IAC-AH-CJ-V3

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/41656/2013
IA/41680/2013
IA/41694/2013

THE IMMIGRATION ACTS

Heard at Field House
On 13th November 2015

Decision & Reasons Promulgated
On 5th January 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MRS KF (FIRST APPELLANT)
MR WZ (SECOND APPELLANT)
MISS FN (THIRD APPELLANT)
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr R De Mello (Counsel)
For the Respondent: Mr P Duffy (Home Office Presenting Officer)

DECISION AND REASONS

1. The Appellants are citizens of Pakistan born respectively on 1st February 1960, 17th August 1990 and 27th July 1992. They are consequently all adults. They are respectively mother, son and niece.

2. The Appellants had made combined applications for residence cards as confirmation of a right of residence as the family members of an EEA

national. Their applications were refused by the Secretary of State by Notice of Refusal dated 3rd September 2013. The first Appellant had an extensive immigration history. Previous applications had been made for a residence card back in September 2010. That decision was refused by the Secretary of State, dismissed on appeal on 23rd May 2011 by Immigration Judge Kaler and following a grant of permission to appeal their appeals in respect of claims pursuant to Article 8 of the European Convention of Human Rights were dismissed in the Upper Tribunal by Upper Tribunal Judge Eshun following a hearing on 16th December 2011 promulgated on 9th February 2012. Thereafter a fresh application was made seeking a residence card as a confirmation of a right to reside on 20th March 2013.

3. The first Appellant states she is the mother of a Pakistani national [HZ] who was married to [FM] a Portuguese national. [HZ] had been issued with a residence card on 27th October 2007 which expired on 27th October 2012. Thereafter he was issued on 3rd May 2011 with indefinite leave to remain in the United Kingdom under the UK immigration long residency Rules. It was noted by the Secretary of State in the Notice of Refusal in September 2013 that [HZ] was currently divorcing his EEA national Sponsor [FM].

4. The Secretary of State's argument was that in order for the Appellant to qualify for a residence card under the Regulation satisfactory evidence needed to be provided in regard to [FM] and that the first Appellant's son had not obtained his residency through the European (EEA) Regulations and therefore she could not apply for a residence card as his family members as he did not have leave under the European (EEA) Regulations. Therefore for the purpose of the application the Appellants were considered as the family members of [FM]. The Notice of Refusal pointed out that if the Appellants wished to apply as dependants of [HZ] that they could submit an application under the UK Immigration Rules for consideration. It was noted that this had been done on 20th March 2013 but that the Appellants failed to submit their Sponsor's passport/ID card although it was noted that it was allegedly submitted with the previous application. The Secretary of State noted information held by the Home Office that the Portuguese passport for [FM] had been reported lost or stolen to the relevant authorities since February 2011 and therefore that could not be relied upon as evidence of the EEA national Sponsor's identity. As a result the application was refused on the ground that the applicants had not provided evidence in the form of either a valid national passport or ID card as evidence that their family member was an EEA national as claimed.

5. The Appellants appealed and the appeal came before Judge of the First-tier Tribunal Ghani sitting at Birmingham on 1st December 2014. In a determination promulgated on 30th December 2014 the Appellants' appeals were allowed under the 2006 EEA Regulations.

6. On 13th January 2015 the Secretary of State lodged Grounds of Appeal to the Upper Tribunal. On 16th February 2015 Designated First-tier Tribunal

Judge Macdonald granted permission to appeal. Judge Macdonald noted that the grounds of application contended that the second and third Appellants could not succeed under Regulation 8(2) as they are not "presently dependent on in the same household as the EEA national." Judge Macdonald noted that it was contended that the approach by the judge was said to be confused and misconceived and that Regulation 10(6)(a) and (b) cannot be taken in isolation. He acknowledged that the case did not appear to be straightforward and that the application by the Appellants was for a residence card presumably as extended family members under Regulation 8. He took the view that if the appeal was going to be allowed on that basis, then the Secretary of State would have to exercise her discretion under Regulation 17(4). However the judge had granted the appeals under Regulation 10 in reasoning which was arguably unclear.

7. To add to the issues despite having succeeded on the appeal on 28th February 2015 grounds for a cross-appeal were lodged by the Appellants' legal representatives. On 17th March 2015 First-tier Tribunal Judge Astle granted the Appellants permission to cross-appeal despite the fact that they had succeeded before the First-tier Tribunal. Judge Astle noted that the grounds of the cross-appeal contended that the Secretary of State accepted that the Appellants are family members of an EEA national. He considered that that statement was a misunderstanding of the Secretary of State's letter giving reasons for the decision and that the Secretary of State was simply setting out the basis on which the applications were to be considered. However he noted that it was argued, amongst other things, that the judge had failed to address various issues arising out of the Sponsor's status. He considered that the grounds raised were sometimes contradictory and at times confusing but that in the light of the permission having been granted to the Secretary of State he considered that it was in the interests of justice that they should be ventilated and that he therefore extended time and granted permission to proceed.

8. On 27th March 2015 the Secretary of State responded to the cross-appeal pursuant to Rule 24 stating that the Secretary of State could not identify on what basis the Appellant had been granted permission and that Judge Astle had merely noted that the grounds are sometimes contradictory and confusing but he had considered in the interests of justice the Appellants' grounds should be ventilated. The Secretary of State contended that the judge had failed to identify any arguable error of law for granting the Appellant permission for leave to appeal and opposed the application.

9. It was on that basis that the appeal came before me to consider whether or not there was a material error of law in the decision of the First-tier Tribunal Judge – Judge Ghani. There were extant before me cross-appeals albeit that the current status is that the Appellants have succeeded on their appeal as a result of Judge Ghani's determination. For the purpose of continuity throughout the legal process Mrs KF and her nephew and niece are referred to herein as the Appellants and the Secretary of State as the Respondent. The Appellants appear by their instructed Counsel Mr De

Mello. Mr De Mello is familiar with this matter. He appeared as the instructed Counsel for the Appellants before the First-tier Tribunal and he is the author of the grounds of cross-appeal. The Secretary of State appeared by her Home Office Presenting Officer Ms Everett, at the error of law hearing.

10. The approach adopted by the Appellants' legal representatives by way of describing their document of 28th February 2015 as a cross-appeal appeared to me to be wrong in law. What that document effectively constitutes is a Rule 24 response to the grant of permission to appeal given to the Secretary of State by Immigration Judge Macdonald. It seemed inappropriate that the matter was then referred to Judge Astle with a view to granting permission. As it happens Judge Astle's grant of permission does not add a great deal due to the very vague nature of its content. That is specifically referred to in the Rule 24 response to that grant of permission provided by the Secretary of State. That in itself, had the proper legal process been followed, would not have taken place and what that document effectively is is a Rule 25 response to what should have been a Rule 24 response (wrongly couched as a cross-appeal) by the Appellants.

11. When the matter came before me to determine whether there was a material error of law in the decision of the First-tier Tribunal Judge, one thing that was clear was the complexity of the issues and I have tried above to set out the historical factors in some detail. I also impressed upon the parties at the hearing that I was only considering the issue as to whether or not there was a material error of law in the decision of the First-tier Tribunal. Mr De Mello was to a certain extent in a position of conflict. In one breath it must have been to his client's advantage to have the appeal dismissed and for the original decision of Judge Ghani to stand but in the other he sets out extensive legal argument as to why there are failings in the First-tier Tribunal decision and invites a reference to the European Court as to whether the family members of [HZ] acquired derivative rights by virtue of the fact that he is the ex-spouse of an EEA worker at the time of his divorce.

12. I was persuaded by the more simplistic approach adopted by Ms Everett. There was merit in her submission that it is not possible for the Appellants to satisfy Regulation 10 since none of them have ever been granted any sort of EEA leave and there are therefore no rights for them to retain and that the judge has erred in finding [HZ] has a retained right of residence even though he already found the requirement of Regulation 10(5)(a) has not been met.

13. I was consequently satisfied that there was a material error of law in the decision of the First-tier Tribunal Judge. On giving directions I acknowledged that the issue outstanding was whether or not the Appellants have acquired derivative rights of residence as the purported family members of an EEA national. I gave directions as to the filing of additional evidence including skeleton arguments, statutory material and

case law and reserved the matter to myself. It is on that basis that the appeal comes back before me for rehearing. The Appellants continue to be represented by their instructed Counsel Mr De Mello. The Secretary of State now appears by her Home Office Presenting Officer, Mr Duffy. I am grateful for the additional documents provided. Mr Duffy has provided his own skeleton argument. The Appellant's instructed solicitors have lodged an up-to-date bundle. Such bundle includes an up-to-date witness statement from the Sponsor dated 29th October 2015. Mr De Mello has himself provided a further detailed skeleton argument and a substantial bundle of authorities upon which he seeks to rely.

Preliminary Important Facts

14. I start by reminding myself of the issue in this case namely whether or not the Appellants have acquired derivative residence rights pursuant to the 2006 EEA Regulations as the purported family members of an EEA national. An agreed chronology is relevant.

29th June 2007	[HZ] and [FM] marry.
26th June 2010	The three Appellants arrive in the UK.
21st September	The three Appellants submit their first EEA residence card application.
11th January 2011	Application refused by the Secretary of State.
15th March 2011	[HZ] (hereinafter called the Sponsor) applied for indefinite leave to remain in the UK on the basis of ten years' continual residence.
3rd May 2011	Sponsor granted indefinite leave to remain.
25th May 2011	The appeal of the three Appellants is dismissed by First-tier Tribunal Judge Kaler.
24th October 2011	Following permission being granted to the Upper Tribunal an error of law is found by Upper Tribunal Judge Eshun.
9th February 2012	Upper Tribunal Judge Eshun remakes the decision dismissing the appeal.
24th May 2012	The Sponsor applies to be naturalised as a British citizen.
14th August 2012	Sponsor's British citizenship is approved.
20th March 2013	Appellants renew application for a residence card.
3rd September 2013	Renewed application is refused by Secretary of State.
16th May 2013	Sponsor and his wife [FM] are granted decree absolute.
30th December 2014	Appellants' appeal is allowed by First-tier Tribunal Judge Ghani.
31st July 2015	I find error of law and set aside decision of the First-tier Tribunal Judge and give directions for rehearing of this matter.

It is against that chronology that the appeal appears before me. Further I note the application had previously been made for an anonymity order due to the second Appellant's mental capacity. There are no documents relating to same but it is not an issue that is contentious before the Tribunal. For the purpose of the second Appellant's protection I maintain the anonymity direction and it would be inappropriate for the direction to apply to one Appellant and not to all three.

15. I previously directed that there could be further witness statement evidence produced by the Sponsor. I am referred to his witness statement dated 29th October 2015 set out at pages 4 to 6 within the Appellants' supplementary bundle. Mr Duffy indicates that he does not challenge that witness statement and on that basis that statement is admitted in evidence. Consequently thereafter the appeal proceeds by way of submissions/discussion only.

Submissions/Discussion

16. As a starting point both legal representatives rely on their detailed skeleton arguments. For the purpose of this decision I indicate that I have read thoroughly both skeletons and taken on board the content therein. It is not my contention to recite swathes of these skeletons and I note that they form the starting point for the submissions made by the legal representatives.

17. Mr De Mello uses his skeleton to amplify his submissions that the Appellants are family members of [FM] (a Portuguese national). It has to be remembered that these applications are based on claims the Appellants have acquired derivative residence rights as the purported family members of the EEA national i.e. as the family members of [FM]. It is accepted by both parties that it would be open to the Appellants to make a separate application as dependants of their Sponsor, [HZ], and that they could pursue such applications under the Immigration Rules. When addressing the submissions Mr De Mello does not strictly follow the order within his skeleton argument. His opening submission relates to what is described in his skeleton as his sixth ground, namely that the Sponsor's EU rights would be breached if the Appellants are removed. He submits that [HZ] is a British citizen and an EU citizen and that he travels to the EEA for his work. He comments that the Sponsor has set out why it is essential for him to have his family live with him in the UK and that that will facilitate his work and provision of services in the EEA. I accept that [HZ] is, as submitted, an accountant and that he has an international clientele which requires him on occasions to travel throughout Europe. Mr De Mello contends that following *S&G v Minister voor Immigratie, [2014] Imm AR 843 [2014] EUECJ C-457/12* that the Appellants have obtained derivative rights as being family members of the union citizen in the home state. That is a right of residence stemming from [HZ]'s cross-border activities and that the Secretary of State should have considered such position when looking at the exercise of discretion to be allowed under Regulation 17(4) of the EEA Regulations 2006 independently of any

derivative rights which flow from Article 45 TFEU. He further refers me in some detail to the interpretation of Article 45 TFEU to be found at paragraphs 36 to 46 in *S & G*. He submits that the decision of the Secretary of State is not in accordance with the law and that in particular no regard has been paid with reference to Article 7 of the EU Charter to the third party rights of [HZ] if the Appellants are removed.

18. Mr De Mello poses the question as to whether the term family member in relation to Article 45 has the meaning as set out within the Directive. It is his contention that freedom of movement has been extended to other family members and that it is a question of fact for the domestic courts to exercise firstly the degree of relationship between the parties and secondly the Sponsor's right to travel i.e. the element of dependency that is raised.

19. Mr De Mello takes me to the Sponsor's witness statement of 30th October 2014 that was before the First-tier Tribunal Judge. He points out that within that witness statement the Sponsor's itinerary and travel across Europe are raised in his capacity as a company sole director. He points out that these issues were not addressed by the First-tier Tribunal Judge and that that forms part of the cross-appeal. He asked me to accept the Sponsor regularly travels across Europe and that there is an emotional relationship between him and his family and that if they are not granted residency that would seriously interfere with his community rights.

20. Mr De Mello then refers me to the decision in *Carpenter v Secretary of State for the Home Department [2003] QB 416* – a decision of the Court of Justice of the European Communities when the court was asked for a preliminary ruling to the answer to the question whether the non-national spouse could derive right of residence in his or her spouse's Member State of origin from, inter alia, Article 49 of the European Treaty on the freedom to provide services. He seeks to equate the situation to the present position pointing out that in *Carpenter* Mr Carpenter exercised his community rights in two respects, firstly by travelling to another Member State for professional reasons to carry out self-employed activity there, and secondly by providing services across the frontier without having personally to travel to another Member State. He takes me to paragraphs 29 and 30 of the findings of the court pointing out that Mr Carpenter was found to have availed himself of the right freely to provide services guaranteed by Article 49, namely cross-border services, and that that right could be relied upon by a provider as against the state in which he is established if the services are provided for persons established in another Member State. Mr De Mello seeks to equate this position to that to be found by the Sponsor. He then goes on to submit that the findings of the court therein state:

> "39. It is clear that the separation of Mr Carpenter and the applicant would be detrimental to their family life and, therefore, to the conditions under which Mr Carpenter exercises a fundamental freedom. That freedom could not be fully effective if Mr Carpenter were to be

> deterred from exercising it by obstacles raised in his country of origin to the entry and residence of his spouse.
>
> ...
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> 46. In view of all the foregoing, the answer to the question referred to the court is that Article 49 EC, read in the light of the fundamental right to respect for family life, is to be interpreted as precluding, in circumstances such as those in the main proceedings, a refusal by the Member State of origin of a provider of services established in that Member State who provides services to recipients established in other Member States, of the right to reside in its territory to that provider's spouse who is a national of a third country."

Mr De Mello submits that the principles in *Carpenter* apply in this case. He submits that the family members therefore have a derived right of residence and consequently they should all succeed.

21. Mr De Mello then submits that the Sponsor's mother is a family member of the Sponsor's ex-wife. He acknowledges that no residence card has been issued to her. He however seeks to rely on guidance given in *R (McCarthy) and Others v Secretary of State for the Home Department [2015] 3 WLR 61* where at paragraph 62 it states:

> "… Even though the court declare and do not create rights the fact remains that … the Member States are, in principle, required to recognise a residence card issued under Article 10 of Directive 2004/38 for the purposes of entry into their territory without a visa."

Consequently he submits that although the first Appellant was not given a residence card that does not mean she does not possess those rights and that a residence card is merely declaratory of the rights. He therefore submits that the first Appellant is a family member, for the purpose of European legislation, of [FM]. His argument is that [FM]is an EU national and that the Appellants are ex-family members of [FM] with retained right of residence under Article 13 of the Directive or Regulation 10(6)(a) and (b). He notes the first Appellant is supported by a son – the Sponsor – and that she is self-sufficient. His contentions are, under Regulation 4(1)(c), on the basis that she does not have recourse to public funds and is supported by the Sponsor.

22. Thereafter he turns to the positions of the second and third Appellants and in his view states that this is the most difficult part of his case but he takes me to the reference in Macdonald pointing out that paragraph 3(2)(a) of the Directive (Article 3. Beneficiaries) refers to "other family members" of the Sponsor and ex-wife and their position is that they are dependent upon him and were members of his household when they lived in Pakistan. He seeks to rely on the authority of *Secretary of State for the Home Department v Rahman [2013] 2 WLR 230*. That case analysed Article 3(2)(a) of the Council Directive 2004/38/EC as to where a citizen of the European Union resided in a Member State other than that of which he was a national the host Member State would be required to "facilitate entry and residence" for any other family members irrespective of nationality, not falling under the definition of "family member" in Article

2(2) of the Directive, who, in the country from which they had come, were dependent on members of the union citizen's household.

23. Mr De Mello considers in detail the findings of the European Court in *Rahman*. He starts by pointing out that account has to be taken of the actual wording of Direction 2004/38 and that whilst it confers an automatic right of entry and residence on "family members" mentioned in Article 2(2), Article 3(2) thereof provides merely that each Member State must "facilitate" entry and residence for extended family members and that it is clear from such provisions that the European legislature intended to draw a distinction within the family of the union citizen between the closest members who have an actual and automatic right to enter and reside in the territory of the host Member State with the union citizen and more distant family members who do not enjoy an individual right of residence under Directive 2004/38. He acknowledged each case turns on its own circumstances and requires an extensive examination of their personal circumstances and that Member States have an unfettered discretion to facilitate as they wish entry and residence for a person coming within the scope of the provisions.

24. Mr De Mello concedes that within the Regulations there are no specific provisions for extended family members to get an extension of a residence card in the event of divorce or even otherwise and that the nearest comparison is to be found in Regulation 17(4) of the 2006 Regulations but contends that the difficulty with that Regulation is that at the time the Sponsor's divorce occurred an EEA national did not include a British citizen. He submits that the Regulations failed to take account of Article 3.2 and *Rahman* and that the second and third Appellants appear to be without remedy if that is followed under the Regulations.

25. Thereafter he submits if that argument is not accepted then he seeks to rely on Articles 20 and 21 of the Regulations and Article 7 of the Charter. He acknowledges that the Sponsor is not an EEA national because he is a British citizen but submits the fact that the Sponsor has acquired British citizenship does not extinguish his former rights acquired under EU law. He further asks me to look at Articles 20 and 21 and submits that if the first Appellant succeeds then because the Appellants are family members of [FM] that their appeals fall within the scope of EU law and accordingly each of them singularly and cumulatively retain rights of residence exclusively on their personal circumstances including under Article 7 of the Charter of Fundamental Rights. He submits that it is appropriate to look at Article 7 and by reference thereto to Article 8 of the European Convention of Human Rights. He acknowledges the Regulations are silent but contends that these are important points. For all these reasons he asks me to allow the appeal.

26. In response Mr Duffy states that it is appropriate to look at this matter and interpret treaty rights through the prism of the 2006 Regulations. He submits there are no comparable Regulations in place to address the issues in *S&G* and *Carpenter* and that can only be construed on the basis

that the government did not find it necessary to do so. He acknowledges that when the Appellants arrived in the UK had they produced sufficient evidence of dependency upon the Sponsor it is arguable that the first Appellant could potentially have succeeded at that time under Regulation 7(1)(c). However he submits that the second and third Appellants could never have succeeded under the Regulations as they do not qualify under any of the limbs of Regulation 7 and whilst they would be potentially said to engage Regulation 8(2) that requires that they be dependent upon the EEA national not the spouse of the EEA national. He points out it has never been the submission of the Appellants that they were dependent upon [FM] but that their claim is that they were, and continue to be, dependent upon the Sponsor who is not an EEA national for the purpose of the Regulations.

27. He points out that Regulation 7 and 8 identify what are family members and therefore there is no need to go to the Charter to consider it. Whilst it was originally possible that sufficient evidence had been provided for the first Appellant to succeed under Regulation 7, dependence was not made out. The second and third Appellants would, he submits, need to try and show that they can succeed under Regulation 8(2). However he takes me back to Regulation 2(a) which would require the Appellants to be dependent on an EEA national i.e. [FM], and so whilst they could potentially succeed, Regulation 8(2) requires them to be dependent on an EEA national at the relevant point they could have contended they were members of the household but he submits that they were never ever dependent upon [FM]. Further he submits that Regulation 7(3) prevents a person who is an extended family member under Regulation 8 from being treated as a family member until they have been issued with a residence card and reminds me Regulation 17(4) states that the issue of a residence card is at the Secretary of State's discretion. Therefore as the second and third Appellants have never been issued with a residence card they have no rights to retain. He points out that the Directive and Regulations need to give reasons for approval and there is no mechanism or independent right to a residence card. It is a factual assessment and until there is recognition by the Secretary of State there is no mechanism to proceed under Regulation 8. Therefore he submits that as the second and third Appellants have not been issued with residence cards they cannot succeed.

28. Mr Duffy points out that although Mr De Mello makes much of an allegation of self-sufficiency, as the case is all about dependency it would be bizarre if they were to be found to be self-sufficient. He reminds me of Regulation 10(6) of the 2006 Regulations. On the basis the first Appellant cannot meet Regulation 10(6)(a) as she claims to be dependent upon the Sponsor she cannot succeed under that Regulation. He thereafter goes on to remind me that pursuant to Regulation 2 an EEA national is not a British citizen but if Regulation 10(6)(b) were read as widely as that then almost anyone would apply. The Regulations he submits are about movement of EEA nationals and that there is not a relevant EEA national here to

consider. He points out that the phrase "family member" in Regulation 10(6)(b) is a reference to the concept of "family member" in Regulation 7 and that because the Sponsor is a British citizen and is outside of the Regulations the first Appellant cannot claim to be his "family member" even though he is her son. On that basis he submits that none of the Appellants can possibly retain a right of residence. Further he points out that if they returned they would not have any impact on the Sponsor's free movement and therefore to give Regulation 10(6)(b) such a wide meaning is wrong. He points out that the Sponsor is a British citizen and therefore outside the Regulations and that the Appellants cannot bring themselves within the Regulations by seeking to rely on the authorities of *S&G* and *Carpenter* where the facts were very different and free movement did not arise. It has never been suggested, he points out, that the Sponsor would have to give up his job and go to live in Pakistan. In such circumstances he submits that the Appellants' appeals must fail.

29. In brief response Mr De Mello points out that it was never implicit that the Regulations should implement *Carpenter* nor has it ever been suggested by reference to Regulation 8 that [FM] was not a family member. He takes me in some detail once again to his skeleton particularly at paragraphs 1 to 3 thereof and seeks to rely upon it.

Findings

30. I have set out above in very considerable detail the submissions that are made to me. I think it is important to do so. It is important to do so because they reflect the manner in which this appeal is being addressed. These are appeals under the EEA Regulations 2006 by which the Appellants seek derivative residence cards. To succeed under the Regulations the Appellants have to show that they meet the requirements of either Regulation 7 or Regulation 8. I agree with the succinct submissions made by Mr Duffy on behalf of the Secretary of State. Whilst, potentially, provided there had been evidence of sufficient dependency upon the Sponsor, the first Appellant could have succeeded at that time under Regulation 7(1)(c), that was not shown and that remains the case. However I further agree on an interpretation of the Regulations that the second and third Appellants could never succeed under Regulation 7 and whilst I acknowledge potentially they could be seen to engage Regulation 8(2) that would require a dependency upon the EEA national i.e. [FM], and not the Sponsor. Throughout factual evidence provided in this appeal it has always been the contention of the Sponsor and the Appellants and their legal representatives that the dependency of the Appellants is on the Sponsor and not [FM]. That seems to me to be a perfectly sustainable finding both in fact and in law.

31. Much has been made in Mr De Mello's submissions upon a reliance on authorities relating to the EU Directives relating to the ability of a spouse to travel in Europe with her EU husband. The authorities of *McCarthy*, *S&G* and *Rahman* all emphasise that each case turns on its own facts. The general principle is not one that the courts in the UK resile from. However

there are issues raised by Mr De Mello which I find to be completely unsustainable as matters of fact which are challenged by the Secretary of State. It is the Sponsor's contention that it is essential for him to have his family live with him in the UK which will facilitate his work and provisions of service in the EEA. Factually such a situation does not arise. This is not a case where the Appellants seek to travel with the Sponsor across Europe. The Sponsor carries out a lot of his business in Europe. He is an intelligent man with a good job. He is a British citizen. He is a corporate accountant. The role that he fulfils is one that I anticipate is filled by many in these days of cross-European business arrangements. It makes absolutely no sense in law or fact to contend that based on that factual matrix the Appellants should succeed under European legislation relying on the authorities of *S&G*, *Carpenter* and *Rahman*. If that were to be the case then quite simply, providing a dependency could be established, then the floodgates would potentially open.

32. However this appeal is not about the Sponsor's rights. It is about Appellant's rights and it is about an interpretation as to whether someone is entitled to a derivative right of residence under the 2006 Regulations. I am satisfied that such rights cannot be maintained. In any event pursuant to Regulation 17(4) grant of the residence card is discretionary. In order to succeed as I have already indicated under Regulation 8(2) a dependency would be necessary on the EEA national and it could never in any event be contended that there was a dependency of the Appellants upon [FM]. Further I find the link submitted (even though reliance is made I note to certain authorities) to be so tenuous as to be unsustainable. *Carpenter* related to an application by a spouse and child. Clearly in such circumstances there was a dependency upon the EEA national. That cannot be and is not the case here. I remind myself that it is accepted and conceded that the Sponsor is a British citizen and is outside the Regulations. Consequently it is not even possible for the first Appellant to claim that she is a family member under the Regulations of the Sponsor yet alone that she is the family member of the Sponsor's ex-wife. This is an appeal under the Regulations. It is not an appeal under the provisions of the European Charter. For all the above reasons whilst I am sure it will be disappointing to the Appellants I am satisfied that they do not meet the provisions of the 2006 Regulations and their appeals are consequently dismissed.

33. Prior application was made for anonymity and granted, and I maintain it.

Decision

34. The Appellants' appeals under the Immigration (European Economic Area) Regulations 2006 do stand dismissed.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify

him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date

Deputy Upper Tribunal Judge D N Harris

TO THE RESPONDENT
FEE AWARD

No application is made for a fee award and none is made.

Signed Date

Deputy Upper Tribunal Judge D N Harris