



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

Appeal Number: EA/04982/2018

THE IMMIGRATION ACTS

Heard at Field House

On 18th March 2019

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

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MANDEEP KAUR
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Ms S Jones, Home Office Presenting Officer

For the Respondent: Mr A Chohan, S Z Solicitors

DECISION AND REASONS

1. Although this is an appeal by the Secretary of State for the Home Department, I shall refer to the parties as in the First-tier Tribunal. The Appellant is a national of India born on 28 November 1987. Her appeal against the refusal of a residence card as an extended family member was allowed by First-tier Tribunal Judge Ford on 28 January 2019.
2. The Secretary of State for the Home Department appealed on the ground that, having found the Appellant had adduced valid proof of her identity at the time of her application, the judge then needed to consider whether she

satisfied Regulation 8. The judge failed to properly direct herself following Dauhoo (EEA Regulations reg 8(2)) [2012] UKUT 79. An appellant could satisfy Regulation 8 in four ways and in the Appellant's case the judge had failed to make a finding on whether she was a member of the Sponsor's household prior to coming to the UK.

3. Permission to appeal was granted by First-tier Tribunal Judge Bulpitt on 12 February 2019 on the following grounds: "It is arguable that the judge has made a mistake of fact as to whether prior dependency on the extended family member has been conceded by the Respondent. At [11] the judge says that dependency has not been raised as an issue. The Reasons for Refusal Letter however expressly states that no element of the application other than whether it was a valid application had been considered. It is arguable therefore that the judge has mistakenly treated the issue as conceded when it was not. The judge has not made an explicit finding with reasons on the issue of prior dependency which is a requirement of the regulations as set out in Dauhoo (EEA Regulations reg 8(2)) [2012] UKUT 79. The only reference to the issue is at [14] where the judge refers to evidence from individuals in India about the Appellant and family member living in the same household but does not express a view on that evidence."
4. In submissions, Ms Jones stated that there was no challenge to the judge's finding that the Appellant had submitted a valid passport and there was no issue in relation to her identity. The issue was solely in relation to the application of Dauhoo. The judge failed to identify the steps to be taken in the test of establishing either dependency or membership of the household and failed to give adequate reasons for the Appellant's prior connection to the Sponsor. The judge only dealt with the present position.
5. Mr Chohan submitted that the whole focus of the hearing was on the validity of the passport and the Appellant's relationship to the Sponsor. At paragraph 11, the judge concluded that, although dependency was raised as an issue in other decisions, it was not raised as an issue in the decision letter under appeal. Accordingly, there was no challenge from the Respondent, who was represented at the hearing, to the test to be applied in Dauhoo. In any event, there was evidence of prior membership of the household at page 30 of the Appellant's bundle, an affidavit from a Numberdar, who stated the Appellant's family lived together with the Sponsor's family in India. The Appellant lived with the Sponsor and his family in the same household while they were in India.
6. Having established the validity of the passport and the claimed relationship there was ample evidence before the judge to show that the Appellant lived in the same household as the Sponsor, both families having lived together in India prior to coming to the UK. There was also a photograph at page 39 of the Appellant's bundle showing the Appellant's father, the Appellant's Sponsor and the Appellant when they were young and living in India. It is a group photo of both families together.

7. Accordingly, the judge's failure to make a specific finding was not material because there was evidence to support such a finding and the Home Office representative at the hearing had not suggested otherwise. No argument was made that Regulation 8 was not satisfied. Mr Chohan submitted it was reasonable for the judge to proceed on the basis that prior dependency or membership of a household was accepted. In any event, it was not a point taken at the hearing and there was evidence before the judge to support prior membership of the Sponsor's household. The judge considered all the evidence and her finding was open to her on the evidence before her.

Discussion and Conclusion

8. The Respondent refused the application for a residence card on 5 March 2016 on the basis that the Appellant had failed to provide a national passport of identity or sufficient evidence that she was related as claimed to an EEA national. The First-tier Tribunal considered both of these issues and found in the Appellant's favour. There was no challenge by the Respondent to the judge's findings that the Appellant had produced valid evidence of identity and she was related to the Sponsor as she claimed.
9. The judge found at paragraph 18: "The Appellant has provided other consistent evidence including an India Land Revenue certificate showing the names of the Appellant's father and the name of the Sponsor [sic] father as well as the name of their grandfather. There are family photos taken when the Appellant was young. There is also ample evidence to show that the Appellant has lived in the same household as the Sponsor, his wife and son for several years. I note that they all live in a property jointly purchased by the Sponsor and his son in 2015." It is clear from this paragraph that the judge found the Appellant was a member of the Sponsor's household in India and in the UK. Accordingly, the Appellant satisfied Regulation 8.
10. The judge found at paragraph 20 that the Appellant was an extended family member and recognised that issuing a residence card was discretionary. She concluded: "It is now a matter for the Secretary of State to exercise that discretion." She then allowed the appeal under the Immigration (EEA) Regulations 2006. The Tribunal in Ihemedu (OFMs - meaning) Nigeria [2011] UKUT 00340 (IAC) held:

"Regulation 17(4) makes the issue of a residence card to an OFM/extended family member a matter of discretion. Where the Secretary of State has not yet exercised that discretion the most an Immigration Judge is entitled to do is to allow the appeal as being not in accordance with the law leaving the matter of whether to exercise this discretion in the appellant's favour or not to the Secretary of State.
11. For the sake of clarity, I set aside the decision to allow the appeal under the Immigration (EEA) Regulations 2006 and remake it as follows: The

Appellant's appeal against the refusal of a residence card as an extended family member is allowed insofar as the Respondent's decision of 5 March 2016 was not in accordance with the law.

12. The Appellant satisfies the requirements of Regulation 8. It is for the Respondent to consider the exercise of discretion under Regulation 17(4) of the 2006 Regulations. No anonymity direction is made.

J Frances

Signed
Upper Tribunal Judge Frances

Date: 15 April 2019