Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/22411/2015

THE IMMIGRATION ACTS

Heard at Field House	Decision & Reasons Promulgated
On 23 January 2019	On 14 February 2019

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

M A S
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Maqsood, Counsel, instructed by Expert Law Solicitors
For the Respondent: Mr T Lindsay, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of India whose date of birth is 6 March 1990. He made an application on 16 December for a residence card as a dependent family member of an EEA national exercising treaty rights, namely his father-in-law [DQ], a citizen of Poland.

2. His application was refused. He appealed. His appeal was allowed on 29 February 2016 by First-tier Tribunal Judge Hussain. There is a history to this case and

I concluded that the judge had made a material error of law and set aside the decision to allow his appeal under the 2006 Regulations.

3. The history of the case and the reasons for my decision are to be found in my decision which was promulgated on 8 November 2018 following a hearing at Field House on 25 October 2018. The salient parts read as follows:

> "2. The Appellant appealed. His appeal was allowed by Judge of the First-tier Tribunal Hussain following a hearing on 29 February 2016. The decision was promulgated on 8 March 2016. The judge found that the marriage was not a marriage of convenience finding the Appellant and his wife credible. The judge went on to allow the appeal "under the Immigration (EEA) Regulations 2006". The Secretary of State was granted permission by Upper Tribunal Judge Blum on 15 September 2016. The matter came before Deputy Upper Tribunal Judge Sheridan on 16 November 2016. His task was to decide whether Judge Hussain made an error of law. He concluded that Judge Hussain materially erred and set aside the decision. He concluded, agreeing with the Secretary of State, that following the case of Sala [2016] UKUT 411 there was no jurisdiction to determine the appeal because the Appellant's rights depended on whether he could meet the requirement of the Regulations as they relate to extended family members. He dismissed the appeal.
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> 3. Judge Sheridan's decision was set aside by the Court of Appeal (in a decision of 3 August 2018) following the decision of Lord Justice Hickinbottom on 3 July 2018 granting permission to the Appellant and remitting the matter to the Upper Tribunal for fresh determination of the Secretary of State's application for permission to appeal. The parties agreed that Judge Sheridan erred in the light of the case of Khan [2017] EWCA Civ 1755.
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> 4. I heard submissions from both parties at the hearing before me. I conclude that Judge Hussain materially erred in law. The findings relating to the marriage of convenience are not challenged. However, the only way this Appellant's appeal could succeed under the Regulations was as an extended family member of an EEA national (his wife is a citizen of India). Considering the decision of Judge Hussain, it is not entirely clear whether he allowed the appeal under Regulation 8; however, if he did, there was no lawful basis to do so because there was no consideration of whether the Appellant was an extended family member in accordance with the Regulations. That the marriage between the Appellant and his wife, neither of whom are EEA nationals, is not one of convenience is not a lawful basis on which to allow an appeal this appeal under the 2006 Regulations. There was no analysis of Regulation 8 and whether the Appellant met the requirements set out in Regulation 8 of the 2006 Regulations (see Dauhoo (EEA Regulations – Reg 8(2)) [2012] UKUT 00079). This is a material error. I set aside the decision to allow the appeal.
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> 5. It was Mr Maqsood's view that the appeal should be allowed and remitted to the Secretary of State to decide whether to issue a residence card based on the Appellant's rights as an extended family member. However, this is misconceived. It should have been clear to those representing the

> Appellant at every stage of these proceedings that findings need to be made concerning whether the Appellant is an extended family member on the basis that it is now the case as found by the FTT that the marriage between him and his Sponsor's daughter in law is not a sham. The judge found for the Appellant in this regard and there is no reason to go behind this finding. The Secretary of State did not have to engage with reg 8 in the decision letter because he concluded that the marriage was one of convenience and so the application was refused. This is not a concession that the Appellant otherwise meets the requirements of the regulations. I indicated an intention to remake the decision on the evidence before the FTT. Mr Maqsood asked for the substantive hearing to be adjourned. I reluctantly agreed to adjourn because of the history of the case and how the matter had proceeded to date which, taking a very generous view of the represented Appellant's situation, may have given rise to some confusion. The issue is narrow. It relates to dependency and or membership of household with reference to Dauhoo. I rejected the submission made by Mr Maqsood that the matter should be remitted to the FTT. I adjourned the matter to be re-heard in the UT."

The resumed hearing

4. At the resumed hearing on 23 January 2019 it was established that there had been a failure to comply with my directions and that the Appellant had not served further evidence as directed. However, Mr Maqsood indicated that it was his intention that the case be dealt with by way of submissions only. The case was put back to later in the day because the Appellant and his family were not in attendance. They were travelling from Birmingham and had not arrived. I put the matter to the end of my list.

5. It was Mr Maqsood's case that Dauhoo should not apply. The Appellant cannot succeed under Dauhoo. He came to the UK in 2011; at a time when the Sponsor was not an EEA national. There was no prior relationship between the Appellant and the EEA Sponsor. Because the Appellant would have no protection under the 2006 Regulations or in any other category it would be right, according to Mr Maqsood, to afford him some protection. Mr Maqsood conceded that his submission was not backed by legal authority. However, he invited me to find that the Appellant is an extended family member notwithstanding Dauhoo.

6. I heard submissions from Mr Lindsay. He submitted that the Appellant cannot meet the Regulations. The position is made clear in Dauhoo. There is no hampering of free movement in this case. The Appellant cannot succeed as an extended family member. He referred me to paragraph 14 of Dauhoo.

Conclusions

7. I remind myself of the decision in Dauhoo:

> Under the scheme set out in reg 8 (2) of the Immigration (European Economic Area) Regulations 2006, a person can succeed in establishing that he or she is an

"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:

i. prior dependency and present dependency

ii. prior membership of a household and present membership of a household

iii. prior dependency and present membership of a household;

iv. prior membership of a household and present dependency.

It is not necessary, therefore, to show prior and present connection in the same capacity: i.e. dependency- dependency or household membership-household membership ((i) or (ii) above). A person may also qualify if able to show (iii) or (iv).

8. It is accepted that the Appellant is a "present" member of the Sponsor's household and that he does not satisfy either of the "prior" requirements. Mr Maqsood's argument, raised at the resumed hearing for the first time was a last -ditch attempt. The case was adjourned on the last occasion to give the Appellant the opportunity to serve further evidence. The Appellant did not comply with the directions. His solicitors must have advised him that he could not succeed under the Regulations. For some reason he decided to pursue this appeal. It may be that he has been poorly advised by his solicitors. He and members of his family travelled to the hearing centre from Birmingham. There was no live evidence. Furthermore, there was simply no hope of this appeal succeeding under EU Law. There was no argument that the Regulations would be improperly applied to the Appellant. There was no argument that the Directive was not properly transposed into the Regulations or that there was an issue with interpretation. There was no reference made by Mr Maqsood to the Directive. The nub of the argument was that there is no other route under which the Appellant could succeed and therefore the decision is unfair. This is a hopeless and spurious argument. There is no good reason to depart from Dauhoo. There is no legal basis under EU law on which this appeal can be allowed.

9. The Appellant's appeal is dismissed under the 2006 Regulations.

Signed *Joanna McWilliam* Date 7 February 2019

Upper Tribunal Judge McWilliam