



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/08050/2014
OA/08053/2014

THE IMMIGRATION ACTS

Heard at Field House
On 12 January 2016

Decision & Reasons Promulgated
On 22 February 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE L J MURRAY

Between

ENTRY CLEARANCE OFFICER - LAGOS

Appellant

and

**EDITH IDONIJE
HARRISON IDONIJE
(ANONYMITY DIRECTION NOT MADE)**

Respondents

Representation:

For the Appellant: Mr S Kotas, Home Office Presenting Officer
For the Respondent: Mr C Emezie, DCK Solicitors

DECISION AND REASONS

1. I refer to the Appellant in this appeal as the Entry Clearance Officer (ECO) and to the Respondents as the Claimants. The Claimants in this case are Nigerian nationals born on 18 May 1952 and 26 December 1994 respectively. The relationship to the EEA national sponsor ("the sponsor") is that of mother-in-

law and brother-in-law. The ECO refused their applications for entry clearance as a family member and extended family member of the EEA national sponsor under Regulations 7 and 8 of the Immigration (European Economic Area) Regulations 2006. Their appeals against those decisions were allowed by First-tier Tribunal Judge Rees in a decision promulgated on 2 June 2015.

2. The ECO was granted permission to appeal on 12 August 2015 by First-tier Tribunal Judge Ford against that decision on the basis that it was arguable that there was inadequate reasoning in the decision of the First-tier Tribunal in relation to the findings of dependency.
3. I found at a hearing on 13 October 2015 that there was an error of law in the decision of the First-tier Tribunal. I found that it was clear from the ECO's decision and indeed from the application form of both Claimants that they were in receipt of an income in Nigeria amounting to £109 from income as a petty trader and further income from some property and rents. In view of the fact that the Claimants had an income in Nigeria and that this was an issue raised by the Respondent it was incumbent on the First-tier Tribunal to apply the correct test and consider whether the remittances from the sponsor were in fact required as material support for essential needs. The First-tier Tribunal made no findings regarding how the money from the sponsor was used or whether it was necessary to meet their essential needs.
4. I rejected the ECO's second ground of appeal and found that the First-tier Tribunal Judge's finding that the sponsor's wife and the Claimants were related as claimed was adequately reasoned and open to him on the evidence. In the light of the limited findings of fact required I considered that it was appropriate for the decision to be re-made in the Upper Tribunal.

The Re-hearing

5. The sponsor, Mr Courage Enomayo, gave evidence. He relied on the witness statement dated 2 April 2015 at page 1 of the bundle that was before the First-tier Tribunal.
6. Mr Emezie asked a number of supplemental questions. He asked what the first Claimant's job as a petty trader entailed. The sponsor answered that she sold seasonal fruits like mangos, oranges and tomatoes depending on the season and not on a large scale. She had a stall in a market in Benin City. The stall was the size of a table. Mr Emezie asked if she made £100 a month. He said that he did not know but knew that they paid for rent for the stall. He could not confirm her income – it could be less. She was a petty trader. The fruits came in different seasons. She sold fruits that were available. Mr Emezie said to him that she stated in her application form that there was an income of 41,000 Naira from property and asked him to confirm this. He said that he did not know and

did not know how she could get that amount. The property was located at Auchi which was a small town. Mr Emezie asked if she was renting out the whole property. He said that he did not know and did not expect the rent to be more than 2000 Naira monthly. He did not know how much that was in sterling. Mr Emezie asked how many rooms were rented out. He said he had no idea. Mr Emezie asked what she did with the money. He said that she paid for the stall. Her house rent was 20,000 Naira and transportation would be 5,000 Naira and the cost of renting a shop 15,000 Naira. Her living expenses would be 35-40,000 Naira and 8,000 for house help. Her medication for high blood pressure was 20,000 and she paid for Harrison's extra mural studies. He was a student with fees of 5000 Naira a month.

7. The sponsor said that he sent 20,000 Naira a month for living expenses for food, bills and so on. The first Claimant was 63 years old. He did not think that they sent her enough money and without it things would be difficult.
8. Mr Kotas asked how the Claimants were related to his wife. The sponsor said that they were the mother of his wife and her son. The sponsor came to the United Kingdom in 2009 and he could not remember when his wife came. They sent money in one transaction per month. His wife worked part-time. They married in 2012. Before they married his wife sent them money and then she had children and could not. He did not know how much she was sending. They possibly used an agent to fill out their application forms. It was not a guess that there was £108 of expenses. Before he decided to help her he worked out what she needed.
9. They had been living in Benin City for about 2 years. They were not living in Auchi in 2014. He did not know why it said Auchi in the application form, perhaps it was because she got her correspondence there. Mr Kotas said that she said she lived there for 19 years and asked where she was living in May 2014. He said Auchi was the correspondence address.
10. It was put to him that in Harrison's application form they were asked about finances and he said that he gave £100 to his mum. The sponsor confirmed that he sent £100 a month which was enough for food. It was put to him that she earned more from petty trading and at Q66 of the application form said she earned £150 from properties and rent. He said that he did not think she got the money on her own. It was a polygamous home. She was in charge of collecting the rent. It was put to him that she earned more from rental property than from him. He said she had to live and had expenses. She had other children and brothers. They did not support her. They lived not far away. She had two daughters and two sons in Nigeria. The daughters had their own families. Harrison was trying to get into University and the other was a grown up. In February last year he was unemployed. He could be doing a petty job like construction.

11. The first Claimant was a widow. He did not know what happened to the family property when her husband died. She was not living in the family home rent free. The family property was rented out and she was a benefactor and they decided it was better for her to stay in Benin and felt that being in the village was not good enough.
12. In May 2014 Harrison was trying to get into university and doing a JUMP exam. If he was successful he would not be doing the exam again. Mr Kotas referred the sponsor to page 62 of the Claimants' bundle and an entry in the bank statement in April 2014 and asked if he knew what she was doing with the money. He said that he did not know.
13. In re-examination he said that the distance between Auchi and Benin was 80 km which was one and a half hours by transport. She did not keep all the money from the rent but had to share it. Her husband had up to five wives and they would receive money. What was intended when they applied was a family visit not application for permanent residence. His wife was having baby.
14. I asked a number of questions. The sponsor said that at the date of the application no one else was living with the Claimants. He started sending money in 2012 when he married his wife. She ceased work in 2012. Before that she was working part-time. He did not pay an agent to help with the application. He did not just send money via bank transfer but also sent it with people. There were a lot of problems sending money by hand and so he decided to send it via her account. The entries the Claimant's bank statements with the name "Naomi" next to them were for their money transfers. His wife was not receiving any other money other than from him in 2013.
15. Mr Kotas relied on the notice refusing entry clearance. The Claimants were required to demonstrate that they needed material support for their essential needs. The sponsor's statement was very brief and there was no updated statement provided. There was no letter or witness statement from the Claimants. It was not beyond wit of man to have that sent over. The daughter of the Claimant had not been called to give evidence. The reality was that when the application was submitted the evidence was that the sponsor was sending £100 amounting to £50 each and that could not be construed as suggesting that that met the essential needs as the Claimant received more from her rental income than from the sponsor and that excluded petty trading. The first Claimant had children and other relatives in Nigeria and the sponsor's evidence about level of help from them was hazy. The evidence about the family property was relevant. Her permanent address was in Auchi in Nigeria and she apparently had resided there for 37 years and the second Claimant for 19 years. The bank statements started from September 2013 and there was no real evidence as to how they coped before that. It did look as if some of the money was being recycled as it came in and out in the same amount which lent weight to the ECO's contention that the sponsor was not responsible for their

essential needs. The application suggested that the moneys were topping up rather than essential.

16. Mr Emezie submitted that the notice of decision was deficient and as the First-tier Tribunal remarked there was no attempt to exercise discretion. The difficulty that the First-tier Tribunal faced was that there were no questions in relation to how the money was spent. The sponsor was found credible. It was not determinative that there was no witness statement from the Claimant. It was not necessary. The sponsor's wife's evidence would have tallied with sponsor's evidence. It could not have assisted further. The amount sent by the sponsor was £100 monthly. There was no evidence it was £50 each. The sponsor got more from rental income but that was not the test. The test was whether the support was necessary for basic needs. There was nothing wrong with dependency of choice. In that case it did not assist the ECO. There was no evidence that other relatives in Nigeria could help. The children had their own problems and needs. The permanent address was in Auchi because that was where her house was and there was no reason why she should change her address as she knew the post would get there. If she lived in Auchi there was no rental income. There was no requirement in law for them to show how they were previously receiving money. The sponsor's evidence was that they were receiving money from his wife before they got married. It was speculative that money was being recycled. Dependency was a question of fact. There could not be any documentary evidence as to her outgoings as there were no receipts. Given her circumstances, she engaged in petty trading at a stall and the amounts were small and could not satisfy her essential needs. There was a deficit which was made up from money received from the sponsor. Her income took care of the rent from the stall and a number of things and after paying that there was a shortfall of 20- 25,000 Naira. It was not incredible and the evidence dated back to 2014. He submitted that there had to be a finding that she was a petty trader and had a rented property. He relied on his skeleton argument. The key point was that it was a question of fact. There was no authority to say that you had to be wholly dependent. There was other income. She could have said she had no income but he urged me to find that the sponsor was credible and his account was straight forward and he had volunteered evidence. Whatever discrepancies existed they did not undermine the account. He asked me to allow the appeal.

Discussion and findings

17. I have taken all of the evidence submitted by both parties into account before coming to my conclusions in this appeal. The Claimants applied for a family permits under Regulation 12 of the Immigration (EEA) Regulations 2006 ("the EEA Regulations"). The first Claimant is the mother of the sponsor's wife and therefore to qualify for a residence card she must demonstrate that she meets the requirements of Regulation 7 of the EEA Regulations.

18. Regulation 7 provides in so far that it is relevant to this appeal that:

7.- (1) Subject to paragraph (2), for the purposes of these Regulations the following persons shall be treated as the family members of another person –

(a) his spouse or his civil partner;

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

(i) under 21; or

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

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

(d) a person who is to be treated as the family member of that other person under paragraph (3).

19. The second Claimant is the brother of the sponsor's wife and is not a family member for the purposes of Regulation 7 of the EEA Regulations as he is not a direct descendant of the sponsor's wife or a directive relative in her ascending line. He therefore has to demonstrate that he meets the requirements of Regulation 8 of the EEA Regulations as an "extended family member". Regulation 8 in so far as it relates to this appeal provides that:

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 the conditions in paragraph (2),(3),(4) or (5).

(2) A person satisfies the condition in this paragraph if the person is a relative of an EEA national, his spouse or civil partner and –

(a) the person is residing in a country other than the United Kingdom and is dependent upon the EEA national or is a member of his household;

(b) the person satisfied the condition in paragraph (a) and is accompanying the EEA national to the United Kingdom and wishes to join him there; or

(c) the person satisfied the condition in paragraph (a), has joined the EEA national in the United Kingdom and continues to be dependent upon him or to be a member of his household.

20. The ECO refused the Claimants applications on 28 May 2014 on the grounds that he was not satisfied that the Claimants needed the financial support of the sponsor to meet their essential needs in Nigeria.

21. The test for dependency is the same in relation to family members and extended family members. What is required to be shown is that the family member of a Union citizen needs the material support of that Union citizen in order to meet their essential needs (see **Bigia & Others Others** [2009] EWCA Civ 79 and **Moneke (EEA - OFMs) Nigeria** [2011] UKUT 00341). In **Moneke** it was further held that financial dependency should be interpreted as meaning that the person needs financial support from the EEA national or his or her spouse, in order to meet his financial needs, not in order to have a certain level of income. Provided a person would not be able to meet his or her essential

needs without the financial support of the EEA national she or he should be considered dependent on that national. In those circumstances it does not matter that the applicant may in addition receive financial support or income from other sources and 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 or herself by taking paid employment.

22. Further, in the case of **Lim (EEA dependency) Malaysia** [2013] UKUT 437 the Upper Tribunal held that subject to there being no abuse of rights the jurisprudence of the Court of Justice allows for dependency of choice. In **Reyes v Migrationsverket (Case C-423/12) CJEU (Fourth Chamber)**, 16 January 2014 it was held that the fact that a Union citizen regularly and for a significant period paid a sum of money to the descendant necessary in order to support her in the country of origin was enough to prove that the descendant was in a real situation of dependence.
23. In **Rahman** [2012] CJEU Case-83/11 (which followed a reference to the CJEU in **MR and Ors (EEA extended family members) Bangladesh** [2010] UKUT 449 (IAC)) the CJEU considered the issue of dependency for extended family members. The CJEU held that in order to fall within the definition of 'Extended Family Member' on the basis of dependency on an EEA national, there is no requirement for the applicant to reside in a country in which the Union citizen has previously resided, whether recently or at all. The term "Country from which they have come" is, in the case of a national of a third state who declares that he is a dependent of a Union Citizen, the state in which he (the third country national) was resident on the date when he applied to accompany or join the Union citizen". The CJEU further held that, while ties may exist without the family member and the Union citizen having resided in the same state or without there having been dependency on the Union citizen shortly before or at the time the Union citizen coming to the UK, "the situation of dependence must exist, in the country from which the family member concerned comes, at the time when he applies to join the Union citizen on whom he is dependent." In **Ronivon Soares v Secretary of State for the Home Department** [2013] EWCA Civ 575 it was held that the criteria for being an "extended family member" in Regulation 8(2)(a) and (c) of the Immigration (European Economic Area) Regulations 2006 did not extend to dependence on, or household membership of, a spouse or partner of an EEA national. Such dependence or household membership could only relate to the EEA national.
24. In **Boodhoo and another (EEA Regs: relevant evidence)** [2013] UKUT 00346 (IAC) (Blake J) it was held that neither section 85A of the Nationality, Immigration and Asylum Act 2002 nor the guidance in **DR (Morocco)*** [2005] UKAIT 38 regarding a previous version of section 85(5) of that Act has any bearing on an appeal under the Immigration (European Economic Area) Regulations 2006. In such an appeal, a tribunal has power to consider any

evidence which it thinks relevant to the substance of the decision, including evidence which concerns a matter arising after the date of the decision.

25. I gave directions for the resumed hearing pursuant to my finding that there was an error of law. I directed that the Claimants serve an indexed and paginated bundle. That was not done. In order to demonstrate dependency for the purposes of the EEA Regulations, the Claimants rely on a witness statement from the sponsor at pages 1-2 of the Claimant's bundle before the First-tier Tribunal and the first Claimant's bank statements at pages 48 to 77 of the Claimant's bundle. Further bank statements are also to be found in the Respondent's bundle.
26. The sponsor's witness statement is very brief. The only information it contains in relation to the support provided to the Claimants is at paragraph 3 where the sponsor states: "My mother in law depends largely on my wife and I for financial support. We send her money either once or twice monthly". The first Claimant's bank statements in the Claimants' bundle cover the period from 28 January 2014 to 22 February 2015. The bank statements in the ECO's unpaginated bundle cover the period from 1 September 2013 to 31 March 2014.
27. The first Claimant's application form is dated 9 May 2014. She applied for entry as the family member of an EEA national. Whilst Mr Emezie argues that the Claimants were seeking entry as visitors this was not the application they made. She gave her current working status as self-employed (question 57) and stated that her total monthly income from all sources of employment after tax was 30,000 Naira (question 58). She described her occupation as petty trader (question 59). She stated that she also had a monthly income from properties and rents amounting to £150 (question 66). She stated that she spent 100 (presumably pounds) on living costs and that she gave none of her monthly income to other family members. She was asked at question 137 who supported her financially and she answered "my children and in-laws". She stated in answer to question 141 that she was given £100 by family members.
28. The second Claimant's application form states that he is a student (question 55), that he has no income, that he lives with his mother and brother Noah (question 126), that he is supported by his mother and sister and her husband (question 129) and that his mother is given £100 monthly (question 133). Their applications were accompanied by a letter dated 11 May 2014 from JLP Legal stating that bank statements were also submitted showing transfers.
29. According to the Respondent's notice of decision, the exchange rate used was £1 to 275 naira. This meant that the figure of 30,000 Naira the first Claimant gave for her monthly income from self-employment equated to £109.09. She then provided information in her application form that she had an additional monthly income from properties and rent of £150 meaning that her total

monthly income was £259.09. The sponsor gave evidence that he sent £100 a month. However, according to the first Claimant's application form she spent only £100 in living costs which is less than half of her claimed income from her occupation as a petty trader and income from properties and rent.

30. I have had regard to the first Claimant's bank statements which show transfers from the sponsor. No schedule was provided to show the dates and amounts or which transfers were said to be from the sponsor and his wife. However, having been through all of the bank statements it is clear that the sponsor transferred on average 20,000 Naira a month. I therefore accept his evidence that he transfers around £100 a month.
31. However, I find that the Claimants have not demonstrated that the money they receive from the sponsor is material support for their essential needs. There are frequent regular credits into the first Claimant's bank account from other sources. There has been no attempt by way of a witness statement to explain the source of credits or why they do not cover her needs. The Claimants have not set out in a witness statement what their income and outgoings are and why they require the sponsor's money for their essential needs. The information provided by the first Claimant in her application form states that she spends less on living costs monthly than she receives in income in Nigeria.
32. Further, I found the sponsor's evidence to be less than satisfactory. Despite the fact that I gave directions for the filing of evidence and it was also clear from my directions that the sole issue in this hearing was financial dependency, no witness statement was filed dealing with the matter. In oral evidence the sponsor did not know how much the first Claimant made from her market stall, how much income she received from property, whether she was renting out the whole property and he guessed that the rental income she received would be 2000 Naira. He did not satisfy me that he had a full knowledge of the Claimants' financial circumstances and their income and outgoings.
33. In the circumstances therefore the Claimants have not shown that they are or were at the time of the application dependent on the sponsor and therefore do not satisfy the requirements of Regulations 7 and 8 of the EEA Regulations.

Conclusions:

The decision of First-tier Tribunal Judge Rees promulgated on 2 June 2015 contained a material error of law and I set it aside.

The Claimants have failed to meet the requirements of the EEA Regulations 2006. I re-make the decision in the appeal by dismissing it.

Anonymity

The First-tier Tribunal did not make an order for anonymity and no application has been made for such an order.

Signed

Date

Deputy Upper Tribunal Judge L J Murray