Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/24865/2015

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice	**Decision & Reasons promulgated**
On 1 October 2018	**On 22 October 2018**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

[R L]
~~(anonymity direction not made)~~

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Saini instructed by Universal Solicitors
For the Respondent: Mr Wilding Senior Home Office Presenting Officer.

DECISION AND REASONS

1. This appeal has a long procedural history. The respondent's decision under challenge is the refusal of an application for a residence card as the family member of an EEA national exercising treaty rights in the United Kingdom dated 24 June 2015.
2. The appellant, a national of the Philippines born on 29 January 1974, claimed to be fully financially dependent upon her stepfather Mr [PE],

a citizen of the Republic of Ireland, who is the partner of the appellant's mother, a British citizen.

3. The EEA national and the appellant's mother are not married but have lived together as an unmarried couple since 1994. The appellant states all three adults live in the same household at Pinner in Middlesex.
4. First-Tribunal Judge Moan dismissed the appellant's appeal in a decision dated 3 April 2016. Permission to appeal to the Upper Tribunal was granted on 7 September 2016 by Designated Judge Appleyard (as he then was). On 17 October 2016 Deputy Upper Tribunal Judge Chapman adjourned the Initial hearing set to determine whether a material error of law had been made in the decision to dismiss the appeal, giving appropriate case management directions. The 24 July 2017 the Upper Tribunal reconvened in a panel composed of Upper Tribunal Judge Rintoul and Deputy Upper Tribunal Chapman. In a decision handed down on 13 October 2017 it was found there was no material error of law in the decision of the First-Tier Tribunal which was upheld.
5. The Upper Tribunal considered an alternative argument put forward by Mr Saini as to whether or not the appellant qualified as an extended family member pursuant to regulation 8(2) of the 2006 Regulations but found that following *Sala [2016] UKUT* 00411, promulgated on 19 August 2016 which post-dated the promulgation of the First-Tier Tribunal decision, there was no statutory right of appeal against the decision not to grant a Residence Card to a person claiming to be an extended family member. The panel did not consider it appropriate to entertain arguments designed to challenge the reasoning underlying the decision in *Sala* in light of the fact the matter was to be shortly considered by the Supreme Court.
6. Upper Tribunal Judge Rintoul, following the decision of the Court of Appeal in *Khan*, which found *Sala* was wrong a position subsequently upheld by the Supreme Court, directed pursuant to Rule 45(i)(b) of the Upper Tribunal Procedure Rules that the Upper Tribunal intended to set aside the decision of 13 October 2017. The direction is dated 21 February 2018.
7. On 19 April 2018 Upper Tribunal Judge Rintoul set the decision of 13 October 2017 aside in accordance with the earlier direction.
8. On 20 July 2018 Upper Tribunal Judge Kebede adjourned the reconvened Initial hearing, with directions, leading to the matter being relisted on 1 October 2018.
9. An application to adjourn this hearing on the basis the chosen advocate was not available, was refused by the Upper Tribunal on the papers. The appellant is represented today by Mr Saini who has prior knowledge of and involvement in the case. No fairness issues arise.

Error of law

10. Mr Saini relied upon his earlier written submissions considered by the panel chaired by Upper Tribunal Judge Rintoul in support of the

appellant's assertion that he is a family member of an EEA national and the alternative claim of an entitlement to a residence card as an extended family member.

11. The relevant parts of Mr Saini's submissions set out in his skeleton argument are in the following terms:

    i. the term "family member" is not confined to blood relatives *cf. Dulger* [2012] EUECJ C-451/11 at [23] and *Alarape* [2011] UKUT 443 (IAC) (Article 12, EC Reg 1612/68) Nigeria [2011] UKUT 413 (IAC) in which the Upper Tribunal found that, although undefined in the European Regulations, the term "child" should be read to include "stepchild". Mr Saini asserted that there is no preclusion or restriction stating that a stepchild's parent must be married to the qualifying person;

    ii. to distinguish her is not being a stepchild due to her mother and partner not being married (or in a civil partnership) would be an act of indirect discrimination and will be in contravention of European law via Council Directive 2000/78/EC article 1 and a contravention of domestic law via the Equality Act 2010 *cf. Bull & Anor v Hall and Anor* [2013] UKSC 73 and regulation 3 of the Equality Act (Sexual Orientation) Regulations 2007;

    iii. it is implicit from the decision of the FtTJ at [49] – [50] that the appellant has been dependent on the EEA national since her arrival in the United Kingdom in 2004 and she is thus entitled to a residence card pursuant to regulation 7(1)(b)(ii) of the EEA Regulations;

12. The submission in the alternative that the decision of the Upper Tribunal in *Sala* had been wrongly decided need not be set out as it is now settled law that that submission is correct.
13. The respondent's position is to maintain there is no arguable error of law on the basis the appellant is neither a family member nor extended family member of an EEA national exercising treaty rights.
14. The first issue is whether the appellant is a 'family member' under the Directive.
15. The decision of the Judge was that the appellant did not qualify as a family member under regulation 7(1). The Judge records at [17] of the decision under challenge that it was agreed before her that the appellant could not qualify under regulation 7(1)(a)(b) or (d), the question being whether she qualified under regulation 7(1)(c) as a dependent direct relative in an ascending line. The Judge finds the appellant is precluded from qualifying under regulation 7(1)(b) on the basis of her age as she is over 21, and as she is a descendant and not an ascendant and is precluded from qualifying as a 'family member' under regulation 7(1)(c); leaving the issue that of whether the appellant was able to qualify as an extended family member.
16. Although the earlier decision of Upper Tribunal Judge Rintoul and Deputy Upper Tribunal Judge Chapman was set aside for the reasons set out above, the analysis of the question of whether there was any error in the conclusion the appellant did not satisfy the definition of a family member was not arguably infected by the subsequent decision relating to whether an extended family member has a right of appeal.

17. At [19] the Judge writes: "*What I considered to be significant in regulation 7(1)(c) is the wording "ascending line". Regulation 7(1)(b) uses the phrase "descendants" to make it clear that this means children. Descendants is not used in regulation 7(1)(c).*"
18. The Judge appears to have made an error of law finding the phrase 'descendants' in relation to 7(1)(b) relates only to children. Whilst this interpretation is arguably permitted in relation to regulation 7(1)(b)(i) which provides for direct descendant of an EEA national, his spouse or civil partner who is under 21, subsection (ii) makes provision for "dependence of his, his spouse or civil partner". The Judge did not consider whether or not the appellant is a dependent of an EEA national, his spouse or civil partner within the meaning of regulation 7(1)(b)(ii) of the Regulations.
19. The issue is, as it has always been, whether such error is material. Mr Saini's position has always been that it is unlawfully discriminatory to treat the appellant who he claims is the *de facto* stepchild of an EEA national by virtue of her mother's unmarried relationship with Mr [PE] as falling outside the definition of a family member for the purposes of regulation 7.
20. It is not disputed regulation 7 is concerned with direct family members and does not encompass unmarried partnerships but any allegation of unlawful discrimination is not arguably made out for the reasons set out in the decision of Upper Tribunal Judge Rintoul and Deputy Upper Tribunal Judge Chapman which I repeat and adopt in this determination and which are written in the following terms:

    i. There is provision for unmarried partnerships (durable relationships) as extended family members pursuant to regulation 8. Whilst the provisions of regulation 8 are less favourable……. The decision to distinguish between marriage/civil partners and unmarried partners is deliberate and reflects their differing legal status.

    ii. There has always been a distinction between a descendant and a dependent and between family members and descendants, who are different in that one is a subset of the other. The Association Agreement was drafted on the basis of family members, who are defined at 10[1] of Council Directive 2004/68 which predates the Regulations and the distinction between the different groups has been maintained and carried through.

    iii. We accept that the jurisprudence upon which Mr Saini sought to rely recognises the rights of stepchildren and the fact that "family member" in EU law terms encompasses non-blood relations *cf. Dulger* [2012] EUECJ C – 451/11 at [23]; *Ayaz* [2004] EUECJ C – 275/02 at [46] and [48] and *Alarape* (Article 12, EC Reg 1612/68) Nigeria [2011] UKUT 413 (IAC) but these cases concerned the stepchildren of a

marriage and not a *de facto* stepchild as is the case before us.

iv. We further do not accept that the Equality Act (Sexual Orientation) Regulations 2007 assist us, given that the complaint of discrimination relates to marital status and the position would be identical were the appellant to be the *de facto* stepchild of an unmarried gay couple. Whilst in *Bull v Hall* [2013] UKSC 73 the Supreme Court found in favour of a couple in a civil partnership on the basis that they had been subjected to discriminatory treatment by the refusal of a Christian hotel keeper to provide them with a double-bedded room, the Appellants had a protected characteristic *vis* their sexual orientation. However, Mr Saini was unable to identify the protected characteristic in playing this case. We do not consider that the fact of being unmarried partners or the descendant of an unmarried partner can constitute a protected characteristic.

v. Similarly, whilst in *R ota Brewster* [2017] UKHL 8, the Supreme Court found in favour of an unmarried partner in respect of a right to receive a survivor's pension, the legal right was established by way of the Local Government Pension Scheme (Benefits, Membership & Contributions) Regulations (Northern Ireland) 2009, which made express provision for the right of a cohabiting surviving partner to receive a survivor's pension. The issue in the case was the fact that she had to be nominated by the member and the administrating body had not received the nomination form. Their Lordships per Lord Kerr disapplied the requirement for nomination essentially on the basis of proportionality, in order to give effect to the objective which was to remove the difference in treatment between a long-standing cohabitant and a married or civil partner. The EEA Regulations have a different objective, which is to preserve family unity whilst maintaining a distinction between direct and extended family members on the basis of *inter alia* marital status.

vi. It is further clear from both the law and the jurisprudence that some forms of discrimination are permissible. It is not unlawful to discriminate against an unmarried person under the Sex Discrimination Act 1975 or now the Equality Act 2010. Being an unmarried person is not, in itself, a protected characteristic. Thus being the child or descendant of an unmarried person is also not a protected characteristic.

vii. Moreover, the logical effect of Mr Saini's argument is that, whilst the Appellant's mother falls to be considered as an

> extended family member by virtue of being the unmarried (durable) partner of an EEA national, the Appellant is entitled to be recognised as a family member. This is not only inconsistent but perverse.

21. It was not made out that any amendments to the equality legislation or recent decided authorities warrant departing from the above conclusion.
22. Whilst there are errors in the decision of the First-Tier Tribunal's decision they have not been shown to be material, given that the appellant does not qualify as the dependent of an EEA national, his spouse or civil partner within regulation 7 (1) (b) (ii) of the Immigration (EEA) Regulations 2006 as amended.
23. In relation to the submissions in the alternative, that the appellant is able to succeed as an extended family member pursuant to regulation 8 of the 2006 regulations, the Judge notes at [22] that it is not disputed that the appellant was not a family member of the EEA nationals household in the Philippines and that it is disputed that the appellant was dependent upon the EEA national in the Philippines. At [23] the Judge records that it is agreed that the appellant is a member of the household of the EEA national in the UK albeit that it is disputed that the appellant is dependent on the EEA national in the UK and at [24] that it is therefore 'dependency' that is in dispute and that if the appellant could show dependency in the Philippines on the EEA national she would have fulfilled one of the criteria recognised by the Upper Tribunal in *Dauhoo* (EEA regulations –reg 8(2)) [2012] UKUT 79 of prior dependency and present membership of the household.
24. The Judge considered the evidence with the required degree of anxious scrutiny before setting out findings from [36] of the decision under challenge which in relation to this issue are the following terms:

> 36. The Guidance from the Home Office entitled "Extended family members of EEA nationals" dated 7 April 2015 states that an applicant must submit financial evidence of dependency such as bank statements or money transfers between the EEA National and the extended family member. The Guidance does not specify how much information must be provided.
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> 37. Between 1996 and 2004 five remittance slips were provided. I note that two large remittances were sent to the Appellant in the two months prior to the Appellant coming to the UK in March 2004. Other than those transfers in 2004 there are 3 payment slips between 1996 and 2004 for that 7–8 year period. I would have expected to see many more payment slips if 12 monthly payments or more were paid per year over such a long period.
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> 38. The Appellant was less than specific about her financial leads whilst in the Philippines. She said that she needed 15,000 Peso a month to survive. All of the transfers made to the Appellant were for less than 15,000 Peso other than the one made in February 2004.
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> 39. Whilst I accept that I do not need to have evidence to show that the Appellant's mother was covering all of the expenses of the Appellant in

the Philippines, I am unclear as to how the Appellant maintained herself bearing in mind the shortfall between the sums sent by her mother and her expenses. I was not given a breakdown of what income was required and how it was met in the Philippines.

40. The evidence given by the Appellant was less than satisfactory. She suggested that she was still studying when her mother started to send money in 1997/8. The Appellant later said that she finished studying when she was 22 years (i.e. 1996). This was inconsistent.

41. The Appellant said that she started to receive money from her mother in 1998. Mr [PE] was clear that in 1997 the Appellant's mother was left unemployed and without a home and so started to live with him. The evidence on the money transfer from 1996 shows that the Appellant's mother was at that time living with Mr [PE].

42. During the hearing both the Appellant and Mr [PE] gave a piece of evidence in almost identical terms. They both said that that the Appellant's mother suffered a stroke in 2011 and had been hospitalised every year since 2011. The latter part of that sentence being offered voluntarily and not as a result of a direct question. It was striking to me that the Appellant and Mr [PE] both voluntarily said at the Appellant's mother had been "hospitalised every year since 2011" without prompting and in identical terms. It left me with the impression that some of the evidence may have been rehearsed.

43. It is also interesting that the Appellant had held employment whilst in the UK as a nanny but that Mr [PE] gave evidence that she had not been employed. I found it hard to understand why Mr [PE] would not know that she had been working when she lived in his household.

44. I note that the money was sent by the Appellant's mother and not Mr [PE] but I am less concerned with this factor as I note that Mr [PE] said that he gave money to the appellant's mother for the appellant.

45. What I am less certain about is the frequency of the payments to the Appellant, these have certainly not been established by the documentary evidence and whether each and every of the payments made to the Appellant were from Mr [PE]'s resources and not that of the Appellant's mother.

46. I have been given no breakdown of the essential living expenses of the Appellant and I have some concerns about the accuracy of the evidence on behalf of the Appellant due to inaccuracies about dates and concerns about reliability.

47. I am not satisfied that the Appellant has proved on the balance of probabilities that she was dependent on Mr [PE] prior to coming to the UK.

25. Mr Saini submitted the Judge had erred as the requisite element of dependency had been established on the evidence. The Judge accepted that funds had been sent and the frequency of the same which satisfied the requirements of dependency.

26. Mr Saini sought to reply upon the decision in *Rahman [2012] CJEU Case-83/11* (which followed a reference to the CJEU in MR and Ors (EEA extended family members) Bangladesh [2010] UKUT 449 (IAC))

in which the CJEU considered the issue of dependency for extended family members.

27. What is important to note in relation to his submission is that *Rahman* was only concerned with the issue of dependency and not with being a member of the same household; and second, in Rahman the CJEU was not being asked about extended family members who were already in the UK seeking leave to remain here. *Rahman* was concerned with a Bangladeshi national seeking leave from Bangladesh to join an EEA national in the UK. In that context, the CJEU held that in order to fall within the definition of 'Extended Family Member' on the basis of dependency on an EEA national, there is no requirement for the applicant to reside in a country in which the Union citizen has previously resided, whether recently or at all. The term "Country from which they have come" is, in the case of a national of a third state who declares that he is a dependent of a Union Citizen, the state in which he (the third country national) was resident on the date when he applied to accompany or join the Union citizen". The CJEU went on to say that, while ties may exist without the family member and the Union citizen having resided in the same state or without there having been dependency on the Union citizen shortly before or at the time the Union citizen coming to the UK, "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."

28. The appellant is already in the United Kingdom. Suggested approaches to this question in such circumstances include (i) to proceed on the basis that the Appellant only needs to show dependency in the country he is in at the date of application, which would mean the UK if he is already here. However, Rahman was not dealing with the situation where the Appellant was already in the UK and the CJEU in Rahman was not specifically asked to rule on that question. When the Appellant is in the UK such an approach would be hard to reconcile with the wording of Article 3.2 and the EEA Regulations, (ii) to proceed on the basis that, if the Appellant must, as the Article states, show dependency in the "country from which he has come" then, in line with the broad thrust in *Rahman*, that means the last country the Appellant was resident in before she arrived in the UK and made her application, there being no requirement for the applicant to have resided in a country in which the Union citizen has previously resided (on the dependency test), or (iii) to distinguish *Rahman.* The approach by the Judge is that set out at (ii) above.

29. The Judge clearly examined the evidence of made available and the conclusion the appellant failed to establish she satisfied the requisite test has not been shown to be an irrational finding or one not reasonably available to the Judge on the evidence.

30. It is also important to note another point recorded by the earlier panel at [14] – [15] where it is written:

> 14. In respect of the issue of dependency, Mr Saini submitted that this had been accepted by First Tier Tribunal Judge Moan. His attention was

drawn to the decision of the First-tier Tribunal Judge at [38] and [39] of the First-tier Tribunal Judge's decision and [47] where the Judge stated that she was not satisfied that prior dependency had been established. Consequently, the Appellant could not qualify in any event as she did not previously live in the same household nor was she dependent on the EEA national, on the findings of the First-tier Tribunal Judge.

15. Mr Saini sought to challenge these findings, however, we indicated that we were not prepared to permit at this late stage a challenge to the findings of fact made by the First-Tier Tribunal and that it was long past the time that challenge could be made, particularly given that no reasons had been provided as to why this issue was not dealt with in the initial grounds and it was not an immediately obvious point. In effect it was an out of time application to challenge a decision on a particular point and it could not be said that the point is clearly meritorious thus we refused the application to amend the grounds of appeal.

31. No further application to amend the grounds has been made and the situation remains as set out above, that there is no challenge to the factual findings of the Judge upon which permission to appeal has been granted. No obvious point warranting consideration of what may be a further grounds of challenge has been made out.

32. I find the appellant has failed to discharge the burden of proof upon her to the required standard to show that the Judge has erred in law in a manner material to the decision to dismiss the appeal under the Immigration (European Economic Area) Regulations.

Decision

33. There is no material error of law in the Immigration Judge's decision. The determination shall stand.

Anonymity.

34. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Upper Tribunal Judge Hanson

Dated the 18 October 2018