Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/04173/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 30th October 2020	**On 12th November 2020**

Before

UPPER TRIBUNAL JUDGE KEITH
DEPUTY UPPER TRIBUNAL JUDGE WELSH

Between

MS SABINA BEGUM
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr G Ó Ceallaigh, instructed by Lexwin Solicitors
For the respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. These are the approved record of the decision and written reasons which were given orally at the end of the hearing on 30th October 2020.

2. This is an appeal by the appellant against the decision of First-tier Tribunal Judge C H Bennett (the 'FtT'), promulgated on 5th February 2020, by which he dismissed the

appellant's appeal under the Immigration (EEA) Regulations 2016, against the respondent's refusal to issue her a residence card as the extended family member of an EU (Italian) national, her maternal uncle, Mr Shofiqul Islam (the 'sponsor').

3. The background to the appeal is that the appellant, a Bangladeshi national, had entered the UK, aged 22, on a Tier 4 (General) student visa on 2nd April 2010. However, before entering the UK, as the FtT later found, she lived with her family in Bangladesh. Her father died in 2003, after which time she was dependent financially upon the sponsor, who lived in Italy at the time, and who regularly remitted monies to the appellant, her mother and his mother. The sponsor later settled in the UK on 5th April 2013 and in support of her application, the appellant provided a copy of the sponsor's Italian ID document. There was a dispute as to when the sponsor was naturalised as an EU (Italian) citizen but the appellant accepts that this was after she entered the UK (possibly only a matter of a few weeks afterwards, in May 2010) and not when she was dependent on him while she lived in Bangladesh.

4. The respondent refused the appellant's application on the basis that she was not satisfied that the appellant was a dependent extended family member of the sponsor.

The FtT's decision

5. The FtT considered the appellant's appeal on the basis that she was an extended family member and so potentially qualified under Regulation 8(2) of the 2016 Regulations. At §13(c), the FtT cited the well-known case of Moneke (EEA – OFMs) Nigeria [2011] UKUT 341 (IAC), the reported decision of a Presidential panel of this Tribunal, as authority for the proposition that at the time of her pre-entry dependency, (i.e. when the appellant lived in Bangladesh), the sponsor needed to be an EEA national.

6. The FtT accepted (and there is no appeal on the core facts) that:

   6.1. the sponsor, a Bangladeshi national, had moved to Italy in 1989, where he was resident until coming to the UK in late 2012/early 2013;

   6.2. the sponsor acquired Italian citizenship in 2010, after the appellant entered the UK;

   6.3. the sponsor and the appellant were related as claimed (maternal uncle and niece) (§22 of the decision);

   6.4. the sponsor paid the costs of the appellant's education and supported the appellant and her family, after the death of the appellant's father in 2003, up to her arrival in the UK in April 2010 and thereafter (§28).

7. At §32, the FtT cited Moneke, and noted that either dependency or membership of the household must be "*on a person who is an EEA national at the material time.…It is necessary for the pre entry dependency to be on the EEA national and not on a person who subsequently became an EEA national*" (§40(ii) of Moneke)). As a consequence, despite the appellant's dependency on the sponsor while she lived in Bangladesh, she did

not meet the requirements of regulation 8(2) of the 2016 Regulations, as an extended family member of the sponsor.

8. The appellant appealed against the FtT's decision on 18th February 2020. First-tier Tribunal Judge Cruthers initially refused permission on 14th April 2020, but following a renewed application, permission was granted by Upper Tribunal Judge Gill on 18th June 2020. The gist of the grounds, which are set out in further detail below, is whether the proposition from Moneke, set out above at §7, was wrongly decided.

9. We should add for completeness that amended grounds of appeal were drafted and submitted on 25th June 2020, after Judge Gill's grant of permission, but Mr Tufan did not object to us considering the amended grounds. We granted permission for those amended grounds to proceed.

The hearing before us

The appellant's grounds

10. We set out below the appellant's amended grounds.

> 3. "*The sole basis on which the Appellant's appeal was dismissed was that the Appellant had not been reliant on the Sponsor before entry into the United Kingdom at a time when he was an EEA national, and although he became an Italian citizen the same year the Appellant entered the United Kingdom, possibly the same month, there was no evidence that he became an Italian citizen on or before 2 April 2010 when the Appellant entered the United Kingdom. The Sponsor has in fact lost his certificate of naturalisation, but believes that the date was at or around the date on which the Appellant entered the United Kingdom. [Mr Ó Ceallaigh confirmed to us that the sponsor's naturalisation was after the appellant entered the UK.]*
>
> 4. *The FTT's conclusion was compelled by the authority of Moneke and others (EEA - OFMs) Nigeria [2011] UKUT 341 (IAC) which concluded:*
>
> > *'… dependency or membership of the household must be on a person who is an EEA national at the material time. For this reason it is essential that tribunal judges establish when the sponsor acquired EEA nationality.' [Headnote]*
> >
> > *'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.' [40(iii)]*
> >
> > *'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.' [40(iv)]

Grounds

5. *The Appellant submits that the FTT erred in law in following the decision in Moneke as it was wrongly decided on this point, and that this Tribunal should depart from it. The Appellant submits that this is an important point of principle and practice. That decision is routinely relied upon in this Tribunal and has not received consideration, on this point, either from any domestic or European Court.*

6. *Moreover, the relevant conclusion in Moneke, though it forms part of the Headnote, does not appear to have been the subject of any argument in that case and therefore: (i) should never have been in the Headnote; and (ii) is at least arguably obiter dictum.*

7. *The Appellant submits that this Tribunal should grant permission and depart from the decision in Moneke that an Extended Family Member can only succeed where the dependence relied on in the country of origin was at a time when the EEA Sponsor was an EEA national on the following basis.*

8. *Firstly, the decision in Moneke includes no analysis at all as to why it must be the case that the EEA Sponsor was an EEA national at the time of the dependence prior to entry into the United Kingdom. There is lengthy analysis of where the applicant/sponsor should have lived prior to entry, but none at all on this issue, for which Moneke is also the only authority. The conclusion is obiter. Given the seriousness of the consequences of the decision some detailed consideration of the issue was required, and the absence of such is a reason not to follow it.*

9. *Second, insofar as there is any authority cited in support of the conclusion set out above in Moneke itself, it is KG (Sri Lanka) v SSHD [2008] EWCA Civ 13 and Bigia & Ors v SSHD [2009] EWCA Civ 79 which the Upper Tribunal referred to. However, neither provides any support for the proposition at all, or makes any reference to the issue. There is, as noted above, no higher court authority either domestically or in the CJEU endorsing or examining this issue that the Appellant has been able to find. Moneke is the sole authority cited in support of this issue in Macdonald's Immigration Law and Practice at [6.140].*

10. *Third, there is nothing in the 2016 Regulations at all limiting the circumstances in which prior dependency is relevant to a period in which the Sponsor was an EEA national. Quite the contrary – an EEA national is exhaustively defined in Regulation 8(6) for the purposes of Regulation 8(2) as '…the EEA national to whom the extended family member is related'. There is no basis for reading the Regulations more strictly than they appear to be on their face, by specifying a time during which they must hold such status.*

11. *Fourth, there is nothing in the Directive itself which indicates any temporal limitation on when a person became a Union citizen so as to limit the circumstances in which they are entitled to have dependents join them in a Member State. There is no basis for reading such a limitation into the Citizens' Directive. Nor has the Court of Justice done so.*

12. *Fifth, the approach of the Tribunal in Moneke appears to run directly contrary to the reasoning of by the Court of Justice of the European Union in several cases. Firstly, in Lassal (European citizenship) [2010] EUECJ C-162/09 where it was held that residence in a host member state in advance of the Directive being transposed counted towards the acquisition of permanent residence. Secondly, that Court also found in Ziolkowski and Szeja v Land Berlin [2011] ECR I-14051 that residence of Polish nationals in a host member state in advance of Poland joining the Union also counted towards the acquisition of permanent residence. That was in part because in the absence of transitional provisions the protections of the Directive may 'be relied on by nationals from any Member State and be applied to the present and future effects of situations arising before the accession of that State to the European Union'. The consistent approach of the Court of Justice points directly away from the approach adopted by the Tribunal in Moneke.*

13. *Sixth, rights derived from EU law apply to Union Citizens themselves and not to the Other Family Members per se except as parasitic on those Union Citizens' rights. There is no basis for distinguishing between European Citizens in respect of their right to free movement by reference to the date at which they became Union citizens. Further, to discriminate between Union Citizens in terms of their free movement rights by reference to the date on which they became EU citizens is contrary to the clear aims of the Directive, as set out in the Recital at (3):*

> *'Union citizenship should be the fundamental status of nationals of the Member States when they exercise their right of free movement and residence.'*

14. *It should follow, in the absence of powerful reasons to the contrary, that all Union Citizens are entitled to the same protections in the Directive, providing its terms are met. There is nothing in the Directive itself that supports the Moneke limitation.*

15. *Seventh, the Court of Justice of the European Union recently gave guidance in SM (Enfant place sous kafala algerienne) (Citizenship of the European Union - 'Direct descendant' - Judgment) [2019] EUECJ C-129/18 as follows:*

> *'60. As follows from recital 6 of Directive 2004/38, the objective of Article 3(2)(a) thereof 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 that directive 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 (judgment of 5 September 2012, Rahman and Others, C-83/11, EU:C:2012:519, paragraph 32).*
>
> *61. According to the case-law of the Court, Article 3(2) of Directive 2004/38 imposes an obligation on the Member States to confer a certain advantage on applications submitted by the third-country nationals referred to in that article, compared with applications for*

entry and residence of other third-country nationals (see, to that effect, judgments of 5 September 2012, Rahman and Others, C-83/11, EU:C:2012:519, paragraph 21, and of 12 July 2018, Banger, C-89/17, EU:C:2018:570, paragraph 31).

62. Thus, the Member States must, in accordance with that provision, make it possible for the persons envisaged therein to obtain a decision on their application that is founded on an extensive examination of their personal circumstances, taking account of the various factors that may be relevant, and, in the event of refusal, is justified by reasons (see, to that effect, judgments of 5 September 2012, Rahman and Others, C-83/11, EU:C:2012:519, paragraphs 22 and 23, and of 12 July 2018, Banger, C-89/17, EU:C:2018:570, paragraphs 38 and 39).

63. It is true that each Member State has a wide discretion as regards the selection of the factors to be taken into account, provided that their legislation contains criteria which are consistent with the normal meaning of the term 'facilitate' used in Article 3(2) of Directive 2004/38 and which do not deprive that provision of its effectiveness (see, to that effect, judgments of 5 September 2012, Rahman and Others, C-83/11, EU:C:2012:519, paragraph 24, and of 12 July 2018, Banger, C-89/17, EU:C:2018:570, paragraph 40).

64. However, that discretion must, having regard to recital 31 of Directive 2004/38, be exercised in the light of and in line with the provisions of the Charter of Fundamental Rights of the European Union ('the Charter') (see, by analogy, judgment of 6 December 2012, O and Others, C-356/11 and C-357/11, EU:C:2012:776, paragraphs 79 and 80 and the case-law cited).

65. In that regard, Article 7 of the Charter recognises the right to respect for private and family life. As is apparent from the Explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17), in accordance with Article 52(3) of the Charter, the rights guaranteed by Article 7 thereof have the same meaning and the same scope as those guaranteed by Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 (see, to that effect, judgments of 5 October 2010, McB., C-400/10 PPU, EU:C:2010:582, paragraph 53, and of 5 June 2018, Coman and Others, C-673/16, EU:C:2018:385, paragraph 49).'

16. *It follows from the above extract:*

    a. *That the Directive is to be construed purposively;*

    b. *That the Directive is to be construed so as to give effect to the right to family life enshrined in the Charter;*

    c. *That the objective of Article 3(2)(a) is to maintain family unity in a broader sense.*

17. *Each of the considerations above militates strongly against the narrow approach taken by the Tribunal in Moneke, which the Appellant submits was wrong.*

18. *On the facts found by the FTT the Appellant has maintained close and stable family ties with her Sponsor, whom she looks upon as a father figure, and upon whom she has been economically dependent, for 17 years. She has been a member of his household for the past 7 years. The Appellant submits that it simply cannot be right that the Directive must be interpreted such that the fact that the Sponsor appears to have become an Italian citizen a month or so after she entered the United Kingdom has the effect that he is deprived of the EU law right to have her with him, despite the essential relationship of dependence having existed throughout.*

19. *Finally, it is clear from the decision in Moneke that the Tribunal had itself some doubts as to its interpretation in what was at that stage a rapidly evolving area of law. The Tribunal on two separate occasions notes that the guidance it is giving is subject to clarification 'by the higher courts' (§8; §40). There has been no such clarification.*

Conclusion

20. *The Appellant submits that the decision on this issue in Moneke is wrong in principle, unsupported by the Regulations or Directive, unsupported by any other authority and contrary to EU law. The Upper Tribunal is invited to grant permission to appeal, to depart from it and to allow this Appellant's appeal."*

The respondent's Rule 24 response

11. The respondent provided the following Rule 24 response, on 24th August 2020.

"*Introduction*

1. *The SSHD asks the UT to accept this document as the SSHD's Rule 24 response. The SSHD has had sight of the Appellant's ('A's') Grounds of Appeal (dated 3rd June 2020) in the drafting of this document.*

The SSHD's response to the grounds:

2. *The SSHD asserts that there is, with respect, no merit in the A's Ground of appeal, namely that the FtT materially erred in finding that the A's dependency upon her maternal uncle in Bangladesh was not materially relevant to Reg. 8(2)(b)(i) of the 2016 EEA Regulations because the uncle ('SI') did not show, on the balance of probabilities, that he was an EU national at that time (the A entered the UK on 22nd April 2010 on T4 entry clearance, see §1(a)).*

3. *The A does not directly challenge the finding that there had been a failure to prove, on balance, that SI became an Italian Citizen earlier than when the relevant passport was issued (11th March 2011, see §36) and so simply relies upon the argument that EU law does not require the supporting relative to have been an EU national during the claimed dependency/household residence in a country other than the UK (Reg. 8(2)(b)) – the stage prior to the later (established) dependency/household membership. This also requires the A to argue that Moneke (EEA - OFMs) Nigeria [2011] UKUT 00341 (IAC) is wrong in law and*

should not have been followed by the FtT (albeit that this argument was not run before the FtJ).

4. *Firstly, in respect of paras. 7-8, the SSHD contends that the A makes no legal argument at all. The A simply asserts that, in Moneke, the UT did not particularly analyse why the supporting relative should have to be an EU national prior to entry to the UK. The A posits no reason in law why that should not be the case bearing in mind the clear wording of Regulation 8 and Article 3(2) of the Directive (2004/38/EC).*

5. *Secondly, in respect of the latter part of the A's argument, the SSHD respectfully argues that such a contention is contrary to domestic and European authority.*

The policy purpose of Article 3(2):

6. *The SSHD contends that the purpose of Article 3(2) has been analysed by both the Court of Justice and domestic Courts in Secretary of State for the Home Department v Islam & Anor [2012] EUECJ C-83/11 ('Islam' also known as Rahman); Metock v Minister for Justice, Equality and Law Reform ('Metock'); Bigia v Entry Clearance Officer [2009] EWCA Civ 79 ('Bigia'); Oboh & Ors v Secretary of State for the Home Department [2013] EWCA Civ 1525 ('Oboh'); Aladeselu v SSHD [2013] EWCA Civ 144 ('Aladeselu'); EO (Nigeria) v Secretary of State for the Home Department [2014] EWCA Civ 1418 ('EO'). The effect of these judgments is:*

   a. *Article 3(2) centres upon the qualified rights of the third-country national extended family member – Member States are required to confer 'a certain advantage' upon such people (Islam, §21);*

   b. *The objective of the provision is described at Recital 6 of the Directive, namely ''to maintain the unity of the family in a broader' sense by facilitating entry and residence … [for those who] 'maintain close and stable family ties with a Union citizen'' (Islam, §32);*

   c. *The objective is not however, one of family reunion – this is a fixed point in the assessment of the underlying policy as a consequence of Metock – it is one of 'facilitating the EU citizen maintaining his household wherever he is in the Union. This seems to us to be a critical consideration' (Oboh, see §57);*

      In Bigia, the Court of Appeal expressly said:

      > *'43. In my judgment, Metock does not impact on these propositions. I accept that Article 3.2(a) is based on the same policy considerations as Article 2.2 – 'ensuring the protection of the family life of nationals of the Member States in order to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the EC Treaty' (here the right of free movement and residence of the Union citizen) and aiming 'to strengthen the right of free movement and residence of all Union citizens'. That is why the Directive goes beyond Article 2.2 family members and makes provision, albeit in a different way, for OFMs. However, the emphasis remains on elimination of*

obstacles to the Treaty rights of the Union citizen rather than a policy of family reunification…'

d. *When interpreting the underlying policy of Article 3(2) it was only necessary that there was the 'possibility' of an adverse effect on the rights of the EU national to free movement and residence – this was the threshold condition for this provision (Aladeselu at §49);*

e. *The dependence does not have to have existed in the same country as the Union citizen (Islam, §33);*

f. *The dependence may have occurred only shortly before or at the same time as the Union citizen settled in the host state but it must exist in the country from which the third-country national comes when he/she applies to join the Union citizen (Islam, §33);*

g. *It does not matter if the third-country national entered the Member State before the Union citizen (Aladeselu, at §44 & §48);*

h. *The dependency must continue from the previous country to the host Member State (Oboh at §47);*

i. *Though there must be a 'nexus of recency' between the arrivals of the other family member and the Union citizen (EO at §21):*

> *'… This is because the purpose of these provisions in the Citizenship Directive is to ensure that the EU citizen is not deterred from exercising treaty rights by being unable to move with members of his or her household.'*

7. *The SSHD asserts that it is plain from the natural wording of the provision in Article 3(2) that the provision is designed to provide qualified protection for Union citizens who have an established relationship of dependency with an extended family member in another country and that the Article facilitates the qualified entry and residence of such a dependent in order to prevent the automatic situation that the Union citizen is deterred from exercising his/her free movement rights.*

8. *It is also the natural interpretation of the policy context of Article 10(2)(4) of Directive 2004/38 which authorises the Member States to require family members referred to in Article 3(2) of the directive to present a 'document issued by the relevant authority in the country of origin or country from which they are arriving certifying that they are dependants ... of the Union citizen' (this is given emphasis by the Court of Justice in Islam at §30).*

9. *In the context of this case, the entry into the UK by the A (22nd April 2010) at a time when the A's supporting uncle was not an EU citizen (the Italian passport was not issued to SI until 11th March 2011, at §26) – cannot be described as admission and residence which was relevant to the Treaty rights of an EU national. That entry in 2010 had absolutely nothing to do with EU law (either in the personal or broader family context) and at this point the previous dependency outside of the UK ended.*

10. *In the alternative, SI did not in fact enter the UK until sometime around January 2014 (§30) and, applying EO, there was equally no 'nexus of recency' between the arrival of the A and that of the supporting EU national."*

Oral submissions

The appellant's oral submissions

12. Mr Ó Ceallaigh reiterated Article 3(2) of Directive 2004/38/EC. It contained no temporal requirement of nationality and focussed on entry and residence of other family members of Union citizens. That lack of a temporal requirement in relation to Union or EEA nationality was similarly reflected in the implementing Regulations, and in particular, Regulation 8(2)(b)(ii), which had as a condition that the extended family member "*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*." Moving on to Regulation 8(6), the relevant EEA national meant referred to: "*the EEA national to whom the extended family member is related*."

13. Any suggestion that Regulation 8(2)(b)(ii) might be interpreted as imposing some sort of temporal limitation, was incorrect – see §44 of Aladeselu:

> *"44. The second element is that the person "has joined" the EEA national (specifically in this case the EU citizen) in the United Kingdom. The concession made by the Secretary of State in relation to the meaning of "join" in regulation 8(2)(b) is equally applicable to "has joined" in regulation 8(2)(c). It involves an acceptance that the expression "has joined" does not of itself impose a temporal limitation: it does not matter whether it is the relative or the EU citizen who arrives first in the United Kingdom, and one cannot glean from the expression any requirement as to contemporaneity or recent arrival. The argument that such a requirement is to be derived from Rahman is a matter to which I will return. Subject to that argument, it is clear that each of the applicants "has joined" the sponsor in the United Kingdom, even though each of them arrived here before the sponsor."*

14. Turning next to the question of dependency, the purpose of Article 3(2) of Directive 2004/38/EC was to ensure the maintenance of the unity of a family in the broader sense. Support for this was at §§31 to 33 of Rahman:

> *"31. As the Advocate General has explained in points 91, 92 and 98 of his Opinion, there is nothing to indicate that the term 'country from which they have come' or 'country from which they are arriving' ['pays de provenance'] used in those provisions must be understood as referring to the country in which the Union citizen resided before settling in the host Member State. On the contrary, it is clear, on reading those provisions together, that the country referred to is, in the case of a national of a third State who declares that he is a 'dependant' of a Union citizen, the State in which he was resident on the date when he applied to accompany or join the Union citizen.*
>
> *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."

15. Mr Ó Ceallaigh then referred to two cases which illustrated the absurdity of imposing a temporal restriction. The first case was the case of Lassal and in particular, §§26 to 31.

"Observations submitted to the Court

26. Among the interested parties who have lodged written observations, in accordance with Article 23 of the Statute of the Court of Justice of the European Union, two positions of principle may be distinguished.

27. On one hand, the Belgian and United Kingdom Governments take the view that only periods of residence either ending on 30 April 2006 or thereafter, or which commence after 30 April 2006, should be taken into account. In support of such an interpretation, the United Kingdom Government relies essentially on the phrase 'in compliance with the conditions laid down in this Directive' in recital 17 in the preamble to Directive 2004/38 and its travaux préparatoires, while the Belgian Government relies, in particular, on the fact that that directive does not have retroactive effect and on the principle of legal certainty.

28. On the other hand, CPAG and the European Commission take the view that, even if the right of permanent residence was acquired only from 30 April 2006, continuous five-year periods completed in accordance with the EU law instruments pre-dating Directive 2004/38 and ending before that date should be taken into account for the purposes of Article 16 of that directive. Both CPAG and the Commission base their arguments in particular on the objective and ratio legis of that directive, which, they submit, require that Article 16 is applied in full to those residence periods. The Court's reply

29. As a preliminary point, it must be observed that citizenship of the Union confers on each citizen a primary and individual right to move and reside freely within the territory of the Member States, subject to the limitations and restrictions laid down by the Treaty on the functioning of the European Union and the measures adopted for their implementation, freedom of movement for persons being, moreover, one of the fundamental freedoms of the internal market,

which was also reaffirmed in Article 45 of the Charter of Fundamental Rights of the European Union.

30. With regard to Directive 2004/38, the Court has already had occasion to point out that that directive aims to facilitate the exercise of the primary and individual right to move and reside freely within the territory of the Member States that is conferred directly on Union citizens by the Treaty and that it aims in particular to strengthen that right, so that Union citizens cannot derive less rights from that directive than from the instruments of secondary legislation which it amends or repeals (see Case C-127/08 Metock and Others [2008] ECR I-6241, paragraphs 82 and 59).

31. The Court has also observed that, having regard to the context and objectives of Directive 2004/38, the provisions of that directive cannot be interpreted restrictively, and must not in any event be deprived of their effectiveness (see Metock and Others, paragraph 84)."

16. While the Belgian and UK governments had argued that periods of residence, for the purposes of permanent residence, which pre-dated the implementation of the Directive could not be taken into account, the Commission had taken a different view and the Court agreed with them, making clear that the provisions of that Directive could not be interpreted restrictively and must not in any event be deprived of their effectiveness. The absurdity would be to impose a temporal limitation in the case of extended family members. Any argument that do to so would retroactive effect and lead to legal uncertainty was addressed in §§38 to 39 of Lassal, which noted:

"38. Furthermore, it should be noted that, in so far as the right of permanent residence provided for in Article 16 of Directive 2004/38 may only be acquired from 30 April 2006, the taking into account of periods of residence completed before that date does not give retroactive effect to Article 16 of Directive 2004/38, but simply gives present effect to situations which arose before the date of transposition of that directive.

39. It should be borne in mind in that regard that the provisions on citizenship of the Union are applicable as soon as they enter into force and therefore they must be applied to the present effects of situations arising previously (see Case C-224/98 D'Hoop [2002] ECR I-6191, paragraph 25 and the case-law cited)."

17. The second case along a similar theme was that of Ziolkowski and Szeja and in particular, §§58 to 62:

"58. Furthermore, the Court has also held that the provisions on citizenship of the European Union are applicable as soon as they enter into force and must therefore be applied to the present effects of situations arising previously (see Case C-224/98 D'Hoop [2002] ECR I-6191, paragraph 25, and Lassal, paragraph 39).

59. In the present case, there is no transitional provision concerning the application to the Republic of Poland of the European Union legal provisions on freedom of movement of persons in the Act concerning the conditions of accession to the European Union of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the

Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded (OJ 2003 L 236, p. 33), except for certain transitional provisions concerning freedom of movement for workers and freedom to provide services in the Annexes to that act.

60. Consequently, the provisions of Article 16(1) of Directive 2004/38 can be relied by Union citizens and be applied to the present and future effects of situations arising before the accession of the Republic of Poland to the European Union.

61. It is, admittedly, true that the periods of residence completed in the territory of the host Member State by a national of another State before the accession of the latter State to the European Union fell not within the scope of European Union law but solely within the law of the host Member State.

62. However, provided the person concerned can demonstrate that such periods were completed in compliance with the conditions laid down in Article 7(1) of Directive 2004/38, the taking into account of such periods from the date of accession of the Member State concerned to the European Union does not give retroactive effect to Article 16 of Directive 2004/38, but simply gives present effect to situations which arose before the date of transposition of that directive (see Lassal, paragraph 38)."

18. The appellant's case was a paradigm case of applying EU rights to present effects of situations which had arisen previously. Contrary to the respondent's suggestion in the Rule 24 response that a "nexus of recency" applied here (because the appellant had arrived in the UK in 2010 and the sponsor had only begun exercising treaty rights in 2013, (as per §21 of EO) that only made sense when prior membership of a household was relied on, but did not make sense when prior dependency (which had continued until the exercise of treaty rights) was relied on, as in the appellant's case.

19. There was no valid justification for limiting the sponsor's and appellant's EU rights. It was now accepted that the appellant had been dependent on the sponsor since her father died in 2003 and the sponsor had been a father figure to the appellant. Mr Ó Ceallaigh urged us to consider, that Moneke may not have been decided the way it was, had it not pre-dated Aladeselu. Crucially, there was nothing in the Directive or the Regulations which compelled us to impose a restriction which Moneke impermissibly did, in clear breach of the approach endorsed by the CJEU against a restrictive interpretation of the Directive. Mr Ó Ceallaigh reiterated that the perversity of the result was reflected in the pure happenstance of the sponsor becoming an Italian citizen in May 2010. Had he done so in March 2010, before the appellant's arrival in the UK, she would meet the limitation set out in Moneke.

20. We briefly explored with Mr Ó Ceallaigh two further authorities. The first was Latayan v SSHD [2020] EWCA Civ 191, where, as §24 records, Mr Ó Ceallaigh, who appeared in that case, sought to rely on Moneke. In response, Mr Ó Ceallaigh pointed out that Moneke in that case was relied on for a different proposition in relation to evidence of dependency, which did not arise in the appellant's case.

21. The second was the case of Fatima & Ors v SSHD [2019] EWCA Civ 124 and in particular §25, which made clear that to 'bite', any rights based on dependency must be based upon the EEA national, as opposed to another third-party sponsor. Once again, with admirable clarity, Mr Ó Ceallaigh agreed that the dependency needed to be on the EEA national, but that the appellant was so dependent. The challenge to Moneke was the impermissible temporal requirement.

22. Mr Ó Ceallaigh had referred to the discriminatory impact of such a requirement and the "chilling effect" on the exercise of free movement rights. We explored with Mr Ó Ceallaigh whether there might be such an impact, if, taking the appellant's case, she could bring herself within the 'Moneke' interpretation of the Directive, simply by returning to Bangladesh while remaining dependent, and then re-entering the UK. Mr Ó Ceallaigh that this was analogous to R (SSHD) v Immigration Appeal Tribunal and Surinder Singh (Case C-370/90); [1992] ECR I-04265, namely seeking alternative routes to having EU rights recognised, and was a practical solution rather than a legal answer to the impact of Moneke.

23. We also explored with Mr Ó Ceallaigh whether it might be said that the 'Moneke' principle that the sponsor must be an EEA national at the material time, was simply a practical requirement, based on the need for the Directive and Regulations to have something to 'bite' on. He accepted that prior to somebody becoming an EEA national, there was nothing on which the Directive and Regulations could 'bite'. However, the crucial point here was that once the sponsor was an EEA national, there needed to be recognition of the present effects of previous dependency.

The respondent's oral submissions

24. Mr Tufan accepted that the recognition of the scope of dependency in Article 3(2) had widened over the years, as confirmed in the analysis of the authorities in Aladeselu.

25. While not binding on us, Moneke was a reported decision of a Presidential panel of this Tribunal and its reasoning and conclusions should be accorded significant weight.

26. It was plain from the natural wording that Article 3(2) was designed to provide only qualified rights to facilitation of entry and residence to other family members of EEA citizens where there was an established relationship of dependency or membership of household of the EEA citizen. The purpose of the Article was to facilitate qualified entry and residence, in order to prevent an automatic situation of an EEA national being deterred from exercising treaty rights. In that context, the appellant's pre-entry dependency on the sponsor could not be described as having an impact meriting the facilitation of entry and residence, for the simple reason that the sponsor was not an EEA national.

27. The authorities which we had asked to consider had all focussed on the rights of EEA nationals and their family members (in Aladeselu, the sponsor was an EEA national prior to the application). The absence of EEA nationality in the appellant's case

meant that there were no EU rights to 'bite' on. Lassal and Ziolkowski and Szeja could be distinguished as applying either to the arrangements on accession or the timing of implementation of a new Directive. Neither dealt with a change in personal circumstances, namely the acquisition of a new nationality on which rights and obligations would hinge.

Discussion and conclusions

28. Drawing together the arguments and in reaching our conclusions, first, we make the point, as reflected in the Upper Tribunal Immigration and Asylum Chamber Guidance Note 2011 No 2: Reporting Decisions of the Upper Tribunal Immigration and Asylum Chamber dated 1st March 2014, (§10), that in the absence of a starred case, the common law doctrine of judicial precedent does not apply and earlier reported decisions of this Tribunal such as Moneke do not, as a matter of law, bind us. Nevertheless, we accept Mr Tufan's submission that a reported Presidential panel decision is of significant persuasive weight.

29. Whilst we appreciate the attractiveness of Mr Ó Ceallaigh's submissions, we do not accept his fundamental proposition that Moneke imposes a temporal restriction on EU rights, which amounts to a restrictive interpretation of those rights. Instead, we accept Mr Tufan's submission that there is a theme running through the authorities to which we have been referred, that the sponsor, on whom the extended family member rights hinge, must be an EEA national when the dependency or membership of household exists, in the country from which the extended family member comes. Indeed, taking the example of §33 of Rahman, to which Mr Ó Ceallaigh's cited to us, it ends:

> *"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 [our emphasis]*** *on whom he is dependent."*

30. In other words, there are core components such as dependency or membership of household in the country from which the family member comes; and the sponsor must be an EEA national. We agree with Mr Ó Ceallaigh that the focus of Article 3(2) is to avoid barriers to free movement because of dependency *on an EEA national*. We do not accept that 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. This is implicit in Mr Ó Ceallaigh's agreement with us that prior to a sponsor's naturalisation as an EEA citizen, no rights under Article 3(2) 'bite'. Mr Ó Ceallaigh seeks to meet that challenge, saying that it is answered by Lassal and Ziolkowski and Szeja, namely we must apply those rights to "*present*

effects of situations arising previously", just as rights were recognised for residence prior to the Directive coming into force; and in the context of EU accession.

31. We do not accept that Lassal and Ziolkowski and Szeja are relevant to this case. The sponsor has gained individual rights, from being a third country national to becoming an EEA national. Lassal and Ziolkowski and Szeja reflect changes at a national level; the extent to which transitional provisions might apply in the move from non-membership to membership of the EU; or the implementation of new, time-related EU rights (permanent residence). Neither relate to a change in individual, personal circumstances, as in the case of the sponsor. What the Courts were resolving in both cases were circumstances where a member state was, effectively, being treated as having always been a member state (thereby avoiding tiers of states and citizens' rights, depending on when a country joined the EU) and the transitional implementation, at nation-state level, of new rights, in a way that was not restrictive. Both are different scenarios from where a person moves from being a third-country national, with no possible Article 3(2) rights (as Mr Mr Ó Ceallaigh accepts), to having new individual rights, on acquiring nationality. The principle of recognising the "*present effect*" of "*situations arising previously*" does not mean that no distinction can be drawn between when a person was an EEA national, with full individual rights; and an earlier period when he was not, with no such relevant rights, otherwise the purpose of facilitating entry and settlement, has nothing to 'bite on,' as there is no EEA nationality. At the individual level, (as opposed to the nation-state level of the cases of Lassal and Ziolkowski and Szeja) the appellant was never dependent on the sponsor, in the country from which she came to join him, as an EEA national. His subsequent acquisition and exercise of free movement rights cannot therefore have been inhibited by that pre-entry dependency. Moneke does not so much impose a temporal limitation, but reflects a new nationality (with corresponding rights at an individual level), which the sponsor has not always had.

32. In these circumstances, we decline to depart from this Tribunal's interpretation of Article 3(2) in Moneke. The FtT was correct to apply that authority and his decision discloses no error of law.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law.

The decision of the First-tier Tribunal stands.

No anonymity direction is made.

Signed *J Keith* Date: 9th November 2020

Upper Tribunal Judge Keith