Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/07496/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9 December 2019	**On 17 December 2019**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

MR LUKE KENECHUKWU ILECHUKWU

Appellant

And

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mr D Olawanle, Solicitor, Del & Co Solicitors
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

BACKGROUND

1. The Appellant appeals against a decision of First-tier Tribunal Judge Rose promulgated on 18 July 2019 ("the Decision") dismissing the Appellant's appeal against the Respondent's decision dated 24 October 2018 refusing his application for a residence card as the family member (dependent adult child) of Ms Bella [G] who is an EEA (Irish) national exercising Treaty rights in the UK ("the Sponsor"). The Respondent refused the application on the basis that he

was not satisfied that the Appellant is dependent on the Sponsor. The Appellant is aged twenty-three years and is resident in Nigeria with his aunt. He has been so resident since he was aged fourteen years.

2. The Judge accepted the documentary and witness evidence that the Sponsor sends regular remittances to the Appellant. However, she did not accept that the evidence showed that the Appellant is dependent on the Sponsor. She therefore dismissed the appeal.

3. The Appellant appeals on the basis that the Judge's conclusion is irrational when read with her findings about what the evidence shows. The Appellant points out that the amount which the Judge found that the Sponsor remits to Nigeria is about three times the minimum wage in that country.

4. Permission to appeal was refused by First-tier Tribunal Judge Povey on 30 September 2019 in the following terms so far as relevant:

> "… 2.The grounds assert that the Judge erred in law in determining that the Appellant was not dependent upon his mother (per Regulation 7 (1)(b) of the EEA Regulations 2016).
>
> 3. The Appellant lives in Nigeria with his aunt. He was 23 at the date of the determination. His mother is an Irish citizen. He appealed against the Respondent's refusal of his application for entry clearance. The Judge found that the mother sent her son money transfers "*sufficient to fund* [his] *school fees and pay for his upkeep, living with his maternal aunt…*" (at [16]). However the Judge found that the Appellant's mother did not fund his "*accommodation and all ancillary expenses*" because "*she was not needed to*" (at [16]). The Judge directed herself correctly on the law (namely, whether the Appellant needed the material support of his mother, as an EU citizen, in order to meet his essential needs in Nigeria) but found that the Appellant had failed to establish such dependency on the evidence. It was a finding open to the Judge. The mother's witness statement (which was accepted by the Judge at [16]) only referred to "*school fees and upkeep*" as the purpose of the funds she provided (at Paragraphs 14-17 and 19). The grounds did not claim that there was more detailed evidence before the Judge of how such "*upkeep*" manifested itself. The Judge was entitled to conclude that there was insufficient evidence that the mother's funds were needed to meet the Appellant's basic needs. Additionally, she was implicitly entitled to find that schooling costs for a 23-year-old were not essential needs, as envisaged by the EEA Regulations.
>
> 4. For those reasons, the grounds disclosed no arguable errors of law and permission to appeal is refused."

5. The Appellant renewed his application to this Tribunal. Permission to appeal was granted by Upper Tribunal Judge Sheridan on 29 October 2019 as follows:

> "... 2. The issue before the First-tier Tribunal was whether the appellant was dependent on his mother. Given the finding at paragraph 16 that the appellant's mother provided the appellant with sufficient funds to pay for his school fees and upkeep, the judge arguably fell into error by finding

dependency under regulation 7(b)(ii) of the Immigration (EEA) Regulations 2016 had not been established."

6. The Respondent opposes the Appellant's appeal. He submits that Judge Rose directed herself appropriately. In particular, the Respondent's Rule 24 statement says the following:

> "… 3.At paragraph 16 of the determination the FTTJ finds that the Appellant's Aunt in Nigeria provides for his basic needs, ie accommodation, bills etc. The Judge was entitled to find on the evidence submitted that the money provided by his mother in the United Kingdom was not required to meet the Appellant's essential needs in Nigeria in line with **Lim v The Entry Clearance Officer (Manila) [2013] EWCA Civ 1383**"

7. The appeal comes before me to determine whether there is a material error of law in the Decision and if so either to re-make the decision or to remit to the First-tier Tribunal to do so.

DISCUSSION AND CONCLUSIONS

8. The Judge's findings on the evidence and central issue of dependency appear at [14] to [16] of the Decision as follows:

> "14. I accept the evidence of the appellant, as summarised in his witness statement, and the evidence of Mrs [G], namely that Mrs [G] regularly sends small amounts of money (i.e. £50) to the appellant via money transfer and periodically sends much larger sums (i.e. £500) on an occasional basis, for example via Henry Mordi or her sister Rosemary Williams, both of whom gave evidence to me to that effect.
>
> 15. I have had the benefit of money transfer receipts and of annotated copies of Mrs [G]'s TSB bank account statements, which accord with that evidence. I attach significant weight to the money transfer receipts, which cover a period of approximately 6 months. I considered with care the annotations on the bank account statements, which show fluctuating amounts being withdrawn, but where the annotations are at odds with the money transfer receipts – i.e. showing much greater amounts being withdrawn or multiple withdrawals in a particular month – I prefer the evidence of the money transfer receipts. Of course, I accept that there have been occasions when Mrs [G] has arranged, via relatives or friends, to have larger sums taken to Nigeria. However, bearing in mind Mrs [G]'s income from her work as a care worker, I find that she has provided the appellant with no more than approximately £1,500 in any given year.
>
> 16. I accept that that has been sufficient to fund the appellant's school fees and pay for his upkeep, living with his maternal Aunt, as described in Mrs [G]'s own witness statement. It does not, however, mean that he is dependent upon his mother. At best, I find that Mrs [G] has paid for his upkeep but has not – because she has not needed to – funded his living in Nigeria, i.e. accommodation and all ancillary expenses, such as bills, taxes …etc. Consequently, I do not find that the appellant has proven to the required standard that he is a dependant of his mother."

9. The Judge thereafter correctly self-directed herself in accordance with the judgment in Lim v The Entry Clearance Officer (Manila) [2013] EWCA Civ 1383 ("Lim") ([18]). She also noted that the fact that the Appellant was not self-sufficient as was the appellant in Lim did not matter; the issue remained whether he was dependent in that sense on the Sponsor or not ([17]).

10. Mr Olawanle's submission was, in essence, that, having accepted the Appellant's evidence at [14] to [16] of the Decision, the Judge's finding that the Appellant was not dependent on the Sponsor at [16] was irrational. That is the point which found favour with Judge Sheridan when he granted permission. Of course, irrationality is a high test. The Appellant must show that the finding made by the Judge as regards dependency is one which was not open to her on the evidence.

11. I turn first to the evidence on which the Judge's findings were based. I had before me a bundle of documents which were before Judge Rose to which I refer hereafter as [AB/xx].

12. An issue arose in the course of the hearing as to whether Judge Rose had any statement from the aunt in Nigeria with whom the Appellant currently lives. I had initially understood that this was Ms Williams whose statement appears at [AB/J-K]). However, that is apparently an aunt who lives in the UK. The aunt with whom the Appellant resides is Mrs Mary Fufeyn. I was told by Mr Olanwale that her signed statement was handed in at the First-tier Tribunal. Notwithstanding that assertion, there was no copy on either the Tribunal's file or the Home Office's file. Nor was Mr Olanwale able to produce one from the papers which he had with him. I therefore allowed him a short adjournment to obtain the file copy. That statement is dated 11 May 2019 and was therefore available at the time of the First-tier Tribunal. Mr Olanwale said that he had given three copies to the Tribunal clerk at the hearing. He did not think that Judge Rose had "probed" that aspect of the evidence and so it was not dealt with. That does not of course explain why it was not on either the Tribunal file or Home Office file. Based on Mr Olanwale's assertion that the statement was handed in, I am prepared to deal with the case on the assumption that it was before Judge Rose even though not mentioned in the Decision. Given the absence of the statement from the Tribunal and Home Office files, however, the position is far from clear. I also note that the Appellant has not taken any point in the grounds about a failure of the Judge to deal with this statement. For reasons which follow, the statement does not advance the Appellant's case materially in any event.

13. Dealing first with the statements in the bundle, the Appellant's statement dated 11 May 2019 (unsigned) ([AB/D-F] records that he has completed his secondary education and is now due to go to university ([8]). As to money received from his mother, he says this:

> "11. My mother has always provided for my upkeep while I was with her in Ireland and since I have been in Nigeria. She is a single mother and responsible for our upbringing.
>
> 12. She sends money regularly to me through our family and friends who travel to Nigeria from the UK. She is always on the lookout for our family who are making trips to Nigeria to help her take money to me. This is because it is more convenient and cheaper for her to send money to me that way. They also get more when the foreign currency is exchanged locally than when it is sent through money agencies. The family friends also use that opportunity to talk to me, see how well I am doing and to take me out for shopping and to eat. They definitely knew I missed my mother and sibling."

The remainder of the statement details the money sent and family circumstances.

14. The Sponsor's statement also dated 11 May 2019 and unsigned at [AB/G-] is in very similar form. She says the following about financial support:

> "9. I have always paid my son's school fees and I have been involved in every aspect of his day to day life.
>
> …
>
> 11. I have always provided for my son's upkeep while he was with me in Ireland and since he has been in Nigeria. I am a single Mother and responsible for my children.
>
> 12. I send money regularly to my son through my family and friends who travel to Nigeria from the UK. I am always on the lookout for my family who are making trips to Nigeria to help me take money to my son to save a little on commission. This is because it is more convenient and cheaper for me to send money to him this way."

Again, the statement goes on to detail payments made and family circumstances.

15. I do not need to deal in any detail with the statements of the Appellant's aunt in the UK or the family friend, Mr Mordi. I note that the Appellant's aunt in the UK says that she gives the Appellant money when she visits Nigeria, takes him out and buys "many things for him". Mr Mordi makes the point in very similar terms to the Appellant and Sponsor that the Sponsor pays the Appellant's school fees and has provided for the Appellant's upkeep. It is not clear how he would know but that evidence from the Appellant and Sponsor was accepted by the Judge in any event.

16. Finally, I turn to Ms Fufeyn's statement which, unlike the others in the bundle, is signed. Ms Fufeyn is of course well placed to comment on what financial support is provided by the Sponsor for the Appellant. She is also well placed to deal with any financial arrangements between her and the Sponsor as to the amounts which are needed to provide for the Appellant. Her statement says this about the Appellant's living arrangements and the Sponsor's support:

> "5. The Appellant has been living with me under the same roof since he came to Nigeria.
>
> 6. He has been supported financially and in every way possible by his mother who always sends money and food items through friends and family members when they come to Nigeria…
>
> 7. Of course when I cook [Luke] eats part of it and I support him in my own little way but his school fees and major maintenance is provided by her [sic] mother as I suffer from very poor health and I had to take early retirement based on ill health.
>
> …
>
> 11. I may not list all the people that brought money to me from the Appellant's mother over the years as I did not write them down but I confirm in all honesty that Bella has always supported Luke more so when he [sic] is the mother and the father. Luke has never had any input into his life by his father."

17. The difficulty with the Appellant's grounds and Mr Olanwale's submissions is the failure to differentiate between financial remittances and a need to show that the Appellant is dependent on the Sponsor for "his basic needs". As Judge Rose points out, it does not matter that he may be dependent on another person, namely Ms Fufeyn, for those needs. As such, Mr Olanwale's attempt to distinguish Lim on the facts does not assist. As appears from the CJEU and other authorities cited in Lim, the Appellant must establish on the evidence "the existence of a situation of real dependence" whereby the EEA national is shown to provide "material support". The position is succinctly made by the Court of Appeal at [25] of the judgment in Lim:

> "In my judgment, this makes it unambiguously clear that it is not enough simply to show that financial support is in fact provided by the EU citizen to the family member. There are numerous references in these paragraphs which are only consistent with a notion that the family member must need this support from his or her relatives in order to meet his or her basic needs. For example, paragraph 20 refers to the existence of 'a situation of real dependence' which must be established; paragraph 22 is even more striking and refers to the need for material support in the state of origin of the descendant ' who is not in a position to support himself'; and paragraph 24 requires that financial support must be 'necessary' for the putative dependant to support himself in the state of origin. It is also pertinent to note that in paragraph 22, in the context of considering the Citizens Directive, the court specifically approved the test adopted in Jia at paragraph 37, namely that:
>
> > 'The need for material support must exist in the State of origin of those relatives or the State whence they came at the time when they apply to join the Community national.'"
>
> [my emphasis]

18. Mr Olanwale submitted that on the evidence here, the test is met. However, the evidence from the witnesses is that Ms Fufeyn has accommodated the

Appellant for about nine years, from childhood into adulthood. She herself says that when she cooks, the Appellant eats part of it. She does not say how often that is or what happens when she does not cook. She does not say that she is paid any set amount by the Sponsor to cover the Appellant's board and lodging. Indeed, the inference from her statement is that she receives irregular payments when friends and family visit (although Judge Rose did accept that there were some regular money transfers being made based on what the Appellant and the Sponsor said was the position). The evidence does not show what happens to the money sent to Nigeria, whether that goes to the Appellant for incidental expenses or whether he gives some or all of it to his aunt to feed and accommodate him. Mr Olanwale did seek to suggest at one point that the reference to "food items" at [6] of Ms Fufeyn's statement meant that the Sponsor was providing food to the Appellant. That point has to be read in context. Mr Olanwale agreed that what is there shown is that friends and family members take food items out to Nigeria when they visit; most probably items of food which the Appellant grew to like from his childhood spent in Ireland. It cannot sensibly be suggested that this evidence shows that the Sponsor regularly provides food to the Appellant.

19. There is evidence of receipts for school fees during the academic sessions 2014-2017 at [AB/41-47]. However, three points can be made about those. First, none of them are addressed to the Sponsor (although I accept that the Judge found that the Sponsor had paid those fees based on her and the Appellant's evidence). Second, it is not clear to me that school fees form part of "basic needs". They might of course whilst a child is attending primary and even secondary education. However, this Appellant is now aged twenty-three years. That then brings me on to the third and most important point which is that they are historic. They do not reflect the current position which is that the Appellant has completed his secondary education. There is no evidence that he is currently in education for which the Sponsor pays. As the Court of Appeal noted in Lim, the point in time at which dependency must be assessed is when the application to join the EEA national is made or, more probably in the case of an appeal, at the date of the hearing. In either event, there is nothing to show that the Appellant was dependent on the Sponsor for payment for school fees at that point in time.

20. Whilst I accept therefore that "upkeep" denotes some contribution to living needs, on the evidence here, the Judge was entitled to find that dependency for those basic needs on the Sponsor was not established. As I have already pointed out, the issue for me is whether there is an error of law in the Decision which requires me to consider whether the Judge was rationally entitled to reach the conclusion which she did on the evidence. Other Judges might have reached a contrary view (although in my opinion, the evidence of dependency is thin), but that is not the issue which I have to decide. I also note that it is of course open to the Appellant to make a further application supported by further and better evidence as to the living arrangements in Nigeria and who

pays for the Appellant's living needs. However, for the foregoing reasons, the Appellant has not shown that the Decision contains any error of law.

Conclusion

21. For the above reasons, the Appellant's grounds do not establish any material error of law. I therefore uphold the Decision.

DECISION

I am satisfied that the First-tier Tribunal Decision of Judge Rose promulgated on 18 July 2019 does not contain any material error of law. I therefore uphold the Decision.

Signed Dated: 12 December 2019
Upper Tribunal Judge Smith