Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/03450/2015

THE IMMIGRATION ACTS

Heard at the Royal Courts of Justice	**Decision & Reasons Promulgated**
On 24 June 2019	**On 26 June 2019**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

OSANDA DARSHANA SANDARUWAN SILVA NILENTHI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J Plowright, Counsel, instructed by Lawland Solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of judge of the First-tier Tribunal Cameron (the judge), promulgated on 11 March 2019, dismissing the appellant's appeal against the respondent's decision dated 23 November 2015 refusing to issue him a residence card under the Immigration (European Economic Area) Regulations 2006 (the 2006 Regulations) as an extended family member.

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Background

2. The appellant, a national of Sri Lanka, was born in 1986. He entered the UK in 2010 as a student. After being issued further leave to remain as a Tier 4 Student, the appellant applied for a Residence Card based on his relationship with Mrs Kottagedona Ratnaseeli (the sponsor), his maternal 1st cousin. At the time of the application the sponsor was an Italian citizen exercising treaty rights in the UK. This application was refused and an appeal before Judge of the First-tier Tribunal K W Brown was dismissed in a decision promulgated on 30 September 2014. Judge Brown was not satisfied the appellant was dependent on his cousin when he lived in Sri Lanka as there was insufficient evidence to support this assertion. Judge Brown found that the appellant and the sponsor lived in the same household until 1991 but they did not live in the same household after that time until March 2013. Applications for permission to appeal to the Upper Tribunal were refused and he became appeal rights exhausted on 13 April 2014.

3. On 29 June 2015 the appellant again applied for a residence card as the extended family member of his EEA national sponsor. The respondent was not however satisfied the appellant provided sufficient evidence to prove that he fell within the category of extended family member. This decision attracted a right of appeal which the appellant duly exercised.

The decision of the First-tier Tribunal

4. For reasons that will become apparent it is not necessary for me to consider the First-tier Tribunal's decision in detail. Judge Cameron had before him two large bundles of documents relating to the appellant's circumstances and those of his sponsor. These included some money remitted slips relating to money sent by the sponsor to Sri Lanka between 2003 and 2010. Judge Cameron approached the decision of Judge Brown as his starting point. Judge Cameron was satisfied that, since her arrival in the UK in March 2013, the appellant lived with the sponsor as part of her household. Judge Cameron considered the 7 Western Union money transfers dated between 20 August 2003 and 15 January 2010, and the evidence of 3 visits by a Mr Fernando in 2008, 2009 and 2010, bearing funds from the sponsor. The judge noted that, when the appellant came to the UK as a student, his application did not refer to his receipt of monies from his sponsor in order to meet his educational costs. At [37] the judge found that, notwithstanding the appellant's claim to have been dependent on the sponsor when he lived in Sri Lanka, the evidence before for him did not support the asserted dependency but indicated rather that the appellant was living in the family home and the family were being generally being supported by the sponsor. The judge then found that the appellant was a young child when the sponsor left Sri Lanka in

1991 and that he was supported by his own family rather than by the sponsor. The appeal was dismissed.

The challenge to the First-tier Tribunal's decision and the 'error of law hearing'

5. The written grounds of appeal relied on **Lim (EEA –dependency)** [2013] UKUT 00437 (IAC) (although this was overturned by the Court of Appeal decision in **Lim v Entry Clearance Officer Manila** [2015] EWCA Civ 1383) in contending that the judge erred in his approach to the issue of dependency by seeking to evaluate the frequency of the funds remitted by the sponsor rather than to the intended purpose and significance of the funds. The judge also failed to give appropriate weight to the evidence that the sponsor travelled to Sri Lanka and provided financial assistance to the appellant. The grounds additionally relied on **SM (India) v Entry Clearance Officer (Mumbai)** [2009] EWCA Civ 1426 in respect of the proper definition of dependency.

6. In granting permission to appeal Judge of the First-tier Tribunal Alis stated,

> "Whilst the findings on financial support may have been open to him it is arguable that there is an error in the way the Judge approached Regulation 8(2)(a) of the 2006 Regulations having regard to the papers contained on the file.
>
> The Tribunal should have been considering whether the appellant was part of the sponsor's household as against who the appellant's carer actually was. Whilst the appellant's parents could be his primary carers nevertheless if they were living in the sponsor's home then it is arguable regulation 8(2)(a) may be met."

7. Mr Melvin provided a Rule 24 response on 21 June 2019. His submission was very straightforward. Regardless of whether the judge erred in his approach to the issue of dependency, the sponsor only became an Italian citizen in 2013. This was apparent from her own witness statement (at paragraph 6). In these circumstances the appellant could not meet the requirements of reg 8(2)(a) of the 2006 Regulations and his application was bound to fail.

8. At the outset of the 'error of law' hearing I invited Mr Plowright to express his views of the content of the Rule 24 response. Mr Plowright drew my attention to the sponsor's Italian passport which was issued on 11 March 2013, and to what appears to be an Italian identity card issued on 14 February 2013. Mr Plowright however accepted that the available evidence pointed to the sponsor only obtaining Italian citizenship in 2013. Mr Plowright was mindful of the requirements of reg 8(2)(a) of the 2006 Regulations and accepted that the application

for a residence card as an extended family member could not have succeeded.

9. I indicated that I would dismiss the appeal on the basis that the First-tier Tribunal's decision did not need to be set aside because, even if there was an error on a point of law, the appellant could not, on any view, be successful in his application.

Discussion

10. Article 3(2) of the Citizens Directive (Directive 2004/38/EC) provides, so far as is relevant:

> 'Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:
>
> (a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;'

11. Regulation 8(2) of the 2006 Regulations indicated, at the material time, that an 'extended family member' (the equivalent of 'other family members' in the Directive included a person who is a relative of an EEA national, his spouse or his civil partner and -,

> 'The person is residing in a country other than the United Kingdom and is dependent upon the EEA national or is a member of his household'

12. In her statement the sponsor indicated that she became an Italian citizen and an EEA national in March 2013. This is supported by the contained in the appellant's bundle. This wasn't disputed by the appellant at the 'error of law' hearing or by his legal representative.

13. The appellant entered the United Kingdom in 2010. Any financial support that may have been provided by the sponsor to the appellant when he lived in Sri Lanka was provided when she was not an EEA national. When the appellant and the sponsor lived together in 1991, the sponsor was not an EEA national. In these circumstances the appellant could never succeed in his application for a residence card, either by reference to the definition of 'other family members' in the Directive, or the definition of 'extended family member' in the 2006 Regulations, because his sponsor did not become an EEA national until after the appellant left Sri Lanka.

14. It was never suggested that anyone else provided financial support to the appellant when he lived in Sri Lanka. I note, in any event, that in the recent case of **Fatima & Ors v Secretary of State for the**

Home Department [2019] EWCA Civ 124 the Court of Appeal wasted little time in rejecting an applicant's argument that "dependents or members of the household of the Union Citizen" in the Directive can include dependents or members of the household of the spouse of the Union Citizen. This was said to be "clear on its face".

15. In the circumstances any appeal would have been bound to fail and it is not appropriate to set aside the judge's decision dismissing the appeal.

Notice of Decision

The decision of the First-tier Tribunal does not contain an error on a point of law requiring the decision to be set aside.
The appeal is dismissed.

Signed
Upper Tribunal Judge Blum

24 June 2019
Date