



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/18960/2013

THE IMMIGRATION ACTS

Heard at Field House
On 5 February 2014
Prepared 5 February 2014

Determination Promulgated
On 14 February 2014

Before

UPPER TRIBUNAL JUDGE MCGEACHY

Between

MS FAITH OMOROGBE

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Dhanji, Counsel, instructed by Messrs Mitchell Simmonds
Solicitors

For the Respondent: Ms A Holmes, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant appeals, with permission, against a decision of Judge of the First-tier Tribunal Walker, who in a determination promulgated on 3 December 2013 dismissed the appellant's appeal against a decision of the Secretary of State to refuse to issue a residence card as a confirmation of a right to reside in the UK as an extended family member of an EEA national under Regulations 8(2) and (a) of the Immigration (EEA) Regulations 2006.
2. The appellant, a citizen of Nigeria, born on 11 July 1993 had entered Britain with a visit visa on 17 May 2011. On 21 September 2011 she applied for a residence card as the extended family member of her maternal aunt Owen Omorogbe. That was refused. The appellant appealed. Her appeal was dismissed by Judge of the First-tier Tribunal Bart-Stewart on 5 April 2012. Judge Bart-Stewart had found that the appellant had not proved that she was related as claimed to her aunt and moreover that there was no evidence of prior dependency. The judge referring to the fact that the only evidence produced were three money transfer receipts dated January, February and March 2011. The judge had found that the appellant had not only failed to show that she was related to the sponsor as claimed but also that she had failed to show that she had resided with the sponsor prior to her arrival in Britain or that she was a dependant.
3. Judge Walker stated that the starting point in the consideration of the appellant's appeal was the first judge's determination. He took into account a DNA report and found that the appellant was related as claimed to her aunt.
4. He noted evidence from the appellant and her aunt relating to the issue of dependence but found that there were clear discrepancies in their evidence and noted that the only corroborative evidence was limited to the three money transfers of January, February and March 2011. In paragraph 23 of his determination, he stated that:

"With regards to dependency in Britain, I accept that the appellant is living with her aunt, the sponsor but it does appear there is and possibly has been in the past some financial help from another aunt, Cynthia, and who resides nearby in the UK. Nevertheless I accept that in the UK the appellant is a member of the household of the aunt and also a dependant. However, with regard to the appellant's time in Nigeria I do not accept that firstly she has been a member of her aunt's household. The aunt left in 2004 and whilst the exact date she acquired German citizenship is not known her German passport shows that this was issued on 11 May 2009. I do not accept the appellant has been a dependant of her aunt while she lived in Nigeria."
5. Judge Walker therefore found that the appellant did not meet the requirements of the Regulations and dismissed the appeal.

6. Grounds of appeal claimed that the judge had not had regard to the judgment in **Pedro [2009] EWCA Civ 1358** where the Court made the point that an appellant's dependency on the EEA national sponsor does not need to have existed before he or she came to the United Kingdom. Consequently the judge's decision was wrong and not in accordance with the law. The grounds stated that this point was also maintained by the Court in **Bigia & Others [2009] EWCA Civ 79**.
7. On those grounds, Judge of the First-tier Tribunal Grant-Hutchison granted permission to appeal.
8. The respondent submitted a Rule 24 response pointing out that case law **VN (EEA rights - dependency) Macedonia [2010] UKUT 380 (IAC)** had made it clear that the decision in **Pedro** applied only to "Regulation 7 core family members and not Regulation 8 other family members". The respondent also pointed out that there was no evidence of dependency or a household relationship existing at the relevant time that is immediately or very recently before the EEA national came to Britain. It was pointed out that **Bigia [2009] EWCA Civ 79** confirmed that historic or lapsed dependency does not count. The response went on to say that:

"At the very minimum when the appellant entered the UK to visit and stay with an uncle she was not dependent upon the EEA national, let alone the findings that there had not been financial dependency before the appellant had not arrived in the UK."

9. At the beginning of the appeal before me Mr Dhanji, with complete integrity, stated that he accepted that the grounds submitted which referred to the decision in **Pedro** were wrong and that it was correct that the decision in **Pedro** only referred to Regulation 7 family members. He went on, however, to argue that the judge had erred in his consideration of the previous determination in that as he had found that there was in effect a mistake in fact in the determination of the first judge all findings of the first judge should have been disregarded.
10. I have concluded that there is no material error of law in the determination of Judge Walker. The reality is that the findings relating to dependency in the determination of the first judge have in no way been undermined by the fact that the appellant has been unable to prove the relationship. There was no additional evidence to show dependency at the relevant time. The only evidence (apart from the oral evidence of the appellant's aunt and the appellant herself) were the three payment slips of remittances in 2011. The judge did consider the evidence and did consider the discrepancies therein, not only between the appellant and her aunt but also between what had been said in evidence before the first judge. He was fully entitled to do so. He was therefore entitled to find that there was no prior dependency.
11. I note the head note in **Ihemedu (OFMs - meaning) Nigeria [2011] UKUT 00340 (IAC)** that:-
 - (ii) An important consideration in the context of an OFM - extended family member case that if a claimant has come to the UK without applying for a

family permit abroad (for which provision was made in Regulation 12 of the Immigration (EEA) Regulations 2006), this will mean that the UK authorities have been prevented from conducting the extensive examination of the individual's personal circumstances envisaged by Regulation 12(iii) and in the course of such an examination checked the documentation submitted. If an applicant chooses not to apply from abroad for a family permit under Regulation 12 of the 2006 Regulations, thereby denying the UK authorities an opportunity to check documentation in the country concerned, he cannot expect in the burden of proof that applies to him when seeking to establish an EEA right."

12. I consider that the judge was correct to find that the appellant did not qualify for a residence permit as an "other family member" under the provisions of Regulation 8 of the Immigration (EEA) Regulations 2006. There was simply no evidence on which he could have found that the appellant so qualified.
13. I therefore find that there was no material error of law in the determination of the First-tier Judge and his decision dismissing this appeal on immigration grounds and his finding that the appellant was not entitled to a residence card as confirmation of a right to reside in the UK shall stand.
14. It was not argued before the judge that the appellant's rights under Article 8 of the ECHR would be infringed by the decision and indeed that was not argued in the grounds of appeal before me. Given the appellant's age and the short length of time that she has lived in Britain, it is clear that such a claim would be unarguable in any event.

Decision

15. This appeal is dismissed.

Signed

Date

Upper Tribunal Judge McGeachy