



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/10242/2014

THE IMMIGRATION ACTS

Heard at Field House
On 26 August 2015

Decision & Reasons Promulgated
On 30 September 2015

Before

UPPER TRIBUNAL JUDGE O'CONNOR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR GULAM ABBAS
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:

For the Appellant: Mr S Walker, Senior Presenting Officer

For the Respondent: Mr M Iqbal, instructed by Law Lane Solicitors

DECISION AND REASONS

Introduction

1. The Secretary of State is the appellant before the Upper Tribunal. I shall refer to Mr Abbas as the claimant herein.
2. On 21 October 2013 the claimant applied for an EEA residence card as an extended family member of his brother, Mr Waris - a German national. The application was

refused by the Secretary of State in a decision of 12 February 2014, ostensibly for the following reasons:

“You have not provided any evidence of your dependency on your EEA national sponsor at any time, either in Pakistan or in the United Kingdom. You have not provided any evidence that your (sic) were dependent on your EEA national sponsor immediately prior to entering the United Kingdom as required under Regulation 8(2)(a), in addition, we have not received any evidence that you have been dependent upon your EEA national sponsor since entering the United Kingdom as required under Regulation 8(2)(c).”

3. The claimant appealed this decision to the First-tier Tribunal and the appeal was allowed by First-tier Tribunal Judge Fletcher-Hill in a determination signed on 28 October 2014. The First-tier Tribunal’s conclusions, found in paragraphs 56 to 61 of its determination, can be summarised thus:
 - (i) The sponsor, Mr Waris, is a qualified person;
 - (ii) The claimant and sponsor have lived together since the claimant’s arrival in the United Kingdom in 1997;
 - (iii) The claimant’s brother, Mr Waris, has been a German national since at least 2006;
 - (iv) The claimant lived in the same household as Mr Waris in Pakistan between 1965 and 1980 and has done so in the United Kingdom since 1997; and,
 - (v) The wives and children of both the claimant and Mr Waris also lived in the family home in Pakistan after their respective marriages in 1982 and 1984, and continued to do so until Mr Waris’ wife and family joined him in the United Kingdom in 2010 or 2011.
4. For these reasons the First-tier Tribunal found the claimant to be an extended family member of Mr Waris for the purposes of regulation 8 of the Immigration (EEA) Regulations 2006.
5. The Secretary of State sought and obtained permission to appeal to the Upper Tribunal, thus the matter came before me.

Error of Law

6. At a hearing before the Upper Tribunal on 20 March 2015 it was properly conceded on behalf of the claimant that the First-tier Tribunal had erred in failing: (i) to consider whether Mr Waris had become an EEA national prior to 2006 and, if so, (ii) to determine when he had become an EEA national. A finding on these matters was necessary given the other findings made by the First-tier Tribunal.
7. As a consequence I set aside the determination of the First-tier Tribunal in a decision given orally at the hearing of 20 March 2015 and, thereafter, reduced to writing on 26 March.

Remaking of the decision under appeal

8. At the hearing of 20 March Mr Iqbal indicated that he had been instructed that evidence could readily be obtained to demonstrate that: (i) Mr Waris had become an EEA national in 1996, (ii) that he had travelled to Pakistan in 1996 after he had become an EEA national and (iii) that at that time the claimant was living in Mr Waris' household in Pakistan. In such circumstances, and without objection from the Secretary of State, I adjourned the re-making of the decision until a later date so as to enable the claimant to obtain such evidence.

Legal Background

9. It is necessary at this stage to set out briefly the regulations that are pertinent to a decision in this appeal. Regulation 8 of the Immigration (EEA) Regulations 2006 (2006/1003) is headed "Extended Family Member" and reads:

Regulation 8(1) reads:

"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)."

Regulation 8(2) continues:

"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 (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."

And then Regulation 8(6) says:

"In these Regulations 'relevant EEA national' means, in relation to an extended family member, the EEA national who is or whose spouse or civil partner is the relative of the extended family member for the purpose of paragraph (2), (3) or (4) or the EEA national who is the partner of the extended family member for the purposes of paragraph (5)."

10. Turning to the regulations relating to the issuing of an EEA residence card, these are found in regulation 17 of the 2006 EEA Regulations - the relevant provision in this appeal being regulation 17(4) which reads:

"The Secretary of State may issue a residence card to an extended family member not falling within Regulation 7(3) 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 under Regulation 15; and
- (b) in all the circumstances it appears to the Secretary of State appropriate that to issue the residence card."

Further evidence

11. By the time the matter came back before me on 26 August the claimant had produced the original of a German passport, bearing Mr Waris' name, date of birth and photograph - such passport having been issued on 11 July 1996 and being valid until 10 July 2006. It contains a multiple entry visa for Pakistan issued on 28 October 1996.
12. The claimant also gave oral evidence to the effect that Mr Waris had travelled to Pakistan in November 1996 had returned to the UK in July 1997. When in Pakistan Mr Waris had resided in the same house as the claimant's, the claimant's wife and children, his other brothers, his sister in law, niece and his father. His mother had passed away a long time previously. This was the family house that he (the appellant) had grown up in with, amongst others, Mr Waris.
13. Mr Waris gave oral evidence broadly to the same effect.

Submissions

14. Mr Walker accepted the authenticity of Mr Waris' passport and the stamps contained therein. He also accepted the truth of the oral evidence given. He submitted, however, that the claimant had not lived in Mr Waris' household in Pakistan between 1996 and 1997 or, indeed, at any time subsequent to Mr Waris becoming an EEA national. The house Mr Waris resided in whilst in Pakistan between November 1996 and July 1997 was a communal household headed by the claimant's father.
15. It was further submitted that the meaning to be ascribed to the words "*member of his household*" in regulation 8 of the 2006 EEA Regulations has already been the subject of consideration by the Court of Appeal in KG (Sri Lanka) and AK (Sri Lanka) [2008] EWCA Civ 13. It is not sufficient for the claimant to demonstrate merely that he had lived in the same house as the relevant EEA national in 1996 to 1997, but rather he had to show something more to demonstrate that he had to been a member of the EEA national's household at this time.
16. In his submissions (made in writing on 4 September 2015) Mr Iqbal drew the Tribunal's attention to passages in the decisions of Moneke (EEA - OFMs) Nigeria [2011] UKUT 00341 (IAC), RK (OFM - membership of house - dependency) India [2010] UKUT 421 (IAC), KG (Sri Lanka) and SM (India) v ECO (Mumbai) [2009] EWCA Civ 1426, thereafter asserting as follows:

"16. On the facts of this appeal the appellant and his EEA national (sic) have lived in the same house since their respective births. They never lived separate from each other in Pakistan. Following their respective marriages their wives moved into the same

house. The EEA national's wife and children moved to the UK in 2010/2011. It is thus the family home.

17 Although it appears from domestic authorities that in order for a house to be considered at the EEA national's household either the EEA national has to be the owner of the house or the leaseholder but, as far as research conducted on behalf of the appellant is concerned, there is (sic) such authority from the ECJ which support this view or even the contrary view.

18 It is arguable that in many countries the headship of a household depends on culture and traditions.

19 In any event the Upper Tribunal has had the benefit of hearing evidence from the appellant and from his sponsor. The Tribunal is therefore invited, strictly on the balance of probabilities, to find the appellant has lived in Pakistan (sic) a member of the EEA national's household in 1996/97."

Discussion and Decision

17. The issues I must determine are: (i) when Mr Waris became an EEA national and (ii) whether the claimant was a member of Mr Waris' household in Pakistan after Mr Waris became an EEA national.
18. As to the first of these issues, it is now properly accepted by the Secretary of State that Mr Waris became a German, and therefore an EEA, national in July 1996. I also accept this to be so, given the production of Mr Waris' original passport.
19. Mr Walker further accepts, as I do, that Mr Waris travelled to Pakistan in November 1996 and remained there until approximately July 1997 - living in the same house as the claimant, amongst other of the family members, during such time; this being the same house that he and his siblings grew up in.
20. Turning to the meaning of "*a member of his [the EEA national's] household*" - found in regulation 8(2) of the 2006 EEA Regulations - although this has been the subject of consideration by both the Upper Tribunal and the Court of Appeal, I need only set out the following.
21. In KG (Sri Lanka) the Court of Appeal considered a matter in which the appellant had come to the United Kingdom from Sri Lanka, made an unsuccessful claim for asylum but remained in this country for some years without leave and then applied for a residence card on the basis of regulation 8, as an extended family member of an EU citizen who had gone from Sri Lanka to Germany, had made a successful claim to asylum and acquired German citizenship. He had then come to the United Kingdom in the exercise of his rights as an EU citizen, entering the United Kingdom over 5 years after KG. The appellant AK was in a factually similar position, advancing a claim by reference to a relative who had gone from Sri Lanka to France and had acquired French citizenship before entering the United Kingdom.
22. Under the heading "*Members of the household of the Union citizen*" Buxton LJ (with the agreement of Hooper and Smedley LJ) said as follows:

“[77] There was some tendency in the argument before us to read this requirement as one of being members of the same household; or, as was said on behalf of AK, members of a communal household. That is not what Directive 2004/38 says, nor was that the condition in Regulation 1612/68, which requires the OFM to have been, in relation to the Union citizen, under his roof, not under the same roof. It seems very likely that the assumption is that the household will indeed have been that of the Union citizen, that is, that he was in colloquial terms head of it, the relations were under his roof, and on that basis he can reasonably wish to be accompanied by the members of it when he leaves for another country. If, on the other hand, the liberty extends to what might be called collateral members of the same household, then it is very difficult to see why for instance cousins with a close relationship but not actually living together are excluded; or why, to give a concrete example, it should be crucial to the case of AK that he was living in the same house, rather than the same street, as his cousin.

[78] KG asserts membership of the Union citizen's household, but the household in their case was clearly that of their parents. AK asserts that the household headed by his parents was the household of his seventeen year old cousin who was living there with her own parents. That seems to be an abuse of language. The claim also demonstrates the reach of the appellants' case. The household in question was lived in by fourteen people, all of whom if living unlawfully in the United Kingdom would on the appellants' argument qualify for a residence permit as soon as the Union citizen relative arrived here. To them would have to be added any other relatives of the Union citizen with whom she happened to have lodged or shared a flat either in Sri Lanka or in any other country that she passed through on her way to France.”

23. Nothing that is said by the Court of Appeal in SM India casts doubt on the aforementioned analysis and such analysis was specifically approved by the Court of Appeal in Bigia and others v ECO [2009] EWCA Civ 79 at [43].
24. Applying this rationale to the facts of the instant case it is clear that the claimant has failed to demonstrate to the balance of probabilities that he was a member of Mr Waris' household in Pakistan between November 1996 and July 1997, or indeed at any other time after Mr Waris became an EEA national and prior to the claimant's arrival in the UK. When coming to this conclusion I have had full regard to the findings of the First-tier Tribunal and to the evidence before me.
25. Whilst the claimant clearly lived at the same property as Mr Waris during this period of time, the evidence does not support the contention that Mr Waris was the head of the household, or that there were any other features of his residence therein which should lead to the conclusion that it was Mr Waris' household. I observe that the claimant's father was still alive at this time and living in the same house.
26. It has not been suggested that the claimant was dependent on Mr Waris after Mr Waris became an EEA national and prior to the claimant travelling to the UK. In any event, the evidence does not demonstrate to the balance of probabilities that this was so.

27. For this reason I conclude that the claimant does not meet the requirements of regulation 8 of the 2006 EEA Regulations (or Article 3(2) of 2004/38). Consequently, the claimant's appeal must be dismissed.

Notice of Decision

The First-tier Tribunal's determination contains an error on a point of law and is set aside.

Having re-made the decision on Mr Abbas' appeal for myself I dismiss it.

Signed:

A handwritten signature in black ink, appearing to read 'M. O'Connor', written over a horizontal line.

Upper Tribunal Judge O'Connor
Date: 18 September 2015