Upper Tribunal
(Immigration and Asylum Chamber)

Appeal nos: **EA/05985/2017**
EA/05983/2017
EA/05982/2017
EA/05984/2017

THE IMMIGRATION ACTS

At **Field House**
on **28.11.2018**

Decision & Reasons Promulgated
on 11.12.2018

Before:

Upper Tribunal Judge
John FREEMAN

Between:

Adebayo [Y] (Mr)
[K Y]
Bekere [F] (Mrs)
[O Y]

appellants

and

Secretary of State for the Home Department

respondent

Representation:
For the appellants: *Matthew Moriarty* (counsel instructed by ROCK)
For the respondent: Mr Nigel Bramble

DETERMINATION AND REASONS

NOTE: (1) no anonymity direction made at first instance will continue, unless extended by me.
(2) persons under 18 are referred to by initials, and must not be further identified.

This is an appeal, by the appellants, against the decision of the First-tier Tribunal (Judge Christopher Randall), sitting at Hatton Cross on 28 May, to dismiss EEA appeals by the (main) appellant, a citizen of Nigeria, born 1974, and his dependent wife and sons.

2. The appellant's elder son was born in Nigeria on 30 July 2005, following which the family went to Italy, where his grown-up son André Djossou was living. Their younger son was born there on 14 February 2007, but like the others is a Nigerian citizen. In 2009 they came here, the appellant as a student and the others as his dependants, with leave till 2011. On 10 January 2012 they were issued with five-year residence cards as the dependants of André, now here too, and an Italian citizen.

3. On 9 January 2017 the appellants applied for permanent residence cards; but on 15 June last year they were refused, a decision upheld by the judge, who noted that the appellant himself had been earning more than André, especially for their first three years with residence cards, so that they were not dependent on him. There is now no issue on that.

4. The issue before me is on the appellants' alternative submission, dealt with by the judge at paragraphs 56 – 57. They argued that, even if they were not entitled to a permanent right of residence, they were still entitled to residence cards, since, following an injury in December 2017, the appellant himself had been unable to work. The judge found in their favour on the facts, and that finding is not challenged by Mr Bramble; but he took the view that it was not open to the appellants, having applied for permanent residence cards, now to seek ordinary ones, and that was supported by Mr Bramble.

5. Mr Moriarty referred to the broad rights of appeal given by reg. 36 of the Immigration (European Economic Area) Regulations 2016, taken together with s. 84 (1) of the Nationality, Immigration and Asylum Act 2002, allowing it simply to be argued

> (d) that the appellant is an EEA national or a member of the family of an EEA national and the decision breaches the appellant´s rights under the Community Treaties in respect of entry to or residence in the United Kingdom;

6. He went on to point out that the issue of residence cards involves recognition, rather than creation of rights, and that excessive technicality is not required in cases of this kind: see *HB* (EEA right to reside - Metock) Algeria [2008] UKAIT 00069, if authority is required for this trite proposition.

7. Mr Bramble referred to the judge's point at 57 that neither the covering letter with the applications for permanent right of residence, nor the forms themselves, nor the grounds of appeal had mentioned this alternative possibility. Mr Moriarty had already given his answer to this point, partly in terms of the argument already set out, and partly on the basis of the prescribed form, which made no allowance for alternative applications. This would mean that appellants in this position would have to make, and presumably pay for two applications, or in this case two sets of them, at the same time.

8. I agree with Mr Moriarty that insisting on this could not be in the public interest, any more than that of the appellants. While it would have been helpful, to say the least, if the possibility had been raised in advance of the first-tier hearing, it was clearly raised in the grounds of appeal to the Upper Tribunal, and permission was granted on this point only. The respondent's r. 24 response argues that the judge was right on it, and it must be left to the appellants to make further applications now if they wished.

9. If the issue of ordinary residence cards had required any further findings of fact, or resolution of any challenge to those made by the judge at 36, then there might have been something to be said for the respondent's argument. However that is not the case here, where the facts are agreed: the overriding objective (see Tribunal Procedure (Upper Tribunal) Rules 2008 r.2) is to deal with cases fairly, justly, proportionately to their nature and to the resources of the parties, without unnecessary formality, and with as much flexibility as possible. Those acting for the respondent should bear this objective in mind when drafting r. 24 responses, still more when arguing second appeals.

10. Here I regard it as clear beyond argument that this objective would be best served by allowing these appeals, with a direction to issue these appellants with ordinary residence cards, on the basis that they have all been dependent on André since December 2017.

Appeals allowed:: direction accordingly

(a judge of the Upper Tribunal)