Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: EA/03606/2017
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THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated**
On 16 December 2019	**On 16 June 2020**

Before

MR C. M. G. OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE MANDALIA

Between

FREDERICK BRAND
ALETTA BRAND

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Peer of Peer & Co. Solicitors.
For the Respondent: Mr Mills, Senior Home Office Presenting Officer.

DETERMINATION AND REASONS

1. The appellants are nationals of South Africa. They were granted EEA permits on 13 April 2011 as family members of their daughter in law ("the sponsor"), who is a Polish national in the United Kingdom by virtue of her rights under the Citizens Directive, 2004/38/EC. As family members in the ascending line of the spouse, the appellants' entitlement to reside in the United Kingdom was on the basis that they were dependent upon the sponsor. Within a very short time of their arrival the appellants both

obtained employment at a supermarket, and they have continued in employment. They derive sufficient resources from their employment for their own needs and have variously occupied their own housing and lived with the sponsor.

2. Their residence permits expired in October 2011 and they applied to extend them. Their unchallenged evidence is that they informed the Secretary of State that they were working. They were granted Residence Cards valid for five years, expiring on 20 December 2016. After the fifth anniversary of their arrival, the appellants applied for documents recognising that they had a permanent right of residence. That right would depend on their having resided for five years in the United Kingdom with the sponsor as her family members. Their applications were refused on the ground that they were neither living with the sponsor nor were financially dependent on her: they were not her "family members".

3. The appellants appealed against that decision. Judge V Jones dismissed their appeals, holding on the authority of PM [2011] UKUT 89 that the appellants were to be regarded as residing 'with' the sponsor, but concluding that the level of their income meant that they were not dependant on the sponsor. The appellants appeal with permission to this Tribunal.

4. The governing legislation is in the Directive itself, transposed into United Kingdom law by the Immigration (European Economic Area) Regulations 2016. In the Directive, by art 2(2)(d), 'family member' is defined to include 'the dependent direct relatives in the ascending line' of a Union citizen or the spouse of a Union citizen. Article 16 provides, so far as relevant to this appeal, as follows:

> "16: General Rule for Union citizens and their family members
> 1. Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there. …
> 2. Paragraph 1 shall apply also to family members who are not nationals of a Member State and have legally resided with the Union citizen in the host Member State for a continuous period of five years."

5. Article 23 is as follows:

> "Irrespective of nationality, the family members of a Union citizen who have the right of residence or the right of permanent residence in a Member State shall be entitled to take up employment or self-employment there."

6. In the EEA Regulations, the relevant part of the definition of 'family member' is reproduced in reg 7(1)(c), and the relevant provisions of art 16(2) in reg 15(1)(b). We use the word 'reproduced' because there is absolutely no difference in the effect, actual, literal or intended, between the provisions of the Regulations and those of the Directive, although there are differences in nomenclature. The substance of art 23 is not

enacted in the Regulations. It does not need to be, because there is in United Kingdom law no general restriction on access to the employment market save where individually imposed as a condition of entry. In the United Kingdom, art 23 is, therefore, part of the general law.

7. No issue now arises with regard to whether the appellants' residence in the United Kingdom has been 'with' the sponsor. It is clear from PM, as the judge appreciated, that the requirement is to be in the same Member State, not in the same house. The grounds of appeal, drafted by Mr Nazir Ahmed, and a skeleton argument prepared by him and adopted by Mr Peer before us, rely on two strands of argument. The first is that because the appellants had been issued with family permits and subsequently residence cards, and are not said to have acted in any way contrary to any conditions attached to the issue of those documents, they are now to be regarded as having resided legally in the United Kingdom for five years and that as the quality of, and authority for, their residence is the Cards issued to them as family members, they have resided as family members. The second is that the appellants, despite their earnings, remain dependent on the sponsor within the meaning of the Directive.

8. EU rights are derived from law and facts, not from EU documentation. The documentation has value and effect only insofar as it reflects rights derived from the Directive (or the Regulations) save insofar as specifically provided otherwise. An example of such a provision is reg 7(3), but it is to be noted that in the circumstances to which it applies, the person who has been issued with the document 'must be treated as' a family member, not 'is' a family member. No such exceptions apply in the present case. It follows from the general rule that the appellants cannot derive status as family members from a document describing them as family members. In order to be entitled to the right conferred by art 16(2) and reg 15(1)(b), the appellants must be family members; and to be family members they must fall within art 2(2)(d) and reg 7(1)(c).

9. But Mr Peer argues that art 23 shows that that is not right. Family members are permitted to work, and by working they lose their dependence, at any rate if the dependence is financial dependence. It follows, according to this argument, that the Directive envisages a person's being a family member despite having ceased to be dependent. That, the argument continues, must be because the question of dependence is to be settled once and for all at some earlier stage and is not affected by subsequent cessation of dependence. Otherwise the Directive would render itself internally inconsistent by including art 23.

10. In our judgment there is no inherent contradiction, particularly when it is recalled that art 23 applies to all family members, not only those whose status as family members requires dependence. A person may, while working, continue to be dependent in a non-financial sense; or, while working, may continue to be dependent in a financial sense if the income is lower; or may be a family member of the sort (spouse, registered

partner, child under 21) whose status as a family member is not defined by dependence. This point removes all force from Mr Peer's argument that art 23 has the effect that income from work is in some way to be disregarded in assessing status as family members. The position is that family members may work: there is no suggestion that a person who is not a 'family member' can derive a right to work from this article, or that a person who works can derive status as a 'family member' from this article without meeting all the definitional requirements of a family member. Article 23 simply shows that a right to work can be seen alongside a notion of being a family member and, in an appropriate case, alongside a notion of dependence. Reyes C-423/12 (which neither party cited to us) points out that when an assessment is being made of dependence at the point of entry, the possibility of employment in the Member State to which entry is sought cannot be relevant in the case of a person who is presently dependent, because that would be to nullify the effect of art 23 for such a person; but that is not the case here: we are concerned not with prospects before arrival, but actualities many years after arrival.

11. Mr Peer further argued that because art 23 gives the right to work it cannot also have the effect of removing the status of family member. That may be so, but there is no basis on which it could be said that it does remove the status. A family member may cease to be dependent (if the asserted dependence is purely financial) by sufficient income from working, by a legacy, by successful investments in the United Kingdom or overseas, or in a host of other ways; if the dependence has some other content it might cease by marriage, or a family dispute; in the case of a child under 21 the status as 'family member' ceases on reaching the age of 21 unless at that point the child is dependent. The mere fact that these things, including employment, can happen does not mean that the requirement of dependence, when it applies, has no effect. A person who, whether working or not, is dependent, may be a "family member" within art 2(2)(d); a person, whether working or not, who is not dependent, cannot be a family member within art 2(2)(d).

12. It follows that there is nothing in Mr Peer's argument that in some way the fact that the Secretary of State knew in 2011 that the appellants were working means that it was also known or suspected that they were not at that time dependent. As working and dependence can co-exist, the knowledge of the existence of the one does not imply the non-existence of the other. For the reasons we have given, this argument does not assist anyway, because the knowledge of the Secretary of State, like the issue of the previous Card, is irrelevant to entitlement at the time of the decision under appeal.

13. Underlying the submissions made under this head is an implication that the pattern of the Directive and of the rights under it prevents a status being lost by change of circumstances. In both the skeleton argument and his oral submissions Mr Peer referred on a number of occasions to status at the time of entry, and status at a former time, and to provisions

inhibiting the withdrawal or deprivation of a status acquired under the Directive. None of this is to the point. The appellants were entitled to the residence Cards they sought only if they were at that time family members. If the Directive had intended that once a person had entered as, had established as, had demonstrated status as, or had been recognised as, a family member, then status as a family member continued as long as the family relationship continued, it could have said so. Not only does the Directive not say that: the provisions in relation to children show that nothing of the sort was intended. As Mr Mills pointed out, Jia C-1/05, on which the appellants rely, does not purport to deal with the situation after the point of entry, and does not suggest that status continues to be governed by the factual matrix at the time of entry. Of the other authorities cited by the appellants, Okafor [2011] EWCA Civ 499 concerns retained rights of residence, where, specifically under the Directive, a status is treated as though it continued when in fact it does not, Ziolkowski C-424/10 does not cover the situation of individuals who are not themselves Union citizens, and Derin C-325/05 relates to a Turkish national, who for reasons connected with the Ankara agreement, fell to be treated in the same way as a Union citizen. Metock C-127/08 and Eind C-291/05 remind us that the provisions of the Directive should not be interpreted restrictively, but do not very much help at the initial stage of analysing what those provisions are.

14. Mr Mills in his submissions treated Alarape C-529/11 together with the retained rights cases, but it is a case whose facts are in some ways rather similar to the question posed in the present case. The question there concerned the parents of a child who had a right to be in a Member State to pursue education and who while he was under 21 was clearly entitled to have his parents with him. If he remained in education after reaching the age of 21, did his parents continue to have the derived right to be in the Member State with him? The answer given by the Court at [28]-[31] is that it depends on the extent to which the person continues to need the presence and care of the parent or parents in order to be able to pursue and complete his education. That is a matter to be determined on the facts by the national court. There is no suggestion that the parents' right, once acquired, is to continue if the facts change. In our view, the same applies to dependence under art 2(1)(d), and nothing in the authorities tends to the contrary.

15. Having cleared the board, as it were, the legal position is in our judgment that taken by the Secretary of State. The appellants are entitled to succeed if (but only if) they are "family members", which for present purposes means if they are dependent on the sponsor. We need to consider whether Judge Jones erred in assessing on the evidence that they were not. The grounds, the skeleton argument, and Mr Peer's submissions do not assist very much on this point. The grounds assert that the judge erred in failing to provide any proper or adequate reasoning for the conclusion that the appellants "were no longer dependent" on the sponsor, but there is no elaboration of that. The written skeleton does not

take the point, and Mr Peer' oral submissions went no further than his submission that dependence is not limited to financial dependence, which, as we have indicated, the Secretary of State does not dispute.

16. Jia sets out the basic nature of dependence at at [43], although that decision related to the predecessor of Directive 2004/38/EC:

> "Article 1(1)(d) of Directive 73/248 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 or his or her spouse in order to meet their essential needs in the country of origin of those family members or the State from which they have come at the time when they apply to join the Community national. Article 6(b) of that directive must be interpreted as meaning that the proof needed for material support may be adduced by any appropriate means, while a mere undertaking by the Community national or his or her spouse to support the family members concerned need not be regarded as establishing the existence of the family members' situation of real dependence."

17. Other authorities, particularly Reyes, have investigated the position where the dependence, normally evidenced by the payment of remittances to a relative while that relative is not in the Member State concerned, includes a concept of necessity; and Reyes itself rules that it is not necessary for the recipient of such remittances to establish that obtaining work would be impossible. No authority to which our attention has been drawn has suggested that a person can be regarded as a dependent without some external indicia of reliance.

18. Given the Secretary of State's concession that the notion of dependence is wider than purely financial dependence (although presumably constrained by the Jia notion of "material support") we are content to consider any available evidence of the appellants' dependence on the sponsor both now and at any previous period when (in order to be regarded as having resided in the United Kingdom as "family members") they would need to have been dependent on her. We were referred to no such evidence. There does not appear to be any evidence of remittances or other material assistance before the appellants arrived in the United Kingdom: the evidence before the First-tier Tribunal implies the opposite, giving as a reason that the appellants cannot live in South Africa that they gave up "everything" in South Africa when they were granted entry clearance (sic) to the United Kingdom. That is stated in the appellants' joint witness statement and is confirmed in the joint witness statement of the sponsor and her husband. The appellants assert that if they were in South Africa now they could not work because of their age. That is surprising and unsubstantiated: they are, respectively, 59 and 57 years old. There is no evidence of any material dependence in the Jia sense at the time of the present decisions. There is no evidence that the appellants have lived in the United Kingdom as dependent family members of the sponsor for five years or indeed for any period of time.

19. It follows that the appellants cannot show that they are entitled to the permanent right of residence. Judge Jones was correct to reach that view on the evidence. There was no error of law. We dismiss the appellants' appeals.

C. M. G. OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 8 June 2020