



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

Appeal Number: EA/07411/2018

THE IMMIGRATION ACTS

**Heard at Birmingham Justice Decision & Reasons Promulgated
Centre
On 17th February 2020 On 9th April 2020**

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

**KULJIT SINGH
(NO ANONYMITY DIRECTION MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Azmi, Counsel instructed by Charles Simmons

For the Respondent: Mr A McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of India. He was admitted to the UK as the family member of an EEA national with an EEA family permit valid from 6th April 2018 to 6th October 2018. On 22nd September 2018, the appellant sought a Biometric Residence Card. On 2nd November 2018, the respondent refused to issue a residence card as confirmation of a right of residence. The appellant's appeal against that decision was dismissed by First-tier Tribunal Judge Lodge for reasons set out in a decision promulgated on 14th June 2019.

The background

2. The appellant had previously applied for an EEA family permit to join Mr Harminder Pal Padda, a German national, in the UK. Although the Tribunal has not been provided with a copy of the application made by the appellant, or the respondent's decision, it appears the application was refused by the respondent for reasons set out in a decision dated 3rd February 2017. The appellant appealed that decision and the appeal was allowed by First-tier Tribunal Judge Greasley for reasons set out in a decision promulgated on 27th February 2018. At paragraphs [3], [6] and [7], FtT Judge Greasley summarised the claim made by the appellant in the following way:

"3. The appellant applied for an EEA family permit to join his brother-in-law Mr Harminder Pal Padda, a German national. The application, together with all supporting documentation, was considered, but on 3 February 2017 a notice of immigration decision, together with the reasons for refusal letter, was issued to the appellant refusing the application.

...

6. In a witness statement, the appellant stated that he was an Indian citizen who had lived alone in India, his mother having died in August 2008 due to a brain haemorrhage and his father having died in 2013 due to a heart attack. The appellant's close family members were his sister, brother-in-law, and their children, who lived in the United Kingdom.

7. The appellant described how he had applied as a dependent to join his relatives in the United Kingdom, but this had been refused. The respondent claimed the appellant had failed to provide proof of the relationship, financial support, and the nationality of the sponsor. The appellant stated that as proof of the relationship, he had enclosed his father's death certificate and his sister's father's death certificate, which showed that they had the same parents. In relation to financial support, the appellant also provided his bank statement the Punjab National Bank in which money transfers were clearly identifiable from his family in the United Kingdom. In relation to nationality, the appellant also provided the sponsors passport copies, and the sponsorship declaration, which had been made jointly by his brother-in-law and sister, dated 23 November 2016."

3. FtT judge Greasley heard evidence from the sponsor, Mr Harminder Pal Padda. At paragraphs [15] to [17] of his decision, FtT Judge Greasley concluded:

"15. In the absence of a Presenting Officer, I find that all of the evidence before the tribunal is effectively unchallenged. I accept that there is credible and reliable evidence from the appellant's sponsor Mr Padda that he is genuinely related to them. Mr Padda provided his

original German passport for examination at the hearing. He indicated that he had lived and exercised treaty rights in Germany for 15 years before travelling to the United Kingdom. There is no adverse immigration history known about the sponsors.

16. I also find that there is credible and further unchallenged evidence indicating that the UK-based sponsors have provided financial support to the appellant in India over number of years (*sic*).

17. They have provided bank details not only in relation to the appellant, but also their own. I also find there is a credible explanation as to why they have sought to support the appellant, not only financially, but also emotionally as well, following the death of both of his parents.”

4. The appeal was allowed by FtT Judge Greasley and the appellant was granted an EEA family permit valid until 6th October 2018.
5. In the subsequent decision of the respondent dated 2nd November 2018, refusing the application for a residence card to confirm the appellant is an extended family member of an EEA national exercising treaty rights in the UK, the respondent claimed the appellant is not related to his sponsor (*the EEA national*), and his relationship is with the EEA national’s spouse, and the appellant is unable to rely on Regulation 8 of the Immigration (European Economic Area) Regulations 2016 (“the 2016 Regulations). Furthermore, the respondent stated, without elaboration:

“ It is noted that you were issued with a EEA family permit on 06 April 2018 in order to join your sponsor in the UK, however as this document was issued incorrectly, this department is unable to confirm any current right to reside under the EEA Regulations.”

6. The appellant’s appeal was heard by FtT Judge Lodge on 5th June 2019 and dismissed for reasons set out in a decision promulgated on 14th June 2019. The evidence received by the Tribunal is set out at paragraphs [6] to [19] of the decision. There was considerable focus upon the nature of the relationship between the appellant, Mrs Kuldip Kaur Padda and Mr Harminder Pal Padda. At paragraph [22] of his decision, the judge summarises the respondent’s position:

“The respondent’s position is that the appellant has not established that he is related to the sponsor. He is related to the sponsor’s wife. Under Regulation 8(7), he cannot rely on their relationship under the 2016 regulations. The respondent had that the EEA family permit issued on 6th April 2018 was issued incorrectly.”

7. At paragraph [27], FtT Judge Lodge states:

“Judge Greasley allowed the appellant’s appeal against a decision refusing him the grant of an EEA family permit to join his brother-in-law

in the UK. It is clear and not contested (indeed not contestable) that Judge Greasley was under the impression that the appellant was the brother of the sponsor's wife. At paragraph 7, Judge Greasley writes "The appellant stated that as proof of the relationship, he had enclosed his father's death certificate and his sister's father's death certificate which showed they had the same parents". That statement can only mean that the appellant's father and his sister's father had the same parents.

8. At paragraph [30] of his decision the Judge concluded that FtT Judge Greasley was approaching the matter on the basis that the appellant was the brother of the sponsor's wife and not on the basis that they were cousins. FtT Judge Lodge concluded at paragraphs [33] to [35] as follows:

"33. Looking at the evidence, I am satisfied that the appellant obtained his initial EEA family permit on the basis of the assertion that he was the brother of the sponsor's wife when in fact he is the cousin of the sponsor's wife. I am satisfied that all the witnesses were being disingenuous and using a meaningless expression like cousin sister and cousin brother to cover up the fact that they had deliberately been misleading in their initial application. I am obliged to take note that the grounds of appeal (paragraphs 4A-4D in the appellant's bundle) speak of the appellant being a direct family member of the sponsor and the sponsor being the appellant's brother-in-law and his wife being the appellant's sister. Those grounds of appeal were settled on 19th November 2018. It would appear that even at that date, the appellant's solicitors were unaware of what is now said to be the true relationship.

34. I am satisfied that the determination of Judge Greasley cannot stand as it was based on the finding that the appellant is the sponsor's brother-in-law and the sponsor's wife is his sister. Miss Rands submitted in closing that there is no reliable evidence to establish any relationship between the appellant and sponsor. I am satisfied that in the absence of Judge Greasley's determination, I am not prepared to rely on the oral evidence of the appellant and his witnesses. I am therefore left with no evidence to establish the relationship between the appellant and sponsor.

35 In any event, even if the appellant had established that the sponsor is his brother-in-law, having regard to Regulation 8(7) and the fact that he was never issued with an EEA document prior to 1st February 2017, he is not entitled to rely on the previous definition of an extended family member."

The appeal before me

9. The appellant claims FtT Lodge focused extensively on the credibility issue concerning the use of the words "cousin" and "brother" to describe the relationship between the appellant and Mrs Kuldip Kaur Padda. The judge appears, at [33], to conclude that the appellant is the cousin of the sponsor's wife (*i.e. the cousin of Mrs Kuldip Kaur Padda*), and thus,

although not a direct relative, falls within the definition of “*any other family member*” as provided for in Article 3(2) of Directive 2004/38/EC of the European Parliament and of the Council (“the Citizens Directive”).

10. Permission to appeal was granted by Upper Tribunal Judge Stephen Smith on 10th October 2019. He noted:

“The Judge found that the appellant was not an “extended family member” because he was the cousin of the spouse of the EEA sponsor; see [35]. Arguably, that was an error because, as the respondent now accepts pursuant to the amendments made to Regulation 8(7) of the Immigration (European Economic Area) Regulations 2016 by Regulation 2(5)(e) of the Immigration (European Economic Area) (Amendment) Regulations 2019/1155, Article 3(2) of Directive 2004/38 EC did not restrict “other family members” in that way. Arguably, given those changes were introduced to implement the requirements of SM v Entry Clearance Officer C-129/18 (see the *Explanatory Note* to the 2019 Regulations, which was handed down before this appeal, the judge fell into error by failing to give effect to the relevant directly effective provisions of the Directive.”

11. Mr Azmi submits the appellant and his witnesses have never sought to deceive the Tribunal about the way in which they are related. He submits that at the outset of the hearing before FtT Judge Lodge, the appellant confirmed that Kuldip Kaur is the daughter of the brother of the appellant’s father. She is therefore his ‘cousin sister’. Mr Azmi acknowledges that the appellant had in the past referred to Kuldip Kaur as his ‘sister’, rather than ‘cousin’, because in a cultural context, that is how they would describe the relationship. He submits that at paragraph [27], FtT Lodge proceeds upon the premise that FtT Judge Greasley had allowed the previous appeal because he was under the impression that the appellant was the brother of the sponsor’s wife (*i.e. the brother of Mrs Kuldip Kaur*). FtT Judge Lodge refers to what was said at paragraph [7] the decision of FtT Judge Greasley; “*The appellant stated that as proof of the relationship, he had enclosed his father’s death certificate and his sisters father’s death certificate, which showed that they had the same parents.*”. Mr Azmi submits FtT Lodge confirms in the final sentence of paragraph [27]; “*That statement can only mean that the appellant’s father and his sister’s father had the same parents.*”. That is essentially an acknowledgement that the appellant’s father and Kuldip Kaur’s father (*who were brothers*) had the same parents. If that is correct, FtT Judge Greasley was aware that the appellant and Kuldip Kaur are first cousins and did not proceed under the impression that the appellant was the brother of Kuldip Kaur, the EEA sponsor’s wife.

12. In any event, even as a cousin of the EEA sponsor's wife, the appellant falls within the category of 'other family members' referred to in Article 3(2)(a) of the Citizens Directive. Under that provision, the Grand Chamber of the European Court of Justice in SM v ECO (C-129/18) held that Member States must facilitate entry and residence of family members in Member States in accordance with national legislation. Insofar as the 2016 Regulations excluded relatives of an EEA national's spouse or civil partner, the FtT Judge should have given direct effect to the Citizens Directive.
13. In reply, Mr McVeety submits the appellant had previously claimed to be the brother of Mrs Kuldip Kaur, when plainly he was not. He submits the appellant is on any view, only related to the spouse of the EEA national, and the appeal was therefore bound to fail in any event, upon an application of the 2016 Regulations in force at the time.

Discussion

14. There was clearly some confusion as to the precise nature of the relationship between the appellant and Mrs Kuldip Kaur Padda and Mr Harminder Pal Padda. The appellant appears to have previously described them as his 'sister' and 'brother-in-law', whereas he now claims Mrs Kuldip Kaur is his first cousin. It is said the appellant's father and Mrs Kuldip Kaur's father, are brothers.
15. I have carefully considered the decision of FtT Judge Greasley promulgated on 27th February 2018. At paragraph [1] of that decision, the judge records that the appellant appeals against a decision of the respondent refusing him the grant of an EEA family permit to join his brother-in-law, a German national, in the United Kingdom pursuant to Regulations 7 and 8 of the Immigration (EEA) Regulations 2006. Those regulations, like Regulations 7 and 8 of the 2016 Regulations, identify the category of persons who are treated as a "family member" or "extended family member". At paragraph [7] of his decision, FtT Judge Greasley, records that *"..The appellant stated that as proof of the relationship, he had enclosed his father's death certificate and his sister's father's death certificate, which showed that they had the same parents."* It is not clear whether the death certificates were seen by FtT Judge Greasley, and Mr Azmi was unable to direct me to copies of the death certificates in the appellant's bundle. However, at paragraph [15] of his decision, FtT Judge Greasley states:

“... I accept that there is credible and reliable evidence from the appellant’s sponsors Mr Padda that he is genuinely related to them...”

16. It is not clear whether FtT judge Greasley proceeded upon the basis that the appellant is the brother or cousin of Mrs Kuldip Kaur Padda, but in the end, he accepted that they are genuinely related. FtT Lodge appears to have concluded at paragraph [33] of his decision that the appellant is the cousin of Mrs Kuldip Kaur Padda. He states:

“Looking at the evidence, I am satisfied that the appellant obtained his initial EEA family permit on the basis of the assertion that he was the brother of the sponsor’s wife when in fact he is the cousin of the sponsor’s wife ...”

17. However, in the following paragraph, at [34], FtT Judge Lodge states that he is “... *left with no evidence to establish the relationship between the appellant and sponsor ...*”. It is difficult to reconcile that with what he said in the extract from paragraph [33] of his decision that I have set out above. It is not therefore clear whether the judge found the appellant is the cousin of the EEA sponsor’s wife. If, as it appears he did from what is said at paragraph [33] of his decision, the judge did accept the appellant is the cousin of Mrs Kuldip Kaur, it was incumbent upon the judge to consider whether the appellant is an ‘extended family member’. To that end, at paragraph [35] of his decision, the judge appears to proceed upon the premise that in any event, even if the appellant is the brother-in-law of an EEA national, he gains no assistance from Regulation 8(7) of the 2016 Regulations as in force at that time.
18. From 1st February 2017, when the 2016 Regulations came into force, the rights of extended family members only applied to relatives of the EEA national and not to relatives of the EEA national’s spouse. That meant that an extended family member could no longer rely on their relationship to the EEA national’s spouse in order to meet the requirements of Regulation 8. Here, the appellant was therefore unable to rely upon his relationship with Mrs Kuldip Kaur, the EEA national’s spouse.
19. However, on 26th March 2019, in SM v ECO (C-129/18) the Grand Chamber of the European Court of Justice addressed issues concerning the practical application of the 2016 Regulations. Following that decision, The Immigration (European Economic Area) (Amendment) Regulations 2019, amended the 2016 Regulations, amending Regulation 8 of the 2016 Regulations by *inter alia* making it clear that the category of extended family member can include relatives of an EEA national’s spouse or civil

partner. Although the amendments came into force on 15th August 2019 after the decision of FtT Judge Lodge was promulgated, the decision in SM v ECO (C-129/18) was handed down on 26th March 2019. There is some force in the submission made by the appellant that in reaching his decision, the judge failed to consider whether the appellant falls within the definition of “*any other family member*” as provided for in Article 3(2) of the Citizens Directive. I should add that in fairness to the judge, the grounds of appeal that were before the FtT did not make a claim that the respondent’s decision was in breach of Article 3 of the Citizens Directive notwithstanding the 2016 Regulations. Perhaps unsurprisingly, the issue was not considered by the judge in that way.

20. In all the circumstances, I am satisfied that the decision of FtT judge is vitiated by a material error of law and must be set aside.
21. As to disposal, I am urged by the parties to remit the matter for hearing before the First-tier Tribunal. There remains an issue as to whether the appellant is related to the EEA sponsor’s wife and no findings were made by FtT Judge Lodge as regards any ‘dependency’. Having considered paragraph 7.2 of the Senior President’s Practice Statement of 25th September 2012, in my judgment, the nature and extent of any judicial fact-finding necessary will be extensive.
22. The parties will be advised of the date of the First-tier Tribunal hearing in due course.

Notice of Decision

23. The appeal is allowed. The decision of FtT Judge Lodge promulgated on 14th June 2019 is set aside, and I remit the matter for re-hearing de novo in the First-tier Tribunal.

V. Mandalia

Upper Tribunal Judge Mandalia

30th March 2020

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be received by the Upper Tribunal within the appropriate period after this decision was sent to the person

making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent.

2. Where the person who appealed to the First-tier Tribunal is in the United Kingdom at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is 12 working days (10 working days, if the notice of decision is sent electronically).

3. Where the person making the application is in detention under the Immigration Acts, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically).

4. Where the person who appealed to the First-tier Tribunal is outside the United Kingdom at the time that the application for permission to appeal is made, the appropriate period is 38 days (10 working days, if the notice of decision is sent electronically).

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent" is that appearing on the covering letter or covering email.