

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/05213/2013
IA/05220/2013

THE IMMIGRATION ACTS

Heard at Field House
On 26 July 2013

Determination Promulgated
On 29 July 2013

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

(1) MRS MONUARA BEGUM
(2) MS FORHANA BEGUM
(NO ANONYMITY ORDER MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr S. Saeed, Solicitor Advocate, Aman Solicitors
For the Respondent: Mr S. Walker, Specialist Appeal Team

DETERMINATION AND REASONS

1. The appellants appeal from the decision of the First-tier Tribunal (Judge Grimmett sitting at Sheldon Court, Birmingham on 2nd May 2013) dismissing their appeals against the decision by the Secretary of State to refuse to issue them with residence cards as confirmation of their claimed right to reside in the UK under the Immigration (European Economic Area) Regulations 2006. The first appellant ("M") is the mother of the second appellant ("F"), and both of them are nationals of Bangladesh.

2. The background to this case is that M's late husband ("K"), who was born in Bangladesh, acquired Portuguese nationality in February 2003. He came to the UK in March 2003 and remained here until his death on 31 January 2011. M entered the UK on 22 December 2003 as his spouse, and obtained an EEA residence card on 14 March 2006. F entered the UK on 13 September 2005 with a brother Muhammad Ali ("A") who was one year younger than her. (As of July 2011, A was aged 26 and F was aged 27). Each of them was issued with a residence card that was valid until 29 January 2010.
3. M, F and A applied for permanent residence cards under Regulation 15 of the Regulations 2006, but their applications were refused in June 2011. They appealed against these refusals on *inter alia* Article 8 grounds, and their appeals were dismissed by Judge Stott sitting in the First-tier Tribunal in Birmingham on 26 July 2011. He accepted that M, F and A had all lived with their EEA national "sponsor" K from 2005 until his death, but K had not acquired a right of permanent residence by the time he died as he was not a qualified person after 30 January 2006, when he retired. So none of M, F or A could claim a permanent, or indeed a continuing right, of residence on the basis of their relationship to K. As for the Article 8 claim, he found that F and A each had a spouse in Bangladesh; and that M had two married sons still living in Bangladesh. M would leave behind in the UK a son and daughter, both of whom had acquired Portuguese nationality. But there was no evidence that the ties between these two and M, F and A went beyond normal emotional ties.
4. Following this ruling by Judge Scott, A went back to Bangladesh. M and F stayed here, and applied for residence cards on the ground that they were family members of Ali Haydor ("H"). H is the son of M referred to by Judge Scott. The applications were refused in February 2013 *inter alia* on the grounds that M and F had not shown that they were dependent on H in the UK, and that F had not shown that she was dependent on H or a member of H's household prior to arriving in the UK.

The Hearing before, and the Decision of, the First-tier Tribunal

5. As previously indicated, the appeals of the two appellants came before Judge Grimmett sitting at Sheldon Court in Birmingham on 2 May 2013. Mr Hussain appeared on behalf of the appellants and Ms Venables, a Home Office Presenting Officer, appeared on behalf of the respondent. The judge received oral evidence from the first and second appellants, and from their sponsor, H.
6. In his subsequent determination, Judge Grimmett gave detailed reasons for finding that M had not proved that she was dependent on H in the UK (paragraphs 5 to 10); and for finding that F had not shown prior/present dependency on H or prior membership of H's household (paragraphs 11 to 22).

The Application for Permission to Appeal

7. Mr Saeed settled the appellants' application for permission to appeal to the Upper Tribunal. He submitted that the Judge had erred in law in failing to consider whether the appellants were members of the sponsor's household in Bangladesh; and

whether they continued to be members of his household in the UK. The Judge had only looked at whether the appellants had lived with the sponsor in Portugal, “which is not a requirement of the regulations.” The Judge had failed to make a finding as to whether the appellants were members of H’s household in the UK.

The Grant of Permission

8. On 11 June 2013 Designated Judge J.M. Lewis granted the appellants permission to appeal. He saw merit in the argument raised by Mr Saeed, following **RK (India) v SSHD [2010] UKUT 421**.

The Appeal Hearing

9. At the hearing of the appeal, Mr Saeed submitted that it did not need to be shown that the sponsor was the head of the household. It was enough that the appellants had shared the same household as the sponsor. In support of this proposition he referred me to an EC proposal document issued in 2001 which, he submitted, was a valuable aid in interpreting the subsequent directive dealing with the rights of union citizens and their family members to move and reside freely (Directive 2004/38/EC of 29 April 2004). The document contains at page 8 the following commentary on Article 3:

These provisions are taken from the existing provisions of Article 10(2) of Regulation 1612/68 and Article 1(2) of Directive 73/148/EEC, which call on Member States to facilitate the entry of any other family members of Union citizens or their spouses who are dependent on them or *lived with them* (my emphasis) in the country from which they are arriving.

10. In reply, Mr Walker repeated and adopted the points made by Lee Ong of the Specialist Appeals Team in the Secretary of State’s Rule 24 response.

Analysis

11. At paragraph 40 of **Moneke (EEA - OFMS) Nigeria [2011] UKUT 341**, which is reported in the immigration appeal reports for 2011 at pages 928 to 944, the Upper Tribunal concluded that for the time being, subject to future clarification by the higher courts, Immigration Judges should adopt the following approach:
 - (i) A person claiming to be an OFM may either be a dependant or a member of the household of the EEA national; they are alternative ways of qualifying as an OFM.
 - (ii) In either case the dependency or membership of the household must be on a person who is an EEA national at the material time. Thus dependency or membership of a household that preceded the sponsor becoming an EEA national would not be sufficient. ...
 - (iii) By contrast with Article 2(2) family members, an OFM must show qualification as such not just since arrival in the United Kingdom but before arrival here and the application to join the EEA national who is resident here. The applicant must

have been a dependant in the country from which they have come, that is to say their country of origin or other country from which they have arrived in the United Kingdom.

- (iv) Membership of a household has the meaning set out in **KG (Sri Lanka)** and **Bigia** (above); that is to say it imports living for some period of time under the roof of a household that can be said to be that of the EEA national for a time when he or she had such nationality. That necessarily requires that whilst in possession of such nationality the family member has lived somewhere in the world in the same country as the EEA national, but not necessarily in an EEA state.
- (v) By contrast the dependency on an EEA national can be dependency as a result of the material remittances sent by the EEA national to the family member, without the pair of them having lived in the same country at that time.

29. At paragraph 41 the Tribunal held that nevertheless dependency was not the same as the mere receipt as some financial assistance from the sponsor. For present purposes the Tribunal accepted that the definition of dependency was accurately captured by the current UKBA ECIs which read as follows at chapter 5.12:

Financial dependency should be interpreted as meaning that the person needs financial support from the EEA national or his/her spouse/civil partner in order to meet his/her essential needs – not in order to have a certain level of income.

Provided a person would not be able to meet his/her essential living needs without the financial support of the EEA national, he/she should be considered dependent on that national. In those circumstances, it does not matter that the applicant may in addition receive financial support/income from other sources.

30. At paragraph 42 the Tribunal said:

We of course accept (and as the ECIs reflect) that dependency does not have to be necessary in the sense of the Immigration Rules, that is to say an able bodied person who chooses to rely for his essential needs on material support of the sponsor may be entitled to do so even if he could meet those needs from his or her economic activity: see **SM (India)**. Nevertheless where, as in these cases, able bodied people of mature years claim to have always been dependent upon remittances from a sponsor that may invite particular close scrutiny as to why this should be the case. We note further that Article 10(2)(e) of the Citizens Directive contemplates documentary evidence. Whether dependency can ever be proved by oral testimony alone is not something that we have to decide in this case, but Article 10(2)(e) does suggest that responsibility is on the applicant to satisfy Secretary of State by cogent evidence that is in part documented and can be tested as to whether the level of material support, its duration and its impact upon the applicant combined together meet the material definition of dependency.

31. At paragraph 43 the Tribunal went on to say that where there is a dispute as to dependency Immigration Judges should therefore carefully evaluate all the material to see whether the applicant has satisfied them of these matters.

32. In **Dauhoo (EEA Regulations - Regulation 8(2) [2012] UKUT 79**, Upper Tribunal Judge Storey said as follows at paragraph 13:

It is immediately apparent 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 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 dependant abroad but who had now moved into 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.

33. Article 10(2) of Directive 2004/38/EC (the Citizens Directive) sets out the documents which should be presented to a member state in order for a residence card to be issued. In cases falling under Article 3(2)(a), the following is required:

[A] document issued by the relevant authority in the country of origin or country from which they are arriving certifying that they are dependants or members of the household of the Union citizen...

Membership of Household in Bangladesh

34. The evidence before Judge Grimmett included a certificate issued by the Chairman of No-5 Chilaura Holdipur Union Parishad in March 2102 certifying that M and her sons and daughters including F and H were living as members of a joint family unit at Holding No 05/62 until 2002.
35. In his evidence before the First-tier Tribunal H was silent on the question of when he acquired Portuguese nationality. H's Portuguese passport was issued to him in 2011 and it is unlikely that his citizen card, which has an expiry date of 2014, was issued to him before 2009. In any event, it was not part of the appellants' case before the First-tier Tribunal that H had Portuguese nationality when the family were living under the same roof in Bangladesh. So Judge Grimmett did not err in law in failing to consider whether M or F were members of H's household in Bangladesh. As he was not a Union citizen at the time, it is a completely irrelevant consideration, as is apparent from the guidance given in **Moneke**.

Membership of Household in Portugal

36. There is no challenge in the grounds of appeal to the Upper Tribunal to the finding by Judge Grimmett that F had not proved that she was a member of H's household in Portugal in the period after 2002 until she came to the UK in 2005. But the judge accepted, on the basis of the documentary evidence provided, that H and F were living at the same address in Portugal in 2002. Mr Saeed submits that this is enough

to discharge the burden of proving prior membership of H's household in another country apart from the UK. He relies on the following dicta from paragraph 21 of RK:

For an OFM to fulfil the household requirement he or she must have lived with the Union citizen in the same country *at some time in the past* (my emphasis), whilst dependency requires no such link.

37. I accept that the implication of RK is that there can be a lengthy interregnum during which the relative outside the UK is not a member of the Union citizen's household without that relative becoming disqualified from subsequently claiming OFM status in the UK.
38. However, it was not part of the appellants' case that H was a Portuguese national in 2002. Therefore the judge did not err in law in failing to consider whether this period of cohabitation qualified F for OFM status.
39. The same considerations apply to M. In addition, I am not persuaded that Mr Saeed's construction of Article 3(2)(a) of the Directive is correct. I consider that the OFM must show that he or she was a member of the EEA national sponsor's household, and not merely that the OFM and the sponsor lived under the same roof. If the head of the household and/or the provider of the accommodation is not the sponsoring EEA national, it is straining the language of Article 3(2)(a) to characterise the OFM as being a member of the sponsoring Union citizen's household, as opposed to (i) the sponsor being a member of the OFM's household or (ii) the sponsor and the OFM being members of someone else's household (e.g. members of K's household prior to K's death). The guidance from Moneke which I have cited above supports my construction. It is also supported by Judge Storey's discussion in Dahoo where he refers to the "EEA principal". This term implies that the OFM must be occupying a subordinate position in the household of the EEA principal in order to be treated as a member of his household, even if the OFM is not otherwise dependent on the EEA principal (because, for instance, he or she has independent means). However, I accept that there are other passages in Moneke and elsewhere which are consistent with the more liberal construction contended for by Mr Saeed. For that reason, I primarily base my decision on the fact that H is not shown to have acquired Portuguese nationality at the time when F and M were residing under the same roof as him in Portugal.

Membership of Household in UK

40. The Judge did not make a specific finding on whether M and F were living under the same roof as H. But it is reasonably apparent from his other findings that he treated this as an accepted fact. It is also reasonably apparent that he did not accept that M and F were members of H's household, as opposed to H and F being members of M's household. He did not accept that H was providing M with accommodation (paragraph 6). The evidence indicated to him that it was the other way round: that M was providing H and F with accommodation, since "the tenancy appeared to be in the name of their mother" (paragraph 7) and there was no evidence that H was

paying rent (paragraph 7). The failure to prove that M was financially dependent on H fed into an implicit and sustainable finding that M was not a member of H's household.

41. F stands in the same position as H vis-à-vis her mother. It follows from the judge's findings that she is a member of her mother's household, as opposed to being a member of H's household.
42. On an alternative and more liberal construction of the "membership of household" requirement, M and F meet this criterion. But they only meet it in the United Kingdom, and this is not sufficient to enable either of them to qualify as family members of H for the purposes of the Regulations 2006. So even if the judge erred in law in not finding that M and F are members of H's household in the United Kingdom, the error is not material.
43. In conclusion, and for the reasons I have given above, I find the First-tier Tribunal did not err in law in dismissing the appellants' appeals.

Decision

The decision of the First-tier Tribunal did not contain an error of law, and so the decision stands.

The First-tier Tribunal did not make an anonymity direction.

Signed

Date

Deputy Upper Tribunal Judge Monson