Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/18231/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 14 June 2013	**On 27 June 2013**
Delivered orally	

Before

UPPER TRIBUNAL JUDGE GOLDSTEIN

Between

OSEMWONYENWEN UZEBU

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Kannangara, Counsel
For the Respondent: Mr Lawrence Tarlow, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal against the decision of the Respondent dated 24 July 2012 to refuse to the Appellant the issue of a residence card as confirmation of a right of residence under European Community Law as the family member of an EEA national exercising treaty rights in the

United Kingdom, the relevant Regulation being Regulation 8(2) of the Immigration (European Economic Area) Regulations 2006 that states 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 in 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 an EEA State in which the EEA national also resides 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 paragraph (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."

2. It will suffice to say that on 27 February 2013 I presided over the error of law hearing referable to this appeal and I concluded in a decision dated 9 April 2013 that the First-tier Judge had erred in law. In so doing I also recorded that it was agreed with the parties that those paragraphs in the First-tier Judge's determination recording the Appellant and her witnesses' several statements and their oral evidence before the First-tier Judge as recorded by him, could be preserved, as could paragraph 21 of his findings. Paragraph 23 could be preserved but only to the extent that the First-tier Judge found that the Appellant was related to the Sponsor's wife namely as her sister. However, the rest of that paragraph was not to be preserved. Paragraph 22 was not to be preserved.

3. Rather than repeat all that I set out in some detail in that error of law decision, I would refer to that decision which I have attached to this determination marked Appendix A.

4. I have of course most carefully considered afresh the Appellant's and her witnesses' several statements and the record of the oral evidence that was given before the First-tier Judge and recorded in his determination. It would, however, be as well for the sake of completeness if I make some reference to other aspects of the First-tier Judge's preserved findings at paragraph 21 and partially at paragraph 23. Insofar as paragraph 21 of the First-tier Judge's determination is concerned, he summarised the

findings within the determination of Immigration Judge Oxlade following the hearing before her on 28 June 2010 in which the Appellant's then-appeal was dismissed. Those findings were in summary that the Sponsor had been resident in the United Kingdom since 1996; that the Appellant was not a member of his household or his dependant in 1996 when he left for the United Kingdom; that the Appellant and the Sponsor had not since formed a household; and finally that the Appellant had not been his dependant either in the period 2000 to 2005 when she and her sister were living together in Nigeria or in the period 2005 to 2008 after her sister left for the United Kingdom and when she was a student. Those findings were properly considered by the First-tier Judge as her starting point in accordance with Devaseelan principles. See now also Mubu and Others (immigration appeals – res judicata) Zimbabwe [2012] UKUT 00398 (IAC) to which I referred at paragraph 16 of my error of law decision, annexed hereto.

5. At the time of the error of law hearing and as recorded in my subsequent decision thereon, I set out in some detail (see paragraph 18) the documents that were before the First-tier Judge and gave a brief description as to each, and identified those aspects of the documentation that the First-tier Judge clearly disregarded, which indeed in the event, formed part of the errors of law that I identified within her determination.

6. Prior to the hearing before me on 14 June 2013, the Tribunal received from the Appellant a fresh and comprehensive bundle of documents upon which they relied that in effect encompassed all the documents that were before the First-tier Judge but with some further clarification. At the outset of the resumed hearing, I received from Mr Kannangara his skeleton argument that I have carefully considered in conjunction with the documentation before me.

7. It will suffice for the purposes of this determination, to refer to the fact that Mr Tarlow who now represented the Respondent, told me at the outset of the hearing, that having carefully considered that documentation and other evidence, he was in a position to helpfully inform me as follows:

> "Having carefully considered the documents and other evidence before me, I am content to put it this way – that I formally rely on the refusal letter but otherwise have nothing further to add and shall leave it to you to determine the matter on the evidence before you. It is not my position that for this purpose, and mindful of that evidence, there will be any need for you to hear oral evidence today."

8. Nonetheless, and for the avoidance of doubt, Mr Kannangara was able to readily confirm to me that having taken instructions from both the Appellant and her witnesses – comprising the Appellant's sister and brother-in-law (the Sponsor) – that they were all content to adopt the evidence that they had already given in their statements and indeed as accurately recorded by the First-tier Judge in her determination.

The Legal Framework

9. In his most helpful skeleton argument, Mr Kannangara referred me to several decisions that he considered to be relevant to the issue at hand, and indeed I have found them to be so relevant. In that regard I am mindful that at the outset of the resumed hearing, the parties agreed with me that what had to be established was either that the Appellant could show prior and present dependency on the EEA Sponsor or prior membership of a household and prior dependency on her EEA Sponsor.

10. Indeed such was the guidance of the Upper Tribunal in Dauhoo (EEA Regulations – Reg 8(2)) [2012] UKUT 79 (IAC) in relation to which the headnote had this to say:

> *"Under the scheme set out in reg 8 (2) of the Immigration (European Economic Area) Regulations 2006, a person can succeed in establishing that he or she is an "extended family member" in any one of four different ways, each of which requires proving a relevant connection both prior to arrival in the UK and in the UK:*
>
> *i. prior dependency and present dependency*
>
> *ii. prior membership of a household and present membership of a household*
>
> *iii. prior dependency and present membership of a household;*
>
> *iv. prior membership of a household and present dependency.*
>
> *It is not necessary, therefore, to show prior and present connection in the same capacity: i.e. dependency- dependency or household membership-household membership ((i) or (ii) above). A person may also qualify if able to show (iii) or (iv)."*

11. In RK (OFM – membership of a household – dependency) India [2010] UKUT 421 (IAC) it was pointed out, inter alia, that:

> "For an OFM to fulfil the household requirement he or she must have lived with the Union citizen in the same country at some time in the past, whilst dependency requires no such link. Further as dependency can be on the non national spouse of a Union citizen that opens up the reasonable possibility of continued residence outside the EEA after such a non national spouse has married and moved to the EEA. … Dependency [does] not have to be whole or main or necessary but there has merely to be economic dependency in fact."

12. With that guidance in mind I have turned my attention in particular to the documentation put forward by the Appellant, as clarified in the Upper Tribunal guidance to which I have above referred.

Assessment

13. I begin with the documents put forward to support the Appellant's contention that whilst living in Nigeria, her country of origin, she lived at the relevant time with her sister in accommodation in relation to which the rent was paid by the EEA Sponsor, the Appellant's sister's future husband.

14. It was of course the Appellant's account that she and her sister Mrs Adesuwa Uwechu were born in Benin City, Nigeria, and that in 1992 her sister met her husband (the Sponsor) Mr Emeka Uwechu and they started a relationship. In 1996 armed robbers visited their home and they were attacked. In consequence and upon hearing this, Mr Uwechu, when he visited Nigeria, asked them both to move to Abuja where it would be safer, and so the two sisters moved to Abuja with the Sponsor and he paid for the accommodation for both of them. Evidence of this can be correlated upon a consideration of the documentation within pages 32 to 36 of the Appellant's bundle. This discloses a tenancy agreement at an address, namely Plot 343, Bamako Street, Wuse Zone 1 Abuja and dated 1 June 2004 that clearly shows the tenants to be the Sponsor and the Appellant's sister, each of which had indeed, together with the landlord, signed the agreement.

15. The Appellant's evidence continued that her sister and the Sponsor were married on 8 January 2005 and moved to the United Kingdom on 29 January 2005. The Appellant repeated that before their relocation she and her sister were both dependent on the Sponsor (the sister's then-fiancé) from the year 2000 and had lived at various temporarily rented apartments in Abuja, Nigeria. That claim is further identified in the Appellant's bundle at page 39 that discloses the Appellant's sister's international driving licence and gives an address at Plot 88, Utako District, Abuja.

16. Further, at pages 41 and 42 of the bundle, there appear two documents comprising a Statutory Affidavit of Declaration of the Appellant that shows her as living at the Utako District address and which is dated 4 May 2006. It is of course significant that it is a sworn document, indeed sworn at the Court of Appeal registry in Abuja before a Commissioner for Oaths. The second document is described as a "Certificate of State of Origin" issued by the Government of Edo State of Nigeria Liaison Office further certifying the Appellant as residing at that address and dated 4 May 2006.

17. It was also the Appellant's evidence that she was able to produce her Nigerian driver's licence and national identity card, all of which appear at page 40 of the bundle and which again shows the Appellant as living at Bamako Crescent. It is a driving licence issued in February 2004 expiring in July 2007.

18. I have also taken account of page 45 of the bundle that discloses a copy of a Memorandum and Articles of Association of a company called "Uzade Nigeria Limited" that bears a stamp of verification from the Corporate Affairs Commission of Nigeria and is dated 23 November 2004. Of significance is that the address of the director of the company is shown as 344 Bamako District and that the director concerned is indeed the Appellant's sister Adesuwa Uzebu.

19. My attention has been further drawn to page 45(a) of the bundle that again relates to the same memorandum and on this occasion also refers to a co-director as indeed being the Sponsor, and shows his address in Abuja as the same 344 Bamako Crescent.

20. For the sake of completeness I have also taken account of a further document on page 43 of the Appellant's bundle, that being the Appellant's identity card issued by the Federal Republic of Nigeria and which shows her to at that stage, to be living at the Aminu Kano address in Abuja.

21. Taking all of these documents together cumulatively, if not indeed individually, it is readily apparent to me that they wholly support in a cogent and probative way, the accounts given by the Appellant as reflected in her witness statement and oral evidence before the First-tier Judge as to her situation in Nigeria from 2000 onwards, and in such circumstances and in light of the fresh evidence before me, I differ from the conclusion reached by Immigration Judge Oxlade in her determination of June 2010 where she concluded, inter alia, that the Appellant had not been the Sponsor's dependant either in the period 2000 to 2005 when she and her sister were living together in Nigeria. The evidence before me taken together, and mindful of the requisite standard of proof to a balance of probabilities, demonstrates to the contrary.

22. The matter does not of course end there, because the Appellant's bundle of documents proceeds to identify documentation that runs contrary to Judge Oxlade's conclusion that the Appellant had failed to demonstrate her dependency on the Sponsor in the period 2005 to 2008 after her sister left the United Kingdom and when she was a student. This of course is evidence that, in fairness to Judge Oxlade, was not before her, and indeed was evidence that I earlier identified in the error of law hearing as documentation constituting fresh evidence that had been overlooked or disregarded by First-tier Judge Roland in his determination.

23. That documentation is as follows; firstly, at pages 20 to 23 of the bundle there appears a series of University of Benin cards. I should explain, to

put the Appellant's account in its context and as it cross-relates to those documents, that it has always been her account that when her sister left Abuja to join the Sponsor, her husband, in the United Kingdom, the Appellant had to stay behind due to her admission to the University of Benin, Microbiology Department, during which period the rent had already been paid in advance for the period by the Sponsor thus enabling the Appellant to stay on at the accommodation in Bamako Crescent until such time as her school programme started. It was her account that the Sponsor and her sister between them thereafter continued paying for a room for the Appellant in a three bedroom flat at Flat 6, Plot 88, Utako District, Abuja, and indeed confirmation of that tenancy and the connection of that property with the Sponsor and the Appellant's sister has already been demonstrated by the documentation to which I have above referred.

24. It was the Appellant's account that during the period of her study at university her brother-in-law had become accustomed to taking care of her, and that he continued to cater for her daily and academic needs by sending both financial and material support through relatives and friends who have been regular travellers to Nigeria. I shall refer to that aspect of her account later in this determination. However, for the present purpose the student cards at pages 20 to 23 show a "clearance" card issued by the University Bursar's Department of the Students Accounts Division and this identifies the Appellant, the courses that she has undertaken, her student number, that she is attached to the Faculty of Life-Sciences but more particularly it identifies the Sponsor as Mr Emeka Uwechue, the Appellant's Sponsor and brother-in-law. There are indeed several clearance cards before me, all of which display the same information.

25. There is also at page 24 of the bundle, a hospital receipt issued out of the University of Benin Teaching Hospital in Benin City and dated 3 June 2008. It was the Appellant's evidence that in or around June 2008 she suffered a serious bout of malaria such as to result in her being hospitalised for one week. The hospital receipt identifies the Appellant and there are in fact two receipts, one of which refers to a consultation fee of 759 Naira, and the other fees for the Appellant's inpatient treatment and X-rays totalling 3,250 Naira. It is notable that in relation to both receipts there is stated clearly that payment was received from Mr Emeka Uwechue, the Appellant's brother-in-law and Sponsor.

26. It was also the Appellant's evidence that her brother-in-law in sending monies for her material support through relatives and friends, more particularly utilised the services of a Mr Richard Bello-Osagie and Mr Edwin I E Diejomaoh. It was claimed that the Sponsor sent funds through them because he was certain that they were easily accessible to the Appellant and that it was a cheaper, faster and more convenient method for him to send the Appellant money without having to pay any commission. He had, however, on some occasions sent money to the Appellant through Western

Union Money Transfer when he could not find anyone travelling and the Appellant needed urgent funding.

27. That claim is indeed supported by the sworn affidavits of Mr Diejomaoh and Mr Osagie. Mr Diejomaoh's affidavit appears over pages 5 and 6 of the bundle and it would be as well to set out in full what he had to say. The affidavit was sworn on 17 September 2010 and states, inter alia, as follows:

> "1. That I have been a family friend of Mr Emeka and Mrs Adesuwa Uwechue since 2005.
>
> 2. That during my numerous visits to Nigeria, I have helped Mr Emeka and Mrs Adesuwa Uwechue to take money, ranging from £100 to £500 (one hundred to five hundred pounds) from the UK to their dependant Ms Osemwonyenwen Uzebu (also known as Titi) as listed below, who was at that time in Nigeria and I later gathered was encouraged to remain to complete her University Education in Nigeria before coming to join them in the UK. She was dependent upon them and these monies were for her upkeep, academic pursuit and at some point for her UK visa application, to the best of my knowledge.
> 3. Below are listed the dates of my travels and returns, as well as the amount in cash that was given to me by Mr Emeka and Mrs Adesuwa Uwechue to give to their dependant Ms O Uzebu (Titi) for the purposes stated above.
>
> (i) On 17/08/2006 to 06/09/2006 Mr and Mrs Uwechue gave me £200 to Ms O Uzebu.
>
> (ii) On 15/03/2007 to 03/04/2007 Mr and Mrs Uwechue gave me £100 to Ms O Uzebu.
>
> (iii) On 16/08/2007 to 15/09/2007 Mr and Mrs Uwechue gave me £500 to Ms O Uzebu.
>
> (iv) On 19/03/2008 to 01/04/2008 Mr and Mrs Uwechue gave me £350 to Ms O Uzebu.
>
> (v) On 02/07/2008 to 29/07/2008 Mr and Mrs Uwechue gave me £250 to Ms O Uzebu.
>
> 4. As receipts were not in any way involved in our dealings, but a matter of friendship, trust and cash moving from one hand to the other, I have attached photocopies of my international passport showing my various journeys to Nigeria and back with confirmatory dates and I am willing to give testimony if necessary to this effect."

28. Indeed there is further exhibited to those affidavits and they appear in the Appellant's bundle, those international passport details.

29. Mr Osagie's affidavit and accompanying attachments appear over pages 11 to 19 of the Appellant's bundle. It will suffice to say that in that affidavit, Mr Osagie also makes reference to his dates of travel from the

United Kingdom and Nigeria, the amounts that he was given from the Appellant's brother-in-law and sister to give to the Appellant in Nigeria, and again the accompanying copy passport details including exit and entry stamps, that correlate with the dates that Mr Osagie gave within his affidavit. He also adds in his affidavit that he is a cousin of the Appellant and her sister and that he formerly owned a Western Union business which was still functioning and through which money was sometimes sent to the Appellant on the part of the Sponsor and his wife for the Appellant's benefit in Nigeria. I pause there because I regard that as additional evidence of Western Union money transfers in addition to the single receipt that has been produced to reflect those transfers that also appear within the Appellant's bundle.

30. Mr Osagie in his affidavit also adds that during his various travels to Nigeria the sort of things that he used to transport on the Sponsor's behalf to the Appellant not only included cash but also "letters, documents, clothes, shoes, toiletries and some food items".

31. Mr Osagie's affidavit further confirms that the Appellant is a dependant of the Sponsor and the Appellant's sister and that she was studying at the University of Benin, Nigeria "and needed this money for her upkeep both in school and outside school".

32. As I say, evidence of Western Union money transfers not only derives from the single Western Union receipt that appears in the bundle but from the affidavit of Mr Osagie and indeed the statement of the Sponsor.

33. It was the Sponsor's further account in maintaining that she had been totally dependent on him since 2000 to date, both financially and materially, that it was agreed between her and her sister and the Sponsor, that she would come and visit them in the United Kingdom once a year during her long school holidays and that she did so between 23 October 2006 and 1 February 2007. It was the Appellant's evidence that she was unable to do so in 2007 because of her school's industrial attachment program which had lasted till she resumed the final year session.

34. The Appellant continued that she was supposed to visit during her mid-term holiday in June/July 2008 but her visa was initially denied due to the British High Commission's doubts about her being a student that were eventually allayed such that she was granted a visa until October 2008. She stated that after her final examinations on 8 December 2008, she did make another visit and that on all the occasions of such visits the Sponsor paid for her air ticket.

35. That contention is, I find, borne out from further documentation within the Appellant's bundle that appears over pages 28 and 29. That evidence comes in several different forms. Firstly, there is before me a copy of the Sponsor's credit card statement through Lloyds TSB dated 1 November 2006. Within those entries there appears on 20 October, an entry of the

payment to British Airways in the sum of £400.10 and a further payment of £3.67 by way of payment protection cover. There is also a copy of the Appellant's boarding card relating to her flight from Abuja to Heathrow on 23 October 2006 and her return flight from London back to Abuja on Wednesday 31 January 2006.

36. There is also before me the credit card statement of the Appellant's sister dated 18 December 2008 that includes an entry dated 1 December 2008 showing a payment to British Airways for £717.90 that clearly must relate to the air ticket upon which the Appellant travelled in that period and indeed which is reflected at page 31 of the bundle by the production of the Appellant's boarding pass for those flights.

37. Taking this documentation into account both individually and more particularly cumulatively, together with the evidence given by the Appellant and her witnesses both oral and documentary, it is apparent to me, that not least to the requisite standard of proof, the Appellant has discharged the burden on her to show that she at all times met the requirements of Regulation 8(2) of the EEA Regulations 2006. I am satisfied on that evidence, that the Appellant was dependent and part of the household of her Sponsor – her brother-in-law, an EEA national – and that of her sister, his wife. I find therefore that she meets the requirements not least as identified in (iii) and (iv) and as identified in the headnote to the decision of the Tribunal in Dauhoo (above).

38. I have further borne in mind the guidance of the Tribunal both in Aladeselu and Others (2006 Regs – Reg 8) Nigeria [2011] UKUT 00253 (IAC) and Ihemedu (OFMs meaning) Nigeria [2011] UKUT 00340 (IAC), both of which make reference to the requirements of Regulation 17(4) of the 2006 Regulations that makes the issue of a residence card to an extended family member a matter of discretion. Where the Secretary of State has not yet exercised that discretion the most an Immigration Judge is entitled to do is to allow the appeal as being not in accordance with the law, leaving the matter of whether to exercise discretion in the Appellant's favour or not to the Secretary of State. That of course is the guidance that I shall now follow.

39. For the avoidance of doubt and in the light of my findings, I have concluded that the Secretary of State has not acted in accordance with the law and that the proper course for me is therefore to allow this appeal to the extent that he now exercises his discretion as required by Regulation 17(4).

40. I have, of course, taken the trouble to ensure in reaching this decision, that the Appellant's Sponsor is indeed an EEA national and I have been so satisfied by reference to the Tribunal bundle where at B1 there is displayed a copy of the Sponsor's Polish passport issued on 7 May 2010 and which does not expire until 7 May 2020. On the basis of that evidence and of course the other evidence to which I have referred, not least the

Sponsor's own evidence, I am wholly satisfied that he is indeed a Polish national and therefore a national of the European Union.

Conclusions

41. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

42. I set aside the decision.

43. I remake the decision in the appeal by allowing it to the extent that it is remitted to the Secretary of State to exercise her discretion in accordance with the requirements of Regulation 17(4) of the 2006 EEA Regulations.

Signed Date 19 June 2013

Upper Tribunal Judge Goldstein

APPENDIX A

APPELLANT: Osemwonyemwen Uzebu

RESPONDENT: Secretary of State for the Home Department

CASE NO: IA/18231/2012

DATE OF INITIAL HEARING IN UPPER TRIBUNAL: 27 February 2013

Representation:

For the Appellant: Mr H Kannangara, Counsel
For the Respondent: Ms H Horsley, Home Office Presenting Officer

REASONS FOR FINDING THAT TRIBUNAL MADE AN ERROR OF LAW, SUCH THAT ITS DECISION FALLS TO BE SET ASIDE

1. This is an appeal against the decision of the Respondent dated 24 July 2012 to refuse to the Appellant the issue of a residence card as confirmation of a right of residence under European Community law as the family member of an EEA national exercising treaty rights in the United Kingdom, the relevant Regulation being Regulation 8(2) of the Immigration (European Economic Area) Regulations 2006 that states 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 paragraphs (2), (3), (4) or (5).
>
> (2) the person satisfies the condition in this paragraph if the person is the relative of an EEA national, his spouse or his civil partner and –
>
> (a) the person is residing in an EEA State in which the EEA national also resides 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 paragraph (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".

2. In her Reasons for Refusal Letter, the Secretary of State noted that the Appellant had provided a Western Union money statement dated 2 August 2006 to show that she had been sent funds by her sister in the United

Kingdom, but there was no evidence to show that she had been relying upon her EEA Sponsor prior to entering the United Kingdom.

3. It was further contended that the Appellant had failed to provide evidence that she was a member of her EEA family member's household in Nigeria and to provide any evidence that she established her financial dependency or household relationship with her Sponsor in the country from which they moved to the United Kingdom.

4. Further that the Appellant also failed to provide any evidence that her financial dependency or household relationship with her Sponsor existed immediately before or very recently before they came to the United Kingdom.

5. It was also contended that the Appellant failed to demonstrate that she arrived in the United Kingdom at the same time as her EEA Sponsor or shortly after him.

6. Therefore it had been decided to refuse the confirmation that the Appellant sought, with reference to Regulation 8(2)(a), (b) and (c) of the 2006 EEA Regulations.

7. The Appellant's appeal came before First-tier Tribunal Judge Rowlands who sitting at Hatton Cross on 3 and 30 October 2012 and in a determination promulgated on 21 November 2012, dismissed the Appellant's appeal.

8. In his determination the Judge recorded the content of the Appellant's witness statement and her oral evidence particularly in cross-examination. He also heard and recorded the evidence of the Appellant's Sponsor, her brother-in-law Emeka Uwechue who relied on his witness statement that the Judge set out in full. Evidence was also heard from the Appellant's witness, her boyfriend.

9. The Judge noted that there had been previous applications made by the Appellant and previous findings by Judges. He had been specifically referred to the determination of Immigration Judge Oxlade following a hearing on 28 June 2010 in which she dismissed the Appellant's appeal against the refusal of her application for a residence card. It was noted that Judge Oxlade concluded in terms of the relationship between the Appellant and her Sponsor that:

> "(a) Mr Uwechue has been resident in the United Kingdom since 1996 and has not lived in Nigeria since then (although he has visited).
>
> (b) The Appellant was not a member of his household or his dependent in 1996 when he left for the United Kingdom as a student.
>
> (c) The Appellant and Mr Uwechue had not formed a household since then.

(d) The Appellant has not been his dependent either in the period 2000 to 2005 when she and her sister were living together in Nigeria nor in the period 2005 to 2008 after her sister left for the United Kingdom when she was a student".

10. It was noted that in an appeal against that determination the Upper Tribunal reached the view that those conclusions were properly open to Judge Oxlade on the evidence.

11. The Judge made reference to the case of Devaseelan* and at paragraph 22 of his determination continued as follows:

> "22. The case of Devaseelan suggests that the conclusion reached by previous Judges should, in the absence of evidence compelling to the contrary, be the starting point for me. I have considered all the evidence that I have been provided and can see no reason to reach a different conclusion to that of Judge Oxlade so far as those facts are concerned. **There was no additional evidence given to me** and indeed although there may have been some written evidence from persons claiming to have taken funds on behalf of the Sponsor to the Appellant **there was no additional evidence called and given in person to the Court**. (Emphasis added)
>
> 23. Whilst I am satisfied the Appellant has shown that she is related as claimed to the Appellant's wife and has dealt with the issue inadvertently raised by the Respondent during the first hearing, I am not satisfied that she has shown that there was anything different to that which applied back in 2010 that her inability to be able to show that she fulfils the requirements of the relevant EEA Regulation remains exactly the same now as it did then". (Emphasis added)

12. The Judge thus proceeded to dismiss the appeal.

13. The Appellant subsequently made a successful application for permission to appeal that decision in which it was contended inter alia, that the First-tier Tribunal Judge was simply relying on the previous determination of Immigration Judge Oxlade submitting that it was not appropriate for the Judge's decision to use as her starting point, the Devaseelan principles in cases where the appeal was not under the Immigration Rules but under the 2006 EEA Regulations.

14. It is right to say that most fairly and in my view realistically, Mr Kannangara at the outset of the hearing before me, clarified that he was no longer pursuing that ground of appeal.

15. He was quite right to do so. A judicial assessment of facts in the past has to be a starting point. Indeed if nothing else was offered it would be bizarre if a different view was taken to an unchallenged or unchallengeable judgment made some ago.

16. Ms Horsley further most helpfully provided me with the transcript of the decision of the Tribunal in Mubu and Others (Immigration Appeals – Res Judicata) Zimbabwe [2012] UKUT 00398 (IAC) in which the head note states inter alia as follows:

> "The guide lines set out in Devaseelan [2002] UKIAT 00702; are always to be applied to the determination of a factual issue, the dispute as to which has already been the subject of judicial determination in an appeal against an earlier immigration decision involving the same party. This is so whether the finding in the earlier determination was in favour, or against, the Secretary of State".

17. The grounds of application continued that the Immigration Judge had before him a bundle of supporting documents that included, apart from the witness statements, *"many documents that prove the Appellant was living as part of the household of an EEA national spouse (Appellant's sister) while they were living in Nigeria".*

18. The grounds continued as follows:

> "6. The documents in the below mentioned pages proved that the Appellant was living in the same household with the EEA national spouse (Appellant's sister):
>
> - pages 32-36 (tenancy agreement of one address they both lived);
> - page 39 (the sister's international driver's licence (at pages 41 to 42);
> - page 43 (Appellant's ID card) and page 44 (Appellant's sister's certificate of state of origin);
> - page 45 the address in Bamako Crescent and a copy of the Appellant's driver's licence – copy was given to the Judge separately.
>
> 7. It is also submitted that the documents in the below mentioned pages proved that the EEA national was paying for the Appellant's university fees and hospital bills. The EEA national's name was clearly mentioned in the documents:
>
> - pages 20 to 23 (university clearance cards);
> - page 24 (hospital bills);
> - page 27 (Western Union receipt);
> - pages 28 and 29 (the EEA national's card payment details when he paid for Appellant's air ticket to come to the UK in 2006 with a copy of the air ticket;

- pages 30 and 31 (the EEA national's bank statement showing the payment he made to British Airways for the Appellant to come to the UK in 2008 and a copy of the Appellant's ticket).

8. The above-mentioned documents clearly suggested that the Appellant was dependent and a part of the household of the EEA national and/or his spouse. It was also submitted to the Judge at the hearing that the above-mentioned documents were not available to the previous Immigration Judge. The Appellant did not have those documents at that time and after that appeal was dismissed by the Tribunal, the Appellant managed to get those documents from Nigeria and made the fresh application.

9. It is respectfully submitted that the Immigration Judge had not given any consideration to the documentary evidence available to (him) and also failed to adequately reason his decision".

19. Prior to the hearing of the appeal before me, the Tribunal received the Respondent's Rule 24 response dated 27 December 2012 that notably omitted to challenge that part of the grounds of application as set out above and solely challenged that part of the grounds that questioned the First-tier Tribunal Judge's right to invoke the principles of Devaseelan to an EEA appeal.

20. Thus the appeal came before me on 27 February 2013 when my first task was to determine whether the determination of the First-tier Tribunal Judge disclosed an error or errors on a point of law such as might have materially affected the outcome of the appeal.

21. There followed an exercise between myself and the parties' in which the documents referred to in the grounds of application were painstakingly gone through and clarified and it will suffice to say that in consequence, I was wholly satisfied, that with the exception of the documents at pages 5 and 6, 11 and 12 and 29 and 31, the remaining documents before the First-tier Tribunal Judge clearly did amount to fresh evidence arguably material to the outcome of the appeal before him, in particular the following:

Flight ticket to proof of payment by the Sponsor and the Appellant's sister	-	pages 29 and 30
Lloyds Bank statement and credit cards	-	page 28
Appellant's driving licence		
Sister's registration card	-	page 45
Western Union money transfer	-	page 27

Hospital receipts - page 24

Clearance cards - pages 20 and 23

22. Mr Kannangara proceeded to set out their relevance to the Appellant's case and the manner in which he submitted that they demonstrated that the Appellant met the requirements of Regulation 8(2)(b) which he submitted, was the sole issue that the First-tier Judge was required to determine.

23. Whilst Ms Horsley had initially sought to argue that the determination of the First-tier Tribunal Judge demonstrated consideration to these documents, it was with great respect to her, clear to me, that upon a reading of the determination that was not at all the case. It was apparent to me that the Judge's reasoning in dismissing the appeal, was wholly predicated upon the previous findings of Judge Oxlade and on her clearly mistaken understanding that there was no additional evidence before her and thus no reason for the Judge *"to reach a different conclusion to that of Judge Oxlade so far as those facts are concerned"*.

24. It was apparent to me that the Judge failed to give the documents before him the anxious scrutiny that they deserved and if they were simply overlooked, then it follows that she made a mistake of fact, clearly material to the outcome of this appeal.

25. In those circumstances, I had no difficulty in informing the parties that I was satisfied that for those reasons, the Judge had materially erred in law and that his decision to dismiss the Appellant's immigration appeal should be set aside.

26. It was however agreed with the parties that those paragraphs in the Judge's determination recording the Appellant and the witnesses' several statements and their oral evidence could be preserved, as could paragraph 21 of her findings. Paragraph 23 could be preserved but only to the extent that the First-tier Judge found that the Appellant was related to the Sponsor's wife namely as her sister. However the rest of that paragraph was not to be preserved. Paragraph 22 was not to be preserved.

27. It was decided that the appeal would be reserved to myself for the first available date, Listing to check with Mr Kannangara's clerk (020 7583 8595) as to his availability before fixing a date. I was informed that the Appellant and her sister (subject to her being able to do so having just given birth to her baby) and the Appellant's brother-in-law, the Sponsor, would be giving oral evidence before me in relation to which no interpreter would be required. There would be a time estimate of 3 hours. I also made appropriate directions for the resumed hearing.

Signed:

Upper Tribunal Judge Goldstein

Dated 9 April 2013