



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: OA/08854/2014
OA/05862/2014
OA/05864/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 20 August 2015**

**Decision Promulgated
On 9 November 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

**Mrs Zubaida BIBI
Mr Jahangir RAMAY
Mr Muhammad Yasin RAMAY
(NO ANONYMITY DIRECTION MADE)**

Appellants

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr P. Saini, counsel instructed by Mitchell & Co solicitors
For the Respondent: Mr S. Whitwell, Senior Home Office Presenting Officer

DECISION & REASONS

1. The hearing of this appeal first came before the Upper Tribunal for hearing on 22 July 2015. In a decision of the same date the Upper Tribunal found that First Tier Tribunal Judge Andonian had erred materially in law and adjourned the appeal for a resumed

hearing on 20 August 2015. The error of law decision and reasons are appended to this decision.

Hearing

2. At the resumed hearing, Mr Saini produced a typed transcript of his handwritten notes of the hearing before the First Tier Tribunal, his handwritten notes having been sent to the Upper Tribunal in advance. The parties agreed that the finding of fact by the First Tier Tribunal that the Appellants were extended family members of an EEA national was preserved and the only question that arose was one of dependency *cf* Dauhoo for the 4 possibilities. Mr Saini handed up a money transfer receipt dated 12 March 2015. Mr Whitwell handed in a printout of SS postcodes for Southend on Sea which was potentially relevant to the landlord's address on the tenancy agreement of SS17 0AN. Mr Saini was given time to take instructions on this document.

3. The Sponsor, Mr Muhammad Tayyab Ramay, was called to give evidence and confirmed his statement of 26 February 2015. He was asked about his landlord's postcode on his tenancy agreement and stated that he had never been to his landlord's address or had cause to write to him. He said that his property was rented indirectly through an agent, Lake Star property on Romford Road and that he met the landlord after he and his wife rented the property. The landlord lives outside London and owns 16 properties. The Sponsor did not know the landlord's address. He stated that his parents and brother's names were on the tenancy agreement to show they had permission to live there.

4. In respect of his father, the Sponsor confirmed that he has had diabetes for 15 years. In 2013, his father's toe was removed due to gangrene. His father receives £35 a month in the form of a pension as he was a teacher. His mother is a housewife and has never worked. His brother is making efforts to get a job but has not got one. He completed a Degree in Banking & Commerce and wants to do a Masters in Commerce. In addition to the money transfer receipt dated 12 March 2015, the Sponsor said that he had sent three or four money transfers this year including that one, for differing sums of money, altogether for £3-4000. He sent the money to his brother because his father was ill.

5. In cross-examination, the Sponsor was asked what he and his wife would do if the appeal is unsuccessful and he stated that he did not know but he would possibly leave the United Kingdom. Last time his father was ill he travelled to see him even though his work did not give him holiday. He confirmed that his father owned his own property. In respect of his living expenses he said that the Doctor and medicine are not free; that his father calls him and he sends money for this. He said that on a monthly basis his parents' and brother's living expenses, including his brother's university fees were £300-£400 excluding medical fees. His father gave up work three and a half years ago around the time that he came to the United Kingdom. Prior to that his father was earning 30,000 Pakistani rupees equivalent to approximately £300 per month and that he worked as a private tutor as well in the evenings at a private academy. The Sponsor confirmed that his father has a bank account but he does not have savings as he spent them [10,000 Pakistani rupees] on his sister's wedding. He said that his sister is not working and her husband is in a low paid job and they are unable to support his parents.

6. The Sponsor's wife, Aneta Ramay was then called to give evidence. She confirmed her statement and that she resided with the Sponsor at 6 Bronte Close. They married on 20 March 2012. When cross-examined by Mr Whitwell she was asked whether she knew anything about her father in law's financial circumstances in Pakistan and she said that he is retired; he was a teacher and has been retired for 3 and a half years. He receives a pension of about £35 a month. She said that her mother-in-law does not work and is not educated. She said that they do not have enough money and depend on her and her husband as £35 a month is not enough to survive. In response to a question from the Tribunal the witness stated that she supported her family in Poland as her mother is disabled. She said that would go to Poland every 6 months and would take £400 with her when she went.

7. Mr Whitwell then made submissions. He stated that the test for dependency was set out in Lim. He submitted that the question that needed to be decided was one of fact and that was whether the Appellants are dependent on the Sponsor and his wife in the United Kingdom. He said that he had two observations to make: (i) despite the fact that quite detailed financial circumstances of the Sponsor and his wife had been provided in terms of their bank accounts and P60's, there was very limited evidence in relation to Pakistan and this was essentially limited to the oral evidence; (ii) in the visa application form at question 66 when asked how much money was spent, the response was recorded as 7000 Pakistan rupees. Based on the evidence in respect of the money transfer receipts however and given that 150 Pakistan rupees is equivalent to £1, £300 = 45,000 Pakistani rupees. He submitted that the Sponsor's evidence was more stark than the position as set out in the visa application form. He further submitted that, even on the evidence of the Sponsor his family were struggling financially before his father stopped working as he had taken a second job. He acknowledged that if the Appellants can show that their essential living needs are met by receipt of money sent by the Sponsor and his wife from the United Kingdom their appeal should be allowed.

8. Mr Saini submitted on behalf of the Appellants that essential living costs would not include University fees or medical expenses. He submitted that the visa application form had been completed by a non-professional or lay person who had not appreciated that it was important to give accurate evidence about costs and that if there was a discrepancy or fluctuation this was not due to fabrication. There was no inconsistency apart from this. He submitted that the question was one of pure fact: was there dependency or not. In respect of Lim he submitted that even if he was wrong about the figure of living costs, given the Sponsor's father's age and the fact that he is diabetic and unable to work, his mother has never worked and his brother has applied for work but cannot get work and is doing a Masters degree. He submitted that they fall within dependency by choice even if not dependency by necessity. He submitted that it is necessity as the Sponsor's father requires medication. The amount that they need a month exceeds £35 as their living costs are £46 and this is sufficient for dependent standards and it is necessary for the Sponsor and his wife to supplement his father's pension income. He submitted that on the pure factual question dependency is made out. In respect of the caselaw, Mr Saini relied on Dauhoo and submitted that the Sponsor's brother is 8(1) or (a) seeking to join Sponsor here and that this only the first limb that needs to be met in terms of Dauhoo as it is an entry clearance application. He accepted that the "same household" requirement was not met as

the Sponsor was not married to an EEA national at that time. In response to a question from the Upper Tribunal as to when dependency began, he stated that the marriage between the Sponsor and his wife took place on 20 March 2012 and so the possibility first arose at that date and that money was first sent on 3 April 2012 according to the itemized list dated February 2014. He also relied on the decision in Moneke at headnotes 1, 3 and 5.

The Relevant Law

9. Article 3(2)(a) of Directive 2004/38/EC and Regulation 8(2)(a) of the Immigration (EEA) Regulations 2006 make provision for the rights of movement and residence of other or extended family members of an EEA national.

10. The headnote in Moneke (EEA – OFMs) Nigeria [2011] UKUT 341 (IAC) provides:

“i. A person claiming to be an OFM under Article 3(2) of Directive 2004/38/EC may either be a dependant or a member of the household of the EEA national: they are alternative ways of qualifying as an OFM.

ii. In either case the dependency or membership of the household must be on a person who is an EEA national at the material time. For this reason it is essential that tribunal judges establish when the sponsor acquired EEA nationality.

iii. By contrast with Article 2(2) family members, an OFM must show qualification as such before arrival in the United Kingdom and the application to join the EEA national who is resident here.

iv. Membership of a household has the meaning set out in KG (Sri Lanka) [2008] EWCA Civ 13 and Bigia & Ors [2009] EWCA Civ 79; that is to say it imports living for some period of time under the roof of a household that can be said to be that of the EEA national for a time when he or she had such nationality. That necessarily requires that whilst in possession of such nationality the family member has lived somewhere in the world in the same country as the EEA national, but not necessarily in an EEA state.

v. By contrast the dependency on an EEA national can be dependency as a result of the material remittances sent by the EEA national to the family member, without the pair of them having lived in the same country at that time before making those remittances.

vi. The country from which the OFM has come can be either the country from which he or she has come to the United Kingdom or his or her country of origin.

vii. Notwithstanding the preliminary reference to the Court of Justice made by the Upper Tribunal in MR & Ors (EEA extended family members) Bangladesh [2010] UKUT 449 (IAC) tribunal judges can proceed to determine OFM appeals in accordance with the guidance given by the Upper Tribunal in this and related cases, making sure to make findings of fact based on a rigorous examination of the evidence.

viii. Where relevant, findings need also to be made on whether it is appropriate to issue a residence card in accordance with the discretion afforded by regulation 17(4) of the Immigration (European Economic Area) Regulations 2006.

ix. In deciding whether a person falls within the material scope of regulation 8 of the 2006 Regulations, policy considerations relating to such matters as the appellant's immigration history, the impact of an adverse decision on the exercise by

the EEA national of his or her Treaty rights, etc are irrelevant. Such policy considerations are relevant, however, to the exercise of regulation 17(4) discretion.

The Upper Tribunal further clarified at [41] that dependency is not the same as mere receipt of some financial assistance from the sponsor and adopted the approach in the Entry Clearance Instructions in force at that time held that: *'Financial dependency should be interpreted as meaning that the person needs financial support from the EEA national or his/ her spouse/civil partner in order to meet his/her essential needs – not in order to have a certain level of income.'*

11. In Dauhoo (EEA Regulations – reg 8(2)) [2012] UKUT 00079 (IAC) the Upper Tribunal held, in the headnote, that:

"Under the scheme set out in reg 8 (2) of the Immigration (European Economic Area) Regulations 2006, a person can succeed in establishing that he or she is an "extended family member" in any one of four different ways, each of which requires proving a relevant connection both prior to arrival in the UK and in the UK:

- i. prior dependency and present dependency**
- ii. prior membership of a household and present membership of a household**
- iii. prior dependency and present membership of a household;**
- iv. prior membership of a household and present dependency.**

It is not necessary, therefore, to show prior and present connection in the same capacity: i.e. dependency- dependency or household membership-household membership ((i) or (ii) above). A person may also qualify if able to show (iii) or (iv)."

12. In Secretary of State for the Home Department v Rahman [2012] 3 CMLR 55, the CJEU held at 32-35:

"32. ... it is to be noted that, as follows from recital 6 in the directive's preamble, the objective of [article 3(2)] is to 'maintain the unity of the family in a broader sense' by facilitating entry and residence for persons who are not included in the definition of family members of a Union citizen contained in art.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, being a member of the household or serious health grounds.

33. It is clear that such ties may exist without the family member of the Union citizen having resided in the same State as that citizen or having been a dependant of that citizen shortly before or at the time when the latter settled in the host State. On the other hand, the situation of dependence must exist, in the country from which the family member concerned comes, at the time when he applies to join the Union citizen on whom he is dependent.

34. In the main proceedings, it is for the national tribunal to establish, on the basis of the guidance as to interpretation provided above, whether the respondents in the main proceedings were dependants of the Union citizen ... in the country from which they have come ... at the time when they applied to join her in the United Kingdom. It is only if they can prove that dependence in the country from which they have come ... that the host Member State will have to facilitate their entry and residence in accordance with art.3(2)

35. In the light of the foregoing, the answer to the third and fourth question referred is that, in order to fall within the category, referred to in art.3(2) of Directive 2004/38, of family members who are 'dependants' of a Union citizen, the situation of dependence must exist in the country from which the family member concerned comes, at the very least at the time when he applies to join the Union citizen on whom he is dependent."

13. In Lim (EEA –dependency) [2013] UKUT 00437 (IAC) the Upper Tribunal held *inter alia* as follows:

"24. Even though it seems clear that not all of the sum sent in remittances (amounting to around £150-£200 a month) is for the claimant (some is intended to help support her mother and the 10 year old grandchild), for dependency to arise it is not necessary that a person be wholly or even mainly dependent. If a person requires material support for essential needs in part, that is sufficient."

My findings

14. The only issue before me was whether the three Appellants are dependent upon their Sponsor and his EEA national wife. It is uncontroversial that this is defined in the jurisprudence and the Respondent's policy instructions as meaning that the Appellants require financial support in order to meet their essential needs.

15. I have considered the written and oral evidence of the Sponsor, Mr Muhammad Tayyab Ramay and his wife, Aneta Ramay in this respect. Mr Whitwell submitted that the evidence in relation to Pakistan was limited and the Sponsor's evidence as to the Appellants' requirements was starker than the position as set out in the visa application form at question 66. The form is dated 19 March 2014. At question 66, in response to the question: "*How much do you spend each month on living costs?*" the first Appellant responded "*PKR 7000.*" At that time this was equivalent to approximately £46. I note that in response to question 63, the first Appellant stated that he was retired and in response to question 65 that he received £200 per month from other sources – family and friends.

16. I do not consider that the Sponsor's evidence differed materially from the information in the visa application form and I accept the Sponsor's evidence that his father, the first Appellant, receives a monthly pension of £35 and that the money he and his wife provide is used to cover not only his father's medical bills and his brother's University fees but also to meet the Appellants essential living needs. The Sponsor's evidence was as to the current position ie this year rather than the date of decision and it is clear that his father's health has deteriorated since the amputation of his toe in 2013 and this has necessitated additional remittances. Whilst I accept that the evidence relating to the Appellants' income absent remittances is limited, Mr Whitwell did not seek to suggest that the evidence of the Sponsor and his wife was not credible and I accept their evidence as to the Appellants' means, noting that it was consistent, not only with each other but with the supporting documentary evidence.

17. It is clear from the decision of the CJEU in Secretary of State for the Home Department v Rahman [2012] 3 CMLR 55 that it not necessary for the Appellants to have

resided with the EEA national in the same State or the same household but only that the situation of dependency exists at the time the application to join the Sponsor was made.

18. The Sponsor and his wife's evidence as to remittances in the form of money transfer receipts is corroborated by the evidence at 40-45 of the Appellants' bundle showing that, on average, £200 a month was sent to the Appellants starting from 3 April 2012, which post dates the marriage between the Sponsor and his wife on 20 March 2012 and thus can properly be taken into account. The last pre-decision receipt is dated 17 January 2014 and is for £200.

19. The relevant date is the date of the decision of the Entry Clearance Officer 3 April 2014 and I find that at that date the Appellants were financially dependent upon the Sponsor and his EEA national wife in order to meet their essential needs.

20. For the reasons set out above, I allow the appeal.

Conclusion

21. The decision of the First-tier Tribunal judge having been set aside, I remake the decision and allow the appeal.

Deputy Upper Tribunal Judge Chapman

5 November 2015