



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/08023/2017

THE IMMIGRATION ACTS

Heard at Field House
On 14th November 2018

Decision & Reasons Promulgated
On 6th December 2018

Before

UPPER TRIBUNAL JUDGE KING TD

Between

OLADAPO ADEPOJU IHEMEDU

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Dr Onipede, instructed by way of Direct Access

For the Respondent: Mr Walker, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Nigeria born on 27th November 1978.
2. He seeks to appeal against the decision of the respondent dated 4th September 2017 refusing his application for a permanent residence card as a confirmation of his right of residence as the family member of an EEA national under the Immigration (EEA) Regulations 2016.
3. The hearing of that appeal came before First-tier Tribunal Judge Shanahan at the Nottingham Justice Centre on 17 April 2018. In the decision promulgated on 14th May

2018 the appeal was dismissed. It was the clear finding of the Judge, having heard evidence, that the appellant was not dependent upon his EEA sponsor in the United Kingdom. The sponsor being Mr John Kenneth Ihemedu, who was the appellant's first cousin.

4. An appeal to the Upper Tribunal was granted to challenge that decision on the basis that the Judge had not considered the alternative position namely whether the appellant resided as a member of the sponsor's household in the United Kingdom.
5. At a hearing before Upper Tribunal Judge Reeds on 6th September 2018 it was accepted that the Judge's failure to have considered that alternative rendered the decision as a whole in error of law. Thus it was that the decision was set aside to be remade.
6. It would seem to have been the intention of the Upper Tribunal to have proceeded to deal with that aspect at the same time but Mr Walker, on behalf of the respondent, sought to adduce fresh evidence which was relevant to the allegation of fraud that had previously been made. The previous determination of Senior Immigration Judge Storey promulgated on 19th August 2011 was also to be relied upon. No prior notice under Rule 15(2A) had been given before the hearing and it was not surprising therefore that those representing the appellant had been taken by surprise. Thus the matter was adjourned for the legal advisors to consider the material sought duly presented.
7. Thus the matter came before me at a hearing several months later.
8. The material, which was relied upon by Mr Walker in which he continues to rely upon, is set out at Annexes A to H of the respondent's bundle. No objection was taken for that material now to be considered.
9. The matter is of some complexity and it is therefore perhaps helpful to set out the chronology of the matter.
10. At some stage the appellant entered the United Kingdom unlawfully.
11. On 26th March 2010 an application was made by the sponsor to the Home Office for the grant of an EEA residence card to two members of his family namely Daniel Obinna Ihemudu, who was his half-brother, and the appellant said to be his cousin. Photographs of both Daniel and the appellant were attached to the application form.
12. On 29th October 2010 Daniel was granted an EEA residence card but the appellant was refused one in a decision of 5th November 2010.
13. It was not accepted that the appellant was related to the sponsor as claimed nor was it accepted that he had resided with that sponsor prior to arriving in the United Kingdom and since his arrival, or that he had been generally dependent upon that family member. Further it was not accepted that the sponsor was a qualified person.

14. The appellant sought to appeal against that decision. The appeal came before First-tier Tribunal Judge Somerville for hearing and in a determination notified on 21st January 2011 the appeal was allowed. The judge found that the appellant and the sponsor were related and that the claimant was residing with the sponsor in the United Kingdom and was dependent upon him.
15. The Secretary of State sought to appeal against that decision upon error of law on the basis that the Judge had failed to make a finding as to whether the appellant had been dependent upon the sponsor prior to arrival in the United Kingdom or a member of his household.
16. The matter thus came before Senior Immigration Judge Storey for hearing on 16th May 2011. In effect Judge Storey found there to be an error of law in the First-tier decision and proceeded to consider the evidence relating to whether the appellant had been dependent upon the sponsor and or residing in his household prior to coming to the United Kingdom. It was his findings upon detailed reasons that he did not, accordingly the appellant's appeal was dismissed.
17. However in that determination Judge Storey expressed some concern that the residence card was given to Daniel arising from the same application that was made for the appellant. He invited the Secretary of State to consider carefully why there should have been such a distinction. Whether as a result of those comments or not, in fact a residence card was granted to the appellant on 21st February 2013 valid until 12th June 2017.
18. It then came to the attention of the respondent that Daniel had practised deception upon the authorities, falsely representing himself in that identity as being the half-brother of the sponsor when in fact he admitted that he was a different person with a different name and a different date of birth. As a result of those matters the decision of 17th January 2013 revoked his residence card. The relevant evidence that is relied upon is set out in that refusal letter, which was one of the documents which Mr Walker has sought to produce, the relevant passages are as follows:

“On 10th December 2012 North London Command Team were informed by the US authorities that you had been matched by facial recognition systems in the identity of Mr Timidayo Adeshina Olanikawo Nga born 28th November 1977.

When presented with the evidence of facial recognition results you made a full and frank admission to the US authorities when applying for a visa to travel to the states. You confirm that you took on the identity of Daniel Obinna Ihemedu to apply for a residence card in the United Kingdom and it has been confirmed therefore that you have sought leave by deception in a false identity. Whilst the Nigerian passport which you previously presented to the UK Border Agency appears to have been genuinely issued it has been obtained by fraudulent means.”

19. As the decision went on

“As the identity of Daniel Obinna Ihemedu has been found to be false in the use of purposes of deception it follows that the claimed relationship and birth certificates previously presented to support your claimed relationship to Mr J K Ihmedu is false and can no longer be relied upon.”

20. Thus it was that when the appellant sought to apply for his application for permanent residence as the extended family member of the sponsor, such deception was said to have cast doubt on the credibility of the appellant’s claimed relationship with the sponsor and of his continuing dependency upon him.
21. At the outset of the hearing I sought to clarify the issues which were at large at the hearing, bearing in mind the requirements set out in Regulation 8 of the EEA Regulations to the nature of establishing what was an extended family member. Regulations were also considered in the case of **Dauhoo (EEA Regulation - Reg 8(2)) [2012] UKUT 79 (IAC)**.
22. It was necessary for the appellant to establish dependency or membership of the household of the sponsor prior to coming to the United Kingdom, in addition to the requirement that he show dependency or membership of the sponsor’s household in the United Kingdom.
23. In terms of the latter requirements no challenge was made to the findings of Judge Shanahan. There was no dependency by the appellant upon the sponsor in the United Kingdom. That was not the challenge mounted originally nor indeed has there been any suggestion that the conclusion of the Judge is in any way in error. Thus the live issue in terms of the UK is whether or not the appellant established, upon the balance of probabilities, that he is a member of the sponsor’s household since being in the United Kingdom.
24. In terms of dependency and or residence with the sponsor before coming to the United Kingdom Dr Onipede sought to argue that that was not a relevant matter, given that the residence card had been granted to the appellant, therefore it must be deemed to have been accepted by the respondent that those requirements had been met. He submits that the EEA residence card given to Daniel was also an acceptance by the respondent of the prior dependency and or residence.
25. Given that it is the case presented that the claim by Daniel was fraudulent, it perhaps does not assist materially to rely upon that. It was accepted by the respondent that there had been prior dependence or residence. To submit otherwise is to ignore the nature of the original refusal decision so far as the appellant was concerned in which that matter was specifically challenged and also the findings of Senior Immigration Judge Storey in the determination, now relied upon by the respondent in the bundle of documents presented. I indicated that I considered that it was a live issue to be considered as part of the appeal.
26. The appellant gave evidence adopting his witness statement of 14th November 2018.

27. He said that he entered the United Kingdom in December 2008 the sponsor was his cousin. The sponsor's father and his father had been brothers. He said of Daniel Obinna Ihemedu that he was also the cousin and half-brother of the sponsor being born to a different mother albeit to the same father. The family tree was presented.
28. He said that in 2002 the sponsor had left Nigeria for Belgium and before then he was living together with the sponsor at a flat in Lagos Nigeria.
29. In 2007 he joined the sponsor in Belgium and lived with him for almost one year. In 2007 he moved to the United Kingdom and the sponsor eventually moved to the United Kingdom some time in 2007.
30. In 2010 Daniel and himself applied for an EEA residence card on the basis of their relationship with the sponsor. Daniel's application was granted and his was refused.
31. His statement continues that he has continuously lived with the sponsor since 2009 until the present day. Daniel also lived with them from 2009 until 2011 when he moved out to live with his fiancée. He denies any knowledge of the fraud committed by Daniel nor does he know his current whereabouts.
32. In terms of the oral evidence the appellant said the original of his birth certificate was with the Home Office. He produced various affidavits of members of the family as to when they were born in the absence of birth certificates in Nigeria. The sponsor rented the flat for himself and the appellant and from time to time for Daniel. The sponsor paid for the flat rent.
33. He said that when his father died and gone to live with the sponsor rather than his mother who was not able to support him.
34. He was financially supported by the sponsor from Belgium by various remittances sent to him. He joined the sponsor in Belgium.
35. Since coming to the United Kingdom he has resided with the sponsor at three addresses which he set out. Again the sponsor pays the rent and gives some support to him financially.
36. When asked what the sponsor did by way of work he did not seem to be very clear but said he worked with various agencies but was currently working as a fork lift operator storing pallets.
37. When questioned by Mr Walker, the appellant insisted that the Daniel with whom he had made the application, was the Daniel that he had grown up with as his cousin. He did not explain why the Daniel with whom he had made the application should present himself finally in a different identity to the authorities.
38. He was asked when it was that the sponsor obtained his citizenship of Belgium but he did not know.

39. The sponsor Mr John Kenneth Ihemedu also gave evidence. He adopted his statement of 14th November 2018 indicating that as a Belgian citizen he entered the United Kingdom in 2007 and had lived continuously since. He confirmed that the Appellant was his first cousin and that Daniel, the one who had been the subject of his application for a residence card, was his half-brother.
40. Before leaving Nigeria he had been living with the appellant in Lagos Nigeria. In 2002 he left Nigeria for Belgium and in 2007 he was joined by the appellant in Belgium. They lived together for one year before moving to the United Kingdom.
41. He indicated that he knew nothing about the fraud committed by Daniel or that he had any other name or identity.
42. He said in oral evidence that from 2002 to 2004 he lived in Brussels and was studying. From 2004 to 2005 he was in Ghent undertaking study in food sciences and technology. He was then working in Belgium and moved to the UK sometime in 2007 he was unable to recall precisely when. He married in Belgium sometime between 2005 and 2006. When pressed as to the date of the marriage he could not recall but confirmed that he had remained married to his wife in the United Kingdom.
43. He could not recall precisely when it was that he obtained his Belgian nationality.
44. When he first came to the United Kingdom he lived in Huntingdon at [~]. In 2013 moved to Peterborough living at [~] and in 2017 moved to another area of Peterborough to an address [~]. He said he had lived there with the appellant throughout all that time.
45. He was registered for various agencies and did work supplying kitchen equipment and currently was a fork lift driver.
46. He confirmed to Mr Walker that he had grown up with Daniel. I note a copy of a residence card granted in Belgium was shown to him dated 2008 and he agreed that that was correct. When pressed upon when he had moved to the United Kingdom he seemed to remain unclear saying that he may have moved backwards and forth because he got a job in 2008 in Huntingdon.
47. He was asked what the appellant was doing at the time that he left for Belgium in 2002. He indicated that he could not remember whether he was working or studying. He maintained that whilst in Belgium he kept on the flat in Lagos and paid rent for it and sent money to support the appellant. He was asked what the appellant was doing in those years and he indicated that he did not know and was not very clear. He was asked what the appellant had done in Belgium when he arrived and once again he did not seem to know, other than saying that the appellant had done some work.
48. In terms of dependency and or residence with the sponsor prior to coming to the United Kingdom the important document to consider is the determination of Senior

Immigration Judge Storey as it was precisely that question which fell for consideration by that Senior Judge. It seems to me to be unnecessary to repeat all that is set out in that determination which was part of the evidence presented at the hearing. The conclusion of the judge was that the appellant did not discharge the burden upon him of showing either that he was dependent on the sponsor prior to arrival or that he was a member of the sponsor's household prior to arrival. Applying the principle of Devaseelan, it is that decision which the starting point for any consideration of any subsequent evidence.

49. As was noted by the Judge Storey there was no evidence that the sponsor was an EEA national earlier than April 2008, which is the date shown on his Belgian ID card also exhibited in the bundle. The evidence that was given by both appellant and sponsor to the First-tier Tribunal Judge differed on the matter as to when the appellant went to Belgium. The appellant then stating 2008 and the sponsor stating 2007. The appellant only admitted to having arrived in the United Kingdom illegally under cross-examination. The appellant had produced very scant documentary evidence to substantiate his and the sponsor's claim about prior connections, such being an energy bill made out to the sponsor at an address in Lagos in November 2006 and a tenancy agreement at the address in Lagos covering 28th October 1999 to 29th October 2001 naming the appellant and sponsor as co-tenants. There was also a document in French identifying the appellant and sponsor's co-tenants at an address in Belgium in January 2007.
50. It was noted by Judge Storey that the sponsor in his evidence referred to supporting the appellant financially between 2002 and 2005 from his father's money. No documentation had been adduced to show that. The tenancy documents produced by the appellant did not show that the sponsor was the head of the household. Documents relating to the sponsor's financial means during the period for 2002 to 2005 in Nigeria and 2007 and 2008 in Belgium were non-existent. Thus it was that the appeal was dismissed on the basis of those conclusions.
51. I find nothing in the evidence, as currently presented, to engage or challenge those particular findings. Little further evidence, whether financial or in terms of property, has been presented to support the contention of either of financial support and dependency or residence in the sponsor's household over the period before the appellant came to the United Kingdom. The evidence as presented by both appellant and sponsor was exceedingly vague. According to the sponsor he has given considerable financial assistance to the appellant in paying for the flat in which they both lived and subsequently keeping on that flat when he was in Belgium for many years he mainly supporting the appellant. I find it, therefore, to lack credibility that when the appellant is aged 24, at a time that the sponsor is about to leave for Belgium, that he cannot even remember what the appellant was doing with himself in terms of work or study nor that he seemed to have little idea as to what the appellant was doing over the period 2002 to 2007.

52. The claim to be financially supporting the appellant is in contradiction to the evidence that had been previously presented, as noted by Judge Storey, of a much more limited period 2002 to 2005 as rendering financial support.
53. I find as a matter of common sense that if the sponsor had been so closely associated with the appellant as claimed, he would have been better informed as to what the appellant was doing. There has been no financial documentation to support the dependency aspect or any further evidence as to residence.
54. Whether or not the appellant has ever lived with the sponsor in Belgium is also a matter of inconsistency and discrepancy. The sponsor said that the appellant arrived in 2007. The appellant indicated previously that he arrived in 2008. The sponsor in his evidence before me indicated that he came to the United Kingdom in 2007 as did the appellant. He cannot remember when he had come in that year nor when the appellant had come or indeed when either had moved to the United Kingdom. The statement of the appellant itself contains a significant discrepancy. At paragraph 2 the appellant says that he entered the United Kingdom in December 2008 whereas in paragraph 6 that he moved to the United Kingdom in 2007 and that the sponsor moved to the United Kingdom in 2007 but he could not remember at which month.
55. The Belgian identity card relating to the sponsor valid from 16th April 2008 to 16th April 2013.
56. The evidence of the sponsor was that the appellant had come to Belgium as a visitor. If I find that the discrepancies fundamentally undermine the credibility of the account as presented by the sponsor and appellant I find, therefore, that on the balance of probabilities the appellant has not resided at any material stage prior to coming to the United Kingdom in the household of the sponsor nor that he was at any stage prior to or approximate to coming to the United Kingdom in anyway dependent upon the sponsor.
57. In those terms the appellant has failed to establish any dependency or residence prior to coming to the United Kingdom. No evidence that has been adduced has in any sense challenged the findings of Judge Storey, but rather serves simply to re-enforce them. On those findings the appeal will fail.
58. However I do consider the evidence as to residence in the United Kingdom. Again I find it to be undermining of credibility that, although the appellant claims to have resided with the sponsor for the number of years, he was particularly vague as to what sort of work the sponsor conducted. There is a tenancy agreement that is relied upon at page 9 of the appellant's bundle relating to [~] in Peterborough dated 3rd January 2013 as to show the tenants in that property as being the sponsor and the appellant. I place little weight upon that document as I note that although the sponsor said he was married there was no indication of his wife as a tenant in that property either.
59. I have little doubt from the documents provided that the appellant resided at the various addresses which have been given. Significantly the majority of the

documents presented relate to the appellant living at those addresses various bills and statements addressed to him rather than the sponsor.

60. The aspect of finance has already been considered. I note the appellant's bank statements that have been adduced showing from time to time payments from the sponsor into such accounts in the sums of £100 or less. The question of course arises why, if they were living at the same household it was necessary, to make such transfers through the bank.
61. For the sake of fairness, however, it is right to note that in the bundle as presented there are other letters, such as from the Halifax Building Society addressed to the sponsor at, certainly, [Peterborough]. They are fairly infrequent. The fact that a letter is addressed to a particular person at a particular address does not, of itself, necessarily denote that that person lives in that property as his primary residence or provides any indication as to who is the head of the household so far as residence at those addresses is concerned. It is also relevant, in terms of the overall assessment of the claim throughout and particularly the assessment of the evidence given as to residence in the United Kingdom or before, to bear in mind the fraud committed by Daniel and admitted by him as set out in the various documents. That the sponsor and appellant were unaware of the fraud cannot in common sense be accepted. The evidence, as adduced by the respondent, is that the very person who is identified as Daniel in the application made by the sponsor on 8th March 2010 with the photograph attached, has been identified by the same photograph and has admitted that he is not that person as claimed.
62. There may well be a brother-in-law by that name as shown in the family tree. If the person who is described as Daniel living with the sponsor and the appellant is in fact not Daniel it defies common sense that neither would know that. As both have agreed they have long association with Daniel the half-brother or cousin and it would be immediately apparent that the person using that name is not him.
63. It would have been entirely possible for the sponsor to come to the United Kingdom in the exercise of his treaty rights as a Belgian national and to have made an application for the appellant to join him. That was not done. The appellant for whatever reason entered the United Kingdom illegally and sought to associate himself in the claim that is made. Significantly it was admitted by Daniel that the purpose of taking that identity was in order to secure entry clearance. I have no doubt, having looked at the evidence, that the sponsor was party to that deception. I find that the appellant was well aware that such a deception was being practised. He would have known straightaway that the person who purported to be half-brother of the sponsor in the application, to which he was also party, was not in fact that person. I find therefore that there has been a contrived presentation of identity of Daniel to promote the obtaining of a residence card for both Daniel and for the appellant.
64. As I have indicated this finding is not determinative of the appeal, as I have already found that Regulation 8 of the ECHR has not been satisfied as to residence or

dependence prior to entry to the United Kingdom on the evidence as presented. However the evidence as to the fraud perpetrated upon the authorities is such that in any event would fundamentally undermine the credibility of the sponsor and of the appellant.

65. Dr Onipede submits on behalf of both, that it would be unfair to take such a view given that neither have been questioned or charged with the matter. I take that comment into account. It is perhaps surprising that the authorities did not take action to revoke the residence card of the appellant earlier but it has been made abundantly clear in the decision under challenge the basis upon which refusal has been made. Such has provided ample time for the appellant to obtain any further evidence relating to the matter that would challenge it.
66. Given the attempt to deceive the authorities I can place little weight upon the documents as presented, particularly those of the sponsor in this case.
67. Dr Onipede produces a claim for costs for the hearing in light of the comments made by Judge Reed at paragraph 40 of her decision as to whether the respondent should bear the costs of the hearing, which may not have been necessary had the material been served timeously. The respondent was put on notice that that was a matter to be determined at the next hearing. In the event the applicant's summary of costs was only served on the morning of the hearing and consequently Mr Walker has not had the opportunity of responding to it. I shall allow 21 days for any response which the respondent wishes to make on that issue before determining what costs if any I should make.

Notice of Decision

The appeal in respect of the EEA Regulations is dismissed. The issue of costs shall be reserved.

No anonymity direction is made.

Signed



Date 30 Nov 2018

Upper Tribunal Judge King TD