



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: EA/03391/2015
& EA/06111/2016

THE IMMIGRATION ACTS

Heard at Field House
On 5 March 2019

Decision & Reasons Promulgated
On 2 August 2019

Before

MR JUSTICE LANE, PRESIDENT
UPPER TRIBUNAL JUDGE RINTOUL

Between

BRYCE JAMES EDWARD MAREE (1)
OSARAO JAMES OSAGHAE (2)
(NO ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For Mr Maree: Mr Farhat, Gulbenkian Harris Andonian
For Mr Osaghe: Mr Layne instructed by Londinium solicitors
For the Respondent: Ms J Smyth, instructed by the Government Legal Department
(Osaghae)
Mr P Duffy, Senior Home Office Presenting Officer (Maree)

DECISION AND REASONS

1. Must an individual have been a member of the household of, or dependent on, an EEA national relative for a continuous period of five years in order to be eligible for

permanent residence? The respondent's case is that he must; the appellants in these appeals, for different reasons, argue that that he need not. It is because of that common issue that these appeals were heard together.

2. Both appeals arise under the Immigration (European Economic Area) Regulations 2006, but in different situations.

Mr Maree

3. Mr Maree is a citizen of South Africa. He arrived in the United Kingdom in on 8 July 2009, at the age of 17, on the basis of a family permit granted under the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations") to join his sister and brother-in-law (a German citizen). Shortly after arrival he applied for and was granted a residence card as the extended family member of an EEA national (his brother in law) valid for 5 years. Mr Maree lived with his sister and brother-in-law until 2011 when he moved out to live with fellow church members. He studied and then obtained part-time and finally permanent employment in late 2012. Although employed, he was still financially dependent on his brother-in-law, but this and the other support diminished over time as he matured.
4. The judge concluded that, under the 2006 Regulations, Mr Maree needed to show dependence on his brother-in-law for a period of 5 years from 8 July 2009; and, having directed himself at paragraph [25] as to the meaning of dependency, concluded at paragraph [27] that the appellant had not been dependent for the required continuous five-year period.
5. The judge also considered at paragraphs [28] - [29] Mr Maree's alternative argument that, following Rahman [2012] EUECJ C-83/11, that continuous dependency as set out in the 2006 Regulations was not required by Directive 2004/38 but rejected it at paragraph [31] and went on to dismiss the appeal.
6. In the grounds of appeal, Mr Maree does not challenge the findings of fact, nor does he dispute that the 2006 Regulations require 5 years' continuous dependency or membership of the household of the relevant EEA national. Instead, it is averred in the grounds that, properly understood, the CJEU in Rahman concluded at paragraphs[43]-[45] that the legislature (i.e. the EU) had not addressed the question of whether a residence card can be refused to those who have ceased to be dependents and that a member state cannot make decisions in a manner not provided for by the Directive which, in this case, includes a requirement for 5 years continuous dependency or membership of a household.

Mr Osaghae

7. Mr Osaghae is a citizen of Nigeria. On 8 November 2010 he was granted a residence card as the extended family member of his uncle, Dr M O Ehigiamusoe, an Austrian citizen. That card was valid for 5 years. On 23 September 2015 he applied for a card confirming his right of permanent residence. That application was refused on 16 May 2016 following a visit by immigration officers to the uncle's house. As a result of

information obtained during that visit, the respondent concluded that Mr Osaghae was no longer dependent on or residing with his uncle.

8. On appeal, the First-tier Tribunal concluded at paragraph [13] after hearing evidence from both of them that Mr Osaghae was not dependant on his uncle and was not a member of his household at paragraphs [14] - [15], rejecting the submission that all that the relevant regulations required were that Mr Osaghae had been continuously resident.
9. Mr Osaghae sought and was granted permission to appeal against the decision on the grounds that the judge had arguably erred in law with respect to the conclusion that Mr Osaghae was not living with his uncle, there being no proper finding on that ground; and had erred with respect to regulation 15 of the 2006 Regulations, as that did not require him to show financial dependency for five years.

Issues arising

10. There are three issues which arise out of these appeals:
 - (i) Did the First-tier Tribunal fail to make a proper finding of fact in respect of whether Mr Osaghae was living with his uncle?
 - (ii) On a proper construction, do the 2006 Regulations require an extended family member seeking permanent residence to show five years' continuous dependency on and/or membership of the household of an EEA national?
 - (iii) Is the requirement to show five years' continuous dependency and/or membership of the household of an EEA national compatible with Directive 2004/38 ("the Directive")?
11. It is only issue (iii) which is common to both appeals.

The Law

12. The 2006 Regulations provided, so far as relevant, as follows:

7. - Family member

- (1) Subject to paragraph (2), for the purposes of these Regulations the following persons shall be treated as the family members of another person –
 - (a) his spouse or his civil partner;
 - (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;
 - (d) a person who is to be treated as the family member of that other person under paragraph (3).

(2) A person shall not be treated under paragraph (1)(b) or (c) as the family member of a student residing in the United Kingdom after the period of three months beginning on the date on which the student is admitted to the United Kingdom unless –

- (a) in the case of paragraph (b), the person is the dependent child of the student or of his spouse or civil partner; or
- (b) the student also falls within one of the other categories of qualified persons mentioned in regulation 6(1).

(3) Subject to paragraph (4), a person who is an extended family member and has been issued with an EEA family permit, a registration certificate or a residence card shall be treated as the family member of the relevant EEA national for as long as he continues to satisfy the conditions in regulation 8(2), (3), (4) or (5) in relation to that EEA national and the permit, certificate or card has not ceased to be valid or been revoked

8. - “Extended family member”

(1) In these Regulations “*extended family member*” means a person who is not a family member of an EEA national under regulation 7(1)(a), (b) or (c) and who satisfies the conditions in paragraph (2), (3), (4) or (5).

(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.

14. - Extended right of residence

(1) A qualified person is entitled to reside in the United Kingdom for so long as he remains a qualified person.

(2) A family member of a qualified person residing in the United Kingdom under paragraph (1) or of an EEA national with a permanent right of residence under regulation 15 is entitled to reside in the United Kingdom for so long as he remains the family member of the qualified person or EEA national.

15. - Permanent right of residence

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

- (a) an EEA national who has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years;

- (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;
- (c) a worker or self-employed person who has ceased activity;
- (d) the family member of a worker or self-employed person who has ceased activity;

13. Directive 2004/38 (“the Directive”) provides, so far as is relevant:

Recital (6): In order to maintain the unity of the family in a broader sense and without prejudice to the prohibition of discrimination on grounds of nationality, the situation of those persons who are not included in the definition of family members under this Directive, and who therefore do not enjoy an automatic right of entry and residence in the host Member State, should be examined by the host Member State on the basis of its own national legislation, in order to decide whether entry and residence could be granted to such persons, taking into consideration their relationship with the Union citizen or any other circumstances, such as their financial or physical dependence on the Union citizen.

Article 2 - Definitions

For the purposes of this Directive:

- 1) “Union citizen” means any person having the nationality of a Member State;
- 2) “Family member” means:
 - (a) the spouse;
 - (b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;
 - (c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);
 - (d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);

Article 3 - Beneficiaries

- 1. This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.
- 2. Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in

accordance with its national legislation, facilitate entry and residence for the following persons:

- (a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;
- (b) the partner with whom the Union citizen has a durable relationship, duly attested.

The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people.

Submissions

14. We heard submissions from all the representatives. We also took into account written submissions from the appellants made in response to our directions issued on 21 May 2019.
15. Mr Layne submitted that the First-tier Tribunal judge had erred in his approach to regulation 15(2); and had erred in his assessment of the evidence as to whether Mr Osaghae was living with his uncle. He submitted also that the judge erred in his approach to regulation 8(1) as, on the facts, the appellant had been either a dependent or in the uncle's household at the relevant times.
16. Ms Smyth submitted that the FtT had properly analysed the evidence, and had properly concluded that Mr Osaghae was not living with his uncle, and had found at paragraphs [11] and [13] that there had been no dependency; and, at paragraphs [14] to [15], that the appellant was not residing with his uncle.
17. Ms Smyth submitted that the appellants had no rights under EU law beyond the right for their applications to be facilitated, and any associated procedural rights; anything beyond that was purely a matter of domestic law, and on that basis, Reyes [2014] EUECJ C-423/12, which held that Article 2(2)(c) of the Directive must be interpreted as meaning that the fact that a relative – due to personal circumstances such as age, education and health – is deemed to be well placed to obtain employment and in addition intends to start work in the Member State does not affect the interpretation of the requirement in that provision that he be a 'dependant' could be distinguished as that relates to the rights of dependents under the Directive.
18. Turning to Rahman v SSHD, Ms Smyth submitted that it was clear from the Advocate-General's opinion that he considered that sixth question made in the request for a preliminary opinion (see [33] below) was hypothetical.
19. Ms Smyth submitted that domestic law quite properly required continual dependence, as provided for in the Regulations, relying on Aladeselu and Others

(2006 Regs - reg 8) Nigeria [2011] UKUT 00253(IAC) at paragraph [45] and *Fatima v SSHD* [2019] EWCA Civ 124

20. Mr Farhat submitted that the respondent's analysis of Rahman was too narrow and that, properly understood it is ambiguous. Further, he submitted that in the light of the ECJ's approach to question 5, it could be said that the Regulations were too blunt an instrument. Mr Farhat submitted also that the application of the Regulations in this case had a disproportionate effect, and that an extensive examination of the personal circumstances would result in a different outcome. He submitted that proportionality was a core part of EU law and is applicable.
21. Mr Duffy relied on Ms Smyth's submissions, adding that the position taken by the Regulations in requiring a five-year dependency in order to obtain permanent residence was proportionate
22. In response, Mr Farhat submitted that adopting a blanket response was not proportionate.

Discussion

23. We deal with the issues in order.

Issue (i)

24. The judge stated in Mr Osaghae's appeal at [15] that :

"I have very real doubts as to whether or not the appellant has in fact been living at that address [the uncle's] - and that is confirmed (in my view) by the enquiries made by the Immigration Officers."

25. This passage must be considered in light of the decision as a whole. It is evident from the decision at [3] and [4] that the judge did consider the evidence adduced by the respondent to show that Mr Osaghae was not living with his uncle, and that a copy of the record of the enforcement visit had been provided. It is also evident [14] that the judge weighed the evidence of the immigration officers with the documentary evidence. In this context, and in the context of the applicant not adducing evidence from the aunt to whom the immigration officers had spoken, and who had told them that he was not living there, it is evident that the judge found that Mr Osaghae had not been living at his uncle's house. While his finding could have clearer, the statement that he had very real doubts is, in the context of the burden being on Mr Osaghae, the finding is sufficiently clear and sustainable. Mr Osaghae had failed to show on balance that the factual position was as he claimed.

Issue (ii)

26. The contention that 2006 Regulations do not require continuous dependency and/or membership of a household is based on a misreading of reg 15. (1) (b) which stipulates that residence must be "in accordance with these Regulations for a continuous period of five years". In this case, Mr Osaghae's right of residence was conferred by reg14 which provides that it lasts only so long as he remained a family member of a qualified person.

27. As Ms Smyth submitted, “family member” as defined in reg 7 (3) includes an extended family member only for so long as he continues to meet the requirements of reg. 8. In this case, while it is evident that Mr Osaghae was the extended family member of an EEA national when his residence card was issued, as he met the requirements of reg. 8 (2). As the First-tier Tribunal found, Mr Osaghae had not been part of the household and was not dependent – see paragraphs [13] and [14]. He had therefore ceased to meet the requirements of reg. 8 (2) and so ceased to be a family member. Consequently, as he ceased to be a family member, his right of residence under reg 14 ceased, and he was no longer residing in accordance with the regulations.
28. We do not accept that there is any material difference between reg. 8 of the 2016 Regulations and reg. 8 of the 2006 Regulations. The former does, however, set out in a more comprehensible format the different means by which an applicant can show he meets the dependency and/or membership of a household criteria identified in Dauhoo (EEA Regulations – reg 8(2)) [2012] UKUT 79 (IAC). The argument put to the First-tier Tribunal in Mr Osaghae’s appeal was, as is set out in paragraph [10] of the decision, that under the Immigration (European Economic Area) Regulations 2016, all that was required was continuous residence, not dependency or membership of a household is simply not made out. In any event, reg. 8 (2)(b) (ii) requires a continuity of dependency and/or membership of a household.

Issue (iii)

29. We accept that the 2006 Regulations must be interpreted in the light of EU law; the right of appeal in these appeals is expressed in terms of whether the decision breaches the appellants’ rights under the EU Treaties. The question then arises whether, as is contended, the requirement of domestic law - in this case a continuity of dependency and/or membership of a household - is contrary to EU law.
30. We note that, as was stated in SM (Algeria) [2018] UKSC 9 at [21]:
- “The purpose of the Directive is to simplify and strengthen the right of free movement and residence for all Union citizens, freedom of movement being one of the fundamental freedoms of the internal market. Having to live apart from family members or members of the family in the wider sense may be a powerful deterrent to the exercise of that freedom.”
31. The Directive draws a distinction between family members as defined in article 2 and beneficiaries identified in article 3. This distinction between rights accruing to workers and their spouses/children on the one hand, and other members of the family whose entry is to be facilitated, is a distinction which dates back as far as Regulation 15/1961, the first European legislation on the issue.
32. It is not in doubt that the appellants in these appeals were beneficiaries within Article 3.2 (b), nor is it in doubt that beneficiaries are to be in a better position than other non-EEA nationals. Equally, the requirement is not just to facilitate their entry but also their residence. That much is clear from Khan v SSHD [2017] EWCA Civ 1755 at [34].

33. In Rahman the CJEU considered Article 3.2 in some detail. We note that the sixth question put to the court was:

“Must the dependency on which the other family member relies in order to be admitted to the Member State continue for a period or indefinitely in the host State for a residence card to be issued or renewed pursuant to Article 10 of Directive 2004/38 ... and if so how should such dependency be demonstrated?”

34. In his opinion, the Advocate-General said this:

“26. It is clear from the order for reference (8) that, by that question, the national court is in fact seeking to ascertain whether adults admitted to reside in the United Kingdom as family members who are then free to work have to remain dependent throughout the period of validity of their residence permit in order to be able to obtain an extension of stay and entitlement to permanent residence. In my view, that question is hypothetical and has no bearing on the main proceedings, since there is nothing whatsoever in the information contained in the order for reference to suggest that the respondents in the main proceedings would be in a position to apply for an extension or a renewal of their residence permits when they are no longer dependent on Mr and Mrs Rahman. It is not possible to answer the question in general and abstract terms without taking into account the reasons why they would no longer be dependent. The answer could be different depending, for example, on whether the family member has found employment in the host Member State or whether he is now being cared for by another person living in his State of origin.

27. As it is not the task of the Court to resolve, in a manner which goes beyond the scope of the specific case which the national court is required to decide, all the difficulties of interpretation which might have been raised by the provisions transposing Article 3(2) of Directive 2004/38 in the United Kingdom, the sixth question must be considered inadmissible.”

35. We note also what the Advocate-General said at paragraphs [105] – [107]:

“105. By contrast, in so far as I take the view that [article 3 (2)(a)] does not imply the automatic grant of a right of residence, I cannot identify any fundamental obstacle to a Member State laying down particular conditions for obtaining the right of entry and residence in order to ensure the reality, effectiveness and duration of the dependency.

106. Such conditions must, however, respect the principle of effectiveness, which presupposes that they must not be framed in such a way as to render practically impossible the exercise of the rights conferred by the EU legal order. Accordingly, the conditions laid down by the Member States cannot deprive, de facto, persons coming within the scope of that provision of all possibility of obtaining a right of entry and residence. For example, a national provision would be unacceptable if it provided that, in order to be able to benefit from a right of residence, a national of a non-member country had to prove that he had been dependent on the Union citizen for more than 20 years.

107. Furthermore, conditions as to the nature or duration of dependency may constitute restrictions on the admission of other family members, which the Member States are, however, required to facilitate. Consequently, in order to be permissible, they must pursue a legitimate objective, be appropriate for securing

the attainment of that objective and must not go beyond what is necessary to attain it.”

36. In its judgment, the court did not address this point, but it is echoed in Banger [2018] EUECJ C-89/17 at paragraph [40]:

“40. In the light both of the absence of more specific rules in Directive 2004/38 and of the use of the words ‘in accordance with its national legislation’ in Article 3(2) of that directive, each Member State has a wide discretion as regards the selection of the factors to be taken into account. Nonetheless, Member States must ensure that their legislation contains criteria which are consistent with the normal meaning of the term ‘facilitate’ and which do not deprive that provision of its effectiveness (see, to that effect, judgment of 5 September 2012, *Rahman and Others*, C-83/11, [EU:C:2012:519](#), paragraph 24).. “

37. There is thus authority for the proposition that any conditions imposed on the grant of entry or residence to an EFM/beneficiary must comply with the usual EU law caveat that they must be effective, that is, they do not prevent the right from being exercised.
38. The Secretary of State’s case is that once entry has been facilitated, then the issue becomes one of domestic law. That we accept, but subject to the caveat that the rights which then accrue to the EFM must have substance. We bear in mind that the purpose of the facilitation of EFMs is to strengthen the right of free movement.
39. It is evident from the approach of the CJEU in O. and B. in the passages cited above that its primary concern is whether the EU national would be discouraged from leaving his state of nationality to exercise his right of residence under the Treaty owing to an uncertainty over whether he can continue a family life which has been created or strengthened during a genuine residence. In principle, we accept that similar discouragements could apply in a situation where, as here, Mr Maree’s brother-in-law may have been discouraged from moving to the United Kingdom were he not able to bring Mr Maree with him.
40. It is, however, difficult to argue that there would be a discouragement to an exercise of free movement rights if it were known that Mr Maree would not be able to stay if he were no longer dependent, that is, an adult reliant on his own resources. If the position were otherwise, it is difficult to see how or why the EU legislature would have framed the Directive as it did.
41. Further, it must be recalled that while the Directive makes extensive provision for the rights of family members, that does not extend to EFMs/beneficiaries. That is, we consider, a deliberate choice of the legislator. We recall also that that the Directive does not in its terms allow beneficiaries to acquire permanent residence by operation of law – they are omitted from Articles 16 to 21, unlike the provisions at Article 8, which allow for beneficiaries to be issued with residence cards. The Regulations are more generous than the Directive in that they do permit EFMs to acquire permanent residence.

42. Given the clear legislative decision to maintain a difference between beneficiaries and family members, we do not accept that effectiveness requires a beneficiary to be permitted to acquire permanent residence; nor are we satisfied that a requirement of continuing dependency/membership of a household is an obstacle to freedom of movement.
43. Turning next to proportionality, we are not satisfied that the continuing requirement for dependency is disproportionate in the EU law sense. The requirement is, all things considered, simply that the status quo persists. We accept that this is different from the position of family members, in particular children who reach the age of 21 and become self-supporting as in Reyes; but that decision relates specifically to descendants who are provided for in the Directive at article 2 (2). The point made by the CJEU in Reyes at paragraph [32] is that if a person granted entry would no longer be a dependant as he or she would be able to get employment, and so would not be able to work if he or she wanted to retain status would be contrary to article 23 of the Directive which does not apply to beneficiaries. It can be distinguished on that basis and it relates to an interpretation of article 2 (2), not article 3 (2).
44. Returning to Rahman, we consider that, contrary to Mr Farhat's submission, paragraph [47] cannot be read as meaning that enduring dependence is not a requirement that can be lawfully imposed. We see no reason to read the passage cited from paragraph [47] as meaning anything more than that the issue falls outside the scope of the Directive. That is a logical statement in the context of the limited manner in which it addresses the position of EFMs. Had the CJEU intended to say that the requirement could not be imposed, they would have said so; but it is in any event not clear how that could be deduced from the Directive.
45. To conclude, therefore, we find that the requirement to show five years continuous dependency and/or membership of the household of an EEA national is compatible with the Directive and the EU treaties.
46. We therefore find that the decisions of the First-tier Tribunal did not involve the making of an error of law, and we uphold them.

Summary of Conclusions

1. The decisions of the First-tier Tribunal did not involve the making of an error of law and we uphold them.

Signed

Date: 26 July 2019



Upper Tribunal Judge Rintoul