Upper Tribunal
(Immigration and Asylum Chamber)

RK (OFM – membership of household – dependency) India [2010] UKUT 421 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 9 November 2010	

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Before

MR JUSTICE BLAKE, THE PRESIDENT

LORD BANNATYNE

SENIOR IMMIGRATION JUDGE WARR

Between

RK

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Mr Z Jafferji instructed by Lawrence Lupin Solicitors

For the Respondent: Mr S Ouseley, Home Office Presenting Officer

Other family Member – Article 3(2) of the Citizens Directive – to be interpreted in the light of Article 10(2) – distinction between membership of household and dependency – meaning of country from which they have come – any requirement to have resided with EEA national or spouse shortly before the application doubted – case remitted for re-examination by Secretary of State.

DETERMINATION AND REASONS

Introduction

1.
There is before us the appeal of the appellant, RK, who applied in 2008 for an EEA family permit to join her husband. Both husband and wife are Indian nationals.

2.

The appellant's mother in law is a Portuguese national, by reason of connection with Goa. The appellant's mother and father in law moved to the United Kingdom in 2003 exercising Treaty Rights of free movement. In 2005 their son, who was then over 21, joined them in the United Kingdom, as a dependant family member within the definition of "family members" in Article 2(2) of the Citizens Directive 2004/38/EC ("the Directive").

3.
The appellant married in 2007. There was a civil ceremony in India, a religious one is to be celebrated if and when she ever gets to the United Kingdom. Following the civil ceremony the appellant moved into the premises in India owned by her parents in law, where she lives to this day. Her brother in law also lives there.

4.
At the time of the EEA application, the appellant's husband was residing in the United Kingdom, in a common household with his parents, pursuant to an EEA Family Permit. He did not have indefinite leave to remain in the United Kingdom and could not sponsor his wife for permanent residence here under the ordinary Immigration Rules.

5.
In her application for an EEA permit the appellant stated that she was dependant upon her parents in law and her husband. She identified a sum of money that was remitted by them both to her from the United Kingdom to support her in India. It is an undisputed fact that she resides in the family property in India that her in-laws own.

6.
The Entry Clearance Officer ("ECO") was not satisfied that she was a family member or that she qualified under the Immigration (European Economic Area) Regulations 2006 ("the Regulations"). When the case came before the Immigration Judge (IJ), later in 2008, he also was not satisfied that the appellant qualified under the terms of the Regulations.

The legislation

7.
Regulation 8(2) requires that the relative of a EEA national:

i.
is residing in an EEA State and

ii.
the EEA national resides in the same state and

iii.
is dependent upon the EEA national or

iv.
is a member of his household.

8.
If these words are to be applied literally to the appellant she clearly cannot comply with them. She is residing and has at all the material time resided in India which is neither an EEA state nor the country of residence of her husband or parents in law at the time she became a family member. She could not therefore meet i. and ii. above.

9.
However, both before the IJ and us, it is contended that she nevertheless fulfilled the requirements of "other family member" ("OFM") within the meaning of the Directive.

10.
The material part of Article 3(2) is as follows:

" Without prejudice to any right to free movement and residence the person 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 of 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"

11.
In the case of SM (Metock: extended family members) Sri Lanka [2008] UKAIT 75 the AIT concluded that "country from which they had come" meant the country in which the EEA national had been residing prior to exercising the Treaty rights in question. The AIT had reached that conclusion in part by reference to the guidance given to the construction of Article 3(2) by Buxton LJ in the case of KG (Sri Lanka) and AK (Sri Lanka) v SSHD [2008] EWCA Civ 13.

12.
Shortly after the Court of Appeal had delivered its judgment the ECJ handed down its judgment in Case C-127/08 Metock and others (2008) ECR I 6241. The AIT concluded that Metock was concerned with family members and did not change the interpretation of Article 3(2). In the case of Bigia v ECO [2009] EWCA Civ 79, the Court of Appeal accepted that the clarification of the law in Metock did have implications for the construction of Article 3(2) of the Directive. Article 3(1) made reference to a relative who accompanies or joins a Union citizen in a host state. It was accepted by counsel for the ECO that if there was no requirement of prior lawful residence in an EEA state for family members within Article 2 of the Directive, there was no case for importing such a requirement for other family members under Article 3(2). The Court accordingly concluded at [40] that there was no prior requirement for prior residence in an EEA state and regulation 8(2)(a) should be read as if that requirement was absent.

13.
However, at [43] it concluded that Metock did not change other aspects of the guidance in KG (Sri Lanka) and noted:

"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 while 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 would be discouraged. The OFM could continue to benefit from the accommodation or the income after the Union citizen has exercised the rights in the host Member State."

14.
In neither KG (Sri Lanka), SM or Bigia was judicial consideration given to Article 10 (2) of the Directive that states the following:

“For the residence card to be issued Member States shall require presentation ` of the following documents:

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 or country from which they are arriving certifying that they are dependants or members of the household of the Union citizen….”

15.
In both the ECJ Case C/105 Jia [2007] QB 545 and the subsequent Court of Appeal case of Pedro v Secretary of State for Work and Pensions [2009] EWCA Civ 1358 use has been made of the subordinate provisions of Community legislation (in Pedro Article 10 of the Directive) identifying the documents that should be presented to obtain the residence card as a means of construction of the requirements for eligibility as a family member within Article 2 of the Directive. In our judgment, Article 10 is a legitimate source of assistance in construing Article 3(2).

16.
This does not mean that the provisions for family members are the same for OFMs. The Court of Appeal made that clear in Pedro and so has this Tribunal in VN (EEA rights – Dependency) Macedonia [2010] UKUT 380 (IAC). But the distinction made between Article 10(2)(d) and (e) reflects the difference. Family members may now rely on dependency in the host state, whereas OFMs must show dependency or membership of the household of the Union citizen “in the country of origin or the country from which they arriving”.

Discussion

17.
Before us Mr Jafferji focused his principal argument on the submission that Metock and the subsequent case of C-162/09 Lassal demonstrate that a broad meaning has to be given to the word ‘household’ and applying that broad meaning the appellant could be said to have been residing in her in laws household in India. He recognised that nothing in the case law he relied on was addressed to Article 3(2) or the meaning of household.

18.
We do not consider that such an argument has any substance. As Buxton LJ pointed out in KG (Sri Lanka) the previous expression used in Article 10(2) of Regulation 1612/68 was “under his roof”. This suggests that not merely is a household a community that lives together in the same accommodation but the household should be that of the Union citizen. The appellant has never lived in her mother in law’s household. She lives in a house owned by her father in law in which the mother in law used to live, but ceased living there four years before she became a member of the mother in law’s family.

19.
He also indicated a secondary argument based on discrimination contrary to Article 24 of the Directive and Article 8 European Convention on Human Rights. In the light of the conclusions to which we have come it is not necessary to say any more about those submissions.

20.
In our judgment the AIT was wrong in SM to conclude that “country from which they have come” refers only to the country in which the OFM resided with the EEA national before entry to the host

state. The term in Article 3(2) must cross-refer to the relevant provisions of Article 10(2)(e) and enable the OFM to prove eligibility from documents either in his or her country of origin (in this case India) or the country from which the OFM has most recently been residing. For reasons already noted, when considering claims based on membership of the household of the Union citizen, there will need to be relevant residence in the same country as the Union citizen. This will often be another EEA state. However a claim based on dependency is a separate one and raises distinct issues.

21.
We pointed out to the parties at the outset of this hearing that the requirement of dependency is an alternative to membership of the household. For an OFM to fulfil the household requirement he or she must have lived with the Union citizen in the same country at some time in the past, whilst dependency requires no such link. Further as dependency can be on the non national spouse of a Union citizen that opens up the reasonable possibility of continued residence outside the EEA after such a non national spouse has married and moved to the EEA.

22.
In our judgment it is clear from Article 10(2)(e) that dependency can be proved by documents in the OFM's country of origin. We note the reference in Bigia to dependency of an OFM living outside the EEA having no impact on the willingness of the Union citizen to move to the United Kingdom or other host state to exercise Treaty rights. However, that would be the same whether the dependant lived apart from the Union citizen in Sicily or in Sri Lanka, and it is doubtless the case that the Directive requires states to facilitate the admission of dependants who do not live in the same premises or same city as the Union citizen. We rather doubt that the Court of Appeal in Bigia would have reached the conclusions it did regarding OFMs if its attention had been directed to Article 10(2)(e).

23.
We also note that in the case of SM (India) [2009] EWCA Civ 1426, decided after Bigia, the facts have a certain similarity to the present case. One of the appellants was a cousin of the EEA national resident in the United Kingdom and the question was whether he could bring himself within the Directive by reason of dependency? The AIT had concluded that a stricter definition of dependency applies under the Directive than had previously been applied in Community law. The Court of Appeal at paragraphs [19] – [25] held that was an error of law by the AIT and dependency had the broad meaning assigned by the European Court of Justice in the earlier case of Lebon [1987] ECR 2811. In a word, dependency did not have to be whole or main or necessary but there had merely to be economic dependency in fact.

24.
The Court of Appeal concluded that the case of the cousin (FM) should be remitted for re-determination because the same error as to the meaning of the word dependency had been applied in that case as well as those of family members: see paragraphs [30] – [32]. There needed to be an assessment of dependency as a matter of fact. There was no reference to a requirement for the cousin to have lived in the same country as the EEA national on which he claimed dependency.

25.
As we have pointed out, the appellant claimed to have been a dependant on her parents in law in her residence permit application. There is some evidence of reliance on her parents in law to meet her essential living requirements because she lives in their house, even if not their household. This case has never been considered, by the ECO, the Secretary of State or the IJ. Mr Ouseley readily agreed that the case of dependency should be reconsidered by the Secretary of State.

26.
We conclude that the case law has moved on since the appeal was decided in 2008 and the IJ ought to have grappled with the Directive directly as well as the EEA Regulations 2006. To that extent his dismissal of the appeal was based upon an error of law which is arguably material to the outcome since it is possible that the appellant could succeed as a dependant.

27.
Doubtless the resolution of all the problems created by the tension between the terms of Regulation 8 of the 2006 Regulations and the terms of Article 3(2) of the Directive will need further consideration by a court having power to re-examine the case law. The Upper Tribunal has no power to refer a case direct to the Supreme Court to consider whether permission to appeal should be given (a leapfrog appeal). We informed the parties at the hearing of this appeal that a fortnight ago the Tribunal had announced in the case of FB and MR that it proposed to make a reference to the Court of Justice of the European Union to resolve a number of issues as to the nature of the duty to facilitate and whose entry and residence should be facilitated under Community law.

28.
We do not consider a reference is necessary in this case, or that the hearing of this appeal should be adjourned to await the outcome of the reference. We conclude that there is a reasonable possibility that if the appellant's case is reconsidered by the Secretary of State applying the criteria set out in SM (India) and she is found to be dependent on an EEA citizen, there is a case for the exercise of discretion in her favour under Regulation 17.

29.
There is another reason why the case should be reconsidered. Before the IJ there had also been argument as to whether the exclusion of the appellant from the United Kingdom was a violation of the Article 8 ECHR right to respect for family life of her husband and herself. In that context, the IJ thought that the denial of the residence permit only had limited impact on the family relationship because he was under the impression that the husband would be eligible for permanent residence in 2008. Mr Jafferji has pointed out that that was an error: he was in fact eligible for permanent residence under Regulation 15 in January 2010 after five years residence.

30.
We were told that the husband has lodged an application for permanent residence which is now under consideration. If the husband is granted permanent residence and both the ECO and the IJ contemplate that he would be in due course, then the wife would be eligible to come in as his dependant under the ordinary Immigration Rules. It would certainly be an odd situation if an adult over 21 years who was lawfully resident in the United Kingdom under an EEA permit and entitled to work here cannot be joined by a spouse who otherwise meets the requirements of the Immigration Rules.

31.
Despite his discrimination and human rights arguments Mr Jafferji was content for the case to be reconsidered by the respondent on these two bases.

Conclusions

32.
We therefore conclude:

i)
Applying the test in SM (India) the appellant may well be a dependant on her in-laws as well as being supported by her husband.

ii)
If the husband is shortly to be given permanent residence then the appellant's position fundamentally changes and she could be admitted as the spouse of a man with permanent residence in the United Kingdom and further consideration of both the Directive and the discrimination argument would be unnecessary.

iii)
We are satisfied that a person may be an OFM by reason of dependency on an EEA national or the non-national spouse of such a person without having resided in EEA state.

iv)
We doubt whether properly construed in the light of Article 10 there is any requirement for a dependent OFM to have lived in the same country as the Union national shortly before the latter exercised free movement rights, but this is one of the questions that will in due course be considered by the Court of Justice.

v)
We set aside the IJ's decision but we remit the case for further consideration to the Secretary of State. We indicate that we conclude it ought to be the Secretary of State rather than the ECO who reconsiders the matter because of the two questions to be considered, and the review of Community law that would doubtless be needed in the light of the intention to make a reference in another case.

vi)
We are conscious that it is three years since the appellant's marriage and two years she applied for a residence permit. Accordingly we invite the Secretary of State to reconsider this case with reasonable expedition.

We are grateful that the parties have recognised that as a matter of practicality this outcome is probably the most that could be achieved today having regard to the difficult issues in the appeal.

Signed

President of the Upper Tribunal

(Immigration and Asylum Chamber)