Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/06416/2016

THE IMMIGRATION ACTS

Heard at Field House
On 11th March 2019

Decision & Reasons Promulgated
On 21st March 2019

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

MR MATEE UR REHMAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr P Turner instructed by Diplock Solicitors
For the Respondent: Mr I Jarvis, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, a national of Pakistan born on 12th January 1984 appealed the determination of First-tier Tribunal Monson, promulgated on 20th December 2018 which dismissed his appeal against the Secretary of State's decision refusing his application for a Residence Card as an Extended Family Member ('OFM') of an EEA national under the Immigration (European Economic Area) Regulations 2016.

2. The appellant had entered the United Kingdom on 16th September 2011 and applied on 18th November 2015 for a residence card. His application

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was refused on 13th December 2016. It was asserted that he had not shown sufficient evidence of dependency on the sponsor (or membership of a household) prior to entering the United Kingdom as required by Regulation 8(2) (a) of the Immigration (European Economic Area) Regulations 2016. Initially the matter was rejected by the First-tier Tribunal on the grounds the appellant had no right of appeal. That was challenged and the matter came before First-tier Tribunal Judge Monson.

3. The appellant sought permission on two grounds

(i) The judge stated at [32]

> *'I find the sponsor joined the appellant in the United Kingdom three years after the appellant had entered the United Kingdom as a student. I find that the reverse is not true: it is not true that the appellant 'has joined the EEA national in the United Kingdom' as required by Regulation 8(2)(c)' …*

At [34] the judge determined

> *'since the appellant had come to the United Kingdom as a student, rather than joining the sponsor in Spain as a dependent family member, the objective of maintaining the unity of the family in a broader sense' has not been triggered. Put another way, it is no accident that Regulation 8(2) requires the OFM to accompany the sponsor to the host state, or to join the sponsor in the host state, rather than the sponsor being able to generate a right of residence, because the latter scenario is inconsistent with the notion that the OFM and the sponsor are part of a family unit which needs to be maintained in order not [to] frustrate the sponsor's exercise of free movement right'*

The grounds of appeal to the Upper Tribunal argued that the judge had erred in law and reliance was placed on **Aladeselu and others (2006 Regs-reg 8) Nigeria** [2011] UKUT 00253 (IAC) which held

> *'1. For the purposes of establishing whether a person qualifies as an Other Family Member (OFM)/extended family member under regulation 8 of the Immigration (European Economic Area) Regulations 2006, the requirement that they accompany or join the Union citizen/EEA national exercising Treaty rights must be read as encompassing both those who have arrived before and those who have arrived after the Union citizen/EEA national sponsor'.*

The judge erred in holding that the appellant could not meet regulation 8 because he arrived in the United Kingdom before the sponsor.

(ii) Although the judge made the findings at [32] to [34] he nonetheless made further findings which were inconsistent

4. Permission to appeal was granted in the following terms

> *'It was arguable that the judge erred in the construction of Regulation 8 in view of the above case law. It is also arguable that the point is not resolved (Rahman [2012] CJEU Case -83/11'.*

5. At the hearing before me Mr Turner submitted that it was a 'red herring' as to which party entered the United Kingdom first and that the matter should be remitted to the First-tier Tribunal. He further argued that the judge should have granted an adjournment on the point of when the EU national obtained his EEA status. It was not clear when the sponsor had obtained Spanish nationality.

6. Mr Jarvis agreed that the judge's approach was not consistent with **Aladeselu** but there was no interplay between that direction and the later findings of the judge that there was no consistent evidence as to when the EU national acquired Spanish nationality. At paragraph 35 the judge assessed the evidence. It was not open to the legal representative to argue outside the terms of the permission grant and in relation to the adjournment point. There was no substance to that complaint. The appellant needed to adduce evidence by way of legal submission and that was not addressed. There was no indication as to how the law in Spain worked on the acquisition of nationality. At paragraph 38 there was a clearly lawful disposal of the appeal.

7. Mr Turner advanced that the findings were unclear and that the last sentence of paragraph 38 did not undermine the sponsor's evidence. The paragraph should be read backwards. The judge conflated the date of issue with the acquisition of the right and misinterpreted a key piece of evidence and much of the law. There was a fundamental mistake and the findings unsafe.

Analysis and conclusion

8. Judge Monson found that 'it is not true that the appellant 'has joined the EEA national in the United Kingdom' as required by Regulation 8(2)(c). That analysis did not take into account **Aladeselu** which I have cited above, in other words *the requirement that the appellant accompany or join the Union citizen/EEA national exercising Treaty rights must be read as encompassing both those who have arrived before and those who have arrived after the Union citizen/EEA national sponsor'.* That held that the appellant could enter first. Nonetheless, the EU national must be exercising treaty rights at the relevant time.

9. That, however, was not the end of the analysis. The judge went on to state at [34] that the appellant had come to the United Kingdom as a student and at [36]

> *'the difficulty for the appellant is that he did not enter the United Kingdom as the dependant of his sponsor. Accordingly following **Ihemedu** the appellant cannot expect any relaxation in the*

> *burden of proof that applies to him when seeking to establish an EEA right'.*

The critical passage is this at [37]

> *'The appellant has wholly failed to bring forward cogent evidence that is in part documented to show that at the time of entry in September 2011 his sponsor had acquired Spanish nationality, let alone that he was an extended family member of the sponsor by virtue of a <u>background of continuing financial dependency on the sponsor</u> stretching back many years' [my underlining]*

10. As submitted by Ms Jarvis, the sponsor did not give consistent evidence on the topic of <u>when</u> he acquired his Spanish nationality. The judge recorded at [38]

> *'He initially stated that he became a Spanish national in 2012, which accords with the information given in his Spanish passport. It also accords with his oral evidence that it took 3.5 years for his citizenship application to be processed. Three-and-a-half years from 2009 accords with the date of issue of the Spanish passport. His subsequent claim that he received an acknowledgement letter in 2011 which confirmed that his citizenship application had been approved is clearly inconsistent with his initial evidence. It is also undermined by the fact that his passport was not issue to him until 11 May 2012'*.

11. The difficulty for the appellant is that the judge clearly found that there was inconsistent evidence as to when the Sponsor acquired EU citizenship. The judge directed himself correctly with regard **<u>to Ihemedu (OFMs – meaning) Nigeria [2011] UKUT 00340(IAC)</u>** and **Moneke (EEA – OFMs) Nigeria [2011] UKUT 00341(IAC**) which held that a person claiming to be an 'other family member/extended family member' may either be a dependant or a member of the household of the EEA national: and in either case the prior dependency or membership of the household must be on a person who is an EEA national at the material time. There must be prior dependency or member of the household prior to the <u>appellant's</u> arrival in the United Kingdom although it is open to the EU national to join him later.

12. **<u>Dauhoo (EEA Regulations – reg 8(2))</u> <u>[2012] UKUT 79</u> (IAC)**

> *'Under the scheme set out in reg 8 (2) of the Immigration (European Economic Area) Regulations 2006, a person can succeed in establishing that he or she is an "extended family member" in any one of four different ways, each of which requires proving a relevant connection both prior to arrival in the UK and in the United Kingdom'*

<u>Rahman [2012] CJEU</u> Case-83/11 held that

> *'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'***.**

13. The appellant in this instance came to the United Kingdom in September 2011 and could not have been dependent on an EEA national if the sponsor at that time did not have Spanish citizenship. The question of when his citizenship became 'effective' was asked and the sponsor's passport was issued in May 2012. The appellant arrived in the United Kingdom as a student, without mention of the sponsor, on 16th September 2011. The sponsor gave evidence that he supported the appellant until 2011 and the letter referring to 'approval' of the Spanish citizenship was not produced. As to the citizenship, the only documentary evidence was the passport and that post-dated the relevant time for dependency. That is the point the judge is making when identifying that the examination of the evidence will not be relaxed. In effect it was not made out that the dependency, if any, was prior to the Sponsor demonstrating that he had acquired Spanish citizenship and exercising treaty rights. It was also open to the judge to find that the 'prior dependency in Pakistan' was not made out.

14. Permission to appeal was limited to grounds as pleaded – and concentrated on ground (i). I am not persuaded that the findings related to ground (i) have influenced the findings with regard dependency and as I have discussed above. Although the judge stated it was not strictly necessary to consider the point of dependency, he did so and in manner open to him on the evidence. The judge stated that the letter confirming the approval of his citizenship in 2011 was inconsistent with his previous evidence. That letter was not however produced, and Mr Turner confirmed that the letter was not available. It was not only this point on the inconsistency of the Sponsor's evidence which attracted the judge's attention. The sponsor's and Mr Butt the witness's evidence was at variance over where the sponsor actually resided in Spain or the United Kingdom. He also was found to contradict himself as to the method of funding of the appellant between 2005 and 2011 [41].

15. The judge was entitled to find that the appellant had not discharged the burden of proof with regards dependency and the challenge does not disclose a material error of law.

16. Mr Turner also attempted to argue that the judge should have adjourned the proceedings to allow the sponsor to produce evidence of the date of his acquisition of citizenship. That was not a ground of appeal before me and I did not permit Mr Turner to pursue that ground of argument. The appellant was legally represented, the respondent's decision had been given on 13th May 2016. There had been ample time to collate evidence.

17. For the reasons given above I find there is no error of law in the First-tier Tribunal determination and that decision will stand.

Signed Helen Rimington Date 11th March 2019

Upper Tribunal Judge Rimington