IAC-AH-SC-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/08274/2014

THE IMMIGRATION ACTS

Heard at Manchester	**Decision & Reasons Promulgated**
On 15th May 2015	**On 28th May 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

NAGINA ASLAM
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: No representation
For the Respondent: Miss C Johnstone, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellant appeals against a decision of Judge of the First-tier Tribunal Kelly promulgated on 18th July 2014.

2. The Appellant is a female citizen of Pakistan born 1st January 1986 who on 26th March 2013 applied for a residence card as the sister of an EEA national exercising treaty rights in the United Kingdom. The Appellant's

sister is Haseena Aslam, to whom I shall refer as the Sponsor. It was contended that the Sponsor was exercising treaty rights in the United Kingdom as a self-employed person, and therefore fell within the definition of a 'qualified person' in accordance with regulation 6 of the Immigration (European Economic Area) Regulations 2006 (the 2006 Regulations).

The Refusal

3. The application was refused by Notice of Immigration Decision dated 10th January 2014. The decision indicated that the application had been considered in accordance with regulation 8 of the 2006 Regulations but there were insufficient grounds for issuing a residence card, and the application had also been considered under Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention), but it was not accepted that refusal of the application breached the Appellant's Article 8 rights.

4. The Respondent issued a reasons for refusal letter which was also dated 10th January 2014 which may be summarised as follows.

5. It was accepted that DNA evidence proved that the Appellant and Sponsor are siblings. The application was considered with reference to regulation 8(2). The Respondent required evidence that the Appellant was dependent upon or resided with the Sponsor prior to entering the United Kingdom, and that since entering the United Kingdom the Appellant had continued to be dependent upon or residing with the Sponsor.

6. It was accepted that the Appellant had provided evidence of residing with the Sponsor, but it was not accepted that she had provided any evidence that she was dependent upon the Sponsor before entering the United Kingdom, or since entering the United Kingdom.

7. The Respondent's records showed that the Appellant was encountered working illegally on 12th July 2012 at Naila Hair and Beauty Salon, [ ] Slade Lane, [ ]. While at the premises two telephone calls were answered by UKBA officers, both callers asking for appointments with the Appellant, who was the only member of staff present but denied working at the premises, claiming that she was only working on a voluntary basis undertaking four hours a week work experience for a course at Manchester City College. The Appellant denied knowing the owner of the business and was not cooperative in giving details of the manager.

8. UKBA staff found post addressed to the Appellant at the Salon and also post addressed to the Sponsor, but the Appellant denied that the Sponsor was her sister. The Appellant stated that she was not aware that she was in the United Kingdom without authority, and that an EEA application had been submitted on her behalf. That application showed that Haseena Aslam was the Appellant's sister, and Slade Lane was given as her current address. The Appellant stated that the Sponsor was not in the United Kingdom and she did not know when she would return, and she stated that

the Sponsor had only arrived in the United Kingdom in October or November 2011.

9. The EEA application gave Slade Lane as the Appellant's address, but the Appellant claimed she had never lived at that property and was living at Egerton Road, [ ]. It was noted that the Appellant's father was present at the time of the enforcement visit, and was living in the accommodation upstairs.

10. The Appellant claimed that she was being supported by Social Services, who also provided her accommodation and money for food and course fees.

11. The Respondent decided that the Appellant had failed to provide sufficient evidence that she was dependent upon or residing with the Sponsor prior to entering the United Kingdom, and insufficient evidence had been provided to prove that since entering the United Kingdom, she had continued to be dependent upon or residing with her Sponsor, and the application for a residence card was refused with reference to regulations 8(2)(a) and (c) of the 2006 Regulations.

The Appeal to the First-tier Tribunal

12. In summary it was contended that the Respondent's decision was not in accordance with the Immigration Rules, and not in accordance with the law, that discretion under the Immigration Rules should have been exercised differently, and the decision breached the Appellant's Article 8 rights.

13. It was contended that the Appellant is an extended family member of the Sponsor having entered the United Kingdom as the spouse of a person present and settled here, but her marriage broke down and the Appellant became dependent upon her family, especially the Sponsor who were all living in Germany at the time.

14. It was submitted that the Appellant was dependent upon the Sponsor when she was residing in Pakistan before her marriage, and was entirely dependent upon the Sponsor in the United Kingdom.

15. It was further submitted that Article 8 was engaged, and that the decision to refuse the residence card was disproportionate, as the Appellant had family life in the United Kingdom.

The First-Tier Tribunal Decision

16. The appeal was initially heard by Judge Kelly (the judge) on 6th June 2014. The judge allowed the appeal on the basis that the Respondent had not considered whether the Appellant had been or was currently a member of the Sponsor's household, and therefore the decision was not in accordance with the law. However, after the hearing the judge discovered that he had been working from an incomplete copy of the reasons for refusal letter,

and that issue had in fact been considered by the Respondent. The judge therefore gave directions that there should be a further hearing, which took place on 4th July 2014.

17. After hearing evidence from the Appellant, the Sponsor, and their father, the judge dismissed the appeal on the basis that regulation 8(2) of the 2006 Regulations was not satisfied. The judge was satisfied that the Appellant was currently a member of the same household as the Sponsor, but was not satisfied that they had shared the same household in Pakistan immediately before the Appellant came to the United Kingdom. The judge noted that the Sponsor's evidence was that she had left Pakistan to live in Germany in 1998, and that the Appellant left Pakistan in 2006 to travel to the United Kingdom. The Sponsor claimed to have arrived in the United Kingdom in 2010.

18. The judge was not satisfied that the Appellant is currently financially dependent upon the Sponsor, noting that it was accepted that the Appellant had lied to Immigration Officers at the enforcement visit which the judge recorded as taking place on 12th July 2013, although the interview record which took place at the time, indicates that the visit was on 12th July 2012.

19. The judge also found that the appeal was bound to fail on the Appellant's own account of her immigration history because the Appellant did not join her EEA national Sponsor in the United Kingdom, as it was the Sponsor who arrived in the United Kingdom after the Appellant. There was no consideration of Article 8.

The Application for Permission to Appeal

20. The Appellant applied for permission to appeal to the Upper Tribunal. It was contended that when the parties attended the hearing on 4th July 2014, both parties were confused as to why there was a further hearing, as they were under the impression that the appeal had been allowed at the first hearing on 6th June 2014.

21. The Appellant noted that the Respondent's representative requested an adjournment as he did not have any papers which application was refused. The Appellant contended that the judge did not give the Appellant's representative the opportunity to ask comprehensive questions, but took over and asked questions of the Appellant. The representative contended that the judge did not allow him to examine or re-examine the Appellant.

22. It was contended that the judge had not considered Article 8, although this had been raised as a Ground of Appeal, and that the judge's assessment of regulation 8(2) was flawed as he had not adequately considered that the Appellant remained a member of the same household as the Sponsor and remained entirely dependent upon her.

Permission to Appeal

23. Permission to appeal was granted by Judge of the First-tier Tribunal Chohan who found the grounds arguable.

24. The Respondent submitted a response pursuant to rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008 indicating that the application for permission to appeal was not opposed, and the Upper Tribunal was invited to set aside the decision of the First-tier Tribunal, so that there could be a further oral hearing.

25. Directions were issued that there should be a hearing before the Upper Tribunal to ascertain whether the First-tier Tribunal had erred in law such that the decision should be set aside.

The Upper Tribunal Hearing

Preliminary Issues

26. There was no attendance by or on behalf of the Appellant. At a previous hearing there had been no attendance, and on that occasion the Appellant's representatives submitted a fax on the day of the hearing, indicating that their client was unable to attend the Tribunal, and requesting that a decision be made on the papers. That hearing was adjourned.

27. I was satisfied that proper notice of the hearing before me had been given, and I considered rule 38 of the 2008 Procedure Rules. I was satisfied that the Appellant and her representatives had been notified of the time, date and place of the hearing, and that there was no explanation for their non-attendance, and no application for an adjournment. I considered that it was in the interests of justice to proceed with the hearing.

28. However before doing so, I asked the Tribunal clerk to telephone the representatives. I received a message indicating that the representatives had stated that they had not been able to contact their client, and that they had submitted a letter to the Tribunal a few days previously. They were asked to re-send this letter immediately but it was not forthcoming, and therefore the hearing proceeded.

Error of Law

29. Miss Johnstone confirmed that she relied upon the rule 24 response which indicated that the application for permission to appeal was not opposed, but Miss Johnstone also submitted that even if the judge had erred, then the error was not material because of the finding in paragraph 19 that the appeal could not succeed in any event, because the Appellant had arrived in the United Kingdom before the EEA national Sponsor. However, having been referred to Aladeselu [2013] EWCA Civ 144, Miss Johnstone conceded that the judge was wrong in law to make such a finding, and accepted that the decision of the First-tier Tribunal should be set aside.

30. I found it appropriate to set aside the decision of the First-tier Tribunal, based on an error of law. It is unfortunate that at the first hearing on 6th June 2014, the judge was mistakenly working from an incomplete copy of the Respondent's reasons for refusal letter, and his error was not corrected by either representative. When the judge realised his mistake, he correctly decided that there needed to be a further hearing. Unfortunately the notice that was issued to the parties was not clear as to why there was to be a further hearing. The notice in fact indicated that the hearing on 6th June 2014 had been adjourned which was not the case.

31. This resulted in the parties attending a hearing on 4th July 2014, without knowing why there was to be a further hearing and they were therefore not prepared.

32. The judge does not refer, in his decision, to the principles set out in Dauhoo (EEA Regulations – Reg 8(2)) [2012] UKUT 79 (IAC) which for ease of reference I set out below;

> "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)."

33. The judge made findings that the Appellant and Sponsor had not previously been in the same household in Pakistan, that they were currently in the same household, but the Appellant was not currently financially dependent upon the Sponsor. He omitted to make findings as to whether the Appellant had been dependent financially upon the Sponsor, prior to coming to the United Kingdom and this was a material error, as prior dependency was referred to in the Grounds of Appeal.

34. In my view the judge was wrong in law in paragraph 19 in finding that notwithstanding any other findings, the appeal was bound to fail because the Appellant had arrived in the United Kingdom before her EEA national Sponsor, and this did not satisfy regulation 8(2)(c). The Court of Appeal found in Aladeselu that it was not necessary for the EEA Sponsor to have arrived in the United Kingdom before the dependent relative.

35. Therefore the decision of the First-tier Tribunal was set aside with no findings preserved.

Re-Making the Decision

36. I decided that it was appropriate to re-make the decision in the Upper Tribunal, and it was not necessary to remit this appeal back to the First-tier Tribunal.

37. I heard submissions from Miss Johnstone who relied upon the reasons for refusal letter dated 10th January 2014. I was asked to find that there was no evidence that the Sponsor and Appellant resided together in Pakistan before the Appellant came to the United Kingdom. Equally there was no satisfactory evidence that the Appellant had been financially dependent upon the EEA national Sponsor in Pakistan.

38. I was asked to find that there was no satisfactory evidence of the Appellant being dependent upon the Sponsor in the United Kingdom, and that the credibility of the Appellant was damaged by working illegally in July 2012, and not being truthful when interviewed.

39. In relation to Article 8, which had not been dealt with before the First-tier Tribunal, I was asked to find that the Tribunal had no jurisdiction to consider this, even though the Respondent's Notice of Immigration Decision indicated that Article 8 had in fact been considered. In the alternative, if Article 8 was to be considered I was asked to find that the Appellant could not satisfy the Immigration Rules, and that there were no compelling circumstances to consider Article 8 outside the rules.

40. If Article 8 was considered outside the rules, I was asked to take into account section 117B of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act), and to take into account that there was no evidence that the Appellant speaks English, nor that she was financially independent, and I was asked to find that her immigration status was precarious.

41. At the conclusion of oral submissions I reserved my decision.

My Conclusions and Reasons

42. In remaking the decision, I have taken into account the Respondent's bundle of documents with Annexes A – N, together with the Notice of Appeal, and the Appellant's bundle of documents comprising 163 pages. I have also taken into account a further witness statement made by the Appellant which is undated, but attached to a letter from her representatives dated 3rd June 2014, and an undated witness statement of the Appellant's father attached to the same letter. I have also been provided with the notes of an interview that took place with the Appellant when she was encountered working illegally on 12th July 2012.

43. In considering the 2006 Regulations the burden of proof is on the Appellant and the standard of proof is a balance of probability. I have taken into account all the evidence placed before me.

44. I set out below regulation 8(2) of the 2006 Regulations;

"8(2)A person satisfies the condition in this paragraph if the person is a relative of an EEA national, his spouse or his 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;

(b) the person satisfied the condition in paragraph (a) and is accompanying the EEA national to the United Kingdom or wishes to join him there; or

(c) the person satisfied the condition in paragraph (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."

45. I have considered regulation 8(2) taking into account the principles set out in Dauhoo.

46. I find as a fact that the Appellant is a citizen of Pakistan, and that the Sponsor is a German national, and that they are related as claimed. DNA evidence proves this. It is unclear when the Sponsor became a German citizen. A German identity card has been produced issued in October 2010, but it is not clear whether the Sponsor obtained German nationality before this, and her witness statement dated 18 February 2013 does not confirm when she obtained German nationality.

47. The first issue I consider is whether the Appellant has proved that she was a member of the Sponsor's household in Pakistan. I do not find that the burden of proof has been discharged.

48. The Appellant's witness statement dated 18th February 2013 is brief, and contends that the Appellant and Sponsor lived together in Pakistan. No further detail is given. The witness statement of the Sponsor of the same date is equally brief, and contends that she and the Appellant lived together in Pakistan without giving any further detail. The point is not addressed in the undated witness statements of the Appellant and her father.

49. The Appellant has admitted in her undated witness statement, that she was neither truthful nor cooperative when interviewed on 12th July 2012 about her illegal working. I find that she was not truthful on that occasion, and this adversely affects her credibility. I do not find that there is any reliable independent evidence to prove that the Appellant was a member of the Sponsor's household in Pakistan. I take into account that the Sponsor is the older sister. The Appellant was born in 1986, and the Sponsor born 3rd November 1993. The Sponsor's oral evidence to the First-tier Tribunal was that she and her parents left Pakistan in 1998 when she was 5 years of age. I do not find that there is any satisfactory or adequate evidence that the Sponsor returned to Pakistan before the Appellant left to travel to the United Kingdom in August 2006.

50. I therefore find no satisfactory evidence that the Appellant was a member of the Sponsor's household between 1998 and 2006. In any event it is not

clear that the Sponsor was in fact a German citizen prior to 2006. I do not accept that the Appellant was a member of the Sponsor's household between 1993 when the Sponsor was born, and 1998 when the Sponsor left Pakistan, and the Appellant remained in Pakistan. The household could not be said to be the Sponsor's household, taking into account her young age.

51. For the reasons given above, I conclude that the Appellant has not proved that she was residing as a member of the Sponsor's household, before coming to the United Kingdom in August 2006.

52. The next issue that I consider is that of prior dependency. I do not find any satisfactory evidence to prove that the Appellant was dependent upon the Sponsor before coming to the United Kingdom. The Sponsor is approximately seven years younger than the Appellant, and no satisfactory evidence has been produced to prove on a balance of probabilities, that the Appellant was dependent upon the Sponsor prior to coming to the United Kingdom. None of the witness statements addressed this issue, although it is asserted in paragraph 6 of the Grounds of Appeal to the First-tier Tribunal that the Appellant was dependent upon her EEA Sponsor when she was residing in Pakistan before her marriage, but there is no satisfactory evidence to support this assertion.

53. I therefore conclude that as it has not been proved that the Appellant was dependent upon the Sponsor prior to coming to the United Kingdom, the appeal must fail as regulation 8(2)(a) is not satisfied.

54. In relation to present dependency, I find the burden of proof has not been discharged. The Appellant when interviewed, stated that she was supported by Social Services. In my view the evidence proves on a balance of probabilities that the Appellant has been working illegally, and was encountered so doing in July 2012. I am not satisfied that the Appellant has proved that she is currently dependent upon the Sponsor. The Respondent accepted in the refusal letter that the Appellant had provided some evidence of residing with the Sponsor and I accept that to be the case, but this would appear to be somewhat academic, as the appeal cannot succeed because regulation 8(2)(a) is not satisfied. Therefore the appeal under the 2006 Regulations must be dismissed.

55. In relation to Article 8, the reference made by Miss Johnstone to jurisdiction refers to Lamichhaine [2012] EWCA Civ 260, which in brief summary indicates that if no One-Stop Notice pursuant to section 120 of the 2002 Act was served, an Appellant may not raise any Ground of Appeal for leave to remain, different to that which was the subject of the decision appealed against.

56. However in this case it would appear that Article 8 was relied upon by the Appellant when she made her application, as there is reference to Article 8 in the Respondent's Notice of Immigration Decision. JM [2006] EWCA Civ 1402 is authority for the proposition that once a human rights ground has

been properly raised, then the Tribunal must deal with it. Section 86(2)(a) of the Nationality, Immigration and Asylum Act 2002 confirms that any matter raised as a ground of appeal must be determined by the Tribunal. As Article 8 was referred to in the Respondent's Notice of Immigration Decision, it is in my view appropriate to make findings upon Article 8.

57. It is not contended by the Appellant that she satisfies the requirements of Appendix FM of the Immigration Rules in relation to family life, or paragraph 276ADE in relation to private life. The Appellant has placed no reliance upon the Immigration Rules that deal with family and private life.

58. I find that the Appellant cannot succeed under Appendix FM and neither can she succeed under paragraph 276ADE. The Appellant entered the United Kingdom on 15th August 2006 and therefore cannot satisfy the requirement in paragraph 276ADE that she has lived continuously in the United Kingdom for least twenty years. I do not find that she has proved that she can satisfy paragraph 276ADE(vi) because she has not provided evidence that there would be very significant obstacles to her integration into Pakistan if required to leave the United Kingdom.

59. There appears to have been no reference in the Appellant's application for a residence card to her having a child although there is reference to this at paragraph 16 of her undated witness statement. I therefore decided that it is appropriate to consider Article 8 outside the Immigration Rules, on the basis that the Immigration Rules are not a complete code.

60. I therefore considered the five stage approach advocated in Razgar [2004] UKHL 27 which indicates that the following questions should be considered;

    (i) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?

    (ii) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?

    (iii) If so, is such interference in accordance with the law?

    (iv) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?

    (v) If so, is such interference proportionate to the legitimate public end sought to be achieved?

61. The decision in Beoku-Betts [2008] UKHL 39 means that I have to consider the family lives of all members of the family, not only the Appellant.

62. In considering Article 8 outside the rules I take into account Agyarko and Others [2015] EWCA Civ 440 paragraph 28 which I set out below;

> "28. So far as concerns Mrs Agyarko's claim under Article 8 for leave to remain outside the Rules, since her family life was established with knowledge that she had no right to be in the United Kingdom and was therefore precarious in the relevant sense, it is only if her case is exceptional for some reason that she will be able to establish a violation of Article 8: see *Nagre*, paras. [39]-[41]; *SS (Congo)*, para. [29]; and *Jeunesse v Netherlands*, paras. [108], [114] and [122]."

63. The Appellant entered the United Kingdom on 15th August 2006 with entry clearance valid from 21st July 2006 to 21st July 2008 as the spouse of a person present and settled here. She applied for indefinite leave to remain in the United Kingdom as a victim of domestic violence on 17th July 2008 which application was rejected, and was followed by a further application on 29th July 2008. This was refused on 24th November 2008 and an appeal was entered, which was dismissed. The Appellant's appeal rights were exhausted on 27th February 2009. The Appellant has therefore been in this country without valid leave for a very considerable period of time.

64. I accept that the Appellant has established a private life in the United Kingdom. I do not accept that she has established a private life either with her adult sister or her father. Relationships between adult siblings or an adult sibling and their parent do not amount to family life that engages Article 8 unless something more exists than normal emotional ties. Each case must be decided on its own facts, but I do not find that the requisite degree of emotional dependence exists between the Appellant and her sister and the Appellant and her father.

65. I accept that the Appellant may have established family life with her child, but I have been provided with no evidence as to the child's nationality or age, and there is only a passing reference in the Appellant's witness statement to her having a child. The Appellant has not proved that there would be inference with her family life with her child, as if the Appellant was removed, there is a presumption that the child would be removed with her.

66. I find that the relevant issue to be considered in relation to the Razgar principles, is whether the interference with the Appellant's private life is proportionate. I have to consider the child's best interests as a primary consideration, although these interests can be outweighed by other considerations. The Appellant has not provided any relevant information in relation to her child. I can only find that the best interests of a young child would generally be served by remaining with her parents, or at least one parent. I have been provided with no information in relation to the child's father. On the scarce information available, I conclude that the best interests of the child would be served by remaining with the Appellant. No evidence has been submitted to prove that the child is a British citizen.

67. I must have regard to section 117B of the 2002 Act which confirms that the maintenance of effective immigration control is in the public interest.

It is also in the public interest that an individual seeking leave to remain can speak English and is financially independent. No formal evidence has been submitted in relation to the Appellant's ability to speak English, by way of English language certificates, although it appears that she was interviewed in English when found working illegally in July 2012. Having said that, an interpreter was requested for the Tribunal hearings, before the First-tier Tribunal and Upper Tribunal. I am therefore not satisfied that the Appellant has proved that she can speak English, nor am I satisfied that she is financially independent.

68. Section 117B(4) states that little weight should be given to a private life established by a person at a time when the person is in the United Kingdom unlawfully, and (5) states that little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

69. The Appellant has remained in the United Kingdom unlawfully, and has also had a precarious immigration status, and I find it appropriate that little weight should be given to the private life that she has established. In relation to section 117B(6) there is no evidence that the Appellant's child is a "qualifying child".

70. My conclusion is that the Appellant's Article 8 claim cannot succeed under Appendix FM or paragraph 276ADE, nor can it succeed under Article 8 outside the Immigration Rules. I find that the weight that should be given to the public interest in maintaining effective immigration control, outweighs the weight to be given to the wish of the Appellant to remain in the United Kingdom, although she cannot satisfy either the 2006 Regulations, or the Immigration Rules.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law and was set aside. I substitute a fresh decision.

The appeal is dismissed with reference to the Immigration (European Economic Area) Regulations 2006.

The appeal is dismissed under the Immigration Rules.

The appeal is dismissed on human rights grounds.

Anonymity

The First-tier Tribunal made no anonymity direction. There has been no request for anonymity and the Upper Tribunal makes no anonymity order.

Signed Date

Deputy Upper Tribunal Judge M A Hall 19th May 2015

TO THE RESPONDENT
FEE AWARD

The appeal is dismissed. There is no fee award.

Signed Date

Deputy Upper Tribunal Judge M A Hall 19th May 2015