



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/30550/2015

**THE IMMIGRATION ACTS**

Heard at Birmingham Employment Tribunal  
On 20 June 2018

Decision & Reasons Promulgated  
On 25 June 2018

Before

UPPER TRIBUNAL JUDGE HANSON

Between

CHITLAH NGWASHI WONISHI  
(anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: In person.

For the Respondent: Mr Mills - Senior Home Office Presenting Officer

**ERROR OF LAW FINDING AND REASONS**

1. The appellant appeals with permission against a decision of First-tier Tribunal Judge Pooler promulgated on 13 April 2017 in which the Judge dismissed the appellant's appeal against the respondent's refusal to issue him a Permanent Residence Card.

## **Background**

2. The appellant, a citizen of Cameroon born on 12 December 1979, sought a permanent residence card on the basis of being a member of the household of, or dependent on, his EEA national sponsor during the period of five years beginning on 12 March 2010, the date on which he had been issued with a residence card as the extended family member of his brother who is an Italian national.
3. The Judge records at [8] that, with the party's agreement, he focused on the period of five years which began from 12 March 2010 requiring the appellant to show he had resided in the UK for five years in accordance with the EEA Regulations from that date to 12 March 2015. The Judge notes if that was made out the appellant will be entitled to a grant of permanent residence.
4. The Judge clearly considered the evidence with the required degree of anxious scrutiny and sets out the appellant's place of residence in the United Kingdom noting he lived with his family and his brother's family in his brother's house in Leek in Staffordshire before moving out to live in another property in Wednesbury sometime in 2011 and in late 2012 moving to another property in Walsall. The Judge finds that from the date the appellant moved to live at the address in Wednesbury he did not live in the same household as his brother [14].
5. The Judge reviewed the financial information and evidence of transfers made. The Presenting Officer had raised an issue before the Judge that cash deposits recorded in the appellant's bank account were not accepted as having been made by the appellant's brother. The Judge noted the statements did not disclose any evidence to support such a claim because they did not name the person making the deposits and that a significant number of deposits were made at the branch of the bank in Walsall where the appellant's account was maintained. The Judge finds no cogent evidence to suggest those deposits were made by the sponsor and not by the appellant [20].
6. Between November 2012 and March 2015, the Judge finds the bank statements showed no bank transfers. There were between 15 and 20 cash deposits but the most recent was on 20 January 2014 meaning no evidence of any transfers or deposits into the appellant's account had been provided for the period February 2014 to March 2015 [21].
7. The Judge notes that the documentary evidence is wholly silent in relation to the earned income of the appellant and his partner, the most recent bank statement appearing to run to early February 2014, leading to a finding the appellant had failed to provide satisfactory evidence of his and his partners financial circumstances, including their earnings, from February 2014 onwards [24].
8. There was no evidence to support the contention the rent for the property in Walsall was being paid by the appellant's brother such as evidence from the landlord or bank statements showing regular payments of the relevant amount [25].
9. The Judge notes at [26] that the payment of £8,700 transferred into the appellant's account on 1 May 2012 was received from another account in the appellant's name. The appellant admitted he had another bank account, a savings account,

but claimed his brother had made equivalent payment into the savings account from which the transfer of funds was made although the Judge finds there was no supporting documentary evidence in respect of this claim.

10. The Judge sets out his core conclusions at [28 – 31] of the decision under challenge in the following terms:
  28. Drawing together the various threads from the evidence, I am unpersuaded that in the period from February 2014 onwards the appellant has been financially dependent on his brother. The appellant and his partner were both working. No evidence of their income has been provided. There is no evidence of any cash deposits or bank transfers from the sponsor in that period. While the sponsor was named as the tenant of 17 Edelweiss Close, there is no cogent evidence that he has continued to pay the rent. The brother's letter was undated and although it referred to payments in cash and bank transfers, it was particularly vague as to the details of any such payment and there is moreover no evidence by way of bank statements showing that money left the sponsor's account. In any event, the weight which can be placed on the letter is much reduced because the brother was not tendered for cross examination.
  29. As I have recorded, the appellant lived in the same household as his brother until about March 2011. Between March 2011 and October 2012 I find it probable that the appellant was dependent on his brother who provided him and his family with rent-free accommodation, a significant contribution at a time when the appellant and his partner were not working. It is possible that the brother made payments into the appellant's account although the evidence does not allow me to make a finding on the balance of probabilities.
  30. From November 2012 until January 2014 there is no evidence of any bank transfers. There is no evidence that the brother paid rent for the period beyond the tenancy agreement which is in my judgment insufficient to prove on the balance of probabilities that such payments were made by the brother. As I have observed, cash deposits were made into the appellant's account but the evidence is insufficient to persuade me that they were made by the sponsor.
  31. Accordingly the appellant has satisfied me that he was a member of the sponsors household or dependent on him until October 2012 and has failed to satisfy me that he met either requirement from November 2012 onwards. His failed accordingly, to prove that he resided in the UK in accordance with the EEA regulations for a period of five years. His appeal must therefore fail.
11. The appellant sought permission to appeal which was granted by another judge of the First-tier Tribunal on the basis it is said to be arguable that in requiring the appellant to show that he continued it to be dependent on his brother after having been granted a five-year residence card on 12 March 2010 an arguable error of law has been made in assessing Regulation 15.

## Discussion

12. During the hearing the appellant referred to the fact that had his brother been present he would have been able to assist the judge with matters of concern. The Judge records at [5 - 6] an application being made for an adjournment as the appellant's brother had not attended the hearing due to alleged work commitments which it was claimed he had been unable to change. The appellant's representative stated that this was a matter that had only come to his attention on the day. The Judge refused the adjournment as it was unsupported by any evidence of the brothers work commitment or of any steps taken to avoid that commitment and that the appellant had known of the hearing since notice was given on 18 November 2016. There was no challenge to that decision in the application seeking permission to appeal and permission was not granted to pursue that matter before the Upper Tribunal. It appears on the face of the decision and facts that this was a conclusion within the range of those available to the Judge considering the principles of fairness when exercising his discretionary case management power to decide whether the hearing should be adjourned or not, in any event.
13. The Judge clearly records that it was agreed between the advocates that the issues he was required to consider included ascertaining whether the appellant had been a member of the household or a dependent for the period five years beginning on 12 March 2010. It appears that, notwithstanding this position having been agreed with the Judge by professional advocates, the appellant applied for and was granted permission to appeal on a contradictory basis.
14. The appellant was entitled to a right of permanent residence if he demonstrated he had been exercising treaty rights for the continuous period of five years identified by the Judge. If he has not been exercising such treaty rights he is not entitled to the relief he seeks. The appellant claimed to be entitled as an extended family member for the requisite period but the appellant is unable to satisfy the definition of an extended family member under the Regulations unless he is a member of the household or dependent on his EEA national sponsor. It is for that reason the Judge focused upon this question as identified in the decision under challenge.
15. The finding of the Judge is that the appellant failed to discharge the burden of proof upon him to the required standard to show that he was an existing family member and therefore a person exercising treaty rights for the requisite period of five years. The fact the appellant held a residence card issued on 12 March 2010 does not arguably assist for a residence card confers no rights, per se. It is declaratory reflecting rights held under EU law. It is not in issue that when the residence card was issued the appellant was entitled to the same as an extended family member on the basis of membership of his brother's household and dependency upon his brother, the EEA national. Once such status ended, which the Judge finds to have been from November 2012 onwards, the fact an extant residence card existed was arguably irrelevant.
16. The Judge clearly considered the evidence with the required degree of anxious scrutiny, as stated above, and has given adequate reasons for the findings made.

It is not made out those findings were not available to the Judge on the evidence and it appears more likely that they accurately reflect a detailed examination of the evidence before the Judge. The Judge applied relevant principles of EU law when assessing the appellants claim and it is not made out the conclusion, which is effectively that the appellant had failed to discharge the burden of proof upon him to show that what he was claiming to be entitled to was the case in law, was not reasonably open to the Judge on the evidence. Indeed, it is hard to see on the basis of the evidence identified by the Judge and the deficiencies in the material provided that the Judge could have come to any other conclusion.

17. In his submissions the appellant referred to the evidence put before the First-tier Tribunal and considered by the Judge. He referred to the fact his brother had not attended which is dealt with above. The appellant was asked why he had not provided financial information such as evidence of his and his partner's income to which the appellant claimed he was not asked to do so. The appellant was advised that this tribunal was aware that the appellant's representative, Mr Howard, is an experienced practitioner in this field who is fully aware of the issues under consideration and that it appeared unlikely that Mr Howard would not have asked for information and evidence that he thought was required to prove the appellant's case. In relation to the £8,700 the appellant accepted the Judge did not have any more evidence than referred to in the decision but claimed that he could explain more if his brother was present.
18. It is clear from the evidence of the appellant that the Judge is correct when finding that full disclosure had not been made. It is accepted there were some documents provided in relation to the appellant's income but not enough to satisfy the Judge that the appellant required his brother's support to meet his essential needs. Mr Mills also submitted it was not clear whether the appellant's partner, in addition to earned income, received any benefits such as tax credits all of which needed to be before the Judge. The appellant was asked about this and confirmed his partner did receive working family tax credits and was in full-time employment. This was vital evidence that should have been before the Judge but was not.
19. Written submissions handed in by the appellant refer to article 8 ECHR but is not made out this is case where this is a live issue, and was not an issue before the Judge in any event. The refusal is a refusal to issue a residence card, no more. If the appellant wishes to rely on article 8 it is open to him to make a paid application under the Immigration Rules which the respondent can consider on its merits.
20. Disagreement with the findings of the Judge or desire for a more favourable outcome do not establish arguable legal error material to the decision to dismiss the appeal sufficient to warrant the Upper Tribunal interfering in this judgment.

## Decision

21. **There is no material error of law in the Immigration Judge's decision. The determination shall stand.**

Anonymity.

22. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Signed.....  
Upper Tribunal Hanson

Dated the 21 June 2018