



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: EA/04463/2019

THE IMMIGRATION ACTS

Heard at Field House  
On 15 March 2021

Decision & Reasons Promulgated  
On 24 March 2021

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

MR MUHAMMAD UMAR  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr Jafferji, Counsel instructed by Lawwise Solicitors  
For the Respondent: Mr Melvin, Senior Home Office Presenting Officer

This has been a remote hearing to which both parties have consented. The form of remote hearing was video by Skype (V). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. I did not experience any difficulties, and neither party expressed any concern, with the process.

DECISION AND REASONS

1. The appellant, a citizen of Pakistan, applied for a residence card as an extended family member under regulation 8 of the Immigration (European Economic Area) Regulations 2016 (“the 2016 Regulations”) on the basis of his relationship with his

uncle, who is a Portuguese citizen (“the sponsor”). His application was refused. He appealed to the First-tier Tribunal, where his case came before Judge of the First-tier Tribunal Hawden-Beal (“the judge”). In a decision promulgated on 28 October 2019, the judge dismissed the appeal. The appellant is now appealing against that decision.

2. The judge dismissed the appeal for a single reason, which is that the sponsor did not obtain Portuguese nationality until 2013, which is approximately two years after the appellant entered the UK in 2011. The judge found that regulation 8(2) of the 2016 Regulations was not satisfied because, although the appellant was dependent on the sponsor prior to residing in the UK, at the time of this dependency the sponsor was not an EEA national and therefore prior dependency on or household membership of an EEA national was not established.
3. The grounds of appeal make a single argument, which is that there is no requirement under the 2016 Regulations for the sponsor to have been an EEA national prior to the appellant coming to the UK, so long as he was an EEA national at the time the application was made. The grounds acknowledge that there is Upper Tribunal authority to the contrary (*Moneke* [2011] UKUT 341) but argue that (a) the finding on this issue in *Moneke* was obiter and unreasoned; and (b) the issue needs to be considered in the light of the subsequent CJEU judgment of *Rahman* [2012] CJEU Case - 83/11.
4. In his submissions Mr Jafferji argued that *Moneke* should be treated with caution as although a finding/conclusion on the necessity of being an EEA national at the time of the prior dependency was made, no reasons were given for this finding and the focus of the decision was on a different issue.
5. Relying on *Rahman* and the Court of Appeal judgment *Aladeselu & Ors v Secretary of State for the Home Department* [2013] EWCA Civ 144, Mr Jafferji argued that as Directive 2004/38/EC (“the Directive”), which is the Directive which the 2006 Regulations transposes, is silent on this issue in the operative article (Article 3(2)), a teleological approach must be taken to interpreting it, having regard to recital 6 of the Directive, where it is stated:

“In order to maintain the unity of the family in a broader sense and without prejudice to the prohibition of discrimination on grounds of nationality, the situation of those persons who are 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.”

6. He maintained that the purpose underpinning Article 3(2) would be undermined if it did not apply in circumstances where an extended family member had been dependent on the EEA national prior to coming to the UK merely because the EEA

national at that time had not been an EEA national. He referred to paragraph 49 of *Aladeselu*, where it is stated:

The possibility of an adverse effect is sufficient when one is considering whether a particular interpretation of the threshold condition in article 3(2) accords with the underlying policy of the Directive.

7. Mr Melvin argued, in summary, that *Moneke*, a decision of a Presidential panel which has not been overturned/superseded in almost a decade, remains good law, and that there were no policy considerations that support the appellant's position.
8. I agree with Mr Melvin, for the following reasons.
9. First, *Moneke* provides clear authority to support the respondent's position. The finding at paragraph 40(ii) of *Moneke* could not be more clear. It states:

[T]he 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.

10. Mr Jafferji is correct that the panel in *Moneke* focused their discussion on a different issue and did not set out reasons for the conclusion in paragraph 40(ii). However, that does not mean this finding was not properly considered, or that it was obiter. One of the central issues for determination in *Moneke* was whether the sponsor in that case had been a German citizen at the time of the claimed prior dependency and one of the reasons the panel found there to be an error of law was that the material before the First-tier Tribunal did not enable a finding to be made on when the sponsor became a German citizen. The finding at paragraph 40(ii) was not, therefore, obiter.
11. Second, Mr Jafferji has not identified any case, in any jurisdiction, where a different conclusion to that in *Moneke* was reached. Neither of the two cases relied upon by Mr Jafferji, *Rahman* and *Aladeselu*, address, even tangentially, the issue in this appeal.
12. Third, I do not agree with Mr Jafferji that Article 3(2) is silent on whether an EEA national must have been an EEA national at the time of the prior dependency. Article 3(2) provides:

(2) 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 ...;

...

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."

13. Article 3(2) states that the extended family member (referred to as an "other family member") must be dependent on or a member of the EEA national's household in the country from which they have come. It is, in my view, implicit in this that at the time of this dependency (in the country from which they have come) the EEA national was an EEA national. I do not consider this interpretation to undermine the effectiveness or objective of the Directive which is concerned with the free movement of EEA nationals and is not concerned with the circumstances of EEA nationals prior to becoming one.

14. For these reasons, I find that the judge did err in law as claimed in the grounds of appeal.

#### **Notice of Decision**

15. The decision of the First-tier Tribunal did not involve the making of an error of law and stands.

Signed

*D. Sheridan*

Upper Tribunal Judge Sheridan

Dated: 17 March 2021