



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: EA/00717/2018

**THE IMMIGRATION ACTS**

Heard at the Royal Courts of Justice  
On 10<sup>th</sup> June 2019

Determination Promulgated  
On 21<sup>st</sup> June 2019

Before

UPPER TRIBUNAL JUDGE COKER

Between

SAAD ALI

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Ms S Saifolahi, instructed by Kingswright Solicitors  
For the Respondent: Ms S Jones, Senior Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. Mr Ali is a Pakistani national, born on 15 June 1997. On 6<sup>th</sup> July 2017, aged 20, he made an on-line application for a residence card as the family member of an EEA national. The application form does not state, in terms, whether he is applying for a residence card as a family member as defined in regulation 7 of the Immigration (European Economic Area) Regulations 2016 or as an extended family member as defined in regulation 8. The copy form, as it appears in the respondent's bundle, does not identify the type of residence card it applies to.

2. In that application form, the appellant has described that he is applying as a 'family member of an EEA National'; he describes himself as being the 'real brother' of Ehsan Ur Rehman who is his 'legal guardian' and an EEA national exercising Treaty Rights. In response to the question as to his current working status, the appellant responds, 'supported by spouse/partner/brother'. In response to questions as to how he is related to the EEA national, the appellant describes Mr Rehman as his 'brother/legal guardian'. In the section in which he gives further information to be considered the appellant says, *inter alia*:

"Ehsan Ur Rehman is real elder brother of Saad Ali and become legal guardian of Saad Ali by the order of Civil Guardian Judge Islamabad on 11 November 2014 and living together on permanent address of Ehsan Ur Rehman in Pakistan....Saad Ali applied for visa of Italy, but rejected and was given right of appeal, Ehsan Ur Rehman filed appeal and the appeal was accepted...but now Ehsan Ur Rehman shifted to UK...and now there is no need for Saad Ali to get Italy visa...EEA national is legal guardian of applicant. EEA national is real elder brother applicant. Applicant is a member of EEA nationals household."

3. The application was refused on 15<sup>th</sup> December 2017 in a document headed 'Refusal of EEA Family Permit' which stated, *inter alia*:

"You have applied for an EEA family permit to join Ehsan Ur Rehman in the United Kingdom as the Direct Family Member (Brother) of an EEA National. I have considered your application under regulation 7.... I have used all the information provided by you to determine if the requirements of the [2016 regulations] have been met. ..."

The ECO did not accept that the documents provided (Pakistan Family relationship Certificate and appointment of guardian document) were sufficient evidence that the appellant was the brother of Ehsan Ur Rehman. Nor did the ECO accept that the financial evidence provided was sufficient to validate the claim that he was dependant on Mr Rehman and he was therefore not satisfied the appellant met the requirements of regulation 7.

4. In his grounds of appeal, the appellant pleaded, *inter alia*, that the ECO decision was against regulations 7 and 8 of the 2016 Regulations. The ECM review that took place after the filing of the grounds of appeal did not address regulation 8 and simply confirmed the ECO decision under regulation 7.
5. First-tier Tribunal Judge Davey heard the appeal on 23<sup>rd</sup> October 2018 and dismissed it for reasons set out in a decision promulgated on 7<sup>th</sup> November 2018.

#### Error of law

6. The First-tier Tribunal judge identified the decision the subject of the appeal as an appeal against a decision refusing a family permit as a direct family member. He found the sponsor to be an EEA National who was residing in the UK in accordance with the Regulations and that the appellant and the sponsor were brothers, as claimed. He identified the meaning of 'direct family member as per

regulation 7, found the appellant was not, as a brother, a direct descendant or direct relative in the ascending line and dismissed the appeal. The judge found that the legal guardianship was not relevant for the purposes of regulation 7 irrespective of whether and when it came to an end (it was expressed as continuing during the appellant's minority).

7. The First-tier Tribunal judge was correct in his finding that the appellant did not meet regulation 7.
8. The judge found:
  - “4. The appellant is not an extended family member but it is clear that the Sponsor is a dual national Pakistan Italian. In these circumstances whilst I am satisfied the documentation produced addresses the basis of the refusal by the ECO and there is sufficient evidence to show that the Appellant is the brother of the Sponsor, the fact is that the point was not picked up by ECO but it is not open to me to waive it; the fact is the Appellant is not a direct descendant nor a family member of the Sponsor.
  5. For these reasons therefore whilst I find the Appellant has been honest and truthful in the application, the fact is that he cannot succeed in this appeal in obtaining an EEA family permit.
  6. The evidence that was provided of the financial support that the Sponsor provides the Appellant was unchallenged as are the other documents establishing their relationship but they do not resolve the matter that the application can succeed on the basis of him being a family member under the Regulation.”
9. The judge has not addressed, in terms, the ground of appeal that the appellant claims to be an extended family member and falls within regulation 8. Ms Jones said that her note of the submissions made by the Presenting Officer did not indicate that the question of whether the appellant met the criteria of regulation 8 was raised before the First-tier Tribunal. It may be that the Presenting Officer did not make submissions on the point, but it is clear that the issue was live because it features in the first line of the grounds of appeal. The First-tier Tribunal judge seems to have been aware of this given his reference to his inability to ‘waive’ the question of regulation 8 because it was not ‘picked up’ by the Entry Clearance Officer.
10. I am satisfied the First-tier Tribunal judge has made an error of law such that the decision is set aside to be remade: the judge failed to reach a clear decision on all the grounds of appeal that were before him.

Remaking the decision.

11. Paragraph 4 of the First-tier Tribunal decision is a little confusing; it seems to me that the first sentence includes an error in stating that the appellant is not an *extended* family member. To make sense given the rest of the decision, it should read that he is not a *direct* family member. Later in that paragraph the judge has only addressed issues of whether he is a family member in the context of regulation 7 and he specifically makes the point that he cannot waive something that has not been addressed by the ECO.

12. The judge notes that the financial documents relied upon by the appellant before him were not challenged. Ms Jones acknowledged that there were no adverse credibility findings and that there had generally been positive findings made.
13. I raised 2 issues with the parties – first whether consideration of the appeal under regulation 8 would or should have been a new matter which the SSHD ought to have taken a decision on whether to consent and secondly whether, in any event, the Tribunal had jurisdiction to determine an appeal in connection with a claimed extended family member.
14. So far as whether consideration under regulation 8 is a new matter, Ms Jones took the view that it probably wasn't given the content of the application form but if it was she was agreeable to it being determined by me and she did not need an adjournment given the positive findings made by the First-tier Tribunal Judge which were not challenged.
15. The question of jurisdiction is more complex. The Immigration (European Economic Area) Regulations 2016 specifically excluded a right of appeal for Extended Family Members. That legislation has now been amended, with effect from 29<sup>th</sup> March 2019, but it does not have retrospective effect. It is however open to Mr Ali to invoke the doctrine of direct effect under EU law in relation to a decision which falls into the lacuna between the 2006 regulations and the amended 2016 regulations.
16. Ms Jones said that if I could, given the positive findings, then I should allow the appeal.
17. The appellant is the brother of the EEA sponsor who is exercising Treaty Rights in the UK; the evidence that the sponsor provides financial support is unchallenged. Ms Jones stated the appeal should be allowed.
18. In these circumstances I allow the appeal.
19. The position therefore is that the respondent is now required to undertake the assessment under regulation 12(5).

Conclusions:

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision and remake it by allowing the appeal.

Date 17<sup>th</sup> June 2019



Upper Tribunal Judge Coker