



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/03294/2016

THE IMMIGRATION ACTS

Heard at Field House
On 17 June 2019

Decision & Reasons Promulgated
On 11 July 2019

Before

UPPER TRIBUNAL JUDGE FINCH
UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

MR MD MASUD RANA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S. Tauhid, Solicitor, Hubers Law

For the Respondent: Mr T. Melvin, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, Md Masud Rana, is a citizen of Bangladesh, born on 7 September 1989. He appeals against a decision of First-tier Tribunal Judge Adio promulgated 14 November 2018 dismissing his appeal against the decision of the respondent dated 7 March 2016 to refuse his application for a residence card as the extended family member of an EEA national.

Factual background

2. The appellant entered the United Kingdom on 25 October 2009 with a student visa valid until 31 December 2011. He was granted further leave in that capacity until 30 September 2015. On 24 March 2015 the appellant's leave was curtailed. On 25 September 2015, the appellant applied for an extended family member residence card. That application was refused, and it is that refusal decision which the appellant appealed to Judge Adio, and which is under consideration in these proceedings.
3. The appellant claims to have been dependent upon his uncle, Enamul Hassan Tipu, a citizen of Italy ("the sponsor"), in Bangladesh, and at all material times since his arrival in this country in 2009. He provided evidence of various remittals made by his uncle in his favour from Italy to Bangladesh, and contended that he has been dependent upon him ever since. As such, it is the appellant's case that he is entitled to a residence card under regulation 8(2) of the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations").
4. Judge Adio did not accept the appellant's evidence that he had "lived with his uncle" in Bangladesh. The judge also had some credibility concerns about remaining elements of the claimed dependence on the sponsor. He found that there was no satisfactory documentary evidence to support the claimed remittances of £2,000 from the sponsor in favour of the appellant for his education in Bangladesh. In relation to the position in the United Kingdom since the appellant's arrival, the judge found that any money that had been provided was in the form of "top up money rather than total dependency". The judge had concerns over discrepancies between the address at which the appellant claimed to be dependent upon his uncle in this country, which contrasted with the sponsor's details the appellant had provided to the respondent. The judge accepted that the appellant is currently a member of his sponsor's household in this country, but found that the appellant had only been "partially financially dependent" on the sponsor since his arrival here.

Permission to appeal

5. Permission to appeal was granted by a Deputy Judge of the Upper Tribunal on the grounds that the judge arguably erred in his treatment of the appellant's living arrangements prior to his arrival in this country. The appellant's written evidence, and that of the sponsor, was that the appellant lived *in* his uncle's house in Bangladesh. By contrast, the judge's summary of the appellant's evidence, and that of the supporting witnesses, was that the appellant lived *with* the sponsor in Bangladesh. The judge found that the appellant did not live with the sponsor in Bangladesh and questioned the credibility of the remainder of the appellant's case accordingly. This was arguably a mistake, since it had never been part of the appellant's case that he lived with his uncle, but rather that he lived in a home owned by his uncle.
6. The permission judge was "disinclined" to grant permission on the second ground, namely that the judge erred in relation to finding that there was no "satisfactory"

evidence of the claimed financial transfers prior to the appellant's arrival in this country. Permission to appeal was granted on both grounds.

Rule 15(2A) application

7. Mr Tauhid applied to adduce additional documents under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008, namely better copies of the remittances in favour of the appellant from the sponsor (via the sponsor's sister) in 2009. The application does not have the required explanation under paragraph (2A)(a)(ii) explaining why these documents had not been submitted to the First-tier Tribunal in this form. The copies of these documents provided to Judge Adio amounted to no more than rectangular blocks of grey, such was the poor quality of photocopying.
8. The application purports to rely on Ladd v Marshall [1954] 3 All ER 745 as authority for the proposition that this new evidence should be admitted. We do not consider any of the three criteria in that well-known case to be met.
9. First, it is not possible to say whether the new evidence could not with reasonable diligence have been obtained for use at the original hearing. As stated above, there is no explanation as to why the original documents had not been copied with greater accuracy or provided in their original form to Judge Adio, still less an explanation as to why they were not provided in this form originally.
10. Secondly, the new evidence is not such as to have a significant impact on the outcome of the proceedings, for the reasons outlined below. It is not necessary to consider the third criterion, namely that the new evidence is apparently credible, as the application fails to pass the first two hurdles.
11. In the absence of any explanation as to why these documents have been provided at such a late stage, we consider the delay to be unreasonable (see rule 15(2A)(b)). This is a further reason not to admit the evidence.
12. We do not, therefore, propose to admit this new evidence. If admitted, it would only be relevant to any decision we took to remake the appeal, if we were satisfied that a material error of law were present. For the reasons outlined below, there are fatal flaws in the appellant's case which mean that it is not possible for this appeal to succeed on any basis.

Submissions

13. Mr Tauhid submits that the judge erred at [17] of his decision by stating that there was "no documentary evidence to support the £2000 given to the appellant for his education", when in fact such evidence existed at pages 69 to 70 of the appellant's bundle. There is no merit to this ground. The judge's remarks at [17] must be viewed alongside his concerns that the quality of that documentary evidence; at [19], the judge said there was no "satisfactory" documentary evidence concerning the claimed transfers. He repeated that finding later on in the same paragraph: "there is simply

no satisfactory evidence that any money was transferred to the appellant whilst he was living in Bangladesh”.

14. Mr Tauhid also relies on the grounds concerning the judge’s mistake concerning the evidence surrounding the appellant’s living arrangements in Bangladesh. The appellant’s evidence was that he lived in his uncle’s house, not that he lived with his uncle. As such, the judge erred when finding that the appellant’s case lacked credibility on account of inconsistencies surrounding this issue.
15. The presenting officer submitted that Judge Adio’s analysis did feature some confusion, but that ultimately he reached the decision which was open to him on the evidence.
16. At the hearing, we asked Mr Tauhid to confirm when the sponsor became an Italian citizen. Documents contained in the appellant’s bundle suggested that this was in September 2014. After taking instructions, Mr Tauhid confirmed that this was the position: the sponsor became an Italian citizen in September 2014.
17. Mr Tauhid sought to rely on Rahman and Others Case C-83/11 as authority for the proposition that the appellant met all requirements of dependency upon a Union citizen. In response, the presenting officer submitted that even if dependency in Bangladesh were established, it would not be possible for the appellant to succeed in these proceedings. The requirement for dependence is predicated upon the sponsor being a Union citizen at the relevant time. Dependency must exist in the country of origin, and continue in the host member state. Taking the appellant’s case at its highest, submits the presenting officer, it is not possible for this appellant to have been dependent on a Union citizen prior to his arrival in this country, for the simple reason that it was not for a further five years until the sponsor even became an EEA national. The presenting officer accepted that arguments on this issue were not canvassed before Judge Adio, but nevertheless submitted that it was a relevant consideration.

Legal framework

18. This appeal is governed by the 2006 Regulations, the decision under challenge having been taken prior to the making and coming into force of the Immigration (European Economic Area) Regulations 2016.
19. To qualify for a residence card as an “extended family member”, it is first necessary to meet the criteria contained in regulation 8(2) of the 2006 Regulations. At the relevant time, that paragraph provided:
 - “(2) 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 paragraph (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.”

20. If a person meets the criteria to be categorised as an "extended family member", there are two further conditions before a right to reside will be conferred. First, the EEA sponsor must be a "qualified person" under the 2006 Regulations, pursuant to the criteria set out in regulation 6. This is often termed "exercising Treaty rights", given the entitlement to do so conferred by the EU Treaties. Secondly, it must, in all the circumstances, be appropriate to issue a residence card. See regulation 17(4).

Analysis

21. We agree that the judge appears to have erred in relation to his treatment of the appellant's evidence concerning his living arrangements in Bangladesh. The appellant in his statement, and in additional oral evidence before the judge, said that he lived in a home owned by his uncle, the sponsor, in Bangladesh. The judge's record of proceedings records the appellant as having given additional evidence in chief to that effect. As such, the judge does appear to have erred in the way he recorded the additional evidence in chief at [6] when he stated that the appellant said he lived with his uncle. Similarly, the judge appears to have erred when blurring the distinction in relation to the evidence given by the appellant's mother.
22. The above error was not material, for three reasons.
23. First, it is necessary for the claimed dependence to have commenced in Bangladesh, and to have continued in this country. The requirement for dependence is continuous. At [18], the judge addressed the claimed dependency in this country. The judge noted that the appellant had worked and supported himself at times while living in the United Kingdom. He stated that the financial support from the sponsor was in the form of "top up money". There had been a large payment into the appellant's account at around the time of the application. The judge found that that was either a gift, or an amount "to try and show dependency by the appellant". The judge expressed concern at the addresses provided by the appellant, which were not consistent with those he had given to the respondent. The judge did accept that the appellant is currently a member of the sponsor's household, but that cannot take matters any further. The judge found the appellant to have been partially financially dependent on the sponsor, but not at all material times. These findings were not impugned by Mr Tauhid; the grounds of appeal went only to the Judge's treatment of the appellant's living arrangements in Bangladesh, and the financial remittances covering that period.
24. In isolation, the above findings of Judge Adio would be a sufficient basis upon which to dismiss the appellant's case, even putting aside the issue concerning the claimed dependency in Bangladesh.
25. Secondly, we do not consider the judge to have erred in relation to his treatment of the remittances to the sponsor's sister, for onward transmission to the appellant, in

Bangladesh. The judge properly had regard to the quality of the evidence provided to him, namely two large blocks of greyscale with no apparent detail, at pages 69 to 70 of the appellant's bundle. It was entirely within the range of responses open to the judge to find that such evidence was not "satisfactory". We agree with the views of the judge granting permission that there is no merit to this ground.

26. Thirdly, and most significantly, it is not possible for the appellant to succeed as an extended family member in relation to his dependence on the sponsor, even were the case that the above deficiencies were not present. This is because the sponsor only became an EEA national in September 2014. The requirement for dependency in the country of origin presupposes that the person upon whom an applicant is dependent is an EEA national.
27. Mr Tauhid's reliance on Rahman does not take matters any further; indeed, it confirms that the appellant cannot succeed on this factual matrix. That case concerned whether the requirement of prior dependency upon a Union citizen must have existed in the Union citizen's Member State of origin, before the Union citizen exercised free movement rights to reside in the host Member State. The Court held at [31] that there is nothing in Directive 2004/38/EC (the EU regime implemented by the 2006 Regulations) which meant that the dependent extended family member must have resided in the same country as the Union citizen prior to the latter's move to the host Member State. The Court, however, was clear at [33] that, "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". So much is clear from the second operative paragraph of the judgment's conclusions:
- "2. In order to fall within the category, referred to in Article 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."
28. Inherent to the above approach is the fundamental requirement that the prior dependency must be in relation to a Union citizen (or, in the parlance of the 2006 Regulations, "an EEA national"). There is no scope for dependency in the country of origin to be in relation to another third country national who later naturalises, but only after the putative third country family member has also moved to the host Member State. What Rahman emphasises is the requirement for dependence upon a Union citizen to exist in the country of origin. Where, as here, there is claimed dependency upon a third country national, that is a situation that is wholly outside the scope of Directive 2004/38/EC and the 2006 Regulations.
29. Were it the case that the appellant had been dependent in Bangladesh on the sponsor *after* the sponsor's acquisition of Italian citizenship, the position may be different. However, as the appellant had moved to the United Kingdom some five years before the sponsor became an EEA national, it follows that the requirement of prior

dependency on an EEA national in the country of origin cannot, by definition, be met.

Conclusion

30. Although Judge Adio erred in relation to the appellant's living arrangements in Bangladesh, that was not a material error. The judge found that there was no continued dependency in this country. In addition, taken at its highest, the case for the appellant could never succeed as the sponsor was not an EEA national at the material times. The appeal is dismissed.

Notice of Decision

This appeal is dismissed and the decision of Judge Adio is upheld for the reasons given above.

Signed *Stephen H Smith*

Date 28 June 2019

Upper Tribunal Judge Stephen Smith