Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/05547/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17 September 2019	**On 26 September 2019**

Before

UPPER TRIBUNAL JUDGE RINTOUL
UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

MR EMMANUEL JACKSON
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms A Delbourgo, Counsel, instructed by Adam Bernard Solicitors
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against a decision of First-tier Tribunal Judge Harris handed down on 12 February 2019 in which he dismissed the appellant's appeal against a decision of the Secretary of State of 4 April 2016 to refuse to issue him with a residence card as confirmation of his right to reside as the extended family member of his brother, Mr [LJ], who is an Italian citizen exercising treaty rights in the United Kingdom.

2. We observe first of all that there is a matter which needs to be clarified with regard to what happened in this case. The appeal, as we have noted, was brought against the decision made in 2016. Following the decision of the Upper Tribunal in Sala (EFMs: Right of Appeal) [2016] UKUT 411 (IAC)and the doubts as to whether there was in fact a right of appeal under the 2006 Regulations for a matter such as this, the appeal was stayed.

3. In the meantime, on 25 September 2017, the applicant made a fresh application for a residence card which was refused on 19 December 2017. That application was made under the Immigration (European Economic Area) Regulations 2016, which, amongst the changes it introduced, removed the right of appeal against decisions not to issue somebody a residence card as confirmation of their right of residence as the extended family member of an EEA member. Although that has now been changed the effect was not retrospective and thus, there was no right of appeal against the decision of 19 December 2017. We say this for reasons which will become clear when we move on to considering the grounds of appeal against the decision of Judge Harris.

4. The judge heard evidence from the appellant and his brother. He also had a number of documents before him and came to a number of conclusions of facts about whether there had been membership of a household in Italy and whether there had been dependence prior to the appellant travelling from Italy to the United Kingdom. The judge found that the appellant's brother had come to the United Kingdom in 2011 to find work and found that the appellant had come to the United Kingdom in 2015.

5. The judge said this at paragraph 25:

> "On the evidence before me I find I am not satisfied it is demonstrated that at the time directly prior to coming to the United Kingdom in February 2015 the appellant in Italy was a member of the brother's household within the meaning of the 2016 Regulations. I am prepared to accept that between 2010 and 2011 the appellant and his brother lived in the same household. However, on the appellant's account in 2011 Mr [LJ] came to the United Kingdom to find work which he did successfully. I am not satisfied that the ties that Mr [LJ] had to Italy after he came to the UK were sufficient to establish that he still had a household in Italy. He spent the clear majority of each year working in the UK not Italy."

6. The judge then went on to consider whether there was dependency, taking into account the evidence as to the expenses. The judge noted at paragraph [36] that the evidence of the appellant and his brother was not consistent and he would not expect such discrepancies to exist, and he concluded at paragraph [37]:

> "I am not satisfied it is demonstrated that [the living expenses] there were at least €270 per month. I also find there are significant doubts which arise over the appellant's claim he was not earning sufficient income in Italy to meet his living expenses, which prevent me accepting this element of his claim",

and again, at [38]:

> "I am not satisfied it is demonstrated on the oral and documentary evidence before me that in the period prior to the appellant coming to the United Kingdom he received material support from his brother in order to meet his essential needs. Without that being demonstrated, the appellant is unable to demonstrate that he is the extended family member within the meaning of Regulation 8(2)."

The judge also went on to note at 41, "applying the guidance given in Amirteymour [2017] EWCA Civ 353, no human rights grounds arise for consideration".

7. The appellant sought permission to appeal from the Upper Tribunal. The grounds set out the 2016 Regulations at paragraphs 1 to 8. They then set out Regulation 8, and averred that [15] the standard of proof is the balance of probabilities. There is reference to the evidence at paragraphs [16] to [20] but this is written as criticisms of the respondent and does not engage with the judge's decision.

8. The grounds then turn to findings of fact and it is stated that the application was refused by the respondent on 19 December 2017. There is no reference to the earlier decision. There is then a reference at paragraph 23 to the 2006 Regulations and it is said at paragraph [24] that the application for a residence card was submitted by the appellant's previous solicitors on 22 September 2017 and refused on 19 December 2017. As we have already noted, that is what happened but it is not the whole picture and it is clear that there was an earlier application which was the subject of the appeal.

9. In that context, what is averred at paragraph 25:

> "Paragraph 1 of the Immigration Judge's Decision and Reasons promulgated on 12/02/19 is very misleading and contrary to the respondent's refusal letter as dated above [19 December 2017] …"

makes no sense nor does this statement at paragraph [26]

> "It is categorically denied that the appellant made an application for a residence card on 4 April 2016 as contained in the First-tier Tribunal M P W's Judge's decision dated 12/02/2019 a copy of which is served with this appeal notice".

10. As we observed during the hearing, the denial of an application being made on 4 April 2016 is clearly wrong. It is perhaps somewhat surprising that a competent solicitor could have signed grounds of appeal which contain such an obvious misstatement.

11. What we have just narrated is the sole basis of the challenge to the judge's decision. There is no challenge to the findings of fact. That they state all documents in support of the application would be submitted once the directions had been given by the Upper Tribunal does not permit the addition of additional grounds of appeal nor does it permit them to be amended without a proper application which has not in this case been done.

12. When granting permission, Judge Lindsley said:

> "It is arguable that the First-tier Tribunal unlawfully required the membership of the household to be immediately prior to the appellant coming to the UK in 2015 at paragraph 25 of the decision. It is arguable that this error was material as there is no decision finding that there is no dependency or membership of the household in the UK."

13. We have been assisted by skeleton arguments from both representatives but in the event, we did not need to hear from Ms Isherwood. That is no disrespect to her, it is simply the fact that on the basis of submissions we heard, we considered that there was no error of law, for the reasons which we now proceed to give, and as such, we did not need to hear from her. No disrespect is intended.

The Core of the Applicant's Case

14. With regard to the matters raised in the grounds of appeal, as already noted we find that there is simply no material error identified. It might have been helpful if the judge had set out that a second application had been made but it is clear that he reached findings which are unchallenged about the appellant's prior dependency on his uncle and prior membership of his uncle's household.

15. It is, we consider, clear from the decision of the Upper Tribunal in Dauhoo (EEA Regulations Regulation 8(2)) [2012] UKUT 79 that there are four means by which eligibility can be shown but all of those require either prior dependency or prior membership in the country of origin. The judge found that there was neither.

16. As to the nexus between that prior dependency or prior membership of a household, we note that this has been considered in two previous decisions of the Court of Appeal. We turn first to KG (Sri Lanka) & AK (Sri Lanka) [2008] EWCA Civ 13 and we note, as can be seen from paragraph 33, that:

> "The right of movement on the part of relations is not only to support family values but in order to make real the right of movement of the Union citizen who may be deterred from exercising that right if he cannot take his relevant family with him. That is the constant theme of the cases we were shown in support of the attempt to assert the doctrine of family reunion."

17. The Court of Appeal then went to consider a large part of the jurisprudence and at [65] said this:

> "The basic point can be put quite shortly. No family members have rights of residence unless the Union citizen exercises his own right to move to or reside in a member state of which he is not a national. Article 3.1 of Directive 2004/38 provides that article 2 family members obtain the benefit of the Directive if they accompany or join such Union citizens. Although not specifically so stated, it is hardly likely that an OFM will not be also so required to be accompanying or joining his relevant Union citizen. The tight relationship between the exercise of rights by the Union citizen and the requirement that the OFMs accompanying or joining him should have been his dependants or members of his household in the country from which they have come very strongly suggests that that relationship should have existed in the country from which the *Union citizen* has come, and thus have existed immediately before the Union citizen was accompanied or

> joined by the OFM. It seems wholly unlikely that when article 10(2) of Regulation 1612/68 and article 3(2)(a) of Directive 2004/38 introduce the requirement of dependence on and membership of the household of the Union citizen in the country from which the OFM has come, they can have had in mind anything other than dependence on the Union citizen in the country movement from which by the Union citizen is the whole basis of his rights and, thus of the rights of the OFM."

18. That point was taken and approved when the Court of Appeal next decided to consider the issue in Bigia & Others v Entry Clearance Officer [2009] EWCA Civ 79. They considered the decision in Metock, which had happened since then. They concluded that this did not alter the situation, having reviewed that decision in some detail.

19. Having approved the approach taken in KG (Sri Lanka), they went on to deal with specific appeals at paragraph [42] and [43] concluding that he did not. They did at [43] say this:

> "OFMs who seek to travel from a different country to that from which the Union citizen is moving or has recently moved cannot without more be said to be members of his household. Similarly, whilst an OFM in a non-member state may be financially dependent on a Union citizen because he is provided with accommodation or living expenses by the Union citizen, there is no reason why the Union citizen's movement to the host state would be discouraged. I accept Mr Palmer's submission that it is only those OFMs who have been present with the Union citizen in the country from which he has most recently come whose ability or inability to move with him could impact on his exercise of his right. This also explains Lord Justice Buxton's requirement of very recent dependency or household membership. Historic but lapsed dependency or membership is irrelevant to the Directive policy of removing obstacles to the Union citizen's freedom of movement and residence rights."

20. We then move on to consider the decision of the Court of Justice in Rahman [2012] EUECJ C-83/11. Contrary to what was submitted, we do not consider that this case in any way supports the applicant. On the contrary, we consider that the facts in Rahman as set out in paragraph 11 to 14 are on all fours with this. That is to say that there was a family permit issued under the Regulations then a subsequent application made for a residence card.

21. Whilst the applicant seeks to rely specifically on paragraph 33, this must be seen in its context at paragraphs [32] to [34], most pertinently at [34]:

> " 32 So far as concerns the time at which the applicant must be in a situation of dependence in order to be considered a 'dependant' within the meaning of Article 3(2) of Directive 2004/38, it is to be noted that, as follows from recital 6 in the directive's preamble, the objective of that provision is to 'maintain the unity of the family in a broader sense' by facilitating entry and residence for persons who are not included in the definition of family member of a Union citizen contained in Article 2(2) of Directive 2004/38 but who nevertheless maintain close and stable family ties with a Union citizen on account of specific factual

> circumstances, such as economic dependence, being a member of the household or serious health grounds.
>
> 33 It is clear that such ties may exist without the family member of the Union citizen having resided in the same State as that citizen or having been a dependant of that citizen shortly before or at the time when the latter settled in the host State. On the other hand, the situation of dependence must exist, in the country from which the family member concerned comes, at the time when he applies to join the Union citizen on whom he is dependent.
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> 34 In the main proceedings, it is for the national tribunal to establish, on the basis of the guidance as to interpretation provided above, whether the respondents in the main proceedings were dependants of the Union citizen, in this instance Mrs Rahman, in the country from which they have come, Bangladesh, at the time when they applied to join her in the United Kingdom. It is only if they can prove that dependence in the country from which they have come, in accordance with Article 10(2) of Directive 2004/38, that the host Member State will have to facilitate their entry and residence in accordance with Article 3(2) of that directive, as interpreted in paragraphs 22 to 25 of the present judgment."

22. We consider therefore that there is nothing in this which is contrary to what has been said by the Court of Appeal in the decisions to which we have referred. On the contrary, we consider that this in accordance with the view of the Court of Appeal that there has to be a temporal nexus between an applicant and the sponsor in the host state. That is to say, the applicant must have been a dependent on the sponsor or a member of his household shortly before the sponsor left to travel to the host state to exercise his Treaty rights. Whilst it would not be correct to say that this must exist immediately in the sense of a few hours or days before the sponsor left, it must be such a nexus that

23. Whilst we note Ms Delbourgo's submissions that we must look in this case at the situation prior to the application for a residence card, not the family permit (and thus take into account the situation in the host country), we do not consider that that is a proper reading of Rahman. We do not consider that that case is authority for the proposition that one would have to look at prior membership or dependency in a sense of prior membership or dependency in the United Kingdom prior to an application. That is directly contrary to the clear and express considerations which are taken into account by the Court of Justice in Rahman.

24. Accordingly, we conclude that there was no error here. It cannot be said that the judge, having properly found that there was no prior dependency or membership of the household beyond 2011, erred in concluding that the requirements of the Regulations were not met. Paragraph 33 of Rahman is quite clear on that point. Accordingly, there is no error on that point.

25. Ms Delbourgo sought to raise also Article 8 of the Human Rights Convention. We consider that this is flawed for a number of reasons. First, it did not form part of the grounds of appeal to the Upper Tribunal, nor can it be said that there was any reference to it in the grant of permission by Judge Lindsley. Second, as Judge Harris

correctly noted, since Amirteymour a decision of this Tribunal and affirmed in the Court of Appeal, it is not possible to raise Article 8 rights in a case under the EEA Regulations.

26. Further, and in any event, as Ms Delbourgo accepted, if it has not been shown that the applicant meets the requirements of Article 8(2), that is that there has been prior dependency, present dependency or in any of the four categories set out in Dauhoo then the exercise of discretion into which an Article 8 consideration would flow simply does not arise. Accordingly, we consider that there is no merit in that.

27. Finally, we note that Ms Delbourgo sought to raise in submissions that there were defects in the findings of fact. We find that that is not something on which permission was granted nor was it raised in the grounds of appeal. We do not consider that it is possible to infer from the grounds of appeal to the Upper Tribunal that there was any challenge to the findings of fact made by the judge.

28. Further, insofar as Judge Lindsley's decision does refer to findings it is simply her observation, which is correct, that the judge, having found that there was no prior dependency and no prior membership of the household directly prior to the application, there being a gap of some years between the household in Italy coming to an end and the appellant coming to the United Kingdom, that there was no need for him to go on to make those findings because there had to be a finding of either one of those before he could go on to consider the other requirement, that is his existing membership or existing dependency in the United Kingdom.

29. Accordingly, for these reasons, we are not satisfied that the decision of the First-tier Tribunal involved the making of an error of law and we uphold it.

Notice of Decision

1. The decision of the First-tier Tribunal did not involve the making of an error of law and we uphold it

Signed Date

Upper Tribunal Judge Rintoul