Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: EA/02788/2016
EA/03837/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19 February 2019	**On 22 February 2019**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

MAHFUJUL ISLAM
NOOR-E-JANNAT JAHAN
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Biggs, Counsel instructed on behalf of the Appellants.
For the Respondent: Mr Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellants with permission, appeal against the decision of the First-tier Tribunal (hereinafter referred to as the "FtTJ") who, in a determination promulgated on the 20th September 2018 dismissed their appeals against the decision of the Respondent to refuse their applications for a residence card as confirmation of their right to reside in the United Kingdom on the basis of the dependency upon

the first Appellant's brother, pursuant to Regulations 8 and 17(4) under the Immigration (European Economic Area) Regulations 2016 ("hereinafter referred to as the 2016 Regulations").

2. The Appellants are citizens of Bangladesh and are husband and wife. Their immigration history is set out in the papers. The first Appellant arrived in the UK in October 2007 with leave to enter as a student valid to March 2010. He obtained leave to remain which was extended until 17 February 2015 (having been curtailed to expire on 17 February 2015 on 16th of December 2014 as a result of his Tier 4 sponsor losing its licence). The second Appellant entered the UK with leave to enter as the first Appellant's dependent spouse and was granted leave to remain in line with that of the first Appellant.

3. On 12th June 2015 applications were made by the first and second Appellants for a residence card based on the first Appellant's dependency on his brother, a Swedish national and EU citizen. The sponsor is the brother of the first Appellant.

4. In a decision made on the 19th February 2016 the Respondent refused that application. The application was considered under Regulation 8(2) of the 2006 Regulations. Whilst it was accepted that the first Appellant was related to the sponsor as claimed, the Respondent considered that the Appellants had provided insufficient evidence of dependence on the sponsor immediately prior to entering the UK as required under Regulation 8(2) (a) and there was insufficient evidence that they were residing with or had been dependent upon the sponsor since entering the UK, as required under Regulation 8(2) (c). Furthermore, the financial evidence provided was insufficient to demonstrate dependence or residence with the sponsor while the Appellants were living in Bangladesh. There was also insufficient evidence to demonstrate the sponsor was exercising treaty rights in the UK pursuant to Regulation 6. In the decision of the FtTJ at paragraph 6, he records further oral submissions made on behalf of the Respondent. It is not necessary to set them out they are a matter of record as set out in the determination.

5. The Appellants lodged grounds of appeal against that decision on 22nd March 2016. At the time of lodging the appeals, the decision of Sala (EFM's Right of Appeal) [2016] UKUT 0411 (IAC) had held that there was no right of appeal. Subsequently in the light of the decision in Khan v Secretary of State for the Home Department [2017] EWCA Civ 1755, the First-tier Tribunal set aside the decision on the basis that it was arguably wrong in law to have concluded that it did not have jurisdiction to hear the appeal.

6. The appeal came before the First-tier Tribunal on 10th September 2018. In a decision promulgated on 20th September 2018 the appeals were dismissed.

7. The judge had the advantage of hearing the oral evidence of the first Appellant and his EEA sponsor and also a further witness attended the hearing to give oral evidence. There was also a large bundle of documentary evidence submitted in support of the appeals.

8. The findings of fact and conclusions reached by the FtTJ are set out at paragraphs 15 – 42. The relevant findings of fact can be summarised as follows:-

   (1) The first Appellant had worked in the UK part-time (at [19(a)]).

   (2) The second Appellant has worked part-time in the UK until 2012. There is no evidence that the second Appellant ever studied in the UK (at [19 (c)])

   (3) The sponsor and the first Appellant lived together with their parents until the sponsor left Bangladesh to live in Sweden in 1995. The first Appellant was 15 at that time. The judge accepted the evidence that the sponsor migrated to Sweden in order to support his family in Bangladesh.The judge found that the sponsor was sending money from Sweden to Bangladesh to support his parents and siblings and that he had done so for the whole period prior to the first Appellant's departure for the UK in 2007 (at [20]).

   (4) The documentary evidence (bank statements and confirmation of transfer of funds) demonstrated significant deposits which were consistent with funds being sent from Sweden by her son. The judge found that that was used to support the first Appellant who was living in the family home in Bangladesh at that time (at [21]).

   (5) When the first Appellant applied for a student Visa, the entry clearance officer was satisfied that the sponsor's income in Sweden as at August 2007 was sufficient to enable him to support the first Appellant throughout his proposed period of study in the UK (at [22]).

   (6) The judge accepted the evidence of the witness that when he travelled to Sweden in June 2009, June 2012 and June 2013 and December 2013 he collected cash from the sponsor to give to the first Appellant on his return to the UK (at [23]).

   (7) There were documents that suggested that the sponsor's income from employment was received in Sweden, rather than UK (at [24]).

   (8) When the first Appellant arrived in the UK, the sponsor rented accommodation which was sufficient to accommodate not only the first Appellant but the sponsor. The sponsor had paid for the accommodation in the UK (at [29]).

   (9) The judge accepted that the Appellants were dependent now on the sponsor and that the second Appellant had been dependent since her arrival here as the wife of the first Appellant. The judge

found that the sponsor had supported the first Appellant financially since his arrival in Sweden in 1995 and that he had continued to do so since. He took into account that the Appellants had worked in the UK, but their earnings and part-time employment were not sufficient to cover their share of the rent and their maintenance costs. Therefore, they needed the financial support of the sponsor in order to cover essentials are living in the UK. In summary, the judge accepted that the Appellants are and have been dependent on the sponsor as they claimed (at [31]).

(10) There is no evidence the sponsor's employment or self-employment in the UK prior to 2014. The sponsor was living and working in Sweden until 2014. The judge did not find that the sponsor was residing in the UK with the first Appellant between 2007 and 2014. The sponsor was not exercising treaty rights in the UK between 2007 and 2014 (at [36]).

9. The judge concluded that the Appellants did not satisfy the Regulations and dismissed the appeals. As can be seen from the findings of fact, although the FtTJ found that the Appellants were dependent on the sponsor at what the judge considered to be the material times (as reflected a paragraph 31), the sponsor was not residing in the UK in accordance with EU law from 2007-2014 and therefore the judge considered that the Appellants were not entitled to residence cards (subject to the Respondent's exercise of discretion) pursuant to Regulations 8 (2) and 17 (4) of the 2006 Regulations (see paragraph 36 – 37 and 39 of the decision).

10. On 2nd October 2018 grounds of appeal were lodged on behalf of the Appellants and whilst permission was initially refused by the FtT permission to appeal the decision was granted on 14 January 2019 by Upper Tribunal Judge Lane.

11. At the hearing before the Upper Tribunal, it was common ground between the advocates that the decision of the First-tier Tribunal involved the making of an error on a point of law and that the correct course to adopt would be for the decision to be set aside and for the Tribunal to re-make the appeal by allowing the appeals.

12. It is therefore only necessary for me to set out why I agree with that course and to set out briefly my reasons. I am satisfied that grounds are made out.

13. Mr Biggs on behalf of the Appellants relied on the redrafted grounds that he submitted on 22 November 2018. At paragraph 4, he had set out three points which he relied upon. Firstly, the judge erred in law in concluding that the Appellant did not meet the requirements of Regulations 8 (2) and 17 (4) (a) of the 2006 Regulations by incorrectly stating that it was a requirement of those Regulations that the Appellants EEA national sponsor should be resident in the UK under the 2006 Regulations or EU law or

otherwise from 2007 – 2014 or at some point during that period. He submitted that the decision of the FtTJ was contrary to the Upper Tribunal decision in Aladeselu and others (2006 Regulations – Reg 8) Nigeria [2011] UK UT00253 as confirmed by the Court of Appeal in their decision of Aladeselu [2013] EWCA Civ 144 (see paragraphs 42 – 46 of the Court of Appeal decisions. Mr Biggs submitted that at paragraph 44 of that decision, the Secretary of State had made an important concession that there was no temporal limitation and therefore a dependent can be in the UK before or after the EEA national.

14. In support of his legal argument, Mr Biggs made further submissions by reference to the authorities cited and summarised in Aladeselu, including those of Metock, Bigia and Rahman to demonstrate that the clear approach set out in Aladeselu was correct. Thus, he submitted when applying that decision, the issue is whether at the time the FtTJ came to assess whether the Regulations were met, the sponsor was a qualified person under the 2006 Regulations (i.e, that he was exercising treaty rights) and also that the Appellants were dependent upon him and had been so dependent as required by the Regulations.

15. Mr Avery accepted that the judge erred in law when reaching the conclusion that the sponsor was required to be "resident" in the UK from 2007 – 2014 under the Regulations in the light of the decision of Aladeselu. He further accepted that there had been no challenge to the FtTJ findings of fact and as set out above, it had been found by the judge that the Appellants were dependent upon him and had been so dependent as required by the Regulations.

16. Furthermore, there was no dispute that the sponsor was exercising treaty rights from 2014 (see paragraph 40 of the FtTJ decision). Mr Biggs made reference to the "overwhelming evidence" that had been before the Tribunal as to the nature and extent of employment. In particular, in accordance with his witness statement at paragraphs 11 – 13 (page 23) there were letters from his employers (page 172), payslips, copies of the 60s for 2015 and 2016, and in relation to current employment, the bundle at pages 183 onwards provided evidence of the recent exercise of treaty rights. As to self-employment that was evidence at page 204. This was not disputed by the Secretary of State.

17. I accept those submissions made by Mr Biggs and therefore it has been demonstrated that the decision of the FtTJ involves the making of an error on a point of law. Both parties are in agreement that the decision should be set aside. It is further agreed between the advocates that in the light of the factual findings made by the judge, which have not been the subject of challenge, that the appeals should be allowed. There was only one issue outstanding that had not been addressed as recorded at paragraph 38 of the FtTJ decision, which was the requirement that the sponsor must have been an EEA national at the relevant time for prior dependency. The FtTJ did not know when the sponsor became a Swedish citizen. However, evidence has been provided before the Tribunal at this hearing to

demonstrate that he became a Swedish citizen in 1999. As accepted by Mr Avery, this did not undermine any of the factual findings made by the judge.

18. I therefore set aside the decision of the FtTJ for the reasons set out above. I remake the appeals by allowing the appeals insofar as the Respondent shall be required to consider exercising his discretion under Regulation 17 (4) as set out in the decision of Aladeselu at paragraph 52 and in accordance with the factual findings made and this decision.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law; the decision is set aside, and the appeal is remade as follows: the appeals are allowed.

No anonymity direction is made.

Signed Date 19/02/2019

Upper Tribunal Judge Reeds