UT Neutral citation number: [2022] UKUT 00157 (IAC)

Sohrab and Others (continued household membership) Pakistan

Upper Tribunal
(Immigration and Asylum Chamber)

Heard at Field House

THE IMMIGRATION ACTS

Heard on 28 March 2022
Promulgated on 5 May 2022

Before

THE HON. MR JUSTICE LANE, PRESIDENT
UPPER TRIBUNAL JUDGE STEPHEN SMITH
UPPER TRIBUNAL JUDGE SHERIDAN

Between

MR JAHANZEB SOHRAB
MRS SALAIHA KHALID
MR ARHAAN KHAN
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J. Jegede, Solicitor, Ashton Ross Law
For the Respondent: Mr S. Whitwell, Senior Home Office Presenting Officer

1. *A person seeking recognition as an "extended family member" ("EFM") under regulation 8(2) of the Immigration (European Economic Area) Regulations 2016 must establish a relevant connection with their EEA sponsor in the country of origin, and in the UK.*

2. *The relevant connection may be through being a dependent of the EEA national sponsor, or through being a member of the EEA national's household. The relevant connection may change between the country of origin and the UK, as held in Dauhoo (EEA Regulations – reg 8(2)) [2012] UKUT 79 (IAC).*

3. *There must not be a break in dependence or household membership from the country of origin to the UK, other than a de minimis interruption.*

4. *To be a member of an EEA national's household requires a sufficient degree of physical and relational proximity to the EEA national through living in the household of which the EEA national is the head, living together as a unit, with a common sense of belonging. There should be a genuine assumption of responsibility by the EEA national for the EFM. Questions of the commencement of the assumption of responsibility and the duration of dependency or household membership are relevant.*

5. *An applicant may, in principle, establish a relevant connection to an EEA national in the UK through being a member of the EEA national's household in the UK before the EEA national has arrived here themselves. Such cases are likely to involve putative EFMs who were already members of the EEA sponsor's household in the country of origin.*

6. *It will be a question of fact and degree as to whether a person living away from the EEA sponsor's household is to be regarded as having left that household. Relevant factors are likely to include:*

    (a) the duration of the separation;

    (b) the nature and the quality of the links maintained with the household during the extended family member's time living away;

    (c) whether there was an intention to continue life together as a household, with the EEA national as the head, at the time the putative EFM left;

    (d) the extent to which the departing members of the household have established their own distinct household elsewhere;

    (e) the extent to which there remains a genuine assumption of responsibility (including financial responsibility) by the EEA sponsor for the putative EFMs during the period of physical separation, and any corresponding dependence (including financial dependence) on the part of the EFM;

(f) the immigration capacity in which the EFM has resided in the UK ahead of the EEA sponsor's arrival.

DECISION AND REASONS

1. This appeal concerns the construction of regulation 8(2)(b)(ii) of the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations"), in particular what is meant by the words "*and continues… to be a member of the EEA national's household*". This criterion lies at the heart of whether the appellants in these proceedings fall into the definition of "extended family members" contained in regulation 8(2)(b)(ii), and, accordingly, whether they have the potential to enjoy the relatively preferential rights conferred on extended family members of an EEA national by the 2016 Regulations.

2. Although the UK has now left the EU and the implementation period came to an end at 11PM on 31 December 2020, this appeal was commenced before then. Pursuant to paragraph 5 of Schedule 3 to the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020, the 2016 Regulations continue to apply to these proceedings.

Factual background

3. This is an appeal against a decision of First-tier Tribunal Judge Plowright ("the judge") promulgated on 10 June 2021. The judge dismissed the appellants' appeals against a decision of the respondent dated 2 September 2020 to refuse their applications for residence cards as family members of an EEA national under the 2016 Regulations submitted on 10 July 2020.

4. The appellants are citizens of Pakistan. Their case begins with the first appellant's childhood in Pakistan. He was born in 1984 and lived with his parents, and his aunt, Fosta Ahmed, in a shared family home. Sadly his father died in 1987. His mother continued to live in the family home until she left to remarry in 1989, but he remained with his aunt in the family home, and she raised him as her own son. He continued to be a part of his aunt's household, and she supported him financially throughout much of his adulthood in Pakistan. There is a disputed issue as to whether he was adopted by the aunt, to which we will return, but it is his case that he is her adopted son. In 2017, the first appellant married the second appellant. They lived together as man and wife, in his aunt's house, with her as a single household until July 2018 when the second appellant came to the United Kingdom on a Tier 4 student visa. The first appellant joined her as her dependent (for the purposes of the Immigration Rules) in late October 2018, and in January 2019, their son, the third appellant, was born.

5. In 2005, the aunt had become an Italian citizen. Relying on her free movement rights under EU law, she moved to the United Kingdom in May 2019, and again lives in a single household with the appellants. She is self-employed as a seamstress, in the

capacity, it seems, of a sole trader. In the 2019/20 tax year, her profit declared to HMRC was £3,482.

6. On 10 July 2020, the appellants applied for residence cards under the 2016 Regulations, as "family members" of Ms Ahmed, to whom we will refer to as "the sponsor".

7. The Secretary of State refused the applications on three bases. First, she was not satisfied that the first appellant was a "family member" of the sponsor. That was because the appellants had provided only copies of the relevant documents, and not the original documents. Secondly, she was not satisfied that the appellants were dependent upon the sponsor. Finally, the evidence that the sponsor was self-employed was insufficient.

The decision of the First-tier Tribunal

8. The judge found that the sponsor's income was too low, at £3,482 in 2019/20, to be "genuine and effective". It was difficult to see how she could support the entire household on that low income, and she appeared to be receiving third party financial support from another person. She was not a "qualified person" for the purposes of regulation 6 of the 2016 Regulations: [18] to [22].

9. As to the first appellant's status as a "family member of an EEA national", the judge found that there was insufficient evidence that the first appellant had been adopted by the sponsor. He considered the timing of the purported adoption, said to have taken place in 1987, to be odd, as it suggested that the first appellant was formally adopted by the sponsor before his biological mother left the shared family home: [36].

10. The judge went on to consider the appeal under regulation 8 of the 2016 Regulations, concerning "extended family members", as he found the first appellant to be the nephew of the sponsor. The judge accepted that the first and second appellants were members of the sponsor's household in Pakistan, and that they were financially dependent upon her there: [42].

11. The judge said at [45] that, pursuant to *Aladeselu v Secretary of State for the Home Department* [2011] UKUT 253 (IAC); [2011] Imm AR 765, there was no issue with the first two appellants arriving in the United Kingdom prior to the sponsor. At [46], he identified the operative question for resolution as being whether "the first two appellants continued to be financially dependent upon the sponsor after they came to the United Kingdom and prior to the sponsor coming to the United Kingdom." Pursuant to *Chowdhury v Secretary of State for the Home Department* [2020] UKUT 188 (IAC) it was necessary, said the judge, to determine whether there had been a "break in [the appellants'] dependency on the EEA national sponsor".

12. At [48], the judge made findings of fact that he did not accept:

> "…the unsupported assertions of the witnesses that either the first appellant or the second appellant were financially dependent upon the sponsor after they

> came to the UK, bearing in mind that the first appellant came to the UK as the dependent of the second appellant."

The judge then found that, while the first and second appellants were financially dependent upon the sponsor in Pakistan, and had been members of her household there, he was not satisfied that, once they had arrived in the United Kingdom, either the first or second appellant were now dependent upon the sponsor: [49].

13. At [50], the judge found that the appellants are now members of the sponsor's household in the United Kingdom but went on to find that they were not financially dependent upon her. The judge's operative reasons for dismissing the appeal were in these terms, at [58]:

> "This appeal must therefore be dismissed for the following reasons. Firstly, I am not satisfied that the sponsor is a qualified person under Regulation 6 of the EEA Regulations 2016. Secondly, I do not accept that the appellant has shown that he is the adopted son of the sponsor and so none of the appellants can claim to be the family members of an EEA national under Regulation 7 of the EEA Regulations 2016. Thirdly, since I am not satisfied that the appellants were financially dependent upon the sponsor once they came to the UK (or in the case of the third appellant following his birth), I cannot be satisfied that they continued to be financially dependent upon the sponsor after they left Pakistan and prior to the sponsor entering the UK in May 2019, when the appellants became a member of her household. For this reason, the appellants (including the third appellant who was born prior to the sponsor entering the UK) cannot meet the requirements of Regulation 8 of the [2016 Regulations]."

Grounds of appeal

14. There are two grounds of appeal. The first is that the judge erred in his assessment of the first appellant's adoption deed. The second is that the judge erred in his assessment of whether the sponsor was a "qualified person" by reference to her self-employed earnings.

15. Permission to appeal was granted by Upper Tribunal Judge Stephen Smith on the basis that it was arguable that the judge erred in relation to his analysis of the sponsor's employment. The grant of permission observed that the appeal raised the question of how, in practical terms, an extended family member should be expected to demonstrate continued membership of their sponsor's household, in circumstances where the sponsor arrived in the host Member State after the extended family members.

Legal framework

16. Directive 2004/38/EC of the European Parliament and of the Council ("the Directive") consolidated a number of predecessor instruments concerning the rights enjoyed by EU citizens and their "family members", as defined in Article 2(2), to reside in the territory of the Member States. The definition of "family member" includes:

> "(c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner…"

Article 2(2) has been transposed by regulation 7 of the 2016 Regulations.

17. Article 3(2)(a), concerning the beneficiaries of the Directive, provides, where relevant:

> "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…"

18. Article 3(2) does not confer a right of residence on other family members as such, but rather provides a potential gateway to relatively preferential treatment under the domestic law of the host Member State. This is achieved by the Article obliging Member States to "facilitate" the residence of such persons, and by obliging Member States to undertake "an extensive examination" of their personal circumstances, and to justify denial of residence in the event that an application is refused.

19. Regulation 8 of the 2016 Regulations defines the term "extended family member", to give effect to Article 3(2). There are a number of bases upon which a person may be categorised as an extended family member, through satisfying a condition listed in the regulation. Paragraph (2) is relevant for present purposes:

> "(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."

20. An "EEA national" means, in this context, a person who is a citizen of an EU Member State, or of Iceland, Norway, Liechtenstein, or Switzerland, and is to be read as a proxy for the term "Union citizen" in the Directive.

21. There are a number of bases upon which a person may meet the criteria to be an extended family member under regulation 8(2), by reference to their circumstances in the country of origin, and their circumstances in the UK. The four combinations were summarised in *Dauhoo (EEA Regulations – reg 8(2))* [2012] UKUT 79 (IAC) in these terms:

    a. prior dependency and present dependency;

    b. prior membership of a household and present membership of a household;

    c. prior dependency and present membership of a household;

    d. prior membership of a household and present dependency.

22. Accordingly, it is possible for an extended family member to change what *Dauhoo* termed the "relevant connection" with the EEA national sponsor between that which existed in their country of origin and the status of the connection when in the UK.

23. The authorities establish that it is necessary for dependency to be continuous. In *Rahman v Secretary of State for the Home Department* Case C-83/11 ECLI:EU:C:2012:519 [2013] QB 249; [2013] Imm AR 73, the Court of Justice held at [38] that Member States were able to specify under domestic law:

> "…particular requirements as to the nature and duration of dependence, in order in particular to satisfy themselves that the situation of dependence is genuine and stable and has not been brought about with the sole objective of obtaining entry into and residence in the host Member State."

24. In *Chowdhury v Secretary of State for the Home Department* [2021] EWCA Civ 1220; [2021] Imm AR 1748, Macur LJ held that the approach in *Rahman* meant that dependence must be continuous from the country of origin to the UK. She said at [29]:

> "The adjective 'stable' denotes a durable condition or state of affairs, not an intermittent one separated by a period of time other than could reasonably be adjudicated to be de minimis."

25. The Court of Appeal thus upheld the conclusion reached by a different constitution of this tribunal in *Chowdhury* [2020] UKUT 188 (IAC), expressed in these terms in the judicial headnote:

> "The words 'and continues to be dependent' in regulation 8(2)(c) of the Immigration (European Economic Area) Regulation 2006, properly characterised, require an applicant to establish that there has not been a break in their dependency on the EEA national sponsor."

26. Article 3(1) of the Directive envisages family members of EEA nationals being able to "accompany or join" their EEA sponsor in the host Member State. Article 3(2) does not expressly oblige Member States to treat other family members in the same way,

but regulation 8(2) extends the "accompany or join" refrain to extended family members, as defined.

27. It has been held that the expressions "join" or "has joined" do not of themselves impose a temporal limitation, and that it does not matter whether it is the relative or the EEA national who arrives first in the United Kingdom: see *Aladeselu and Others v Secretary of State for the Home Department* [2013] EWCA Civ 144; [2013] Imm AR 780 at [44]. Nor is regulation 8 to be read as though the ability to accompany or join an EEA national is subject to a requirement of broadly contemporaneous or recent arrival. At [48], *Aladeselu* addressed the import of *Rahman v Secretary of State for the Home Department* Case C-83/11. Rejecting a submission from the Secretary of State that *Rahman* was authority for the proposition that Member States could impose such a continuity requirement, Richards LJ, with whom Pill LJ agreed, held that *Rahman*:

> "…is not to be read as laying down a requirement that the dependency at the date of the application must be dependency in the country from which the applicant comes, such that a relative who has been dependent throughout cannot qualify if he arrives in the host Member State many months before the EU citizen and the making of the application."

Submissions: continuity of household membership

28. In relation to the issue concerning the continuity of household membership identified in the grant of permission to appeal, Mr Jegede submitted that the judge failed to recognise the significance of his findings that the appellants were members of the sponsor's household in Pakistan, and his findings that they were also members of her household here: see [49] and [50] of the judge's decision. That being so, the appellants could point to a relevant connection in Pakistan, and in this country, on the judge's findings, thereby falling within the definition of "extended family members". Pursuant to *Aladeselu*, there could be no objection to the sponsor arriving after her extended family members, who continued to be members of her household at all relevant times.

29. Mr Whitwell relied on the Secretary of State's rule 24 notice, which may be summarised as follows. It is necessary for an extended family member to continue to be a member of the EEA sponsor's household at all times; that requirement applies equally to an extended family member seeking to qualify on a household membership basis; *Chowdhury* should be applied accordingly. It is necessary for the EEA sponsor to be the head of the household in question, even though it is not necessary for the sponsor to be present with the extended family member at all times in that household. The practical reality of requiring an EEA sponsor to be the head of the household to which the extended family member belongs means that, where the putative extended family member locates to the host Member State first, establishing their own home, it may be harder to maintain that such a state of affairs entails continuing to belong to the sponsor's household, even where the sponsor joins subsequently. On the findings of the judge, there had been a break in the appellants' membership of the sponsor's household, and the appellants thereby fell foul of the requirement to have been members of the sponsor's household on a

continuous basis. Pursuant to *Chowdhury* in the Court of Appeal at [29], only *de minimis* breaks would be permitted.

Discussion: continuity of household membership

30. By way of a preliminary observation, *Dauhoo*, *Aladeselu* and *Chowdhury* concerned regulation 8(2) of the Immigration (European Economic Area Regulations) 2006 ("the 2006 Regulations"), whereas this appeal concerns regulation 8(2) of the 2016 Regulations. We are satisfied that for present purposes, the requirements of regulation 8(2) of the 2016 Regulations are substantively the same, with the consequence that the authorities concerning regulation 8(2)(c) of the 2006 Regulations apply in relation to the construction of regulation 8(2)(b)(ii) of the 2016 Regulations. We note that in *Begum v Secretary of State for the Home Department* [2021] EWCA Civ 1878, concerning the need for the EEA sponsor to be an EEA citizen at the time of the relevant connection in the country of origin, Andrews LJ observed at [29] that regulation 8(2)(b)(ii) of the 2016 Regulations was "the equivalent" of regulation 8(2)(c) of the 2006 Regulations.

31. Turning to the issue before us, it was common ground at the hearing that the words "and continues to be" in regulation 8(2)(b)(ii) of the 2016 Regulations apply equally to those seeking to establish a relevant connection to an EEA sponsor through being members of their household as they do to dependence. Our reasons for agreeing with this approach can be stated simply.

32. First, it is clear from a textual analysis of regulation 8(2)(b), concerning the requirement for dependence or household membership in the country of origin, when read with the criteria in paragraph (ii), concerning the need for such status to continue in this country. The requirement "and continues to be" in paragraph (2)(b)(ii) is a reference back to continuing the relevant connection required by the primary criterion in paragraph (2)(b), namely to be dependent on the EEA national or to be a member of the EEA national's household. A relevant connection must exist in the country of origin and must continue into the United Kingdom. The requirement "and continues to be" is expressed in the present tense, denoting an active, ongoing requirement to be linked by a relevant connection to the EEA national sponsor.

33. Secondly, bearing in mind the equal prominence given to dependence and household membership by Article 3(2)(a) of the Directive, and by regulation 8(2)(b) of the 2016 Regulations, we accept that an extended family member could arrive in the UK in advance of their EEA sponsor, even where their eventual intended residence will be as a member of their EEA sponsor's household, when the sponsor subsequently arrives. We see nothing in the Directive, the 2016 Regulations, or *Aladeselu* that calls for a different approach in a household membership case.

34. It follows that the discussion in *Chowdhury* concerning the need for continuity of a relevant connection applies equally to household membership cases as it does to dependence cases. Of course, pursuant to *Dauhoo*, a relevant connection may change from the country of origin to the UK; but, consistent with *Chowdhury*, there may be no break in the dependence, or household membership, from the country of origin to

the UK, as the case may be, other than a *de minimis* break (see *Chowdhury* in the Court of Appeal at [29] *per* Macur LJ).

35. The question then arises as to how does a putative extended family member ("EFM") seeking to reside on a household membership basis arrive in the UK *before* their EEA sponsor demonstrate that they are or remain a member of the EEA national's household, for the purposes of establishing continuity of the relevant connection? Put another way, how can an EFM properly be said to be a member of their EEA sponsor's household if the EFM is not living in the same country as the sponsor? Whereas financial dependence may be demonstrated with relative ease across international boundaries, membership of a person's household implies a degree of co-location in the same property, thereby presenting potential difficulties for the putative EFM residing in a different country to the EEA sponsor.

36. The Court of Appeal considered the meaning of the term "members of the household of the Union citizen" found in Article 3(2)(a) of the Directive in *KG (Sri Lanka) v Secretary of State for the Home Department* [2008] EWCA Civ 13; [2008] Imm AR 343. At [77], Buxton LJ said:

> "There was some tendency in the argument before us to read this requirement as one of being members of the same household; or, as was said on behalf of [one of the parties in those proceedings] AK, members of a communal household. That is not what Directive 2004/38 says, nor was that the condition in Regulation 1612/68, which requires the OFM to have been, in relation to the Union citizen, under his roof, not under the same roof. It seems very likely that the assumption is that the household will indeed have been that of the Union citizen, that is, that he was in colloquial terms head of it, the relations were under his roof, and on that basis he can reasonably wish to be accompanied by the members of it when he leaves for another country. If, on the other hand, the liberty extends to what might be called collateral members of the same household, then it is very difficult to see why for instance cousins with a close relationship but not actually living together are excluded; or why, to give a concrete example, it should be crucial to the case of AK that he was living in the same house, rather than the same street, as his cousin."

In Buxton LJ's judgment, "OFM" means "other family member", in Article 3(2)(a) of the Directive: see [9].

37. The reference to Regulation 1612/68 in *KG (Sri Lanka)* was to Regulation 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, which was partially repealed and consolidated into Directive 2004/38/EC: see Article 38(1) thereof. The obligation under the Article 3(2)(a) of Directive 2004/38/EC to facilitate the residence of other family members was originally found in Article 10(2) of Regulation 1612/68, albeit in marginally different terms. Having made provision for certain family members of workers to enjoy a right to reside in Article 10(1), Article 10(2) of Regulation 1612/68 made provision for other family members in these terms:

> "Member States shall facilitate the admission of any member of the family not coming within the provisions of paragraph 1 if dependent on the worker referred to above or **living under his roof in the country whence he comes**." (Emphasis added)

The text we have emphasised demonstrates how the predecessor instrument to the Directive approached the equivalent of the concept now termed "members of the Union citizen's household" by reference to a requirement that such persons must be "living under his roof in the country whence he comes."

38. Against that background, and approaching the question of household membership by reference to its ordinary meaning, we consider that members of an EEA national's household will demonstrate a degree of physical and relational proximity to the EEA national, with the EEA nationals(s) being the head of the household. There must be a sense in which the home is the EEA national's home, with the EEA national at the head, rather than merely a shared home to which all contribute to and bear responsibility for equally. Such relational proximity is likely to have a number of facets but will primarily include the persons living together as a unit, with a common sense of belonging, with the EEA sponsor at the head. In *Chowdhury* at [32], Macur LJ said it was reasonable and rational to look for a "genuine assumption of responsibility by the EEA national for a member of his extended family" when construing the requirement, and to that end, questions of the commencement and duration of dependency or household membership were relevant to that assessment.

39. It follows that the household relationship must be such as to be unaffected by a temporary departure by one or more members in order to pursue temporary goals elsewhere. We accept that everyday life is replete with members of the same household living apart, including across international boundaries, for example, to work, or to study. There is no reason why this context calls for a different approach.

40. In our judgment, it will be a question of fact and degree as to whether a person living away from the household is to be regarded as having left the household. Relevant factors are likely to include the following: the duration of the absence; the nature and the quality of the links maintained with the household during the extended family member's absence; whether there was an intention to resume life together as a household, with the EEA national as the head, at the time the putative EFM left; the extent to which the departing members of the household have established their own distinct household elsewhere; and the extent to which there remains a genuine assumption of responsibility by the EEA sponsor for the extended family members during the period of physical separation.

41. Where the extended family members have arrived in the UK before the EEA sponsor, the immigration capacity in which they have done so may be relevant to whether the EFMs have left the EEA national's household. If the putative extended family members sought admission on the express basis that they were members of the household of an EEA national who would, in due course, be residing in the UK under EU law, and sought entry to the UK on that basis, that would be strong evidence to demonstrate that they wished to maintain their status as members of the

EEA national's household upon arrival in the UK. By contrast, if the putative extended family members qualified for entry to the UK in their own capacity, and later established roots indicative of a move away from the EEA sponsor's household and towards being an autonomous family unit, that may indicate a departure from the EEA sponsor's household.

42. The genuine assumption of responsibility on the part of the EEA sponsor may take the form of financial dependence, even though the relevant connection the applicant seeks to establish is on the basis of household membership. We consider that it would be artificial to ignore the presence of ongoing financial support from an EEA sponsor, even where the relevant connection is based on membership of the EEA sponsor's household rather than dependency. Household membership often involves the receipt of financial support from the head or other members of the household. This consideration is of particular relevance where the financial support is not such as to create a situation of "dependence" within the meaning of Article 3(2)(a) of the Directive but where it nevertheless forms a significant part of the fabric of household life shared between all members of the EEA sponsor's household. By the same token, where such financial support comes to an end upon the physical separation between the putative EFMs and the EEA sponsor, that may be an indication that the putative EFMs ceased to be members of the sponsor's household.

43. We take a practical example. An international student may well still be a part of the household of an EEA national in their home country while studying overseas, perhaps where the overseas element is only ever intended to be temporary, and where strong links with their home household are maintained during their time away. The student may be living in student accommodation, on the footing that most of their belongings remain at the sponsor's house, to which they intend to return, pursuant to the sponsor's genuine assumption of responsibility for them. There may be some financial support being remitted by the student's family in the country of origin, even though the student is not a dependent in the Article 3(2)(a) sense, for example, where the student has obtained student finance, or is working alongside their studies.

44. By contrast, where an international student commences an independent life, sets up their own home in the host country, and develops a family life of their own, then it may be less likely that they could be said to be a part of the sponsor's household in their country of origin.

45. Before concluding on this point, we make a final observation on the impact of the advance arrival of putative extended family members on the possible combinations of relevant connections pursuant to *Dauhoo* (see paragraph 21, above). It is difficult to see how an extended family member may qualify on the basis of prior dependency and present membership of a household, if arriving before the EEA sponsor. In such circumstances, the extended family member will not have been a member of the EEA sponsor's household before arriving in the UK at all. It is, therefore, difficult to see how, upon doing so, they may properly be said to be a member of their EEA sponsor's household in circumstances when the sponsor is yet to arrive in the UK. The putative EFM would not have been a member of the EEA sponsor's household in

the country of origin, so it is difficult to see how, upon arrival here, they could acquire that status *in the absence of the sponsor*. We do not rule out the possibility of this combination being possible, however; we simply observe that an applicant may struggle to succeed on this basis. There would likely have to be some distinguishing feature, such as historical household membership, followed by dependence alone, plus evidence of plans to resume household membership in this country, for example.

46. It is important to recall, as Richards LJ noted in *Aladeselu* at [52] in relation to regulation 8(2)(c) of the 2006 Regulations, that a finding that an applicant comes within regulation 8 does not confer upon the applicant any substantive right to residence in the UK. Whether to grant a residence card to a person falling within regulation 8 is a matter for the discretion of the Secretary of State, pursuant to an "extensive examination of the personal circumstances of the applicant": see regulation 18(5).

47. Drawing this analysis together, we summarise our conclusions as follows.

    a. A person seeking recognition as an "extended family member" under regulation 8(2) of the Immigration (European Economic Area) Regulations 2016 must establish a relevant connection with their EEA sponsor in the country of origin, and in the UK.

    b. The relevant connection may be through being a dependent of the EEA national sponsor, or through being a member of the EEA national's household. The relevant connection may change between the country of origin and the UK, as held in *Dauhoo (EEA Regulations – reg 8(2))* [2012] UKUT 79 (IAC).

    c. There must not be a break in dependence or household membership from the country of origin to the UK, other than a *de minimis* interruption.

    d. To be a member of an EEA national's household requires a sufficient degree of physical and relational proximity to the EEA national through living in the household of which the EEA national is the head, living together as a unit, with a common sense of belonging. There should be a genuine assumption of responsibility by the EEA national for the extended family member. Questions of the commencement of the assumption of responsibility and the duration of dependency or household membership are relevant.

    e. An applicant may, in principle, establish a relevant connection to an EEA national in the UK through being a member of the EEA national's household in the UK before the EEA national has arrived here themselves. Such cases are likely to involve putative EFMs who were already members of the EEA sponsor's household in the country of origin.

f. It will be a question of fact and degree as to whether a person living away from the EEA sponsor's household is to be regarded as having left that household. Relevant factors are likely to include those listed at [40] to [42], above.

g. Where the extended family members have arrived in the UK before the EEA sponsor, the immigration capacity in which they have done so may be relevant to whether the EFMs have left the EEA national's household.

48. Applying the above principles to the decision of the First-tier Tribunal, the judge correctly identified the need to determine whether there was a relevant connection in Pakistan, finding that the appellants were both dependent upon the sponsor and members of her household whilst living there: see [49]. On his findings at [48] and [52], the appellants' financial dependence upon the sponsor ceased when they left Pakistan. Accordingly, the only basis the appellants could be "extended family members" under regulation 8 was if they established (i) that they continued to be a part of the sponsor's household upon arrival in the UK, ahead of the sponsor's arrival; and (ii) that there had been no break in their membership of their household by the date of the hearing.

49. While the judge found that the appellants were once again members of the sponsor's household upon her relocation to the UK, he did not expressly consider whether they had continued to be members of her household upon their arrival here, in advance of the sponsor. In one sense the judge was correct to state at [46] that, pursuant to *Aladeselu*, there was "no issue" with the appellants' arrival prior to the sponsor. But the point of principle established by *Aladeselu* does not address the case-specific considerations of whether, in a particular case, the relevant connection continued during the period for which an EFM has arrived in the UK before their EEA national sponsor. That will always be a fact-specific question, to be established on the evidence. The judge addressed that issue in relation to continued dependency but did not expressly address that issue in relation to the question of continued household membership. That was an omission.

50. We are satisfied that, had the judge expressly addressed whether the appellants continued to be members of the sponsor's household during the period when they had arrived in the UK before the sponsor, he would have found that they were not. We recall that the second appellant, the sponsor's daughter in law, was the first to arrive in the UK, on 16 July 2018. She migrated here in her own capacity, as a Tier 4 student. The judge had made only tentative findings that the sponsor had funded her tuition fees and had rejected the appellants' evidence of their claimed continued dependence upon the sponsor following their advance arrival here: [48]. The first appellant, the husband of the second appellant, was the next to arrive, and did so as the second appellant's dependant under the Immigration Rules, on 30 October 2018. The couple's son was born here on 29 January 2019. These are all significant life events which took place in the UK, far away from the sponsor, during a time when, on the judge's findings of fact, financial dependence on the sponsor had ceased. There was no evidence before the judge that the sponsor had sought to maintain the required "genuine assumption of responsibility" for the appellants during their

advance arrival here: on the contrary, the prior such responsibility demonstrated by the sponsor had come to an end by the time of the appellants' arrival here. It is significant that the appellants' immigration status was granted to them in their own capacity, rather than as extended family members present as an advance delegation of the sponsor's household. It was not until May 2019 that the sponsor arrived here, some six months after her son, and ten months after her daughter in law. The evidence before the judge all pointed towards a finding that the first and second appellants had left the sponsor's household upon their arrival here.

51. On the judge's findings, the appellants resumed being members of the sponsor's household upon her arrival here, but the evidence pointed to there being a break prior to their arrival. The required stability of household membership was absent at the relevant times. The duration of the break was clearly more than de minimis.

52. We find, therefore, that the appellants could not have demonstrated their continued membership of the EEA sponsor's household upon their arrival in the UK in advance of the sponsor.

Remaining grounds of appeal

53. We turn to the remaining grounds of appeal. In support of both grounds, Mr Jegede applied to rely on additional evidence that was not before the judge, under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008. The new evidence was in the form of an affidavit of Jamshed Ahmed Khan, an Advocate of the High Court in Pakistan, stating that the adoption deed considered by the judge was genuine. It also consisted of additional financial documents concerning the sponsor's claimed self-employment, and a further statement by the sponsor addressing the concerns of the judge.

54. Under rule 15(2A)(a)(ii), a party wishing to rely on evidence that was not before the First-tier Tribunal must explain why the evidence was not submitted to the First-tier Tribunal. The rule 15(2A) application states that the evidence was not provided to the First-tier Tribunal, "because this was only acquired resulting to the comments raised by the First-tier Tribunal Judge in the determination that is subject to the present hearing."

55. To rely on new evidence to controvert the findings of fact reached by a first instance judge, it is necessary to satisfy the well-known criteria enunciated in *Ladd v Marshall* [1954] 1 WLR 1489. The criteria are threefold. First, it must be shown that the evidence could not have been obtained with reasonable diligence for use at trial. Secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive. Thirdly, the evidence must be apparently credible, though it need not be incontrovertible.

56. We decline to admit any of the new material. It is all material that could have been obtained with reasonable diligence ahead of the hearing before the First-tier Tribunal. It falls at the first *Ladd v Marshall* hurdle.

57. Having not admitted the new evidence, ground 1 must fall away. The judge reached legitimate findings of fact based on the material that before him rejecting the first appellant's claim to be the adopted son of the sponsor. Pursuant to paragraph 3 of the headnote to *Hussein and another (Status of passports: foreign law)* [2020] UKUT 250 (IAC); [2020] Imm AR 1442, foreign law (including nationality law) is a matter of evidence, to be proved by expert evidence directed specifically to the point in issue. The judge was without expert evidence addressing the validity of the first appellant's claimed adoption by the sponsor and was entitled to reach the conclusions he did concerning that issue at [34] to [38].

58. The second ground of appeal concerning the sponsor's self-employment falls away in light of our findings concerning regulation 8, above. We consider Mr Jegede's submissions for completeness. While there is superficial force to Mr Jegede's submission that the judge should not have used the HMRC personal allowance threshold as a benchmark for whether the sponsor's self-employment was "genuine and effective", we are satisfied that the judge was entitled to conclude that it was not. The judge did not use the HMRC threshold as the decisive factor, but only as an indicative guide to calibrate his assessment of the sponsor's overall earnings. The level of the sponsor's income was a relevant factor when assessing whether the activity was marginal or ancillary to the sponsor's overall residence and life in the UK: see the discussion in *DV v HMRC* [2017] UKUT 0155 (AAC) at [3] to [6] and the authorities there cited. It was legitimate for the judge to ascribe significance to the low level of the sponsor's income, in the context of her only doing "some" sewing work.

59. Mr Jegede's reliance on *Secretary of State for Work and Pensions v JS* [2010] UKUT 240 (AAC) is nothing to the point as it concerns the impact of an apparent cessation of self-employed activities by a person who previously enjoyed self-employed status. It does not address the judge's findings that the sponsor's purported self-employed income was so low as not to be genuine and effective in the first place, as found by the judge in these proceedings.

60. Mr Jegede also submitted that it was procedurally unfair for the judge to highlight the sponsor's reliance on third party support, without that issue having been ventilated between the parties. In our view, nothing turns on this. There was no unfairness. The appellants were well aware of the respondent's position that there was insufficient evidence that the sponsor was exercising Treaty rights as a self-employed person. The appellants' grounds of appeal to the First-tier Tribunal raised the issue of whether the sponsor was a self-employed person within the meaning of regulation 6(1)(c) of the 2016 Regulations: see paragraph 3. The sponsor's financial circumstances were plainly relevant to that assessment. Indeed, the contents of the sponsor's bank statements were identified in the Appellants' skeleton argument before the First-tier Tribunal as being relevant to the judge's assessment in this regard: see paragraph 10. The appellants' true complaint is that they dislike the judge's analysis of the evidence they relied upon, which is not an error of law.

61. It follows that this appeal must be dismissed. The judge reached findings he was entitled to reach (i) rejecting the first appellant's claim to be the adopted son of the

sponsor and (ii) rejecting the submission that the sponsor was a "qualified person" on account of being self-employed. In any event, the evidence before the judge did not support a finding that the first and second appellants had continued to be members of the sponsor's household upon their arrival in the UK before her, and the fact that they resumed being members of her household when she later relocated to the UK is not capable of curing the earlier break in their membership of her household.

62. By dismissing the appellants' appeals against the Secretary of State's refusal to grant them residence cards under the 2016 Regulations, the decision of the First-tier Tribunal did not involve the making of an error of law such that it must be set aside.

Notice of Decision

The appeal is dismissed.

The decision of Judge Plowright did not involve the making of an error of law such that it must be set aside.

No anonymity direction is made.

Signed *Stephen H Smith* Date 3 May 2022

Upper Tribunal Judge Stephen Smith