Upper Tribunal
(Immigration and Asylum Chamber)

VN (EEA rights – dependency) Macedonia [2010] UKUT 380 (IAC)

THE IMMIGRATION ACTS

Heard at Field House

On 28 July 2010

Before

SENIOR IMMIGRATION JUDGE STOREY

Between

VN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Miss P Yong of Counsel instructed by Zaidi Solicitors

For the Respondent: Ms F Saunders, Home Office Presenting Officer

The judgment in Pedro [2009] EWCA Civ 1358 establishes that in respect of family members who are dependent direct relatives as defined by Article 2.2(d) of Directive 2004/38/EC, proof of dependence in the host Member State (the United Kingdom) can suffice for them to qualify for a right of residence. However, this judgment does not have application to the case of "Other family members" (OFMs) as defined by Article 3.2(a) of the Directive. In order to establish a right of residence the latter are required to show both dependence in the country from which they have come and dependence in the UK.

DETERMINATION AND REASONS

1. The appellant is a citizen of Macedonia born on 10 April 1986. On 25 September 2009 the respondent decided to refuse the issue of a residence card as confirmation of his right of residence as an extended family member, He is the brother-in-law of Giuseppe Alessi, an Italian national who is in the United Kingdom exercising Treaty rights. The respondent was not satisfied that the appellant had shown he was dependent on his EEA sponsor either prior to or since his arrival in the UK on 17 December 2007 on a visitor's visa. The appellant appealed. In a determination notified on 17 February 2010 Immigration Judge (IJ) Sangha dismissed his appeal. The IJ did accept that the appellant was dependent on his EEA brother-in-law (and his sister) since arrival in the UK (para 29). However, in relation to the situation prior to arrival in the UK, the IJ found that in Macedonia (i) the EEA brother-

in-law had never lived with the appellant; and (ii) the appellant had not been financially dependent upon his EEA sponsor (paras 23-26). The IJ accepted that when the appellant was still living in Macedonia with his parents the appellant's sister and his EEA brother-in-law had sent money to them (his parents) but did not accept that this was to support the appellant. In reaching that decision the IJ attached particular weight to the fact that the money transfers were in the name of the appellant's parents and that the appellant's and his witnesses' explanations for why no transfers had been sent to him were unsatisfactory (in particular, there was a conflict between the appellant's evidence that the reason was because he had no ID and his sister's evidence, which at least at one point was that the appellant did have ID). At para 29 the IJ also found that whilst the respondent's decision may interfere with the appellant's family/private life under Article 8 of the European Convention of Human Rights (ECHR), any interference was proportionate because there was no reason why the appellant could not return to Macedonia as an adult and seek employment there and maintain himself.

2. The appellant was successful in obtaining a grant of permission to appeal which is how the matter comes before me. The appellant's grounds were twofold. Ground 1 submitted that the IJ had applied the wrong legal test by imposing a requirement that the appellant be able to show prior residence in another Member State. Bigia and Ors [2009] EWCA Civ 79 was cited in support.

3. Ground 2 submitted that in commenting on the appellant's previous application for a visitor visa the IJ failed to show procedural fairness as this matter had not been raised by either party at the hearing or beforehand. I can deal with this point straightaway. This was a case in which someone who was a third-country national had arrived in the UK on a visitor's visa and very shortly after made an application for a residence card on the basis of an EEA link. It was clearly foreseeable that on appeal the appellant would be asked questions about why he had come to the UK and in particular why, if as he claimed he had been dependent on his EEA brother-in-law prior to coming to the UK, he had not sought to apply under reg 12(2) of the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations"). Further, the appellant was represented by Counsel and was clearly given adequate opportunity to address the questions asked in cross-examination about this matter.

4. I can also deal now with an additional ground which Miss Yong sought to raise before me challenging the Immigration Judge's findings of fact relating to the appellant's financial situation in Macedonia. I do not consider that I should entertain this ground. It was not identified in the grounds for permission to appeal and even if the second paragraph of ground 2 suggested some concern about the Immigration Judge's credibility findings, it raised no specific challenge to this important part of the evidence. In any event, even if I had entertained this ground, I would have found that it failed, since the Immigration Judge's findings on the appellant's circumstances in Macedonia were entirely sound. In particular I am satisfied that the IJ reached those findings on the basis of a rounded assessment of the written and oral evidence (including that of the appellant's sister in law).

Legal framework

5. Before proceeding further it is necessary to set out the relevant European and national legislation.

6. Article 18 of the European Community Treaty [now Article 21 of the Treaty on the Functioning of the European Union (TFEU)] provides that:

"1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect."

7. Relevant provisions of Directive 2004/38/EC (the “Citizens’ Directive”) are as follows:

“Article 1

This Directive lays down:

(a) the conditions governing the exercise of the right of free movement and residence within the territory of the Member States by Union citizens and their family members;

(b) the right of permanent residence in the territory of the Member States for Union citizens and their family members;

(c) the limits placed on the rights set out in (a) and (b) on the grounds of public policy, public security or public health.

Article 2

For the purposes of this Directive:

1) “Union citizen” means any person having the nationality of a Member State;

2) “Family member” means:

(a) the spouse;

(b) the partner with whom the Union citizen has contracted a registered partnership…

(c) the direct descendants who are under the age of 21 or are dependents and those of the spouse or partner as defined in point (b);

(d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);

3) “Host Member State” means the Member State to which a Union citizen moves in order to exercise his/her right of free movement and residence.”

Article 3

1. This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.

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 dependents or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family members by the Union citizen;

(b) the partner with whom the Union citizen has a durable relationship, duly attested.

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.”

8. Article 8 deals with “Administrative formalities for Union citizens.”

“1…for periods of residence longer than three months, the host Member State may require Union citizens to register with the relevant authorities…

…5. For the registration certificate to be issued to family members of Union citizens…Member States may require the following documents to be presented:…

…(b) a document attesting to the existence of a family relationship…

…(d) in cases falling under points (c) and (d) of Article 2(2), documentary evidence that the conditions laid down therein are met;

(e) in cases falling under Article 3(2)(a), a document issued by the relevant authority in the country of origin…certifying that they are dependents…”

9. Also pertinent are recitals 5 and 6 of the Preamble:

“(5) The right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality. For the purposes of this Directive, the definition of "family member" should also include the registered partner if the legislation of the host Member State treats registered partnership as equivalent to marriage.

(6) In order to maintain the unity of the family in a broader sense … the situation of those persons who are not included in the definition of family members … 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.”

10. The 2006 Regulations, which seek to implement the Directive in national law, define “Family members” in reg 7 in terms consistent with Article 2.2 of the Directive. “Other family members” (OFMs) are dealt with in reg 8, which is headed “Extended family members”. Regulation 8(2) provides:

“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 in 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.”

11. Regulation 17(4) then deals with the circumstances under which the Secretary of State may issue a residence card to an extended family member.

12. In the UK the three principal authorities dealing with the position of extended family members are KG (Sri Lanka) and AK (Sri Lanka) v SSHD [2008] EWCA Civ 13, Bigia and Ors and SM (India) v Entry Clearance Officer (Mumbai) [2009 EWCA Civ 1426. In relation to the appellants in Bigia and Ors who

were OFMs, Maurice Kay LJ addressed the question whether what was said in KG and AK required modification in the light of the European Court of Justice ruling in Metock (Case C-12708):

“The OFM appeals: TS (Sri Lanka) and GT (India) and others

1.
It is first necessary to put a little more flesh on the factual bones to which I referred in paragraphs 7 and 8, above.

2.
TS arrived in the United Kingdom from Sri Lanka in 2002, since when he has remained here. His uncle, who was originally a Sri Lankan national, moved from that country to Germany in 1984, at which time TS was about three years of age. The uncle acquired German nationality. Whilst in Germany, he sent money for the benefit of his family, including TS. In March 2006, the uncle exercised his right of free movement and came to this country. TS applied for a residence permit in 2006, relying on his uncle's presence in this country. At that time, he was dependent on his uncle. However, he had never been a dependant or a member of the household of the uncle in Germany or, for that matter, in Sri Lanka. He was simply one of the family members to whom the uncle sent money from time to time, initially in Sri Lanka and latterly in the United Kingdom. His appeal to the AIT was dismissed by an Immigration Judge on 19 December 2006 and by a Senior Immigration Judge on reconsideration on 10 June 2008.

3.
GT and his five siblings are of Indian nationality. Their uncle moved from India no later than 2002. He has Portuguese nationality. He has lived in the United Kingdom since October 2002. The appellants applied for family permits in August 2004. The Entry Clearance Officer refused their application because he was not satisfied that they were their uncle's dependants or that they were members of his household. On 15 December 2005, the Immigration Judge dismissed their appeals because they had not lived with their uncle in another EEA country and, on reconsideration, in a determination promulgated on 24 July 2008, two Senior Immigration Judges found no error of law in the determination of the Immigration Judge. That was the day before the judgment of the ECJ in Metock .

4.
In both cases, the reconsideration hearing took place after the decision of the Court of Appeal in KG and AK but before the judgment of the ECJ in Metock . It is plain to see that, even before one considers the strength or weakness of their cases on "dependency" and "household", the appellants in both cases are bound to fail if the construction of Article 3.2(a) of the Directive is as determined by KG and AK . We are, of course, bound by that authority unless and to the extent that it is inconsistent with the later decision of the ECJ in Metock .

5.
At no point in the judgment in Metock does the ECJ expressly consider OFMs. Indeed, in the extracts from the Directive which it carefully set out, Article 3.2(a) is omitted. However, it is accepted on behalf of the Secretary of State that the reasoning which underlies the conclusion that, in relation to Article 2.2 "family members", there is no need for prior lawful residence in another Member State, must also apply to OFMs. To that extent, the fourth and sixth propositions expounded by Buxton LJ in KG and AK (see paragraphs 10 and 11 above) require modification. This stems from the ECJ's reconsideration of and departure from Akrich . It follows that the provisions in Regulations 8 and 12 of the 2006 Regulations, to the extent that they require an OFM to establish prior lawful residence in another Member State, do not accord with the Directive. It cannot be the case that the policy which

produced the result in relation to Article 2.2 family members in Metock is inapplicable in relation to OFMs.

6.
The policy, even before the Citizens' Directive, was to recognise "the importance of 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" (Metock paragraph 56). The same interpretation "must be adopted a fortiori " with respect to the Citizens' Directive, it being apparent from recital (3) in the preamble that "it aims in particular to ' strengthen the right of free movement and residence of all Union citizens' …" (Metock , paragraph 59). The scheme of the Directive is then to distinguish between Article 2.2 "family members" of the Union citizen and OFMs. The former, if they accompany or join the Union citizen when he exercises his rights of free movement and residence, benefit from his rights and from the policy that he is not to be discouraged from exercising them by national immigration rules that impact adversely on his "family members". OFMs, on the other hand, are provided with a lesser protection. The host Member State must "facilitate entry and residence" for them and "undertake an extensive examination of the personal circumstances and … justify any denial of entry or residence …" (Article 3.2). Moreover, to benefit from their procedural rights, the OFMs must be persons 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" (Article 3.2(a)). It was these provisions, in particular, that were considered in KG and AK . They raise difficult issues of construction which were determined in that case which (subject to the need for any further reconsideration in the light of Metock) is authority for these propositions:

(1) "The tight relationship between the exercise of rights by the Union citizen and the requirement that the OFMs accompanying or joining him should have been his dependants or members of his household in the country from which they have come very strongly suggests that the relationship should have existed in the country from which the Union citizen has come, and thus have existed immediately before the Union citizen was accompanied or joined by the OFM." (per Buxton LJ at paragraph 65).

(2) "It seems very likely that the assumption is that the household will indeed be that of the Union citizen, that is, that he was in colloquial terms head of it, the relations were under his roof, and on that basis he can reasonably wish to be accompanied by the members of it when he leaves for another country." (per Buxton LJ at paragraph 77).

(3) "Article 3(2)(a) is expressed in the present tense: in the country from which they have come are dependants or members of the household of the Union citizen … while it will not literally be the case that [the OFM] is at that time [viz the time of accompanying or joining] still dependent on the Union citizen or a member of his household in the country from which he has come, it makes sense that he should have been so dependent or a household member very recently ." (per Buxton LJ at paragraph 79, emphasis added)."

The question now is whether any of these propositions has been undermined by Metock .

7.
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. Thus, OFMs who seek to travel from a different country to that from which the Union citizen is moving or has recently moved cannot without more be said to be members of his household. Similarly, whilst an OFM in a non-Member State may be financially dependent upon a Union citizen because he is provided with accommodation or living expenses by the Union citizen, there is no reason why the Union citizen's movement to the host Member State would be discouraged. The OFM could continue to benefit from the accommodation or the income after the Union citizen has exercised his rights in the host Member State. I accept Mr Palmer's submission that it is only those OFMs who have been present with the Union citizen in the country from which he has most recently come whose ability or inability to move with him could impact on his exercise of his primary right. This also explains Buxton LJ's requirement of very recent dependency or household membership. Historic but lapsed dependency or membership is irrelevant to the Directive policy of removing obstacles to the Union citizen's freedom of movement and residence rights. Unlike Article 2.2 "family members", it cannot be said of them that "the refusal … to grant them a right of residence is equally liable to discourage [the] Union citizen from continuing to reside in that Member State" (Metock , paragraph 92). Accordingly, I conclude that these aspects of Article 3.2(a) are not affected by Metock and that, in these respects, KG and AK remains good law.

8.
This conclusion renders the position of the appellants in TS(Sri Lanka) and GT(India) and others hopeless. In each case they fail on dependency and household membership and they fail on the chronology. TS 's alternative appeals to the Immigration Rules and Article 8 of the ECHR are also unsustainable. The Senior Immigration Judge did not fall into any legal error.”

13. In SM (India) Sullivan LJ (correcting the approach of the Tribunal in AP and FP (India) [2007] UKAIT 00048) clarified that the test for dependency in the Directive and in the EEA Regulations is to be found in the European Court of Justice cases of Lebon [1987] ECR 2811 and Jia , (Case C-1/05). Jia concerned Chinese parents-in-law of a German national who worked on a self-employed basis in Sweden; they sought to establish their dependence on the German national for the purposes of Directive 73/148/EEC.

14. In light of the submissions mention must also be made of another Court of Appeal judgment: Pedro v Secretary of State for Work and Pensions [2009] EWCA Civ 1358. In Pedro the Court was concerned with a claim by the 62 year old mother of an EEA national who had been refused state pension credit. A social security tribunal ruling in her favour had been overturned by a Deputy Commissioner in July 2008, but the Court of Appeal allowed her appeal. Noting that the Deputy Commissioner had found that it had never been suggested that the claimant was dependent on her son before she came to join him in the United Kingdom, Goldring LJ stated at para 12 that:

“The fundamental issue in this appeal is whether in order to succeed in her claim the appellant had to show a need for material support in Portugal, or whether it was sufficient that she has become dependent on her son since leaving Portugal and in the United Kingdom.”

15. At para 59 he concluded:

“59. As Metock suggests, if a particular interpretation of the Directive would mean that a national of a Member State might realistically be discouraged from leaving that state and going to another Member State to work or if, when working or having worked, in another Member State, he might be encouraged to leave, that would not be consistent with the purpose of the Directive, or give effect to

it. It seems to me there is substance in Miss Mountfield's submission that the Secretary of State's interpretation of Articles 2(1) and 3(1) could realistically result in a person deciding not to move to another Member State to work or, having moved, to be encouraged to return to his state of origin. A Union citizen who wishes to work in another Member state may be deterred from doing so if he knows that his elderly, but not then dependent mother, will not be regarded as his dependent for the purposes of Article 2(2) if she joins him and later becomes dependent upon him. If, in spite of that, he has left his state of origin, he may then be encouraged to leave his host state for his state of origin to enable his then dependent mother to be supported. As Eind [Case C-291/05] and Metock make clear, no impediment should be placed in the way of a Union citizen which might realistically deter him from choosing to work in (for example) a city in another Member State, as opposed to one in his state of origin. If in the first case his dependent mother would not be supported and in the second she would, that would in my view amount to such an impediment.

60. Moreover, if the Secretary of State is right, were Mrs. Pedro to have become dependent upon her son in Portugal and he to have supported her, she could have come to the United Kingdom to join him as a dependent and enjoy her derived benefits, yet if she becomes dependent in the United Kingdom she cannot. It is difficult to see a principled distinction between the two situations.

61…

62.
In short, I have concluded that proof of dependence by Mrs. Pedro on her son in the United Kingdom will suffice under Article 2(2)(d).”

Discussion

16. It can be seen that the Directive distinguishes between “family members” as defined in Article 2.2 and “other family members” who are dealt with in Article 3.2(a). The 2006 Regulations refer to the latter as “extended family members”. It is clear from the analysis of the relevant legislation made in KG and AK , Bigia and Ors , SM (India) and Pedro that the protection the Directive affords to OFMs is significantly less than that it affords family members as defined by Article 2.2. Furthermore, whereas in relation to Article 2.2 family members other provisions of the Directive lay down the conditions under which they qualify for rights of entry and residence, the obligation imposed on the host Member State in relation to OFMs is limited to a duty to “facilitate their entry and residence in accordance with its national legislation”; see also recital 6. That means that there is a considerable discretion left to Member States as to the circumstances under which those who qualify under Article 3.2 are to be granted entry or residence. So long as the host Member State discharges the duty to facilitate and the duty imposed by the last sentence of Article 3.2 - to “undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people” - it is a matter for its national law what requirements it applies to OFMs. In the UK that means that the eligibility of OFMs for EEA rights is governed by the 2006 Regulations.

17. Since all of the above matters appear to be acte clair I have not considered it appropriate for me to make a preliminary reference to the Court of Justice of the European Union (CJEU) under Article 267.

18. So far as concerns the meaning of dependency, that is also acte clair as a result of the ECJ judgment in Jia which stated at para 35 that:

“…the status of ‘dependent’ family member is the result of a factual situation characterised by the fact that material support for that family member is provided by the Community national who has exercised his right of free movement or by his spouse…”.

19. The ECJ in Jia was concerned with a relative in the ascending line of the spouse of a Community national, and so a person who, had her case been decided now, would have fallen to be considered under Article 2.2(d). Furthermore, it is safe to assume that dependency has the same meaning in Directive 2004/38/EC as it has in the Community provisions examined in Jia , that is Directive 73/148/EEC. It is also safe to assume that dependency has the same meaning in Article 3.2 as it has in Article 2.2(d) and (c) of Directive 2004/38/EC. At para 37 of Jia the ECJ stated that:

“In order to determine whether the relatives in the ascending line of the spouse of a Community national are dependent on the latter, the host Member State must assess whether, having regard to their financial and social conditions, they are not in a position to support themselves…”

20. In light of the above I now turn to examine the appellant’s grounds for permission to appeal.

21. As regards the first ground, I am prepared to accept that the Immigration Judge erred in law in para 26 when he appeared to attach significance to the fact that the appellant “has never lived with his sister and brother-in-law in another EEA state”. Everywhere else the Immigration Judge appears to have focussed (correctly) on the issue of whether the appellant was financially dependent on the EEA sponsor prior to coming to the UK, but the offending sentence muddies the waters and suffices to persuade me that the Immigration Judge erred in law. As noted by Maurice Kay LJ at para 41 of Bigia and Ors , “the provisions in Regulations 8 and 12 of the 2006 Regulations, to the extent that they require an OFM to establish prior lawful residence in another Member State, do not accord with the Directive…”.

22. However, for reasons already explained there is no basis for revisiting the Immigration Judge’s finding that the appellant was not financially dependent on the EEA sponsor prior to coming to the UK. To paraphrase the wording of the ECJ in Jia at para 35, the appellant was properly found not be have been dependent in Macedonia because he had failed to show that his factual situation there was characterised by the fact of material support for him provided by his EEA brother-in-law.

23. The question arises, therefore, whether the Immigration Judge’s error was a material one.

24. Miss Yong submitted that it was. She argued that even if the Tribunal did not accept any dependency by the appellant on his EEA brother-in-law prior to the appellant coming to the UK, his appeal still stood to be allowed on the strength of the principle established in Pedro . However, that submission rests on a plain misconception of the ratio in Pedro . Pedro concerned a family member as defined by Article 2.2 of Directive 2004/38/EC, not an OFM as defined by Article 3.2. Indeed, in coming to the conclusion that in the case of an Article 2.2 (d) ascendant family member dependency in the host Member State (the UK) could suffice, the Court expressly relied on the contrasting position of OFMs under Article 3.2:

“61. I do accept, as Mr. Blundell submitted, that the distinction between "family members" under Article 2(1) of Directive 2004/38 and "any other family members" in article 3(2) is not new. That is clear from the previous European legislation. It was present in the legislation considered by the court in Jia . It is clear too that in both KG and AK and Bigia , the Court of Appeal proceeded on the basis that Jia was still good law. However, in neither case was the present argument raised. KG and AK did not concern Article 2 family members. When in Bigia Maurice Kay LJ applied the test in Jia to the

Article 2(2) family member, he did so, as I have indicated, in the context of the alleged support having been provided in India by Mr. Bigia in circumstances where that was the only basis of the dependency alleged.

62. As Lebon [[1987] ECR 2811] made clear, whether someone has the status of a dependant family member is a question of fact. Such a status is characterised by the material support for that family member provided by the Union national who has exercised his free right of movement. Why the family member is dependent does not matter. The fact that Jia [Case C-1/105] itself concerned the derived rights of the alleged dependents of a self-employed citizen is not significant. In its reasoning the Court relied on Lebon and Article 4(3) of Directive 68/360, which did not concern those who are self employed. There is no justification in principle for distinguishing between the two for present purposes.

63. When in Jia the court referred (as relevant to the present case) to the need for material support having to exist in the state of origin, it did so on the basis of what was said in Article 4(3)(e) of Directive 68/360. It said as much in paragraph 38. I do not accept Mr. Blundell's submission to the contrary. What was said in that Article may be contrasted with what is said in Article 8(5)(d) of the Citizens' Directive. That says nothing to suggest that documentary evidence of an Article 2(2)(d) dependency need emanate from the state of origin. That is in specific contrast to "other family member cases," where under Article 8(5)(e) the relevant authority of the country of origin is referred to. The basis of the decision in Jia , insofar as it concerns family members, therefore falls away in a case involving the Citizens' Directive.

64. In short, the basis of the conclusion in Jia as to the need for material support to exist in the state of origin is not present in a case such as the present brought under the Citizens' Directive. It lends support to Miss Mountfield's contention that that Directive did strengthen the right of free movement.

65. Moreover, on the rather extreme facts of Jia , the question revolved around the basis on which dependency was to be assessed; in particular, whether by reference to the country of origin or of normal residence. That is very different from a case such as the present.

66. It does not seem to me relevant that Jia was decided after the Citizens' Directive became law. The decision was not taken on the basis of it.

67. Article 2(2) does not specify when the dependency has to have arisen. Neither does it require that the relative must be dependent in the country of origin. Article 3(2)(a), on the other hand, requires actual dependency at a particular time and place. That difference, as I have said, is reflected by Article 8(5)(d) as compared with 8(5)(e). It cannot be an accident of drafting. It contemplates, as it seems to me, that where in an Article 2(2)(d) case reliance is placed on dependency, it can be proved by a document from the host state without input from the state of origin. Taking Article 2(2)(d) together with Article 8(5)(d), suggests that dependency in the state of origin need not be proved for family members. It is sufficient if, as is alleged here, the dependency arises in the host state. Such an interpretation reflects the policy of the Directive to strengthen and simplify the realisation of realistic free movement rights of Union citizens compatibly with their family rights. On the one hand, close family members of Union citizens can move freely with Union citizens who might otherwise be inhibited from exercising their rights of free movement. On the other, Member States are merely obliged, as Miss Mountfield put it, to give open-minded consideration to those extended family members who have demonstrable need. Such an interpretation, as well as being in accordance with the language of the Citizens' Directive, is consistent with the approach of the European Court of Justice in Metock [84-9]. “

25. Hence the clear conclusion to be drawn from Pedro is that whilst financial dependency on the sponsor since arrival in the UK may suffice to benefit a family member as defined by Article 2.2(d), it will not benefit an OFM as defined by Article 3.2(a).

26. Even leaving to one side the guidance given in KG and AK , Bigia and Ors , SM (India) and Pedro , it is clear that both the Directive and the 2006 Regulations require, in the case of OFMs, that dependency must be shown both in the county of origin and in the host Member State. Article 3.2(a) applies only to OFMs (other than those in respect of whom there are serious health grounds) "who, in the country from which they have come, are dependents or members of the household of the Union citizen having the primary right of residence…" (This is underlined by Article 10.2(e) which permits Member States to require of OFMs "a document issued by the relevant authority in the country of origin or country from which they are arriving certifying that they are dependants…".) The use of the present tense is to be noted. Correspondingly, reg 8(2)(c) requires an applicant to show that the extended family member who has joined the EEA national in the United Kingdom "continues to be dependent upon him or to be a member of his household". As was clearly in the mind of Buxton LJ in KG and AK , use of the word "continues" denotes that the dependency must have existed in the recent past and must still exist once here.

27. In seeking to support her submission in relation to the appellant's EEA rights under the Directive and/or the 2006 Regulations, Miss Yong contended that the IJ should have concluded that in view of the appellant's dependency on his brother-in-law in the UK it would be disproportionate as a matter of EU law as informed by Article 8 ECHR to refuse to issue him with a residence card. No doubt she was influenced in putting her submission in this way by the fact that the grounds applying for permission did not raise any Article 8 ECHR point as such.

28. I am unable to accept that contention in substance.

29. Miss Yong is right, of course, that we must give effect to EHCR provisions within Community/ Union law and that Article 8 ECHR considerations are relevant in determining EEA rights: see e.g. Carpenter (Case C-60/00) [2002] ECR I-6279; MRAX (Case C-459/99) [2002] ECR-I-6591; and Zhu and Chen (Case C-200/02) [2004] ECR I-9925.

30. At a general level it is right to express matters tentatively, as there is a lack of case law. However, I think Miss Yong must also be right in reasoning that in the context of the Directive and the 2006 Regulations Article 8 ECHR cannot only be relevant to Article 2.2 family members: it must also be of potential assistance to OFMs under Article 3.2. Article 8 ECHR has universal application.

31. I would also accept that in respect of OFMs it is arguable that there may be inbuilt reasons why Article 8 ECHR might be of some importance, in that Article 3.2 OFMs are by definition persons who already have been able to establish some significant factual content to their relationship (whether family life or private life) with the EEA national: they have either established dependency; membership of the household; serious health grounds requiring personal care; or the existence of a durable relationship. At the same time, the starting point for OFMs is different. They are persons who are considered to have ties with the Union citizen/EEA national that are less close than those of Article 2.2 family members. Hence, even in order to receive a lesser form of protection, they have to prove more; the existence of the tie itself is not enough.

32. So it would not seem that there are necessarily any clear demarcations, at least for Article 8 ECHR-related purposes, between Article 2.2(d) family members and OFMs. However, what is clear is that even if for Article 8 ECHR purposes there are no bright lines, in certain circumstances a decision

as to whether persons in either category qualify for protection under the Directive or the Regulations will require an assessment of the proportionality of the measure in question.

33. In am fortified in taking this view by the observations made by Advocate General Sharpston in a very recent Opinion in Zambrano v Office national de l'emploi (ONEM) (Case C-34/09), 30 September 2010 when discussing the situation of a third-country national ascendant family member (the parent clearly falling into the Article 2.2(d) family member category). At paras 107-111 she states:

"107. There are, clearly, situations in which the exercise of rights by an EU citizen is not contingent upon the grant of residence rights to an ascendant family member. Thus, an EU citizen who has attained his majority is able to exercise his rights to travel and to reside within the territory of the European Union without it being necessary to grant his parent(s) concurrent rights of residence in the chosen Member State.

108. In my view, therefore, the potential interference with EU citizenship rights that arises if an ascendant family member does not enjoy an automatic derivative right of residence in the EU citizen's Member State of nationality is acceptable in principle. However, it may not be a permissible interference in certain circumstances (in particular, because it may not be proportionate).

Proportionality

109. As the Court has stated in Micheletti , Kaur and more recently in Rottmann , although the grant of nationality is a matter that falls within the competence of each Member State, it must, none the less, when exercising that competence, comply with [EU] law. The same result was reached in Bickel and Franz when it came to criminal law and procedure, in García Avello as regards national rules governing surnames and in Schempp , concerning direct taxation – all sensitive areas in which Member States still exercise significant powers.

110. Here, as so often, the situation is one that involves exercise of a right and a potential justification for interfering with (or derogating from) that right; and the question comes down to one of proportionality. Is it proportionate, in the circumstances of this case, to refuse to recognise a right of residence for Mr Ruiz Zambrano, derived from his children's rights as EU citizens? Whilst the decision on proportionality is (as usual) ultimately a matter for the national court, some brief remarks may be of assistance.

111. Application of the principle of proportionality in the present case (as in Rottmann) requires 'the national court to ascertain ... whether the ... decision at issue in the main proceedings observes the principle of proportionality so far as concerns the consequences it entails for the situation of the person concerned in the light of [EU] law' (in addition to any examination of proportionality that may be required under national law). As the Court went on to explain in that case, '[h]aving regard to the importance which primary law attaches to the status of citizen of the Union ... it is necessary, therefore, to take into account the consequences that the decision entails for the person concerned and, if relevant, for the members of his family with regard to the loss of the rights enjoyed by every citizen of the Union. In this respect it is necessary to establish, in particular, whether that loss is justified ...'. "

34. The obligation on the decision-maker in respect of an ascending family member to conduct an assessment of proportionality based on the individual case is very similar to the obligation imposed in respect of OFMs by Article 3 of Directive 2004/38/EC final paragraph, which states: "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". Recital (6) of the Directive also enjoins the need in respect of such person for decision-makers to take into consideration "their relationship with the Union citizen or any other circumstances, such as their financial or physical dependence on the Union citizen".

35. How do such considerations, whether considered as required directly by the Directive or the Regulations or indirectly on the basis of Article 8 ECHR, apply to the appellant's particular case? Bearing in mind that this question is, as Advocate General Sharpston reminds us, a matter for national courts to decide on the facts of the individual case, several matters appear of particular importance.

36. First, it was a clear finding of the Immigration Judge that the appellant had not shown that his situation when in Macedonia was one characterised by the fact that material support for him was provided by his EEA brother-in-law.

37. Second, there is absolutely nothing to indicate that refusal of a residence card would have any material effect on the way in which his EEA brother-in-law continued to exercise his Treaty rights here. They had not previously lived in the same household. There was nothing to suggest that he would feel impelled to accompany the appellant back to Macedonia. Indeed the evidence was that he had been ordinarily residing in the UK (exercising Treaty rights) since 2005/6 at least and that previously he had been content to remain in contact with his brother-in-law by way of returning to visit Macedonia on very few occasions.

38.Third, the Immigration Judge found that when in Macedonia the appellant was a healthy young man who had been able to play football on a part-time basis (for which he was paid a small amount) and there was "no reason why [he] could not seek employment there".

39. A fourth matter is this. It is true that the appellant and his EEA brother-in-law and his sister refer to living together in the UK in "a close and loving relationship" and that the Immigration Judge said nothing to dissent from that. It is also true that he has been found to be financially dependent on them in the UK. But the appellant is 24 years old and has no known health problems and was found by the Immigration Judge to have come to the UK for no other reason than that he found the life and employment prospects in Macedonia to be inferior. The evidence did not establish that in Macedonia the appellant would be unable to support himself. In my assessment, even assuming the evidence demonstrated that there was a family and private life relationship between the appellant and his EEA brother-in-law within the meaning of Article 8 and that the decision refusing a residence card amounted to an interference with that relationship, such considerations do not establish that the decision was a disproportionate one. I see no error of law in the Immigration Judge's finding that the appellant's Article 8 rights were not breached. Nor, for the reasons given, do I see that in the particular circumstances of this case Article 8 considerations add anything of significance to the assessment of proportionality required by EU law.

40. For the above reasons I conclude that:

The IJ materially erred in law.

The decision I remake is to dismiss the appellant's appeal.

Signed Date

Judge of the Upper Tribunal

(Immigration and Asylum Chamber)