Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/15623/2014
IA/15653/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 24th March 2015	**On 23rd April 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

(1) MR MANISH KUMAR SHARMA
(2) MRS AARTI SHARMA
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr M Iqbal (Counsel)
For the Respondent: Miss I Isherwood (HOPO)

DECISION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge Bircher promulgated on 15th December 2014, following a hearing at Hatton Cross on 11th November 2014. In the determination, the judge allowed the appeal of Mr Manish Kumar Sharma and Mrs Aarti Sharma. The Respondent Secretary of State,

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subsequently applied for, and was granted permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellants

2. The Appellants are citizens of India. The first Appellant, a male, was admitted to the UK on 12th September 2009 on a student visa, valid from 28th August 2009 to 28th June 2011. The second Appellant was last admitted to the UK as a post-study partner to the first Appellant valid from 26th November 2012 to 30th January 2014. On 24th January 2014 the Appellant sought a residence card which was refused on 19th March 2014.

The Appellant's Claim

3. The Appellant's claim is that they were dependent on an EEA national Sponsor, namely, Mr Arnaldo Richard Teles, a Portuguese national, who was born on 18th July 1980, and who claimed to be a person exercising treaty rights in the UK by virtue of his full-time employment. The first Appellant is the cousin of Mr Teles. Mr Teles claims to be employed with Contact Transport, Garrets Green Freight Department, Garrets Green, Birmingham B33 0SL, and his weekly wage is approximately £500. He claims

> "to have supported his cousin and has worked financially every month and further claims that he has been supporting both of them in India for their studies. Mr Teles stated that his cousin (first Appellant) and his cousin's wife (second Appellant) shared a house with him in India" (paragraph 8).

The Judge's Findings

4. The judge heard oral evidence from the Appellants and their EEA Sponsor (paragraph 9) the evidence before the judge confirmed that the Appellants were living with the Sponsor in India from 2002. The judge heard evidence from the first Appellant that the EEA Sponsor provided him with "purely financial support of no fixed amount" but that he had last given him £300 in October to pay for the next month's rent (paragraph 13). That the EEA Sponsor explained that "he had helped the first Appellant financially in India when he was working as a supermarket manager" (paragraph 15).

5. The judge accepted that the Appellants were members of the EEA national Sponsor's household namely in India (paragraph 17). There was evidence before the judge in the form of affidavits and the judge accepted the content of these affidavits (see paragraphs 18 to 23). The judge accepted the evidence that was put before him (see paragraphs 32 to 34). He concluded that the Appellants are family members of an EEA national Sponsor and to qualify for a residence card (paragraph 35). The appeal was allowed.

Grounds of Application

6. The grounds of application state that the judge erred in a number of respects. First, even if the judge was satisfied on the evidence before him, it was not open to him to allow the appeal outright. The best he could do was to remit the matter back to the Secretary of State for the Secretary of State to exercise discretion. This was established by the judgments in **Ihemedu [2011] UKUT 00340**. Second, the judge relied on paragraph 345AA of the Immigration Rules and the application of the evidential flexibility policy, but this had no application in EEA law, and the judge was wrong to apply it there.

7. On 2nd February 2015, permission to appeal was granted.

Submissions

8. At the hearing before me on 24th March 2015, neither the Appellants nor the Sponsor were in attendance. Mr M Iqbal, of Counsel, appeared to represent them. The Respondent Secretary of State, who was appealing the decision below, was represented by Miss I Isherwood, a Senior Home Office Presenting Officer.

9. Miss Isherwood relied upon the Grounds of Appeal. First, she submitted that the judge could not have been satisfied on the evidence before him that the Appellants had established their relationship to the EEA Sponsor, which evidence was based from an affidavit from an individual in India (see paragraphs 17 and 21). It was not clear from the determination who Chinder Pal Sharma was, and so reliance on his affidavit could not be placed in the way that it was by the judge. The fact was that there was no independent or official documentation available to evidence the claimed relationship (see paragraph 21). The burden remained on the Appellants to discharge their case to the civil standard. They were unable to do so.

10. Second, even if the judge was to be satisfied on the evidence, he was wrong to allow the appeal outright under the Immigration (European Economic Area) Regulations 2006. This was because whether a residence card is issued to a Regulation 8(5) extended family member is at the discretion of the Secretary of State. The case of **Ihemedu [2011] UKUT 00340** makes it clear that,

> "where the Secretary of State has not yet exercised that discretion the most an Immigration Judge is entitled to do is to allow the appeal as being not in accordance with the law leaving the matter of whether to exercise this discretion in the Appellant's favour or not to the Secretary of State".

The judge therefore erred in law in allowing the appeal outright.

11. Third, the judge had erred in concluding that just because the Appellants resided with Mr Teles, that they were dependent upon him. The affidavits which the judge relied upon at paragraph 19 do not demonstrate, at the very highest, that the property was rented out, in joint names, to the Appellant, and the EEA national from January 2002 to December 2009. There was no evidence adduced to show that the

EEA national incurred any additional expenses during this period of shared residence. Nor is it the case that the documentation shows the payment of the Appellants' tuition fees (see paragraph 32). A simple cohabitation did not amount to "dependency" as required under the Regulations.

12. Fourth, the judge erroneously directed himself to paragraph 245AA of the Respondent's evidential flexibility policy because this had no application in the EEA national case.

13. Fifth, the judge provided inadequate reasons for finding that the Appellants were presently dependent on the EEA national. While the bank statements provided show a few payments to the Appellants from December 2013, there was no evidence of any dependency from 2009, as claimed.

14. For his part, Mr Iqbal submitted that to say that the standard of proof had not been discharged, on the basis of the oral evidence heard by the judge, and on the basis of the affidavit of Chinder Pal Sharma, was simply to disagree with the judge's findings. Second, the Respondent had not taken issue with the Sponsor's EEA status (see paragraph 30) and it was therefore open to the judge to accept what the EEA national said with respect to his status in the UK. Third, as far as membership of the household was concerned, the tuition fees were paid, and whilst it is accepted that paragraph 245AA was misconceived in this application, the judge was entitled to take into account as he did at paragraph 28. Finally, there was plainly evidence before the judge of dependency and of membership of a household of the EEA Sponsor.

15. In reply, Miss Isherwood submitted that the case of **Dauhoo (EEA Regs – Reg 8(2)) [2012] UKUT 79** establishes that a person can succeed in showing that they are a "extended family member" in any one of four different ways, each of which requires proving a relevant connection both prior to arrival in the UK and in the UK. These are:

    (1) prior dependency and present dependency;

    (2) prior membership of a household and present membership of a household;

    (3) prior dependency and present membership of a household; and

    (4) prior membership of a household and present dependency.

    It was not necessary to show prior and present connection in the same capacity. However, these Appellants here simply provided no evidence of dependency since 2009.

Error of Law and Re-Making the Decision

16. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside

the decision and remake the decision. I do so for the reasons given by Miss Isherwood before me.

17. There is an error of law simply because the judge was not entitled to allow the appeal outright, but to remit the matter back to the Secretary of State. There is an error of law also because there was reliance placed by the judge upon paragraph 245AA of HC 395. This has no application in EEA law.

18. I have remade the decision on the basis of the findings of the original judge, the evidence before him, and the submissions that I have heard today. I am dismissing this appeal for the following reasons. First, providing "financial support" (see paragraphs 12, and 13) is not the same as showing "dependency" under the Rules. The Appellants do not show dependency.

19. There is no evidence whatsoever of any tuition fees being paid by Mr Teles. There is no evidence whatsoever of the EEA national having occurred any additional expenses during the period of a shared residence. There is no evidence of any support from 2009 onwards. There are affidavits, but the affidavits, such as the one from Chinder Pal Sharma, have failed to show how the deponent of the affidavit can speak to the facts alleged. There is no independent or official evidence of the claimed relationship.

20. As far as the shared residence is concerned, at best it shows that the property was rented out in joint names, but this does not mean that there was dependency of the Appellants on the EEA Sponsor. It is for the Appellants to discharge the burden of proof at the requisite standard. They have signally failed to do so in this appeal.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is dismissed.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Juss 11th April 2015

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed
Deputy Upper Tribunal Judge Juss 11th April 2015