



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/25498/2013

THE IMMIGRATION ACTS

Heard at Bradford
On 13 January 2014

Determination Promulgated
On 18 February 2014

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SHELTON CHAKRAWARTI ARULANANTHAM

Respondent

Representation:

For the Appellant: Mr N Diwnycz, Senior Home Office Presenting Officer
For the Respondent: Ms C Physsas, instructed by Ravi, Solicitors

DETERMINATION AND REASONS

1. The respondent, Shelton Chakrawarti Arulanantham was born on 13 June 1980 and is a citizen of Sri Lanka. The respondent had appealed against the decision of the respondent dated 4 June 2013 to refuse his application for a residence card as a family member of an EEA national (his mother, Mrs Shanti Philomena Anthonypillai, a Dutch national, hereafter referred to as the sponsor). The Secretary of State now appeals, with permission, to the Upper Tribunal.

2. As an extended family member, the respondent's application to the Secretary of State and his subsequent appeal fell to be considered under Regulation 8 (2) of The Immigration (European Economic Area) Regulations 2006:

"Extended family member"

8. – (1) In these Regulations "extended family member" means a person who is not a family member of an EEA national under regulation 7(1)(a), (b) or (c) and who satisfies the conditions in

paragraph (2), (3), (4) or (5).

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

(a) the person is residing in an EEA State in which the EEA national also resides and is dependent upon the EEA national or is a member of his household;

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

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

3. The facts of the appeal as found by the judge and which are not challenged by the appellant are that the respondent is currently a member of the sponsor's household in the United Kingdom and was a member of the sponsor's household when they lived together in Sri Lanka. However, as the First-tier Tribunal (Judge Duff) observed at [7] the sponsor did not leave Sri Lanka until 1994 and it was sometime after that, when the appellant and sponsor no longer lived together in the same household, that the sponsor travelled to live in the Netherlands where she married a Dutch national and subsequently became a citizen of the Netherlands herself. The sponsor and appellant were subsequently reunited in the United Kingdom when the sponsor came to live here in 2009. The grounds of appeal asserts [4] that:

[the Secretary of State] is unclear on what basis the appellant can meet the requirements of Regulation 8(2) when his mother was not an EEA national when he resided with her in Sri Lanka (see also *Moneke (EEA – OFMs) Nigeria* [2011] UKUT 00341 (IAC)).

4. In his determination at [12], Judge Duff, having found that the appellant and sponsor were living together in the United Kingdom and had lived together in the same household in Sri Lanka prior to 1994, concluded that,

Upon the basis that the law as stated by Upper Tribunal Judge Storey in *Dauhoo* (EEA Regulations – Regulation 8(2)) [2012] UKUT 79 (IAC) I am satisfied the appellant has demonstrated that he comes within the terms of Regulation 8(2)(c) and that he was a member of his mother’s household in Sri Lanka (and was also dependent upon her in Sri Lanka) and is a member of her household in the United Kingdom.

5. In *Dauhoo*, the Upper Tribunal summarised the provisions of Regulation 8(2):

Under the scheme set out in reg 8 (2) of the Immigration (European Economic Area) Regulations 2006, a person can succeed in establishing that he or she is an “extended family member” in any one of four different ways, each of which requires proving a relevant connection both prior to arrival in the UK and in the UK:

prior dependency and present dependency

prior membership of a household and present membership of a household

prior dependency and present membership of a household;

prior membership of a household and present dependency.

6. The respondent also relies on the following passage of **Rahman [2012] EUECJ C-83/11 (5 September 2012)**:

32. So far as concerns the time at which the applicant must be in a situation of dependence in order to be considered a ‘dependant’ within the meaning of Article 3(2) of Directive 2004/38, it is to be noted that, as follows from recital 6 in the directive’s preamble, the objective of that provision is to ‘maintain the unity of the family in a broader sense’ by facilitating entry and residence for persons who are not included in the definition of family member of a Union citizen contained in Article 2(2) of Directive 2004/38 but who nevertheless maintain close and stable family ties with a Union citizen on account of specific factual circumstances, such as economic dependence, being a member of the household or serious health grounds.

33 It is clear that such ties may exist without the family member of the Union citizen having resided in the same State as that citizen or having been a dependant of that citizen shortly before or at the time when the latter settled in the host State. On the other hand, 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 on whom he is dependent.

7. Ms Physsas, for the respondent, also referred me to the following passage in **Oboh [2013] EWCA Civ 1525**:

We acknowledge that, if what is required is historic dependency or membership of household as well as present dependency or membership of household, there will be situations, such as those posited by Mr Jafferji (see [28] – [29] above), in which the inability of

the individuals concerned to qualify as "other family members" within Article 3(2)(a) of the Directive may have some deterrent effect on the exercise by the EU citizen of his right of free movement and residence, in particular of residence, within the territory of the Member States. However, it is important not to lose sight of the nature of Article 3(2) which is intended to lay down a rule of general application. In our view it was not intended to make detailed provision for individual cases. Furthermore, it is significant that it confers on persons falling within the identified category certain advantages in the pursuit of rights of entry or residence. Its application does not result in the refusal of such rights to individuals who fall outside the preferred category. They are able to make their applications in the ordinary course. In the exceptional cases postulated by the appellants other legal principles will come into play, among them Article 8 of the European Convention on Human Rights. Accordingly, we consider that we would not be justified in permitting such exceptional cases to set the limits of general application of Article 3(2). [56]

8. The submission made by the Secretary of State is that the judge has completely overlooked the determination of the Upper Tribunal (Blake J presiding) in *Moneke*, in particular at [40] [my emphasis]:

Conclusions: place of dependency

40. We therefore conclude that for the time being, subject to future clarification by the higher courts, IJs 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. 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.**

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 dependent 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.

9. Curiously, in what is otherwise a detailed and helpful skeleton argument, Ms Physsas refers to *Moneke* only as follows:

(xiv) The SSHD seeks to rely upon **Moneke**.

(xv) However the judge found that the A and his mother were credible. The A was previously found to be a credible witness by a judge in respect of his asylum claim (as recorded in the determination paragraph 7).

10. The Secretary of State has not challenged the credibility findings of the judge, simply the application of the law to the facts as he found them. The point made in *Moneke* is that, where the qualification as an extended family member depends on dependency or membership of a household either in the United Kingdom or abroad, the individual upon whose EU citizenship the entire application is founded must have been and must continue to be an EEA national at the time of dependency and/or membership of a household. In the present appeal, the appellant was never a dependant and/or member of a household of an EEA national in Sri Lanka because, during the period of time upon which he relies when he and his mother lived together in Sri Lanka), she was not an EEA national. I can identify nothing in the jurisprudence cited by Ms Physsas which in any way contradicts the conclusions at [40] of the Upper Tribunal in *Moneke*. It follows that Judge Duff erred in law by failing to apply the principles enunciated in *Moneke*. As a consequence, I set aside his determination. In the light of the facts which I have detailed above, I find that the appellant is unable to satisfy Regulation 8(2) of the 2006 Regulations so I remake the decision by dismissing the appeal.

DECISION

11. The determination of the First-tier Tribunal which was promulgated on 19 November 2013 is set aside. I have remade the decision. The appeal against the respondent's decision dated 4 June 2013 to refuse the appellant a residence card is dismissed.

Signed

Date 11 February 2014

Upper Tribunal Judge Clive Lane