



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/03623/2015

THE IMMIGRATION ACTS

Heard at Field House
On 19 April 2017

Decision & Reasons Promulgated
On 01 June 2017

Before

UPPER TRIBUNAL JUDGE O'CONNOR

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR MANJOT SINGH DHAMI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr S Staunton, Senior Presenting Officer

For the Respondent: Mr J Gajjar, instructed by M-R Solicitors

DECISION AND REASONS

Introduction

1. The appeal before the Upper Tribunal is brought by the Secretary of State for the Home Department ("SSHD"). I shall refer herein to Mr Dhami as the claimant.
2. The claimant, a citizen of India born 8 April 1988, entered the United Kingdom on 22 January 2010 as a student. His leave was subsequently extended in the same capacity so as to eventually expire on the 28 May 2015. On that same date, he applied for an EEA Residence Card as the "*Dependent family member*" of an "*EEA national or British citizen*", this being the claimant's brother-in-law, Maljit Singh. Maljit Singh ("the EEA sponsor"), who is both a British national and a national of Republic of Slovakia, married the claimant's sister on 23 January 2008.

3. The SSHD refused this application by way of a decision dated 30 November 2015. In this decision (headed "*Immigration (European Economic Area) Regulations 2006 Regulation 2 with reference to 9*") and in combination with a further reasons letter attached thereto, the SSHD, *inter alia*:
- (i) Observed that the EEA sponsor is a British national;
 - (ii) Concluded that the EEA sponsor had never exercised his EU free movement rights;
 - (iii) Concluded, in reliance both on the decision of the CJEU in McCarthy (C434/09) and on regulation 2 of the Immigration (EEA) Regulations 2006 ("the 2006 EEA Regulations"), that as a consequence of the finding set out in 3(ii) above the EEA sponsor could not benefit from the "*terms of the free movement directive*"; and,
 - (iv) Found that the requirements of regulation 9 of the 2006 EEA Regulations were not met - the claimant not being the EEA sponsor's spouse or civil partner.

Decision of the First-tier Tribunal

4. The claimant appealed to the First-tier Tribunal. In a decision promulgated on 22 August 2016 the FtT allowed the claimant's appeal, concluding (i) that the SSHD ought to have considered regulation 8 of the 2006 EEA Regulations and (ii) that her failure to do so required the "*case... [to be] remitted to the Secretary of State to be considered under the appropriate regulation.*"

Setting aside of the FtT's Decision

5. The SSHD appealed to the Upper Tribunal asserting that the FtT had exceeded its jurisdiction, it being submitted that the FtT had no power to remit the matter back to the SSHD for further consideration but instead was required to determine the appeal for itself.
6. In an oral decision given on the 1 February 2017 I set aside the FtT's decision for the following reasons.
7. The grounds of appeal that can be deployed in an EEA case such as the instant one are set out in Schedule 1 to the 2006 EEA Regulations, which states:

"1. The following provisions of, or made under, the 2002 Act have effect in relation to an appeal under these Regulations to the First-tier Tribunal or Upper Tribunal as if it were an appeal against a decision of the Secretary of State under section 82(1) of the 2002 Act -

Section 84(b) (grounds of appeal, as though the sole permitted ground of appeal were that the decision breaches the appellant's rights under the EU treaties in

respect of entry to or residence in the United Kingdom (“an EU ground of appeal”).

8. The words “*sole permitted ground of appeal*” plainly permit no other ground to be deployed by an appellant before the FtT (in this context) other than an “*EU ground of appeal*”, which is defined within Schedule 1.
9. The FtT must have concluded that the SSHD’s decision was not in accordance with the law, and it was for this reason that the matter was remitted back to the SSHD. As is clear from what I say above, this is not a ground upon which the FtT was permitted to found its decision. It was required decide for itself whether the SSHD’s decision would breach the claimant’s rights under the EU Treaties. The FtT did not do that and, consequently, its decision was set aside.

Re-making of the Decision under Appeal

Preliminary matters

10. The SSHD initially took a jurisdictional point before the Upper Tribunal, asserting that the claimant did not have a right of appeal against the decision of 30 November 2015 for the reasons identified in Sala (EFMs: Right of Appeal) [2016] UKUT 00411. This submission was, correctly in my view, withdrawn at the outset of the hearing on the basis that the SSHD had made an ‘EEA Decision’, the claimant’s application having been determined (albeit incorrectly) under regulation 9 of the 2006 EEA Regulations.

Law

2006 EEA Regulations

11. It is necessary at this stage to set out briefly the regulations that are pertinent to a decision in this appeal. Of most relevance to the instant appeal is the definition of “EEA national” in regulation 2 of the 2006 EEA Regulations. As originally enacted, the definition of an EEA national was: “*a national of an EEA state*”. However, this definition was twice amended in 2012. First, by the Immigration (EEA) Amendment Regulations 2012 [SI 1547/2012] (‘2012 Amendment Regulations’) which defined an EEA national as “*a national of an EEA state who is not also a United Kingdom national*” and, thereafter, on 8 November 2012 by the Immigration (EEA) Amendment No. 2 Regulations 2012 [SI 2560/2012] which defined an EEA national as “*a national of an EEA state who is not also a British national*”.
12. Regulation 8 of the 2006 EEA Regulations is headed “Extended Family Member”. Regulation 8 reads:

“(1) In these Regulations ‘extended family member’ means a person who is not a family member of an EEA national under Regulation 7(1)(a), (b) or (c) and who satisfies the conditions in paragraph (2), (3), (4) or (5).

(2) A person satisfies the condition in this paragraph if the person is a relative of an EEA national, his spouse or civil partner and –

(a) the person is residing in a country other than the United Kingdom and is dependent upon the EEA national or is a member of his household...;

(c) the person satisfied the condition in (a), has joined the EEA national in the United Kingdom and continues to be dependent upon him or to be a member of his household. ”

Directive 2004/38/EC

13. Directive 2004/38/EC is commonly known as "the Citizens' Directive". It is this Directive which the 2006 EEA Regulations transposed into UK law. Article 3 of the Directive states as follows;

"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 members by the Union citizen;

(b) the partner with whom the Union citizen has a durable relationship, duly attested.

The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people."

Discussion

14. Mr Gajjar properly conceded that the claimant could not meet the requirements of the 2006 EEA Regulations. This is so because of the definition of EEA national found in regulation 2 thereof, which does not include a person, such as the EEA sponsor, who also has British nationality.

15. This concession is, however, not determinative of the appeal before me. As identified above, the ground that may be deployed in an appeal against an EEA Decision is not directly related to the 2006 EEA Regulations, but rather requires an appellant to demonstrate that the "...decision breaches the appellant's rights under the EU Treaties in respect of entry to or residence in the United Kingdom".

16. The claimant asserts that the SSHD's decision breaches his rights under the Citizens' Directive, and in particular article 3(2) thereof. In support of this the claimant submits that:
 - (i) He was dependent on his EEA sponsor when living in India, immediately prior to coming to the UK;
 - (ii) He is both dependent on, and a member of the household of, his EEA sponsor in the UK;
 - (iii) His EEA sponsor is a relevant Union citizen for the purposes of Article 3(2) of the Citizens' Directive, despite him also being a British Citizen.
17. There is dispute between the parties as to whether the EEA sponsor can be treated as a Union citizen under the Citizen's Directive - the SSHD asserting that the same rationale applies to a consideration of article 3(2) thereof as applies under the 2006 EEA Regulations. It is submitted in the alternative that the claimant cannot demonstrate that he was dependent on the EEA sponsor whilst he [the claimant] was living in India.
18. It is prudent for me to consider these two issues in reverse order because in relation to the former the question also arises as to whether a preliminary reference should be made to the CJEU for it to consider the legal issue in play. However, there is no value in considering whether to make a reference if the factual matrix of the case is not such so as to make a reference necessary.
19. Turning then to factual matrix. There is no dispute in this case that the claimant is either currently dependent on the EEA sponsor, or is a member of the EEA sponsor's household.
20. Focus, therefore, turns to the position prior to the claimant's departure from India in January 2010. The claimant does not assert that he was a member of the EEA sponsor's household in India. He does, however, assert that he was dependent on the EEA sponsor whilst he [the claimant] was living there.
21. In his witness statement, signed on 3 August 2016, the claimant states that the sponsor sent money to India for his welfare and upkeep, but it would not be sent in his name. Neither he, nor the sponsor, kept evidence of such remittances.
22. The claimant supplemented his evidence on this issue orally, stating that the sponsor would send money to his [the claimant's] father three times per year, and his father would then pass monies on to the claimant as necessary. The purpose of the monies was to pay for the claimant's education and school/college fees, which were the equivalent of approximately £60 per month. His parents did not work, save for on the land that the family own (approximately one canal in size) - his father having given up work prior to 2007. The claimant's brother, who lives in Germany, currently provides financial support for his parents, although the claimant is unaware as to how much support is provided.

23. In his statement, also dated 3 August 2016, the EEA sponsor asserts that *"he used to send money"*. There is, however, no indication as to the sum of monies sent, how often monies were sent, to whom they were sent or for what purpose.
24. In oral evidence the EEA sponsor confirmed that he became a Slovakian national in 2002 and a British national in 2012. He further asserted that: (i) he sent money to the claimant's father whenever money was required; (ii) the money was for the claimant, but it was a matter for the claimant's father how the monies were used; (iii) the claimant's parents worked their own land which financially provided only for the expenses of running the household; and, (iv) the claimant's parents *"might have been selling something [from the farm] to get some money"*. Having been asked what the claimant's circumstances would have been had money not been sent, the EEA sponsor stated that they would have been *"very difficult because he is the youngest"*.
25. In an affidavit signed on 21 May 2015 the claimant's father affirmed that:
- "... [the EEA sponsor] has been financially assisting me since 2009 in order to lead my family comfortably. It is worthy to mention here that [the EEA sponsor] has been totally financially assisting me for the study of [the claimant] since 2009 and even all the expenses of the study of [the claimant] in the UK... ."*
26. The question I must determine is whether the claimant has established on the balance of probabilities that he was dependent on the EEA sponsor prior to leaving India in January 2010. In doing so I must consider what is meant by the term 'dependent' in article 3(2).
27. The issue of dependency has recently been considered by CJEU, in Reyes v Migrationsverket 2014/C-423/12, [2014] QB 1140. Although the court in Reyes was concerned with the question whether an EU direct descendant aged 21 or older could be treated as a dependant within the meaning of article 2(2)(c) of the Citizens Directive, I can see no reason why the principles enunciated therein would not apply equally in relation to a consideration under article 3(2) of the Directive. In its judgment, the Court concluded:

"[20] In that regard, it must be noted that, in order for a direct descendant, who is 21 years old or older, of a Union citizen to be regarded as being a 'dependant' of that citizen within the meaning of Article 2(2)(c) of Directive 2004/38, the existence of a situation of real dependence must be established (see, to that effect, Jia, paragraph 42).

[21] That dependent status is the result of a factual situation characterised by the fact that material support for that family member is provided by the Union citizen who has exercised his right of free movement or by his spouse (see, to that effect, Jia, paragraph 35).

[22] In order to determine the existence of such dependence, the host Member State must assess whether, ... a Union citizen, is not in a position to support himself. The need for material support must exist in the State of origin ... or the State whence he came at the time when he applies to join that citizen (see, to that effect, Jia paragraph 37)."

28. In Siew Lian Lim v ECO (Manila) [2015] EWCA Civ 1383, the Court of Appeal addressed its mind to the decision in Reyes, as well as the decisions in Jia (Case C-105) and Maria Pedro v SSWP [2009] EWCA Civ 1358, Elias LJ giving judgment of the Court:

“[25] In my judgment, this makes it unambiguously clear that it is not enough simply to show that financial support is in fact provided by the EU citizen to the family member. There are numerous references in these paragraphs which are only consistent with a notion that the family member **must need this support from his or her relatives in order to meet his or her basic needs.** ...

[29] Receipt of support is a necessary but not sufficient condition. It is still necessary to determine that a family member is dependent in the sense of being **in need of the assistance.** I accept that the authorities clearly establish that it is irrelevant why he or she is dependent, whether because he has given his money away or because he is unwilling to work...” (my emphasis)

29. Turning back to the instant case. On the evidence before me I accept that the EEA sponsor provided the claimant’s father with monies. The only specific evidence relating to the period of time over which such monies were sent by the EEA sponsor to the claimant’s father is found in the claimant’s father’s affidavit, in which it is said that the EEA sponsor has been assisting him “*since 2009*”. The EEA sponsor stated in oral evidence that he was sending monies to the claimant’s sister (the EEA sponsor’s wife) when she lived in India and that she came to the UK in 2009. There is no evidence, however, that these monies were for the use of the family generally, or the claimant specifically and no mention is made in this regard by the claimant’s father. On the available evidence, I accept that the EEA sponsor was sending monies to the claimant’s father in 2009 and early 2010 (until the claimant came to the UK), but not before 2009.
30. I further accept that; (i) The EEA sponsor sent the money with the intention that it be for the claimant’s use (EEA sponsor’s oral evidence); (ii) that monies were used to pay for the claimant’s education in 2009 (the claimant’s, claimant’s father’s and EEA sponsor’s oral evidence), and (iii) the claimant’s father also worked on the family land, the money from which was used for the expenses of running the household (the claimant’s, and EEA sponsor’s, evidence).
31. Despite all I say above I conclude that it has not been demonstrated to the balance of probabilities that the monies provided by EEA sponsor were required in order for either the claimant (or the claimant’s family members living in the same household as the claimant) to meet their basic needs. I find, therefore, that the claimant has not established that, for the purposes of article 3(2) of the Citizens’ Directive, he was dependent on the EEA sponsor prior to coming to the United Kingdom.
32. There is no direct evidence to this effect nor, in my conclusion, can the fact that the claimant was dependent on the EEA sponsor prior to coming to the UK be inferred from the limited evidence that has been provided.

33. The evidence that has been provided is incomplete. There is no information or evidence regarding the financial circumstances of the family in 2008 i.e. after the claimant's father stopped working (other than on the family land) and before monies were being sent to the claimant's father by the EEA sponsor. It is not asserted that the claimant was unable to continue his education during that period, nor is it said that in order for him to do so the family were required to forgo other basic needs so as to be able to afford the cost of this education. One could speculate that it maybe that the claimant's father had surplus savings from his time in employment that he used in 2008 which had been depleted by 2009, but there is simply no evidence in this regard.
34. The claimant's father, who is in the best position to give evidence on the issue I must determine, does not address it directly. Whilst he states that the monies were sent by the EEA sponsor to pay for the claimant's education and *"in order to lead my family more comfortably"*, there is nothing in his evidence addressing the other financial aspects of the family's circumstances or what the circumstances would have been for the claimant had the EEA sponsor not sent monies in 2009. Insofar as any inference can be drawn from the claimant's father's evidence, it is not that the family required the monies in order to ensure the family's, or the claimant's, basic needs were met. The evidence from the EEA sponsor adds little in this regard, although I have taken full account in coming to my conclusions that the EEA sponsor stated that the claimant's circumstances, absent the EEA sponsor's monies, would have been *"very difficult because he is the youngest"*.
35. As I have already identified above, having looked at all the evidence before me in the round I find that it does not discharge the burden on the claimant to establish that he was dependent on the EEA sponsor prior to coming to the UK. Consequently, the claimant cannot meet the requirements imposed by article 3(2) of the Citizens' Directive. In such circumstances, I need not grapple with the issue of whether the EEA sponsor is to be treated as an EEA national for the purposes of article 3(2) of the Directive.

Decision

For the reasons given above, the decision of the First-tier Tribunal is set aside.

Upon remaking the decision under appeal, I conclude that the claimant's (Mr Dhami's) appeal is to be dismissed – the SSHD's decision does not breach the EU Treaties.

Signed:



Upper Tribunal Judge O'Connor
Signed: 16 May 2017