Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: EA/03396/2020**
EA/03399/2020

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On 4 February 2022 **On 18 March 2022**
Extempore

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

MRS PARVEEN KAUR
MR HARJINDER SINGH
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr Z Raza, Counsel instructed by Bukhari Chambers Solicitors
For the Respondent: Mr S Walker, Home Office Presenting Officer

DECISION AND REASONS

1. The appellants appeal with permission against a decision of First-tier Tribunal Judge Aziz promulgated on 15 June 2021. That was a decision dismissing their appeals under the Immigration (European Economic Area) Regulations 2016(“the EEA Regulations”) against a decision by the Secretary of State made on 17 April 2020 to refuse to issue them with

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residence cards as the extended family members of an EEA national exercising treaty rights in the United Kingdom.

2. In this case the sponsor is Mr Inderjit Singh, who is the brother of the second appellant and brother-in-law of the first appellant. There is a relatively long history to their relationship which is set out in detail in the decision of Judge Aziz but in summary, the sponsor is an Irish citizen born in India on 15 June 1971. He lived with his parents and his brother Harjinder Singh until 2001 when he left India for Ireland and whilst there he said he continued to support his family and provide for them. The appellants entered the United Kingdom in 2011, the first appellant as a student, the second appellant as the dependant. The sponsor left Ireland for Australia in 2012 and they returned to the United Kingdom in 2014.

3. Judge Aziz heard a significant amount of evidence and reached conclusions about whether they met the requirements of the Regulations for a residence card as the extended family members within the meaning of Regulation 8 of the 2016 Regulations, the judge finding that there was a requirement for the dependency to have been consistent. The judge said in his decision at paragraph 58 that the wording “continues to be dependent” required an applicant to establish that there has not been a break in their dependence on the EEA national sponsor.

4. The judge found that when the appellants came to the United Kingdom in 2011, the sponsor was not present in the United Kingdom and it was only in November 2014 that he came here. In analysing dependency, the judge found that they appellants and sponsor were members of the same household in India up until 2001. Dealing next with the ongoing dependency between 2001 and 2011, he found at paragraph 77 that he was not persuaded that the sponsor was regularly and continuously sending financial remittances to the family in India between 2001 and 2011 in order for their essential needs to be met.

5. The judge then turned to whether the appellants had been dependent on the sponsor between August 2011 and November 2014, finding that he had not been told the truth regarding some of what had been said about that period and found at paragraph 82 that there had been a break in dependency although he was prepared to accept that the appellants and the sponsor are currently part of the same household and are dependent and that that had been the situation since the end of 2004, finding in terms that he was not persuaded that there was a dependency in order to meet the applicants’ essential needs between 2001 and November 2014.

6. The appellants sought permission to appeal on a number of grounds:

   (i) the judge had misconstrued the effect of <u>Chowdhury (Extended family members: dependency</u>) [2020] UKUT 188,

(ii) in any event the findings with regard to dependency prior to 2011 were flawed, for the reasons set out in the grounds at paragraphs 5 to 6, and

(iii) this case could be distinguished from Chowdhury on account of where the break in dependency arose.

7. Permission to appeal was granted by Judge Adio, who observed that there may be a tension between the decisions of the Upper Tribunal in Chowdhury and Dauhoo (EEA Regulations – Regulation 8(2)) [2012] UKUT 79. Following the grant of permission, Upper Tribunal Judge Norton-Taylor gave directions for there to be service by both parties of skeleton arguments. The respondent complied with that, providing a skeleton argument, and the appellants finally complied with that today.

8. It is relevant to note at this point that subsequent to the grant of permission the Court of Appeal handed Chowdhury v Secretary of State [2021] EWCA Civ 1220 on 9 August 2021.

9. The Secretary of State relies in her submissions to a significant extent on that decision, submitting that it is authority for the proposition that there had to be a continuity of dependency, relying in particular on passages set out at paragraphs [25] to [27] of Chowdhury, concluding that the appellant must show a continuous period of dependency in any of the four relevant categories outlined in **Dauhoo** without a break in dependency and on that basis the grounds of appeal fail to demonstrate any material error of law.

10. Mr Raza for the appellants seeks to draw a distinction between the facts of this case and those in Chowdhury; and, that on that basis, Chowdhury can be distinguished. He accepts that there is in reality no tension between the decisions in Dauhoo and Chowdhury but submits that the distinguishing factor in this case is that the gap in dependency arose around the time the appellants entered the United Kingdom. He does, however, accept that there was a gap in dependency between sometime after they arrived in the United Kingdom and that this was resumed in November 2014 of the appellants being a member of the EEA sponsor's household.

11. Turning then to Chowdhury, it is important to note that at paragraph 22 the Court of Appeal records Ms Smyth's submissions that the only logical and sensible interpretation of Regulation 8(2) is it required continuous dependency from the time it commenced in the country from which the extended family member travelled to the United Kingdom and endures. At [27] the Court of Appeal stated:

> "I read the words 'and continues to be' in Regulation 8(2)(c), when seen in the chronological context of the primary condition in Regulation 8(2)(a), 'residing in a country other than the UK and *is* dependent upon' (emphasis provided), as speaking to a persisting state of affairs. That is the plain and natural meaning of the words. The condition in Regulation 8(2)(a) defines the starting point. The condition in Regulation 8(2)(c) the necessary duration."

12. Whilst the Court of Appeal does deal with the possibility of resuming at paragraph 29, the Court of Appeal maintained that there needed to be continuity of dependency.

13. On any view of the facts, and as Mr Raza conceded, there has in this case been a break in continuity of dependency. I am not satisfied that there is any basis on which Regulation 8(2)(c) could be construed as permitting the circumstances which arose here, which is a significant gap of time between at the very least 2012 and 2014, as not being a break in continuity I do not consider either that it can be properly argued that such an interpretation fails to give effect to the European legislation, in this case Article 3 of the Directive, nor do I consider that it is contrary of the decision of the Court of Justice in Rahman.

14. I consider that there is in reality no material distinction in this case between the facts here and the facts in Chowdhury such that the clear principle as set out in Chowdhury and indeed endorsed in Sabina Begum is such that the relevant legislation could be construed either by reference to domestic law or European law such that the requirement for continuity of dependence or for that matter membership of a household which is admitted did not occur here is inconsistent with the rights under European law or for that matter under the Regulations.

15. I bear in mind in reaching that conclusion what was said in Banger [2018] EUECJ C-89/17 at [40]:

    40. In the light both of the absence of more specific rules in Directive 2004/38 and of the use of the words 'in accordance with its national legislation' in Article 3(2) of that directive, each Member State has a wide discretion as regards the selection of the factors to be taken into account. Nonetheless, Member States must ensure that their legislation contains criteria which are consistent with the normal meaning of the term 'facilitate' and which do not deprive that provision of its effectiveness (see, to that effect, judgment of 5 September 2012, *Rahman and Others*, C-83/11, EU:C:2012:519, paragraph 24)..

16. It is of note also what was said by the Advocate General in Rahman [2012] EUECJ C-83/11 :

> 105. By contrast, in so far as I take the view that [article 3 (2)(a)] does not imply the automatic grant of a right of residence, I cannot identify any fundamental obstacle to a Member State laying down particular conditions for obtaining the right of entry and residence in order to ensure the reality, effectiveness and duration of the dependency.
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> 106. Such conditions must, however, respect the principle of effectiveness, which presupposes that they must not be framed in such a way as to render practically impossible the exercise of the rights conferred by the EU legal order. Accordingly, the conditions laid down by the Member States cannot deprive, de facto, persons coming within the scope of that provision of all possibility of obtaining a right of entry and residence. For example, a

national provision would be unacceptable if it provided that, in order to be able to benefit from a right of residence, a national of a non-member country had to prove that he had been dependent on the Union citizen for more than 20 years.

107. Furthermore, conditions as to the nature or duration of dependency may constitute restrictions on the admission of other family members, which the Member States are, however, required to facilitate. Consequently, in order to be permissible, they must pursue a legitimate objective, be appropriate for securing the attainment of that objective and must not go beyond what is necessary to attain it.

17. This point is echoed in Banger at paragraph [40]:

18. I am not satisfied that there is any basis on which the interpretation of the continuity within the EEA Regulations undermines the effectiveness of EU law so on the facts of this case.

19. In this case the interpretation of the relevant legislation must be also seen through the lens of whether the EU national would be discouraged from leaving his state of nationality to exercise his right of residence under the EU Treaty owing to an uncertainty of whether a family life could be created or strengthened but in this case I do not consider that that observation is of relevance, given the factual matrix applicable. It is of course evident that in this case between 2011 and 2014 the sponsor was not in fact within the European Union and was in fact in Australia working.

20. Accordingly, for these reasons I consider that the decision of the First-tier Tribunal did not involve the making of an error of law and I uphold it.

Notice of Decision

1. The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold it.

Signed Date: 26 January 2022

Jeremy K H Rintoul
Upper Tribunal Judge Rintoul