



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

Appeal Number: UI-2022-003828
[EA/12879/2021]

THE IMMIGRATION ACTS

**Heard at Field House, London
On Monday 12 December 2022**

**Decision & Reasons Promulgated
On Friday 17 February 2023**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

VALERY NTAMACK MAM'MABOL

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Ms H Short, Counsel instructed on a direct access basis

For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

BACKGROUND

1. The Appellant appeals against the decision of First-tier Tribunal Judge C H Bennett promulgated on 6 June 2022 (“the Decision”). By the Decision, the Judge dismissed the Appellant’s appeal against the Respondent’s decision dated 15 April 2021 refusing his application for a family permit under the Immigration (European Economic Area) Regulations 2016 (“the EEA Regulations”).

2. The Appellant is a national of Cameroon. He seeks to join his cousin, Mrs Michelle Montjen (referred to by the Judge as [AM]) who is an EEA (French) national. The Respondent did not dispute although did not concede that the Appellant was related to [AM] as claimed and that [AM] was a French national. She refused the application primarily on the basis that the Appellant was not dependent on [AM] as he claimed. Nor did she accept that [AM] was able to support the Appellant on his arrival in the UK.
3. Judge Bennett determined at [11] of the Decision that the Appellant had to show not only that he was dependent on [AM] in Cameroon but also that he would continue to be dependent on her following his arrival in the UK. As I will come to, before me, Ms Short sought to withdraw a concession which was made in the grounds that this was the correct approach. She also sought to amend her grounds to argue that the Judge had erred in this regard and had misunderstood the effect of the Tribunal's guidance in Moneke (EEA - OFMs) Nigeria [2011] UKUT 00341 (IAC) ("Moneke").
4. Having reached findings that the Appellant is related as claimed to [AM] who is an EEA national (with settled status under the EU Settlement Scheme) ([18] and [19] of the Decision) and that he was dependent upon [AM] for his essential living needs ([24]), Judge Bennett went on to consider what he thought was the further relevant issue, namely what would be the position following the Appellant's arrival in the UK. He found at [25] of the Decision that the Appellant would immediately on arrival in the UK live with [AM] and her family and remain dependent upon her. However, he found that the Appellant would not wish to remain dependent upon [AM] and would therefore find work as soon as he was able ([26]). He would therefore cease to be dependent upon [AM] after a "comparatively short space of time" after his arrival ([27]). For that reason, Judge Bennett concluded that the Appellant could not satisfy the requirements of regulation 8 of the EEA Regulations (specifically regulation 8(2)) ("Regulation 8").
5. The Appellant appealed the Decision. He challenged paragraphs [26] and [27] of the Decision in particular. He did so first on the basis that whilst the Appellant might have an aspiration to work in the UK following arrival, there was no concrete evidence that he would find such work. There was evidence that he had been unable to find work in Cameroon and no evidence of any job search in the UK. It was also said that the Judge erred in finding that dependency must be not only continuous but permanent. The grounds assert that the finding that dependency would continue after the Appellant's arrival was sufficient for the Appellant to meet Regulation 8 of the EEA Regulations and the Appellant's appeal should therefore have been allowed.
6. Permission to appeal was granted by First-tier Tribunal Judge I D Boyes on 10 August 2022 in the following terms so far as relevant:

“... 3. The grounds are clearly arguable. The point taken is an interesting one and one which requires determination from the UT. At one [sic] point does aspiration trump dependency?...”

7. The matter came before me to determine whether there is an error of law in the Decision. If I find there is, I then have to decide whether to set it aside. If I set aside the Decision, I must then either go on to re-make the decision or remit the appeal to the First-tier Tribunal for reconsideration.
8. Having heard submissions from Ms Short, in particular in relation to the amendment of the Appellant’s grounds and the concession concerning the guidance in Moneke which Ms Short sought to withdraw, Mr Whitwell indicated that he agreed that the Judge had erred by requiring continuing dependency and certainly permanent dependency following the Appellant’s arrival in the UK. As he pointed out, the requirements of Regulation 8 so far as concern the position in the UK are predicated on an applicant who is already in the UK. This is an entry clearance case and therefore the requirement for continued dependency under Regulation 8(2)(ii) does not apply.
9. Having accepted Mr Whitwell’s submission in that regard and that the Decision should therefore be set aside at least in relation to the Judge’s findings as to continued dependency, I enquired of Mr Whitwell whether the remaining findings as to relationship and dependency in Cameroon were challenged. He accepted that those had not been challenged by the Respondent and he did not seek to do so. He did not dissent from my view that based on those findings, the Appellant’s appeal fell to be allowed. I indicated that I would set out my reasons briefly in writing which I now turn to do.

DISCUSSION AND CONCLUSION

10. The EEA Regulations have now been revoked. However, they are preserved in certain regards for applications made prior to the date of the UK’s withdrawal from the EU and for appeals against decisions made in relation to such applications. Those transitional provisions apply to the Appellant’s case.
11. Regulation 8 prior to revocation read as follows:
 - 8.- (1) In these Regulations “extended family member” means a person who is not a family member of an EEA national under regulation 7(1) (a), (b) or (c) and who satisfies a condition in paragraph ... (2),
 - (2) The condition in this paragraph is that the person is—
 - (a) a relative of an EEA national; and
 - (b) residing in a country other than the United Kingdom and is dependent upon the EEA national or is a member of the EEA national’s household; and either—

(i) is accompanying the EEA national to the United Kingdom or wants to join the EEA national in the United Kingdom; or

(ii) has joined the EEA national in the United Kingdom and continues to be dependent upon the EEA national, or to be a member of the EEA national's household."

12. The guidance in Moneke reads as follows so far as relevant:

"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) ...

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...."

13. As is evident from the foregoing, the guidance for which Moneke is reported has nothing to say about the need for continuing dependency after arrival in the UK. Instead, Judge Bennett referred to paragraph [40(iii)] of the decision which to some extent reflects (iii) of the guidance but reads in full as follows:

"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."

14. Judge Bennett accepted at [11] of the Decision, that "read literally" the sub-paragraphs of Regulation 8(2) are in the alternative "with (i) applying to those who are *outside* the United Kingdom and (ii) applying to those *who have arrived* (and '*joined the EEA national*'). However, he went on

to say that this would “produce an anomalous outcome and cannot be correct”.

15. Judge Bennett appeared to think that the literal construction was at odds with the guidance in Moneke. It is not. Leaving aside that Moneke is a case concerned with extended family members who had already come to the UK to join the EEA national sponsor, the final sentence of paragraph [40(iii)] is in accordance with what Judge Bennett described as the literal reading of Regulation 8(2).
16. Judge Bennett also set out thereafter why he thought that a literal reading of Regulation 8(2) would produce an anomalous result. Whilst to many his analysis may well suggest such an anomaly, in the sense that a person previously outside the UK and dependent on an EEA national could come to the UK following a successful application or appeal and then begin remunerative employment here so as to cease dependency immediately, that has never been objectionable from the point of view of EU law.
17. As is made clear by this Tribunal in Reyes (EEA Regs; dependency) [2013] UKUT 314 (IAC) (in particular in the analysis at [32] to [34] of the decision) the issue under Regulation 8 is whether an applicant “is dependent” (present tense). The applicant must show that he or she is dependent at the date of application and remains so at date of decision. If the decision is adverse and is appealed, the relevant date is the date of hearing. Similarly, in the case of Jia v Migrationsverket [2007] EUECJ C-105, the CJEU described the test as follows (at [43]):

“... Article 1(1)(d) of Directive 73/148 is to be interpreted to the effect that 'dependent on them' means that members of the family of a Community national established in another Member State within the meaning of Article 43 EC need the material support of that Community national or his or her spouse in order to meet their essential needs in the State of origin of those family members or the State from which they have come at the time when they apply to join the Community national. Article 6(b) of that directive must be interpreted as meaning that proof of the need for material support may be adduced by any appropriate means, while a mere undertaking from the Community national or his or her spouse to support the family members concerned need not be regarded as establishing the existence of the family members' situation of real dependence.”

[my emphasis]
18. In this case, Judge Bennett found the Appellant to be dependent at the date of hearing. That was sufficient for him to meet Regulation 8(2)(i). The Judge was not required to speculate as to what would be the position following the Appellant’s arrival in the UK.
19. As I noted at [3] above, Ms Short sought to withdraw a concession made in the grounds of appeal and to amend the Appellant’s grounds. At [9] of

the original grounds, it was said that the Appellant “accepts that dependency needs to continue after entry to the United Kingdom”. Ms Short who was the author of those grounds accepts that she was mistaken in her view that this is what Regulation 8(2) required in a case such as the Appellant’s. Insofar as that is a concession rather than a misinterpretation of the law and insofar as the Appellant requires my permission to allow him to withdraw that concession, I permit him to do so. Counsel was clearly wrong in her analysis as she now accepts.

20. The amendment to the grounds which Ms Short sought was to submit that Judge Bennett was wrong to require dependency to continue at all following the Appellant’s arrival in the UK, let alone for that to be a permanent feature. Mr Whitwell did not object to that amendment and, as I have already indicated, accepted that Judge Bennett had erred in this regard. For the reasons set out above, I agree that the grounds as amended disclose an error of law. I therefore set aside that part of the Decision which relies on the need for continuity and permanence of dependency following the Appellant’s arrival in the UK whilst preserving the unchallenged findings as to the relationship between the Appellant and [AM] and his dependency on her. I therefore preserve what is said at [18] to [24] of the Decision.
21. As I have also already indicated, given the findings made by Judge Bennett at [18] to [24] of the Decision which I have preserved, I am able to re-make the decision immediately and without further evidence. Mr Whitwell did not suggest to me that further evidence or a further hearing was required. Based on those findings, I allow the Appellant’s appeal. The Appellant satisfies Regulation 8(2). It was not suggested to me by Mr Whitwell that there were any reasons not to exercise discretion in the Appellant’s favour having made that finding. The Respondent’s decision therefore breaches the EEA Regulations as continued by the transitional provisions.

DECISION

I am satisfied that the decision of First-tier Tribunal Judge Bennett involves the making of a material error on a point of law. I set aside that decision but preserve the findings at [18] to [24] of the decision. Based on those findings, I re-make the decision. I allow the appeal on the basis that the Appellant satisfies Regulation 8 of the EEA Regulations. I allow the appeal under the EEA Regulations as continued by the transitional provisions.

Signed
2022

L K Smith

Dated: 15 December

Upper Tribunal Judge Smith