Upper Tribunal
(Immigration and Asylum Chamber)

Dauhoo (EEA Regulations – reg 8(2)) [2012] UKUT 79 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 30 January 2012	

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Before

UPPER TRIBUNAL JUDGE STOREY

Between

MR SHEIKAR AMITH ROY DAUHOO

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Mr R Subramanian, legal representative, Lambeth Solicitors

For the Respondent: Mr G Saunders, Home Office Presenting Officer

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 UK:

i. prior dependency and present dependency

ii. prior membership of a household and present membership of a household

iii. prior dependency and present membership of a household;

iv. prior membership of a household and present dependency.

11. It is not necessary, therefore, to show prior and present connection in the same capacity: i.e. dependency- dependency or household membership-household membership ((i) or (ii) above). A person may also qualify if able to show (iii) or (iv).

DETERMINATION AND REASONS

1. The appellant is a citizen of Mauritius. He arrived in the UK on a six months visit visa to his sister, Ms K Kupp, on 9 September 2004. He came with his spouse, Ms K Dauhoo, who was an EEA national.

He received subsequent grants of permission for leave to remain as a student until 31 May 2011. On his own account his marriage broke down in April 2009 and he produced a decree absolute dated 6 April 2010. Since his arrival he claimed to have been living with and dependent upon his sister, Ms Kupp, who was also an EEA national. On 29 January 2011 he applied for a residence card on the basis that he was an extended family member of his sister. On 12 May 2011 the respondent refused that application stating:

“There is no evidence to show that you were resident with or dependent on your sister in another country immediately prior to your arrival in the UK in 2004 nor have you supplied any evidence that since you arrived in the UK you have been resident with or financially dependent on her”.

2. The appellant appealed. His case came before First-tier Tribunal Judge Aziz on 28 June 2011. His evidence to the (FTT) was that (1) his sister had always been financially supporting him when he was in Mauritius; (2) his sister had gone on supporting him financially since his arrival in the UK in 2004, even paying for his ex-wife’s studies in the UK; and that (3) after the breakdown of his marriage to Ms Dauhoo in mid-April 2009, he had begun dating Ms A M Renwicz, a Polish national, and they have continued in a subsisting (durable) relationship ever since, she moving in to live with him at his sister’s address in December 2009. The appellant’s evidence was supported by oral evidence from his sister and his girlfriend, his girlfriend’s sister as well as a close friend of the appellant, Mr S Jukhoop. The witnesses’ accounts corroborated those of the appellant.

3. Despite finding the witnesses consistent, the judge found their evidence not credible in key respects. He rejected the appellant’s claim to have been dependent on his sister either when he lived in Mauritius or since he arrived in the UK. As regards the appellant’s claim to have been in a durable relationship with an EEA national since July/August 2009, his finding was:

“Whilst I am prepared to accept that Ms A M Renwicz lives in the same household as the appellant, I find that I am not persuaded by the evidence that they are a cohabiting couple, let alone a couple who have been cohabiting for two years”.

4. He went on to dismiss the appellant’s further claim that he was entitled to succeed in his appeal on Article 8 grounds.

5. The appellant was successful in obtaining a grant of permission to appeal. The kernel of the grounds accompanying the application for permission was that the FTT judge had wrongly assessed the evidence about the appellant’s dependency on his sister whilst he was still in Mauritius; that in relation to dependency both in Mauritius and in the UK the judge had misapplied EU law on the meaning of dependency; and that as regards the appellant’s relationship with his girlfriend, the judge had made contradictory findings and had disregarded relevant documentary evidence. These points were amplified by Mr Subramanian in submissions. Mr Saunders, for the respondent, urged that I find the judge had not erred in law.

6. In the course of these submissions I raised with the parties whether the judge’s findings on the appellant’s situation since arrival in the UK were open to the criticism that he had failed to consider whether, even if the appellant could not prove dependency on his sister, he had proved (or could prove) membership of his sister’s household. Mr Saunders said the judge’s finding did not dispute that the appellant was a member of his sister’s household in the UK and that she was the head of his household here. He further accepted that this sufficed to show that the appellant had met the requirements of reg 8(2)(c) so far as his position in the UK is concerned.

Reg 8(2) extended family members

7. In my judgment Mr Saunders was right so to accept. Regulation 8 as amended by the Immigration (European Economic Area) (Amendment) Regulations 2011 (in force from 2 June 2011) is headed "Extended family members". At reg 8(2) it provides:

"(2) A person satisfies the condition in this paragraph if the person is a relative of an EEA national, his spouse or his civil partner and—

(a) the person is residing in a country other than the United Kingdom in which the EEA national also resides and is dependent upon the EEA national or is a member of his household;

(b) the person satisfied the condition in paragraph (a) and is accompanying the EEA national to the United Kingdom or wishes to join him there; or

(c) the person satisfied the condition in paragraph (a), has joined the EEA national in the United Kingdom and continues to be dependent upon him or to be a member of his household."

8. Reg 8 also includes within the definition of extended family members relatives on serious health grounds (reg 8(3)); dependent relatives who meet the requirements of the Immigration Rules (reg 8(4)); and partners in a durable relationship (reg 8(5)). But the focus here is on reg 8(2). As the Tribunal has emphasised in a number of cases, e.g. in RK (OFM – membership of household dependency) India [2010] UKUT 421 (IAC) and Moneke (EEA – OFMs) Nigeria [2011] UKUT 00341 (IAC) (at para 11(b)), the requirements of dependency and household membership as found within reg 8(2)(a) and within reg 8(2)(c) are alternates; they are not conjunctive. That is clear from the relevant wording of each: under reg 8(2)(a) a person must show he is "dependent upon or is a member of [the EEA national's] household". Under reg 8(2)(c) a person must show he "continues to be dependent upon…or to be a member of his household". So in the present case, even though rejecting that the appellant had shown present dependency, the FTT judge should have accepted that he had satisfied this provision by virtue of having shown present membership of the EEA principal's household.

9. However, it remains that in order t o qualify as an extended family member/"other family member" under reg 8(2), a person who is in the UK must show that he meets the requirements of both reg 8(2)(a) and (c). He has to show a relevant connection with the EEA principal both: (a) prior to coming to the UK (the essence of reg 8(2)(a))(the "prior" test); and (b) now he is here in the UK (the essence of reg 8(2)(c)) (the "present" test).

10. It may help to clarify these requirements in the following way. Under the reg 8(2) scheme, 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 UK:

v.
prior dependency and present dependency

vi.
prior membership of a household and present membership of a household

vii.
prior dependency and present membership of a household;

viii.

prior membership of a household and present dependency.

11. It is not necessary, therefore, to show prior and present connection in the same capacity: dependency- dependency or household membership-household membership, i.e. (i) or (ii) above. A person may also qualify if able to show (iii) or (iv).

12. Although the above scheme is consistent with case law, it is fair to consider one possible semantic objection to it. It might be said that the use of the present tense verb “continues” in reg 8(2)(c) denotes that a person can only meet the requirement to show present dependency if that is a “continued dependency” and, likewise, that a person can only meet the requirement to show present membership of an EEA national’s household if that is a “continued membership”. If that reading were correct, then permutations (iii) and (iv) above would be impermissible. However, such an interpretation cannot be correct. Leaving aside that if the drafters had intended the meaning of reg 8(2)(c) to be restricted in this way they would have said so, reg 8(2), being an attempt to transpose Article 3(2)(a) of Directive 2004/38/EC, must be construed purposively so as to be compatible as far as is possible with that provision. Article 3 provides:

“1. This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.

2. 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 members by the Union citizen;

(b) the partner with whom the Union citizen has a durable relationship, duly attested.

The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people.”

13. It is immediately apparent that there is nothing in the wording of Article 3(2)(a) that requires a person who, in the country from which they have come, was a dependant or a member of the household of a Union citizen to show they continue in the host Member state to be in precisely the same category. Further, to read in such a requirement would be contrary to the stated underlying purpose of facilitating the residence of such persons. It would exclude, for example, a sibling who abroad had been, although self-sufficient, a member of the EEA principal’s household but who now wished, with the financial support of the EEA principal, to undertake studies living separately. An elderly aunt who had been a dependent abroad but who had now moved in to the EEA principal’s household would be excluded simply if, for example, she was recently left enough in a will to make her self-sufficient financially. My conclusion is that under reg 8(2) there are four, not two, possible ways in which a person can qualify as an extended family member.

14. However, even under the above fourfold schema, the appellant in this case is still shut out. For whilst he turns out to have established that he met the “present” requirement set out in reg 8(2)(c), by virtue of being a member of the EEA principal’s household in the UK, he could still only qualify as

an extended family member if able to show a “prior” relevant connection in his country of origin either in the form of dependency or membership of the EEA principal’s household.

15. Mr Subramanian did not seek to argue that the appellant could show that in Mauritius he was a member of his sister’s household. Nor did the evidence disclose any such feature. He did maintain, however, that the judge should have found that the appellant satisfied the requirements of reg 8(2)(a) by virtue of dependency on his sister alone. I am unable to accept that submission.

16. First of all, as regards the judge’s assessment of the appellant and his witnesses’ evidence, I consider he gave sound reasons for concluding that their claims were not credible. On the appellant’s own account he had studied mechanical engineering in Mauritius and had also done work as a mechanical engineer in Mauritius, which was a skilled job. Although he claimed that his wage for this work was low, he adduced no evidence to support that claim. The appellant did not claim to have had any physical or mental problems. He was able-bodied. In relation to the claim that his sister (who then lived in Germany) had financially supported him since school, the documentary evidence adduced to support it had very significant shortcomings. There was only one money transfer from his sister. There was also a letter from a Western Union branch in Germany which avowed that the appellant’s sister had been sending money to her brother in Mauritius from 1999 – 2004, but it was not on any official letter headed paper and did not provide any particulars in support. There were items of correspondence from individuals supporting the appellant’s claim about prior dependency, but the judge found they lacked substance, as was within his scope to do. Accordingly I consider it was entirely open to the judge to find this body of evidence, which contained very little independent documentary evidence, quite insufficient to demonstrate the appellant’s claimed dependency in Mauritius. It should be recalled that in Ihemedu (OFMs – meaning) Nigeria [2011] UKUT 340 (IAC) the Upper Tribunal held that:

“ If an applicant chooses not to apply from abroad for a family permit under reg 12 of the 2006 Regulations, thereby denying the UK authorities an opportunity to check documentation in the country concerned, he cannot expect any relaxation in the burden of proof that applies to him when seeking to establish an EEA right.”

17. Had the appellant sought to apply from Mauritius for an EEA family permit under reg 12, it is envisaged by Article 10(2)(e) of Directive 2004/38/EC that he would need to produce documents certifying dependency. By having afforded the British post in Mauritius no opportunity to receive and check documentation relating to dependency, and having chosen to travel to the UK instead (and eventually to apply from here), the appellant could not expect the judge to overlook a lack of satisfactory documentary evidence just because he was able to produce witness statements and witnesses.

18. Accordingly, even accepting that the appellant had met the requirements of reg 8(2)(c), he had failed to meet those set out in reg 8(2)(a) (and so could not show he was an extended family member).

The EEA claim based on durable relationship

19.Turning to Mr Subramanian’s challenge to the FTT judge’s treatment of the appellant’s claim to qualify by virtue of being in a durable relationship with an EEA partner under reg 8(5) (a separate subcategory of “extended family member”), again I discern no material error of law. It is true that the judge had accepted that the appellant’s partner now lives in the same household as the appellant (para 72). I would also agree with Mr Subramanian that given that finding the judge was obliged to explain more fully why he nevertheless considered they were not in a durable relationship,

particularly since being in a durable relationship does not even necessarily entail cohabitation: see YB (EEA reg 17(4) – proper approach) Ivory Coast [2008] UKAIT 00062 and Rose (Automatic deportation - Exception 3) Jamaica [2011] UKUT 276 (IAC) (at para 24). However, the furthest that this line of challenge can take the appellant is to establish a prima facie case for considering the couple had been in a relationship for a relatively short period prior to the date of hearing. That is because the judge was quite adamant, and in my judgment with good reason, in finding the couple's claim to have been in a relationship from July/August 2009 to 24 May 2011 not credible. The judge gave a number of reasons for this, relying in particular on the fact that the appellant had made no mention of this relationship when he submitted his application for a residence card in January 2011. The judge considered the appellant's attempt to explain this omission – in terms of his wanting to wait for the outcome of the EEA application on the basis of being a dependent of his sister – and was quite entitled to reject it by pointing out that at the time of the application the appellant, on his own evidence, had already been cohabiting with his partner for over a year and in a relationship with her since July/ August 2009. I note further that even in the grounds of appeal lodged in May 2011 the appellant made no reference to this relationship. Mr Subramanian rightly points out the appellant's grounds of appeal do raise Article 8, but they do not particularise that claim at all and can only have been taken by implication to refer, if to anyone, to the appellant's ties with his sister. None of the supporting documents referred to the partner.

20. The grounds of appeal before me complain that the judge failed to consider the bank statement of the appellant's fiancée which had been submitted in time for the hearing and which clearly showed the same address as that of the appellant, but the judge accepted that she was in a common household with the appellant. What the judge did not accept, and what this statement did not show, was any evidence of a relationship prior to May 2011.

21. Although Mr Subramanian did not raise the point, it is accepted by the Tribunal in reported decisions that despite the reference in UKBA European Casework Instructions to proof of a durable relationship requiring evidence that the relationship has lasted two years, the concept of a durable relationship is a term of EU law and as such it does not impose a fixed time period: see YB . Having said that, on the judge's findings the relationship had only been shown to exist, if at all, very recently and on the appellant's own evidence his partner was economically self sufficient. Mr Subramanian sensibly did not seek to argue that the appellant was entitled to succeed in showing that the relationship was durable if only a very recent relationship could be established. For the avoidance of doubt I would add that on the basis of the evidence before the FTT judge a durable relationship had not been established.

22. As regards Article 8, I consider that the judge's findings of fact (which I have found to be unaffected by legal error) more than justified him in concluding there was no violation. The appellant, albeit living in his sister's household, had not established financial dependency on her in the UK, only membership of her household. The appellant was in good health and his relationship with his sister, both being adults, was not sufficient to establish family life. His relationship with Ms A M Renwicz was too recent to merit treating it as a significant (de facto) family life or private life tie. The appellant had only been granted leave to enter or remain in the UK for temporary purposes (studies) which he no longer pursued. The appellant had spent the majority of his life in Mauritius and had also worked there as a mechanical engineer. There was no valid reason to suppose that on return to Mauritius he could not support himself and any dependants. All these were factors which the judge considered and weighed fairly in the balance.

23. For the above reasons I conclude that although the judge can be criticised in one or two respects, the determination did not contain an error of law and is not, therefore, to be set aside.

Signed Date

Upper Tribunal Judge Storey