Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: UI-2021-000040**
EA/03978/2020

THE IMMIGRATION ACTS

Heard at Field House, London
On the 22 June 2022

Decision & Reasons Promulgated
On the 08 September 2022

Before

UPPER TRIBUNAL JUDGE BLUNDELL
DEPUTY UPPER TRIBUNAL JUDGE BAGRAL

Between

AMOS OSAHON
(ANONYMITY DIRECTION NOT MADE)

Appellant

-and-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Ajala, Legal Representative, Emmanuel Solicitors
For the Respondent: Ms S Cunha, Senior Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant appeals against the decision of First-tier Tribunal Judge S J Clarke dated 17 June 2021 ("the Decision"). By the Decision, the judge dismissed the appellant's appeal against the respondent's decision dated 30 July 2020, refusing his application for a residence card under the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations") as an extended family member of an EEA national exercising treaty rights in the United Kingdom.

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Background

2. The appellant is a national of Nigeria who was born on 8 August 1971. He claims that he entered the United Kingdom lawfully in 2010 to join his stepbrother, Daniel Osahon ("the sponsor"). The sponsor is a German national who has permanent residence in the United Kingdom.

3. On 19 February 2018, the appellant applied for a residence card as confirmation of his right to reside in the United Kingdom as an extended family member of the sponsor. This application was refused and led to an in-country appeal which was dismissed on 27 June 2019 ("the first appeal") [EA/07384/2018]. In the first appeal the appellant contended that he was dependent on the sponsor in Nigeria and in the United Kingdom. To support his claim of past dependency he relied on, amongst other things, rent receipts covering the period 2003 to 2010 and a letter from Mr K. O. Evbakhare (the appellant's claimed landlord).

4. As for present dependency he relied on, amongst other things, tenancy agreements dated from 2010 to 2018 and letters from Mr Bakare Alade dated 13 December 2017 and 5 June 2019 respectively, stating that he received rent from the sponsor on the appellant's behalf. The appellant attended the first appeal and gave oral evidence, but the sponsor did not attend. Whilst there was no dispute that the appellant and sponsor are half-siblings, the evidence of dependency both past and present was rejected. It is common ground that the findings in the first appeal stand as an authoritative assessment of the appellant's circumstances at that time.

5. On 27 January 2020, the appellant lodged a further application for a residence card as an extended family member of the sponsor. In this application, the appellant sought to improve on the evidence relied on in the first appeal and provided further evidence to establish his entitlement to a residence card as an extended family member. We shall come to that evidence later.

The Respondent's Decision

6. On 30 July 2020 the respondent refused the application. She noted the findings made in the first appeal and considered that the appellant had failed to fill the lacuna in the evidence identified therein and, in any event, she was of the view that the additional evidence was inadequate proof of dependency. She observed as follows:

> "It must be noted that you have previously been refused a Residence Card as the extended family member of your sponsor on 10 May 2018.
>
> You appealed this decision and an Immigration Judge dismissed the appeal based upon the evidence available.
>
> In your previous application, you submitted a letter from the same Solicitor, 'K.O. Evbakhare ESQ' dated 13 November 2017. At appeal this evidence was assessed and dismissed by an Immigration Judge and the following was stated:
>
> "There was no financial documents showing the transfer of funds in and out of a bank account belonging to the sponsor, no evidence of posting or money transfers and ultimately, no other evidence to corroborate the payment of rent by the sponsor."
>
> As such, the same principle applies with the letter submitted with this application from K.O Evbakhare ESQ Barristers and Solicitors dated 22 January 2020. You have not

provided any further evidence in the form of financial documents showing any payments being made from your sponsor to the landlord.

It is also noted that you have provided:

- Photocopy of a MoneyGram document

The MoneyGram document indicates that a sum of £240 was sent from your sponsor to you in Nigeria, however, there is no date on the document. This one document alone is insufficient evidence of dependency."

The Appeal to the First-tier Tribunal

7. The appellant appealed against this decision on the ground that the refusal was contrary to the EEA Regulations. He contended that the evidence was sufficient to establish prior and present dependency and membership of the sponsor's household in Nigeria and the United Kingdom.

8. The appeal was heard remotely. The appellant attended and was represented by Mr Ajala (who appears before us). The sponsor also attended. The respondent was not represented. The judge heard evidence from the appellant and sponsor and considered the documentary evidence. The judge did not accept that the appellant was dependent upon the sponsor as required by regulation 8(2) of the EEA Regulations and had not, therefore, established that he was the sponsor's extended family member.

9. The judge referred to the first appeal at [6] of the Decision as her starting point in application of the guidance in Devaseelan [2002] UKIAT 00702; [2003] Imm AR 1. She observed the sponsor's absence at the first appeal and took note of the adverse conclusions. The judge noted the appellant's continued reliance on the same documentary evidence in both appeals to show dependency in Nigeria and then considered the additional evidence adduced by the appellant. The judge concluded given the lack of evidence and the inconsistencies within the documentary evidence that she could not be satisfied of the appellant's prior dependency on the sponsor in Nigeria. In the Decision the judge noted the following:

"8. For both appeals the Appellant provided the same documentary evidence to show dependency whilst living in Nigeria. This consisted of 20 rent receipts covering the period 2003 to 2010 and a letter from K O Evbakhare Esq stating that rent was received from the sponsor...

9. The letter from Mr Evbakhare was dated 22 January 2020 and given the difficulties raised by the Judge regarding that letter I ask myself why the Appellant did not merely try to improve upon the evidence from Mr Evbakhare. The tenancy agreement described Daniel Osahon as "TENANTS" in plural yet the agreement then described the Tenant in the singular and the Appellant was stated to be the only Tenant.

10. For this appeal in the Appellant's bundle some rent receipts have been produced. This read Mr B A Evbakhabokun of 24 Oglemwenken Street, Ihinmwinrin Quarter, Benin City. The letter from K O Evbakhare Esq. gives an address of 24 Oglemwenken Street Benin City. There is no explanation as to who Mr Evbakhabokun is and what role he played in issuing a rent receipt. I noted the Appellant and brother gave consistent evidence about the payment of the rent in Nigeria but I also note that they described the payment of rent to the landlord and not to any agent.

> 11. The Appellant told Judge Stedman that he had expected the sponsor to attend, that the sponsor was in hospital and then said the wife of the sponsor was in hospital. The Judge afforded the Appellant the opportunity to apply for an adjournment for the brother to give evidence but the Appellant preferred to press on and pursue the appeal. No evidence was provided at this hearing to confirm the brother had to visit the hospital for the previous hearing but I have not taken this into account for this decision."
>
> [our emphasis]

10. The judge then considered the issue of dependency in the United Kingdom and stated thus:

> "15. … What is missing is any evidence to show that the sponsor had the financial means to meet the accommodation and living expenses of the Appellant in at least the £400 a month region and this was noted by Judge Stedman as being absent and when set against the fact that the sponsor and his wife and children were hearing themselves a one bedroom flat that suggested he was not able to meet such a sum whilst the Appellant did not work to support himself for many years.
>
> 16. In addition, in the Appellant's bundle there is an assured shorthold tenancy for 18 Mina Road in the name of the sponsor only as a tenant and it is for Flat 12 Perronet House. It reads that the tenant must not let any other person live in the property under the heading Use of the Property. The new shorthold tenancy in the name of the sponsor only contradicts what the witnesses told me which is that they share the accommodation and there is no letter from the new landlord confirming that the Appellant has permission to reside in this accommodation with the sponsor."

11. Accordingly, the judge was not satisfied that the appellant was dependent on the sponsor and therefore she dismissed the appeal.

The Appeal to the Upper Tribunal

12. The appellant appeals on the ground that the judge erred when determining the issue of dependency. It was argued that the judge misconstrued the evidence, made contradictory findings and failed to consider relevant evidence. We will come to the detail of the grounds and submissions below.

13. Permission to appeal was refused by the First-tier Tribunal but granted on renewed application by Upper Tribunal Judge Plimmer on 17 March 2022 who was "prepared to find by a small margin that the grounds of appeal raised an arguable material error of law."

14. The respondent filed a Rule 24 Reply on 6 April 2022 seeking to uphold the Decision. We will come to the substance of that below.

15. The matter comes before us to determine whether the Decision contains an error of law and, if we so conclude, to either re-make the decision or remit the appeal to the First-tier Tribunal to do so. We have before us a core bundle including the respondent's bundle, the appellant's bundle before the First-tier Tribunal (referred to hereafter as [RB/xx] and [AB/xx] respectively) as well as a skeleton argument filed on the appellant's behalf. We refer only to those documents relevant to our consideration, but we have read all documents when reaching our decision.

Discussion

16. The grounds of appeal are not particularised under separate heads of challenge but are set out in seven broad discursive paragraphs. They are wide-ranging and criticise the judge's approach to her consideration of the evidence. The import of the grounds is that the judge's findings turn upon mistakes of fact that have caused unfairness and are predicated upon an over reliance on the previous findings in the first appeal and a failure to consider the evidence. Before us Mr Ajala amplified the grounds of appeal and, in turn, Ms Cunha amplified the respondent's Rule 24 Reply. The observations we make on the grounds reflect the submissions of the parties before us.

17. We are grateful to the representatives for their submissions and to Mr Ajala who, at our invitation, ably took us through the evidence that was before the judge. Having considered the competing arguments of the parties we are just persuaded that the judge materially erred in law.

18. This appeal concerned the sole issue of the whether the appellant is an extended family member under regulation 8 of the EEA Regulations. There are several bases upon which a person may meet the criteria to be an extended family member by reference to their circumstances in the country of origin and their circumstances in the United Kingdom. The four combinations were summarised in Dauhoo (EEA Regulations – reg 8(2)) [2012] UKUT 79 (IAC) in these terms:

    a. prior dependency and present dependency;

    b. prior membership of a household and present membership of a household;

    c. prior dependency and present membership of a household;

    d. prior membership of a household and present dependency.

19. The combinations are interchangeable, but whichever applies, an extended family member is required to show a relevant connection with the EEA national in their country of origin and in the United Kingdom.

20. In the first appeal, the appellant's then representative, sought to establish a relevant connection between the appellant and sponsor based on prior dependency and present dependency. As we indicated earlier, the appellant adduced rent receipts and letters from his claimed landlord in Nigeria and the United Kingdom respectively, stating they received rent from the sponsor on behalf of the appellant. Whilst the appellant continued to rely on that same evidence before the judge, he adduced additional evidence with a view to persuading her to depart from the findings made in the first appeal. That evidence included, the written and oral evidence of the sponsor, evidence of the sponsor's travel to Nigeria [AB/49-50], a MoneyGram receipt [AB/51], a letter from Mr K.O. Evbakhare dated 22 January 2020 [RB/97], 20 rent receipts issued by Mr B.A Evbakhabokun, a tenancy agreement for the property in Nigeria [RB/91], tenancy agreements for 103 Milesdrive West Thamesmead and Flat 12 Perronet House, a letter from Lewisham Electoral Services in the appellant's name for 14 Edmond Court [RB/94], a TV Licensing letter for the same address in the appellant's name [RB/95], the sponsor's bank statement, copies of the sponsor's vehicle hire licence for that address from 2016 to 2020 [RB/93] and [AB,/11-23] respectively, and the appellant's TV Licensing bill for 12 Perronet House [AB/10].

21. The judge began her consideration with the findings made in the first appeal. Mr Ajala submitted that she erred in doing so because she, unlike the judge in the first appeal, had the benefit of hearing evidence from the sponsor. In the circumstances, he submitted that the findings in the first appeal were of no relevance. There is no merit in this submission. We observe that the Devaseelan guidelines indicate that issues such as whether the appellant gave evidence are irrelevant to the principle that the first determination should always be the starting point. Similarly, we see no reason(s) why this guidance should not equally apply to the evidence of a witness. The judge was clearly aware of the guidelines and applied them: [6]. Following a fair appraisal of the evidence she indicated that she did not take the sponsor's failure to give evidence in the first appeal into account in her decision: [11]. That approach in our view is unimpeachable. The judge's application of the guidelines cannot be faulted.

22. Next, Mr Ajala took issue with the judge's treatment of the letter from the appellant's landlord in Nigeria, namely, Mr Evbakhare dated 22 January 2020. A similar letter from Mr Evbakhare was adduced in the first appeal dated 13 November 2017. The judge considered that evidence at [8] and [9] of the Decision which we have set out above.

23. Mr Ajala submitted, *first*, that the judge at [9] was assuming the letter from Mr Evbakhare dated 22 January 2020 was before the judge in the first appeal and, *second*, that she was wrong to discount the tenancy agreement on the basis of a mere typing error when she had committed the same error in her Decision in referring to "representatives" when he was the sole representative before her: [5]. We see no merit in either of these submissions.

24. The difficulty with Mr Ajala's first submission is that he reads paragraph [9] of the Decision too literally and in isolation. In order to understand the judge's consideration paragraphs [8] and [9] of the Decision need to be read together in the context of all the evidence. In so doing, it is appreciably clear that the judge was aware of the existence of two letters from Mr Evbakhare. As we set out earlier they are referred to in the respondent's refusal letter, which the judge had before her, and at [8] she was simply observing that in both appeals the appellant relied on letters from Mr Evabakhare. Whilst we accept that the judge expressed herself infelicitously and could have been clearer at [9], it is inconceivable that she assumed that a letter dated in 2020 was adduced in the first appeal heard in 2019. We consider that a reasonable and sensible view is that the judge was simply referring to the type of evidence being relied upon as being similar in both appeals rather than the exact same evidence.

25. As for Mr Ajala's second submission, it is plain to any reader of the Decision that the judge's typing error is a mistake. This is not comparable to an asserted error in documentary evidence which must be substantiated by evidence. Here there was no such evidence. The judge's duty was to assess the reliability of the documentary evidence before her and, in performing that task, she was entitled in the circumstances to comment on the syntax used in the tenancy agreement. Her observations at [9] were based entirely on the evidence.

26. In his oral submissions Mr Ajala, in reply to Ms Cunha's submissions, complained about the judge's treatment of the rent receipts at [10], which we have set out above. The judge noted the landlord's letter and the rent receipts were issued by two different individuals. Mr Ajala submitted that it was not incumbent on the appellant to explain the discrepancy as it was not raised by the respondent in

the refusal letter. We reject that submission. *First*, there is a jurisdictional point. We note that no challenge is made to the judge's findings at [10] in the grounds of appeal and no application was made before us to amend the grounds. *Second*, even if the point was properly before us, we see no merit in the challenge. The discrepancy is obvious. It was a matter for the appellant as to whether he addressed the discrepancy at the hearing. He did not do so and it is unlikely to have been a surprise to him that the judge seized upon that discrepancy to support her conclusions. We are of the view, in the circumstances, that the judge cannot be fairly criticised in her consideration of this evidence and made findings that were plainly open to her on the evidence.

27. Notwithstanding the fact that we have rejected Mr Ajala's submissions thus far, we accept his critique of the Decision in the following respects establishes a material error of law.

28. We explored with Mr Ajala the basis upon which the appeal was argued before the judge. He submitted that, unlike in the first appeal, he sought to establish that there was a relevant connection between the appellant and sponsor on the basis of past and present dependency and/or past or present membership of a household. He informed us that he advanced the appellant's case on that basis in his oral submissions before the judge. We are unable to discern from the Decision whether any oral evidence was led and whether oral submissions were made on this basis as a summary of the evidence and submissions is not set out therein. The audio recording of the proceedings is not available to us and no application has been made by the appellant to obtain a copy. Notwithstanding, we accept from Mr Ajala that he did so as this is supported by the evidence before us. *First*, we note the application was made on that basis [RB/32-34]; *second*, the sponsor's written testimony is to that effect and *third,* the case was similarly pleaded in the appellant's skeleton argument. There was no dissent from Ms Cunha that the issue was before the judge and she properly acknowledged that the judge failed to consider the "household point."

29. We accept therefore that the judge failed to appreciate that the combination the appellant relied upon in order to show a relevant connection with the sponsor had changed since the first appeal. It is apparent from the Decision that the judge was focused on the issue of prior and present dependency only: [12], [13] & [17]. Her focus was narrowed we believe by her over reliance on the findings in the first appeal which she referred to at [7], [8],[13] and [15], and is the basis upon which she formulates most of her reasoning. The consequence of this is that a material part of the appellant's claim has not been considered.

30. This, in turn, dovetails into a further error, namely, a failure to consider relevant documentary evidence. We set out above at [20] the additional evidence relied upon by the appellant. Whilst the judge grappled with some of that evidence within the context of dependency at [9], [10], [14], [15] and [16], we accept Mr Ajala's submission that there is no reference to or consideration of: i. the sponsor's written testimony; ii. evidence of the sponsor's travel to Nigeria; iii. the MoneyGram receipt and iv. the appellant's TV Licensing bill for 12 Perronet House.

31. In order to understand the relevance of this evidence and consequently whether the failure to consider it is material, we turn briefly to consider it.

32. Mr Ajala submitted that the sponsor gave oral evidence of the nature and means by which he supported the appellant in Nigeria, but as we do not have a record of his evidence, we go only by what is stated in his witness statement. It is stated thus:

> "6. Prior to the applicant entering the UK, I was responsible for him financially and regularly send him money to meet all his essential needs which includes paying his rent. I also gave him lump sums of cash to cover his expenses whenever I visited Nigeria and pay the landlord directly in cash any outstanding levies owed.
>
> 7. ...The evidence of money transferred enclosed with this appeal bundle is the evidence I was able to recover and collate (others I could not recover/find)."

33. To support that evidence the appellant adduced the sponsor's passport which shows that he travelled to Nigeria in 2009 and a MoneyGram receipt as evidence of transfer of funds.

34. As we indicated earlier, the MoneyGram receipt is referred to in the refusal but the respondent rejected it observing that there was no date on the document. The hardcopy and the scanned copy of that MoneyGram before us is of poor quality and the date cannot be discerned. Mr Ajala was able to show us his copy where the year 2009 at the very least is legible. We further note that in the skeleton argument a date of 16 December 2009 is stated, but it is not clear to us how this date is supported by the evidence. Nonetheless, it is plain that there was evidence and submissions before the judge that supported the appellant's claim that he was financially supported by the sponsor in Nigeria and/or a member of his household.

35. Similarly, the TV Licensing bill in the appellant's name for 12 Perronet House sought to establish his claim that he resided with the sponsor in the United Kingdom. The judge dealt with that claim at [16]. Whilst she incorrectly referred to the tenancy agreement for that property as being for "18 Mina Road" (that is in fact the address of the landlord), she correctly noted that the sponsor was named as the sole tenant; that a condition of the tenancy was the tenant must not let any other person live in the property and there was no evidence from the landlord confirming the appellant had permission to reside in the property. Whilst our initial view was that these findings were open to the judge, we accept from Mr Ajala that she failed to recognise that the tenancy was subject to the right to rent scheme that came into force on 1 February 2016 the terms of which prohibit a private landlord from renting to a tenant with no immigration status in the United Kingdom. In that context, it is unsurprising that there was no evidence from the landlord confirming the appellant's residence at 12 Perronet House. In those circumstances, the evidence of the TV Licensing bill is apposite. It was the only documentary evidence that potentially connected the appellant to the sponsor's address. At the very least we consider that the judge was required to factor that evidence into her assessment and give reasons for either accepting or rejecting it. We are satisfied that she failed to do so as there is no mention of that evidence either at [16] or anywhere else in the Decision.

36. Having traversed the evidence, with the assistance of Mr Ajala, we are persuaded that there was relevant evidence before the judge that she failed to consider.

37. Ms Cunha's answer to this is that the judge's unchallenged findings are sufficient to sustain the Decision, but we do not consider that is a satisfactory

response. The judge's unchallenged findings are based predominantly on the findings in the first appeal, which were not determinative of the issues before the judge in view of the additional evidence. Whilst Ms Cunha said everything that she could say in defence of the Decision, by her own candid admission the Decision "appeared rushed" and, whilst we make no observations about that, we are satisfied that the judge's consideration of the evidence was inadequate. She failed to take into account relevant evidence and the arguments deployed on the appellant's behalf thereby depriving him of a fair hearing. We are satisfied that the combination of errors are material and constitute errors of law: ML Nigeria [2013] EWCA Civ 844.

Conclusion

38. For the reasons stated above, we are satisfied that the Decision does disclose material errors of law which make the findings unsafe and the Decision must therefore be set aside and remade. Remaking in the Upper Tribunal would constitute the usual approach to determining appeals where an error of law is found unless the effect of the error has deprived a party of a fair hearing before the First-tier Tribunal, or the nature or extent of any judicial fact-finding which is necessary for the decision in the appeal to be remade, is such that it is appropriate to remit the case to the First-tier Tribunal. In this case there was unfairness and the appropriate course is for this appeal to be remitted to be heard afresh by the First-tier Tribunal. No findings are preserved.

39. As an aside we simply observe, that at the re-hearing the appellant will need to demonstrate, amongst other things, that there is no break in dependence or household membership from Nigeria to the United Kingdom, "other than a de minimis interruption" as established by the decision of the Presidential Panel of the Upper Tribunal in Sohrab and Others (continued household membership) Pakistan [2022] UKUT 00157 (IAC).

Notice of Decision

40. We are satisfied that the Decision involves the making of a material error on a point of law. The Decision of First-tier Tribunal is set aside in its entirety. The appeal is remitted to the First-tier Tribunal for re-hearing before a Judge other than Judge S J Clarke.

R.Bagral

Deputy Upper Tribunal Judge Bagral

18 July 2022