Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/00018/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 6 December 2019	**On 8 January 2020**

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

MD TANVIR AHAMED
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Burrett, Counsel instructed by Londonium Solicitors
For the Respondent: Mr Jarvis, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Bangladesh who entered the UK as a student in 2009. In 2017 he married his wife, who is a Bangladeshi national with settled status in the UK, and began living with her family. His wife's father is a national of Portugal.

2. The appellant applied for a residence card under the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations") on the basis that he is an extended family member of his father-in-law. The application was refused by the respondent. The appellant appealed to the First-tier Tribunal where his appeal was

heard at Hatton Cross by Judge of the First-tier Tribunal Thapar ("the judge"). In a decision promulgated on 10 July 2019 the judge dismissed the appeal. The appellant is now appealing against that decision.

3. The judge found that the appellant did not meet the definition of an extended family member under Regulation 8(2) of the 2016 Regulations because he had not been dependent on or a household member of his father-in-law prior to his arrival in the UK.

4. The grounds of appeal submit that the judge erred by failing to appreciate that there is no requirement for the appellant to have been dependent on or to have cohabited with his father-in-law (the EEA national) prior to coming to the UK, so long as he is able to establish dependency at the date of application. The grounds argue that this interpretation is supported by the decision of the European Court of Justice in *Rahman* [2002] CJEU Case 83/11.

5. Mr Burrett argued that there are conflicting authorities in the Court of Appeal on the issue of whether there must have been dependency prior to entry to the UK and that I should follow *Aladeselu & Ors v SSHD* [2013] EWCA Civ 144. He also submitted that Regulation 8 of the 2016 Regulations must be read in a broad and flexible way in order to cover varying circumstances and in particular to ensure that the 2016 Regulations are interpreted such that an EEA national would not be deterred from exercising free movement rights. He argued that it was possible that if the appellant is not treated as an extended family member his father-in-law might not feel able to continue living in the UK. He referred to paragraph 8(8) of the 2016 Regulations which states:

> "(8) Where an extensive examination of the personal circumstances of the applicant is required under these Regulations, it must include examination of the following –
>
> (a) the best interests of the applicant, particularly where the applicant is a child,
>
> (b) the character and conduct of the applicant; and
>
> (c) whether an EEA national would be deterred from exercising their free movement rights if the application was refused."

6. Mr Jarvis' argument, in short, was that *Aladeselu* did not address the issue of prior dependency and therefore is irrelevant and that there is no conflict in the authorities, which consistently show that there must be prior dependency or household membership prior to entry to the UK.

7. The 2016 EEA Regulations give direct effect to Directive 2004/38/EC ("the 2004 Directive") on the right of EU citizens to move and reside freely within the EU. The material provision of the 2004 Directive is Article 3 which provides:

"1. This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.

2. Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:

(a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, **in the country from which they have come**, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen." [emphasis added]

8. The material provision of the 2016 Regulations is Regulation 8(2) which provides:

"(2) The condition in this paragraph is that the person is –

(a) a relative of an EEA national; and

(b) residing in a country other than the United Kingdom and is dependent upon the EEA national or is a member of the EEA national's household; and either –

(i) is accompanying the EEA national to the United Kingdom or wants to join the EEA national in the United Kingdom; or

(ii) has joined the EEA national in the United Kingdom and continues to be dependent upon the EEA national, or to be a member of the EEA national's household."

9. At the start of the hearing I drew to the attention of the parties an authority which neither raised but which is plainly relevant to this appeal: *Alexander Oboh v SSHD* [2013] EWCA Civ 1525. In that judgment the Court of Appeal considered the applicability of Article 3 of the 2004 Directive where an appellant was not dependent on or a household member of an EU citizen prior to coming to the UK and concluded that the plain and natural meaning of Article 3(2)(a) is that an appellant must have been dependent on or a household member of the EU citizen in the country from which he came. At paragraphs 60 to 61 the court concluded:

"60. Furthermore, the language of Article 3(2), and in particular the crucial words 'in the country from which they have come' can be characterised as limiting words in the sense of limiting the scope of the policy, or indeed the scope of the aspirations engendered. The words in question are words delimiting a category of person who are to be given privileged treatment in order to promote the objectives of free movement and residence by EU citizens. That policy might well be advanced if the criteria delimiting the category of other family members were set wider. However, that it not what the Directive does. It uses clear words

> to set the limits of the qualifying category. We do not consider that it is legitimate to use the tool of purposive interpretation to defeat those clearly stated limits and to substitute what would be new and very different criteria.
>
> 61. We consider that the combination of the clear language and structure of Article 3(2) of the 2004 Directive, the contrast with Article 3(1) when read with the definition of 'family member' in Article 2", and the clear statement of the CJEU that the underlying policy of the Directive is not family reunion suffices to justify our giving effect to that clear language and not making a reference to the CJEU. In the absence of a clear legislative purpose discernible in either the Directive (including its recitals) or the jurisprudence of the CJEU requiring us to conclude that the words 'in the country from which they have come' do not mean what they state, we do not consider that it is justifiable to make a reference with the consequent delay to the final determination of these appeals and, in all likelihood, other appeals raising similar issues."

10. Mr Burrett submitted that *Aladeselu* is a judgment of the Court of Appeal that conflicts with *Alexander Oboh* and which I should follow. This submission is plainly misconceived as the appellants in *Aladeselu* had been financially dependent on the EEA national before they came to the UK and at all material times. Indeed, the only relevance of *Aladeselu* to this appeal is that it supports the respondent's position because at paragraph 48 there is a reference to it being established that there is a need for a situation of dependence in the country from which the applicant comes. Mr Burrett's reliance on *Rahman* is similarly misconceived as in that case, too, it was confirmed that there must have been dependence in the country from which the applicant came.

11. There is, in my view, no basis for Mr Barrett's submission that there is conflicting case law in the Court of Appeal. The Court of appeal is consistent and clear that article 3(2)(a) of the 2004 Directive must be given its plain meaning and therefore an appellant must show that there was dependence or household membership in the country from which he or she came.

12. Mr Burrett's submissions in relation to Regulation 8(8) are also unpersuasive. Firstly, they were not raised in the grounds. Secondly, Regulation 8(8) was added to the 2016 Regulations on 15 August 2019 which is after the date of the First-tier Tribunal decision which is being challenged. Thirdly, Regulation 8(8) does not amend the plain meaning of Regulation 8(2) which in clear terms state a requirement for dependency or household membership prior to entering the UK. Fourthly, it does not change the meaning of article 3(2)(a) of the 2004 Directive.

13. The appellant was not dependent on or a household member of his father-in-law prior to arriving in the UK and therefore did not satisfy the requirements of Article 3 of the 2004 Directive or Regulation 8 of the 2016 Regulations. I am satisfied therefore that the decision does not contain an error of law.

Notice of Decision

The appeal is dismissed.

The decision of the First-tier Tribunal does not contain an error of law and stands.

No anonymity direction is made.

Signed

Upper Tribunal Judge Sheridan Dated: 3 January 2020