



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

Appeal Numbers: OA/20550/2013
OA/20551/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 5th March 2015**

**Decision & Reasons Promulgated
On 20th March 2015**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MISS EKUNDAYO MARILYN OROBATOR
MASTER OSEENAGA GREAT EBHONU
(ANONYMITY DIRECTION NOT MADE)**

Respondents

Representation:

For the Appellant: Miss A Holmes, Senior Presenting Officer

For the Respondents: Mr S Unigwe, Counsel instructed on behalf of S L A Solicitors

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of the First-tier Tribunal (Judge Metzger) who, in a determination promulgated on 19th November 2014 allowed the appeals against the Respondent's decision to refuse to grant them entry clearance as the daughter and grandson of an EEA national exercising treaty

rights and therefore qualifying as family members of an EEA national under Regulation 7 of the EEA Regulations 2006.

2. Whilst this is an appeal brought by the Secretary of State, I intend to refer to the parties as they were before the First-tier Tribunal.
3. On 17th October 2013 the Appellants, who are citizens of Nigeria, sought entry clearance as the family members of an EEA national but were refused in notices of immigration decision dated 1st November 2013. In respect of the First Appellant it was noted that she had applied for admission under the EEA Regulations as a direct descendant of the Sponsor, her mother, but the documentation submitted did not satisfactorily evidence that she was wholly or mainly financially dependent on the Sponsor. In the alternative, if she was, that was a dependency of necessity rather than choice and it was noted that she was employed as a research assistant and therefore the Entry Clearance Officer was not satisfied that she needed the financial support of the Sponsor to meet the essential needs. Thus he was not satisfied she met the Regulations to qualify as a family member of an EEA national in accordance with Regulation 7 of the EEA Regulations 2006. A second reason was given also that on the basis that the Appellant had not provided satisfactory evidence that she and the Sponsor were related as claimed. In respect of the Second Appellant it was noted that he had failed to provide satisfactory evidence that he was the grandchild of an EEA national and thus his application was also refused.
4. The Appellants issued grounds of appeal leading to the hearing before the First-tier Tribunal (Judge Metzger) on 3rd November 2014. He recorded at [2] that the issues had been narrowed as the second ground raised for refusing the First Appellant's application on the basis of the failure to demonstrate she was related to the Sponsor and that was the main ground also in respect of the Second Appellant, had been dealt with by the provision of DNA test results. Thus the judge found that the relationship between the Sponsor and the two Appellants had been established and the sole issue requiring determination was the issue of financial support.
5. The judge had the opportunity of considering and hearing the evidence of the Sponsor which he recorded at paragraphs [3] and [6]. It is plain from reading the determination that the Secretary of State was not represented during that hearing and no Presenting Officer was present to conduct the appeal.
6. The judge set out the findings at paragraphs 8 to 9 of the determination. He concluded at [9] that in respect of the financial support and applying the Upper Tribunal authorities of **Lim [2013] UKUT 00437** at paragraphs 21 and 22 and **Reyes [2013] UKUT 00314** at paragraph 19 that dependency is a matter of choice on the basis that there is no abuse of rights and that he therefore did not follow the basis of the refusal which made reference to the financial dependency upon the Sponsor being "a dependency of necessity rather than choice". The judge found that to be inconsistent with the case law but in any event found that the Sponsor had:

"Materially contributed to the financial support of the Appellants and that the Appellants would not be able to manage without the assistance of the Sponsor. In the circumstances, I find that the Sponsor has insured that the Appellants' essential needs in Nigeria are met and in all the circumstances, I find the Appellants have established

to the relevant standard that they are family members of an EEA national exercising rights of free movement under the Treaty of Rome in the United Kingdom bearing in mind the clear evidence of the Sponsor's nationality, her earnings, and evidence of employment and evidence of money transactions sent to assist the Appellants."

7. Therefore he allowed the appeals under the Regulations.
8. The Secretary of State sought permission to appeal and permission was granted on 9th January 2015 by Judge Landes.
9. Before the Tribunal Miss Holmes relied upon the grounds submitting that the judge failed to have sufficient regard to the issue of dependency. She made reference to the Entry Clearance Manager's review and that the money that the First Appellant had received by way of a salary was a large amount in Nigeria and that the Appellants were required to show with evidence that money was being provided for their essential needs. This was not clear in the determination. By reference to the decision of **Reyes** (as previously cited) it was submitted that the test of dependency is a factual test and that the question of dependency should not be reduced to a bare calculation of financial dependency but should be construed to involve a holistic examination of a number of factors to establish whether the dependence is genuine (see paragraph 19). She also made reference to paragraph 21 of that decision in which it was stated that the assessment of dependency was to consider whether it was to meet their essential living needs. She submitted that this had not been done in the determination and it was not known whether the sums of money that were sent were for essential living needs or not. Consequently she submitted the grounds were made out and the determination should be set aside.
10. Mr Unigwe on behalf of the Appellants observed that the Secretary of State had failed to send a representative to the hearing and therefore they had chosen not to cross-examine the Sponsor who had provided evidence before the judge and it was plain that the judge accepted that evidence. He referred the Tribunal to the decision of **Lim (EEA - dependency) [2013] UKUT 00437** and that the EEA Regulations did not define the notion or concept of dependency and that it was dependent upon the judicial interpretation of that and in this case the judge found that the Appellants had satisfied the issue of dependency. He stated that the fact that the First Appellant had employment did not preclude the Appellant being in receipt of other money that was provided for her essential needs. He made reference to paragraph 21 of **Lim** where Lord Justice Goldring in **Pedro** stated that whether someone had the status of a dependent family member was a question of fact and that such a status was "characterised by the material support for that family member provided by the union national who has exercised his free right of movement. Why the family member is dependent does not matter." He reminded the Tribunal of paragraph 22 of **Lim** that the only qualification that the Court of Justice has ever made to this principle is that there must not be an abuse of rights and thus the jurisprudence clearly allowed for a dependency of choice. At paragraph 24 of **Lim**, it stated that "for dependency to arise it is not necessary that a person be wholly or even mainly dependent. If a person requires material support for essential needs in part, that is sufficient."
11. Therefore Mr Unigwe, submitted that it was open to the judge to reach the conclusion on the evidence before him based on the witness statement which had

been adopted as her evidence that she had sent money for the upkeep of both Appellants (see paragraph 5). It was not necessary for the judge to set out the costs for rent and food but the judge had relied properly upon the evidence that was before him which he accepted fully that she did not earn enough money to pay for their essential needs including school fees and other needs set out in the witness statement and that the financial support was necessary. Paragraph 9 of the judge's determination set out his findings that the Appellants were not able to manage without that financial assistance. The documents provided evidence of those money transfers. Thus there was no error of law.

12. I reserved my determination.
13. In the light of the DNA evidence that had been provided by the Appellants which demonstrated their relationship with the Sponsor, the sole issue remaining before the First-tier Tribunal was that of dependency. The Sponsor in respect of this issue had provided a witness statement dated 3rd November 2014 and produced a number of documents within the Appellants' bundle including money transfer orders. In her evidence she confirmed that she was an EEA national exercising treaty rights in the United Kingdom as a worker and produced evidence of that employment namely as a carer with an average income of over £12,000 per year. She enclosed her payslips, her bank statements and her P60 and also her contract of employment. She had demonstrated that she had suitable and sufficient accommodation for the Appellants should entry clearance be granted (paragraph 6).
14. As regards to the issue of dependency, the evidence of the Sponsor recorded by the judge at [4] was that whilst the first appellant had worked in Nigeria, she was not earning sufficiently well and received £220 per month. In view of that, the evidence of the Sponsor was that she sent an average of £200 per month and the money was utilised for their general upkeep (living needs), school fees and other relevant expenditure.
15. It is plain from reading the determination that the judge found the Sponsor to be a credible witness and had considered her evidence in the light of the documents. There was no evidence before the judge to show that the position set out in the Sponsor's evidence and given before him was either wrong or in error. In those circumstances, it was entirely open to the judge to reach his findings of fact upon that unchallenged evidence.
16. Whilst the grounds assert that the judge failed to give any adequate reasons, I do not find that that is the case. At paragraph 9 of his determination the judge properly had regard to the relevant legal authorities relating to the issue of dependency and made a self direction to the cases of Lim and Reyes. He properly identified that the basis of the refusal which had made reference to financial dependency upon the Sponsor being "a dependency of necessity rather than choice" was inconsistent with the case law and indeed both advocates before me agree that the judge was entirely correct to reach that view. Those decisions make it plain that when determining if a family member is dependent on the relevant EEA national for the purposes of the EEA Regulations, financial dependency should be interpreted as meaning that the person needs financial support to meet his or her essential needs. In those circumstances it

does not matter that the applicant may in addition receive financial support from other sources. In this case the Entry Clearance Officer made reference to the income that the First Appellant received from her employment. I observe that the Entry Clearance Manager stated that the Appellant's monthly wage which although modest by UK standard is anything but in Nigeria, but he did not provide any evidence in support of that statement. The judge considered the evidence before him in the light of those two authorities and reached the conclusion that on that evidence that the Sponsor had materially contributed to the financial support of the Appellants and that the Appellants would not be able to manage without the assistance of the Sponsor. He found that the Sponsor had ensured that the Appellants' essential needs in Nigeria were met and in the circumstances found that the Appellant had established that they are family members of an EEA national exercising treaty rights.

17. It is plain from reading paragraph 9 that those findings were firmly evidence based as he went on to state that that was based on the "clear evidence of the Sponsor's nationality, her earnings and evidence of employment and evidence of money transactions sent to assist the Appellants." In the findings that he had earlier made he accepted that whilst the First Appellant had worked in Nigeria she was not earning sufficient money and received in addition to her salary the £200 per month from the Sponsor which was used for both her and the Second Appellant's upkeep, school fees and other expenditure. It is further plain by reading paragraphs [4] and [9] together that the judge found that the additional money that was being sent by way of the money transactions, which were evidenced in the papers, were sent to meet the essential needs which he considered were there for their upkeep, school fees and other expenditure.
18. In those circumstances the judge gave adequate reasons for reaching the conclusion that the Appellants had established to the relevant standard that they are the family members of an EEA national and in those circumstances the grounds do not demonstrate any arguable error of law in the judge's determination.

Notice of Decision

The First-tier Tribunal did not make an error of law. The decision stands.

No anonymity direction is made.

Signed

Date 18/3/2015

Upper Tribunal Judge Reeds