findings of fact. I have already stated that the appellant was not dependent on the sponsor before she left Sri Lanka. She received a pension, accrued by her late husband through his employment, and indeed continues to receive that income, which is paid into her HNB bank account. Although her visa application form stated she also received an income from savings and investments, as well as properties and rent, the appellant denied this at the hearing, as she did in the First-tier Tribunal. She said her only income was her pension. She is unable to read in English and the agent who completed the form must have made a mistake.
6. The First-tier Tribunal found the material inconsistencies in the evidence indicated a lack of credibility on the part of the appellant. Mr Melvin also raised this matter in his cross-examination. I do not find it necessary to decide the point because it is clear that, even if the appellant’s income was restricted to the pension, this was sufficient to meet her essential living costs. The only suggestion in the evidence that she required additional funding was in respect of her medical bills. Shortly before travelling to the UK the appellant’s heart problems required the insertion of a stent. Plainly, cardiac surgery would be expensive and not a matter which could be considered as an ordinary expense.

¹ “Family member

7.-(1) Subject to paragraph (2), for the purposes of these Regulations the following persons shall be treated as the family members of another person-

...

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

7. I note the appellant entered the UK on 6 July 2015. The visa application form, which is copied in one of the appellant's bundles, shows that she applied for entry clearance as a family visitor. The appellant's witness statement, dated 10 July 2017, states that the appellant held a six-month visit visa which she used to enter the UK on 6 July 2015. There is a copy of the appellant's passport in the respondent's bundle which shows that she was issued with a "C-FAMILY VISIT" visa on 27 June 2015 valid until 27 December 2015. It is not clear from the information contained on it whether this was in fact an EEA family permit, although Mr Melvin's submissions appear to accept it was. The application for a residence card was made on 24 December 2015.
8. I find as fact that, since arriving in the UK, the appellant has lived as part of the household of the sponsor together with his wife and two children. They share accommodation joined to the family's corner shop business. A ground floor living room was converted for use by the appellant as a bedroom. The rent for the entire premises is paid for from a business bank account. All the utility bills are met by the sponsor, either in person or through his business. The costs of maintaining the appellant are also met by the sponsor. The appellant takes her meals with the family and her incidental expenses are met out of the common family budget.
9. It emerged from the oral evidence that the appellant has been able to save up her pension income in Sri Lanka. Early in 2017 her youngest son travelled to Sri Lanka and she gave him her bank card in order to withdraw funds to buy jewellery and clothes for her. She also bought a bangle for her grandson. The total cost of these purchases was around £2000. Apart from that, she has not drawn on the money and the latest HNB bank statement I was shown has a balance of nearly 286,000 Sri Lankan Rupees. This is the equivalent of approximately £1360.
10. The bank statements show that the appellant's pension is in the order of 31,000 Sri Lankan Rupees per month, which would be the equivalent of around £160. It is quite clear therefore that, even if the appellant contributed her entire income towards her upkeep, she would remain mainly or substantially dependent on support from the sponsor. As a matter of fact, I find she is dependent on the sponsor in the UK and has been since her arrival here.
11. For the sake of completeness, it might have been argued that, had the income from investments and rent mentioned in the visa application form been taken into account, the appellant might have been self-sufficient in the UK. However, I proceed on the basis that, for whatever reason, the application form was inaccurate. There is no evidence the appellant has any other bank account in Sri Lanka and the HNB bank statements which the appellant has provided do not suggest the appellant has any other regular income.
12. For the avoidance of doubt, it is also clear that the existing dependence is not a continuation of previous arrangements as they existed while the appellant resided in Sri Lanka, perhaps with an enhancement for the additional costs of living in the UK. The appellant ceased supporting herself and chose to become dependent on the sponsor.

13. So I now come to the legal question at the heart of this appeal, which is this. What is the effect of the finding that the appellant was not dependent on the sponsor when she left Sri Lanka and has only become dependent on him in the host EEA state (UK)? While the case does not turn on the point, it is worth pointing out that the dependency has arisen because the appellant now lives in a more expensive country where her income is insufficient to meet her essential needs. This issue was somewhat obscured at the error of law hearing by the arguments regarding possible abuse of rights which, as seen, are not now pursued.
14. Mr Walsh argued that I should follow *Pedro v SSWP* [2009] EWCA 1358 and find that, as this is a case brought under the Citizens' Directive, the appellant did not need to show a need for material support in the country of origin (Sri Lanka). Mr Melvin argued that Pedro was no longer good law following *Reyes v Migrationsverket 2014/C-423/12*, as discussed in *Lim v ECO, Manila* [2015] EWCA Civ 1383. I shall therefore consider these authorities in more detail.

Pedro

15. The facts of the case were similar to the present case insofar as it concerned a mother who had joined her Portuguese national son in the UK. The appellant appealed the refusal of State Pension Credit. One of the reasons given by the Deputy Commissioner for dismissing her appeal was, as in this case, the dependency on the EEA sponsor had only arisen in the UK and the legal test of dependency for the purposes of European law had to be assessed in the country of origin.
16. The Court of Appeal overturned the decision of the Deputy Commissioner, agreeing with submissions made on behalf the appellant that there was no such requirement in European law. The Court noted that the Citizens' Directive had been enacted to strengthen rights of free movement and residence of citizens of the European Union. Article 2 said nothing as to when or how the dependency arose. The Court noted the additional requirement in Article 3(2)(a) for other family members to show actual dependency at a particular time and place. This could not be an accident of drafting. Imposing a requirement for the dependency to have arisen in the country of origin before the appellant joined the sponsor would create a barrier to free movement.
17. As Goldring LJ put it, "*a Union citizen who wishes to work in another Member State may be deterred from doing so if he knows that his elderly, but not then dependent mother, will not be regarded as his dependent for the purposes of Article 2(2) if she joined him and later becomes dependent upon him.*" In conclusion, it was sufficient that the dependency arises in the host state.

Reyes

18. In this case, the Swedish Immigration Board requested a preliminary ruling on the interpretation of Article 2(2)(c) of the Citizens' Directive. It concerned dependency on the part of an adult child but identical considerations applied. The dispute in the case centred on the relevance, if any, to the question of the existence of a situation of real dependence where the appellant, although apparently capable, had done nothing to

find employment in order to support herself in the country of origin. The Court, echoing the opinion of Advocate General Mengozzi, held the appellant could not be required to establish that she had tried without success to find work or obtain subsistence support from the authorities of the Philippines. As a corollary, the fact she was well placed to obtain employment did not affect the interpretation of the requirement that she be a dependant.

19. The case is important for the purposes of this appeal because, in setting out the conclusions of the Court in the earlier case of *Jia v Mikrationsverket (Case C-1/05)*, dealing with the correct interpretation of Article 43 of Directive 73/148/EEC, the Court stated as follows,

“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 citizen (see, to that effect, *Jia*, paragraph 37).” (emphasis added)

Lim

20. The issue for determination in this case was whether an applicant who had sufficient savings to meet her own needs but who chose instead to rely on financial support from a Union citizen relative so that she would be able to pass on her assets to her children could be regarded as a dependent relative in the ascending line within the meaning of Regulation 7(1)(c). In concluding that receipt of support was a necessary but not sufficient condition and that it was still necessary to determine that the family member was dependent in the sense of being in need of the assistance, the Court considered a number of authorities, including *Pedro* and *Reyes*.

21. Of *Pedro*, the Court said this:

“22. In a judgment handed down three weeks after *SM*, namely *Pedro v Secretary of State for Work and Pensions* [2009] EWCA Civ 1358, [2010] 2 CMLR 20, Goldring LJ (with whom Mummery and Sullivan LJJ agreed) again considered the question of dependency and the true ratio of *Jia*. This was a case on the Citizens Directive. A 62-year-old Portuguese national had come to the UK in 2004 to join her son. At that point she was able to support herself in Portugal. Subsequently she relied upon her son for support. She claimed state pension credit. This depended upon whether she was a dependent family member within the meaning of the Citizens Directive. The Secretary of State said that, in accordance with *Jia*, she was not since she could support herself in her country of origin at the time when she applied to come to the UK. She contended that she had become dependent on her son since leaving Portugal and that this was enough to make her a dependent family member within the meaning of the Citizens Directive. The Court of Appeal agreed. Goldring LJ distinguished *Jia* on the grounds that it was concerned with a different directive. He held that the Citizens Directive went further than earlier Directives on freedom of movement and did not require in all cases that the question of dependency should be assessed by reference to the circumstances in the state of origin. However, Goldring LJ accepted (paragraph 61) that where the only basis of

an alleged dependency was support in the state of origin, it would be appropriate to apply *Jia*, citing the decision of the Court of Appeal in *Bigia v Entry Clearance Officer* [2009] EWCA Civ 79, [2009] 2 CMLR 42.

23. I do not, therefore, read *Pedro* as affecting the appropriate principles to apply in a case of this nature; it does not address the specific question that we have to resolve. In any event, I very much doubt whether it can now stand in light of the third and most recent decision of the CJEU, namely *Reyes v Migrationsverket* 2014/C-423/12, [2014] QB 1140. *Reyes* was concerned with the question whether an EU direct descendant aged 21 or older could be treated as a dependant within the meaning of Article 2.2(c) of the Citizens Directive. The same principles would apply equally to ascendants under paragraph (d)."

22. Of *Reyes* the Court said this:

"25. In my judgment, this makes it unambiguously clear that it is not enough simply to show that financial support is in fact provided by the EU citizen to the family member. There are numerous references in these paragraphs which are only consistent with a notion that the family member must need this support from his or her relatives in order to meet his or her basic needs. For example, paragraph 20 refers to the existence of "a situation of real dependence" which must be established; paragraph 22 is even more striking and refers to the need for material support in the state of origin of the descendant "who is not in a position to support himself"; and paragraph 24 requires that financial support must be "necessary" for the putative dependant to support himself in the state of origin. It is also pertinent to note that in paragraph 22, in the context of considering the Citizens Directive, the court specifically approved the test adopted in *Jia* at paragraph 37, namely that:

"The need for material support must exist in the State of origin of those relatives or the State whence they came at the time when they apply to join the Community national."

26. This, as I say, makes the analysis in *Pedro* highly problematic. I doubt whether it is compatible with *Reyes*."

23. In other words, the common thread found in *Jia* and *Reyes*, that the dependence had to exist in the country of origin, was confirmed in *Lim*. That would appear to be fatal to the appellant's case on the basis of the findings of fact which have been made.
24. However, Mr Walsh sought to argue that the doubts about the rightness of *Pedro* expressed in *Lim* did not affect the particular aspects of *Pedro* on which the appellant relies. He described the facts of the present case as being on all fours with *Pedro*, which they are in most material respects.
25. It is clear that *Pedro* was concerned with dependency which arose after the appellant had installed herself with her son in the UK, as in this appeal. However, *Reyes* was also concerned with an adult child who entered the Schengen Area with a visa to visit her mother and stepfather and who made an application for a residence card later in the same year. Unlike the sponsor in this appeal, the sponsor in *Reyes*, who had left the appellant behind in the Philippines as a young child in order to move abroad to work, had always sent money for her support. *Lim* was concerned with an entry clearance

application so, in that sense, the issue of where the dependency has to be shown did not arise.

26. Mr Walsh argued I should apply the same reasoning applied by Goldring LJ in *Pedro* with respect to the importance of not imposing unnecessary barriers to free movement and the need to apply the Citizens' Directive so as to strengthen rights. *Jia* was concerned with an earlier Directive. Furthermore, *Reyes* and *Lim* were cases which decided other aspects of the correct approach to the meaning of dependency. The cases established that it was not enough to find a factual situation of the provision of support and it was necessary to examine whether the appellant is dependent in the sense of needing assistance. It is irrelevant that the appellant has been unable or unwilling to find a job (*Reyes*) but if the appellant simply chose not to use her own resources she was not dependent (*Lim*). Mr Walsh's argument was that the current appeal does not concern those types of issues and therefore *Pedro* continued to be authoritative on the issue of whether it was possible to have regard to dependency which only arose in the host country.
27. I respectfully disagree with Mr Walsh and I do not consider that *Pedro* can be distinguished from *Reyes* in the manner advanced. That is because, as explained in paragraph 23 of Elias LJ's judgment in *Lim*, with which McCombe and Ryder LJ agreed, the doubts expressed over the correctness of Goldring LJ's approach was in the context of its incompatibility with *Reyes*. It was not suggested parts of *Pedro* remained compatible and other parts not. The proposition advanced in *Pedro* that dependency did not always have to be determined by reference to the country of origin was the very point which was described in paragraph 22.
28. In any event, to my mind, the facts of this case do not make it possible to say that such an interpretation, restricting consideration of dependency to the country of origin as propounded in *Jia* and *Reyes*, would impose a barrier to the sponsor's freedom of movement so as to run counter to the recitals of the Citizens' Directive, relied on by Goldring LJ in *Pedro*. It is not known on what basis the sponsor came to the UK in 2005 or when or how he became a French citizen. He has not stated that he would not have exercised his right of free movement by coming to the UK to work if he had known that he would not have been able to bring his mother to join him some ten years later. What is clear is that, when the appellant entered the UK in September 2015, she was in good health and she intended to return to Sri Lanka to resume her life there. She confirmed this in evidence. She explained that the decision for her to remain in the UK was taken by her children after she became ill and it became apparent her heart surgery had not been as successful as initially thought. In other words, she had not been seeking to join the sponsor's household when she arrived and the suitability of this arrangement only became apparent some weeks or months afterwards. The facts of the case are not, it seems to me, meaningfully connected to the sponsor's freedom of movement.
29. I also note that such a conclusion would be in line with the opinion of the Advocate General in *Jia*, cited in paragraph 15 of *Lim*, and paragraph 2.1.4 of the European Commission's "Guidance for the better transposition and application of Directive

2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States”, issued on 2 July 2009 and cited in paragraph 43 of *Pedro*.

30. For these reasons, the appellant’s appeal brought under the EEA Regulations is dismissed. She cannot bring herself within Regulation 7(1)(c) and she is not a ‘family member’.

Notice of Decision

The appeal is dismissed under the EEA Regulations.

No anonymity direction is made.

Signed

Date 4 July 2018

Deputy Upper Tribunal Judge Froom