Upper Tribunal
(Immigration and Asylum Chamber)

MR and ors (EEA extended family members) Bangladesh [2010] UKUT 449 (IAC)

THE IMMIGRATION ACTS

Heard at Laganside Court Centre, Belfast
on 28 October 2010

Before

Mr Justice Blake, President
Mr CMG Ockelton, Vice President
Senior Immigration Judge Deans

Between
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR
FI
MR

Respondents

and

THE AIRE CENTRE

Interested Party

Representation:

For the Appellant: Ms M O'Brien, Senior Home Office Presenting Officer
For the Respondent: *Mr McTaggart BL*, instructed by Paul K Nolan and Co
For the Interested Party: Ms N Mole, The AIRE Centre

This decision refers to the Court of Justice of the European Union the questions set out at the end of it.

ORDER FOR REFERENCE
TO THE COURT OF JUSTICE OF THE EUROPEAN UNION

Introduction

1. The Tribunal has to decide the Secretary of State's appeal against a decision of IJ Fox ("the IJ") given on 6 April 2009 allowing the appeal of each appellant before him to the extent of remitting their cases for a decision on the merits of their claims to remain as dependent family members of an EEA National. We heard it with the linked case of Jahanara Begum where a separate determination has been made.

2. Jahanara Begum is the widowed mother of Mahbur Rahman who is married to Roisin Patricia Rahman who is an Irish national working in Northern Ireland. The marriage took place on 31 May 2006. Shortly thereafter she and the respondents applied for EEA family permits to come to the United Kingdom as dependants of Mahbur and Rosin Rahman. There was a dispute as to their eligibility that was resolved in their favour on appeal. She was admitted to the United Kingdom with entry clearance as a dependant mother. There was then an application made for a residence permit and that was also refused. The case came before the IJ who concluded that although the evidence was sparse she continued to be dependent since her arrival in the UK. She, however, was a dependent family member in the ascending line.

3. The cases of the respondents raise different issues. Muhammed Rahman is the brother of Mahbur Rahman; Fazly Islam is half brother and Mohibullah Rahman the nephew of Mahbur Rahman. They accordingly have a horizontal rather than a vertical family connection with Mr and Mrs Rahman. They do not fall within the definition of family members under reg. 7 but fall to be treated as extended family members under reg. 8 of the Immigration (European Economic Area) Regulations 2006 SI 2006/1003 ("the Regulations"). At best they claim consideration of the discretionary issue of a residence card under reg. 17 (4) if "in all the circumstances it appears to the Secretary of State appropriate".

4. They had also been issued with entry clearance to join Mr and Mrs Rahman as dependents of an EEA family member. Their applications for a residence card were refused on the basis that they did not qualify as extended family members and they appealed to the IJ. He concluded that they were in fact dependent and therefore directed their cases be considered for the exercise of discretion under reg. 17(4). The Secretary of State sought reconsideration by the AIT on the basis that the evidence of dependency was unsatisfactory and none of these appellants qualified as extended family members.

5. Reconsideration was ordered in 2009 and the case now comes before us as an appeal to the Upper Tribunal. A precise record of what happened on the previous occasion has been lost, but for the avoidance of doubt if the IJ's decision has not already been set aside, we set it aside now and will remake the decision for the reasons given below.

6. Although as the IJ noted, the evidence of continued dependency was thin, there was some evidence that each of the respondents resided in the household of Mr and Mrs Rahman who were in remunerative employment and stated they continued to support their dependants. It is now accepted that the IJ was entitled to conclude that the mother Jahanara Begum was a dependant. We would conclude it was open to the IJ to reach the factual findings he did in respect in the cases under consideration in this judgment. Although the issue below was concerned with the essentially factual question of dependency, we pointed out to the parties at the hearing that there were deeper problems about the cases of these appellants that needed examination.

The issue

7. Mr McTaggart in seeking to resist this appeal on behalf of these respondents submitted that each satisfied the terms of reg. 8(2)(a) and (c) of the Regulations and therefore qualified as an extended family member because:

   (i) Each is residing in an EEA State in which the EEA national also resides and is dependent upon the EEA national and
   (ii) Each continues to be dependent on him.

   The difficulty with that submission is that "EEA State" in reg. 2, means a Member State *other* than the United Kingdom. It is common ground that none of the applicants has been a dependent or a member of the household of his EEA spouse in an EEA state other than the United Kingdom. If their cases are to be determined by the plain words of reg. 8 they do not qualify for the exercise of discretion.

8. If these respondents are to succeed, therefore, it would have to be on the basis that reg. 8 needs to be read down in order to be compatible with the relevant provisions of Directive 2004/83/EC or that the Directive gives directly enforceable rights irrespective of national Regulations transposing them.

9. Article 3(1) of the Directive reads as follows:-

> "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. "

10. Article 3(2) provides:

> "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 serious health grounds strictly require the personal care of the family member 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 shall justify any denial of entry or residence to these people."

11. The respondents are not family members within Article 2(2). None of them have any freestanding right of their own to free movement and residence, so if Article 3(2) assists in the present case it must be because there is a duty on the United Kingdom to 'facilitate entry and residence' 'in accordance with its national legislation'.

12. If there is such a duty, it is directed at other family members (hereafter "OFMs") 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. We are not concerned in the present cases with admission on health grounds or with unmarried partners in a durable relationship.

13. The Union citizen in this case is Roisin Rahman. The country from which the OFMs have come is Bangladesh. There is no evidence or reason to believe that the Union citizen has ever established a household in Bangladesh. The duty under Article 3(2) to facilitate admission in accordance with national legislation applies only where there has been either previous residence in the household of the Union citizen or prior dependency. The text of the Directive does not indicate that the household or the dependency should be in another EEA state. It is unclear from this text alone whether a duty to facilitate residence would extend to membership of a household or dependency that only began in the host state.

14. However, the requirement of pre-admission dependency or membership of the household is indicated by Article 10 of the Directive that provides:

"1. The right of residence of family members of a Union citizen who are not nationals of a Member State shall be evidenced by the issuing of a document called 'Residence card of a family member of a Union citizen' no later than six months from the date on which they submit the application. A certificate of application for the residence card shall be issued immediately.

2. For the residence card to be issued, Member States shall require presentation of the following documents:

(a) a valid passport;
(b) a document attesting to the existence of a family relationship or of a registered partnership;
(c) the registration certificate or, in the absence of a registration system, any other proof of residence in the host member State of the Union citizen whom they are accompanying or joining;
(d) in cases falling under points (c) and (d) of Article 2(2), documentary evidence that conditions laid down therein are met;
(e) *in cases falling under Article 3(2)(a), a document issued by the relevant authority in the country of origin or country from which they are arriving certifying that they are dependants or members of the household of the Union citizen*, or proof of the existence of serious health grounds which strictly require the personal care of the family member by the Union citizen;
(f) in cases falling under Article 3(2)(b), proof of the existence of a durable relationship with the Union citizen."

(emphasis supplied)

National case law

15. The application of these provisions has given rise to uncertainty and difficulty in the national case law both before the former Asylum and Immigration Tribunal and the Court of Appeal in England Wales. Strictly these decisions may not be binding on the Upper Tribunal when sitting in appeal on a case arising from Northern Ireland and where any onward appeal would be to the Court of Appeal of Northern Ireland but in the absence of any pertinent jurisprudence of the Northern Ireland Court of Appeal we have no doubt that we should follow the English cases, subject to any clarification of Union law by the Court of Justice

16. In AP and FP (Citizens Directive Article 3(2); discretion; dependence) India [2007] UKAIT 00048 a constitution of the former AIT with the Vice President in the chair, rejected the submission that "facilitate" means the same as the recognition of a right of residence of OFMs. It concluded:-

(i) "Facilitate" in context meant ensuring that if national legislation gave a right of entry or residence, national procedures were operated in such a way as to ensure that they could be readily exercised (12 -14).
(ii) Jia v Migrationsverket, Case C-1/05 had departed from C 316-85 Lebon [1987] ECR 2811, and indicated that dependency should be necessary and could not apply to those who were self sufficient (28-33).

17. In KG (Sri Lanka) and AK (Sri Lanka) [2008] EWCA Civ 13, 25 January 2008, the Court of Appeal considered the scope of Article 3(2) of the Directive in a case where OFMs who had irregularly entered the UK as asylum seekers claimed a right of residence under Article 3(2) when their family members who had acquired Union citizenship in another EU state relocated to the United Kingdom.

The claims were rejected for a number of reasons spelt out in the judgment of Buxton LJ:

(i) The requirement of reg. 8(2)(a) of prior residence by the OFM in another EEA state was not incompatible with Article 3(2) of the Directive interpreted in the light of its policy and objectives, save possibly in the case of EU citizens (such as Portuguese nationals resident in Goa) who first entered the EU by coming to the host state rather than the state of nationality (paragraphs 63 - 69);

(ii) The OFMs had not accompanied or joined the Union citizen in the Host State, rather the reverse; whereas the policy of EU law was to afford only those residence rights to OFMs that might deter the Union citizen exercising free movement rights (paragraphs 72 - 74);

(iii) If prior dependency in Sri Lanka was permissible the appellants had not shown that they needed the material support of the sponsor in order to meet their essential needs (paragraphs 75 - 76);

(iv) The evidence did not show that the OFMs were living in the household of the Union citizen. It was not enough that they lived under the same roof in a communal household, that household had to be headed by the Union citizen (paragraphs 77 - 78);

(v) Historic dependency or membership of the Union citizen's household was irrelevant to the Article 3(2) test (indeed it seems in both cases such residence in Sri Lanka was before the family member became an Union citizen at all). There should be dependency or household living that is recent. The use of the present tense in the Article assumes dependency at the time of the accompanying or joining (paragraph 79).

(vi) If not an absolute rule, the Directive should be interpreted as only applying to cases where the Union citizen would be actually deterred or dissuaded from exercising treaty rights of free movement, and this would generally only be the case if the relative had joined the citizen before the free movement took place.

Sedley LJ concurring in the conclusion observed that:

> "The policy of the Directive is to be found as much in the requirement to facilitate entry and residence as in the place from which the applicant has come. If that place is the EU state from which the EU citizen himself or herself has moved, the obligation to facilitate entry and residence is a strong one; if not there seems to me nothing in the policy or objects of the Directive which requires a right of entry to be recorded by way of implementation or transformation."

18. In the case of Bigia and others v Secretary of State for the Home Department [2009] EWCA Civ 79, 19 February 2009, the Court of Appeal considered the extent to which the decision in KG needed revision in the light of the judgment of the

Court of Justice in Case C-127/08 Metock v Minister of Justice decided a few days after KG. Most of the appellants in this group of cases were family members within the meaning of Article 2(2) and the decisions were accordingly governed simply by whether there was sufficient evidence of dependency at the material time.

19. In paragraphs [37] to [44] the Court of Appeal considered the position of OFMs. TS was a Sri Lankan national resident in the United Kingdom supported by an uncle who was a German national. The uncle moved to the UK and the nephew applied for a residence permit. In the case of GS the nephews of a Portuguese national by reason of connection with Goa were supported by him after he came to the UK. Their applications for residence permits were refused because they had not resided with the uncle in Portugal.

20. On the basis of an acknowledgement by the Secretary of State that the reasoning in Metock with respect to family members should apply to OFMs, the Court concluded (at 41):

> "It follows that the provisions in Regulations 8 and 12 of the 2006 Regulations to the extent that they require an OFM to establish prior lawful residence in another Member State do not accord with the Directive. It cannot be the case that the policy which produced the result in relation to Article 2.2 family members in Metock is inapplicable in relation to OFMs."

21. The court nevertheless concluded (at [43]) that three other propositions derived from KG remained good law despite Metock:

    (i) "The tight relationship between the exercise of rights by the Union citizen and the requirement that the OFM should be dependants in the country from which they have come strongly suggests that the relationship should have existed in the country from which the Union citizen has come and thus have existed immediately before the Union citizen was accompanied or joined by the OFM".

    (ii) The members of the household whose entry is to be facilitated will be members of the Union citizen's household immediately before the Union citizen leaves for another country.

    (iii) Even if the OFM cannot still be a member of the Union citizens' household at the moment of application for entry to the EEA host Member State, both such membership and dependency should be very recent.

22. In emphasising the first of these three requirements the Court observed:

> "Whilst an OFM in a non-Member State may be financially dependent upon an Union citizen because he is provided with accommodation or living expenses by the Union citizen, there is no reason why the Union citizen's movement to the host Member State would be discouraged. The OFM could continue to benefit from the accommodation or the income after the Union citizen has exercised his rights in the

host Member State. I accept (the) submission that it is only those OFMs who have been present with the Union citizen with the union citizen in the country from which he has most recently come whose ability or inability to move with him could impact on his exercise of a primary right".

23. In the case of SM (India) and others v ECO (Mumbai) [2009] EWCA Civ 1426 one of the appellants was an OFM cousin of a Portuguese national working in the United Kingdom. The cousin was living in the same house in India where the sponsor used to live and was sent remittances. The IJ dismissed the appeal because there was no dependency of necessity rather than choice. The Court of Appeal concluded that the IJ had fallen into error by applying the interpretation of Jia identified in AP and FP (see [16] above). Dependency did not have to be of necessity. The Lebon test still applied and it was sufficient if in fact the sponsor supplied support for the essential needs in the country of origin whether he had the ability to supply his needs from his own labour or not.

24. Consideration was given to the case of Bigia. The Court was not satisfied that the lapse of one year between the sponsor arriving in the UK and the relative seeking to come was such to make the dependency historic or lapsed. There was no judicial comment on the fact that Bigia seemed to require that the OFM be dependent in the country from which the Union citizen had most recently come and dependence in the OFM's country of origin was not within the policy of the Directive. The case was remitted for detailed consideration of the extent of the dependency.

25. In the case of Pedro v Secretary of State for Work and Pensions [2009] EWCA Civ 1358 the Court of Appeal was concerned with the social security rights of the elderly mother of an EU national whose dependency had begun only after her arrival in the host state. The Court distinguished the decision of the Court of Justice in Jia on the basis that that case was concerned with EC legislation before the Directive had extended free movement rights for family members. The governing legislation in Jia was Directive 73/148/EEC but as the requirements of documentation for non-Union family members was not specific the Court of Justice turned to the documentation provisions of Council Directive 68/360 Article 4(3) that sets out the documentary requirements for family members of workers within the meaning of Article 10 of Regulation 1612/68.

26. Article 4(3) reads as follows:

> "For the issue of a residence permit for a national of a Member State of the EEC, Member States may require only the production of the following documents;
>
> - by the worker:
> (a) the document with which he entered their territory;
> (b) a confirmation of engagement from the employer or a certificate of employment;
> - by the members of the worker's family:
> (c) the document with which they entered the territory;

(d) a document issued by the competent authority of the state of origin or the state whence they came, providing their relationship;
(e) in the cases referred to in Article 10(1) and (2) of Regulation (EEC) No 12612/68, a document issued by the competent authority of the state of origin or the state whence they came, testifying that they are dependent on the worker or that they live under his roof in such country."

27. By contrast under the equivalent provisions of the Citizens Directive (Article 10 quoted at [14] above) family members only need to prove the relevant facts and did not need documents from their state of origin or the state where they had come to do so. The Court of Appeal also accepted the submission from the applicants that an EU citizen may be deterred from moving to the UK if he or she was aware that she could not bring over an elderly mother because she would not be regarded as a dependent if dependency only arose later and in the host Member State (see [59]).

28. In VN (EEA rights – dependency) Macedonia [2010] UKUT 380 (IAC) the Upper Tribunal reviewed this case law in the context of extended family members and concluded that the case law developments since KG primarily concerned family members as defined in Article 2 of the Citizens Directive rather than other or extended family members dealt with in Article 3. In particular Metock was not concerned with OFMs and Pedro specifically distinguished them from. SIJ Storey accepted in the light of Maurice Kay LJ's comments in Bigia (cited at [22-23] above) that the IJ had fallen into error in requiring prior residence in another EEA state, the error was not material because there was a finding of no pre-entry dependency. He rejected the submission that Pedro enabled OFMs to rely on post entry dependency.

29. In RK (OFM - membership of household - dependency) India [2010] UKUT 421 (IAC) the Tribunal drew attention to Article 10 of the Citizens Directive and concluded that a daughter in law of an EU national might qualify for admission as an OFM if she was dependent.

Discussion

30. We confess that this national case law leaves us in a state of uncertainty. If one assumes, as the Court of Appeal in Bigia did, that an OFM can challenge national legislation by a failure to properly transpose Article 3(2) of the Citizens Directive and the principles of the case law on family members apply by analogy, we find it very difficult to see how the restrictions on the circumstances when an OFM who is dependent before seeking admission to the United Kingdom identified in Bigia can apply when they are not contained in Community legislation.

31. In neither KG nor Bigia was attention paid to Article 10 of the Citizens Directive or the assistance provided by such subordinate measures to the scope of Article 3 (2). Article 10(2)(e) seems to us to be unambiguous in stating that proof of dependency by the OFM should be provided from documents in their state or

origin or state from which they have come. We cannot see how an ability to prove dependency in the OFM's state of origin can be cut by reference to general principles that the dependency must be so closely linked to the exercise of Treaty rights by the Union citizen as to exist immediately before the exercise of Free Movement rights and in the place where the Union citizen was before he or she exercised those rights.

32. In any event a close chronological link between prior dependency and the exercise of Treaty rights has been rejected in Pedro with respect to family members, and we cannot see how the scope of the general principle of avoiding measures that deter the exercise of Treaty rights relied on to construe the Directive can be different depending on whether Article 2 or Article 3 is being examined.

33. We recognise that OFMs must demonstrate that dependency preceded their admission to the host state and in this they are distinguished from family members but this is a consequence of the plain words of the Directive itself rather than the application of a general principle reading words into it. As the Court of Appeal noted in Pedro, Article 10(2)(d) makes a notable contrast with Article 10(2)(e) as to where the dependency must be, according to how it is proved.

34. Further, it might well be said that the place of residence of the dependant makes little difference in impact on a willingness to move to the United Kingdom by say an Italian national resident in Milan who is married to a Sri Lankan national who financially supports a non EU-national brother in law. The brother in law or similar OFM might reside in Sicily or Sri Lanka and might continue to do so after the Union citizen has moved to the United Kingdom. If the restrictions in KG as upheld in Bigia are right , in one case the dependent can come to the United Kingdom because he lived in the same country as the Union national when dependent and in the other case he cannot.

35. We observe that in some parts of the judgments in KG and Bigia dependency and membership of the household are treated together but as we read the Directive they are alternatives with materially different requirements. Membership of the household must be the Union citizen's household while dependency can either be on the Union citizen or his or her non national spouse. We recognise that membership of the household requires at least a physical cohabitation under the same space. If the OFM has never lived with the Union citizen before seeking admission this requirement simply cannot be met. Although it is not impossible that an Italian national married to a Sri Lankan national has set up a household in Sri Lanka with his in laws, it may not be the most usual pattern in such cases.

36. By contrast dependency does not have to be on the Italian national directly but may also be on the remittances from the non national spouse. We see no over-riding policy reason to be applied to the construction of the Directive why the place of dependency should not be the country where the non-national dependent comes from, irrespective of whether the Union citizen has ever lived

there. We note that this seems to have been the approach of the Court of Appeal in SM (India) despite observations to the contrary in Bigia.

37. All this assumes that Article 3(2) requires the national legislator to make provisions in domestic law to facilitate the admission of OFMs who are dependents or members of the household. There are some strong arguments in favour of that conclusion:

    (i) The Directive uses the word "shall" facilitate rather than "may".

    (ii) The Directive supplements the previous Regulation 1612/68 Article 10 of which referred simply to "shall facilitate admission" as opposed to any requirement to facilitate in national legal provisions.

    (iii) Regulation 1612/68 as a Regulation needs no implementing measures to give it effect.

    (iv) It is unlikely that a measure that the Court of Justice described in Metock at [59] as intended to strengthen the rights of free movement intended to grant a broader discretion to national legislator whether to facilitate members of the class or not.

    (v) The addition of the requirement to facilitate entry and residence in accordance with its national legislation, may well be intended to ensure that such facilitation is judicially enforceable rather than the subject of an administrative discretion that may not be.

    (vi) Article 10 of the Citizens Directive looks as if it establishes different ways in which different classes can prove the necessary elements to secure admission, and such a measure seems inconsistent with a broad national discretion as to whether to facilitate entry and residence.

38. On the other hand, there must be some distinction between the right of entry and residence accorded to close family members and the duty to facilitate entry and residence of a broad class of other family members, who may be related only very distantly. These distinctions have never been teased out in national case law:

    (i) The comments of the AIT in as to the duty being procedural have not been expressly overruled in SM (India) (contrast the observations about dependency).

    (ii) Preamble (6) to the Citizens Directive refers to "the situation of those who are not included in the definition of family members under this Directive *and who therefore do not enjoy an automatic right* of entry and residence in the host Member State, should be examined by the host Member State on the basis of its own national legislation, in order to decide *whether* entry or residence could be granted to such persons, taking into consideration their

relationship with the Union citizen or any circumstances, such as their financial or physical dependence" (our emphasis).

(iii) The concluding words of Article 3(2), requiring the Member State to "undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people" suggest a broad measure of discretion is afforded to Member States as to who and when entry and residence can be denied.

39. Apart from disputes about when and where the OFM must be dependent, the cases coming before the AIT and since 14 February 2010 proceeding before then First tier Tribunal Immigration and Asylum Chamber (FtTIAC) and the Upper Tribunal Immigration and Asylum Chamber (UTIAC) suggest that there are frequent contests about the nature of the dependency. If dependency does not have to be one of necessity as opposed to choice as the Court of Appeal in England and Wales has concluded in the case of SM (India), there is considerable scope for contrived dependencies being created in order to gain admission and residence under the Directive. If an able bodied male of working age, who may have financial resources of his own, can chose to rely instead, for some part of his basic living expenses, on remittances from a distant relative in the host State, can the host state be afforded a relevant margin of appreciation when promulgating its national law to require in OFMs something more than the minimal dependence identified in Lebon? Even if the national regulations cannot be prescriptive as to where the dependency takes place, could it not set a reasonable threshold of what level of dependency is required to secure admission and residence?

40. We recognise that Community law enables the national legislator or judge to prevent reliance on fraud or abuse of rights, but cannot envisage how those principles can be engaged if there is an actual dependency that is genuine and effective as opposed merely to an artificial appearance of dependency.

41. There is a further problem in the case of able bodied adults admitted as dependants who are then free to work under national law, as these appellants were. Do they have to remain dependant throughout the period of the first residence permit to obtain an extension of stay and or permanent residence? Is enforced dependency required? If so could they be required to leave if they become independent in the host state and possibly resume dependency in their country of origin. These are not problems encountered by family members where it seems that it is normally the biological or social relationship that must continue.

Conclusions

42. We conclude that a clear understanding of the Community law provisions is necessary for us to determine these appeals:

(i) To succeed in their appeals the respondents need to rely on the Citizens Directive as national law does not assist them. The issue is not simply the

factual question of their dependency or continued dependency but their eligibility for an EU residence document as a dependent OFM.

(ii) Even if regs. 8 and 12 of the national regulations are read down to excise a reference to prior residence by the applicant in another EEA state, national case law suggests that the respondents cannot come with the scope of the UK Regulations as they were not dependent on the EEA national or her spouse prior to admission in another country where the EEA national resided, which the guidance from the court of Appeal suggests may still be a requirement.

(iii) The existence of such a requirement in (ii) above does not appear to be supported by the terms of Article 10(2) of the Citizens Directive. If we were to construe the matter for ourselves without previous Court of Appeal authority we would be likely to reach this conclusion.

(iv) We are uncertain whether Community law permits the words of the Directive to be made subject to an implied exception that facilitation is only required in factual circumstances where the exercise of Treaty rights would be deterred. If comparison is made between an OFM resident in an EEA state but not in the same immediate vicinity as the EEA national and an OFM resident in his country of origin, we cannot see a distinction between the admission of the family member and the deterrent effect (if any) on the exercise of Treaty rights. The guidance from the Court of Appeal in this Bigia and Pedro does not appear to be entirely consistent.

(v) We are unsure of what the phrase "in accordance with its national legislation, facilitate entry and residence for the following persons" means. On one view it could mean that it is up to the national legislator to decide whether there should be any facilitation of anybody or not, in which case rights of admission and continued residence are entirely dependent on the terms of such legislation. The other view is that there is a Community law duty to facilitate the admission of a class of OFMs and a duty to facilitate by enforceable laws as opposed to discretionary policies. On this view it is uncertain whether there is a material distinction to rights of entry and residence by virtue of family membership and membership of the broader family categories covered by being an OFM.

(vi) If there is a Community law duty to facilitate entry we are unsure whether it is open to the national legislator to make particular requirements as to the degree and duration of dependency that may be required to obtain entry and residence. If dependency does not have to be of necessity able bodied adults who chose to rely on the support of their families may be able to enter and reside in a Member State and obtain a right of indefinite residence in the host Member State.

43. The case law of the Court of Justice cited in the national cases and in particular the decisions in Jia and Metock concern family members rather than OFMs. We are unaware of any jurisprudence of the Court of Justice that specifically addressed Article 3(2) of the Citizens Directive or its predecessor reg. 10(2) of Regulation 1612/68.

44. We are able to make reference to the Court of Justice of the European Union for a preliminary ruling under Article 267 of the Consolidated Treaty on the Functioning of the European Union. Applying the test in R v Stock Exchange ex parte Else [1993] QB 534 we are unable with complete confidence to decide the matter ourselves.

45. We further recognise that the issues of concern to us have implications for all OFMs of EEA nationals and Member States throughout the Union. Although we are not a final appeal court obliged to make a reference we note that in Case 283/81 CILFIT Srl v Ministro della Sanita [1982] ECR 3415 at paragraph [16] of its judgment in that case, the ECJ said:

> "The correct application of Community Law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved. Before it comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice. Only if those conditions are satisfied, may the national court or tribunal refrain from submitting the question to the Court of Justice and take upon itself the responsibility for resolving it."

46. In deciding whether to make such a reference we have had regard to the Information Note on references from national courts for a preliminary ruling (OJ 2009/C-297/01, 5 December 2009). We conclude:

    (i) The facts of this present case have been determined by the IJ.

    (ii) The Community law issue is likely to be determinative of the outcome of this appeal.

    (iii) There is already a substantial procedural history to this case and the applicants are no nearer to knowing whether they can continue to reside in the UK. If a reference needs to be made then in our judgment the sooner it is made the better.

    (iv) We are conscious that there are many hundreds of similar cases pending before both the First-tier and Upper Tribunal that may need to be adjourned until the law is clarified. This is a further reason why we consider we should make the reference now as merely leaving the problem for the Court of Appeal or Supreme Court to resolve before a reference is made would merely add to the delay that unfortunately has already been incurred in this case.

(v) We sent out an earlier version of this determination and invited submissions on it and the questions we were minded to pose in a reference. None of the parties has opposed the making of a reference although the Home Office submitted that a number of the questions posed were unnecessary to determine in the present case.

47. Accordingly we have decided to make a reference to the CJEU on the issues of Community law on which we need assistance.

48. We have reconsidered the questions posed in the light of the representations received. We disagree with the Home Office contention that the questions about the nature of the state's obligation to make legislative provision are unnecessary in this case because the United Kingdom has promulgated reg. 8 of the 2006 Regulations. The respondents cannot comply with this regulation even if we were to read it in the light of the Court of Appeal's judgment in Bigia. It is unfortunate that the Regulations do not set out what the Home Office believe the law to be. We seek the guidance of the Court of Justice on what Community requires in this area and what room for legislative or judicial discretion is left to the national authorities.

49. We have received an application by the AIRE Centre to intervene in this case. It is a well known organisation based in London with considerable expertise of European free movement and human rights law and comparative practice in Europe. We note that it has recently intervened in important judgments of the Court of Appeal of England and Wales in Quila [2010] EWCA Civ 1482 and the Supreme Court of the United Kingdom in ZH (Tanzania) [2011] UKSC 4 on the questions of family life and immigration. We aware that consider that it has been given leave to intervene in proceedings before the European Court of Human Rights in Strasbourg, but that there is no power in the rules of the Court of Justice to join non state interveners once a reference has been made. We conclude that the AIRE Centre is likely to have a relevant contribution to make the problems that cause us difficulty; its application for joinder is supported by the respondents and not opposed by the Home Office. We have accordingly made it a party to these proceedings in the exercise of our case management powers.

50. We therefore refer the questions set out in the attached schedule for the advisory opinion of the Court of Justice of the European Union pursuant to Article 267 of the Treaty on the Functioning of the European Union.

Signed

President of the Upper Tribunal,
Immigration and Asylum Chamber

SCHEDULE OF QUESTIONS TO BE REFERRED TO THE COURT OF JUSTICE

1. Does Article 3(2) of Directive 2004/38/EC require a Member State to make legislative provision to facilitate entry to and or residence in a Member State to the class of other family members who are not nationals of the European Union who can meet the requirements of Article 10(2)?

2. Can such other family member referred to in Question 1 rely on the direct applicability of Article 3(2) of Directive 2004/38/EC in the event that he cannot comply with any requirements imposed by national legislative provisions?

3. Is the class of other family members referred to in Article 3(2) and Article 10(2) of Directive 2004/38/EC limited to those who have resided in the same country as the Union national and his or her spouse, before the Union national came to the host state?

4. Must any dependency referred to in Article 3(2) of Directive 2004/38/EC on which the other family member relies to secure entry to the host state be dependency that existed shortly before the Union citizen moved to the host state?

5. Can a Member State impose particular requirements as to the nature or duration of dependency referred to in Article 3(2) of Directive 2004/38/EC by such other family member so as to prevent such dependency being contrived or unnecessary to enable a non national to be admitted to or continue to reside in its territory?

6. Must the dependency on which the other family member relies in order to be admitted to the Member State continue for a period or indefinitely in the host state for a residence card to be issued or renewed pursuant to Article 10 of Directive 2004/38/EC and if so how should such dependency be demonstrated?