



**Upper Tribunal
(Immigration and Asylum Chamber)** Appeal Number: EA/06462/2019 (V)

THE IMMIGRATION ACTS

**Heard at Field House via Skype for
Business
On 15 September 2020**

**Decision & Reasons
Promulgated
On 28 September 2020**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

MRS PRECIOUS AKPOMA

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr F Saeed, Legal Representative, Legal Eagles Solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

BACKGROUND

1. The Appellant appeals against the decision of the First-tier Tribunal Judge T Lawrence promulgated on 24 March 2020 ("the Decision"). By the Decision, the Judge dismissed the Appellant's appeal against the Respondent's decision dated 6 November 2019 to remove her from the United Kingdom pursuant to section 10 Immigration and Asylum Act 1999. Although that is a decision made under the Immigration Acts, it is made on

the basis that the Appellant no longer meets the provisions of the Immigration (European Economic Area) Regulations 2016 (“the EEA Regulations”) and therefore the appeal involves considerations of EU law as I will come to.

2. The Appellant has previously exercised a right of appeal against a decision refusing her and her mother a permanent residence card as the extended family members of a Mr Ogiesoba (“the Sponsor”) who is a national of Germany and the cousin of the Appellant’s mother. The Appellant’s appeal was dismissed by First-tier Tribunal Judge CH Bennett in a decision promulgated on 24 November 2017 (“the First Appeal Decision”). The First Appeal Decision held that the Appellant and her mother were not entitled to permanent residence as they had not remained dependent on or the members of the household of the Sponsor during a five-year period. Although the First Appeal Decision was appealed, it was not appealed on the basis that Judge Bennett had erred in his interpretation of EU law.
3. I do not need to set out the background facts of the case extensively. The Appellant and her mother were issued residence cards under the 2006 version of the EEA Regulations as extended family members of the Sponsor valid from 29 September 2010 to 29 September 2015. They applied for permanent residence on 28 September 2015 but that was refused, and the Appellant’s appeal dismissed by the First Appeal Decision. Judge Bennett found that he was “not satisfied that there has been any continuous 5 year period since 29 September 2010 when either Mrs D or Miss A have been dependent on Mr O or been members of his household” ([32] of the First Appeal Decision). Although I was informed by Mr Saeed that the Appellant has since lost her job and may have become dependent once again on the Sponsor following the making of the Respondent’s decision in this appeal, there is no evidence to that effect before me, no application under Rule 15(2A) to adduce any further evidence and Mr Saeed confirmed that, as at the date of the hearing before Judge Lawrence, the Appellant was still in work, as I understand it working out her notice period. I will come back to the relevance of that in due course.
4. The position of the Appellant in this appeal and indeed at the time of the appeal before Judge Bennett is that she does not have to show that she has been continuously dependent on or a member of the household of the Sponsor in order to be entitled to remain under EU law. Reliance is placed by the Appellant on the CJEU’s judgment in Reyes v Migrationsverket (C-423/12) (“Reyes”). Although Judge Bennett rejected that argument, Judge Lawrence appears to have accepted it. He therefore went on to consider whether the Appellant could “show that she had been dependent on the EU citizen, independent due to taking up employment or self-employment, or a member of the EU citizen’s household, continuously since the Respondent recognised that she satisfied the requirements in regulation 8(2)(c) of the 2006 Regulations on 29 September 2010, until such time as she acquired the right to permanent residence” ([28] of the Decision).

5. The Appellant's grounds assert that the Decision "was correct in relation to how the law applied but [the Judge] failed to recognise or note material findings and information and thus materially misdirected himself as to the conclusions he draws on the appeal". In short summary, the grounds assert that the Judge failed to deal with evidence about the Appellant's earnings and misunderstood some of the findings made by Judge Bennett in the First Appeal Decision which were at odds with the findings made by Judge Lawrence. It is said that, having accepted that the Appellant did not have to show continuous dependency on the Sponsor, Judge Lawrence erred in his finding as to the Appellant's self-sufficiency based on her own employment.
6. Permission to appeal was granted by First-tier Tribunal Judge Boyes on 10 June 2020 in the following terms so far as relevant:
 - "... 2. The grounds assert that the Judge erred in the assessment of the previous determination and the factual matrix.
 3. I have considered the grounds as provided. I have read them three times and can still not fathom what the actual argument is that is being advanced. It may be somewhere between the Tribunal and UT in 2017/18 got it wrong and Judge Lawrence similarly did not understand the factual matrix sufficiently.
 4. I grant permission solely on the basis that there seems to be a need to examine a number of other documents and judgments which I do not have access to and which may be relevant to the outcome.
 5. Permission is granted not on the basis that there is some clear and identifiable merit in the application but that having read the grounds and judgment, I cannot say there is or is not merit in the application.
 6. Permission is thus granted."
7. The matter comes before me to determine whether the Decision contains an error of law and, if I so conclude, to either re-make the decision or remit the appeal to the First-tier Tribunal to do so.
8. The parties were given notice that the hearing would be conducted via Skype for Business. Although I was unable to see Mr Saeed on the video-link due to problems with his connection, he confirmed that he was able to see me and although the sound did cut out intermittently, he was able to indicate to me when this occurred and I ensured that anything he missed during those (short) interruptions was repeated so that he could follow the hearing. Both parties confirmed at the end of the hearing that they were able to follow the hearing. I had before me a bundle of documents prepared by the Appellant for the hearing before me and the Appellant's bundle for hearing before Judge Lawrence and other sundry documents. The Appellant's bundle for the hearing before me contained the Reyes decision and reference was made to a number of other cases and EU law/statutory provisions which, although not contained in the papers before me, were of relevance and with which Mr Saeed was clearly

familiar. Mr Saeed also produced a skeleton argument for the purposes of the hearing before me. I also had the Respondent's Rule 24 reply.

DISCUSSION AND CONCLUSIONS

9. Judge Lawrence set out the issue which he considered that he had to decide at [28] of the Decision as follows:

“The difficulty for the Appellant in the instant appeal is however that, even if her argument as to the correct meaning of dependency in point 2(a) of Article 3 of Directive 2004/38 is correct, it would still in my consideration be necessary at least for her to show that she had been dependent on the EU citizen, independent due to taking up employment or self-employment, or a member of the EU citizen's household, continuously since the Respondent recognised that she satisfied the requirements in regulation 8(2)(c) of the 2006 Regulations on 29 September 2010 until such time as she acquired the right to permanent residence...”

10. The error asserted in the grounds relates to the Judge's finding as to self-sufficiency. Mr Saeed confirmed that the Appellant accepts that she was neither dependent on the Sponsor nor a member of his household at the time of the hearing before Judge Lawrence (although he said that the position may have changed since then as the Appellant has lost her job as a result of the Respondent's decision under appeal). However, as at the time of the hearing before Judge Lawrence, even if the finding as to self-sufficiency is open to challenge (as I accept it might be), the materiality of any error in that regard depends whether the Judge has asked himself the right question. If that question was not legally relevant, then it matters not if the Judge has made an error in deciding it. For that reason, the main part of the hearing was devoted to discussion of the law with which I will need to deal first. If I decide that issue against the Appellant, I do not need to go on to consider the challenge to the Judge's consideration of the self-sufficiency issue for reasons which I will come to.

11. Judge Lawrence set out the paragraphs of the Reyes judgment on which the Appellant relies at [24] of the Decision and it is appropriate to start with that citation as follows:

“29. By its second question, the referring court asks, in essence, whether, in interpreting the term ‘dependant’ in Article 2(2)(c) of Directive 2004/38, any significance attaches to the fact that a family member – 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, which would mean that the conditions for him to be regarded as a relative who is a dependant under the provision are no longer met.

30. In that regard, it must be noted that the situation of dependence must exist, in the country from which the family member comes, at the time when he applies to join the Union citizen on whom he

is dependent (see to that effect, *Jia*, paragraph 37, and Case C-83/11 *Rahman* [2012] ECR I-0000, paragraph 33).

31. It follows that, as, in essence, has been stated by all the parties which have submitted observations to the Court, any prospects of obtaining work in the host Member State which would enable, if necessary, a direct descendant, who is 21 years old or older, of a Union citizen no longer to be dependent on that citizen once he has the right of residence are not such as to affect the interpretation of the condition of being a 'dependant' referred to in Article 2(2)(c) of Directive 2004/38.
 32. Furthermore, as the European Commission has rightly pointed out, the opposite solution would, in practice, prohibit that descendant from looking for employment in the host Member State and would accordingly infringe Article 23 of that directive, which expressly authorises such a descendant, if he has the right of residence, to take up employment or self-employment (see, by analogy, *Lebon*, paragraph 20).
 33. In consequence the answer to the second question is that Article 2(2)(c) of Directive 2004/38 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'".
12. Judge Lawrence went on to cite Article 23 of Directive 2004/38 which concerns the right to take up employment for family members with the right of residence and permanent residence in a member state. He then continued with his analysis of the law as follows:
- “27. Regulation 7(3) of the 2006 Regulations also provided that an extended family member who has been issued with a residence card must be treated as a family member of the EEA national family member provided that they continue to satisfy the condition on which they were recognised as such, but I would accept that the provision may need to be 'read down' in order to give effect to the meaning of dependency in point 2(a) of Article 3 of Directive 2004/38 for which the Appellant contends.”
13. As I have already pointed out and as Judge Lawrence noted at [16] of the Decision, Judge Bennett did not accept the Appellant's arguments about the lack of a need for continued dependency. I accept of course that Judge Lawrence was not bound by Judge Bennett's conclusions as to the law. The issue though is whether he was right to conclude that, in order to give effect to EU law, one must read down the very clear provision in the EEA Regulations (the 2016 ones which apply in this case as much as the 2006 version) which provides that an extended family member who has been given a residence card is to be treated as a family member only for so long as he/she continues to fulfil the requirements of qualification as an extended family member.

14. As I pointed out to Mr Saeed, and I took him to accept, Reyes itself was concerned directly with a person who is a family member under Article 2 of Directive 2004/38 (“the Directive”). A family member includes directly related relatives who continue to be dependent on the EEA national sponsor (direct descendants over 21 years and direct relatives in the ascending line of the EEA national or the EEA national’s spouse or partner). It is not disputed, as I understand it, that the Appellant in this case does not fall within that category.
15. The issue therefore is whether EU law confers the same rights on an extended family member who has been a dependent but, by reason of the obtaining of employment, ceases to be so, to fall within the definition of “family member”.
16. Mr Saeed referred in passing to the Tribunal’s decision in Reyes (EEA Regs: dependency) [2013] UKUT 00314(IAC) which appears in the updated bundle before me but, so far as I can see, was not before Judge Lawrence. In spite of the same surname of appellant, that is not the same case as was before the CJEU. The appellant in the Tribunal case was the father-in-law of an EEA national. However, although, the appellant in that case was initially given a residence card as the extended family member of an EEA national, as paragraph [4] of that decision makes clear, the First-tier Tribunal had concluded that the appellant was a “family member in the ascending line of the spouse of an EEA national” and therefore that “the appellant should have been considered under regulation 7(1)(c) which covers ‘dependent direct relatives in his ascending line or that of his spouse or his civil partner’”. Accordingly, as with the CJEU case, the appellant was accepted to be within the definition in Article 2 of the Directive and the consideration of dependency arose in that context. Otherwise, the case is reported for what it has to say about evidence of dependency which does not arise in this case as the Appellant accepts that, as at the date of hearing before Judge Lawrence at least, she was not dependent on the Sponsor.
17. Turning then to the position of extended family members, I drew Mr Saeed’s attention to the case of Secretary of State for the Home Department v Rahman and others (C-83/11) (“Rahman”), a decision of the Grand Chamber of the CJEU. Although that case is referred to in Reyes at [30] in the paragraph which I have set out at [11] above (taken from the Decision), the judgment itself is not in the bundle before Judge Lawrence and was not in the bundle before me. However, Mr Saeed was content to deal with it. Before I record his submissions in this regard, I deal with the relevant parts of the judgment.
18. The case concerned the half-sibling and nephew of a Bangladeshi national who had married an Irish national. They applied for EEA family permits to obtain the right to reside as dependents of their relative and his EEA national wife. They were granted family permits by the Entry Clearance Officer (following a successful appeal) but were later refused residence permits whilst within the UK on the basis that they had not shown that

they were dependent on or members of the household of the EEA national family member. It was the refusal to grant the residence permits which led to the appeal which itself generated the reference to the CJEU. As such, although I accept Mr Saeed's submission that in that case, unlike the present case, the appellants had not been granted residence permits recognising them as extended family members of an EEA national whilst within the UK, they had been granted family permits (also by the UK) in order to come to the UK. The question is whether that is a material distinction.

19. I begin with the distinction drawn in that judgment between family members and extended family members as explained by the Court as follows:

"19. As contended by the governments which have submitted observations to the Court and by the European Commission, it follows both from the wording of Article 3(2) of Directive 2004/38 and from the general system of the directive that the European legislature has drawn a distinction between a Union citizen's family member as defined in Article 2(2) of Directive 2004/38, who enjoy, as provided for in the directive a right of entry into and residence in that citizen's host Member State, and the other family members envisaged in Article 3(2) of the directive, whose entry and residence has only to be facilitated by that Member State.

20. That interpretation is born out by recital 6 in the preamble to Directive 2004/38, which states that, 'in order to maintain the unity of the family in a broader sense ...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.'

21. Whilst it is therefore apparent that Article 3(2) of Directive 2004/38 does not oblige the Member States to accord a right of entry and residence to persons who are family members, in the broad sense, dependent on a Union citizen, the fact remains, as is clear from the use of the words 'shall facilitate' in Article 3(2), that that provision imposes an obligation on the Member States to confer a certain advantage, compared with applications for entry and residence of other nationals of third States, on applications submitted by persons who have a relationship of particular dependence with a Union citizen.

22. In order to meet that obligation, the Member States must, in accordance with the second subparagraph of Article 3(2) of Directive 2004/38, make it possible for persons envisaged in the first subparagraph of Article 3(2) to obtain a decision on their application that is founded on an extensive examination of their

personal circumstances and, in the event of refusal, is justified by reasons.

23. As is clear from recital 6 in the preamble to Directive 2004/38, it is incumbent upon the competent authority, when undertaking that examination of the applicant's personal circumstances, to take account of the various factors that may be relevant in the particular case, such as the extent of economic or physical dependence and the degree of relationship between the family member and the Union citizen whom he wishes to accompany or join.
 24. 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 the directive, each Member State has a wide discretion as regards the selection of the factors to be taken into account. None the less, the host Member State must ensure that its legislation contains criteria which are consistent with the normal meaning of the term 'facilitate' and of the words relating to dependence used in Article 3(2) and which do not deprive that provision of its effectiveness.
 25. Finally, even though, as the governments which have submitted observations have correctly observed, the wording used in Article 3(2) of Directive 2004/38 is not sufficiently precise to enable an applicant for entry or residence to rely directly on that provision in order to invoke criteria which should in his view be applied when assessing his application, the fact remains that such an applicant is entitled to a judicial review of whether the national legislation and its application have remained within the limits of that discretion...."
20. Whilst, as Mr Saeed submitted, and I accept, that passage is largely concerned with the questions of an application for a residence permit and not the position once one is granted, it does not follow as he suggested that what is there said has no relevance to that latter situation. As that passage makes clear, a person who seeks entry and residence as an extended family member rather than a family member does not derive a right of residence directly from EU law generally or the Directive in particular. The only right is to have entry and residence facilitated in appropriate circumstances, in accordance with national legislation, to have the application considered on the basis of an advantage compared with other third state nationals who are not related to EEA nationals and in a way which does not deprive Article 3 of the Directive of effectiveness.
21. Although, as I accept, Rahman was not concerned directly with the position of an extended family member once a right to reside is conferred within the UK and does not deal with permanent residence as such, the case does still have some relevance to that issue. Questions [5] and [6] posed by the Tribunal in the reference were as follows:
- "17. ...
- (5) Can a Member State impose particular requirements as to the nature or duration of dependency referred to in Article

3(2) of [Directive 2004/38] by such other family member so as to prevent such dependency being contrived or unnecessary to enable a non-national to be admitted to or continue to reside in its territory?

- (6) 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?"

22. The Court answered the fifth question as follows:

"40. Accordingly, the answer to the fifth question referred is that, on a proper construction of Article 3(2) of Directive 2004/38, the Member States may, in the exercise of their discretion, impose particular requirements relating to the nature and duration of dependence, provided that those requirements are consistent with the normal meaning of the words relating to the dependence referred to in Article 3(2) (a) of the directive and do not deprive that provision of its effectiveness."

23. The sixth question is perhaps the more pertinent to the issue in this appeal. As such, I set out the fuller answer to that question which is as follows:

- "41. By its sixth question, the national tribunal asks, in essence, whether issue of the residence card referred to in Article 10 of Directive 2004/38 may be conditional on the requirement that the situation of dependence for the purposes of Article 3(2)(a) of that directive has endured in the host Member State.
42. With regard to the issue of the residence card referred to by Directive 2004/38, the European Union legislature essentially confined itself to listing, in Article 10 of that directive, the documents to be presented in order to obtain such a card, which is then to be furnished within six months from the date on which the application was submitted.
43. So far as concerns the applicants envisaged in Article 3(2)(a) of Directive 2004/38, Article 10 of the directive states that those applicants must present inter alia ' a document issued by the relevant authority in the country of origin or country from which they are arriving certifying that they are dependents .. of the Union citizen'.
44. The legislature did not settle, either in that provision or in other provisions of Directive 2004/38, the question whether family members of a Union citizen who do not fall under the definition in Article 2(2) of the directive and who apply for issue of a residence card by presenting a document, issued in the country from which they have arrived, certifying their dependence on that Union citizen can be refused a residence card on the ground that, after their entry into the host Member State, they have ceased to be dependants of that citizen.

45. The answer to the sixth question therefore is that the question whether issue of the residence card referred to in Article 10 of Directive 2004/38 may be conditional on the requirement that the situation of dependence for the purposes of Article 3(2)(a) of that directive has endured in the host Member State does not fall within the scope of the directive.”
24. For completeness, I also refer to the recent Tribunal decision in Chowdhury (Extended family members: dependency) [2020] UKUT 00188 (IAC) (“Chowdhury”). This decision was not and could not have been before Judge Lawrence. It was not included by the Appellant in the updated bundle before me. Again, Mr Saeed was, however, familiar with it and sought to distinguish it on the basis that it concerned a refusal to issue an initial residence permit and not the issue whether a person issued one and who remains in the UK, albeit not dependent on or a member of the household of an EEA national, is entitled to permanent residence. I accept that distinction but, again, on the reasoning, the question is whether the distinction is a material one.
25. The headnote in Chowdhury reads as follows:
- “The words ‘and continues to be dependent’ in regulation 8(2)(c) of the Immigration (European Economic Area) Regulation 2006, properly characterised, require an applicant to establish that there has not been a break in their dependency on the EEA national sponsor.”

As appears from that headnote, although I accept that the Tribunal in Chowdhury was concerned with the situation of a person refused a residence permit, what the Tribunal was required to consider was whether a break in the continuity of dependency disentitled an applicant from the obtaining of a right to reside in the UK under EU law. As such, it is a not dissimilar situation to that which arises in the present appeal.

26. In that regard, what the Tribunal said in its discussion is of relevance as follows:
- “16. Article 3(2) of the Citizens Directive makes provision for applications by a broad category of family members (‘other family members’) who are dependants or members of the EU citizen’s household. The rights given to this category of ‘other family members’ differ from the more extensive rights for family members within Article 2(2) of the Citizens Directive. A host Member State is only under an obligation to ‘facilitate entry and residence’”

Having referred to Rahman and set out [21] to [24], [32] to [35] and [37] to [40] of that judgment, the Tribunal continued as follows:

- “20. As Mr De Mello acknowledges, the decision of the Grand Chamber of the CJEU does not directly provide the answer to the question that we are considering. What is clear is that Article 3(2) of the Citizens Directive does not oblige Member States to accord a right of entry and residence to persons who are family members, in the broad sense, dependent on a Union citizen. The provision

imposes an obligation on the Member States to confer a certain advantage, compared with applications for entry and residence of other nationals of third States, on applications submitted by persons who have a relationship of particular dependence with a Union citizen.

21. It is uncontroversial that the refusal of a host Member State to authorise 'other family members' of an EU citizen to join them in the host Member State is likely to discourage an EU citizen from continuing to reside there and encourage him to leave in order to be able to lead family life in another Member State or in a third country. The purpose and justification of the ancillary rights granted to other family members of union citizens is therefore to support the exercise by those union citizens of their own rights, if needs be, by overriding domestic immigration law. That is why, to qualify, the relatives must be dependent upon the EEA national, or be a member of his household.
22. It is useful to start with the wording of regulation 8(2)(c) itself. The regulation requires that '*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*'. The first requirement is that the applicant '*satisfied the condition in paragraph (a)*'. The applicant must have satisfied the requirement that 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. The focus is upon the past and prior dependency or membership of the household ... The second requirement is that the appellant '*has joined the EEA national in the United Kingdom*'. In Metock and Others v Minister for Justice, Equality and Law Reform C-127/08, the CJEU confirmed, albeit in the context of 'family members', nothing in the Citizens Directive made its application conditional upon the applicant family member of a Union citizen having previously resided in a Member State. The CJEU held the Citizens Directive is to be interpreted as applying to all nationals of non-Member States who were family members of a Union citizen, irrespective of where they had resided prior to their arrival. It does not matter whether it is the EU citizen or the relative of the EU citizen who arrives first in the United Kingdom.
23. It is the interpretation of the third strand of regulation 8(2)(c); '*and continues to be dependent upon him or to be a member of his household*', that is at the heart of the appeal before us. The word 'continues' as an ordinary word of the English language is to carry on, keep up, maintain, go on with, or persist in an action. We acknowledge that 'to carry on' could also include to 'resume from a point of suspension or interruption'.
24. In our judgement, the context is important. In considering the interpretation of the words '*and continues to be dependent ...*', in this context we must give effect to the purposes of the Directive which the 2006 Regulations transpose. The material recitals to the Citizens Directive are recitals 1, 5 and 6. The first objective is to promote the free movement of Union Citizens. Recital 5 records that the right, if it is to be exercised under objective

conditions of freedom and dignity, be also granted to their family members, irrespective of nationality.

25. The obligations on host member states in respect of 'other family members' are explained in recital (6) to the Citizens Directive as follows:

'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.'

26. The obligations in respect of 'other family members' under Article 3(2) are clearly more restricted than the obligations and rights conferred on family members under Article 2. Whereas the Directive requires that the primary and individual right enjoyed by EU citizens to move and reside freely within the territory of Member States shall also be granted to family members as defined within Article 2(2), by contrast, in the case of other family members who fall within the scope of Article 3(2), the Directive imposes an obligation on Member States to 'facilitate' their 'entry and residence'. In Rahman, the CJEU made clear, at [32], that the objective of that provision is to 'maintain the unity of the family in the broader sense' by facilitating entry and residence for persons who are not included in the definition of family member contained in Article 2(2) of Directive 2004/38 but who nevertheless maintain close and stable family ties with a Union citizen on account of specific factual circumstances, such as economic dependence (our emphasis), being a member of the household or serious health grounds. In our judgment, the recognition in Rahman that what Article 3(2) is seeking to promote is an ability to maintain close and stable family ties with a Union citizen on account of specific factual circumstances, such as economic dependence, is of some significance. It suggests that at least one facet of stable family ties, is economic dependence.
27. Member States have a wide discretion as regards the selection of factors to be taken into account when examining applications for entry and residence submitted by 'other family members', and in the exercise of that discretion Member States may lay down particular requirements as to the nature and duration of dependence, in order to satisfy themselves that the situation of dependence is genuine and stable.
28. Regulation 8(2)(c) of the 2006 Regulations requires that an applicant continues to be dependent upon the EEA national or to be a member of his household. Thus, the applicant may satisfy the requirement if he either continues to be dependent upon the EEA national or continues to be a member of the EEA national's

household. If, as the appellant contends, all that is necessary is for the appellant to establish past dependency so that the condition in paragraph 8(2)(a) is satisfied, and present dependency or membership of the EEA national's household, the Regulations would have used the words '*and is dependent..*' rather than the words '*and continues to be dependent*' in regulation 8(2)(c).

29. The language of Article 3(2) of the Citizens Directive and in particular the requirement to 'facilitate' entry and residence for any other family members who 'are dependents or members of the household of the Union citizen having the primary right of residence, establish a category of person who are given privileged treatment in order to promote the objectives of free movement and residence by EU citizens. The refusal to grant 'other family members' a right of residence where there has been historic, but lapsed or broken dependency or membership of a household, does not in our judgment, undermine the objective of removing obstacles to the Union citizens freedom movement and residence rights. The refusal to grant a right of residence in such circumstances does not discourage or act as a deterrent to the Union citizen from continuing to reside in the host Member State. It is important to highlight that the policy of the 2004 Directive, as Mr De Mello accepts, is not one of family reunion.
30. In our judgment, the requirement for there to be continued unbroken dependency is consistent with the rationale that the Directive seeks to preserve stable family ties with a Union citizen, where there has been stable continued economic dependence. It follows that in our judgment, in this context, the words '*and continues to be dependent*' in regulation 8(2)(c) of the 2006 Regulations, properly characterised, require an applicant to establish that there has not been a break in their dependency on the EEA national sponsor."

27. The principles which flow from Rahman and Chowdhury read together are as follows:

- (1) A family member within the definition of Article 2 of the Directive (including those who qualify as such by reason of their dependency on the EEA national) have a right of entry and residence under EU law flowing from the Directive. In other words, they have their own right to enter and reside. That is made clear by Article 3(1) of the Directive. The Directive applies to those family members directly.
- (2) By contrast, those other family members who, by reason of Article 3 of the Directive, simply have a right to have their entry and residence "facilitated" on an advantageous and effective basis and do not enjoy their own right of entry and residence flowing from the Directive itself. Their right to enter and reside in the UK flows from that of the EEA national on whom they are dependent or with whom they share a household. The Directive does not confer any right of entry or residence on such persons directly.

- (3) The question whether dependency is required to be continuous in order to qualify or continue to qualify for entry and/or residence does not therefore fall within the Directive and is not governed by the Directive. It is a matter for national legislation subject to the requirement of effectiveness of that legislation in order to comply with the purpose of the Directive.
 - (4) The purpose of the Directive in the context of other family members who fall within Article 3(2) of the Directive is to ensure that, where a factual situation of dependency or membership of household exists, the EEA national concerned is not dissuaded from exercising his or her right of free movement as might otherwise be the case in order to promote family unity.
 - (5) Although a lapse in dependency does not prevent dependency arising again in the future, it is necessary for an applicant under the EEA Regulations to show that he continues to have such dependency or be a member of the EEA national's household at the relevant time. In a case such as this, that is at the date of the hearing of the appeal.
28. As I have already noted, the Appellant does not dispute the finding that she was not dependent on or a member of the household of the Sponsor at the time of the hearing before Judge Lawrence. As such, she could not have met the requirements of Regulation 8 of the EEA Regulations. Although the reference to the EEA Regulations in Chowdhury is to the 2006 version, the 2016 version is not materially different. I do not need to refer to Article 8 of the EEA Regulations as it is not disputed that the Appellant did not meet those criteria at the date of the hearing before Judge Lawrence. Applying the rationale of Chowdhury, itself dependent on what is said in Rahman, the Appellant would fail under those provisions of the EEA Regulations.
29. Mr Saeed's argument is however more nuanced. As he points out, before Judge Bennett, the Appellant sought to establish a right of permanent residence under EU law. That was on the basis that, having been given a right of entry and residence as the extended family member of the Sponsor, she fell to be treated as a family member under the EEA Regulations and/or the Directive and therefore her own continued residence and exercise of Treaty rights gave rise to the right of permanent residence.
30. Judge Bennett rejected that argument. Judge Lawrence appears to have accepted it. He was wrong to do so. As I have already pointed out, the Directive does not apply directly to relatives other than those who fall within the definition of "family members" within Article 2 of the Directive. Cases falling within Article 3(2) of the Directive are not said to be categorised as family members once their entry and residence is "facilitated" by the member state. As was said in Rahman, the "question whether the issue of the residence card [or it follows the renewal of the same] referred to in Article 10 of Directive 2004/38 may be conditional on the requirement that the situation of dependence for the purposes of

Article 3(2)(a) of that directive has endured in the host Member State does not fall within the scope of the directive”.

31. For that reason, the question whether the Appellant is entitled to permanent residence as the extended family member whose entry and residence has been facilitated by the UK is one for domestic law. It is not governed by EU law. Indeed, as I pointed out to Mr Saeed, Article 16 of the Directive does not confer any entitlement to permanent residence on persons who have resided in the UK for five years other than where they fall within the definition of “family members” under Article 2 of the Directive (or obviously when they are EEA nationals themselves).
32. Judge Lawrence refers at [28] of the Decision to Regulation 8 of the EEA Regulations (albeit to the 2006 version). As I have already noted, the Appellant accepts that, if one were looking at the grant of a residence permit under the EEA Regulations, she was unable to meet those provisions at the time of the hearing before Judge Lawrence. She relies however on the recognition of extended family members under the EEA Regulations as family members once a residence permit has been granted. Regulation 7 provides as follows (so far as relevant):
- “7(3)A person (“B”) who is an extended family member and has been issued with an EEA family permit, a registration certificate or a residence card must be treated as a family member of A, provided—
- (a) B continues to satisfy the conditions in regulation 8(1A), 8(2), (3), (4) or (5); and
- (b) the EEA family permit, registration certificate or residence card remains in force.
- [my emphasis]
33. That an extended family member in the position of the Appellant is not entitled to permanent residence in domestic law unless he or she continues to satisfy the criteria under Regulation 8 is reinforced by the requirement under Regulation 15(1)(b) of the EEA Regulations that a family member must have continued to reside “in accordance with these Regulations” for a continuous period of five years. Regulation 14(2) makes clear that, in order to continue to reside under EU law, a family member of an EEA national must remain as such. Once the Appellant ceased to meet the criteria under Regulation 8 of the EEA Regulations, she was no longer to be treated as a family member under Regulation 14 or to be residing “in accordance with” the EEA Regulations and was not therefore entitled to permanent residence under Regulation 15 (the period of her dependency/membership of household having been found by the First Appeal Decision to be less than the continuous period of five years which was required).
34. For the reasons I have already given, Judge Lawrence was wrong to conclude that the provisions of the EEA Regulations had to be read down in order to give effect to EU law and in particular the Directive. It follows that Regulation 7 of the EEA Regulations needs to be read as drafted. It

requires that the extended family member who is granted a residence card must continue to satisfy the conditions in regulation 8 in order to fall within the definition of a family member within the EEA Regulations. It also follows that the right to permanent residence conferred on family members under Regulation 15(1)(b) of the EEA Regulations (which is itself more generous than the Directive) does not apply to the Appellant as she is no longer able to satisfy Regulation 8, and therefore does not fall within the definition of a family member within Regulation 7.

35. The Appellant asks that, if the Tribunal finds that her submission as to EU law and the interpretation of the Directive is wrong, a reference be made to the CJEU to clarify the position. That is unnecessary. The position in EU law is clear arising from what is said in Rahman. The Directive does not apply to the situation in this appeal. The question whether continued dependency is required is a matter for national legislation. The issue is therefore “acte claire” and no reference is needed to interpret the Directive.
36. I should also address a submission made by Mr Saeed that to find as I have done in relation to the Appellant’s rights would deprive the Directive of any effectiveness. Notwithstanding that Rahman states that the issue of continued dependency is a matter for domestic law rather than the Directive, there is of course a principle that of effectiveness which has to be considered. In support of his proposition that EU law does not regard the prospects of obtaining employment as precluding dependency, Mr Saeed relied on what is said in Reyes which, for reasons I have already explained is not on point as it concerns a family member within Article 2 of the Directive. As to the continued effectiveness of the Directive in relation to extended family members if I am right in my interpretation, there are three broad answers to Mr Saeed’s submission.
37. The first is that simply because an extended family member becomes entitled to work when granted a residence permit does not mean that he or she will necessarily do so and, in any event, if that person becomes no longer dependent on the EEA national by reason of their employment, they may still satisfy Regulation 8 of the EEA Regulations if they remain a member of the EEA national’s household or if their income is such that dependency continues.
38. The second is, per Rahman, that the Directive itself is not what confers the right of entry and residence. The Appellant’s entitlement is only to have her entry and residence facilitated in the factual circumstances provided for under Article 3(2) of the Directive. The question of what continued dependency is required is a matter for the Member State’s own legislation, in this case the 2016 Regulations.
39. Third, the reason why the Directive does not govern the Appellant’s continued residence is because the purpose of the Directive in relation to extended family members is different to that for family members. The purpose of the Directive in relation to extended (or other) family members

is “to support the exercise by [the EEA national] of [his] own rights”. The Appellant is no longer dependent on the Sponsor. She does not live with him. That factual scenario indicates that the Sponsor would not be dissuaded from exercising his own Treaty rights if the Appellant were to be removed from the UK.

40. In summary of the above, therefore, Judge Lawrence erred when finding that the issue he had to determine included whether the Appellant was “independent due to taking up employment or self-employment”. The only issue was whether the Appellant is (or was at that time) dependent on the Sponsor or a member of his household.
41. Although I have accepted that the Decision contains errors of law, section 12(2) of the Tribunal, Courts and Enforcement Act 2007 provides that, if an error of law is found, the Tribunal “may (but need not) set aside” the Decision. The issue which then arises therefore is whether the errors of law make any difference to the outcome.
42. I return therefore to where I began with the Appellant’s grounds of appeal. The Appellant’s challenge to the Decision is as to the findings on self-sufficiency. As this was not an issue which the Judge was required to consider at all, any error in that regard is not material. It could make no difference to the outcome. I have already recorded more than once that the Appellant accepts that she was not, at the date of the hearing, dependent on or a member of the household of the Sponsor. It follows that, although the Judge made findings at [29] of the Decision which appear to run contrary to what was said in the First Appeal Decision (and which are also challenged on that basis), it is conceded that the Appellant did not meet Regulation 8 of the EEA Regulations. It is perhaps rather confusingly stated in the Appellant’s skeleton argument for the hearing before me that the Appellant “demonstrated that she was a dependant by virtue of her being ‘independent due to taking up employment’” ([7]), which submission I do not understand, the skeleton argument accepts in what precedes that submission that “the initial FTT had been satisfied that the income evidence shown was such as to mean that the Appellant and her sister [sic] had sufficient income to meet their basic needs” ([6(2)(b)]).
43. On my analysis of the law as above, it follows that the Appellant was no longer entitled to be treated as a family member under Regulation 7 once her dependency had ceased and she was no longer a member of her Sponsor’s household. It also follows that the conclusion of Judge Bennett in the First Appeal Decision that the Appellant was not entitled to permanent residence under the EEA Regulations was correct in law (and was not challenged on this point or overturned). Any error made by Judge Lawrence in the findings on the Appellant’s position under Regulation 8 is for that reason not material.
44. It also follows that the Appellant is no longer entitled to have her residence in the UK facilitated under EU law as she no longer satisfies the conditions for recognition as an extended family member taking into

account Article 3(2) of the Directive and in compliance with Regulation 8 of the EEA Regulations. For that reason, although the reasoning of Judge Lawrence contains errors of law, in particular in relation to the correct interpretation of EU law, the challenge to the Respondent's decision under appeal fails.

45. Although Mr Saeed submitted that, even if I were not with him as to the law, it was still necessary to set aside the Decision in order to consider the current position as to dependency, I decline to do so. There is no application under Rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 to adduce further evidence. If the Appellant contends that the position as to dependency has changed, it is open to her to make a further application for a new residence card under the EEA Regulations.

CONCLUSION

46. For the above reasons, I am satisfied that there is an error of law in the Decision but that the error is not material. I therefore decline to set aside the Decision. I uphold the Decision.

DECISION

The Decision of First-tier Tribunal Judge T Lawrence promulgated on 24 March 2020 does involve the making of an error on a point of law, but I decline to set aside the decision on that basis as the error is not material. I therefore uphold the Decision with the consequence that the Appellant's appeal remains dismissed.

Signed L K Smith
Upper Tribunal Judge Smith

Dated: 23 September 2020