



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

Appeal Numbers: EA/04380/2018
EA/04883/2018
EA/03887/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 18th March 2019**

**Decision & Reasons Promulgated
On 17th April 2019**

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

**MR SOLOMON AMPONSAH
MR MICHAEL OSEI ANTWI
MR DAVID OSEI ANTWI
(ANONYMITY DIRECTION NOT MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr M Murphy instructed by Krishmorgan Solicitors
For the Respondent: Ms S Jones, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellants are citizens of Ghana born in May 1980, November 1989 and August 1991. They appeal against the decision of First-tier Tribunal Judge S J Clarke dated 13 November 2018 dismissing their appeals against the refusal of residence cards as confirmation of rights of residence under Regulation 7 of the Immigration (EEA) Regulations 2016.

2. The Appellants appealed on the basis that they satisfied Regulation 8(2). The judge found that they lived with the Sponsor in Italy prior to coming to the UK and they shared a house in the UK. Permission to appeal was granted by Upper Tribunal Judge Saffer on 27 January 2019 for the following reasons: "It is arguable that in light of the judge's findings at [19, 20] of household membership both in Italy and here, that Regulation 8(2) of the Immigration (EEA) Regulations 2016 (sic), the appeal should have been allowed.
3. The Appellants made applications under Regulation 7 of the 2016 Regulations as family members who, although over the age of 21 were still dependent on their father, the Sponsor. It was accepted he is an Italian national exercising Treaty rights. The application was refused on the ground that the Appellants had failed to show that they were dependent. The Appellants' previous application was refused and dismissed on appeal.
4. The judge considered the earlier decision and the evidence currently available and stated at paragraph 5: "At the beginning of the hearing Mr Murphy confirmed that the only issue before me in respect of all three Appellants was dependency pursuant to Regulation 7(1)(b) of the Regulations. The Appellants claim they are dependent on the Sponsor and that they are entitled to a residence card pursuant to the 2016 Regulations." The judge concluded that they were not dependent and dismissed the appeals.
5. Permission to appeal to the First-tier Tribunal was sought on the grounds that the judge failed to consider Article 8. This was quite rightly refused following Amirteymour [2017] EWCA Civ 353. The application for permission was renewed to the Upper Tribunal by Mr Murphy on the following grounds:
 - "8. The Judge stated that Counsel who appeared before her and who is drafting these grounds stated that the only issue in the appeal was in relation to regulation 7.
 9. However, Counsel did not intend to shut out the Appellants' rights under regulation 8, and specifically referred and relied upon the below mentioned authority of Dahou (sic) which of course goes to Regulation 8.
 10. Therefore, focusing on Regulation 8, the judge acknowledged the evidence of the Appellants that they all lived together with their father in Italy from 2008 to 2016. See paragraph 12.
 11. The judge acknowledged the evidence that the Appellants came to the UK with their father on 8 February 2016. See paragraph 16.
 12. The judge found that the sponsor was exercising treaty rights had been exercising treaty rights whilst in the UK, see paragraph 16.
 13. At paragraph 19, the judge was satisfied that the family lived together in Italy at the same address and that they lived there for 10 years.

14. At paragraph 20, the judge accepted that the Appellants lived together with the Sponsor at an address in Derby, since they came to the UK.
15. Beyond these findings the judge merely concentrated on whether the Appellants were financially dependent upon their father whilst in the UK, see for example paragraph 31
16. At paragraph 32, the Judge considered the case law on dependency.
17. At paragraph 33, the Judge directed himself that on the balance of probabilities the Appellant were not dependent on upon their Sponsor.
18. Having done so, she dismissed the appeal.
19. However, for the Appellants to be successful, they did not have to show dependency, but that they were part of the same household, and that they had been part of the same household whilst in Italy.
20. The judge erred in law by failing to consider if the Appellants could succeed under Regulation 8(2) which states....
21. The Judge having accepted that the Appellants were part of the same household in Italy and in the United Kingdom, should have allowed the appeal, see Dauhoo (EEA Regulations - reg 8(2)) [2012] UKUT 00079 (IAC).

Submissions

6. Mr Murphy relied on Dauhoo and submitted it was a case dealing specifically and only with Regulation 8(2). He submitted that this case was before the judge and therefore it was incumbent on the judge to deal with Regulation 8. It was relied on by the Appellant even if submissions were not made in relation to Regulation 8. The point was Robinson obvious. It was Mr Murphy's case that, although the judge stated that the issue was Regulation 7, it was not the case that he was not relying on Regulation 8 and somehow, he and the judge had got their wires crossed.
7. Mr Murphy submitted it was not relevant that the application had been made under Regulation 7. If the Appellant had a right to reside under Regulation 8 then the judge was seized of the matter and had to deal with that issue. The judge accepted the Appellants lived together with the Sponsor in Italy and they lived together in the UK in Derby. On a proper application of Dauhoo, the Appellants' appeals succeed under Regulation 8.
8. Ms Jones submitted that there was no error of law and the judge was entitled to dismiss the appeal under Regulation 7. The only issue before her was Regulation 7(1)(b). Although paragraph 8 of the grounds state that Counsel representing the Appellant did not intend to shut out rights

under Regulation 8 that did not suggest that Regulation 8 was specifically argued before the judge. Submitting a case which dealt with Regulation 8 was not enough. It was possible to submit a case and not rely on relevant argument therein.

9. There was no error of law in the judge's decision because the appeal had been argued only under Regulation 7 and any error was the fault of Counsel for failing to argue Regulation 8. Since the matter was not put forward under Regulation 8 either on application or before the judge then the case could not be argued on that basis. Ms Jones had no submissions to make on the Robinson obvious point. There was no challenge to the judge's findings and the Appellants' appeals should be dismissed.
10. Mr Murphy submitted that this was not a case where there were numerous authorities before the judge which were then not properly argued. There was no challenge to the judge's findings. There were clear findings that the Appellants lived with the Sponsor in Italy and in the UK. There were no reasons for the Respondent to resist this appeal because on the facts the Appellants satisfied Regulation 8. The appeals succeeded on that basis.

Discussion and Conclusions

11. The Appellants applied for residence cards as confirmation of rights of residence as family members of the Sponsor, their father, under Regulation 7. They appealed the refusal of a residence card under Regulation 7. There was no mention of Regulation 8 in the grounds of appeal before the judge. The Appellants' skeleton argument which was submitted for the appeal hearing made no reference to Dauhoo or Regulation 8 and there appears to have been an agreement at the start of the hearing that the only issue was dependency under Regulation 7(1)(b).
12. It was submitted by Mr Murphy that, notwithstanding what was agreed at the beginning of the hearing, he relied on the case of Dauhoo in submissions and therefore he had not intended to prevent the Appellants succeeding under Regulation 8(2). It was irrelevant that the application was not made under Regulation 8 and that permission to appeal against the decision was not initially sought on that ground. Mr Murphy had not made the earlier application for permission to appeal.
13. The record of proceedings states at the very beginning "issue is dependency 7(1)(b)". The judge then deals with the evidence, all of which relates to the issue of dependency under Regulation 7(1)(b). The record of proceedings refers to the Appellants' skeleton argument and the case of Dauhoo referring to "four ways can get home prior ... [illegible] ... prior member and present mem. No finding by judge on ... [illegible] ... [illegible] ... not challenged by HO. Subs allow the appeal."

14. The record of proceedings does demonstrate that the case of Dauhoo was relied on by Mr Murphy in his submissions and it acknowledges the content of the decision which deals with the four ways in which an applicant can satisfy Regulation 8. It is understandable that the judge failed to deal with Dauhoo or Regulation 8 in her decision, given that, at the start of the hearing, it was agreed that the issue was Regulation 7(1)(b). The judge dismissed the appeal on that issue. There was no error of law in the decision to dismiss the appeal under Regulation 7.
15. In the circumstances, it is very difficult to see what was actually argued before the judge. Mr Murphy assures me that he referred to his note of proceedings when drafting the grounds of appeal, although he had not thought to submit his note in relation to this appeal hearing.
16. However, on the evidence that I have, it is clear that the case of Dauhoo was put before the judge and that case deals only with Regulation 8. As such I am satisfied that it was a live issue before the First-tier Tribunal and one which the judge should have dealt with. The factual situation confers rights on the Appellants regardless of whether those rights are evidenced by residence cards. The judge found at paragraph 30:

“There is evidence before me, which I accept, that the Appellants and Sponsor lived together in Italy and they share a house in Derby. However, it was equally clear that the Appellants are adult young men who are forging their own independent lives and are able to do so.”
17. There was no challenge to the finding of prior membership and previous membership of the household and therefore the Appellants satisfy Regulation 8. Given that the grant of a residence card to an extended member is a matter of discretion for the Secretary of State and an application was not made under Regulation 8, then the appeal can only be allowed insofar as the Appellants satisfy Regulation 8 and it is a matter for the Secretary of State whether to exercise discretion under Regulation 17(5) of the 2016 Regulations.
18. Accordingly, I find that the judge erred in law in failing to address the issue of Regulation 8. I set aside her decision and remake it. The appeal is dismissed under Regulation 7. I allow the appeal insofar as the Appellants satisfy Regulation 8. No anonymity direction is made.

J Frances

Signed

Date: 15 April 2019

Upper Tribunal Judge Frances

TO THE RESPONDENT

FEE AWARD

I have considered making a fee award and have decided to make no fee award because the Appellants have not succeeded in their appeal under Regulation 7. Regulation 8 was raised only on appeal to the Upper Tribunal and it was not clear whether it was fully or properly argued before the First-tier Tribunal.

J Frances

Signed

Date: 15 April 2019

Upper Tribunal Judge Frances