Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: EA/06860/2018
EA/06863/2018

THE IMMIGRATION ACTS

Heard at the Royal Courts of Justice	**Decision & Reasons Promulgated**
On 17th February 2020	**On 1st April 2020**

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

IRUM SARFRAZ
MUHAMMAD AHSAN BASHIR
(NO ANONYMITY DIRECTION IS MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr E Nicholson, instructed by JJ Law Chambers
For the Respondent: Ms S Cunha, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellants are citizens of Pakistan born on 8 August 1990 and 25 December 1992 respectively. They appeal against the decision of First-tier Tribunal Judge Bartlett promulgated on 11 June 2019 dismissing their appeals against the refusal of permanent residence cards under the Immigration (EEA) Regulations 2016 [2016 Regulations].

2. The Appellants applied for permission to appeal on two grounds. Firstly, it was accepted that the Appellants were dependant on the EEA national sponsor (the first Appellant's father) prior to coming to the UK and accepted that they lived with him in the UK. The Appellants therefore satisfied Regulation 8. Secondly, the judge misdirected himself in adopting a restrictive approach to dependency which was inconsistent with Reyes (EEA Regs: dependency) UKUT 00314 (IAC).

3. Permission to appeal was granted by Upper Tribunal Judge Pickup on 7 November 2019 for the following reasons:

> "… it is arguable that even if the appellants are not presently dependent on the sponsor, on the facts of the case the appellants were arguably dependent on the sponsor before coming to the UK and, even if not presently dependent, may nevertheless be members of the sponsor's household and thus qualify as extended family members. If the first appellant has lived in the UK in accordance with the EEA regulations for a period of five years she may be entitled to permanent residence. It does not appear, however, that the second appellant can so qualify. It is arguable that these issues were not adequately addressed in the impugned decision of the First-tier Tribunal. In the circumstances all grounds may be argued."

Submissions

4. Mr Nicholson relied on Dauhoo (EEA Regulations – reg 8(2)) [2012] UKUT 00079 (IAC) and submitted the Appellants were extended family members given the judge's finding that it was accepted they were dependant on the EEA sponsor prior to coming to the UK and members of his household since arriving in the UK.

5. There was then some discussion about whether the first Appellant could satisfy the five year period required to establish a right to permanent residence when she had entered as a family member under Regulation 7, but had subsequently become an extended family member under Regulation 8. I was referred to no authority on the point.

6. In relation to ground 2, Mr Nicholson relied on the grounds of appeal and submitted the judge had adopted a restrictive approach to dependency. His reference at [13] was similar to the test Kugathas v SSHD [2003] EWCA Civ 31, which was not relevant to the application of the 2016 Regulations and contrary to the guidance referred to at [14] of the grounds. Applying the correct test, it could not be said that the first Appellant did not continue to be dependant on the EEA sponsor.

7. Ms Cunha relied on the Rule 24 response and referred to paragraph 6 of the 2004/38/EC Directive. She submitted that the 2016 Regulations did not allow for a change in the exercise of Treaty rights. The first Appellant had entered as the dependant daughter of the EEA sponsor and could not now become an extended family member. The second Appellant was now dependant on the first Appellant, not the EEA sponsor. The presence of the second Appellant in the UK was not necessary for the exercise of Treaty rights by the EEA sponsor. The second Appellant

was no longer an extended family member. The situation was distinguishable form Dauhoo. Prior dependency no longer existed.

Conclusions and Reasons

8. On 2 July 2018, the EEA sponsor applied for a permanent residence card. His wife, two daughters, son and son-in-law requested residence cards on the basis of the EEA sponsor's status in the UK. The first Appellant is the EEA sponsor's daughter. On 22 August 2018, she was refused a permanent residence card under Regulations 7 and 15 on the basis that there was insufficient evidence to show that she was living with/or dependant on the EEA sponsor.

9. The second Appellant is the EEA sponsor's son in law. On 22 August 2018, he was refused a permanent residence card under Regulations 7, 8 and 15 on the grounds that he was not dependant on or residing with the EEA sponsor and he had not resided in the UK for five years. The Respondent also stated he was not entitled to a residence card on the current evidence.

10. The judge made the following factual findings: The first Appellant has lived with the EEA sponsor (her father) since she came to the UK in 2013. She lives in the family home with her parents and siblings. The EEA sponsor pays the mortgage and most of the household bills. The first Appellant works for a business and the EEA sponsor is a director and shareholder. She earns £1200 per month from which she meets her own personal expenses, gives money to her husband (the second Appellant) and buys food for the family. The second Appellant entered the UK in January 2018 and has lived in the same family home as the first Appellant since then.

The first Appellant

11. The judge found at [13]: "The first appellant is married to the 2nd appellant. By virtue of this marriage she has formed her own family unit with her husband. She is a young adult who has relatively recently married and therefore she maintains ties to her parents and siblings. However I am not satisfied that the relationship that the appellant maintains with her father is one of emotional dependency of a different nature to that enjoyed between adult children and adult parents who do not live with each other. I do not accept that the mere fact of living in the same property, even with the financial conditions I have described below, establishes emotional dependency."

12. I find that the judge has erred in law in his assessment of dependency under the 2016 Regulations. Firstly, on the facts found by the judge, his conclusion that the first Appellant had formed her own family unit was irrational. Secondly, he applied the wrong test in concluding that the first Appellant was not dependant on the EEA sponsor. My reasons are as follows:

13. Firstly, the first Appellant entered the UK as an adult dependant of the EEA sponsor. She continued to be part of the same household even after her husband, the second Appellant, came to the UK in January 2018. The first Appellant lived with the EEA

sponsor as his dependant for almost five years before the second Appellant joined the household. Both Appellants continue to live in the family home with the EEA sponsor and other family members since their marriage. The first Appellant continues to work and her financial, physical and social conditions have not changed since the second Appellant came to the UK. The evidence did not support the judge's finding that the first Appellant had formed her own family unit with the second Appellant.

14. Secondly, on the facts found by the judge, the EEA sponsor provided accommodation, utilities and food and therefore supported the first Appellant's essential needs. It was not necessary for the EEA sponsor to meet all or most of her essential needs. The test of emotional dependency applied by the judge was relevant to Article 8. The test under the 2016 Regulations is different. I find the judge adopted a more restrictive approach to that permitted in EU law on the issue of dependency. On a proper application of Reyes (EEA Regs: dependency), the first Appellant is dependant on the EEA sponsor.

15. I find that the judge misdirected himself in law in concluding that the first Appellant was not dependant on the EEA sponsor. On the facts found by the judge, the first Appellant had shown that she was a family member under Regulation 7 of the 2016 Regulations. She has been living and working in the UK in accordance with the Regulations since July 2013 and has, therefore, acquired the right to permanent residence under Regulation 15.

The second Appellant

16. The second Appellant does not have a right of appeal under the 2016 Regulations. His application was refused prior to the amendment brought about by the Immigration (EEA Nationals) (EU Exit) Regulations 2019 which applied from 29 March 2019. The amendment does not have retrospective effect.

17. I informed the parties of my provisional view on 26 February 2020 and issued a direction that the parties file and serve written submissions by 10 March 2019. The Appellants have complied with that direction. There was no response from the Respondent on the court file.

18. The Appellants submit that following Banger (EEA: EFM – Right of Appeal) [2019] UKUT 000194 (IAC) the second Appellant could request a new decision from the Respondent or rely on the doctrine of direct effect. Mr Nicholson relied in his written submissions on [39] to [43] of Banger and submitted the second Appellant issued a notice of appeal which was accepted by the First-tier Tribunal and he was entitled to rely on the direct effect of the CJEU's ruling in SSHD v Banger (Citizenship of the Union – Right of Union citizens to move and reside freely within the territory of the EU) [2018] EUECJ C89/17 (12 July 2018):

> "Article 3(2) of Directive 2004/38 must be interpreted as meaning that third-country nationals envisaged in that provision must have available to them a redress procedure in order to challenge a decision to refuse a residence

> authorisation taken against them, following which the national courts must be able to ascertain whether the refusal decision is based on a sufficiently solid factual basis and whether the procedural safeguards were complied with. Those safeguards include the obligation for the competent national authorities to undertake an extensive examination of the applicant's personal circumstances and to justify any denial of entry of residence."

19. I am persuaded by the UKUT's conclusions at paragraph 40 of Banger that a statutory appeal is required to make findings of fact and the Respondent has recognised this aspect of the CJEU judgment in amending the 2016 Regulations and providing a statutory appeal. The Respondent did not raise the issue of jurisdiction before the First-tier Tribunal or before me at the error of law hearing and no written submissions have been made. I will therefore proceed to determine the second Appellant's appeal.

20. The judge erred in law in failing to apply Dauhoo (EEA Regulations – reg 8(2)) [2012] UKUT 00079 (IAC). The judge found that the second Appellant was dependant on the sponsor prior to coming to the UK and he was a member of the sponsor's household since he came to the UK. The second Appellant satisfied Regulation 8 and is an extended family member. He came to the UK in January 2018. He does not qualify for permanent residence. Under Regulation 17, the Respondent has a discretion to issue a residence card.

Summary

21. I find that the judge erred in law and his decision of 11 June 2019 is set aside. I remake the decision and allow the appeals under the Immigration (EEA) Regulations 2016.

22. The notice of hearing sent on 3 March 2020 was sent in error. The promulgation of this decision has been delayed pending written submissions from the parties on a point not raised at the error of law hearing. A further oral hearing was not necessary in the circumstances.

Notice of Decision

Appeals allowed

No anonymity direction is made.

J Frances

Signed Date: 31 March 2020
Upper Tribunal Judge Frances

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid, I have considered making a fee award and have decided to make to make a whole fee award of £140.

J Frances

Signed Date: 31 March 2020
Upper Tribunal Judge Frances

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email