Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/42519/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8 December 2015	**On 4 January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

MR CHINEDU PATRICK MORDI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms F Allen, Counsel instructed by Paul John & Co Solicitors
For the Respondent: Ms A Holmes, Specialist Appeals Team

DECISION AND REASONS

1. The appellant, a Nigerian national, appeals to the Upper Tribunal from the decision of the First-tier Tribunal (Judge Wellesley-Cole sitting at Taylor House on 26 November 2014) dismissing the appellant's appeal against the decision by the Secretary of State on 19 September 2013 to refuse to issue him with a residence card as confirmation of a right to reside under European Community law as an extended family member of Vincent Goodluck Uzoma, a dual Nigerian and Austrian national. In his application form, the appellant said they were related as cousins. The First-tier

Tribunal did not make an anonymity direction, and I do not consider that the appellant requires to be accorded anonymity for these proceedings in the Upper Tribunal.

2. The grounds of refusal were that the appellant had not provided any evidence of his dependency on his EEA national sponsor at any time, either in Nigeria or in the United Kingdom. So it had been decided to refuse to issue the confirmation that he sought with reference to Regulations 8(2)(a) and (c) of the Immigration (EEA) Regulations 2006.

The Hearing Before, the Decision of, the First-tier Tribunal

3. Both parties were legally represented at the hearing before Judge Wellesley-Cole. The judge received oral evidence from the appellant and his sponsor ("Uncle Vincent"), and her attention was directed to various documents in the appellant's bundle, which included a tenancy agreement purportedly made on 28 May 2008 between Mr Omashon Omorogbe (the landlord) and the sponsor (the tenant). The agreement was signed by the landlord, but not by the tenant. The agreement related to a tenancy at an address in Benin City for a term of two years.

4. In his oral evidence, the appellant said he was one of seven siblings, and that his uncle Vincent had been financially supporting him since he was a toddler, sending him money through his older brother Peter Uzoma (who continued to live in Benin City, according to an affidavit that Peter Uzoma had made in Benin City on 3 July 2014). When he finished his education in Nigeria, he wished to do a masters degree, and for that purpose he had arrived in the United Kingdom on 23 May 2010 with a student visa. On arrival, he had enrolled at the London Business School in Woolwich and had started a postgraduate diploma in administrative management, being supported by Uncle Vincent every step of the way.

5. In cross-examination, he was asked about the money transfer receipts at pages 40 to 48 of the bundle showing remittances from Uncle Vincent to Uncle Peter in Nigeria. He said that Uncle Peter had passed on to him the cash sent by Uncle Vincent. He used this money to pay his school fees at university where he did a diploma and a BA in political science. He was referred to Uncle Vincent's witness statement, in which the sponsor said that on his annual visits to Nigeria he usually took money with him to give to the appellant, or he sent money to the appellant via money transfer, or through close family and friends returning to Nigeria when he was in the UK. The appellant said it was true that other people had taken money from Uncle Vincent to give to him in Nigeria, but he did not know, "who they are".

6. In cross-examination, the sponsor could not say why the appellant had only produced his Barclays Bank statements for 2012 and 2013, although he had come here in 2010. He also did not know why he had not produced evidence of his own bank statements prior to 2012.

7. He was present when the 2008 tenancy agreement was signed. It was put to him there was no signature from him on the agreement, and he answered that the tenant did not always sign.

8. In her closing submissions on behalf of the respondent, the presenting Officer submitted that there was no corroborative evidence that the appellant was supported by his uncle. There was a serious discrepancy about the amount he claimed he gave the appellant in the UK. The appellant said it was £30 to £50 a month, whereas his uncle said it was £300 to £400. Nor was there anything before the Tribunal indicative of what was in the appellant's account prior to 7 December 2012. There were no bank statements prior to that date evidencing transfers of money or cash deposits. She asked that the judge give little weight to the tenancy agreement, as an undated stamp was appended to it.

9. In reply, Ms Bustani for the appellant submitted there was corroborative evidence in the form of the money transfers to Uncle Peter and Uncle Peter's affidavit. There was dependency prior to the appellant coming to the UK from 2006 onwards when money was sent, and the uncle had attested to that. They were living in the same household in the UK and on the balance of probabilities the appellant met the requirements prior to coming here.

10. In her subsequent decision, Judge Wellesley-Cole extensively rehearsed the evidence in paragraphs [5] to [12], summarised the closing submissions made by the representatives in paragraphs [13] and [14], before going on to make her findings of fact at paragraphs [15] to [17], which I reproduce below.

    15. As part of my assessment of this EEA dependency Appeal under the Regulations, I have taken into account the oral testimony of both the Appellant and his uncle along with the Respondent's bundle and the Appellant's. Considering matters sequentially, in accordance with Regulation 8 of the Immigration (EEA) Regulations 2006 he would have to make out that he was an extended family member who resided as part of the household the EEA national and under Regulation 8(2) satisfies the condition he was residing in a country other than the United Kingdom was dependent upon the EEA or was a member of his household. What was before me was the tenancy agreement in the Appellant's bundle dated 24 May 2008 in Benin City Nigeria, signed not by the landlord. As Ms Pountney rightly observed the stamp referred to was not dated and even though I could accept the tenant may not sign may not these copies, as it was not the stamp of solicitors who prepared it which was not dated leaves me to place limited weight on it as a legal document which confirmed that the Appellant was living in the same household as his sponsoring uncle Vincent Goodluck's home. A curious aspect of page 33 of this tenancy agreement was sub-section (2) which reads as follows:-

        > "The tenant Mr. Vincent Goodluck Uzoma is the uncle of Chinedu Patrick Mordi who is dependent on him. The former is now letting the (3) bedroom flat on the latter's behalf and for his use and the control lies with the former Mr Vincent Goodluck Uzoma."

    16. I regard this as self-serving and not usual term and conditions set out in a lease indicative of the fact that this may have been introduced to bolster this matter on Appeal. Not only was there no other supporting evidence to confirm that the Appellant lived there, but the remittances were from Mr Goodluck Uzoma to his brother Peter which does not necessarily mean that they were for the maintenance of the Appellant. I therefore again place limited weight on those remittances, the Appellant after all was a student at the time. Nor do I place weight on the affidavit from Peter Uzoma the Appellant's uncle sworn on 3 July 2014, exhibited at page 37A.

This is a self-serving document as there is no independent evidence in the form of utility bills or any other paperwork to prove that there was financial dependency or that the Appellant was living in the same household as his uncle. Having taken into account the submissions and looking at this matter in the round in relation to the earlier periods in Nigeria I find that he has not made out his case as the evidence is too thin and unsatisfactory that he was dependent on his family member that is his EEA national uncle in Nigeria that is prior to coming to this country.

17. In relation to the period when he came to the United Kingdom in 2010 as a student, I accept that he probably is dependent on his Sponsor here, although there were one or two evidential hiccups when there was a significant discrepancy between how much his uncle said he maintained him in that he received £300 to £400 and the Appellant saying it was for a bus pass and probably £20 or £30. Whilst not necessarily fatal, it does appear according to the T-Mobil phone bill that he lives with his uncle there who supports him and his uncle earns £36,000 a year which equates to just over £2,000 net a month. His uncle came to court and gave evidence and whilst he was credible in respect of this latter period, that is the UK period, there were more difficulty over the earlier Nigerian period. Nor was the Appellant himself entirely straightforward in this regard, admitting at one stage he was in a hostel. It begs the question why there was no independent evidence to support his contention that his uncle maintained him in Nigeria. On that basis therefore this Appeal does not succeed because of the lack of evidence of the earlier period supporting his nephew in Nigeria. For the above cited reasons therefore his Appeal does not fulfil the requirements of Regulation 8 of the EEA Regulations 2006.

The Application for Permission to Appeal

11. Ms Bustani settled the appellant's application for permission to appeal to the Upper Tribunal. She submitted that the judge had materially erred in law in not making clear credibility findings in respect of the two witnesses who had attended before the Tribunal. The judge made a positive finding of credibility in respect of the sponsor's evidence regarding the period after the appellant came to the UK, and yet had failed to provide any clear finding and/or reasoning for not accepting the same witness' evidence in respect of the period before the appellant came to the UK (paragraph 7 of the grounds).

12. The judge had been wrong to characterise the tenancy agreement and Peter Uzoma's affidavit as self-serving, rather than constituting independent evidence (paragraphs 8 and 9 of the grounds).

13. The judge's observation in paragraph [16] that the remittances from the sponsor to his brother Peter did not "necessarily" mean that they were for the maintenance of the appellant disclosed an error of law as the judge had thereby applied a higher standard than the balance of probabilities in determining whether or not the appellant was dependent on the sponsor while he was living in Nigeria.

The Initial Refusal of Permission

14. On 24 June 2015 First-tier Tribunal Judge Cruthers refused permission to appeal, observing inter alia as follows:

Overall, the grounds amount to no more than disagreement with findings that the judge was clearly entitled to make – for the valid reasons that she gave. Indeed, given the evidence, it is difficult to think that any First-tier Tribunal Judge would have concluded that this appeal should have succeeded on any basis.

The Eventual Grant of Permission

15. On a renewed application for permission to appeal to the Upper Tribunal, Upper Tribunal Judge Goldstein granted permission to appeal on 27 August 2015 for the following reasons:

    1. The renewed grounds amplify but otherwise continue to rely upon the original grounds submitted in support of the first application for permission to appeal, and also challenge the reasoning of the First-tier Tribunal Judge who refused such permission.

    2. Without wishing to unduly raise the Appellant's hopes, I am just persuaded that this renewed application in particular with reference to paragraphs 7 to 10 of the grounds in support of the first application, demonstrates that the original First-tier Tribunal Judge may have made an error of law in failing to give adequate reasons for her findings on material matters and raises arguable issues as to whether the Judge was entitled in law to reach the conclusions that she did for the reasons given.

    3. I have concluded in the circumstances, that permission to appeal should be granted in respect of all of the grounds.

The Rule 24 Response

16. On 9 September 2015 John Parkinson of Specialist Appeals Team settled the Rule 24 response opposing the appeal. In summary, it was submitted that the Judge of the First-tier Tribunal had directed herself appropriately:

    3. The judge has given clear reasons for finding that the appellant was not, as claimed, a dependent of his uncle in Nigeria. It is clear that the judge considered that sme of the evidence was self serving and that certain evidence was produced to bolster the claim. Paragraph 15 and 16 refer. The judge concludes that the evidence is too thin and unsatisfactory to make out the appellant's claim.

    4. The judge in reaching this conclusion has correctly applied the self direction on burden and standard of proof contained in paragraph 3.

    5. The reasoning of the judge is clear and cogent and no material error in law is demonstrated. The grounds are an argument with the decision.

The Error of Law Hearing

17. At the hearing before me to determine whether an error of law was made out, Ms Allen developed the arguments raised in the grounds of appeal. She submitted that it was procedurally unfair for the judge to draw an adverse inference from sub-Section 2 of the tenancy agreement quoted by her at the end of paragraph [15], without giving the appellant the opportunity to put in evidence to explain the background to this clause, if necessary by granting an adjournment. In reply, Ms

Holmes adopted the same position as that taken by her colleague in the Rule 24 response.

Discussion

18. Contrary to what is alleged in the grounds, the judge made a clear finding that the appellant had not discharged the burden of proving that he had been a dependant of his EEA national sponsor when he was living in Nigeria. I refer to the end of paragraph [16], where the judge found that the appellant had not made out his case, "as the evidence is too thin and unsatisfactory".

19. In making this finding, the judge was not applying too high a standard of proof. She gave the correct self-direction as to the appropriate standard of proof at paragraph [3] of her decision. Moreover, her approach to the assessment of the evidence was entirely in line with some pertinent observations on this topic which have been made by the Upper Tribunal.

20. In **Ihemedu (OFMs – meaning) Nigeria [2011] UKUT 00340 (IAC)** Senior Immigration Judge Storey, as he then was, gave the following guidance which is quoted at sub-paragraph 2 of the head note:

> An important consideration in the context of an OFM/extended family member case is that if a claimant had come to the UK without applying for a family permit from abroad …, this will mean that the UK authorities have been prevented from conducting the extensive examination of the individual's personal circumstances envisaged by Reg 12(3) and in the course of such an examination check the documentation submitted. If an applicant chooses not to apply from abroad for a family permit under Reg 12 of the 2006 Regulations, thereby denying the UK authorities an opportunity to check documentation in the country concerned, *he cannot expect any relaxation in the burden of proof that applies to him when seeking to establish an EEA right* (my emphasis).

21. In the same case, Judge Storey noted at paragraph [4] that Article 10(2)(e) of the Citizens Directive stipulated that in cases falling under Article 3(2)(a), which deals with OFMs, applicants must produce "a document issued by the relevant authority in the country of origin or country from which they are arriving certifying that they are dependants or members of the household of the union citizen …".

22. The same observation was made in **Moneke (EEA – OFMs) Nigeria [2011] UKUT 00341 (IAC)** at paragraph [42]:

> We note further that Article 10(2)(e) of the Citizens Directive contemplates documentary evidence. Whether dependency could ever be proved by oral testimony alone is not something that we have to decide in this case, but Article 10(2)(e) does suggest that the responsibility is on the applicant to satisfy the Secretary of State by *cogent evidence that is in part documented* (my emphasis) and can be tested as to whether the level of material support, its duration and its impact upon the applicant combined together meet the material definition of dependency.

23. In this case, there was no documentary evidence of remittances from the sponsor to the claimant in the period 2006 to 2010 (or of the claimant being funded by the sponsor in the period 2010 to 2012). The disclosed remittances were remittances

from the sponsor to his older brother Peter. The affidavit from Peter Uzoma did not constitute independent documentary evidence. It constituted oral testimony being given at a distance by a family member whose evidence could not be tested in cross-examination.

24. It was open to the judge to find that the appellant had not discharged the burden of proving prior financial dependency on the sponsor, for the reasons which she gave.

25. The appellant also sought to rely on the tenancy agreement purportedly entered into between the sponsor and a landlord in Benin City in May 2008 in order to show that he had been a member of his uncle's household in Nigeria between 2008 and his arrival in the United Kingdom in 2010. But the tenancy agreement had not been signed by the sponsor, even though he claimed to have been present when the agreement was signed by the landlord, and the authentication stamp apparently made by a local solicitor did not have a date on it. So it was open to the judge not to attach weight to the tenancy agreement for these reasons, and also because in her judgment the sub-clause quoted by her at the end of paragraph [15] was unusual and self-serving, and, "may have been introduced to bolster this matter on appeal". As the judge also observed, there was no other supporting evidence (such as utility bills or official correspondence addressed to the appellant) which confirmed that the appellant had actually lived at the address referred to in the tenancy agreement.

26. I accept that the judge's observation in the middle of paragraph [16] that the appellant was, "after all a student at the time" appears to be a non-sequitur. For the fact that the appellant was a student at the time would mean that he was likely to require financial support. But I do not consider that this non-sequitur undermines the sustainable reasons which the judge gives for finding that the appellant has not discharged the burden of proving that it was Uncle Vincent who was supporting him financially while he was a student in Nigeria.

27. The same applies to the judge's finding at paragraph [17] that the appellant was not himself entirely straightforward on the issue of prior dependency/prior membership of his uncle's household, "admitting at one stage he was in a hostel". On analysis, this is also a non-sequitur, as in the period when the appellant admitted to being in a hostel, he would not have been a member of his uncle's household in Nigeria. The issue which the judge had to resolve was whether the appellant had moved out of a student hostel and had become a member of Uncle Vincent's household in Nigeria from 24 May 2008. However, the judge gave adequate reasons in paragraphs [15] and [16] for finding that the appellant had not made out this case on the balance of probabilities, and what she says in paragraph [17] does not undermine the reasons which she has given earlier for finding that the appeal should not succeed, "because of the lack of evidence of the earlier period [of the uncle] supporting his nephew in Nigeria".

Notice of Decision

28. The decision of the First-tier Tribunal did not contain an error of law, and the decision stands. Accordingly, this appeal by the appellant to the Upper Tribunal is dismissed.

29. No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Monson