



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/34084/2010

**THE IMMIGRATION ACTS**

Heard at Field House  
On 27 November 2013

Determination Promulgated  
On 5 December 2013

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

BENEDICTA AMACHI OGWUAZOR

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: No appearance and not represented

For the Respondent: Mr R.S. Hopkin, Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. This appeal comes before me following a hearing on 21 June 2013 following which I decided to set aside the decision of the First-tier Tribunal which dismissed the appellant's appeal against a refusal to issue a residence card. In fact, the appeal was remitted to the Upper Tribunal by the Court of Appeal by consent.

2. The history of the proceedings in more detail is set out in the Decision and Directions which followed the hearing before me on 21 June 2013. That decision in full is as follows:

#### DECISION AND DIRECTIONS

1. The appellant is a citizen of Nigeria, born on 19 February 1978. A decision was taken on 1 September 2010 to refuse to issue her with a residence card as an extended family member.
2. Her appeal against that decision was dismissed by Immigration Judge B. A. Morris after a hearing in the First-tier Tribunal on 13 October 2010. Permission to appeal against her decision having been granted, the appeal next came before Deputy Upper Tribunal Judge R.C. Campbell on 28 April 2011. He concluded that there was no error of law in Judge Morris' decision.
3. On 3 May 2013, by consent, the Court of Appeal allowed the appellant's appeal against the decision of the Deputy Upper Tribunal Judge and the appeal was remitted to the Upper Tribunal. Thus, the appeal came before me.
4. The refusal to issue a residence card was on the basis that the appellant had failed to establish the necessary dependency as an extended family member.

#### *Submissions*

5. On behalf of the respondent before me it was accepted that there was an error of law in the decision of the First-tier Tribunal in terms of the conclusion at [17] that dependency needed to be established in a country in which both the appellant and the sponsor lived at the same time.
6. Mr Ngwuocha contended that aspects of Judge Campbell's determination could stand. As I pointed out however, the Court of Appeal decided that the appeal against Judge Campbell's determination was to be allowed and the matter remitted to the Upper Tribunal.
7. As to dependency, it was argued on behalf of the appellant that the relevant date is the date of decision and that it was for the Secretary of State to ask the appellant for further evidence of dependency. I was referred to the decision of the Court of Appeal in Adesulu [2013] EWCA Civ 144. A number of issues had been resolved in the appellant's favour it was suggested. The only issue left to be determined is that of prior dependence or membership of the same household.
8. In terms of whether the error of law requires the decision to be set aside, I was referred by both parties to various domestic and European authorities, in particular on the meaning of "dependency". Mr Ngwuocha submitted that the decision does require setting aside, Ms Isherwood argued that it did not. She submitted that the evidence as to financial support, limited to the payment of school fees, was not sufficient to establish dependency and that the First-tier judge was entitled thus to find, at [17] of the determination.

*My assessment*

9. An error of law having been identified, the only remaining questions are whether the error of law is such as to mean that the decision should be set aside, and if so, whether the decision should be re-made in the Upper Tribunal or the appeal remitted to the First-tier Tribunal.
10. Section 12(2) of the Tribunals, Courts and Enforcement Act 2007 makes it clear that if the Tribunal finds that there is an error on a point of law made by the First-tier Tribunal, there is a discretion as to whether or not the decision of the First-tier Tribunal should be set aside.
11. At [17] of the First-tier Tribunal's determination the judge made a finding that there was no evidence of dependency, finding that the sending of money for school fees was not sufficient to establish dependency. It does seem to me that the evidence for dependency from the appellant's witness statement and in the fact of the money transfer receipts is rather sparse in terms of establishing dependency. However, it also seems to me that a more detailed enquiry was necessary before the conclusion was reached that the evidence did not establish dependency.
12. I also bear in mind that the issue of dependency has received later clarification in the decision of the Upper Tribunal in Moneke (EEA - OFMs) Nigeria [2011] UKUT 00341(IAC). Furthermore, the history of this appeal includes its remittal from the Court of Appeal.
13. In the circumstances, I have decided that the decision of the First-tier Tribunal is to be set aside. Both parties agreed that in the event that I came to that view the decision could appropriately be re-made in the Upper Tribunal, and I agree with that view.
14. The appeal will in the circumstances require a further hearing at which all aspects of dependency will need to be considered. It is therefore incumbent on the appellant to adduce such further evidence as she and her representatives consider necessary to establish both prior and present dependency or present membership of the sponsor's household. I do not agree with the submission made on behalf of the appellant to the effect that it is for the Secretary of State to ask for further evidence of dependency, or incidentally, that it is the date of decision that is the relevant date; it is the date of hearing. In considering whether or not further evidence is to be adduced on the question of dependency, the appellant and her representatives will no doubt bear in mind the observations I have made as to the extent of the evidence on that issue thus far.
15. As I also indicated at the hearing, there is presently no evidence as to when the sponsor obtained his German citizenship. This is a matter that must be addressed by satisfactory evidence at the next hearing.
16. This appeal will therefore be listed for further hearing before the Upper Tribunal and is subject to the directions below.

### DIRECTIONS

1. Any further evidence from the appellant is to be filed and served no later than 14 days before the next date of hearing.
  2. Evidence is required in particular as to the date on which the sponsor obtained his German citizenship.
  3. At the resumed hearing the parties must be prepared to make submissions as to what, if any, findings of fact by the First-tier Tribunal are to be preserved. Provisionally, such findings would appear to be limited to the sponsor having been in the UK exercising Treaty rights since April 2009 [13], that the appellant is the cousin of the sponsor [14], and that the money transfer receipts show that money was sent to the appellant [15].
3. When the appeal was next listed before me on 24 September 2013, notwithstanding the directions given in the error of law decision set out above, in particular with reference to [14] in relation to further evidence, there was no further evidence submitted and the directions had not been complied with. A copy of what was said to be the sponsor's German Identity card was provided but it was largely illegible. On behalf of the respondent evidence was produced in relation to whether the appellant and the sponsor were in fact living at the same address as had been claimed. The sponsor did not appear at that hearing. I was told that he had gone on a business trip.
  4. I indicated to the appellant's then representative, Mr Ngwuocha, that if the hearing were to proceed on that day, my provisional view was that the appeal would be dismissed given the lack of evidence on central issues, notwithstanding that I had given directions for the production of further evidence and identifying the areas in which evidence was lacking. Mr Ngwuocha then applied for an adjournment which I granted. So it was that the appeal came before me again on 27 November. I gave written directions pointing out that previous directions had not been complied with and repeating in emphatic terms the need for the appellant to adduce sufficient evidence in relation to dependency and/or membership of household.
  5. The day before the hearing on 27 November the Tribunal received a faxed letter from the appellant's representatives. It stated that the representatives are unable to attend because they had not received any instructions from the appellant. They were not sure whether or not she would be attending.
  6. When the case was called on at 10.20 am the appellant had not appeared. There was apparently no message from her to administrative staff to indicate that she was for some reason unable to attend. No written communication has been received from her in relation to her inability to attend. The Tribunal file shows that she was given notice of the hearing at the address given to the Tribunal, namely c/o of her solicitors. In any event the hearing date of 27 November was given at the end of the hearing on the last occasion. In the circumstances I decided

to proceed with the hearing in the absence of the appellant having regard to rules 38 and 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

7. In a letter to the Tribunal dated 26 November 2013 Mr Hopkin explained that the sponsor, Mr H. Ehidihamhen, had an appeal outstanding before the First-tier Tribunal against the refusal of a registration certificate. The appeal is listed to be heard at the Hatton Cross hearing centre in May 2014. According to the reasons for refusal letter the Secretary of State was not satisfied that he is exercising Treaty rights.
8. Mr Hopkin's letter accepts that the sponsor holds German nationality. At the hearing before me he went further and conceded, with reference to the copy of his German passport, that the passport was issued on 21 May 2004.
9. The issues before me that remained to be decided therefore, were whether the appellant had established prior and present dependency or present membership of the sponsor's household.
10. I did not consider it necessary, or indeed appropriate, to delay the hearing of this appellant's appeal until the sponsor's own appeal in May 2014. The issue in his appeal appears from the refusal letter provided to me in his case, to relate to whether he is exercising Treaty rights. That has not been in issue in the proceedings before the Upper Tribunal. In any event, I am satisfied that her appeal can be determined without reference to that matter. Furthermore, *for present purposes* Mr Hopkin agreed that the finding by First-tier Tribunal Judge Morris at [13] that the sponsor had been exercising Treaty rights since April 2009 until the time of the hearing before her on 13 October 2010 was a finding that could be preserved.
11. The appellant's claim of entitlement to a residence card is made with reference to Regulation 17 of the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations") on the basis that she is a family member of an EEA national exercising Treaty rights. Reg. 8 defines what is meant by an "extended family member", being relevant here because the appellant is the cousin of the sponsor rather than a family member (such as a spouse) as defined in reg. 7. Again, Judge Morris concluded at [14] that the appellant and the sponsor are so related and that finding is unaffected by the error of law in her decision. I gave my provisional view in the directions sent with the error of law decision as to what findings of Judge Morris could be preserved and no disagreement has been expressed by either party. For completeness, the last preserved finding set out is that the money transfer receipts from the sponsor show that money was sent to the appellant (at [15] of the First-tier judge's determination)
12. Reg. 8, so far as relevant, provides as follows:

**"Extended family member"**

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 a country other than the United Kingdom 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.

13. Accordingly, the appellant must establish, in this case, that she was dependent on the sponsor when she was living in Nigeria and that there she is still dependent on him or a member of his household. There are a number of authorities on these issues and I was referred on behalf of the respondent to Moneke (EEA – OFMs) Nigeria [2011] UKUT 00341(IAC), already noted in the error of law decision, and Lim (EEA-dependency) [2013] UKUT 437 (IAC) in relation to what is meant by dependency. I have also considered Dauhoo (EEA Regulations-reg (8(2)) [2012] UKUT 79 (IAC) in terms of how a person is able to establish that they come within reg 8(2). Further, I have considered the decision of the Court of Appeal in Oboh [2013] EWCA Civ 1525 and that of the European Court of Justice in Rahman Case C-83/11 [2013] QB 249.
14. As evidence of dependency the appellant relies on money transfer receipts, referred to in the decision of the First-tier judge at [15], those receipts being dated November and December 2004, January, February, March and July 2005. In the only witness statement provided by the appellant she states at [2] that “Prior to my arrival [in the UK] I had depended on my cousin, Mr Henry Ehidiamhen, who is a German national for the payment of my school fees, being an indigent student on the account of my father’s unemployment.” As indicated, it is accepted on behalf of the respondent in these proceedings that at the time of the money transfers the sponsor was a German national.
15. There is no evidence that the funds remitted to the appellant by the sponsor were for anything other than school fees and as has been pointed out, that is what the witness statement says they were used for. The money transfer receipts are in relatively modest sums from about 20,000 Naira to 41,000 Naira which at the time of the transfers would have amounted only to about £115 to £237. There are six transfers over a period of about eight months.
16. In Moneke it was said at [41] that “dependency is not the same as mere receipt of some financial assistance from the sponsor” and there the Tribunal referred to

UKBA guidance which refers to the person needing the financial support in order to meet her "essential needs". Mr Hopkin pointed out that at the time the money was sent to the appellant by the sponsor the appellant was in her mid 20's and there is no evidence of the nature of the 'schooling' that the fees were said to relate to. He submitted that the evidence of dependency whilst the appellant was in Nigeria is insufficient.

17. It was made clear in my error of law decision and in the directions that followed the hearing on 24 September 2013 as to the need for the appellant to produce sufficient evidence of past dependency. I am not satisfied that such dependency has been established on the limited evidence that has been provided. The appellant has not given any further evidence on the point and there is no evidence at all from the sponsor.
18. In any event, even if the money transfers do establish prior dependency, there is little evidence of the appellant's present dependency or membership of the sponsor's household. Her witness statement is dated 12 October 2010. In it she states that "I have continued to receive regular cash payments from my cousin, and I have also continued to reside as a member of his household." However, there is no evidence from the sponsor in terms of any witness statement or oral evidence. He did not appear before the First-tier Tribunal or before me on any occasion. There is no up-dated evidence from the appellant on the point of dependency or membership of the sponsor's household.
19. Mr Hopkin referred me to evidence he produced at the previous hearing, namely CID printouts with reference to the sponsor and the appellant which appeared to show that at least in April 2012 they did not live at the same address. I indicated at the earlier hearing that I would consider the admission of any further evidence by either party at the resumed hearing, taking into account rule 15(2A) of the 2008 Procedure Rules. I decided to admit that evidence. There is no prejudice to the appellant who was aware at the previous hearing that it was proposed to adduce it.
20. I note that the appellant's bundle that was before the First-tier Tribunal contains payslips for the sponsor which show his address as the same given by the appellant in her witness statement. However, the most recent of those payslips is dated 31 January 2010 and, as already indicated, the appellant's witness statement is dated October 2010. There is no more recent evidence of where either of them lives (apart from the CID printout to which I have referred, but even that relates to 2012).
21. Neither the sponsor nor the appellant attended the hearing before me for matters to be clarified or for up-to-date evidence of dependency or membership of household to be provided. Mr Hopkin submitted that there was no evidence that the appellant was receiving financial support for her essential needs, what those needs are and what assistance she is receiving from the sponsor. He also contended that it would be surprising if the appellant were dependent on the

sponsor given her age and that she appears to be in good health who would in ordinary circumstances be in employment. In my view those submissions have merit.

22. I am not satisfied that the appellant has established that she was dependent on the sponsor prior to coming to the UK or that she is presently a dependant or a member of his household. The evidence of prior dependency is inadequate for the reasons I have given. The evidence of present dependency or membership of the sponsor's household is similarly manifestly lacking.
23. It follows that the appellant has not established her entitlement to a residence card. No argument has been advanced in relation to Article 8, neither was it advanced before the First-tier Tribunal.
24. For the avoidance of doubt, I make it clear that my findings in this appeal cannot be interpreted as including a finding that the sponsor is presently exercising Treaty rights. As I have indicated, the finding on the issue of exercise by the sponsor of Treaty rights at [13] of Judge Morris' determination is a preserved finding for the purposes of *this* determination. I repeat however, that it has not been necessary for me to make any findings on the issue of his exercise of Treaty rights, the appeal being able to be determined without reference to that matter.

*Decision*

25. The decision of the First-tier Tribunal involved the making of an error on a point of law. The decision of the First-tier Tribunal is set aside and the decision re-made dismissing the appeal under the EEA Regulations.

Upper Tribunal Judge Kopieczek

27/11/13