Neutral Citation Number: [2021] EWCA Civ 1878

Case No: C9/2021/0385

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
Upper Tribunal Judge Keith & Deputy Upper Tribunal Judge Welsh
EA/04173/2019

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/12/2021

Before :

LORD JUSTICE PETER JACKSON
LORD JUSTICE SINGH
and
LADY JUSTICE ANDREWS

- -

Between :

SABINA BEGUM	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Sonali Naik QC and Greg Ó Ceallaigh (instructed by **Lexwin Solicitors**) for the **Appellant**
Julia Smyth (instructed by the **Treasury Solicitor**) for the **Respondent**

Hearing date: 1 December 2021

- -

Approved Judgment

Lady Justice Andrews:

Introduction

1. The appellant, Sabina Begum, is a national of Bangladesh. She first entered the UK aged 22, on 2 April 2010, with leave as a Tier 4 General Student which expired on 31 March 2013. On 30 March 2013 she made an application for further leave to remain as a Tier 4 General Student, which was refused. After exhausting her rights of appeal against that refusal, she remained in the UK. She subsequently made two unsuccessful applications for a residence card under reg. 17(4) of the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations"). Finally, on 13 March 2019, she applied for a residence card under reg. 18(4) of the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations") as an extended family member of an EEA National with a permanent right of residence.

2. The Secretary of State refused that application on the basis that she did not qualify, and the First-tier Tribunal (FtT Judge Bennett) and Upper Tribunal (UT Judge Keith and deputy UT Judge Welsh) dismissed her appeals. She now appeals to this Court on the basis that the Upper Tribunal in this case and the Presidential panel of the Upper Tribunal in *Moneke and others (EEA-OFMs) Nigeria* [2011] UKUT 341 (IAC) were wrong in law to find that in order to satisfy the threshold requirements of being an "extended family member" under reg 8 of the 2016 Regulations, the applicant must have been dependent upon a relative ("the sponsor") who was a qualifying EEA national before and at the time when the applicant leaves their country of origin to enter the UK.

3. The factual background, as found by the First-tier Tribunal, is as follows. The appellant's sponsor is her maternal uncle, Shofiqul Islam. In 1989, Shofiqul Islam moved from Bangladesh to Italy, where he lived until he and his wife and children moved to the UK. The First-tier Tribunal held that the move occurred in February 2014; in the narrative section of its determination, but without referring to that finding, the Upper Tribunal stated that the move was in April 2013, which was consistent with what the sponsor had said in his witness statement. However, the date is immaterial for the purposes of this appeal.

4. Shofiqul Islam sent money to provide for the upkeep of Sabina Begum, her mother, and other family members in Bangladesh in the period from her father's death in 2003 to her arrival in the UK in April 2010. He also paid her school and college fees in Bangladesh from 2004 to 2008 inclusive. He continued to make payments for Sabina Begum's support after her arrival in the UK, and contributed towards the cost of her postgraduate education here. After he and his family arrived in the UK, Sabina Begum went to live with them. She has remained financially dependent upon him ever since. Shofiqul Islam acquired a right of permanent residence in the UK on 13 February 2019.

5. Although Shofiqul Islam became a national of Italy, and there was evidence that he was issued with an Italian passport on 11 March 2011, the First-tier Tribunal had no documentary evidence of the date on which he was granted Italian citizenship. As the Upper Tribunal recorded when the matter came before it on appeal, there was a dispute as to when that occurred, but it was accepted by Sabina Begum that it was after she entered the UK. She claims that it was around five weeks later, relying on an

Italian document that she produced to the Upper Tribunal which suggests that Shofiqul Islam swore an oath to acquire Italian citizenship, and his details were entered on the relevant register, on 13 May 2010.

6. On any view, Shofiqul Islam was not an EEA national at the time when Sabina Begum was still living in Bangladesh and he paid the fees for her schooling and the money for her upkeep, nor was he an EEA national when she left Bangladesh and entered the UK. This was the point which proved fatal to her application. It was held that Sabina Begum did not qualify as an "extended family member" because her uncle was not an EEA national at the time when she was living in Bangladesh and dependent upon him.

7. EU free movement rights ceased to be directly effective and enforceable when the transition period following the withdrawal of the UK from the EU expired at 11pm on 31 December 2020. The 2016 Regulations were repealed by the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020, which prevents such domestic legislation (and any rights deriving from provisions of the Treaty on the Functioning of the European Union ("TFEU") to the extent that they are not implemented in domestic law) from continuing to have effect as retained EU law. Since the end of the transition period, applications can no longer be made for residence cards under the 2016 Regulations.

8. However, it is accepted by the Secretary of State that a court deciding an appeal such as this one, which concerns an application made before the end of the transition period, should generally do so by reference to the law in force before 11pm on 31 December 2020. This is because:

    i) it may be necessary to do so to ascertain whether a person enjoys (or potentially enjoys) rights under the Withdrawal Agreement;

    ii) s.16 of the Interpretation Act 1978 provides for general savings when legislation is repealed; and

    iii) there is specific, complex secondary legislation which preserves certain provisions of the 2016 Regulations notwithstanding their repeal.

9. In the present case, if Sabina Begum did qualify as an extended family member, and if discretion were subsequently exercised in her favour, she would fall within the scope of the Withdrawal Agreement by virtue of Article 10(3), and enjoy potential rights accordingly.

10. The Secretary of State contends that her interpretation of the 2016 Regulations was entirely in accordance with EU law as it applied on 31 December 2020 and as applied by the Upper Tribunal in the case of *Moneke* (above). For the reasons set out below, I have concluded that the Secretary of State is right. Unfortunately for the appellant, because she did not wait until after her uncle had acquired Italian citizenship before she moved to the UK, she did not meet the qualifying criteria which would have enabled her application for an EEA residence card to be considered on its merits.

Extended family members

11. Directive 2004/38/EC ("the Directive") was enacted with a view to remedying the piecemeal approach to the "primary and individual right" of an EU citizen to move and reside freely within the territories of the member states (see recitals (3) and (4)). Its key objective is to promote the right of free movement of EEA nationals, subject to limitations and conditions of public policy, public health, and public security (recital (1)). As this Court recently confirmed in *Chowdhury v Secretary of State for the Home Department* [2021] EWCA Civ 1220, [2021] 1 WLR 5544 at [25], whilst the family circumstances and domestic responsibilities of an EEA national necessarily have an impact on that person's freedom to exercise treaty rights, the objective of the Directive is to enable free movement, not family reunification.

12. As more fully explained by Macur LJ in *Chowdhury* at [3] to [9], there are two distinct categories of family member under EU law, namely, direct family members falling within Article 2(2) of the Directive, and "other family members" falling within Article 3(2). This expression is often abbreviated to "OFM". Persons falling within the former category enjoy automatic rights of residence, whilst persons falling within the latter - referred to in the 2006 and 2016 Regulations as "extended family members" - do not.

13. Article 3(2) of the Directive explains who can qualify as an "OFM" and sets out the obligations of the member states towards such persons. It provides, so far as material, as follows:

> "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*… (Emphasis added).
>
> 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."

14. Recital 6 explains the background to that obligation in these terms:

> "in order to maintain the unity of the family in a broader sense… the situation of those persons who were not included in the definition of family members under this Directive and who therefore do not enjoy an automatic right of entry and residence in the host member state, should be examined by the host member state on the basis of its own national legislation, in order to decide whether entry and residence could be granted to such persons, taking into consideration their relationship with the Union Citizen or any other circumstances, such as their financial or physical dependence on the Union Citizen."

15. Thus the criteria for qualification as an "OFM" are solely those set out in Article 3(2). They relate to the position of the individual "*in the country from which they have come"*, i.e. the country from which they have entered the host member state, and their relationship with "*the Union Citizen having the primary right of residence"* whilst in that country, not after their arrival in the member state.

16. An EU member state is merely required to *facilitate* the entry and residence of such persons under its domestic legislation, and to provide justification to them for the refusal of entry or residence. Therefore, even if Sabina Begum met the threshold requirement of being an "extended family member" at the time of her application, it would still be a matter for the Secretary of State's discretion whether to grant or refuse her a residence card. Nevertheless, the threshold requirement is important because, if it is not met, the discretion does not arise.

17. Member states have a wide discretion as to the factors to be taken into account when examining applications for entry and residence submitted by the family members of a Union Citizen who are envisaged in Article 3(2) of the Directive. They may exercise that discretion by laying down requirements as to the nature and duration of dependence, so long as the domestic requirements do not deprive Article 3(2) of its effectiveness. See Case C-83/11, *Secretary of State for the Home Department v Rahman* [2013] QB 249 at [36] - [39]. In that case, the Grand Chamber of the CJEU confirmed that it is a matter for the individual member states to decide whether to impose any further conditions over and above the requirements of Article 3(2), in order to satisfy themselves that the situation of dependence which existed in the country from which the applicant came is genuine and stable, and not simply a device to gain entry to or residence in that member state.

18. The UK did choose to impose a requirement of what the CJEU described as "enduring dependency" on the sponsor. In its answer to the sixth question referred to it in *Rahman* the Grand Chamber made it clear at [45] that this was not a matter falling within the scope of the Directive. That analysis was followed by the Court of Appeal in *Chowdhury*, in which it was held that the domestic requirement of continuing dependency (now encompassed in reg. 8(2)(b)(ii) of the 2016 Regulations) did not deprive Article 3(2) of its effectiveness. As I shall explain, this distinction between the requirements of the Directive and the requirements of national legislation has some bearing on the issue of construction in this case.

19. The 2016 Regulations replaced the 2006 Regulations as the means of implementing the requirements of the Directive into domestic law. Reg. 18(4) of the 2016 Regulations provides for the discretionary issue of residence cards to extended family members. Reg. 18(4) states that:

> "The Secretary of State may issue a residence card to an *extended family member* not falling within regulation 7(3) who is not an EEA national on application if –
>
> (a) The application is accompanied or joined by a valid passport,
> (b) *the relevant EEA national* is a qualified person or an EEA national with a right of permanent residence under regulation 15, and

c) in all the circumstances it appears to the Secretary of State appropriate to issue the residence card."

(Emphasis added).

Reg.18(5) implements the remaining requirements of Article 3(2), namely that an extensive examination be carried out of the personal circumstances of the applicant, and that reasons justifying any refusal shall be supplied to them, unless this would be contrary to the interests of national security.

20. The expressions "extended family member" and "relevant EEA national" are defined in different paragraphs of reg. 8. This provides, so far as material:

" "**Extended family member**"

(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 … (2)...

(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) 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.

(6) In these regulations, "relevant EEA national" means in relation to an extended family member –

(a) referred to in paragraph 2, 3 or 4, the EEA national to whom the extended family member is related."

21. There are therefore two separate routes to qualification as an extended family member (which may overlap) namely: membership of the same household as the sponsor, or dependence upon the sponsor, in the country in which the applicant is living before coming to the UK. Sabina Begum was not a member of her uncle's household when she was living in Bangladesh, and therefore the dependency route was the only one potentially open to her.

22. A person is to be treated as a dependant of the EEA national if, having regard to his or her financial and social conditions, he or she is not in a position to support himself/herself.

23. It is only once it has been established that the applicant is properly to be characterised as an "extended family member" that there is any need for the Secretary of State to consider the conditions in reg. 18(4)(b) relating to the "relevant EEA national", i.e. whether that person is a qualified EEA national or has a right of permanent residence under reg. 15. Indeed reg. 8(6) makes it clear that that person cannot be regarded as a "relevant EEA national" unless they are related to an "extended family member" falling within one of the relevant earlier paragraphs of that regulation, in this case reg. 8(2). Therefore the definition of the expression "*relevant EEA national*" cannot assist in the interpretation of those earlier paragraphs (in which it does not appear), as at one point was suggested by the appellant's counsel.

24. Although reg. 8(2) is mainly expressed in the present tense, reg. 8(2)(b)(ii) and the Directive itself make it clear that an application can be made after the applicant has already joined the sponsor in the UK and is therefore no longer residing in a different country at the time of their application. The additional domestic requirement of continuous dependency attaches only to this category of applicant, rather than those who are still in the original country of dependency at the time when they apply.

25. The Regulations must be interpreted consistently with Article 3(2), which refers to family members who "*are dependent"* on the EEA national sponsor "*in the country from which they have come*". That must mean that they are dependent on him or her at the time when they are still living in that country and when they leave it for the host member state. Therefore, EU law requires the focus to be on the ties between applicant and sponsor at the time when the family member is in that other country or leaving it, *not* after they have entered the host member state. The expression "*in the country from which they have come*" cannot mean "in the host member state", nor can it encompass any requirement of dependency in the latter state.

26. It is therefore clear from the language of Article 3(2) that if the dependency requirement is relied upon, the person claiming to be an extended family member must be dependent upon the sponsor in the country from which that person has come to the UK, at the time when they left that country to enter the UK. This was confirmed by the Grand Chamber of the CJEU in *Rahman* [2013] QB 249 at [33]-[35]. In answer to the question whether it was necessary for the family member to have been a dependant of a Union citizen shortly before or at the time when the *latter* settled in the host member state, they said this:

> " [33] ... the situation of dependence must exist, in the country from which the family member concerned comes, at the time when he applies to join the Union citizen upon whom he is dependent.
>
> [34] In the main proceedings, it is for the national tribunal to establish, on the basis of the guidance as to interpretation provided above, whether the applicants were dependants of the Union citizen … in the country from which they have come … at the time when they applied to join her in the United Kingdom. It is only if they can prove that dependence in the county from which they have come, in accordance with article 10(2) of Directive 2004/38, that the host member state will have to facilitate their entry and residence.

> [35] … in order to fall within the category, referred to in article 3(2) of Directive 2004/38, of family members who are "dependants" of a Union citizen, the situation of dependence must exist in the country from which the family member concerned comes, at the very least at the time when he applies to join the Union citizen on whom he is dependant."

27. It follows from this that a person will not qualify if they only become dependent on the sponsor after their arrival, see *Oboh v Secretary of State for the Home Department* [2013] EWCA Civ 1525, [2014] 1 WLR 1680. The Court of Appeal in that case described the policy of the Directive as "one of *facilitating the EU citizen* in maintaining his household wherever he is in the Union". They also said that the language of Article 3(2) "uses clear words delimiting a category of persons who are to be given privileged treatment in order to promote the objectives of free movement and residence *by EU citizens*". (Emphasis added).

28. It is possible to satisfy the Article 3(2) dependency requirement where, as in the present case, the person and the sponsor live in different countries before arriving in the host member state: this was finally established in *Rahman*. The Grand Chamber held that it was clear that the country referred to in Article 3(2) is, in the case of a national of a third state who declares that he is a "dependant" of an EU citizen, the state in which he was resident on the date when he applied to accompany or to join the Union Citizen. Moreover, there was nothing in the language of the Directive to indicate that "the country from which they have come" must be understood as referring to the country in which the EU citizen sponsor resided before settling in the host member state (see especially [29]-[31]).

29. The Grand Chamber in *Rahman* was addressing the common situation in which the extended family member comes to the UK to join an EEA sponsor who has already arrived here. However, it has also been held that if the requirement of dependency is met, the extended family member does not necessarily have to arrive in the UK *after* the sponsor: *Aladeselu v Secretary of State for the Home Department* [2013] EWCA Civ 144. In that case, it was held that the expression "has joined" in reg. 8(2)(c) of the 2006 Regulations (the equivalent of reg. 8(2)(b)(ii) of the 2016 regulations) does not impose a temporal limitation, in the sense that the sponsor and the applicant must arrive in the UK together or within a short period of each other. It does not matter whether the applicant or the EU citizen arrives first in the UK, and one cannot glean from the expression any requirement as to contemporaneity or recent arrival.

30. Richards LJ (with whom Pill and Davis LJJ agreed) rejected an argument by the Secretary of State, based on the Grand Chamber's observations in paras [33] to [35] of *Rahman* quoted above, that the applicants could not fulfil the requirement of dependency on the sponsor in the country from which they had come, Nigeria, *at the time of the application*, since they arrived in the UK before their sponsor and before they made their applications. He said at [47] that the references in *Rahman* to dependency "*at the time when [the family member] applies to join the Union citizen on whom he is dependent"* were a formulation appropriate to the particular circumstances of the case, and that the CJEU was not intending to lay down a principle of universal application. It cannot have intended to exclude from the scope of Article 3(2) persons who had arrived in the host Member State before the EU citizen and before making their applications, as that would have been contrary to the

approach taken in Case C-127/08, *Metock v Minister for Justice, Equality and Law Reform* [2009] QB 318 (a case concerned with direct family members).

31. *Aladeselu* is therefore authority for the proposition that for the purposes of Article 3(2), the time at which the state of dependency on an EEA national relative in the country from which the applicant has come must be established is NOT the time of an application made from the host member state after arrival. It is the time when the non-EU national leaves that country and enters the host member state or, if he makes his application from the other country, the time of that application.

32. The Court of Appeal in *Aladeselu* also rejected the Secretary of State's submission that the exercise of EU rights was incapable of being affected by the position of dependent relatives who arrive in the host state many months before the EU citizen. At [49] Richards LJ pointed to an example given by the Upper Tribunal of a case where an EU citizen might be deterred from taking up employment in another Member State unless he could arrange for dependent relatives to arrive there well in advance. At [52], he emphasised that if the threshold condition was met, the detailed circumstances of the particular case, including the importance or otherwise for the EU citizen of the dependent relative's presence in the host Member State, can be taken into account in the individual assessment and discretionary decision that follows. This was an important safeguard against the potential for abuse.

33. In summary, it follows from the reasoning in *Rahman*, *Aladeselu*, and *Oboh* that for the purposes of Article 3(2) of the Directive and reg. 8(2)(b)(ii) of the 2016 Regulations, irrespective of whether the extended family member arrives in the UK before the EEA national sponsor, the situation of dependency in the country from which the applicant has come must exist at the time that he or she moves from that other country to the UK. That is the point in time on which Article 3(2) is focused. The issue in this case is whether the sponsor must have been an EEA national at that time. It did not arise in *Aladeselu* because the sponsor in that case was a Dutch national before the applicants entered the UK.

The Upper Tribunal's decision in *Moneke*

34. *Moneke* was decided before *Rahman,* but it foreshadowed the answers given by the Grand Chamber in that case. The case concerned applications for residence cards as extended family members made by a brother and sister, Nigerian citizens who were then in their thirties. The sponsor, their cousin, had obtained German citizenship some time prior to his arrival in the UK in around March 2005. Thereafter there was evidence that he was exercising his Treaty rights as a worker in the UK. One of the applicants came to the UK shortly before the sponsor, the other arrived a year later, in 2006. They both made witness statements to the effect that the sponsor provided them with financial assistance and accommodation in Nigeria after the death of their father and helped to fund their education. Both they and the sponsor gave evidence that the financial dependency continued whilst he was in Germany and after they came to the UK. However, a great deal of relevant information was missing, including the date on which the sponsor became a German citizen.

35. The main point taken by the Secretary of State in *Moneke* was the one that was finally resolved by the CJEU in *Rahman*, namely that the other family member and the EU

citizen had to come from the same country to the UK. Presciently, the Presidential panel (Blake J and SIJ Storey) rejected that contention, observing at [32]:

> "We cannot agree in the absence of clear legislative words that enormous numbers of "foreign" OFM dependants are excluded from the scope of the Directive by the happenstance of international geography".

36. It was only in the section of the determination headed "Conclusions: place of dependency" that the Upper Tribunal expressed a view on the point which is in issue in the present appeal. Having referred to the two ways of qualifying as an "other family member", they said at [40] (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. It is necessary for the pre- entry dependency to be on the EEA national and not a person who subsequently became an EEA national. Thus if a sponsor has been financially supporting OFMs who live abroad for many years before he became an EEA national, but there was no such support after the sponsor acquired EEA nationality, there would be no evidence of dependency on an EEA national".

37. The Upper Tribunal went on to find that the FtT judge had not only erred in finding that the absence of prior residence in the same country from which the EEA national had come precluded the applicants from being dependants of their sponsor. He had erred in finding as a fact that they were dependent upon him prior to their admission to the UK, because the material before him did not entitle him to reach such a conclusion. They described the date on which the sponsor became a German citizen as "a crucial start point for establishing that there had been remittances during the relevant period."

38. The second error of law identified by the Upper Tribunal had not been contemplated in the grant of permission to appeal (see para [45] of the determination). The Tribunal justified its approach on the basis that the absence of sufficient evidence had formed the basis for the Secretary of State's original refusal of the application. They said that the First-tier Tribunal should therefore have examined the evidence more carefully, albeit that the judge did not have the assistance of a presenting officer or any response to the evidence filed by the applicants.

39. The observations made by the Upper Tribunal at [40](ii) of *Moneke* were technically *obiter dicta*, and possibly made without the benefit of submissions on the issue. Moreover, there is no reasoning given for them. This means that despite being the views of a Presidential panel of considerable experience, they carry less weight than they might otherwise have had.

The Upper Tribunal's decision in this case

40. The matter was, however, fully argued before the Upper Tribunal in the present case. Although the doctrine of precedent does not apply to earlier Tribunal decisions, they

treated the decision in *Moneke* as being of significant persuasive weight. However, the essence of their reasons for accepting the Secretary of State's interpretation of the legislation is encapsulated in the following short passage from para [30] of the determination:

> "We do not accept that the appellant's dependency on the sponsor, in her country of origin, restricted the sponsor's free movement rights, as he had no such free movement rights. The decision in *Moneke* reflects not an additional temporal requirement, but the fact that both the Directive and Regulations are only engaged upon somebody becoming an EEA citizen, by virtue of which they may then exercise free movement rights."

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.

44. On behalf of Sabina Begum, Ms Naik QC contended that there was no basis for interpreting the Directive restrictively or for imposing a "temporal restriction" on the Regulations by requiring the sponsor to be an EEA national at the time of the pre-entry dependency. This approach, she submitted, ran contrary to the approach in the established caselaw of this Court and the CJEU, and would have a "chilling effect" on the exercise of free movement rights. The Court should adopt a purposive construction which gives effect to family life, because the "objective of Article 3(2)(a) is to maintain family unity in a broader sense".

45. It seems to me that that last submission cannot survive the rejection by this Court of the argument that the purpose of the Directive was one of family reunion: see *Oboh* at [56]-[58] and *Chowdhury* at [42]-[43]. Family reunion is an ancillary means by which free movement may be facilitated or promoted. It is not a self-standing objective. Ms Naik also sought to rely on the judgment of the CJEU in Case C-129/18 *SM (Child placed under Algerian Kafala) v Entry Clearance Officer* [2019] INLR 507. However, that case concerned the factors to be considered at the discretion stage in respect of a child who was held to fall within the definition of "extended family member", see the judgment at [59]. The consequences of falling within Article 3(2) cannot assist in construing the scope of the Article.

46. At the heart of Ms Naik's submissions was the contention that the time at which the position of the sponsor falls to be considered is the time of the *application*, "because it is his current status that matters". The sponsor had free movement rights at the time of Sabina Begum's application for a residence card. She argued that, in deciding whether to exercise them by moving elsewhere within the EU or whether to continue exercising them in the UK he must take into account that he has a dependent relative who is said to be ineligible for a residence card as an "extended family member" not because of a lack of continuity in her pre-and post-entry dependency, nor because he is not an EU citizen, but because of the date on which he acquired his EU citizenship.

47. Ms Naik submitted that the expression "EEA National" or "Union Citizen" was simply an identification of the relative/sponsor upon whom the applicant was dependent, and said nothing about that person's status. She accepted that the phrase "*having the primary right of residence"* did impose a status requirement, but submitted that it was sufficient if the sponsor's right of residence existed at the time of the application. She further submitted that the phrase in Article 3(2) "*in the country from which they have come, are dependants"* should be construed as meaning "*were*, in the country from which they have come, *and still are* [at the time of application] dependants".

48. That interpretation would not just do violence to the language. It would import into the Directive a requirement of continuing dependence after entry into the host member state which the Grand Chamber in *Rahman* and the Court of Appeal in *Chowdhury* said was a matter for domestic legislation, *not* part of the Directive, and which other member states might not have chosen to impose.

49. The construction contended for by Ms Naik is also contrary to *Oboh*, in which this Court rejected the similar argument that, adopting a purposive approach to interpretation, the situation of dependence or membership of a household required by Article 3(2) is to be judged only at the date of the application. They accepted counsel for the Secretary of State's submission in that case (recorded at [39]) that the clarity of the language of the Directive could not be overridden by a broad appeal to policy and the need to adopt a purposive approach in order to say that the words of the Directive (as interpreted by the CJEU in *Rahman*) do not mean what they say. As Ms Smyth pointed out, this case is the mirror image of *Oboh*; there, the applicants were dependent on an EU national in the UK, but not at the material time required by Article 3(2), i.e. at the time of leaving their country of origin; here, the applicant was dependent on the sponsor at the material time, but he was not then an EU national. In both situations the natural reading of Article 3(2) leads to the inexorable conclusion that essential requirements of the Directive were not fulfilled.

50. Ms Naik acknowledged that the construction for which she contended would potentially facilitate persons having no connection with the EU and who arrived illicitly in the UK applying for rights of residence on the back of a successful application made many years later by the sponsor (upon whom they were dependant in their country of origin) for EEA citizenship. However, she contended that such abuses could be weeded out at the discretionary stage. Ms Smyth's riposte to that suggestion, with which I respectfully agree, was that there would be little point in having a qualifying requirement if everything turned on the exercise of discretion in an individual case.

51. I consider that Ms Naik's argument also failed to grapple with the force of the point made by Ms Smyth that EU law is concerned with present rights, and that if at the time of the material dependency in the third country, which is the only condition laid down in the Directive, the sponsor had no such rights, because he was not a Union citizen at that time, there is no good reason to interpret Article 3(2) as treating him as if he did simply because he acquired them later. As Ms Smyth aptly put it in her skeleton argument, "a person cannot be deterred from exercising rights which they do not have".

52. The analogy which Ms Naik sought to draw with the situation in cases concerning the accession of member states to the EU, such as *Lassal (European Citizenship)* [2011] 1 CMLR 31 and Cases C-424/10 and C-425/10 *Ziolkowski and others v Land Chamber Berlin* [2013] 3 CMLR 37 appears to me to be a flawed one. In those cases, the provisions on citizenship of the EU were held to apply "to the present effects of situations arising previously", so that, for example, Mr Ziolkowski, a Polish national, was entitled to count his period of residence in another EU member state (Germany) before Poland acceded to the EU, towards the five years of residence necessary to achieve the right of permanent residence which he acquired on the date of accession. However, the fact that Mr Ziolkowski enjoyed EU rights from the point of becoming an EU citizen, and those rights flowed from a prior state of affairs, did not mean that he was to be treated as having had those rights at a time when he was <u>not</u> an EU citizen.

53. Moreover, as Ms Smyth submitted, Article 3(2) of the Directive imposes a single requirement of dependency which all the relevant case law indicates applies at the point in time when the dependent leaves (or seeks to leave) the country of dependency for the host member state. The "present effects" principle of EU law is concerned with circumstances where a situation arose under the law prior to the accession of a member state *and continues thereafter*. Unlike the permanent residence situation considered in *Lassal* and *Ziolkowski* there is no continuing situation on which that principle could bite in this case. Any requirement of continuing dependency after the point at which the requirements of Article 3(2) are to be met is a matter of domestic, not EU, law to which that principle cannot apply.

54. I am also unpersuaded that construing Article 3(2) and reg. 8 in the way the Upper Tribunal did would have a potential deterrent effect on the exercise of treaty rights by sponsors who acquired those rights after the relevant time, let alone the alleged "chilling effect". The example of a potential restriction on the right of free movement referred to by Richards LJ in *Aladeselu* at [49] was one in which the EEA sponsor already had a right of free movement and was settled in one member state at the time of arranging for his dependents to travel ahead to the (different) host member state.

That would have been the situation if Sabina Begum had waited until after her uncle obtained Italian citizenship before travelling from Bangladesh to the UK.

55. Ms Naik pointed out that if, prior to 31 December 2020, Sabina Begum returned to live for a time in Bangladesh and made her application from there, or if her uncle had exercised his treaty rights to go and work in (for example) the Netherlands, and the dependency remained unbroken, it is likely that she would have met the criteria in Article 3(2). However, that simply demonstrates that interpreting Article 3(2) and Reg. 8 as the Upper Tribunal did would probably not have prevented her from joining him on either of those hypotheses, and therefore any concerns on his part about her ability to do so would be ill-founded. There would therefore be no obstacle to his free movement.

56. As Ms Smyth submitted, not every possible disadvantage of non-residence in a member state is a restriction on the right of free movement. Beatson LJ observed in *Oboh* at [54]:

> "We have difficulty in seeing why a failure to accord preferential treatment to dependants resident in a third member state (or indeed in a non-member state) should constitute a disincentive to the EU national to set up his residence in the host member state. We would expect that he would be able to provide for his dependants in precisely the same way in which he did so before his move to the host member state."

Similar points were made in *Chowdhury* when rejecting the argument that the domestic requirement of continuous dependency post-arrival in the UK would inhibit the exercise of treaty rights. It seems to me that the same observation could be made of a failure to accord preferential treatment to dependants who are resident in the host member state long before the EU national, and who left their original country of dependency at a time before he acquired his right of free movement.

57. Ms Naik was unable to identify any relevant deterrent effect on Shofiqul Islam's exercise of his rights of free movement, once acquired, of giving Article 3(2) of the Directive its plain and natural meaning; but even if she had been able to do so in his individual case, that would not have been good enough. Article 3(2) lays down a rule of general application, and there may be hard cases falling on the wrong side of the bright line, of which this may well be one; but that is not a reason for giving the relevant provisions of the Directive and the 2016 Regulations a wider meaning than is justified.

58. For all the above reasons, I consider that the Upper Tribunal correctly interpreted the provisions of the Directive and the 2016 Regulations and that Sabina Begum did not qualify as an "extended family member". I would therefore dismiss this appeal.

Lord Justice Singh:

59. I agree.

Lord Justice Peter Jackson:

60. I also agree.