



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/19402/2012

THE IMMIGRATION ACTS

Heard at Bradford
On 19th July 2013

Determination Promulgated
On 6th August 2013

Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

MARTINS OMORODIAN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr C Cole of Parker Rhodes Hickmotts Solicitors
For the Respondent: Mrs R Pettersen, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is the Appellant's appeal against the decision of Judge Thorne made following a hearing at Bradford on 14th January 2013.

Background

2. The Appellant is a citizen of Nigeria. He arrived in the UK with a six month visit visa valid from February to August 2009. He returned to his home country and entered the UK, again as a visitor, in April 2010. On 27th March 2012 he sought a residence card.
3. On 17th August 2012 a decision was made to refuse to issue him with a residence card as confirmation of a right of residence under the European Community Law as the extended family member of an EEA national exercising treaty rights in the UK.
4. It is the Appellant's case that he is the extended family member of his uncle, Victor Idahosa, a German national, who became his guardian on the death of his father.
5. The judge did not accept that the Appellant was dependent on the Sponsor prior to his entering the UK. Neither did he accept that he had been dependent on him since his arrival in the UK nor that he was a member of the Sponsor's household.

The Grounds of Application

6. The Appellant sought permission to appeal on the grounds that the documentary evidence clearly demonstrated that the Appellant had been dependent on the Sponsor ever since his father died in 1988. The Sponsor was his formal guardian as confirmed in the document from his primary school. Furthermore, there were two key documents which the judge had failed to take into account when reaching his conclusions, namely two sworn affidavits from the Appellant's mother dated 4th January 2010 and 18th July 2011, one just prior to the Appellant entering the UK and the second after he had been living here.
7. Furthermore the judge had had regard to irrelevant considerations in stating that he doubted whether the Sponsor was able to maintain the Appellant, which is not part of the relevant law since the issue is whether the Appellant is in fact financially dependent on the Sponsor for his essential needs. There is no suggestion that the Appellant has any other form of support; it is irrational for the judge to conclude that the Appellant is not dependent on the Sponsor.
8. It was acknowledged in the grounds that there was some confusion in the evidence as to where the Appellant lived for the first three months when he arrived in the UK but this was a minor issue. The judge's comment that there were no bills to demonstrate that the Appellant was part of the Sponsor's household was unreasonable since it was not his house. The Appellant is not entitled to work or claim benefits and there is no possibility of him receiving any official letters at the Sponsor's address.
9. Finally there was a factual error when the judge stated that the Sponsor had been financially supporting the Appellant since 1998 whereas in fact it was 1988. The Sponsor became a German citizen in 1998. The documentary evidence confirmed that he has been in the UK since 2004 and the only possible conclusion is therefore

that he acquired German citizenship by that date, many years before the Appellant came to the UK.

10. Permission to appeal was initially refused by Designated Judge Peart on 13th February 2013 but subsequently granted by Upper Tribunal Judge Goldstein on 18th March 2013.
11. On 26th March 2013 the Respondent served a reply opposing the application.

Submissions

12. Mr Cole relied on his grounds. He submitted that the judge had erred in failing to take into account the relevant evidence, namely the sworn affidavits of the Appellant's mother which was material and supportive. He had applied an irrelevant test in relation to the Sponsor's ability to maintain. He relied on the case of Reyes (EEA Regulations dependency) [2013] UKUT 00314 which held that whether a person qualifies as a dependant under the Regulations is to be determined at the date of decision on the basis of the evidence produced to the Respondent or on appeal at the date of hearing on the basis of evidence produced to the Tribunal. He submitted that the Appellant had produced that evidence and that the appeal ought to be allowed.
13. Mrs Pettersen opposed the appeal. She submitted that the documents from the Appellant's mother did not assist and had the judge referred to them he would have noted that there were inconsistencies between the written and oral evidence. She said it was open to the judge to state that the fact that the Sponsor had not produced any evidence of his circumstances hampered the Appellant in his ability to establish dependency. Finally, there was a serious discrepancy in the evidence as to where the Appellant had lived when he first came to the UK and it was wholly reasonable for the judge to take into account when making his decision.
14. By way of reply Mr Cole submitted that the evidence was that the Sponsor had been appointed the Appellant's guardian on the death of his father and there was no requirement that they live in the same country. There was evidence of remittances having been sent over the years. He said that the Sponsor had submitted some evidence of his circumstances and it was difficult for a person in the Appellant's position, who had overstayed, to provide documentary evidence of his residence. In summary, the judge's reasoning was insufficient and it was not possible to read into it enough to make it legally adequate.

Findings and Conclusions

15. In order to succeed in this appeal the Appellant had to show that he was dependent on the Sponsor or was a member of his household in Nigeria and that he remains as a dependant or a member of his household in the UK.
16. It is not argued that the judge failed to conduct the correct legal analysis. Nor is it argued that the Appellant was a member of the Sponsor's household in Nigeria.

17. The Appellant says that the judge was wrong to find that he had not been dependent on the Sponsor since 1988. The documents showed that Mr Idahosa had been appointed his formal guardian and that, over the years, he had sent money to him for his essential needs. The judge recorded that there was independent reliable documentary evidence of some financial support from 2004 to 2009 namely eight receipts showing payment of £250 between 2006 and 2009 plus a letter from Allwell Investments stating that money had been sent by the Sponsor to the Appellant's mother monthly in 2004 and 2005 and three receipts for school fees paid by him in 1994, 2000 and 2004.
18. The judge did not accept that the Appellant was dependent on the Sponsor prior to his arrival in the UK in April 2010. He said that the documentary evidence of financial support finished some fourteen months before the Appellant left Nigeria and in any event indicated at best sporadic payment of monies over the years. Furthermore the oral evidence was contradictory. The Appellant said that the last time he received money from the Sponsor was in January 2009 and when it was pointed out to him that there had been a fourteen month gap he changed his account and said he must have received the money after that date but could not remember. The Sponsor said that he paid money every month to the Appellant in Nigeria until 2010 but could not remember exactly when.
19. The independent documentary evidence before the judge is not supportive of the statement in the affidavit that Victor Idahosa has been responsible for the Appellant's upbringing to date and the oral evidence was wholly discrepant. The judge was entitled to reach the conclusion which he did.
20. The Appellant now argues that the judge failed to take into account the affidavits from the Appellant's mother. The first affidavit is dated 4th January 2010 and states that the Appellant is presently under the custody of his uncle, Victor Idahosa in the UK. Mrs Pettersen said that this was clearly wrong because at that point the Appellant was in Nigeria. Mr Cole said that this was a misreading of the affidavit which simply meant that Victor Idahosa is in the UK.
21. The second affidavit, dated July 2011 states that after the death of the Appellant's father Victor Idahosa has been his guardian and responsible for his upbringing to date.
22. The judge was not obliged to make specific reference to each and every piece of evidence. He said at paragraph 11 of the determination that he had taken into account all of the documents submitted by both parties. Given the discrepancies in the evidence between the Sponsor and the Appellant and the ambivalent nature of the affidavits from the Appellant's mother the lack of specific reference to them is not fatal to this determination.
23. With respect to the Appellant's situation since he has been in the UK the judge did not apply the wrong legal test. Whether the Sponsor was able to maintain the Appellant, given that he has a wife and four children to support is a relevant

consideration as to whether he was in fact doing so. On the basis of the evidence which the Sponsor had produced, his income was limited. The Tribunal in Reyes held that the mere fact that a person is in the UK without lawful permission to work does not mean that he is to be considered as meeting the test of dependency under the Immigration (EEA) Regulations 2006. There is nothing irrational in the judge failing to find as a fact that the Appellant is dependent on the Sponsor.

24. The judge was clearly entitled to place significant weight on the fact that when the Appellant came to the UK he did not go and stay with his uncle but instead went to live with one of his father's relatives who had sponsored him on his visit visa. The Sponsor denied that this was the case and said that he could remember the Appellant phoning him when he arrived from Nigeria at Manchester Airport and getting a train direct from there to the Sponsor's house. He had no knowledge of the Appellant supposedly living with another person from April to June 2010.
25. Not only does the discrepancy cast light upon the reliability of the witness evidence as a whole, it also tends to show, assuming that the Appellant is correct as to where he stayed when he first came to the UK that his relationship with the Sponsor is not that which he now claims it to be.
26. Neither was it irrational for the judge to comment that there was no reliable independent documentary evidence to show that the Appellant was or is a part of the Sponsor's household. Had the oral evidence been consistent and credible such documentary evidence would not have been necessary. However in these circumstances, where it was not, the judge was fully entitled to comment on the fact that it was lacking. It is not true to state that the Appellant could not have provided any such documentation. He could have registered with a GP, or opened a bank account or even have produced correspondence addressed to him at his uncle's address.
27. The final challenge has more merit. It may be that the judge went beyond what the evidence could bear in stating that there was no adequate evidence of when the Sponsor acquired EEA nationality since there was evidence to show that, at the least he had an ID card issued in January 2010 which was before the Appellant came to the UK. However, given his other findings, any error in respect of the Sponsor's acquisition of German citizenship is immaterial.
28. Taken as a whole this is a sustainable determination. Had the reasoning been fuller it may have been less open to challenge but the grounds disclose no error of law.

Decision

29. The judge's decision shall stand. The Appellant's appeal is dismissed.

Signed

Date

Upper Tribunal Judge Taylor