IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Aladeselu and Others (2006 Regs – reg 8) Nigeria [2011] UKUT 00253(IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 7 June 2011	**28 June 2011**

Before

SENIOR IMMIGRATION JUDGE STOREY

SENIOR IMMIGRATION JUDGE WARR

Between

MS TEMILOLA OPEYEMI ALADESELU

MR FELIX ADELEKAN ANTHONY

MR PASCHAL TOBECHUKWU ASHIEGBU

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellants: Ms L Targett-Parker , Counsel instructed by Davjunnel Solicitors

For the Respondent: Mr P Deller, Home Office Presenting Officer

1. For the purposes of establishing whether a person qualifies as an Other Family Member (OFM)/ extended family member under regulation 8 of the Immigration (European Economic Area) Regulations 2006, the requirement that they accompany or join the Union citizen/EEA national exercising Treaty rights must be read as encompassing both those who have arrived before and those who have arrived after the Union citizen/EEA national sponsor.

2. The 2006 Regulations do not impose a requirement that an OFM/extended family member must be present in the United Kingdom lawfully.

3. But in the context of the exercise of regulation 17(4) discretion as to whether to issue a residence card, matters relating to how and when an OFM/extended family member arrives in a host Member State are not irrelevant.

DETERMINATION AND REASONS

1. There are three appellants in this case, each being a citizen of Nigeria. They are aged 41, 38 and 40 respectively. The second and third appellants entered the UK illegally in July 2007 and November 2006 respectively. The first appellant arrived in the UK in August 2007 on a visit visa and subsequently overstayed. In terms of domestic immigration law therefore they are persons with no lawful basis of stay. However, they have a maternal cousin, Wanderlea De Brito, who is their sponsor. It is not in dispute: that her father had lived in the Netherlands and that she acquired Dutch citizenship some considerable time ago (certainly prior to any of the dates mentioned below); that in April 2008 she came to the UK; and that since then she has been here exercising Treaty rights. Neither is it in dispute that:

(i) between 2004 and the dates when the three appellants decided to go to the UK the appellants were living with her in Nigeria, in accommodation which she had rented and that she was supporting them;

(ii) in between the date of their arrival in the UK and her arrival in April 2008 she continued to support them financially by way of remittances; and

(iii) since April 2008 all three have lived with her in London, in accommodation she has rented, and she continues to support them financially.

2. These are the basic facts as found by the First-tier Tribunal judge, Immigration Judge Hodgkinson, who heard their appeals in November 2010. Those appeals arose from a decision made by the respondent on 9 August 2010 to refuse the application each had made for a residence card as the extended family member of the sponsor.

3. The reason why the Immigration Judge dismissed their appeals was a simple one, namely that he did not consider any of the appellants could meet the requirement set out in regulation 8 of the Immigration (European Economic Area) Regulations 2006 (hereafter “the 2006 Regulations”) which stipulate that extended family members must either be accompanying or joining the EEA national sponsor in the UK. In support of this assessment the Immigration Judge relied on the judgment of the Court of Appeal in KG (Sri Lanka) [2008] EWCA Civ 13 which also concerned an extended family matter (or Other Family Member (OFM) to use the language of the 2004/38/EC (the “Citizens Directive”)), KG, who had arrived before the EEA national/Union citizen sponsor. He recited paras 72-74 of that judgment in which Buxton LJ wrote:

“72. As explained in §65 above, the requirement that the relatives should be accompanying or joining the Union citizen is only specifically stated in Directive 2004/38 in relation to article 2 relatives, but it is inconceivable that that assumption is not also made in the case of OFMs. Further, the only sensible assumption is that the case of an OFM arriving from a third country is assessed from this point of view on his first seeking entry into the Member State; because it is then that the issue discussed above must arise, of whether his Community rights should override national immigration law.

73. Both of the appellants plainly fail on that score. When they sought admission to the United Kingdom (or, in the case of KG , arrived here clandestinely) the movement to the United Kingdom of the Union citizen on which their claims are based was still five years in the future. Indeed, in KG ’s case the relation on whom he relies had not yet even achieved the status of Union citizen. And even if

that difficulty is disregarded, and the question is asked whether when they applied for residence permits they were accompanying or joining the Union citizen relative, the answer is still in the negative. As a simple matter of fact neither appellant accompanied the Union citizen relative. And as a simple matter of language they could not base their application for a residence permit on any claim that they were joining the Union citizen relative in the United Kingdom. Rather, the Union citizen relative had joined them in the United Kingdom, where they had been present for many years before the Union citizen relative arrived.

74. These objections are not merely pedantic points of construction. Rather, they illustrate that the purpose and justification of the ancillary rights granted to the relatives of Union citizens is to support the exercise by those Union citizens of their own rights, if needs be by overriding domestic immigration law. That is why, to qualify, the relatives must either come with the Union citizen when he is exercising his rights or join him once he has exercised those rights. That purpose and justification is not borne out when an OFM who has already for many years been in breach of the immigration laws of a member state seeks to use the arrival there of his Union citizen relative as a means of legitimising his own previous breach."

4. In amplifying the grounds seeking permission to appeal Ms Targett-Parker contended that the fact that the appellants entered the UK before the sponsor is not fatal because the test in Article 3.2 of the Citizens Directive does not require them to do so: it only requires them to show that they were part of the sponsor's household or dependent on the sponsor. Further, she submitted, KG (Sri Lanka) predated the European Court of Justice ruling in Case C-127/08 Metock and it was clear from the latter case that the requirement that family members "accompany or join" the Union citizen has been held not to require the Union citizen sponsor to have come to the host state first. Whilst the Court of Appeal in its subsequent judgment in Bigia & Others [2009] EWCA Civ 79 only specifically found the Article 2.2 related reasoning in Metock to apply to OFMs/extended family members in one respect (so as to disapply the requirement in reg 8(2)(a) that the OFM be "residing in an EEA State"), it affirmed that under both Article 2.2 and 3.2(a) the emphasis was on the elimination of obstacles to the Treaty rights of the Union citizen (Bigia , para 43; Metock paras 56, 62 and 92) and in cases like the appellants' - where there was accepted recent dependency on the Union citizen in the country from which they have come - Maurice Kay LJ in Bigia identified such persons as a sub-class of OFMs who could show an impact on the Union citizen's exercise of free movement rights (para 43). Thus how and when an OFM arrives in the host Member State is irrelevant.

5. Mr Deller submitted that the important concession made by the respondent in Bigia was expressly limited to the issue of the requirement of prior (lawful) residence in another Member State. The court only differed from KG (Sri Lanka) on matters relating to this requirement. When the appellants arrived in the UK they were here illegally or, in the case of the first appellant, unlawfully. There was no exercise of any EEA right by the sponsor in prospect at that time; and in any event the purpose behind the scheme was clearly that OFMs/extended family members should only seek to accompany or join an EEA principal already here. Regulation 12 provided the proper route which was for such persons to apply from abroad for a family permit.

Legal Framework

6. The relevant legal provisions distinguish between close family members (whom we shall term CFMs) and other family members (whom, following Bigia we shall call OFMs or extended family members). Dealing with CFMs, Article 2.2 of the Citizens Directive (2004/EC/38) states:

"Family member" means:

(a) the spouse:

(b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage …;

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

(d) the dependant direct relatives in the ascending line and those of the spouse or partner as defined in point (b).”

7. The corresponding provision of the 2006 Regulations, reg. 7(1) states that:

“… for the purpose of these Regulations the following persons shall be treated as the family members of another person –

(a) his spouse or civil partner;

(b) direct descendants of his, his spouse or his civil partner who are –

(i) under 21; or

(ii) dependants of his, his spouse or his civil partner;

(c) dependent direct relatives in his ascending line or that of his spouse or his civil partners;

(d) …”

8. Dealing with OFMs/extended family members, Article 3 of the Directive provides:

“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 dependants or members of the household of the Union citizen having the primary right of residence, or where there are 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 must justify any denial of entry or residence to these people.”

9. Up until 2 June 2011 the corresponding regulation in the 2006 Regulations, regulation 8(2) headed “Extended family members” stipulates:

“(2) 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 to 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.”

Our Assessment

10. It is well-established that in order to qualify as an OFM/extended family member a person must show dependency on the EEA sponsor/Union citizen or membership of the latter’s household both in the country from which she/he has come and in the host Member State: see Bigia & Others ; RK (Membership of household – dependency) India [2010] UKUT 421 (IAC).

11. It is also well-established that there is no requirement that the OFM/extended family member be resident in another Member State prior to arrival in the host Member State: hence prior to 2 June 2011 the requirement to this effect in regulation 8(1)(a) and the requirement in regulation 12(1)(b) stipulating “lawful residence in an EEA State” was to be disapplied: see Bigia , para 41. As a result of The Immigration (European Economic Area) (Amendment) Regulations 2011 (SI 2011 No.1247) for the words “EEA State” there are now substituted the words “a country other than the United Kingdom”. In regulation 12, for paragraph (1)(b) the provision substituted is “(b) the family member will be accompanying the EEA national to the United Kingdom or joining the EEA national there”.

12. What is less clear is whether there are not two further requirements imposed either by the Directive or by the 2006 Regulations namely (1) an “accompanying or joining” requirement (construed so as to preclude an OFM/extended family member arriving before the Union citizen/EEA national) ; and (2) a requirement of lawful presence in the host State . The status of the former is thrown into sharp relied by the IJ’s assessment of the appellants’ appeals; the status of the latter has been raised by Mr Deller’s contention that the provisions of the 2006 Regulations relating to OFMs have been made pursuant to Article 3.2 of the Directive which limits the obligation on Member States to facilitate their entry and residence to those that are “in accordance with national law” or, as worded in recital 6, “on the basis of its own national legislation”.

“Accompanying or Joining”

a. The Citizens Directive

13. In Metock the ECJ looked at the use of the term “accompanying and joining” as it appears in Article 3.1 and Articles 5 and 6 of the Directive. Article 3.1 provides:

“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.”

The Court ruled that the condition contained in Article 3.1 that Article 2.2 family members had to “accompany or join” the Union citizen was not to be read as imposing a requirement that the family

member's arrival must always precede or occur simultaneously with that of the Union citizen in the host Member State.

14. However, it is notable that the "accompanying or joining" requirement imposed in respect of Article 2.2 family members is not imposed by Article 3.2 in respect of OFMs. The only requirements stipulated in Article 3.2 for OFMs are those relating to dependency or membership of the household in the country from which they have come or serious health grounds.

15. It seems to us that Buxton LJ in KG (Sri Lanka) may have assumed that the Article 3.1 requirement automatically applied to all types of family members, including OFMs. If that is so (and in any event) we can only treat its ruling on the "accompanying or joining requirement" as binding if satisfied that it was consistent with EU law post- Metock .

b. The national law/2006 EEA Regulations

16. Nevertheless, "accompanying and joining" requirements are contained in regulation 8 of the relevant national law – the 2006 Regulations - and we cannot disapply those unless satisfied that they are contrary to the Directive or other EU law. When we turn to regulation 8 we find that there are two provisions that impose an "accompanying or joining" requirement. One is regulation 8(2)(b), which refers to a person who is "accompanying an EEA national to the United Kingdom or wishes to join him there". The other is regulation 8(2)(c), which is given as an alternative way of satisfying the requirements of regulation 8(2): it contains a "joining" requirement only. It states:

"The person satisfied the conditions 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."

17. Plainly in the instant case we are only concerned with regulation 8(2)(c). Ms Targett-Parker has urged us to construe the words it uses - "has joined" - in the same way that the ECJ construed very similar words in Metock , so as to encompass both persons who have physically joined an EEA sponsor already in the UK and persons such as the appellants who came to the UK before the UK sponsor. Mr Deller says that such a reading is not authorised either by Metock or Court of Appeal authority.

18. We have not found this an easy issue to resolve. Even if an "accompanying or joining" requirement was imposed by Article 3.2(a), we would see no reason to construe it differently for OFMs and Article 2.2 (CFM) family members. Metock has defined what the meaning is and a stricter approach should not be imposed on OFMs. But as we have seen, under Article 3.2(a) "accompanying or joining" is not in any event a requirement imposed for OFMs by the Directive. It is purely a national law requirement and Article 3.2(a) and recital 6 permit Member States to impose national law requirements on OFMs subject only to limited constraints.

19. In favour of the construction urged by Ms Targett-Parker are a number of arguments. One is that on the reasoning applied by the ECJ in Metock – and seemingly endorsed in respect of OFMs by the Court of Appeal in Bigia - it seems possible to identify at least a sub-class of OFMs for whom a requirement of joining the Union citizen (construed again so as to prevent the OFM's prior arrival) would have a deterrent effect on the exercise of that citizen's rights of free movement. We discussed with the parties the hypothetical example of a Union citizen who would be deterred from taking up an employment contract in a host Member State starting in the winter unless he could arrange for dependent members of his household to start school in the host Member state at the beginning of the preceding Autumn term. Equally it is possible to construct hypothetical examples in which the need for prior arrival in the host Member State of an OFM would have no impact at all on the exercise by

the Union citizen of free movement rights. Another point, already prefigured in our earlier comments, is that it would be very odd indeed if the word(s) “accompany or join” were to be construed to have one meaning in the Directive (as assigned by the ECJ in Metock) and another meaning in transposing national legislation in the form of the 2006 Regulations; especially when the latter contains no specific definition of its intended meaning. Added to this point is the fact that when interpreting national law transposing a Directive we must apply a teleological approach to interpretation - not the normal rules of statutory interpretation in English/UK law, which allow recourse to a linguistic “simple matter of language” approach. A possible further point to be made is that the Court of Appeal in Bigia , when dealing with the only appellant who had come to the UK before the UK sponsor, TS, appeared to consider he failed solely because of the lack of any recent dependency abroad. Prior arrival was not seen as, or at least was not specified as, a problem.

20. There is a further reason which has to do with the fact that the UK government has chosen to confer on OFMs/extended family members a guarantee that once they establish eligibility as OFMs/ extended family members they have the same level of protection as Article 2.2 family matters. That appears to be the effect of regulation 7(3).

21. Ranged against, there are also strong arguments in favour of Mr Deller’s position. If Article 3.2(a) permits national law regulation of OFMs (by contrast with the automatic rights conferred on Article 2.2 family matters) then surely it must permit a Member State to require a “joining or accompanying” requirement as a condition of eligibility. The provision is part of the 2006 Regulations and it would be wrong to seek to disapply it unless it is plainly contrary to EU law. Further, an accompanying or joining requirement (construed as preventing prior arrival by the OFM/extended family member) was applied by the Court of Appeal in KG (Sri Lanka) and what the Court of Appeal said in Bigia and Others about KG must be no less true for the Upper Tribunal: viz. “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 ”. In Bigia the Court of Appeal was very specific in holding that the Article 2.2-related principles established by Metock only applied to OFMs in relation to the requirement of prior (lawful) residence in another Member State. A further argument is that if there is no requirement for the EEA spouse to be accompanied by the OFM or to come before the OFM then, seemingly, applicants are able to drive a coach and horses through the family permit scheme for which specific provision is made in regulation 12.

22. We consider that the respective merits of the arguments favour Ms Targett-Parker’s position. We must apply a teleological approach that seeks to give effect to the purposes of the Directive which the 2006 Regulations purports to transpose. Those purposes include the elimination of obstacles to the exercise of free movement rights by Union citizens/EEA nationals. Even if it is only a sub-class of OFMs whose EEA sponsor’s freedom of movement rights would be obstructed by a requirement that they arrive in the host Member State before the OFM, that is surely sufficient to show that there can be no blanket requirement to the contrary. And in the absence of any more qualified requirement, it would be otiose for us to seek to impose restrictions that do not appear in the ordinary language of the Regulations. The requirement to join says nothing about when that joining has to take place. Accordingly the requirement to “join” an EEA sponsor as set out in regulation 8(2)(b) must be read as encompassing both OFMs/extended family members who have arrived before and OFMs/extended family members who have arrived after the EEA sponsor.

23. It follows from our analysis that in reaching a contrary conclusion the Immigration Judge materially erred in law and his decision is to be set aside.

Lawful presence

24. When we turn to the matter of what decision to remake the first question we must address is whether the appellants have established that they meet the requirements of regulation 8. In this context one question that has arisen in this case is "Are the appellants nevertheless excluded from qualifying as extended family members because their presence in the UK has hitherto been either illegal or unlawful? "

25. It seems to us that so far as the Directive is concerned, the range of OFMs to whom there is a duty to facilitate their entry or residence is defined by EU law rather than national law, although in the case of OFMs EU law affords national law some discretion as to whether to admit or let reside those eligible for the exercise of that discretion. We know that imposition of such a requirement in respect of Article 2.2 family matters is unlawful. On that very point Metock expressly overruled the earlier ECJ case, Akrich which had held that there was such a requirement. But whether or not the scope afforded by Article 3.2(a) for Member States to regulate the entry and residence of OFMs "in accordance with national law" would prevent recourse to such a requirement in some shape or form is less clear.

26. Happily we do not need to wrestle with that issue because, even if the Citizens Directive is construed as not preventing Member States imposing some kind of lawful presence test on OFMs in their national laws, equally it does not mandate them to do so. In the UK all depends therefore, on what is achieved by the 2006 Regulations. As Mr Deller was quick to acknowledge, the 2006 Regulations contain no such test. Article 37 of the Directive permits Member States in any event to make more generous provision than does the Directive.

27. Hence the appellants cannot be excluded from qualifying as OFMs/extended family members because their presence in the UK has been illegal or unlawful.

28. Accordingly our conclusion is that the appellants have established that they meet the requirements of regulation 8(2) of the 2006 Regulations in full.

The regulation 17(4) issue

29. Establishing that one is an OFM/ extended family member is not, however, the end of the matter. The appeals are against decisions refusing to issue each of the appellants with a residence card. Unlike the position that obtains for Article 2.2 family members – or CFMs - who are entitled to a residence card by operation of regulation 17(1) ("the Secretary of State must issue….."), the position set out in the 2006 Regulations for extended family members affords the respondent a discretion. Reflecting Article 3.2 of the Citizens Directive, regulation 17(4) states that the Secretary of State "may" issue a residence card to an extended family member if the EEA spouse is a qualified person or an EEA national with a permanent right of residence and "(6) in all the circumstances it appears to the Secretary of State appropriate to issue the residence card". As the Tribunal noted in YB (EEA reg 17(4)-proper approach) Ivory Coast [2008] UKAIT 00062, the discretion afforded by regulation 17(4) is not unfettered, there being not only the obligation to consider all the circumstances but also the requirement set out in regulation 17(5) to undertake (in response to an application) "an extensive examination of the personal circumstances of the applicant and if he refuses the application shall give reasons justifying the refusal…..."; see also recital 6 of the Directive.

30. The initial difficulty that confronts the Tribunal in these appeals is that the respondent has not as yet exercised the regulation 17(4) discretion or carried out the regulation 17(5) examination. That is

because in the refusal letter the respondent did not accept they qualified as extended family members under regulation 8. The Immigration Judge followed suit.

31. In such circumstances it is clear that the hands of the Tribunal are tied. Whilst we can consider whether a discretionary power should have been exercised differently, we cannot seek to do that if there has as yet been no exercise of that power. It follows that the appeal can only be allowed to the extent that it remains outstanding before the Secretary of State.

32. Ms Targett-Parker sought to persuade us that it was implicit in the respondent's refusal letter that the regulation 17(4) discretion had been exercised but we think that plainly wrong. The refusal letter focused solely on eligibility under regulation 8(2).

33. Whilst it is not for us in the first instance to exercise that discretion or undertake the personal examination enjoined by regulations 17(4) and 17(5), we would observe that it seems to us that these provisions are the principal mechanism the 2006 EEA Regulations afford for taking into account the weight to be attached to the fact that applicants are in the UK lawfully or unlawfully. For the three appellants the evidence they have presented so far does not obviously establish that there is any reason apart from their lack of lawful status why they cannot support themselves. None have health problems. None is a minor or someone who is still a young person wishing to complete their education. They are in their early 40s. They came to the UK illegally (or in the case of the first appellant have remained unlawfully). They cannot have come with any legitimate expectation that they would be entitled to stay. In Article 8 ECHR terms it is not immediately obvious that, despite ongoing financial dependency on the sponsor, there is family life between them or, even if there is, that it is of any great strength. They have not been in the UK for any significant period, nor is there any evidence, as Ms Targett-Parker conceded, to show that the presence of the three appellants in the UK has been or is essential to their EEA sponsor's exercise of free movement rights. Indeed, even when the sponsor had gone back to Nigeria between 2004-2007 she continued to return to the Netherlands on many occasions. The presence of the appellants in her household in Nigeria did not prevent her doing that and it may be very difficult for them to show that their continued presence here would prevent her exercising Treaty rights in the UK. In such circumstances it may be that the respondent will consider that their lack of lawful presence constitutes a weighty factor counting against the issue of a residence card.

34. Our intention in the preceding paragraph is not to try and second-guess the respondent but rather to illustrate why it seems to us that the wording of Article 3.2(a) does not in itself prevent Member States from taking into account as a relevant consideration when deciding how to regulate the position of OFMs/extended family members the factor of lawful or unlawful presence. Ms Targett-Parker contended at the outset of the hearing that it does not matter how or why an OFM/ extended family member has come to the UK. It seems to us that in the context of the exercise of the discretion afforded by regulation 17(4) as to whether to issue a residence card, matters relating to how and when an OFM arrives in a host Member State are not irrelevant.

35. For the above reasons we conclude:

The First-tier Tribunal materially erred in law and its decision is set aside.

The decision we remake is to allow the appellants' appeals to the extent that they remains outstanding before the Secretary of State to decide whether to exercise the regulation 17(4) discretion in their favour.

Signed Date

Senior Immigration Judge Storey

(Judge of the Upper Tribunal)