Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/48902/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 23 July 2014	**On 1 August 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

MISS ERLOIN ELISABETH HOMMAH-EBBY

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Eteko, Solicitor, Iras and Co
For the Respondent: Mr P Deller, Senior Presenting Officer

DETERMINATION AND REASONS

1. The appellant appeals to the Upper Tribunal from the decision of the First-tier Tribunal (Judge Tipping) dismissing her appeal against the decision by the Secretary of State to refuse to issue her with a permanent residence card as the family member of Ms Laura Ebby (the sponsor) pursuant to Regulation 15 of the Immigration (European Economic Area) Regulations 2006. Judge Tipping did not make an

anonymity order, as there was no evidence that the appellant would be at risk of harm by reason of publication of her name and personal details, and he did not consider that the appeal involved highly personal evidence which should remain confidential. By parity of reasoning, I do not consider that an anonymity order is warranted for these proceedings in the Upper Tribunal.

2. The appellant is a national of Ivory Coast, whose date of birth is 5 July 1945. Her sponsor was her daughter, a French national. The application made on 20 April 2013 was refused on 6 November 2013 on the grounds that she had not provided satisfactory evidence to show that her EEA sponsor was exercising treaty rights in the United Kingdom from April 2008 to December 2012 by way of P60s, wage slips, bank statements and other documents. As a result, the Home Office had been unable to establish that her EEA sponsor had been exercising treaty rights in the United Kingdom for a continuous period of five years as a worker.

The Hearing Before, and the Decision, of the First-tier Tribunal

3. The appellant's appeal came before Judge Tipping sitting in the First-tier Tribunal at Taylor House on 25 March 2014. The appellant was represented by Mr Eteko, and Mr Lenanton of Counsel appeared on behalf of the respondent. The appellant adopted as her evidence-in-chief a witness statement in which she said she had last arrived in the UK on 30 August 2008 as the family member of an EEA national exercising treaty rights. She subsequently submitted an application for a residence card on that basis, and she was issued with a residence card which was valid from 25 September 2009 until 25 September 2013. As her daughter applied successfully for an internal position at Barclays Bank in London, they relocated in 2010. The accommodation she first rented was a one bedroom flat. As the accommodation was overcrowded (as her daughter's son also lived there) she had to move to another property not that far away. The situation had been the same to date. Despite not living at her daughter's place, she spent all her time there cooking for all the family, doing the laundry and other household chores, and doing the school run as her daughter worked full-time.

4. Although she was in receipt of a pension, she got additional financial support from her daughter. She did not spend any money on food as she ate at her place. Without her daughter's financial assistance, it could have been difficult for her to pay her fuel bills in the winter.

5. The appellant's bundle also contained a witness statement from Mrs Laura Ebby signed on 17 March 2014. She says she was married to Mr Kouassi, and they had two children. She had been working for Barclays Bank since 2008, and she was currently on maternity leave. Her mother moved to her own place in February 2011, but she still spent all her time at her place. Her mother helped her with the cooking, laundry and other household chores. Despite her mother receiving a pension, she still assisted her mother financially considering the high cost of living in London.

6. Judge Tipping's determination was subsequently promulgated on 18 April 2014. He found that the appellant had discharged the burden of proving that the sponsor had

been continuously employed by Barclays as claimed, first in Glasgow and then to date in Plumstead, and that therefore she had been exercising treaty rights (for a continuous period of at least five years) as required by the Regulations. However, the judge went on to find that the appellant did not satisfy the requirements of Regulation 7, as she was not dependent on the sponsor. His reasoning was as follows:

> 10. Furthermore, to meet Regulation 7, as a direct relative of the sponsor's ascending line, the appellant must be dependent on the sponsor. The appellant said that the sponsor used to send her occasional gifts of money in the hands of visiting friends when she was in the Ivory Coast, but the sponsor couldn't often do so as she was a student. I note that since not later than August 2009 the appellant has been in receipt of pension credit, cold weather payments and other benefits. It does not therefore appear to be the case that she is dependent on the sponsor. The appellant states that the sponsor gives her £50 to £100 per month, but there is no evidence to support this, including any evidence from the sponsor, whose written statement does not mention any gifts of money to the appellant. It is submitted the statements of the appellant's bank account show it to be continuously overdrawn, and there is no other evidence of the family finances of the sponsor, such as to establish her ability to maintain the appellant.
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> 11. Regrettably, the sponsor did not attend the hearing, so that there has been no opportunity to put these matters to her. Her written statement is brief and lacking in detail. I recognise that the sponsor has recently given birth to her second child, and this may have made it difficult for her to be present at the hearing. No application for an adjournment on this ground was made. The appellant said in evidence that moving to her own accommodation was a matter of convenience, as there was insufficient space in the sponsor's flat for her to live there comfortably with the sponsor's immediate family. She said that she spends much of her time at the sponsor's home, helping with her grandchildren and with household chores, and that the sponsor gives her food when she is there.
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> 12. This evidence does not to my mind alter the plain fact that the appellant does not live with the sponsor, and has not done so for three years. At the date in 2008 when the appellant was granted a residence card, the position was different: she was living in the sponsor's household in Glasgow, and she was not then in receipt of benefits. Given the appellant's reliance on benefits, there is also inadequate evidence to show that the appellant is dependent on the sponsor.

The Application for Permission to Appeal

7. The appellant applied for permission to appeal, arguing that the judge had erred in law by not taking into account all relevant matters on the issue of dependency, and applying the wrong legal test vis-à-vis the issue of dependency. The judge had applied the equivalent of a "wholly or mainly" dependency test appropriate to the Immigration Rules, but in EU law the test was not whether a person was wholly or mainly dependent, but whether he was reliant on others for essential living needs.

8. The evidence of the appellant that she spent more of her time at the sponsor's house where she ate, that the sponsor provided her with financial assistance of £50 to £100 a

month, and that without the sponsor's assistance life would have been difficult for her, was never challenged by the respondent and no adverse comments were made by the judge regarding this evidence.

The Grant of Permission to Appeal

9. On 22 May 2014 First-tier Tribunal Judge Simpson granted permission to appeal for the following reasons:

> The judge found the appellant who did not reside with an EEA national had not done so for three years. In **Dauhoo [2012] UKHL 79 (IAC)** it was held that a person applying as an OFM must show either current residence with the sponsor or current dependency on the sponsor. As for dependency, the judge found the appellant had been in receipt of pension credit, cold weather payments and other benefits since August 2009. Moreover, he did not consider the case of **SM (India) and Others v ECO (Mumbai) [2009] EWCA Civ 1426** in which the Court of Appeal concluded that '*Dependency did not have to be of necessity. The Lebon test still applied and it was sufficient if in fact the sponsor supplied support for the essential needs in the country of origin whether he had the ability to supply his needs from his own labour or not'*. Consequently, the test of dependency applied by the judge was incorrect.

The Rule 24 Response

10. On 11 June 2014 Mr Tufan of the Specialist Appeals Team settled a Rule 24 response on the part of the respondent, opposing the appeal. In a comprehensive determination the judge had considered the evidence, the terms of the Regulations and had given adequate reasons to find that the appellant was not a dependant of the sponsor, who chose not to attend the hearing.

The Hearing in the Upper Tribunal

11. At the hearing before me, Mr Eteko developed the arguments raised in the grounds of appeal, and drew my attention to the passages in the witness statements of the appellant and the sponsor on which he relied.

Discussion

12. The judge did not direct himself that the relevant test was whether the sponsor had been supplying support for the appellant's essential needs for a continuous five-year period. But equally the judge did not specially state that the test was whether the appellant was wholly or mainly financially dependent on the sponsor, and thus he did not specifically misdirect himself to the contrary. The judge simply stated that the appellant had to be dependent on the sponsor, and this proposition encompasses de facto dependency as well as a dependency of necessity. It is also capable of encompassing the concept of the sponsor providing support for the appellant's essential living needs, while not being the main source of such support.

13. If the findings of fact made by the judge disclosed that the test in EU law was satisfied, there would plainly be an error in his conclusion that the appellant had not discharged the burden of proving dependency. But, as submitted by Mr Deller, the judge rejected a crucial aspect of the appellant's evidence, which was that the sponsor was giving her £50 to £100 each month. The judge had the benefit of receiving oral evidence from the appellant, and he was entitled to reject this aspect of her evidence for the reasons which he gave. It is true that the sponsor corroborated the appellant's evidence to the extent that she said that she continued to provide her with financial support, even after the appellant had moved to her own accommodation. But the sponsor did not give any details. Moreover, as explained by the judge, the documentary evidence before him did not establish the sponsor's ability to "maintain" the appellant. As the submitted bank statements showed the sponsor's bank account to be continuously overdrawn, and there was no other evidence of her family finances, it was reasonable for the judge to hold that the sponsor's alleged provision of £50 to £100 a month in cash to the appellant by way of support for her essential living needs in London was not credibly demonstrated.

14. Although the thrust of the appellant's witness statement was that she never had to buy her own food, as she always ate with her daughter, the finding by the judge at paragraph 11 of his determination was that the appellant spent much of her time at the sponsor's home - not all the time - and that the sponsor gave her food when she was there. So by implication there would be times when the appellant would be buying her own food and eating at her own home. It is not suggested in the grounds of appeal that the judge has misrepresented the oral evidence that was elicited from the appellant on this topic, and so there has not been a failure by the judge to take relevant evidence into account. Furthermore, when the appellant was at the sponsor's house she was providing the services of a cook, housekeeper and carer in exchange for a benefit in kind (joining in the family meals), and so it was open to the judge not to treat the provision of food to the appellant at the sponsor's house as constituting evidence of dependency.

15. Finally, there is nothing wrong in the judge placing weight on the fact that the appellant was in receipt of a pension and other public benefits. While the receipt of public funds does not mean that the appellant could not also be dependent on the sponsor for the purposes of the Regulations 2006, the fact that her essential living needs were prima facia being met by the state was and is a relevant consideration in determining the question of whether the sponsor has been providing support for her essential living needs, as opposed to providing no support at all; or merely providing support for non-essential expenditure.

16. There is a paradox inherent in the Regulations that the act of recognising a dependent family member under Regulation 7 or 8 is liable to create the conditions by which such a right is destroyed. The appellant obtained a residence card as the dependent family member of her daughter, and it is reasonable to infer that this residence card enabled her to obtain the pension credit and other public benefits which she has since enjoyed. But at the same time there was in consequence at least a partial transfer of responsibility to the state for meeting the appellant's essential

living needs, thus potentially undermining her status as an EEA family member who is dependent on an EEA national exercising treaty rights here. The conundrum is touched upon in **Dauhoo**, where it is pointed out that an extended family member (OFM) can retain his status under the Regulations by virtue of remaining in the same household as the sponsor, even if he or she ceases to be financially dependent on the sponsor. A fortiori, the same considerations must apply to a direct family member under Regulation 7.

17. The judge thus rightly considered whether the appellant could continue to qualify as a family member on an alternative basis, namely as a member of the sponsor's household. It was open to the judge to find that the appellant was not currently a member of the sponsor's household, and that she had previously been a member of the sponsor's household for a continuous period of five years, for the reasons which he gave.

18. There is no challenge by way of appeal to the judge's finding on the appellant's alternative claim under Article 8 ECHR. The judge observed that there was no decision to remove the appellant from the United Kingdom, and accordingly the decision did not interfere with her right to respect for family life.

Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

Signed Date

Deputy Upper Tribunal Judge Monson