Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: EA/50718/2021
(UI-2022-002654); IA/05118/2021

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21 September 2022	**On 6 November 2022**

Before

UPPER TRIBUNAL JUDGE MCWILLIAM
DEPUTY JUDGE OF THE UPPER TRIBUNAL JARVIS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SAMJHANA DEVKOTA PANDEY
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr A. Maqsood, Counsel instructed by Addison & Khan Solicitors
For the Respondent: Ms A. Nolan, Senior Home Office Presenting Officer

DECISION AND REASONS

INTRODUCTION

1. The Appellant in this appeal is technically the Secretary of State but for ease of reference with the decision of the First-tier Tribunal, we continue to refer to Ms Pandey as the Appellant.

2. On 18 May 2022, the Secretary of State lodged grounds of appeal against the decision of First-tier Tribunal Judge Morgan (dated 9 May 2022). Permission to appeal was given by First-tier Tribunal Judge Moon by way of a decision dated 6 June 2022.

THE RELEVANT BACKGROUND

3. As the findings of fact by Judge Morgan are not under challenge and there was no dispute before us in respect of the immigration history of the Appellant and/or the Sponsor (the Appellant's brother-in-law, Mr Binod Devkota), we briefly record the following:

   (a) From December 2012 the Appellant was being financially supported by the Sponsor who at that time was living and working in Portugal; the Appellant was residing with her parents-in-law in Nepal, §8.

   (b) In May 2013 the Appellant joined her husband in the United Kingdom and whilst both she and her husband were working at times, they continued to be reliant upon the financial support of their Sponsor who was still residing and working in Portugal, §8.

   (c) In September 2019 the Sponsor moved to work in the United Kingdom having acquired Portuguese nationality in September 2019. Since that time the Appellant and her husband (and their two children) have been residing in the same household as the Sponsor, §8.

   (d) In July 2020 the Appellant applied, along with her husband, for an EEA Residence Card; the Appellant's husband's application was successful but the Appellant's application was refused by way of a decision dated 30 October 2020. The basis of the refusal related to the Secretary of State's concern about the relationship between the Appellant and the Sponsor, §9.

   (e) The Appellant made a further application which was also refused for a different reason and that decision was the subject of the appeal before Judge Morgan.

THE SECRETARY OF STATE'S GROUNDS OF APPEAL

4. In the grounds of appeal, the Secretary of State makes one straightforward point, namely that Judge Morgan's conclusion that the Appellant could meet the requirements of reg. 8 of the 2016 EEA Regulations is incompatible with the binding decision of the Court of Appeal in Begum v Secretary of State for the Home Department [2021] EWCA Civ 1878 ("Begum".)

5. The Secretary of State underlined the factual matrix in this case: the Appellant entered the United Kingdom more than six years before the Sponsor became a Portuguese (EEA) national and himself entered the United Kingdom. On that basis it was argued that the Appellant could not as a matter of fact and law demonstrate any prior dependence on an EEA national before her entry to the UK.

THE ERROR OF LAW HEARING

6. We should note for completeness that a few days before the Upper Tribunal error of law hearing, the Appellant applied for an adjournment because of the unavailability of Counsel who had represented the Appellant at the First-tier Tribunal hearing. That request for an adjournment was refused by a Tribunal Case Worker on the basis that there was no evidence to suggest that the Appellant did not have sufficient time to instruct different Counsel.

7. At the Upper Tribunal hearing, Mr Maqsood appeared on behalf of the Appellant and made no further request for an adjournment or extra time. We are therefore satisfied that there was no procedural unfairness under the circumstances.

8. Mr Maqsood candidly accepted that, in light of the Court of Appeal's binding decision in Begum, he was in difficulty in respect of the Secretary of State's argument that Judge Morgan had materially erred in law.

9. We should therefore start with the relevant part of reg. 8:

> ""**Extended family member**"
>
> 8.- (1) In these Regulations "extended family member" means a person who is not a family member of an EEA national under regulation 7(1)(a), (b) or (c) and who satisfies a condition in paragraph (1A), (2), (3), (4) or (5).
>
> ...
>
> (2) The condition in this paragraph is that the person is—
>
> (a) a relative of an EEA national; and
>
> (b) residing in a country other than the United Kingdom and is dependent upon the EEA national or is a member of the EEA national's household; and either—
>
> (i) is accompanying the EEA national to the United Kingdom or wants to join the EEA national in the United Kingdom; or
>
> (ii) has joined the EEA national in the United Kingdom and continues to be dependent upon the EEA national, or to be a member of the EEA national's household..."""

10. In respect of the interpretation of this provision we also detail the relevant binding finding of the Court of Appeal in Begum:

> *"**Must the Sponsor be an EEA national at the time of the pre-entry dependency?***
>
> *41. On the plain and natural meaning of the language of Article 3(2) and reg. 8, the answer to that question is yes. The person upon whom*

dependence in the country from which the extended family member has come must be established is "the Union Citizen having the primary right of residence". That is how the phrase "EEA National" in reg. 8(2) must be understood. It cannot be read as referring to a person who is not a Union Citizen and who has no primary rights under the TFEU upon which the extended family member's rights are dependent, even if that person aspires to acquiring such rights at some point in the future. Like the requirement of dependency "in the country from which [the extended family member] has come", the restriction is in the express language of the Directive itself.

42. That construction of Article 3(2) seems to me to be inherent in the Grand Chamber's approach in Rahman, and in all the other domestic authorities to which I have already referred, and in keeping with the underlying purpose of facilitation of the sponsor's free movement rights. As the Upper Tribunal said, the Directive and Regulations are only engaged upon somebody becoming an EEA citizen. The sponsor's citizenship at the time of the only dependency relevant under EU law provides the necessary connection with the EU that is the foundation of any derivative rights conferred on the extended family member.

43. In her attractively succinct and focused submissions on behalf of the Secretary of State, Ms Smyth made the fundamental point that without an EEA national who has free movement rights, there is nothing on which a derivative right of a family member can depend. If the sponsor has no such rights at the critical time, the applicant does not qualify. She submitted that in the light of this, the interpretation favoured by the Upper Tribunal was not only textually, but contextually and purposively right."

11. There can be no doubt that the ratio of the Court's decision relates precisely to the point in issue in this appeal.

12. In light of this, Mr Maqsood sought to emphasise to us that, in his submission, there was an apparent unfairness in the Secretary of State's decision to grant a Residence Card to the Appellant's husband but not her. Mr Maqsood also asserted that the Secretary of State had not taken the point about the timing of the Sponsor's acquisition of Portuguese nationality until her review document.

13. Mr Maqsood also submitted that there was a discretionary element to the consideration of whether or not a Residence Card should be issued within the EEA Regulations (reg. 18(5)) but fairly conceded that this would only apply if the applicant in question met the initial requirements of reg. 8(2) itself, which contained no discretionary element.

14. Ultimately Mr Maqsood was constrained to accept that, as a consequence of the clarification of the law by the Court of Appeal in Begum, the Appellant could not meet the threshold requirements of reg. 8(2) on the basis that she was not dependent upon an EEA national when she was residing in Nepal and before she entered the United Kingdom in 2013 because the Sponsor did not become a Portuguese (EEA) national until 2019.

15. On the basis of the narrow nature of the point raised by the Secretary of State and Mr Maqsood's submissions, we did not need to hear from Ms Nolan.

16. We explained to the parties that we considered that the Secretary of State had established that the First-tier Tribunal Judge had materially erred in law and that decision of the Judge should be set aside.

THE REMAKING OF THE DECISION

17. We then heard oral submissions from both representatives in respect of the remaking of the decision. Mr Maqsood indicated that he continued to rely on his submissions about the difference in decision-making between the Appellant's case and her husband's application and, although he accepted that Article 8 ECHR could not be relied upon in this appeal, he nonetheless averred that the Appellant had two children, one of whom almost met the seven years residence requirements in the Immigration Rules. Mr Maqsood also referred to the general legal approach in recognising the best interests of children affected by a relevant immigration decision and asked us to allow the appeal.

18. In response Ms Nolan simply reiterated that the Appellant could not take the benefit of reg. 8(2) of the 2016 EEA Regulations and also emphasised that Article 8 ECHR was not an available ground of appeal to the Appellant in this particular case.

19. Having heard these submissions we indicated to the parties that we had decided that the substantive appeal should be dismissed in line with the general points made by Ms Nolan and as we have sought to detail in the earlier part of this judgment.

DECISION

20. We therefore conclude that the making of the decision by the First-tier Tribunal did involve an error on a point of law by reference to s. 12(1) of the Tribunal, Courts and Enforcement Act 2007.

21. We remade the decision and dismissed the appeal by reference to the terms of the 2016 EEA Regulations as preserved by the 'Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations (SI 2020 1309)'.

Signed  Date 22 September 2022

Deputy Judge of the Upper Tribunal Jarvis

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