



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: IA/03354/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 2 December 2014**

**Decision & Reasons Promulgated  
On 16 December 2014**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE GIBB**

**Between**

**NEWTON VIMALATHAS ANTHONYPILLAI  
(NO ANONYMITY ORDER MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr J Martin, Counsel, instructed by Nag Law Solicitors

For the Respondent: Ms S Rahman, Home Office Presenting Officer

**DECISION AND REASONS**

1. This is an appeal against the refusal of a residence card under Regulation 17 of the 2006 Regulations. Following an error of law hearing at Field House on 23 October 2014 I set aside a decision dismissing the appellant's appeal, and the matter was subsequently listed for a remaking hearing before me. My error of law decision and directions, which sets out the immigration history, was as follows.

## ERROR OF LAW DECISION AND DIRECTIONS

- I. The appellant's appeal was heard jointly with that of his uncle, who is a citizen of Denmark. His uncle's appeal was allowed, but the appellant's appeal was dismissed, by First-tier Tribunal Judge Howard (determination promulgated 11 August 2014). The appellant's appeal was dismissed on the basis that the appellant had not established that he had been dependent on his uncle before coming to the UK to claim asylum.
- II. Permission to appeal was granted by First-tier Tribunal Judge Osborne. The basis on which permission to appeal was sought was that various aspects of the evidence of dependency had not been considered; and that the judge had not made clear findings covering the whole relevant period, given that there was no requirement for the appellant to show that he had been dependent throughout.
- III. At the start of the hearing I indicated to the parties that it appeared to me that there was an additional significant point. This was that the judge did not appear to have referred to or applied the relevant test for dependency in European cases, as set out in the Jia case (Yung Ying Jia v Migrationsverket [2007] ECR 1-0001).
- IV. Mr Martin, for the appellant, submitted that there had been a 22 year period where the appellant had been part of a household, after the death of his father, and he did not need to show dependency for all of that period, or immediately prior to coming to the UK. At paragraph 12 of Dauhoo, which was referred to in paragraph 20 of the judge's determination, it was clear that continuous dependency could not be required. On the facts here there was dependency for around two years before he came to the UK. The judge's reasoning was very short, with the evidence not being summarised or set out at any length, and not reflecting lengthy cross-examination. The judge, at paragraph 26 of the determination, only considered the position in around the year 2000, the appellant having been in India for most of the 1990s. There was sufficient detail in the evidence to show the extent of his reliance on his uncle, both when he was working, and when he was not.
- V. Having listened to Mr Martin's submissions Mr Walker, for the respondent, agreed that the judge had erred in law, in a manner material to the outcome, in his approach to the dependency issue.
- VI. In view of this agreement, which appeared to me to be soundly based, there is no need for me to set out in detail an analysis of paragraphs 23 to 27 of the determination. Although the judge referred to the Dauhoo case at paragraph 20 of the determination it does appear that the broad brush finding at paragraph 27 of the determination cannot be said to engage with the legal framework as required by that case. Within the findings at paragraphs 23 to

27 there is insufficient detail to establish whether the appellant did meet the requirements set out in the Dauhoo case, and whether he met the requirements for dependency in view of the Jia test. There is a significant difference between the test of dependency in European cases and under the Immigration Rules, and from the determination it is not clear what test the judge had in mind.

- VII. The parties were in agreement that the decision needed to be remade, and that this required further evidence. The parties were in agreement that the remaking should remain within the Upper Tribunal, following the normal course suggested in the Practice Statement. Neither side suggested that the matter should be remitted to the First-tier.
- VIII. Following the agreement of the parties I therefore set aside the decision dismissing this appellant's appeal under the 2006 Regulations. The matter will be listed for a remaking hearing in the Upper Tribunal.

### Discussion

- 2. In a discussion of the issues of the start of the hearing it was agreed, between the parties, that the appellant had been dependent on, and a member of the household of, his Danish uncle (his uncle) since arrival in the UK in 2002. It was also agreed that the appellant's uncle, who is his mother's brother, has been a citizen of Denmark since 1994, having fled Sri Lanka and claimed asylum there in 1984; and that the appellant's uncle has been resident in the UK from 1999.
- 3. It was agreed that the issue to be decided was whether the appellant could establish, on a balance of probabilities, that he had been dependent on his uncle before the appellant came to the UK; and whether, on the facts, the appellant could satisfy Regulation 8(2) of the 2006 Regulations.
- 4. The appellant and his uncle both gave evidence at the hearing, and were cross-examined.
- 5. The appellant's representatives had prepared a bundle of documents for the remaking hearing (eight pages), which included new witness statements for both witnesses. I was also referred to the appellant's bundle prepared for the First-tier hearing (22 pages), which contained earlier witness statements from July 2014; and a copy of the appellant's witness statement and Asylum Interview Record from the asylum claim that he made in October 2002, shortly after his arrival. Neither side made any mention of the asylum process, but I assume that the claim was refused and all challenges by way of appeal were unsuccessful. Neither side provided or referred to any determination or other documents relating to the asylum refusal or appeal process.

6. It appears that there was an earlier unsuccessful application for a residence card in 2006, but the current application, which led to the refusal dated 2 January 2014, was made in November 2013.
7. I was provided with a number of relevant decisions, to which I was referred. These included Oboh and Others v SSHD [2013] EWCA Civ 1525; Moneke and Others Nigeria [2011] UKUT 341 (IAC); the Jia case; Dauhoo (EEA Regulations - reg 8(2)) [2012] UKUT 79. Within the Oboh case there is reference to the CJEU case of Rahman [2013] QB249 (Case C-83/11).
8. In outline the account of the chronology and factual circumstances was as follows. The appellant's father was killed in 1978, when the appellant was only around 4 years old (the exact date of death was not specified). The appellant's uncle took on, at the appellant's grandmother's request, responsibility for his late brother's widow and children. The appellant's mother had health and other difficulties after her husband's death. Between 1978 and 1984, when the appellant's uncle and his family had to flee Sri Lanka, the appellant was in a household that was financially dependent on his uncle. When the appellant was around 16 or 17 years of age, in 1989 to 1990, he left the household of his mother and grandmother and went to stay with an aunt. In the early 1990s the appellant and one of his sisters went to Chennai in India, and they were followed shortly afterwards by the appellant's mother and another of his sisters. The appellant's maternal grandmother died in 1996.
9. As refugees in India the family circumstances were difficult, and they relied on money sent to them by the appellant's uncle from Denmark. The appellant was able to find work, and also married, in 2000, and had a child, in 2001.
10. For reasons connected with his asylum account the appellant left his wife and children in India and returned to Sri Lanka for about a year between 2001 and 2002. During this period his uncle continued to send money to the family in India, but did not send any to the appellant himself. During this time the appellant was dependent on a paternal uncle in Sri Lanka, who subsequently arranged and paid for his journey to the UK.
11. The appellant's uncle gave various reasons for having been unable to provide much in the way of documentary evidence to show that he had sent money to the appellant and his family. One of the reasons put forward was a burglary that had occurred in 2001, in which a number of personal documents, including passports and financial documents, had been stolen. The only money transfer documents put forward were one from July 1996, showing that the appellant's uncle sent \$3,000 to the appellant's older sister in Chennai; and one from November 2000, showing a transfer to the same person of £2,000.
12. Following the conclusion of the oral evidence both sides made submissions on factual and legal issues. I will summarise the factual submissions. First, those by Ms Rahman, for the respondent, were that variances in the evidence, and the paucity

of documentary evidence, meant that the burden of proof had not been discharged. There were three different versions about the circumstances before the appellant came to the UK. In the asylum witness statement and interview he had said that he left his grandmother's household in about 1990, and went to his paternal uncle. In the witness statements for the July 2014 First-tier hearing both the appellant and his uncle had said that the appellant was not really dependent on his uncle from 1990 onwards. In the latest witness statements both were claiming that there had been financial dependency after the appellant left his grandmother's house, and when he was in India.

13. On the factual issues Mr Martin's submissions for the appellant can be summarised as follows. The limited documentary evidence should be assessed in view of the comments in the Jia case (paragraph 41) which had decided that dependency could be established by any appropriate means. The appellant's uncle's evidence had been credible. It was likely that he would have promised his mother that he would look after his sister and her family after his brother-in-law's death. During the asylum interview and witness statement the period in India had not been mentioned at all, because it was not relevant. The period before the appellant's uncle became a Danish citizen in 1994 was anyway not relevant. The witness statements for the First-tier hearing should be read not as inconsistent but rather as insufficiently detailed. They had been drafted without an appreciation of the detail needed to establish whether there was dependency after 1994. The current witness statements and oral evidence should be accepted. Within the context of Sri Lankan refugees in India it was likely that they would have needed financial help. It was also likely that they would have pooled their resources as a family, as described, and it would not be right to separate out the appellant as if he were an isolated individual. The money transfer documents from 1996 and from 2000 were for very substantial sums, which would have gone a long way in supporting the family in India.

### **Findings**

14. I accept the submission made that there were discrepancies between the different statements, but in looking at the evidence as a whole I have decided that the appellant has done enough to establish that he was dependent on his uncle, both in Sri Lanka and India, for the periods set out above.
15. It is important to note, in my view, that the asylum witness statement and interview were concerned with different matters. No mention at all was made of the appellant's time in India. The focus was on his account of detentions, through political connections, and of having been tortured. In the witness statements prepared for the First-tier hearing there were two sentences that were damaging, but it is significant that the issue of financial dependency in India was not considered in any detail. The entire period from when the appellant went to India is dealt with in a single sentence. On this point I accept, to an extent, the submission made on the appellant's behalf that these can be read more as lacking detail than being directly contradictory. It appears to me to be likely that the person drafting the brief

statements, which only ran to eight short paragraphs, simply failed to appreciate the significance of the period in India, apparently being under the impression that the dependency before leaving the appellant's grandmother's household was sufficient in itself to establish what was needed.

16. The appellant had some difficulty in remembering dates, during his oral evidence, but I accept that many of the points that he was asked about are now many years in the past. I also conclude that all of his answers, whilst approximate, were consistent with the overall chronology put forward at various different times. The appellant's uncle appeared to me to be a credible and reliable witness. Whilst there are certain issues in relation to the appellant's credibility, given that this must have been rejected during the asylum decision making and appeal process, no such issues exist in relation to the appellant's uncle. It appears to me that he has put forward valid reasons for the difficulties that he has faced in providing documentary evidence. I note that the account that he gave of the 2001 burglary is supported by a short newspaper story, from that date. This aspect of his evidence was not challenged. I also note that there are two money transfer documents, neither of which were challenged, which show transfers of very significant sums. Although it is the case that there is no documentary evidence to support the claim of significant sums having been sent approximately every two months, the sum of \$3,000 sent in 1996, and that of £2,000 sent in 2000, would have been large sums for a Sri Lankan family living as refugees in southern India.
17. I also accept that an assessment of the evidence as a whole has to take in the overall context. I accept that it is likely that the financial and general circumstances for a family of Sri Lankan refugees in southern India during those years would have been difficult. The account given of them relying on funds sent from the appellant's uncle in Denmark, and subsequently the UK, as well as a reference to funds sent from another aunt in Norway, is plausible in the overall circumstances.
18. It does appear to me to be unlikely that the appellant would have separated himself financially, once he was earning a wage in India, from the rest of the family. Taking into account his sister's disability, and his mother's health problems, it appears to me more likely than not that his evidence, and that of his uncle, to the effect that resources were shared amongst the family, was accurate.
19. For all of these reasons, having considered the evidence as a whole, my finding is that the appellant has established, on balance of probabilities, that he was financially dependent on his uncle from the date of his father's death onwards. The periods in which he can be said not to have been dependent are those in which he was dependent on his paternal uncle, for a period of about two years in his late teens, before he went to India, and again for a period of about a year before he left Sri Lanka for the last time. Since arrival in the UK in 2002 it has, as mentioned above, been accepted that he has been dependent on, and a member of the household of, his uncle.

20. In my view the dependency between the period of the appellant's father's death in 1978 and him going to stay with his aunt in about 1990 is clear cut. The appellant was a child and he was part of a household that was dependent on his uncle. Between approximately 1992 and August 2001 the level of the appellant's dependency on his uncle varied. At first it would have been nearly total. After he obtained employment in India, from the mid-1990s until he returned to Sri Lanka in August 2001, it would have been reduced. Taking into account the needs of his mother and sisters, however, and bearing in mind that he had never set up an independent household, it appears to me that the correct way of looking at this is to say that he was part of a family unit that remained dependent on his uncle for essential needs, despite the appellant's earnings contributing to the family's overall financial circumstances.
21. My overall finding, therefore, is that the appellant has established dependency within the **Jia** test, that is to say to meet essential needs, for all periods from 1978 onwards, with the exception of two periods between 1990 and 1992, and between August 2001 and October 2002. Given the fact that it was agreed that the relevant periods only postdated the appellant's uncle becoming a Danish citizen in 1994 the first of these periods when he was not dependent predates that. The only period that postdates it is that between 2001 and 2002.

### Legal Submissions

22. The main submission by Ms Rahman, for the respondent, relied on the **Oboh** case, paragraphs 55 and 56. Her submission was that the continuity of the appellant's dependence was broken by the period when he was in Sri Lanka, before coming to the UK. For that reason he did not meet the requirements of Regulation 8(2).
23. Mr Martin, for the appellant, accepted that the appellant had not been continuously dependent since 1994, and also accepted that the appellant had not been dependent immediately prior to coming to the UK, but submitted that this did not prevent him from meeting the requirements of Regulation 8(2). He referred to paragraph 43 of the **Jia** case, which referred to dependency at the time of application. Paragraph 56 of the **Oboh** case suggested that this was conditional. The description in **Dauhoo** at paragraphs 9 and 12 of the prior test suggested that prior dependency could be at any time prior to arrival in the UK, and also suggested that there was no need for the dependency to be continuous.

### Discussion

24. On looking at the passages to which I was referred it did not appear to me that any of them settled the point at issue. In attempting to provide some clarity I followed a chain of research leading to the Court of Appeal judgment in **Aladeselu v SSHD [2013] EWCA Civ 144**. This was not an authority that had been considered at the hearing. I have considered recalling the parties but have decided this is not required. The point at issue was identified well in advance, and both sides had researched the

matter. The above case is neither particularly recent, nor obscure. On that basis it appears to me to be a general authority on which I can rely without unfairness to the parties.

25. The key passages that appear to me to be of relevance are at the end of paragraph 47, and the whole of paragraph 48. What was being considered in the Aladeselu case was the question of whether other family members could succeed under Regulation 8(2) even if they had arrived in the UK before their EEA sponsor. At the end of paragraph 47 Lord Justice Richards concluded that the formulation in the Rahman case, that the situation of dependence must exist in the country at the time of applying to join the Union citizen, was “a formulation appropriate to the particular circumstances of the case (where the applications were made by persons outside the host Member State) rather than laying down a principle of universal applicability.”
26. Paragraph 48 is then as follows:

“Thus, whilst *Rahman* establishes the need for a situation of dependence in the country from which the applicant comes, and a situation of dependence at the date of the application, it is not to be read as laying down a requirement that the dependency at the date of the application must be dependency in the country from which the applicant comes, such that a relative who has been dependent throughout cannot qualify if he arrives in the host Member State many months before the EU citizen and the making of the application.”
27. Applying this to the current situation it is the case here that the appellant applied as a dependent of his uncle in 2006, and again in 2013. At both of these times it appears to be accepted that he was dependent, and a member of this uncle’s household. In accordance with Aladeselu the requirement from the Rahman case should not be one of dependency in Sri Lanka at the time that the appellant left that country, that is to say the time at which he would have made an application as a dependent of his uncle, if that was what had happened, instead of him coming to apply for asylum.
28. What this does not settle precisely, however, is the question of whether there has to be dependency in the period immediately before an applicant leaves their own country. Neither does it settle the question of whether dependency can be broken. It is notable that, at paragraph 48 quoted above, the hypothetical factual scenario concerned a person who had been “dependent throughout”.
29. Turning to Regulation 8(2) itself, however, it does appear that the approach offers some guidance. What is required by Regulation 8(2)(c) is that the appellant continues to be dependent, and that he satisfied the condition in paragraph (a) at some time in the past. Paragraph 8(2)(a) does not specify a particular time, and is in the present tense. There is nothing to say that the dependency or membership of household has to be continuous, and nothing to say that it has to be in place immediately before the appellant leaves his own country.



30. I also note the observation in **Moneke and Others**, that the country from which the OFM has come can be either the country from which he or she has come to the UK or his country of origin. In this case the appellant was dependent on his uncle when he was a refugee in India, but was not dependent on him immediately before he left Sri Lanka, although he had been dependent on him in Sri Lanka at an earlier period.
31. Having considered the various points made, and the cases referred to, I have therefore decided that the facts of this case do not place the appellant outside the conditions set out in Regulation 8(2). This is because he was dependent on his uncle in Sri Lanka and India, and the dependence in India postdated the appellant's uncle becoming an EEA national. The wording of Regulation 8(2) does not appear to justify the introduction of an additional test of the dependency being for an unbroken continuous period, and neither does it appear to me to include any requirement that there must be continuous unbroken dependency leading up to the point at which the appellant left Sri Lanka.
32. The consequence of this is that the appellant is an extended family member within Regulation 8 of the 2006 Regulations. What remains, therefore, is the Secretary of State's discretion under Regulation 17(4) as to whether a residence card should be issued. Under Regulation 17(5) what is now required is "an extensive examination of the personal circumstances of the applicant".
33. As I have said I have not been provided with details of the appellant's asylum claim, and the appeal process. It is not clear whether any allegations have been made against him, such as that he made particular attempts to mislead during this process, or whether it is merely a matter of his account having been disbelieved, or a conclusion having been reached that he had told the truth but would not have been at risk for various reasons. It is not clear what other considerations might be relevant. The appellant's representatives may wish to submit representations about his personal circumstances, which could include any relevant medical evidence, or any other matters relevant to the nature of the appellant's links with his uncle, and any other relatives in the UK.
34. It was not suggested by either side that there was any need for anonymity in this appeal. The outcome of the appeal appears to me to have rested on matters not put forward at the application stage. I have therefore decided, despite the outcome, that it is not appropriate to make a fee award.

### **Notice of Decision**

35. The decision dismissing the appeal having been set aside, for the reasons given above, the decision in the appeal is remade as follows.
36. The appeal is allowed on the basis that the decision was not in accordance with the law. The application therefore remains outstanding, awaiting the exercise of

discretion as to whether to issue the appellant with a residence card as an extended family member of an EEA national.

Signed

Date **15 December 2014**

Deputy Upper Tribunal Judge Gibb

**TO THE RESPONDENT**  
**FEE AWARD**

Despite having remade the decision in the appeal by allowing it I have decided, for the reasons given above not to make any fee award.

Signed

Date **15 December 2014**

Deputy Upper Tribunal Judge Gibb