Upper Tribunal
(Immigration and Asylum Chamber)

Moneke (EEA – OFMs) Nigeria [2011] UKUT 00341(IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 14 June 2011	**22 August 2011**

Before

MR JUSTICE BLAKE, PRESIDENT

SENIOR IMMIGRATION JUDGE STOREY

Between

TONIA OBY MONEKE

FIDELIS CHUKWUALOKA MONEKE

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellants: Mrs R Akthar instructed by Time Solicitors

For the Respondent: Mr S Walker Senior Home Office Presenting Officer

i. A person claiming to be an OFM under Article 3(2) of Directive 2004/38/EC may either be a dependant or a member of the household of the EEA national: they are alternative ways of qualifying as an OFM.

ii. In either case the dependency or membership of the household must be on a person who is an EEA national at the material time. For this reason it is essential that tribunal judges establish when the sponsor acquired EEA nationality.

iii. By contrast with Article 2(2) family members, an OFM must show qualification as such before arrival in the United Kingdom and the application to join the EEA national who is resident here.

iv. Membership of a household has the meaning set out in KG (Sri Lanka) [2008] EWCA Civ 13 and Bigia & Ors [2009] EWCA Civ 79; that is to say it imports living for some period of time under the roof of a household that can be said to be that of the EEA national for a time when he or she had such nationality. That necessarily requires that whilst in possession of such nationality the family member

has lived somewhere in the world in the same country as the EEA national, but not necessarily in an EEA state.

v. By contrast the dependency on an EEA national can be dependency as a result of the material remittances sent by the EEA national to the family member, without the pair of them having lived in the same country at that time before making those remittances.

vi. The country from which the OFM has come can be either the country from which he or she has come to the United Kingdom or his or her country of origin.

vii. Notwithstanding the preliminary reference to the Court of Justice made by the Upper Tribunal in MR & Ors (EEA extended family members) Bangladesh [2010] UKUT 449 (IAC) tribunal judges can proceed to determine OFM appeals in accordance with the guidance given by the Upper Tribunal in this and related cases, making sure to make findings of fact based on a rigorous examination of the evidence.

viii. Where relevant, findings need also to be made on whether it is appropriate to issue a residence card in accordance with the discretion afforded by regulation 17(4) of the Immigration (European Economic Area) Regulations 2006.

ix. In deciding whether a person falls within the material scope of regulation 8 of the 2006 Regulations, policy considerations relating to such matters as the appellant's immigration history, the impact of an adverse decision on the exercise by the EEA national of his or her Treaty rights, etc are irrelevant. Such policy considerations are relevant, however, to the exercise of regulation 17(4) discretion .

DETERMINATION AND REASONS

The facts

1.
This is an appeal from a decision of Immigration Judge Kopieczek given on 14 January 2011 dismissing the appeals of both appellants from a refusal of the Secretary of State to issue residence cards to them as dependent members of an EEA national. At the conclusion of the hearing we indicated that we found a material error of law, we would set aside the decision of the IJ and remake it for ourselves, but we concluded that a more detailed factual examination of dependency is required in order to finally determine the appeal. We here give our reasons for those conclusions.

2.
Anselem Egboh was born in Nigeria in November 1967 and has made a statement accepted by the IJ that he was brought up in his uncle's house in Nigeria along with the present appellants, his cousins. In 1997 Mr Egboh moved to Germany to reside and conduct business there. It appears he subsequently obtained German nationality. Neither his original statement nor his supplementary statement or evidence to the IJ explains when this was. In 2005 Mr Egboh came to the United Kingdom. It is unclear precisely when but it seems to have been shortly after 7 March 2005. Thereafter there is evidence that he was exercising a Treaty right as a worker in this country.

3.
The first appellant, Tonia Moneke, was born in August 1976 and is now aged 34; the second appellant, her brother Fidelis, was born in August 1978 and is now aged 32. Fidelis came to the United Kingdom as a visitor on 7 March 2005 which appears to have been shortly before Mr Egboh moved here from Germany. Tonia followed in 2006. They both gave short witness statements accepted by the IJ to the effect that for a period of time they lived in the house of Mr Egboh in London. The appellants,

supported by their sponsor Mr Egboh, applied for residence cards under regulation 8 of the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations"). The applications were refused by the Secretary of State on the simple grounds that she was not satisfied they were dependent upon the sponsor and therefore fell within the definition of other family member in EU law as transposed by the 2006 Regulations.

4.
Shortly before the appeals were heard the appellants filed witness statements. Fidelis's statement stated that the sponsor "has been extremely helpful; and has helped fund my education since my father died…the sponsor is looked up to in our family as he has provided me with a home in Nigeria and in the United Kingdom and he is also given me financial assistance in order to survive. My sponsor rented the house I lived in whilst in Nigeria. Since my arrival in the United Kingdom he welcomed me to live in his house…Anselem would often send money down with friends or other relatives in order to support us and he would ask for nothing in return…I have needed my sponsor all my life as family in Nigeria could not afford to care for me without Anselem's assistance". Tonia made a witness statement in similar terms.

5.
The sponsor Mr Egboh's statement was in these terms: "whilst in Nigeria I did financially assist both the appellants by providing them with enough money to sustain them through their education and allowed them to stay in the house which I had rented. I ensured that they had sufficient finances so they could look after themselves and get what they needed. I provided them money on several occasions throughout a number of years prior to their arrival in the United Kingdom. This was done through trusted people of mine and who went to Nigeria. I would give them money to give to the appellants so that they could spend it on what they needed. The property which Fidelis and Tonia lived in Nigeria is rented by me and I confirm that I have always supported them throughout their time in the United Kingdom."

The Immigration Judge's decision

6.
When the case was called on for hearing before the IJ there was no attendance by the Home Office Presenting Officer and no response had been made to those witness statements. The IJ heard oral evidence from the parties and in the absence of any challenge concluded that the appellants were dependent on this sponsor in Nigeria and continued to be financially dependent on him when they were in Nigeria and when he was in Germany. The dependency continues in the United Kingdom where the appellants are members of the sponsor's household. The IJ nevertheless concluded he was bound to dismiss the appeal following the decision of the Court of Appeal in Bigia & Ors [2009] EWCA Civ 79 paragraphs 21 and 38 to the effect that in addition to having to show dependency as a matter of fact the appellants had to show they were dependant upon the sponsor in the country that he was in before he came to the United Kingdom, in this particular case, Germany.

7.
He concluded that the decision of the Upper Tribunal in RK (OFM – membership of household – dependency) India [2010] UKUT 421 (IAC) was inconsistent with the Court of Appeal decision that was binding on him. It is of course trite law that the Upper Tribunal as well as the First-tier Tribunal is bound by any decision of the Court of Appeal or the Supreme Court directly in point subject to any subsequent clarification of the law by the higher courts or in the case of EU law by the Court of Justice. If he was bound to dismiss the appeal on this ground as a result of Bigia , then so would we.

For the reasons we give below we conclude that the determination of this appeal turns upon the meaning of an EU law Directive. We conclude that the IJ's interpretation of the Directive was erroneous and that neither the IJ nor we are bound by the decision in Bigia to reach a different conclusion. We recognise the IJ's concerns on a difficult point of law, and we have carefully reviewed previous decisions of the Upper Tribunal and the Court of Appeal as well as those of the Court of Justice in reaching the conclusions to which we have come.

8.
Subject to any further guidance given by the higher courts, the approach we set out in this decision is to be applied by immigration judges.

The relevant provisions of Directive 2004/38/EC

9.
Article 3(2) of Directive 2004/38/EC ("the Citizens Directive") provides:

"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 serious health grounds strictly require the personal care of the family member by the Union citizen."

10.
Other family members (OFMs) whose admission and residence there is a duty to facilitate under Article 3(2) are to be contrasted with family members as defined in Article 2(2). The latter may be summarised as the spouse, partner, direct descendants under 21 of the EU national or spouse/partner, or dependant direct relatives in the ascending or descending line of the EU national or spouse/partner. The Directive recognises a right of residence of a Union citizen who moves to or resides in a Member State other than that or which he is national, to the family members as defined who accompany or join such citizens.

11.
We note that the text of the Directive contrasts the position of family members and OFMs in, amongst other, the following ways:-

a)
Dependent family members may be dependants on either the union citizen or the spouse/partner of such a citizen, whereas OFMs must be members of the household of or dependants of the Union citizen alone.

b)
Family members qualify for a right of admission whenever they accompany or join the Union citizen in the host state, whereas the duty to facilitate the admission or residence of OFMs requires dependency or membership of the household "in the country from which they have come", that is to say prior to their arrival in the host state. However, being a dependant is an alternative rather than a cumulative requirement, it suffices if the OFM is a dependant in the country from which they have come rather than a dependent member of a household in that country.

12.
We recognise that there remains uncertainty as to who qualifies for admission as an OFM dependant and the extent to which admission turns on the terms of national regulations or the Citizens Directive. The Upper Tribunal has reviewed the sequence of Court of Appeal cases from KG (Sri Lanka) [2008] EWCA Civ 13 through to Pedro [2009] EWCA Civ 1358 in the case of MR & Ors (EEA extended family members) Bangladesh [2010] UKUT 449 (IAC). It concluded that although the Directive did not grant rights of residence to OFMs and the matter could not be answered with complete confidence, it seemed that national law (in the case of the United Kingdom this means the terms of the Immigration (European Economic Area) Regulations 2006) had to comply with the requirements of Article 3(2) of the Citizens Directive as respects the scope of the class to whom the duty to facilitate admission may extend. A reference has been made to the Court of Justice of the European Union for an opinion on a number of aspects of Article 3(2) including those raised in the present appeal. The Tribunal's review included:

a)
consideration of the predecessor legislation to Article 3(2) of the Directive, namely Regulation EEC No. 1612/68 Article 10(2) and the fact that the rights and duties set out in the Directive were intended to expand on the provisions set out in the Regulations;

b)
consideration of the decision of the Court of Justice in Case C-1/05 Jia [2007] QB 545, where the Court relied on the equivalent provisions to Article 10 of the Citizens Directive in the preceding legislation to interpret the scope of application of dependency;

c)
consideration of the fact that in KG (Sri Lanka) [2008] EWCA Civ 13 and Bigia [2009] EWCA Civ 79 the Court of Appeal was not apparently concerned with the distinctions between membership of a household and dependency, and factors relevant to dependants where not brought to its attention and considered in its reasoning;

d)
noting the decision of the Court of Appeal in SM (India) [2009] EWCA Civ 1426 with respect to dependent OFMs and the fact that whilst this decision followed the two preceding ones in concluding that dependency had to pre date the OFM's entry into the United Kingdom, it did not proceed on the basis that the earlier decisions imposed a minimum requirement that to be eligible under Article 3(2) an OFM has to demonstrate that he or she was dependent on the Union citizen at a time when the citizen and the OFM lived in the same country (whether in the EEA or elsewhere) prior to coming to the United Kingdom.

13.
Shortly after the decision in MR (Bangladesh) was promulgated the Upper Tribunal further considered the question of dependent OFMs in the case of RK (OFM – membership of household dependency) India [2010] UKUT 421 (IAC). In that case the appellant was the wife of a dependent son of an EEA national exercising Treaty rights in the United Kingdom. She lived in her husband's home formerly occupied by her in-laws before they came to the United Kingdom and was dependent on remittances from the United Kingdom. In neither case had she lived in India with her in-laws in the same household as her in laws or as a dependent spouse when her in-laws resided in India. We recognised that applying the approach laid down in KG (Sri Lanka) she could not be said to have been a member of her in-laws' household, as that implied sharing a common roof with them as such. The

Tribunal concluded, however, that she was potentially eligible as a dependant on the proper interpretation of the Directive, and that such a conclusion was not prevented by the analysis of the Court of Appeal in Bigia .

The respondent's submissions

14.
In the course of the hearing we sought clarification from Mr Walker as to what the respondent's case was on this point. He replied that the appeal was opposed on two grounds. First that there was not sufficient evidence of dependency within the meaning of EU law which was the original basis of the refusal. Second even if there had been the appellants could not meet the definition of OFM within the meaning of reg. 8 of the 2006 Regulations because they had not lived with Mr Egboh in a common country after he became an EEA national. As to the latter he submitted that his case turned upon the construction of Article 3(2)(a) of the Directive: "Any other family members irrespective of their nationality…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 were serious health grounds strictly require the personal care of the family member by the Union citizen" (emphasis added). He submitted that "they" referred to both the family members and the Union citizen implying that the country from which they had both come must be the same. We recognise that the decision of the Court of Appeal in KG (Sri Lanka) as varied in Bigia provides support for such a conclusion.

Discussion

15.
In considering Mr Walker's second submission we consider that it is instructive to examine first the text of the previous legislative arrangements. Regulation EEC No. 1612/68 Article 10(2) provided that:

"Member States shall facilitate the admission of any member of the family not coming within the provisions of paragraph 1 if dependent on the worker referred to above or living under his roof in the country whence he comes".

We observe that dependency is not qualified by the phrase "in the country whence he comes", whereas living under the roof of the worker is.

16.
This was certainly how the United Kingdom authorities understood the position when they transposed the duty under the EEC Regulation into domestic law. By regulation 10(1) of the Immigration (European Economic Area) Regulations 2000 ("the 2000 Regulations") a dependent or a member of a household of a qualified person was eligible for the exercise of discretion to grant a residence document if the conditions set out in regulation 10(4) were complied with. The material conditions were that the relative of the qualified person was:

a.
dependent on the EEA national or his spouse;

b.
living as part of the EEA national's household outside the United Kingdom; or

c.
living as part of the EEA national's household before the EEA national came to the United Kingdom.

17.

The point about these requirements is first that they stress that compliance with any limb suffices and second there is a distinction between dependency and membership of the household. Whereas present or past membership of the EEA national's household imports an implied geographical nexus - the household must be somewhere where the sponsor lives or lived when an EEA national - being a dependant carries no such geographical nexus. This reflected previous national practice in the United Kingdom from 1973 in admitting other family members who were financially dependent on the EU worker before arrival (see Macdonald "Immigration Law and Practice" 4 th edition 1995 para 8.58 citing ex parte Yennin [1995] Imm AR 93.)

18.
In April 2006 the 2006 Regulations came into force replacing the 2000 Regulations. By this time Directive 2004/38/EC had come into force although Article 10 of Regulation No. 1612/68 was only to be repealed from a date 2 years after the coming into force of the Directive and so it was still in force at this time. We consider the impact of the provisions of the Citizens Directive on this issue below at [23].

19.
Regulation 8(2)(a) of the 2006 Regulations for the first time sought to impose the same geographical restriction on dependants as on members of a household:

"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 members of a household".

20.
This restriction of both dependents and members of households to those who had resided in an EEA state and the imposition of a geographical nexus was both new and contrary to the plain words of Article 10(2) of Regulation 1612/68 noted above . Our understanding is that the more restrictive provision was based on the belief that a markedly narrower scope for non-national family members of qualified persons had been adopted by the Court of Justice in Case C-109/01 Secretary of State for the Home Department v Akrich [2004] QB 756. The view was taken that Akrich concluded that only those who had entered the EU lawfully prior to admission to the host state were eligible for admission as family members. That remained a controversial view until the decision in Akrich was re-visited and abandoned first in Case C-1/05 Jia and then in Case C-127/08 Metock . Both these cases were dealing with family members rather than OFMs/extended family members. In Jia the Court of Justice made plain that prior admission to the EU was not a requirement for a non-national dependent parent of the qualified person but that prior dependency was necessary under the predecessor Directive [1] . In Metock the Court of Justice made plain that lawful admission to the EU was not necessary for family members generally.

21.
On 2 June 2011 the 2006 Regulations were amended to substitute for regulation 8(2)(a) the following:

"the person is residing in a country other than the United Kingdom in which the EEA national also resides and is dependent upon the EEA national or a member of his household"

22.
The amendment gives belated effect to the point conceded by the Secretary of State in Bigia (above) that the scope of eligibility of OFMs/extended family families under Article 3(2) of the Citizens Directive must have been affected by the Metock decision on family members and that it is no longer

necessary to demonstrate prior lawful residence in the EU as a dependent or as a member of the household of a qualified person.

23.
However, the amendment does not return the domestic law to the position it was in before 2006 and the misunderstanding of Community law based on the Akrich decision. If some general principle of Community law did not require reading in to the Directive generally some geographical nexus for the pre-entry dependency, it is difficult to see where such a requirement comes from. We have noted that it was not imposed in Regulation EEC No.1612/68 that has now been replaced by the Citizens Directive. It would be surprising if this Directive imposed stricter requirements than Regulation EEC No. 1612/68 given that the purpose of the Directive was to consolidate and extend rather than restrict rights.

24.
Mr Walker submits that the wording of the revised regulation nevertheless properly reflects Article 3(2)(a) of the Citizens Directive:

“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”. (emphasis supplied)

He submits that “they” refers to the EU citizen and the non national OFMs/extended family members.

25.
Viewed entirely in isolation, such a construction is possible as a matter of language but for the reasons given in RK (India) and MR (Bangladesh), and the observations made below in our judgment that construction cannot be right.

26.
First, it would mean that the Citizens Directive has greatly restricted the possibility of admission of non–national family members who are dependants from the position they enjoyed under Article 10(2) of Regulation EEC No. 1612/68 as accurately reflected in the 2000 Regulations. This startling conclusion would be contrary to the consistent jurisprudence of the Court of Justice that the Directive consolidated and enhanced the rights of admission and residence of family members.

27.
Second, the submission affords no role in the construction of Article 3(2) to Article 10(2)(e) of the Citizens Directive concerning the procedures for issuing documents. Yet this Article (or its equivalent in earlier legislation) is a permissible aid to construction of the scope of Article 3 as the Court of Justice found in Jia cited for this purpose by the Court of Appeal in both SM (India) and Pedro .

28.
Article 10(2)(e) states in the case of OFMs the document Member States shall require to establish admission is:

“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”. (emphasis added)

In this Article “they” is plainly only referring to the family members and the country from which they have come may mean either their country of origin or the country from which they are arriving. First,

these plain words give no indication that the country must be a country which the OFMs have shared with the EEA national; secondly, they contain nothing to indicate that “they” in Article 3(2) is to be read as meaning something different from Article 10(2)(e).

29.
Taking these two points together and setting them alongside the jurisprudential developments since the decision of Akrich first suggested a more restrictive approach was permissible, we conclude that the language of the 2000 Regulations accurately reflects the continuing EU law requirement for admission and residence of dependent OFMs/extended family members and the geographical restrictions on dependants imposed in 2006 and maintained in 2011 is inconsistent with Article 3(2) of the Directive.

30.
Third, if dependants of an EEA national who have exercised Treaty rights are in fact dependants in the country from which they have come or their country of origin, we see no reason why they should not be eligible for consideration as extended family members or OFMs as they are described in EEA Regulations. Neither the text nor the purposes of the Directive seen in the light of its drafting history require such a restricted reading. We recognise that a purposive reading of the Directive will take account of the prevention of abuse, and the final words of Article 3(2) of the Directive recognise the scope for some state discretion:

“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”.

31.
However, in our judgment any general consideration of immigration policy that is relied on by a host state to deny residence to “these people” is a separate question from who “these people” are. If it is decided that a person comes within the material scope of regulation 8 as an OFM/extended family member, that is not conclusive of the question of their entry or residence. In the terms of the United Kingdom’s legislative scheme the issue of whether he or she is to be granted a residence card remains a matter of discretion under regulation 17(4). At this stage of the process concerns about abuse of rights, breach of the criminal law in entering the host state, and potential adverse affects on the exercise of Treaty rights by the qualified person may all come into play. But such considerations are not relevant to deciding whether a person is a dependent OFM/extended family member or a member of the household of an EEA sponsor.

32.
Fourth, we conclude that there are also important general considerations in favour of the former and wider construction. An EEA national may want to support the family members of a non national spouse irrespective of whether such a family member has lived in the same country as the EEA citizen in the past. In an age of trans-national marriages there will be increasing numbers of EEA families where the EEA national has not lived in the country where his spouse’s relatives live. Article 3(2) of the Citizens Directive restricts members of the household and dependants to those of the EEA national him or herself and does not include members of the non-national spouse’s family. We cannot accept in the absence of clear legislative words that enormous numbers of “foreign” OFM dependants are excluded from the scope of the Directive by the happenstance of international geography.

33.
We say “happenstance” because in relation to dependent OFMs there is no necessary inference as to their dependency happening in the same home or town as the EEA national. Nor can we see that there

is any difference in impact on the exercise of Treaty rights by the EEA national whether the dependant lives in a remote and distant part of the same country or in a different country altogether to the EEA national. An interpretation that cuts all these applicants out of consideration in limine would appear to be discriminatory on the grounds of national origin without any justification for such an approach. We are entitled to interpret EU legislation in the light of the fundamental principles of EU law and these include the principle of non discrimination reflected for example in Article 21 of the EU Charter on Fundamental Rights.

34.
Having for these reasons reached our own conclusions, subject to any further guidance from the Court of Justice on the meaning of Article 3(2) when applied to dependants, we must now consider whether we are bound to dismiss this appeal for the reasons given by the Immigration Judge, namely the authority of Bigia.

35.
We do not consider that we are bound by this decision because it did not consider and was presumably not referred to Article 10 of the Directive as an aid to the construction of Article 3(2). Further, as we understand the decisions in both KG (Sri Lanka) and Bigia :

i.
Their Lordships were not distinguishing between dependents and members of a household in reaching a policy based construction of the scope of EU law whereas the latter also has and does distinguish between them. We recognise that membership of a household means having shared a roof with the EEA national at some time somewhere in the world before the qualified person came to the United Kingdom. Being a dependent relative of such a person does not.

ii.
Policy considerations first led by the decision in Akrich and then the jurisprudence of the Court of Justice reversing Akrich may still result in negative decisions in some OFM cases because they can be accommodated within the regulation 17(4) discretion, as can the EU concept of abuse of rights. Considerations of policy do not have to rest on an artificial restriction of the term “dependants”.

iii.
The approach adopted in KG (Sri Lanka) and continued in part by Bigia has yielded in the subsequent case law of the Court of Appeal to the text based reading that we have sought to apply. In particular the decision of the Court of Appeal in SM (India) remitting a dependant case for further consideration is inconsistent with the proposition that the claim must fail in limine because the dependant never lived in the same country as the qualified person before admission to the United Kingdom.

36.
Further, we do not understand that UKBA practice in considering such cases is consistent with the exclusionary submission now made. There are two reasons for this observation. First, in MR (Bangladesh) there was no submission advanced to the Upper Tribunal that the claim must fail because we were bound by Bigia to conclude that a dependant who had not lived in another country in which the qualified person also lived could not be a dependent OFM within the meaning of the Directive or the Regulations. There was no such residence in Ireland or elsewhere with the Irish national in-law in that case.

37.

Second, the current European Casework Instructions (ECIs) published on the UKBA website and last updated in May 2011 supports the broader interpretation we have identified. Section 2.4 under the heading of extended family members says as follows:

“Regulation 8 of the 2006 Regulations covers extended family members (for example, brothers, sisters, aunts and cousins). It also covers direct family members (such as parents or children over the age 21) who have failed to provide evidence for financial dependencies. An applicant may be considered under Regulation 8 of the 2006 Regulations if s/he falls within any of the following conditions (the ECIs proceed to use bullet pointing but for ease of reference we shall number them (e) – (i)):

d.
Was living as part of the EEA national’s household in a EEA state before the EEA national came to the UK [1]. Note: there is no dependency test for persons who can show that they have lived under the same roof as the EEA national before coming to the UK. or

e.
Was living as part of the EEA national’s household in the UK or

f.
Has joined the EEA national in the UK and continues to be dependant upon the EEA national or his/her spouse or

g.
Strictly requires personal care from the EEA national on serious health grounds or

h.
Can prove s/he is in a durable relationship with the EEA national.”

Although the reference to “living…in an EEA state” with respect to members of the household must presumably yield to the terms of the 2011 amendment to the 2006 Regulations, we do not understand that limb (g) imposes any requirement of residence in another country other than the United Kingdom where the sponsor resided before the dependant came to the United Kingdom.

38.
Finally, there is a more pragmatic reason why we consider that First-tier Tribunal judges should follow the approach set out in this ruling pending further decisions from the Court of Justice or the higher courts. We are aware that there are a great many OFM appeals pending at First-tier and Upper Tribunal level and that it will take some months before a decision is given by the CJEU. In the meantime immigration judges of the First Tier Tribunal need to know what they should be doing when determining such claims and, if cases have to be held in suspension pending clarification, at what stage this should be. On the approach we enjoin it is possible for immigration judges to proceed with the fact-finding that OFM cases require. But it is of particular importance that such fact-finding is rigorous. It should particularly cover the factual question of dependency as well as those considerations that are relevant to the exercise of the regulation 17(4) discretion as to whether to issue a residence card. Such detailed factual findings will not be made if judges of the First-tier Tribunal dismiss dependency on the sole basis that there was no evidence of residence in the same country before coming to the United Kingdom.

39.

If such an approach is adopted, cases can proceed to the Upper Tribunal if they remain disputed on a point of EU law principle. If our view of the scope of the Directive proves to be accurate, then outstanding cases can be speedily determined or appeals withdrawn because the necessary facts have been found. There will be no need to send cases back to the First-tier for primary fact finding. If our view does not turn out to be accurate, then the disputed cases can also be speedily resolved applying the correct construction of EU law subject to any Article 8 ECHR considerations that may arise on the particular facts found.

Conclusions: place of dependency

40.
We therefore conclude that for the time being, subject to future clarification by the higher courts, IJs should adopt the following approach:

i.
A person claiming to be an OFM may either be a dependant or a member of the household of the EEA national: they are alternative ways of qualifying as an OFM.

ii.
In either case the dependency or membership of the household must be on a person who is an EEA national at the material time. Thus dependency or membership of a household that preceded the sponsor becoming an EEA national would not be sufficient. It is necessary for the pre entry dependency to be on the EEA national and not a person who subsequently became an EEA national. Thus if a sponsor has been financially supporting OFMs who live abroad for many years before he became an EEA national, but there was no such support after the sponsor acquired EEA nationality, there would be no evidence of dependency on an EEA national.

iii.
By contrast with Article 2(2) family members, an OFM must show qualification as such not just since arrival in the United Kingdom but before arrival here and the application to join the EEA national who is resident here. The applicant must have been a dependent in the country from which they have come, that is to say their country of origin or other country from which they have arrived in the United Kingdom.

iv.
Membership of a household has the meaning set out in KG (Sri Lanka) and Bigia (above); that is to say it imports living for some period of time under the roof of a household that can be said to be that of the EEA national for a time when he or she had such nationality. That necessarily requires that whilst in possession of such nationality the family member has lived somewhere in the world in the same country as the EEA national, but not necessarily in an EEA state.

v.
By contrast the dependency on an EEA national can be dependency as a result of the material remittances sent by the EEA national to the family member, without the pair of them having lived in the same country at that time.

Conclusions: evidence of dependency

41.
Nevertheless dependency is not the same as mere receipt of some financial assistance from the sponsor. As the Court of Appeal made plain in SM (India) (above) dependency means dependency in

the sense used by the Court of Justice in the case of Lebon [1987] ECR 2811. For present purposes we accept that the definition of dependency is accurately captured by the current UKBA ECIs which read as follows at ch.5.12:

“In determining if a family member or extended family member is dependent (i.e. financially dependent) on the relevant EEA national for the purposes of the EEA Regulations:

Financial dependency should be interpreted as meaning that the person needs financial support from the EEA national or his/ her spouse/civil partner in order to meet his/her **essential needs** – not in order to have a certain level of income.

Provided a person would not be able to meet his/her essential living needs without the financial support of the EEA national, s/he should be considered dependent on that national. In those circumstances, it does not matter that the applicant may in addition receive financial support / income from other sources.

There is no need to determine the reasons for recourse to the financial support provided by the EEA national or to consider whether the applicant is able to support him/herself by taking up paid employment.

The person does not need to be living or have lived in an EEA state which the EEA national sponsor also lives or has lived.”

42.
We of course accept (and as the ECIs reflect) that dependency does not have to be “necessary” in the sense of the Immigration Rules, that is to say an able bodied person who chooses to rely for his essential needs on material support of the sponsor may be entitled to do so even if he could meet those needs from his or her economic activity: see SM (India). Nevertheless where, as in these cases, able bodied people of mature years claim to have always been dependent upon remittances from a sponsor, that may invite particular close scrutiny as to why this should be the case. We note further that Article 10(2)(e) of the Citizens Directive contemplates documentary evidence. Whether dependency can ever be proved by oral testimony alone is not something that we have to decide in this case, but Article 10(2)(e) does suggest that the responsibility is on the applicant to satisfy Secretary of State by cogent evidence that is in part documented and can be tested as to whether the level of material support, its duration and its impact upon the applicant combined together meet the material definition of dependency.

43.
Where there is a dispute as to dependency (as there was in the present case) immigration judges should therefore carefully evaluate all the material to see whether the applicant has satisfied them of these matters.

Conclusions: outcome

44.
Applying these guidance points to the present decision, we find that there were two material errors of law made by the First-tier Tribunal. First, he wrongly concluded that absence of prior residence in the same country from which the EEA national had come precluded the applicants from being the dependants of their sponsor. Second, he found as a fact that the appellants had been dependent upon the sponsor prior to their admission to the United Kingdom when the material before him did not

enable him to reach such a conclusion. We have examined the oral evidence as recorded by the judge and the written evidence with some care. We observe that following information is missing:

(i)
It is unknown when the sponsor became a German citizen – a crucial start point for establishing that there had been remittances during the relevant period.

(ii)
It is unknown when the appellants' father died and when therefore there was a material need for them to be relying upon remittances from the sponsor.

(iii)
It is unknown what the appellants were doing before their father died or thereafter whether they had financial means available to them from their own labours and why they were not, as able bodied adults, engaged in productive activity prior to 2005 and 2006. It would be somewhat remarkable if they had been doing nothing with their lives by the age of 30.

(iv)
We do not know what the level of remittances made by the sponsor was or the income in Germany that he earned in order to be able to make them. The evidence does not seem to go beyond the fact some remittances were made through friends from time to time.

(v)
Accordingly the IJ on the material before him could not calculate whether the material support provided by the sponsor met the essential living needs of the appellant family member in the place where they were living at the material time or rather simply supplemented their income in some undefined aspect. Nor can we calculate this.

45.
We appreciate the second error of law was not contemplated in the grant of permission and the appellants have therefore not prepared submissions or material directed to it. However, it represented the respondent's original reasons for refusing the application in the first place and in our judgement it was incumbent on the First-tier Tribunal to have examined the state of the evidence more carefully, albeit that the IJ did not have the assistance of a presenting officer or any response to the evidence filed by appellants.

46.
In the circumstances, we set aside the decision of the First-tier Tribunal and propose to remake it in the light of the guidance given in this decision. For the determination of the appeal there will have to be a further hearing in which the appellants may seek to identify all the evidence they rely upon to prove they are OFM dependants within the terms we have analysed above. It may be if fresh evidence is introduced that the Home Office will now wish to test it in a way that was not done at the hearing before the First-tier Tribunal.

47.
We will issue case management directions to give effect to the resumed hearing in due course. When we have finally determined the appeal either party may well want to apply for permission to appeal to the Court of Appeal in respect of the terms of this determination.

Signed

Mr Justice Blake

President of the Upper Tribunal,

Immigration and Asylum Chamber

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[1] We are aware that the Court of Appeal in Pedro reached a different conclusion with respect to dependent family members under the Citizens Directive, but did so because of the material change between Article 10 of the Directive and the equivalent provisions considered in Jia .