



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/20139/2014

**THE IMMIGRATION ACTS**

Heard at Field House  
On 25 November 2015

Decision & Reasons Promulgated  
On 22 January 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS THARMINI SIVATHEES  
(ANONYMITY DIRECTION NOT MADE)

Respondent

**Representation:**

For the Appellant: Mr S Staunton, Home Office Presenting Officer

For the Respondent: Mr M Iqbal, Counsel, instructed by A & P solicitors

**DECISION AND REASONS**

1. The Claimant is a national of Sri Lanka, born on 9 June 1985. She arrived in the United Kingdom on 20 August 2010 as a Tier 4 (General) Dependant Partner. Her leave and that of her partner was curtailed without the right of appeal on 31 December 2013 and on 21 February 2014, the Claimant applied for residence cards for herself, her spouse and her daughter. The basis of this application was her relationship with her aunt, Melita Rajani Joseph-Gubral Geb Siluvairajah, a German national exercising treaty rights in the United Kingdom and with whom the Claimant had been living since her arrival until 2012 and again from November 2013. On 3 April 2014, the Secretary of State for the Home

Department refused to issue her with a residence card as confirmation of a right of residence under European Community law as an extended family member of an EEA national exercising treaty rights in the United Kingdom.

2. Her appeal came before Judges of the First-tier Tribunal Cheales and Moan for hearing on 26 February 2015. The Claimant and her aunt gave evidence in support of the appeal. The Claimant stated that she had previously resided with her aunt in Sri Lanka until 1994 when her aunt went to Germany. Thereafter, her aunt supported her financially by remitting £100 a month until she arrived in the United Kingdom. Thereafter, her aunt had continued to financially support her by way of £45-£50 a week. Whilst she was living in Sri Lanka her aunt covered all her education expenses. The Claimant's aunt confirmed that she had always supported her niece until she married and had continued to support her financially.

3. In a decision promulgated on 16 March 2015 the Judge allowed the appeal finding at [20] that there is consistency throughout the evidence that the Claimant was supported by her aunt in Sri Lanka because she was a teacher there and then went to Germany in 1994. She found both witnesses to be credible and consistent [23].

4. The Secretary of State sought permission to appeal to the Upper Tribunal on 18 March 2015 on the basis that the panel had inadequately analysed the evidence and failed to adhere to the guiding case law *cf.* Moneke (EEA-OFM's - assessment of evidence) Nigeria [2011] UKUT 00430 in that there was no documentary evidence to support the Claimant's claim; that the panel gave no reasons for concluding at [23] that the witnesses gave credible and consistent evidence; the panel failed to establish when the EEA sponsor acquired EEA nationality and misdirected themselves in allowing the appeal outright in that, even if they were correct in arriving at the conclusion that Regulation 8 was satisfied, the most they could have done is to have remitted the matter back to the Secretary of State for discretion under Regulation 17(4) to be exercised *cf.* Ihemedu (OFMs - meaning) Nigeria [2011] UKUT 340 (IAC).

5. Permission to appeal was granted by Judge of the First-tier Tribunal McDade on 5 May 2015 on the basis that the grounds are arguable and there is an arguable error of law. A rule 24 response was filed by the Claimant's representatives on 2 June 2015.

### *Hearing*

6. At the hearing before me, Mr Staunton submitted that at [15] and [16] of the panel's decision there was a clear discrepancy between money in and out of the Appellant's bank account. The panel acknowledge at [22] that there is an inconsistency and this conflicts with the finding at [23] that the witnesses have given credible and consistent evidence given [22] relates directly to whether the Claimant is dependant. In respect of the decision in Moneke he submitted that one needed to examine the supporting evidence with some care and the panel had not done this and there was no finding on the inconsistency and no supporting evidence in relation to out of country support. In respect of the second ground, Mr Staunton submitted that this is a narrow point and if were to find there was no material error of law the appeal should be remitted to the Secretary of State for the

exercise of discretion pursuant to section 17(4) of the Immigration (EEA) Regulations 2006, following Ihemedu (OFMs – meaning) Nigeria [2011] UKUT 340 (IAC).

7. In response, Mr Iqbal stated that he relied upon paragraphs 15, 16 and 22 of the panel's decision. He submitted that with respect to regulation 8 the requirement is such that there has to have been past financial dependency or membership of the household plus continuing financial dependency or membership of the household. Even if the Secretary of State's case was taken at its highest and the two judges were not entitled to find as they did at [22] even then the error of law was not material because the alternative point of membership of the household is met. Mr Iqbal accepted that regulation 17(4) was correct in law and supported by authority and there is an error of law in this respect but it was not material because it is simply an admission at the end of the judgment that could be cured by the slip rule and sending back to the First-tier Tribunal and that it was a matter of form rather than substance.

8. In respect of past financial dependency at [20] & [21] of the decision there was complete consistency in the evidence of the witnesses. In contrast to the Rules, there was no requirement of specified evidence under regulation 8(2) of the 2006 Regulations. Even in the absence of specific evidence if the panel accepts that what they are being told is credible, reliable and truthful they can say so. He submitted that this ground of appeal amounts to no more than a disagreement with the findings of the panel. In respect of past financial dependence, Mr Iqbal drew my attention to the number of letters from people including friends/acquaintances who travelled from the UK to Sri Lanka and handed money over to the Claimant from the Sponsor eg letters from a priest, which were before the Tribunal and were taken into account as part of the credibility assessment. He submitted that the panel had considered this evidence together and formed a view as to past financial dependency. They did apply strict test of scrutiny of Moneke. He submitted that this was simply a case where the two judges were impressed by the Claimant's evidence and that of her witness and also recognized they could have retained remittance slips but did not have in mind they would need them in the future. He submitted that there were no material errors of law in the panel's decision.

### *Decision*

9. I reserved my decision, which I now give, with my reasons. Despite Mr Staunton's clear submissions, I find that there is no material error of law in the decision of the panel in respect of the assessment of the evidence before them. It was open to the panel to find as they did at [20] that "*there is a consistency throughout the evidence that the Appellant was supported by her aunt in Sri Lanka.*" The evidence comprised both the oral evidence of the Claimant and her aunt, the EEA sponsor and documentary evidence which the panel refer to at [19] of their decision. I have had regard to the decision in Moneke (EEA-OFM's – assessment of evidence) Nigeria [2011] UKUT 00430 and I do not consider that the decision of the panel infringes the principles set out therein. This was not a case where there was no documentary evidence to support the claim that the Claimant had been financially dependant upon her aunt in Sri Lanka, whilst her aunt was working in Germany. Whilst there was no evidence in the form of remittance slips, the panel were satisfied on the basis of all the evidence before them that the Claimant resided with her

aunt and mother at her grandmother's house in Sri Lanka prior to her aunt moving to Germany to work in 1994 and that she was financially dependant upon her aunt until she came to the United Kingdom. This was a finding that was open to them to make on the basis of the evidence that was before them.

10. The panel also found that there was one inconsistency regarding deposits into the Claimant's bank account but at [22] that this was not material given that all the money in the Claimant's bank account was given to her by her aunt and uncle and that she is dependant upon this money. I find that it was open to the panel to reach this finding, given that they had the benefit of the assessing the oral evidence of the Claimant and her aunt and reaching findings on their credibility, which are sustainable and given the overall consistency in the remainder of the evidence. Consequently, I find that this ground of appeal amounts to no more than a disagreement with the findings of the panel and does not disclose any material error of law.

11. The second ground of appeal impugns the decision of the panel on the basis that they allowed the appeal outright and this was contrary to the decision in Ihemedu (OFMs - meaning) Nigeria [2011] UKUT 340 (IAC). However, the panel in this case did not find that the Claimant was entitled to a residence card but rather allowed the appeal on the basis that they were satisfied that the requirements of regulation 8 of the Immigration (EEA) Regulations 2006 were met. They did not, therefore, usurp the function of the Secretary of State for the Home Department to exercise her discretion pursuant to regulation 17(4) of the aforementioned Regulations as the effect of allowing the appeal is that the Secretary of State will now consider the exercise of her discretion in light of the findings of the panel.

*Notice of decision*

12. For the reasons set out above, I find no material error of law in the decision of the panel and I dismiss the appeal by the Secretary of State for the Home Department. It is now a matter for the Secretary of State to consider exercising her discretion under regulation 17(4) to grant the Claimant a residence card in light of the finding by the panel that she is the extended family member of her aunt, in accordance with regulation 8 of the Immigration (EEA) Regulations 2006.

Deputy Upper Tribunal Judge Chapman

21 January 2016