



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/06872/2016

THE IMMIGRATION ACTS

Heard at Field House
On 10 September 2018

Decision & Reasons Promulgated
On 28 September 2018

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

IVAN MYRONIUK
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Collins, Counsel, instructed by Sentinel Solicitors

For the Respondent: Ms J Isherwood, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Ukraine. His date of birth is 28 January 1990. He Appellant made an application on 18 December 2015 for a permanent residence card under the EEA Regulations 2006. His application was refused by the Secretary of State on 26 May 2016. The Secretary of State was not satisfied that the Appellant was genuinely dependent on his Sponsor, his step-father, Mr Lanman during the qualifying period. It is not an issue that Mr Lanman is an EEA national exercising Treaty rights.

2. The Appellant appealed against the decision. His appeal was dismissed by Judge of the First-tier Tribunal G Andrews in a decision promulgated on 16 November 2017, following a hearing at Taylor House on 3 November 2017. Permission was granted to the Appellant by Upper Tribunal Judge Kebede on 13 July 2018. The salient part of Judge Kebede’s decision is as follows:

“2. The grounds raise arguable issues about the judge’s approach to dependency and membership of the same household for the purposes of the EEA Regulations and merit further consideration. Whilst there is less arguable merit in the first ground I do not exclude it and all grounds may be argued.”

3. The matter came before me on 10 September 2018 to determine whether the judge erred in law.

The Findings of the FtT

4. The judge heard oral evidence from the Appellant and his stepfather. In addition, they relied on their witness statements. She heard submissions from both representatives. The judge referred to the Sponsor as SL. The judge made salient findings at paragraphs 6, 18, 19, 20, 31, 32 and 33. They read as follows:

“6. At the outset, Mr Collins referred me to paragraphs [13] and [33] of Banger, and to headnote (3) of that case, which headnote says that the Upper Tribunal has referred the following question (as well as other questions) to the CJEU for a preliminary ruling under Article 267 TFEU:

‘(3) Where a decision to refuse a residence authorisation is not founded on an extensive examination of the personal circumstances of the Applicant and is not justified by adequate or sufficient reasons is such decision unlawful as being in breach of Article 3(2) of the Citizens Directive?’

Mr Collins submitted that, in refusing this appellant’s appeal, the respondent had not carried out an extensive examination of his personal circumstances. In the circumstances, Mr Collins invited me to stay the instant proceedings pending the CJEU’s ruling on the above question. Ms McKenzie told me she accepted that there had been no extensive examination of this appellant’s personal circumstances, but she said this was because the appellant had not provided the information necessary for such an examination. In the circumstances, Ms McKenzie submitted that the hearing should not be stayed, but should go ahead. I considered both representatives’ submissions. Both representatives confirmed that there was only one question in issue in this appeal: whether, at relevant times, the appellant was SL’s ‘dependent’ (as referred to in EEA Regulation 7(1)(b)(ii)). As stated in paragraph [19] of Reyes (EEA Regs: dependency) [2013] UKUT 314, the test of dependency is a purely factual test. I took the view that the First-tier Tribunal is a fact-finding tribunal. In the circumstances, whilst the respondent may

not have undertaken the necessary extensive examination, I could do so, as Tribunal Judge. Further, dealing with a case fairly and justly includes avoiding delay so far as compatible with the proper consideration of the issues, and I considered that it might be some time before the CJEU gave the requested preliminary ruling, pursuant to Banger. Taking everything into account, including in particular my responsibilities in terms of the overriding objective in rule 2, I considered it appropriate, and in the interests of justice, to proceed with the hearing. I accordingly refused to stay the proceedings. Mr Collins told me he objected to this, but I nevertheless confirmed my decision not to stay the proceedings. We then continued with the hearing.

...

18. I have carefully considered, in the round, all the evidence before me (both oral and written evidence) whether or not I specifically refer to it in this decision. I have also had the opportunity to see and hear the appellant and SL give evidence. In the light of my analysis of the evidence, I make the following findings.
19. The following findings are gleaned from the appellant's and SL's evidence, and they were not challenged by Ms McKenzie:
 - (i) SL was married to the appellant's mother. SL and the appellant's mother already lived in the UK prior to the appellant coming to the UK.
 - (ii) Before coming to the UK, the appellant lived with his biological father in Ukraine. SL and the appellant's mother would visit the appellant in Ukraine, and would also regularly send him money (for his studies, food, etc.).
 - (iii) The appellant came to the UK in March 2010 (aged 20) and has lived here since then. In December 2010 (when he was still aged 20), he was issued with a residence card, valid until 20 December 2015, as the family member of SL, an EEA national. That residence card was never revoked (WS4-6).
 - (iv) Apart from when he lived with his girlfriend (see paragraph 20 below), the appellant and SL lived together (at different addresses) from March 2010 to May 2016. The appellant's mother also lived with them until shortly before her death (she died of cancer in April 2012 – see AB137-144).
 - (v) The appellant told me that, whilst his mother was alive, SL paid for the appellant's food and accommodation. The appellant does not claim to have had any other financial support from SL since coming to the UK. Based on this evidence, I find that SL has not provided the appellant with any financial support since April 2012 (when the appellant's mother died).

- (vi) The appellant has worked most of the time since 2011 (see his oral evidence, and also question 12.4 of his application, which is in the respondent's bundle).
 - (vii) The appellant and SL have a very close relationship. They both see it as a father/son relationship. The appellant comes to SL for advice.
20. I also find as follows, in relation to the appellant living with his girlfriend in Highfield Road:
- (i) The appellant told me he lived there (and not with SL) for about 2 months during the 5-year period after he arrived in the UK. This differs slightly from SL's oral evidence, that SL and the appellant lived together during the period from March 2010 to 2015. But Mr Collins did not submit that the appellant did not in fact live with his girlfriend during this 5-year period. Because of this, I find that SL's answer was giving a broad view of the situation, and the appellant did in fact live with his girlfriend during the relevant the 5-year period.
 - (ii) Ms McKenzie did not challenge the appellant's evidence that, during the 5-year period after arriving in the UK, he lived with his girlfriend for only about 2 months. I accordingly find that this is not in dispute. The appellant did not give me the dates of those approximately 2 months. But the AB includes bank statements addressed to him at Highfield Road, dated 4 November 2014 (AB411), March 2015 (AB398) and September 2015 (AB375). I consider it very unlikely that the appellant asked his bank to change his address, to the Highfield Road address, prior to moving into that address. It is much more likely that he delayed telling the bank that he had moved back in with SL. In the circumstances, I find on the balance of probabilities that the appellant lived with his girlfriend (and not with SL) for a period of about 2 months during late 2014 (possibly stretching into January 2015).
 - (iii) As at the date of the Tribunal hearing, the appellant now lives with the same girlfriend, at the Highfield Road address.
- ...
31. However, during the approximately 2 months when the appellant lived with his girlfriend (in late 2014 and possibly January 2015 – paragraph 20(ii) above):
- (i) The appellant was 24 years old, and he had worked most of the time since 2011 (paragraph 19(vi) above).
 - (ii) The appellant was not living with SL.

- (iii) He had not been financially dependent on SL for over 2 years (paragraph 19(v) above).
- (iv) It was then more than 2 and a half years since the appellant's mother's death, and the appellant does not claim that he had to move back with SL (after the approximately 2-months) because of any particular emotional reliance on SL.

I have undertaken the required extensive examination, and have considered all the evidence in the round. I take no account of the fact SL is not the appellant's biological father – I approach this case on the basis that they are father and son. But, overall, I do not accept that the appellant was reliant on SL for essential living needs (as referred to in paragraph [22] of Reyes) during the approximately 2 months when he lived with his girlfriend (in late 2014 and possibly January 2015). I find that he was not SL's dependent, and thus not his family member, during that approximately 2-month period.

- 32. This means the appellant has not resided in the United Kingdom in accordance with the EEA Regulations for a continuous period of five years. He has therefore not acquired the right to reside in the United Kingdom permanently, and is not entitled to be issued with a document certifying permanent residence under regulation 18 of the EEA Regulations.
- 33. For completeness, I also mention the appellant's residence card which (as stated above) was valid until December 2015, and was never revoked. But, as stated in Ojo, this card does not in itself confer a right to reside (indeed, Mr Collins did not argue otherwise). This therefore does not impact my decision in this case."

- 5. The judge directed herself in relation to the EEA Regulations and specifically dependency at paragraphs 21 to 25 and on *SSHD and Ojo [2015] EWCA Civ 130*.

The Grounds of Appeal

- 6. The first ground of appeal relates to *Banger* (Unmarried Partner of British National) [2017] UKUT 00125. It is argued that the appeal should have been stayed pending the decision of the CJEU. It is argued that given that it was accepted by the Respondent's representative at the hearing before the First-tier Tribunal in a concession, later that day withdrawn, that there had not been an extensive examination of the Appellant's personal circumstances, it is submitted that it was an erroneous approach for the judge to purport to determine the appeal pending an answer from the CJEU to the question, at paragraph 3 of the headnote in *Banger*; namely, where a decision to refuse a residence authorisation is not founded on an extensive examination of the personal circumstances of the Appellant and is not justified by adequate or sufficient reasons, is such decision unlawful as being in breach of Article 3(2) of the Citizens Directive. The judge's approach appears to be that she can determine facts but equally the Upper Tribunal in *Banger* could have done so but instead saw fit to refer to the CJEU.

7. Ground 2 claims that the decision relating to dependency is irrational. It appears (as stated in the grounds) from the determination that the judge accepted that apart from a two -month period in late 2014, the Appellant was dependent on his mother and then his stepfather (after his mother’s death). Reading the determination as a whole indicates how close the Appellant was and is with his stepfather. By virtue of moving in with his girlfriend for a period of two months, which did not initially work out, this should not in itself bring an end to dependency.
8. Ground 3 claims that the judge erred in failing to make findings about whether the Appellant is an extended family member.
9. I heard oral submissions from both parties. Mr Collins submitted that the judge’s decision was irrational in respect of dependency. However, he accepted that there was a lack of clarity in relation to whether the judge found dependency outside of the two- month period in the light of his findings at paragraph 31(i) and (iii). This being the case, Mr Collins sought to amend the grounds to argue that the decision was lacking in clarity and inadequately reasoned. The Appellant was accommodated and given food throughout the five -year period and was emotionally dependent on his stepfather (giving rise to dependency under EU law) and remained so during the brief period when he moved out to reside with his girlfriend. If the judge found that the Appellant was not dependent on his father outside the two- month period when he was living with him, it is argued that there is an absence of reasons for this decision.
10. It was accepted by Mr Collins that the Appellant did not advance a case on the basis that he was an extended family member under Regulation 8 of the EEA Regulations. The case was advanced on the basis that he was a family member. In any event, Mr Collins argued that the Appellant could meet the requirements of Regulation 8, with reference to the case of *Dauhoo (EEA Regulations – reg 8 (2) [2012] UKUT 79*.
11. Ms Isherwood submitted that there was no error of law. *Banger* did not apply. It related to extended family members and Article 3(2) of the Citizen’s Directive 2004/38/EC. There are a number of lawful and sustainable findings made by the judge; including that there was no financial support from 2012 and that the Appellant had worked since 2011. The focus of the present application was that there was substantial emotional support. However, Ms Isherwood referred me to paragraphs 20(i) and 31(iv)of the decision. She submitted that these unchallenged findings were open to the judge.

The 2006 EEA Regulations

12. The relevant parts of the 2006 EEA Regulations are as follows:
 7. – (1) Subject to paragraph (2), for the purposes of these Regulations the following persons shall be treated as the family members of another person –
 - ...
 - (b) direct descendants of his, his spouse or his civil partner who are –

- (i) under 21; or
- (ii) dependants of his, his spouse or his civil partner;
- (c) dependent direct relatives in his ascending line or that of his spouse or his civil partner;

...

Permanent right of residence

15. – (1) The following persons shall acquire the right to reside in the United Kingdom permanently –

...

- (b) a family member of an EEA national who is not himself an EEA national but who has resided in the United Kingdom with the EEA national in accordance with these Regulations for a continuous period of five years;

...

Conclusions

13. It is not been raised as an issue throughout the proceedings, but to confirm, the Appellant has remained in the UK and in those circumstances can meet part of the requirement in Regulation 15 (1) (b); “has resided in the United Kingdom with the EEA national throughout the entire period” (see *PM EEA - spouse -residing with*) *Turkey*[2011] UKUT 89. The issue was whether he has done so in accordance with the Regulations.
14. It was the Respondent’s case that the Appellant was not dependant on the Sponsor during the qualifying period and not only during the two months when they were not living together. I accept that the findings of the judge about whether the Appellant was a dependant outside of the two- month period could have been better expressed. Whilst I accept that the final sentence of paragraph 31 of the decision would suggest that the judge accepted dependency outside of the period, this does not accord with the clear findings at paragraph 31 (i), (iii) and (iv) which unarguably relate to the period as a whole rather than just the two- month period when the Appellant lived with his girlfriend. These findings followed the findings at paragraph 19 that when his mother was alive the Sponsor would pay for the Appellant’s food and accommodation and that there had not been any other financial support since then and that the Appellant had worked since 2011. The judge did not take the view that living with the Sponsor was sufficient to establish dependency, in the circumstances and on the evidence this was entirely rational. This would be the correct approach to dependency in accordance with the European Court of Justice in Case C-1/105 *Jia v Migrationsverket Jia and Reyes (EEA Regs: dependency) 2013 UKUT314*. There was simply no evidence that would establish that the Appellant was reliant on the Sponsor for his essential living needs throughout any of the period when they were living together or when they were living separately.

15. In my view, a sensible reading of the decision as a whole, leads to the inevitable conclusion that the judge did not accept that there had been dependency, in the sense envisaged in *Jia*, since the death of the Appellant's mother and therefore outside of the two-month period. It is difficult to see how she could have reached a different conclusion on the evidence and taking into account the lawful and sustainable findings that are not challenged. The judge gave adequate reasons for this conclusion. The judge found a close relationship between the Appellant and the Sponsor. However, even applying a broad construction of dependency there was no evidence of emotional or financial dependency which would establish a genuine dependency in the *Jia* sense since the Appellant's mother's death.
16. If the interpretation of the judge's decision favoured by Mr Collins is correct (which I do not accept), it is not material because it is agreed that the judge found that there was no dependency during the two-month period. This is an entirely rational conclusion. There had been a change; namely, that the Appellant was no longer living with the Sponsor. The judge on the evidence was entitled to conclude that there was no dependency during the two-month period. Permanent residence depends on continuous residence in a qualifying status and therefore the appeal cannot succeed; see *SSHD v Ojo* [2015] EWCA Civ 1301.
17. The argument based on *Banger* is misconceived. The grounds predate the decision of the CJEU *Banger C-89/17*. However, there is no error arising from the decision of the FtT to determine the appeal. This application does not concern Article 3 (2) of Citizen's Directive. The Appellant had redress in the form of a statutory appeal whereby matters of both fact and law have been considered by a judge.
18. The Appellant did not advance a case on the basis that he is an extended family member. In any event, there was insufficient evidence before the Tribunal to enable the judge to make findings as to whether the Appellant was able to satisfy the requirements set out in *Dauhoo (EEA Regulations - reg 8(2))* [2012] UKUT 79. It is a matter for the Appellant should he wish to make an application on this basis.
19. There is no error of law properly identified in the grounds capable of having an impact on the outcome in this case. The decision of the judge to dismiss the appeal is maintained.

No anonymity direction is made.

Signed *Joanna McWilliam*

Date 21 September 2018

Upper Tribunal Judge McWilliam