



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/12017/2014

THE IMMIGRATION ACTS

Heard at Field House, London
On 17 February 2015

Decision Promulgated
On 22 May 2015

Before

**THE HON. MRS JUSTICE THIRLWALL
DEPUTY UPPER TRIBUNAL JUDGE McCARTHY**

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JALAL UDDIN HEMEL

Respondent

Representation:

For the Appellant: Mr T Wilding, Senior Home Office Presenting Officer
For the Respondent: Mr D Coleman, instructed by Lawland Solicitors

DECISION AND REASONS

1. At the end of the hearing we announced our decision to dismiss the SSHD's appeal to the Upper Tribunal. This statement contains our reasons.
2. Mr Hemel arrived in the UK on 16 October 2009 with entry clearance that acted as leave to enter as a tier 4 (general) student migrant. On 23 May 2013, he was granted further leave to 10 October 2016. On 15 December 2013 he applied for documentation to confirm he had a right of residence as an extended family member under regulation 8(1) of the Immigration (European Economic Area) Regulations 2006 on the basis that he was dependent on his uncle, Mr Sheikh Mansuruzzaman, a

Portuguese national working in the UK. Mr Hemel claimed to have been dependent on his uncle before coming to the UK in 2009. The SSHD rejected the application on the grounds that Mr Hemel had failed to show that he was dependent on his uncle whilst living in Bangladesh. On 3 November 2011, First-tier Tribunal Judge Buckwell accepted the evidence given by Mr Hemel and Mr Mansuruzzaman and allowed the appeal. The SSHD appeals that decision.

3. The only criticism the SSHD makes of the statement of reasons is that First-tier Tribunal Judge Buckwell did not make a clear finding as to when Mr Sheikh Mansuruzzaman became a Portuguese citizen and thereby failed to comply with the guidance set out in the second head note of Moneke (EEA – OFMs) Nigeria [2011] UKUT 341 (IAC). For convenience, we set out the first two head notes.
 - i. A person claiming to be an OFM [other family member] under Article 3(2) of Directive 2004/38/EC 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. For this reason it is essential that tribunal judges establish when the sponsor acquired EEA nationality.
4. We are satisfied that the criticism is misplaced.
5. First, we find the contents of paragraph 31 establish that Judge Buckwell found the sponsor to be credible and that the oral evidence he gave at the hearing was reliable. That evidence included the fact that the sponsor acquired Portuguese citizenship in June 2009, as recorded in paragraph 20. This means there was a period between June and October 2009 when Mr Hemel was dependent on his EEA national sponsor while living in Bangladesh.
6. We take account of the fact that there was no challenge to the sponsor's oral evidence as to when he became Portuguese despite that evidence being given in cross examination. In answer to our question, Mr Wilding accepted that oral evidence would be sufficient to discharge the burden of proof where it was unchallenged, as it was here. Whilst the SSHD might have preferred documentary evidence, the evidence before the First Tier Tribunal judge was sufficient to discharge the burden of proof.
7. Our second reason for rejecting the SSHD's appeal is that, as we discussed during the hearing, it is far from clear that the SSHD's case was mounted on the premise now advanced. The focus in the reasons for refusal and in the submissions recounted in paragraph 24 is on the question of dependency and household membership and not on whether the sponsor had been an EEA national at the material time. Judge Buckwell's positive findings as to dependency and household membership are unchallenged. It would appear that the focus changed after the decision and reasons statement was promulgated. This indicates to us that the appeal to the Upper Tribunal is in reality an attempt to re-litigate the case on a different basis. Such an approach - based on the notion that the losing party might have done better if it had argued differently - does not give rise to an arguable ground of appeal on a point of law. There was no error by the judge.
8. We have one final observation that relates to the reported case, Moneke. Neither Mr Wilding nor Mr Coleman was able to offer much assistance when we asked them to

identify from where in the determination the second sentence of the second head note derived. Although paragraph 40(ii) confirms that to benefit from the rights of free movement and residence an OFM person must show that they were dependent on an EEA national before coming to the UK and that the sponsor must have been an EEA national at that time, we cannot see the basis for saying that “it is essential that tribunal judges establish when the sponsor acquired EEA nationality.” It is plain from the reported determination that the judge must be satisfied that the sponsor was an EEA national and that the OFM was dependent on them prior to the OFM coming to the UK. It is evident from Judge Buckwell’s statement of reasons when read as a whole that he was so satisfied.

9. In conclusion, because we are satisfied that Judge Buckwell accepted the oral evidence of the sponsor that he became Portuguese in June 2009, and that was before Mr Hemel came to the UK, the SSHD's appeal to the Upper Tribunal fails and we uphold the decision of the First-tier Tribunal.

Decision

The SSHD’s appeal to the Upper Tribunal is dismissed. There is no error of law in the statement of reasons of the First-tier Tribunal and its decision is upheld.

Signed

Date

Deputy Upper Tribunal Judge McCarthy