



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Numbers: EA/07219/2018  
HU/16070/2017

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 23 September 2019**

**Decision & Reasons Promulgated  
On 25 September 2019**

**Before**

**UPPER TRIBUNAL JUDGE KEBEDE**

**Between**

**AKHTAR AYUB**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr N Ahmed, instructed by Tennyson Monroe Solicitors  
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant is a citizen of Pakistan born on 24 March 1982. He appeals, with permission, against the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision of 2 October 2016 to refuse to issue him with a residence card under the Immigration (European Economic Area) Regulations 2006 as the extended family member of an EEA national and dismissing his appeal against the respondent's decision of 14 November 2017 to refuse his human rights claim.

2. The appellant entered the UK on 4 July 2007 with leave to enter as a student until 31 August 2010 and was granted further periods of leave to remain as a Tier 4 student migrant, a Tier 1 post study migrant and then again as a Tier 4 student migrant, until 28 August 2015. On 28 August 2015 he applied for leave to remain outside the immigration rules and on 30 October 2015 he applied for an EEA residence card. The application made outside the immigration rules was refused on 1 December 2015 with no right of appeal, and the appellant was subsequently refused an EEA residence card on 3 April 2016. He applied again for a residence card on 9 April 2016 but was again refused, on 2 October 2016. An appeal against that decision was struck out, on 19 September 2017, on the basis of Sala (EFMs: Right of Appeal: Albania) [2016] UKUT 411, but a later appeal was accepted out of time following the judgment in Khan v Secretary of State for the Home Department & Anor [2017] EWCA Civ 1755 overturning Sala. That is the first appeal before this Tribunal.
3. The appellant made an application on 5 July 2017 for indefinite leave to remain on the basis of 10 years' continuous lawful residence. That application was refused on 14 November 2017 and the appellant's appeal against that decision is the second appeal before this Tribunal.
4. In the decision of 2 October 2016 refusing the appellant an EEA residence card as the extended family member of his uncle, Arshid Muhammad, an Italian national, the respondent accepted that the appellant was related to the EEA national sponsor but considered that he had provided insufficient evidence to show that he was dependent upon him or residing with him prior to coming to the UK or that he remained dependent upon him in the UK. The respondent therefore considered that he could not meet the requirements of Regulation 8(2).
5. In the decision of 14 November 2017 the respondent considered that the appellant's lawful residence in the UK ceased on 1 December 2015, that his application for an EEA residence card did not extend his leave under section 3C of the Immigration Act 1971, that he had therefore been without leave to remain from 2 December 2015 and that he had not demonstrated 10 years' lawful residence. The respondent considered that the appellant could not, therefore meet the requirements in paragraph 276B(i) and (v) of the immigration rules and also considered that he could not meet the criteria in paragraph 276ADE(1) or demonstrate exceptional circumstances outside the immigration rules.
6. The appellant's two appeals were heard by First-tier Tribunal Judge Malone on 6 June 2019. The evidence before the judge at the hearing was that, whilst the appellant had entered the UK in 2007, his EEA national sponsor had entered the UK in 2014 and had only acquired his Italian nationality in September 2014. The appellant claimed to have been dependent upon his uncle when he was in Pakistan prior to coming to the UK in 2007 and after coming to the UK, and that he became a member of his uncle's household after his uncle arrived in the UK. Judge Malone considered that the fact that the sponsor had only acquired his Italian citizenship in September 2014 was fatal to the appellant's application for a

residence card as an extended family member and he dismissed the first appeal under the EEA Regulations. As for the long residence and human rights claim, the judge concluded that the appellant could not demonstrate 10 years' lawful residence in the UK as his leave had ended at the latest in mid-January 2016. The judge considered that there were no very significant obstacles to the appellant's integration in Pakistan for the purposes of paragraph 276ADE(1)(vi) and no compelling circumstances justifying a grant of leave outside the rules. He concluded that the respondent's decision was proportionate and that it would not breach the appellant's article 8 human rights and he dismissed the second appeal as well.

7. The appellant sought permission to appeal that decision to the Upper Tribunal on the basis that the judge had misdirected himself in law and had wrongly interpreted Regulation 8(2), as the fact that his sponsor had acquired his Italian citizenship prior to his own arrival in the UK was not fatal to his ability to meet the requirements of the EEA Regulations; that the judge had failed to determine the substantive issues under Regulation 8(2); and that the judge had failed to take into consideration, in his proportionality assessment, the fact that he would be eligible for an EEA family permit and that the principles in Chikwamba v Secretary of State for the Home Department [2008] UKHL 40 were therefore applicable.
8. Permission was granted in the First-tier Tribunal on 6 August 2019.
9. At the hearing before me, I referred Mr Ahmed to the case of Moneke and others (EEA - OFMs) Nigeria [2011] UKUT 341 which directly addressed the first ground of appeal. He was not aware of that case and accordingly I gave him an opportunity to consider it. Mr Clarke also produced the case of Aladeselu & Ors v Secretary of State for the Home Department [2013] EWCA Civ 144 upon which he relied in submitting that rights flowed from EEA nationals and not from someone without any rights under the Treaties, and that the appellant could not establish dependency for the purposes of the Regulations upon a person who was not an EEA national.
10. Mr Ahmed accepted that the decision in Moneke put him in a difficult position in arguing the appellant's case, but he invited the Tribunal to find that the judge's interpretation of dependency was incompatible with Article 3(2) of Directive 2004/38/EC. He submitted that the appellant met the past dependency requirement given that he was able to show a connection to the sponsor who subsequently became an EEA national. As for the Article 8 claim, the judge failed to give weight to his findings on dependency and to the principles in Chikwamba in assessing proportionality.
11. I advised the parties that, in my view, Judge Malone had made no errors of law in his decision and that I was upholding his decision.

12. Mr Ahmed asked that I consider a request that a reference be made to the ECJ on the relevant point.

### Discussion

13. The appellant's grounds challenge the judge's decision under the EEA Regulations on the basis, set out at paragraph 2(b)(ii) of the grounds, that he did not provide any authority of a higher Tribunal or Court to support his findings. However the judge's findings are entirely consistent with the decision of the President of the Upper Tribunal in *Moneke*, whereby the headnote states that:

*"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"*

and the President concluded at [40] that judges 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.*

14. Mr Ahmed invited the Tribunal to find that, despite the findings in *Moneke*, the judge's decision was incompatible with Article 3(2) of the Directive. Article 3(2) is set out at [9] of *Moneke* and was the subject of detailed analysis by the Presidential panel in that case, in light of other relevant UK and European caselaw. Not only does Mr Ahmed provide no proper basis for me to go behind the findings of a Presidential panel of the Upper Tribunal, but I can see no basis for his interpretation of Regulation 8(2) and Article 3(2). It seems to me that Article 3(2) entirely precludes the appellant's interpretation of Regulation 8(2), as set out in the grounds of appeal, and I see no grounds for there to be a referral to the ECJ as Mr Ahmed rather belatedly requested. Judge Malone was fully and properly entitled to conclude that the fact that the appellant's EEA national sponsor only acquired his Italian citizenship in September 2014 was fatal to the appellant's ability to demonstrate that he was an extended family member for the purposes of Regulation 8(2). The appellant simply could not demonstrate dependency upon, or

membership of the same household, of an EEA national, prior to coming to the UK and, in the circumstances, there was no need for the judge to go on to make any substantive findings on dependency and membership of the same household as asserted in the second ground. Accordingly the judge's decision, that the appellant had failed to demonstrate that he was the extended family member of an EEA national and was thus not entitled to a residence card, was fully and properly open to him on the evidence available. There are no errors of law in his decision in that regard.

15. As for the third ground, that is predicated upon the appellant being successful in demonstrating that he was an extended family member of the EEA sponsor. I do not see any merit in Mr Ahmed's argument that the assessment of proportionality ought to have taken into account the appellant's entitlement to apply for an EEA family permit under the Regulations. The appellant has not demonstrated any such entitlement and such a matter could not possibly have led the judge to conclude proportionality differently. The judge took full account of the appellant's relationship with his uncle and his other family members in the UK and Pakistan and all other relevant circumstances in assessing the appellant's Article 8 claim. He provided cogent reasons for concluding that there were no very significant obstacles to integration into Pakistan and, likewise, properly concluded that there were no compelling or other circumstances justifying a grant of leave outside the immigration rules. The judge was perfectly entitled to conclude that the respondent's decision was proportionate and did not breach the appellant's Article 8 rights. His decision was fully and properly reasoned. There was no error of law in the judge's decision on the appellant's human rights claim.

## DECISION

16. The making of the decision of the First-tier Tribunal did not involve an error on a point of law. I do not set aside the decision. The decision to dismiss both appeals stands.

Signed:



Upper Tribunal Judge Kebede

Dated: 23 September 2019