IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/32394/2014

THE IMMIGRATION ACTS

Heard at Field House
On 16 July 2015
Delivered Orally

Decision & Reasons Promulgated
On 31 July 2015

Before

THE HONOURABLE MR JUSTICE COLLINS
UPPER TRIBUNAL JUDGE GOLDSTEIN

Between

MR MUHAMMAD AWAIS
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Hossain of A I Law Chambers
For the Respondent: Mr N Bramble Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Anstis, who on 25 March 2015 dismissed the appellant's appeal against the refusal by the Secretary of State to issue him with a residence card as the family member of an EEA national. The EEA national in question is the appellant's uncle. He is an Italian national. The

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appellant himself comes from a relatively remote village, we gather in Pakistan. He said that he had been supported by his uncle following the death of his father and he came to this country in May of 2011 and it is clear that two days after his arrival he entered into a joint tenancy agreement of premises in which he is we gather, still living. Certainly it was the address that was given and his uncle was originally in Italy, not resident in this country, albeit would come on visits we gather, to this country from time to time, but has been a permanent resident here since 2013.

2. The application was as we say, based upon that relationship. Now originally the Secretary of State refused on two grounds. One was that it was said that a birth certificate was necessary to prove the relationship. That particular ground was abandoned and rightly so and so the only issue before the First-tier Tribunal was whether the appellant met the dependency criteria which are set out in the Directive as applied in the relevant Directive, which is 2004/38/EC dealing with free movement of citizens as put into domestic law by the Immigration (EEA) Regulations 2006, S.I. 2003.

3. It is we think desirable, that we should set out the relevant provisions both of the Directive and of the Regulations, because the two do not entirely coincide in the sense that there are provisions in the Directive which are not found in the Regulations.

4. The appellant is treated as an extended family member and thus he must be in order to qualify within Article 2(2)(c) of the Directive, a direct descendant who is a dependant of the spouse or partner in question. The proof of such dependency and indeed relationship if established entitles the individual to a residence card and that is dealt with by Article 10 of the Directive which provides:

> "1. The right of residence of family members of a Union citizen who are not nationals of a member state shall be evidenced by the issuing of a document called 'Residence card of a family member of a Union citizen' no later than six months from the date on which they submit the application."

5. Then by 10.2 it is provided:

> "2. For the residence card to be issued, member states shall require presentation of the following documents:
>
> (a) a valid passport;
>
> (b) a document attesting to the existence of a family relationship or of a registered partnership;
>
> (c) the registration certificate or, in the absence of a registration system, any other proof of residence in the host member state of the Union citizen whom they are accompanying or joining;
>
> (d) in cases falling under points (c) and (d) of Article 2(2), documentary evidence that the conditions laid down therein are met."

6. And as we say, 2(2)(c) is the relevant provision and thus the Directive requires documentary evidence that the conditions are met and one of the conditions is a condition of dependency.

7. One goes then to the 2006 Regulations and finds that it is Article 8 that deals with extended family member and provides by 8.2 so far as material

   "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 -

   (c) the person satisfied the condition in paragraph (a)",

   that is to say that he is or was residing in a country other than the United Kingdom and was dependent upon the EEA national or a member of his household,

   "has joined the EEA national in the United Kingdom and continues to be dependent upon him or to be a member of his household."

8. There is no question here of being a member of household and so the question is whether, not only that he is dependent upon him in the United Kingdom, but that he was dependent upon him when he was residing in a country other than the United Kingdom, and so that in this case, what has to be established, is that there was prior dependency before he arrived in this country in May 2011 and there is continued dependency since his arrival here.

9. Paragraph 17 of the Regulations deals with the issue of a residence card and that requires that essentially by paragraph 17(4) that there be proof. Paragraph (4) reads:

   "(4) The Secretary of State may issue a residence card to an extended family member",

   for the purposes of this case,

   "who is not an EEA national on application if -

   (a) the relevant EEA national in relation to the extended family member is a qualified person or an EEA national with a permanent right of residence and in all the circumstances it appears to the Secretary of State appropriate to issue the relevant card.

   (5) Where the Secretary of State receives an application under paragraph (4) he shall undertake an extensive examination of the personal circumstances of the applicant and if he refuses the application shall give reasons justifying the refusal unless this is contrary to the interests of national security",

   which is not material for the purposes of this case, and it is to be noted that there is no specific requirement that there be the production of documentary evidence, merely that there be proof.

10. However, it is clear, that as a matter of law, the Directive prevails over any domestic law and therefore it would be open clearly to the Secretary of State to refuse on the

basis of a lack of any documentary evidence simply relying on that and not accepting that the say so of either the applicant or the sponsor was sufficient. Equally, if there is documentary evidence produced, it is clearly material to consider if there are gaps in the documentary evidence and whether nonetheless the proof exists, proof of course being on the balance of probabilities in the circumstances of a case such as this.

11. Now there was documentary material produced and before the First-tier Tribunal Judge and both the appellant and his uncle attended and gave evidence. However, the documentary material produced did not cover the whole of the necessary period and there were undoubtedly gaps in it. So far as the approach is concerned that the judge was obliged to apply, he sets out under the heading "Discussion Law" in four paragraphs his approach and he notes two decisions of this Tribunal which first indicate that the test he has to run is purely factual, and a case from the European Court of Justice that makes the point that material support, is support in order to meet the essential needs of the individual which would amount to dependency and a decision of this Tribunal in **Moneke [2011] UKUT 00341** which made the point that where able-bodied people of mature years claimed to have always been dependent upon remittances from a sponsor, then that should invite particular close scrutiny as to why this should be the case and we gather from Mr Bramble, who led us further in that decision, that Mr Justice Blake, who gave that judgment, referred to the issue of documentary evidence.

12. In paragraphs 19 to 23, the judge considered the documentary evidence that existed and also referred to that which was absent and whose absence was in his view material. Mr Hossain accepts that his summary of the payments shown in the documentary material is correct and essentially those payments showed that in relation to the time before the appellant came to the United Kingdom, there were three payments amounting to between £400 and £500 each and once he was in the United Kingdom there were payments documented which showed a total under some £500. He did say in paragraph 23, that there was no documentary evidence of any payment by Mr Ali of school or other education fees in Pakistan or of tuition fees in the United Kingdom. So far as school or other education fees in Pakistan is concerned that is correct. So far as tuition fees in the United Kingdom is concerned that is correct, in the sense that there is no direct payment. However, it is possible to marry up a payment on 24 February to the appellant's account with a payment from that account to the educational establishment which he was then attending. However, the fact is that that is the only payment which can be married up. So there is a factual error it would seem in paragraph 23. However, it is not in our judgment an error which is of any real substance in the context of the consideration of all the material.

13. The judge summarised his conclusions, by saying that there was a need for close scrutiny and that is undoubtedly correct and there was very little documentary evidence while the appellant was in Pakistan. He goes on in paragraph 28, that he was conscious that in a case involving family arrangements, people might not keep full records and in addition he and his uncle had both moved countries and that

might also mean that there no records. But he said nevertheless, if it had been the case that his uncle was supporting the appellant and his family with their essential needs during this time, he would have expected there to be more documentary evidence showing that this was done and he then went on to indicate in paragraph 29, why he was not persuaded, because there had not been an explanation for gaps during the period that he was a student here and he concluded that he had not heard evidence of any dependency that the appellant might have on his uncle, other than provision of finance to meet essential needs.

14. Reliance has been placed by Mr Hossain on the existence of a tenancy agreement which was entered into jointly by the appellant and his uncle, as we have indicated, on 5 May 2011, two days after the appellant arrived in this country, and that was a document that was before the First-tier Tribunal Judge, but it does not seem to have been relied on specifically as an indication of dependency and certainly it is not referred to at all in the very lengthy grounds that were submitted on the appellant's behalf on his application for leave to appeal to the Tribunal.

15. In itself, it goes no further than indicating that there was indeed a joint tenancy, but it does not show that his uncle was responsible for the whole of the rent which in fact amounted to £700 a month in accordance with the agreement and it may well be that it was for that reason that it was not relied on specifically on behalf of the appellant below or indeed in the grounds of appeal, because it was recognised that in itself, it could not establish the necessary dependency.

16. In granting leave to appeal, the First-tier Tribunal Judge stated that given the fact that the judge accepted corroboration of some support in Pakistan prior to coming to the UK and in the UK after arriving, it was arguable that sufficient reason had not been given for rejecting the evidence of the appellant and the sponsor that this support continued despite a lack of corroboratory evidence. With great respect to the judge, that is not a proper approach for considering that the appeal should have been granted and that there was an error of law. The judge does explain why he rejected the evidence of dependency or rather why he did not accept that the evidence of dependency showed the necessary level of dependency. That was in our judgment an issue of fact and a conclusion which cannot be shown to have been an irrational conclusion, because that is the test that has to be applied in showing that there was an error of law. The fact is regrettably, that permission should not have been granted and the additional costs incurred and indeed the hopes given to the appellant were not properly given.

17. One other matter we would mention although it does not arise directly in the context of our decision, is that Mr Bramble pointed out that the appellant's uncle's residence card in Italy and passport both were dated in 2011, indeed one in August, the other in September and so after the appellant had come to this country, and he suggested that this might indicate on the face of things that his uncle was not an Italian citizen or Italian national at any material time while the appellant was in Pakistan or indeed when he arrived in this country. If that is indeed correct, then he could not qualify in

any event, because he could not show that his uncle was an Italian national at any material time.

18. However, that was not an issue that was raised by the Secretary of State. It was not an issue taken before the First-tier Tribunal Judge and the fact that those two documents have those dates, does not of itself establish that that reflects the time when the uncle became an Italian citizen. They may simply have been necessary renewals of previous acceptances of citizenship and nationality but as we say, and Mr Bramble accepted this, it is not a matter that we can directly take into account in deciding this appeal and we have not done so, but for the reasons that we have given this appeal must be dismissed.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law material to the outcome of the appeal.

We therefore do not set aside the decision

No anonymity direction is made.

Signed Date 29 July 2015

Upper Tribunal Judge Goldstein
For and on behalf of Mr Justice Collins