



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/17857/2013

THE IMMIGRATION ACTS

Heard at Field House
On 4 February 2014

Determination Promulgated
On 12 February 2014

Before

UPPER TRIBUNAL JUDGE MOULDEN

Between

MISS ABIBAT YINKA SULAIMON
(No Anonymity Direction Made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr O Jibowu of counsel instructed by M J Solomon & Partners
For the Respondent: Ms A Everett a Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Nigeria who was born on 19 February 1988. She has been given permission to appeal the determination of First-Tier Tribunal Judge Eldridge ("the FTTJ") who dismissed her appeal against the respondent's decision to refuse to grant her a residence card as confirmation of a right to reside in the UK as the extended family member of an EEA national under Regulation 8(1) of the Immigration (EEA) Regulations 2006 ("the 2006 Regulations"). The appellant's brother born on 7 March 1976 is her sponsor and he is a French national.

2. The respondent was not satisfied that the appellant was dependent on the sponsor prior to entering the UK or that she had been residing with or was dependent on him since entering the UK. The application was refused under the 2006 Regulations and on Article 8 human rights grounds.
3. The appellant appealed and the FTTJ heard her appeal on 26 November 2013. Both parties were represented the appellant by Mr Jibowu who appears before me. The appellant and the sponsor gave oral evidence. The FTTJ referred to the reported determination of the Upper Tribunal in Dauhoo (EEA Regulations - reg 8(2)) [2012] UKUT 79 (IAC) and set out the relevant provisions which I will repeat;

"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 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)."

4. The FTTJ did not believe the evidence of the appellant and the sponsor. Whether he also disbelieved the evidence of the appellant's father is a question to which I will need to return. There was an almost total dearth of documentary evidence in circumstances where the FTTJ considered that the appellant, who was legally represented, could and should have produced this particularly where the refusal letter had made it clear why the application was being refused and put the appellant on notice as to what evidence was required. The FTTJ found that the appellant had not established that she and her brother had lived together in Nigeria in the same household before he came to this country or that she had been dependent on him in Nigeria. In the circumstances it did not matter whether the appellant could establish dependency on the sponsor in this country. She could not satisfy any of the required tests.

5. The FTTJ found that the appellant had not established that she had a family life in the UK and only a very limited private life. The proposed interference with her right to respect for these was not of such gravity as potentially to engage the operation of Article 8.
6. The FTTJ dismiss the appeal under the 2006 Regulations and on Article 8 human rights grounds.
7. The appellant applied for and was granted permission to appeal to the Upper Tribunal. The grounds argue that the FTTJ erred in law by failing to make any findings of credibility or fact in relation to the evidence which the appellant's father had given in an affidavit. The FTTJ had not applied the appropriate standard of proof and had not correctly followed what the Upper Tribunal said in Ihemedu (OFMs - meaning) Nigeria [2011] UKUT 00340 (IAC). It is said that there was no dispute about the sponsor's support for the appellant in journeying to the UK and prior payment for her admission to College. This amounted to prior dependency whilst the appellant was in Nigeria. This was not a case where there was a sudden or contrived dependency.
8. The appellant representatives submitted a further bundle of documents on the day of the hearing. Some of this was before the FTTJ. There is also new evidence which was not before the FTTJ. The new evidence does not fall to be considered unless I conclude that there is an error of law such that the decision should be set aside.
9. Mr Jibowu relied on the grounds of appeal and argued that the FTTJ erred in law by saying nothing about the appellant's father's affidavit in his reasoning and conclusions. The failure to consider the father's evidence was an error of law which could have made a difference. He argued that in paragraph 10 of the determination the FTTJ made a finding that the sponsor had paid for the appellant school fees and flights. I pointed out that this paragraph did not contain findings by the FTTJ but a record of evidence given. Mr Jibowu accepted this. I was asked to set aside the decision and adjourn for it to be remade in the Upper Tribunal at a later date in the light of the new evidence which it was accepted had been submitted later than it should have been.
10. Ms Everett submitted that it was clear that the FTTJ was aware of the evidence from the appellant's father. It was not clear whether, even if this was believed it would have made any difference to the appellants claim. There were a few relevant details. It was clear that the FTTJ disbelieved both the appellant and the sponsor because of the total lack of any documentary evidence. The FTTJ gave examples of the sort of documentary evidence which could have been expected. This was the type of application where such documentary evidence was of particular importance. The appellant's father had not submitted any documentary evidence either. Ihemedu made it clear that there was no relaxation in the burden of proof merely because an application was made from within the UK rather than abroad. I was asked to find that there was no

error of law and to uphold the decision is of the FTTJ. I reserved my determination.

11. The appellant's father's witness statement dated 11 November 2013 contains 10 short paragraphs. There is also an affidavit dated 5 November 2013. The affidavit does not confirm what is said in the witness statement. The affidavit is headed; "affidavit for correction of name". It is directed to the question of whether the family name is Sulaimon or Sule and why the appellant might use the latter rather than the former. The witness statement does not refer to any documentary evidence which might support the appellant's claims.
12. I find that the FTTJ was aware of the witness statement from the appellant's father. It is referred to in paragraph 6. The FTTJ did not accept the evidence of the appellant or the sponsor which, he concluded, meant that she had not established that she met the requirements of the 2006 Regulations. Whilst he did not state in terms that he rejected the statement from the appellant's father I find it is sufficiently clear that he did not accept this evidence. The father's statement contains nothing material to the issues in this appeal which goes beyond anything said by the appellant or the sponsor and it does not provide any of the documentary evidence which the FTTJ found to be conspicuously lacking.
13. There is a correct statement of the burden and standard of proof in paragraph 31 of the determination. I can find no indication that the FTTJ did not follow this.
14. In paragraph 38 of the determination the FTTJ referred to what Upper Tribunal Judge Storey said in paragraph 17 of *Dauhoo* namely;

"It should be recalled that in Ihemedu (OFMs - meaning) Nigeria [2011] UKUT 340 (IAC) the Upper Tribunal held that:

"If an applicant chooses not to apply from abroad for a family permit under reg 12 of the 2006 Regulations, thereby denying the UK authorities an opportunity to check documentation in the country concerned, he cannot expect any relaxation in the burden of proof that applies to him when seeking to establish an EEA right."
15. I can find no indication that the FTTJ took these passages out of context. The grounds do not make it clear how it is suggested that he did. I find that these were appropriate principles properly applied.
16. The grounds of appeal contain an incorrect statement which was repeated by Mr Jibowu the hearing. The FTTJ did not accept that the sponsor had paid for the appellant's school fees and flights. What he said in paragraph 10 was not findings but a record of evidence given. Mr Jibowu accepted this.

- 17. The FTTJ did not accept that there was prior dependence by the appellant on the sponsor before she left Nigeria by way of deposits, school fees or airfares.
- 18. I find that the FTTJ did not err in law and I uphold his determination.

.....
Signed
Upper Tribunal Judge Moulden

Date 9 February 2014