



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: IA/38604/2013

**THE IMMIGRATION ACTS**

**Heard at Field House**

**Determination**

**Promulgated**

**On 18<sup>th</sup> June 2014**

**On 25<sup>th</sup> June 2014**

**Before  
DEPUTY UPPER TRIBUNAL JUDGE MCCLURE**

**Between**

**MISS ROSEMARY MBEERE NJOGU  
(NO ANONYMITY DIRECTION MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr Lourdes, Counsel, instructed by Edward Marshall Solicitors

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

**DETERMINATION AND REASONS**

1. The Appellant, Miss Rosemary Mbeere Njogu date of birth 4<sup>th</sup> November 1973 is a citizen of Kenya. This is an appeal by the Appellant against a decision by First-tier Tribunal Judge Burnett promulgated on 7<sup>th</sup> April 2014.
2. I have considered whether any of the parties to the present proceedings requires the protection of an anonymity direction. Taking into account all the circumstances I do not consider it necessary to make an anonymity direction.
3. The Appellant on 9<sup>th</sup> May 2013 applied for a residence card as confirmation of a right to reside in the United Kingdom as an extended family member of an EEA qualified person exercising treaty rights in the United Kingdom. It is the Appellant's case that she is an extended family member of a Mr Visaho. It is not challenged that Mr Visaho is an EEA national from

Germany exercising treaty rights in the United Kingdom. Mr Visaho is in employment.

4. The Appellant first came to the United Kingdom on 2<sup>nd</sup> November 2004 on a visa granting entry to the United Kingdom as a Student Nurse. At various stages that leave was extended. In October 2006 the Appellant sought further leave on the basis of being a Student Nurse. That application was granted but there was no further application after that date and the Appellant's leave to be in the United Kingdom came to an end with the passage of time. The Appellant then applied on 13<sup>th</sup> September 2011 for a residence card. That application was rejected.
5. The Appellant further applied on 9<sup>th</sup> May 2013 for a residence card and by decision served on 11<sup>th</sup> July 2013 that application was refused. It is against that decision that the Appellant now appeals.
6. In the main the facts are not in dispute. It is accepted that Mr Visaho is a German national and is working. It is also accepted that the Appellant is now resident with Mr Visaho in the United Kingdom. Thus it is accepted that she is currently a member of the household and dependent upon Mr Visaho as a family member.
7. The issue in the appeal is whether or not the Appellant was dependent upon Mr Visaho when she was living in Nigeria and at a time when he was an EEA national.
8. The evidence was that Mr Visaho became a German national in 2002. The issue therefore before the Tribunal was whether or not for the period of 2002 to November 2004, the date when the Appellant came to the UK, the Appellant had been dependent upon Mr Visaho.

### **Legislative Framework**

9. Directive 2004/38/EC sets down the conditions governing the exercise of rights of free movement and residence in the territory of a Member State of the EU for citizens and their family members. Article 2 of the Directive provides for family members and it is accepted that the Appellant does not qualify under that criteria. It is asserted however that the Appellant falls for consideration under Article 3.
10. Article 3 provides:-
  3. (1) 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.
  - (2) Without prejudice to any right to free movement and residence the person 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 . . .

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. Thus by Article (3) the obligations set out within the Directive are extended to other family members who meet the conditions stated.

12. Those obligations are set out in Recital 6 of the Directive which provides:-

- (6) In order to maintain the unity of the family in a broader sense and without prejudice to the prohibition of discrimination on the grounds of nationality, the situation of those persons 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 and residence should be granted to such persons, taking into consideration their relationship with the Union citizen or any other circumstance, such as their financial or physical dependence on the Union citizen.

13. The issue in the present appeal is whether or not the Appellant falls for consideration as other family members. Assistance is given in understanding that term within the Immigration (European Economic Area) Regulations 2006. Regulation 8 which uses the term extended family member rather than other family member provides as follows:-

- 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 of this paragraph if the person is a relative of an EEA national, his spouse or his 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 or wishes to join him there; or

- (c) the person satisfied the condition in (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.

14. As a final matter I note that during the course of making submissions the representative for the Appellant sought to assert that Regulation 17 specifically Regulation 17(4) and (5) created an independent right to have their cases considered as extended family members. Regulation 17 provides as follows:-

#### Issue of residence card

- 17. (4) The Secretary of State must issue a residence card to an extended family member not falling within Regulation 7(3) who is not an EEA national on application if:
  - (a) the relevant EEA national in relation to the extended family member is a qualified person or an EEA national with a permanent right of residence in Regulation 15; and
  - (b) in all the circumstances it appears to the Secretary of State appropriate to issue the residence card.
- (5) Where the Secretary of State receives an application under paragraph (4) he shall undertake an extensive examination of the personal circumstances of the applicant and if he refuses the application shall give reasons justifying the refusal unless this is contrary to the interests of national security. . .

### **The Appellant's Appeal**

- 15. In the submissions the Appellant seeks to rely upon the case of SSHD v Rahman [2012] (EUECJ.C.83/11), Aladeselu v SSHD [2013} EWCA Civ 14 and the case of Dauhoo [2012] UKUT 79 (IAC).
- 16. Within the Grounds of Appeal no challenge has been made to the findings of fact made by the judge. At the commencement of the hearing I pointed out to the Appellant's representative that there was a specific finding by the judge at paragraph 50 that the Appellant was not dependent upon the Union citizen before she came to the United Kingdom. The Appellant's representative at that stage sought to challenge that finding of fact. He sought to rely upon a number of matters. He asserted that there was evidence from the Appellant and the Sponsor which confirmed the dependency and there was supporting evidence by way of an affidavit from a Mr Mungu. There was also a series of receipts showing money transfers from London to the Appellant allegedly in Kenya.
- 17. The judge has carefully considered all of the evidence presented. He makes specific comment within paragraph 46 about the money transfer receipts. He points out certain discrepancies. He was not satisfied in the circumstances that he could place any reliance upon the same.

18. Other than that the judge considered the evidence otherwise presented as to the alleged support given by the Sponsor Mr Visaho to his cousin the Appellant. He found it in the circumstances vague and lacking in real detail. There was no evidence as to the frequency of payments and when and how much was being sent was also vague and uncertain.
19. The judge thereafter, in all the personal circumstances in which the Appellant had been living in Kenya, had noted that she had been living with her parents who had been paying all the household bills before the Appellant came to the United Kingdom. He noted that the Appellant otherwise for a time had been working and that she had been using that money solely for herself. Given the lack of any substantial evidence to support the contention that Mr Visaho had on a regular basis been supporting the Appellant the judge concluded that he was not satisfied that the Appellant had been dependent upon Mr Visaho at the relevant time. Those were clear findings of fact made by the judge on the evidence that was before him. The judge has given valid reasons for concluding that on the basis of the evidence the Appellant was not dependent upon Mr Visaho before she came to the United Kingdom.
20. The Appellant has sought to rely upon the case of Dauhoo(EEA Regulations -reg 8(2)) Mauritius [2012] UKUT 79(IAC). That case makes plain that in order to succeed under the Directive and Regulations the Appellant has to prove that she was either a member of the household of the Sponsor prior to her coming to the United Kingdom or she was dependent upon the Sponsor prior to her coming to the United Kingdom.
21. It was the Appellant's case that she was dependent upon the Sponsor not that she was a member of the household. The judge has clearly found that she was not dependent. Accordingly the Appellant does not meet the requirements of the Directive and does not meet the requirements of Regulation 8 to be considered as an extended family member. The Appellant therefore is not to be treated as "other family member".
22. In the light of that there was no obligation on the Secretary of State to go on to consider the issue of a residence card. That was not a matter of a discretion but rather that the Appellant did not meet the primary requirement that she be an extended family member or other family member.
23. The Appellant's representative has sought to assert that Regulation 17(4) and (5) creates some independent right to be considered apart from Regulation 8. That is clearly not the case. Regulation 17 at the very beginning refers to the requirement that an individual be an extended family member in order for consideration to be given whether or not a residence card should be given. It is not a case that there is a free standing right to have a case considered merely by reason of some relationship but rather that a person that is an extended family member is entitled to have the process within Regulation 17(4) and (5) undertaken by the Secretary of State. However a pre-condition of the requirement of the

Secretary of State to undertake that process is that the person be an extended family member.

24. The judge has given valid reasons for making a finding that the Appellant is not an extended family member or other family member. On that basis alone the application for a residence card had to be dismissed.
25. The Appellant's representative confirmed that the Appellant did not otherwise have a partner or children within the United Kingdom. She was living with her cousin. However it was accepted that she did not meet the requirements of Appendix FM. No other serious aspect of private life has been advanced other than the fact that the Appellant has been in the United Kingdom since 2004 albeit apparently from some time after 2006 unlawfully. No aspect of private life engaging Article 8 has been advanced.
26. The Appellant could not succeed under the Immigration Rules in any event.
27. As to whether Article 8 is engaged consideration has to be given to the cases of Gulshan 2013 UKUT 640, Nagre [2013] EWHC 720 and Haleemudeen [2014] EWCA Civ 558. The Appellant has to show that there are factors within her case which warrant consideration of Article 8 outside the rules.
28. The Appellant has advanced no significant aspect of family or private life such as to engage Article 8 and there were no circumstances warranting consideration of this case outside Article 8 in any event.
29. Thus for the reasons set out the judge has made findings of fact based on the evidence. He has considered the evidence and has highlighted those parts of the evidence to support his conclusion. He has given adequate reasons for coming to the conclusions that he did. There is no material error of law within the determination.

### **Decision**

30. The appeal by the Appellant against the decision of First-tier Tribunal Judge Burnett is therefore dismissed. The decision to dismiss the appeal stands.

Signed

Date 24.06.2014

Deputy Upper Tribunal Judge McClure

