



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Numbers: IA/08364/2010  
IA/08369/2010  
IA/08375/2010

**THE IMMIGRATION ACTS**

Heard at Bradford  
On 20<sup>th</sup> September 2013

Determination Promulgated  
On 21<sup>st</sup> November 2013  
.....

Before

UPPER TRIBUNAL JUDGE REEDS

Between

JOHN CHUMA OBODOZIE (FIRST APPELLANT)  
MARGARET MARY UCHE OBODOZIE (SECOND APPELLANT)  
MARY JANE IFY OBODOZIE (THIRD APPELLANT)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellants: Mr J Wardle, Senior Presenting Officer  
For the Respondent: Mr O Thorne, Counsel instructed by Julliz Solicitors

**DETERMINATION AND REASONS**

1. The Appellants are citizens of Nigeria born on 5<sup>th</sup> April 1987 and 16<sup>th</sup> November 1989 respectively. They are siblings and Margaret Mary and Mary Jane Obidozie are twin

sisters. All three Appellants came to the United Kingdom with entry clearance as students having been granted visas in this respect. Other relevant individuals are Mrs Nwabude who is the Appellants' maternal aunt and her husband, Mr Tofu, who is a German citizen exercising treaty rights in the United Kingdom.

2. The First Appellant was admitted to the United Kingdom on 14<sup>th</sup> August 2003 with entry clearance as a student and has been granted limited leave to enter as a student since that date. On 5<sup>th</sup> October 2009 he made an application for a residence card as confirmation of his right of residence as an extended family member under the EEA Regulations 2006 (as amended). The Second and Third Appellants arrived in the United Kingdom on 11<sup>th</sup> August 2006 and were granted entry clearance as students and their leave has been extended during that time. They also made an application on the same date on 5<sup>th</sup> October 2009.
3. In a notice of immigration decision dated 2<sup>nd</sup> February 2010, the Respondent refused those applications on the basis that the Appellants did not meet the Regulations.
4. The decision was the subject of an appeal before the First-tier Tribunal (Judge Chandler) on 6<sup>th</sup> April 2010. In a determination promulgated on 8<sup>th</sup> April, whilst he accepted the evidence of the Appellants and their witnesses having found their evidence entirely credible, he dismissed the appeal on the basis they could not succeed in law because the Appellants were required to show that they were members of the EEA national's household and dependent upon him whilst they were in another EEA state.
5. An application was made for permission to appeal that decision and permission was granted on 28<sup>th</sup> May 2010 by Senior Immigration Judge Eshun. Directions for further hearing were given by the Senior Immigration Judge on 26<sup>th</sup> May 2010.
6. The appeal was listed before the Upper Tribunal (Resident Senior Immigration Judge Roberts) on 20<sup>th</sup> July 2010. It appears from that determination that it was common ground between the parties that Immigration Judge Chandler had made a material error of law in the determination on the basis set out at paragraphs 6 and 7 of that determination, namely, that contrary to the judge's assessment of the law, the Appellants were not required to show that they resided in an EEA state prior to coming to the United Kingdom.
7. In those circumstances the Upper Tribunal set aside the decision and went on to remake the decision. The Tribunal did not hear any further evidence concerning the issue of dependency in the UK. At paragraph 10 of the determination, the Upper Tribunal noted that Judge Chandler had found all three of the Appellants credible and the Upper Tribunal also accepted and proceeded on the basis of those findings. The Tribunal went on to determine the issue of whether the Appellants had established dependency or membership of the EEA household but found on the facts that it did not establish dependency within the meaning of the Rules nor that they were members of Mr Tofu's household and consequently the appeal was dismissed.

8. An application was made to appeal that decision the Court of Appeal and that application for permission was refused by Upper Tribunal Judge Lane on 12<sup>th</sup> December 2010. However permission to appeal was granted by Lord Justice Sullivan at an application by way of an oral renewal. There is a relevant extract of the judgment of Lord Justice Sullivan set out in the statement of reasons. I need not set that out. On 19<sup>th</sup> August 2011 by consent the Court of Appeal set aside the determination of the Upper Tribunal. For the present purposes paragraph 7 of the statements of reasons states as follows:-

“For the purposes of this appeal, the Respondent agrees that it is arguable that the SIJ erred in the consideration of the test relating to whether the Appellants were dependents on the EEA national. It is accordingly expedient, and the parties agree, that the appeal be remitted to the Upper Tribunal to re-determine the issue of dependency. The findings to whether the Appellants were members of the Sponsor’s household shall remain.”

9. It is plain from the statement of reasons exhibited in the Tribunal papers and on the basis of the grounds that were placed before the Court of Appeal by Mr Slatter, former Counsel of the Appellants, that the issue to be determined related to the issue of dependency in the United Kingdom. As set out in the extract of the judgment of Lord Justice Sullivan at paragraphs 7 and 8, he was persuaded that it was arguable on the limited facts found by the Immigration Judge and not disturbed by the Upper Tribunal that material support for the applicants was being provided by Mr Tofa and his wife sufficient to meet the tests in the authorities of **Jia [2007] EUECJ C-105** and **Lebon [1987] ECR 2811** (discussed in the judgment of the Court of Appeal in **SM (India) v ECO [2009] EWCA Civ 1426**). He further noted the applicant’s evidence, which had been accepted as entirely credible by the judge, was that they live with their and her husband during vacations and that their aunt made additional financial contributions towards their support. He observed that to dismiss that as being no more than the Appellants being visitors in their aunt’s household (as the Upper Tribunal did) was arguably, if not perverse, an inadequate explanation as to why, when living with their aunt and Mr Tofa’s household during the vacations during which time they were accommodated, fed and looked after entirely free of charge and moreover were then given further financial assistance where their living expenses, it did not amount to material support. He went on to state:-

“The proposition that someone who was living with their aunt and uncle during the whole of vacations is simply a visitor is at least arguably an unduly dismissive approach to the evidence before the Immigration Judge that was undisputed.”

10. Thus the appeal came before the Upper Tribunal on 6<sup>th</sup> June and on 20<sup>th</sup> September 2013 pursuant to the statement of reasons set out earlier.
11. The documentation before the Tribunal consists of three separate bundles encompassing the documents that were produced before the First-tier Tribunal and those relevant for the current proceedings, including witness statements from each of the Appellants and additional witness statements and also for the witnesses, Mrs Nwabude and Mr Tofa. In accordance with the directions made, the Tribunal

had the benefit of hearing oral evidence from the Second and Third Appellants and also the two additional witnesses save for John Obodozie (First Appellant) who was currently studying at the University of St George having completed year two of a four year medical degree.

12. Margaret Mary Uche Obodozie confirmed the evidence in her statement (page 6; bundle 1 dated 27<sup>th</sup> March 2010 and 14<sup>th</sup> October 2011) and recent witness statement confirming the contents and accuracy of the statements. She gave a short summary of her studies to date that she came to the United Kingdom in August 2006 and in September began to study for A levels, between 2006-2007 she did her AS levels and the following year her A levels. In 2008 she attended Imperial College London undertaking an electronic engineering degree which was a four year course. She explained that she had the option to switch to management which will enable her to have an electrical engineering with management degree (MENG). As to her history she stated that before she came to the United Kingdom she was living in Nigeria and lived as a family unit along with her maternal aunt, Mrs Nwabude. She confirmed that they had all lived together until her aunt went to university in 1996 at a time when she was still young. She referred to her returning during the holidays and also she had undertaken employment. In 2001 she stated that she was at school but she recalled that her aunt would send money. She confirmed Mrs Nwabude last lived with them in Satellite Town which was approximately in 2003-2004. She confirmed that during that time she has contributed money to the household and that the money that she contributed at the time had come from money that she had had jointly from her marriage to Mr Tofa. She confirmed in her evidence that without the money that her aunt was providing that came from the resources of her and Mr Tofa that things would have been difficult for the family. She further confirmed that after her aunt had left Nigeria she knew that she was able to send money but it was not as regular as when she was there. When asked to provide some indication of the standard of living at that time she stated that "we were managing".
13. In her evidence she said that after she came to the United Kingdom she had lived in London during term times and with her aunt and uncle during the holidays. She confirmed that her parents had paid the course fees but her aunt would send money to her bank account to provide for her needs in the United Kingdom. She said that she regarded her aunt and uncle's house as "home". She confirmed that her circumstances were the same as they were three years ago; she did not have a part-time job now because the course that she was undertaking made it too stressful to work at the same time and she further stated that had her uncle and aunt stopped giving her money she would not be able to manage. As to other sources of income she said that if she needed something then there was an agreement with the family that they would all support each other and that her uncle and aunt would take care of her and her sisters in the United Kingdom. She confirmed that her aunt did take care of her in that way. She was referred to the bank statements in 2011 and the witness confirmed that her aunt continued to deposit money there. She confirmed that she was still living with her aunt during holiday times and when not at

university and that her aunt not only gave her financial support but also emotional and moral guidance describing her aunt as her “second mother”.

14. In her evidence in cross-examination she confirmed that her accommodation was paid for by using the money that her aunt had sent to her. She confirmed that she was living with a friend who owned the property so the arrangement that they had reached was that the Appellant would pay the bills. She confirmed that that had not always been in the situation that in 2008 until 2009 she lived in halls of residence. After 2009 she went to live with her friend because it was a four year course and for one year between 2009 and 2010 she stayed solely with her aunt. She further confirmed that during 2009 and 2011 she was dependent upon her aunt for her expenses and living costs. She was asked if she received an allowance from her parents and she said that she did not but when her parents visited they gave them some money. The course fees she estimated to be about £20,000 per annum. When asked how money was provided from her aunt she confirmed that money had come from her bank account to the witness’s bank account and money was given during holidays and at weekends. When asked to put a figure on the financial support she stated that it was between £300 and £400 per month but it depended. During the summer she lives with them and does not need any form of allowance so she put it at between £300 to £450. She said that most of her time her mail and bank statements are sent to her aunt’s but if she needed them they would be sent to her address during term time in London. She explained in cross-examination that when her aunt would send her money previously that the arrangement was reached that she would give it to family friends when visiting as that was a convenient way in which to make financial contributions without having to pay any form of interest. She did not know if she had used money transfers. She confirmed that she visited her aunt at the weekends when she was at university and that sometimes she paid but other times her aunt paid.
15. Mary Jane Ify Obodozie gave evidence confirming the statements that she had made set out in the witness bundles. As to her history she confirmed she came in August 2006 studying a BTEC diploma in business. In 2008 she attended the University of York until 2011. In York she lived in student accommodation and in the holidays she lived with her aunt and uncle. She finished in 2011 and then attended St Andrews University to do a Masters degree in finance and management between September 2011 and August 2012. The situation has been the same as her sister that she has always lived with her aunt during weekends and at holidays but at other times has lived at university. In 2012 she confirmed that she was at her aunt and uncle’s house for a while then she applied for a course that she is currently undertaking, a postgraduate diploma in computing. In November 2012 she had confirmation about the course and started it in January 2013. She will finish the course on 13<sup>th</sup> December 2013.
16. Before she came to the UK she confirmed that she lived in Satellite Town in Lagos and that she had been living with her parents. She confirmed that she had been living with her aunt also confirming the evidence of her sister. She stated that between 2002 and 2003 she was in her teens and that when her aunt lived with her

the witness referred to the fact that she had provided money and that money had come from her husband. Again when asked how important the money was, she confirmed that it was used for basic things such as rent and for food. She said that the family were managing with the money and that without that she did not think that they would be able to manage. After her aunt left, she stated that she continued to contribute sending money with people who visited Nigeria. She was asked to give an indication of what it would have been like if the money had not been sent. She said that they were managing but things were not so good at that time and that they needed the money for their needs.

17. She said when they came in 2006 she undertook A levels but was living with her aunt and uncle during the holidays. Again she confirmed the level of assistance given by way of food, money, transport, clothes approximately £200 sometimes more. When she went to York, the witness confirmed that the money went up to £300 per month and they were staying at the home not only during holidays but during the long summer vacation and also as because York was so close she was able to see her aunt at weekends. She confirmed that she was living with her aunt when she applied for a residence card in 2010 and further confirmed that if her uncle and aunt had not been providing money she would not have been able to cope with the expenditure that was necessary.
18. She described a very close relationship between her aunt and uncle and that if she needed moral guidance that it was given to her by her aunt who she would go to with any problems. She said she had no other relatives in the United Kingdom save for her uncle and aunt although there were some family friends. She said that if her aunt and uncle had stopped supporting family members it would have been very difficult and that the money that was provided by her uncle and aunt was spent on clothes, food, going out and all the ordinary normal expenditure. She said that her parents were able to pay the hall fees but money for food, and other expenditure came from her aunt. She did a part-time job for a short while but had not worked since. Whilst at St Andrews she confirmed that her aunt continued to send her money at approximately £300 and that was also used for food, clothes and going out. She said that when she referred to food she meant shopping not entertainment but for food shopping. She confirmed that she was still spending the money given to her for food shopping and that there was not much money spare at the end of each month. She said she relied upon her uncle and aunt for moral support as well as financial support. In cross-examination she confirmed that her parents paid for the course fees currently which were about £9,000 to £10,000 and the accommodation fees were £5,000. She referred to the time that her aunt was contributing to the household in Nigeria and she said there were problems at the time but she was young but she knew that the contributions that she received from the aunt were very important. Both parents are working in Nigeria and that to her knowledge they were in the same jobs. She confirmed as her sister had that her aunt would use the mechanism of sending money mainly through people who had visited because that was a much easier way of ensuring that the money was taken without having to pay interest. She confirmed that she went to her aunt's at weekends and had only been

back once to Nigeria in 2011. As to who paid for the flights she said that they paid themselves, the money came from the monthly payments made from her aunt and that she had worked for a small period. She was asked about her statement at paragraph 4 (see page 17) talking about the financial, emotional and practical support that she obtained from her aunt and uncle. She explained that financial clearly referred to the money that she was receiving from her uncle and aunt, emotional help referred to the fact that she had come to a new country that it was not an easy place to make the transition and it was through her uncle and aunt that she was able to settle well as a student. When asked to give an example she said that she had given her general emotional support for example she used the expression "female banter" and the stresses of everyday life she would turn to her aunt rather than her uncle who was "male" about these things.

19. Mrs Nwabude gave evidence confirming her statements which were adopted as her evidence-in-chief including a statutory declaration that she made at page 26 (bundle 2/3). As to the history she confirmed for a period of time before she left Nigeria she lived with the family in Nigeria and finished at university in 2001. Between 2001 and 2003 she lived with them in Satellite Town. She confirmed her marriage to Mr Tofa in 2001 and that he did not live with them in Nigeria because at that time he was in Germany. She confirmed that whilst he was in Germany he had provided financial assistance to her and that money was provided in two different ways, firstly by people travelling to Nigeria and also by using Western Union transfers. She said that she was also working in estate management in Nigeria, her husband was working in Germany and that her and the family would not have managed without the additional assistance that was given by her husband or her own contributions. The kind of things that the money was used for was to provide provision for them to go to school. She explained in her evidence the general cultural expectation within African households of community support and helping each other. She confirmed that they had been boarding in Nigeria and that the money that was provided was used for their education and used for support with food and clothing. She confirmed that after she went to Germany in 2003 the money continued in the same way for the same purposes and that money was sent mostly from her husband because she was not working and again through the usual methods that the family have used for a long time. She was asked about the term time support. She said that she had promised to assist them for their basic needs so she had given them money. She confirmed Mary when she was at York was close to her and that she would pay money into her account and also give her money personally because she had lived so close. When Margaret was in London there was also money paid to her account. She confirmed that the commitment was to help with the basic needs and also she had provided emotional support toward the children. When asked to give an example, she said that they were present in the United Kingdom and they needed someone to talk to and when there were any kinds of concerns for example when they wanted to have relationships with others they would come and talk to her. She confirmed she had never charged them any rent nor did she charge them for food but in fact fed them and looked after them.

20. She confirmed that when she came to the UK John was already in the UK and he was studying. She said that she was still sending money back to Nigeria at that time. As for support for John she said that before he left they sent money to support him for a period of time and then when she entered the United Kingdom he moved to lived with them during holiday times as the others had done. She said that during the holiday periods he would come and stay with her and Mr Tofa. In August 2006 her twin nieces came and they would again live with her during the holidays. She confirmed in her evidence that in her opinion the family members would not have been able to manage if she had not provided any form of financial assistance. John at the present time was in Cyprus and she said that she was still supporting him. She was directed to the bank statements that she had produced within the bundles of documents at page 29, transactions in June/July of £250 and £100. When asked about the payments she said that they were for the Appellants. At page 31 there were deposits, page 37 there was a statement for John a deposit for £100 from her, page 44 a payment for Mary Jane (bundle 1) and the bank statement at 52 she confirmed were hers.
21. In cross-examination she confirmed that the family needed money from Mr Tofa when they were in Nigeria and because that had been the situation at the time and that she had been providing the money for them before she was married. When asked what the situation was at the time she said that "things were tough" and that generally they were a family who had all tried to help each other, for example, even if their mother had been working she benefited from it and she was able to complete her education and thus by way of her response to that wanted to help in her way for the family. She confirmed that the children's educational fees has been paid by the family but said that they had all struggled and it was not "rosy" and that whilst they paid the educational fees and supporting them she was playing her part and that she gladly supported them. She confirmed she did not keep the union receipts because she did not think that she would be required to have them for such a period as it was such a long time ago. She confirmed that they had not asked Western Union for them. As to money given to John, she said that she had given the money before he had left Nigeria and told him that they would help him when she moved from Germany. She said that he struggled to support himself although she was sending money to Nigeria at that time.
22. Mr Tofu gave evidence in accordance with the statements that he had provided in bundle 1 and bundle 2. Between the date of marriage and when he went to Germany he confirmed that he had provided his wife and family members with financial support by two methods, firstly by sending money through friends who were visiting home, a usual way in which money was sent and also by Western Union. He said the money was to support the family, the sisters and the children. He confirmed that when his wife came to Germany in 2003 money was also being sent from both of them to the family in Nigeria and that the money had come from their joint resources at the time he was a support worker in Germany. He said that he was still supporting them up until today. When asked to describe who "they" were he said Margaret, Mary and John. He confirmed that the money had been paid to the



children to their accounts from his wife's account but the money was joint money. In the university holidays he confirmed that the Appellants came to live with them during the holidays and confirmed the closeness of the relationship.

23. As to his citizenship he said that he had acquired German citizenship in 2003. His identification card gave a date of 27<sup>th</sup> November 2003. He could not say that was the date he became a citizen but that it was the date he collected his ID card. He said that he gained his citizenship a number of months before then. He said his background was that he had been an asylum seeker in Germany and then had been naturalised as a German citizenship.
24. In cross-examination he was asked about the payments made and if he had contacted Western Union. He said that he had sent money via Western Union and when you send money an invoice be issued. He said he had had no contact with them at the moment because he was not sure what documents were required. He was asked about the financial support and that he had not made any reference to this before. He stated that he had sent the money and that this been the position confirming his evidence that when there were people returning to Nigeria as was often the case they would send the money in this way because it was the usual way in which to save upon the interest costs. In respect of John he confirmed that he had come to the United Kingdom in August 2003 and was asked whether money was sent to him in the UK? Mr Tofa said he thought so but he was certainly sending money to Nigeria and that the money was sent via his wife and through her account but it was his money. He said that the reason why the money had been sent is because the family needed that assistance whilst they were in Nigeria to support them. He said he did not know why the parents could nor fulfil all their needs at that time.
25. The submissions of the parties can be briefly summarised. Both advocates had helpfully provided skeleton arguments. Mr Wardle on behalf of the Respondent submitted that the issue to be determined related to that of dependency upon the relevant EEA national, firstly at a time when they were residing in the country other than the United Kingdom and since they joined the EEA national in the United Kingdom. In respect of the second aspect, namely dependency in the United Kingdom, whilst not formally conceding the point, he stated that he saw merit in the Appellant's case concerning this period and considering the circumstances in the United Kingdom and that there was evidence of remittances being paid and that in addition that the Appellants, Mary and Margaret, had in effect been living as part of the EEA national's household during that time, dependent upon them despite living in university accommodation during their studies. He submitted that the issue related to the period before they were residing in the United Kingdom. In this respect he relied upon his skeleton argument noting that the factual account was that they lived with their parents in Nigeria and their aunt, Mrs Nwabude, living together in the same household. She married Mr Tofa in 2001 and joined him in Germany in 2003. He accepted that the finding of fact by Judge Chandler (25) was that at for at least two years Mrs Nwabude was working and contributed funds to the household. It was also accepted that she had given financial support to each of the Appellants when they were returning to school after the holidays. He noted that the claim was

that Mr Tofa had been sending money from Germany to his wife in Nigeria which was used to support the household prior to Mrs Nwabude joining him in Germany and after she had joined him there.

26. He relied upon the definition of dependency outlined in UKBA EC1s which was accepted by the Upper Tribunal (41) in **Moneke and Others (EEA - OFMs) Nigeria [2011] UKUT 341** and that the Appellants would need to demonstrate that the financial assistance was given in order to meet their essential needs. He submitted that whilst the evidence of the Appellants was that things had been difficult without the financial assistance, of their aunt and husband, it was not accepted that they were dependent and that there had been no documentary evidence to support the remittances. In particular there were no documents from Western Union. Furthermore, he stated in his oral evidence that it was not the Respondent's case that the Appellants had been untruthful in their evidence in any way but that if the remittances were made they were not made to meet their essential needs. The course fees were being paid by their parents and they could not explain why remittances were required to meet their needs in Nigeria when they were able to fund the fees in the United Kingdom. Nor did he accept there was any emotional dependency.
27. As to the point raised in the skeleton argument at paragraph 12 in respect of the cause of the decision in **Soares v SSHD [2013] EWCA Civ 575**, he confirmed in his oral submissions that if it was accepted that the money had come via the aunt from joint resources then the decision of **Soares** that would not arise. That was also agreed by Mr Thorne in his submissions.
28. Mr Thorne relied upon his written skeleton argument and also an earlier one in which a schedule had been produced showing the remittances that had been sent via the account of the aunt to the Appellants whilst in the United Kingdom. He reminded the Tribunal of the legal test in dependency and that it was a purely factual test and relied upon the matter set out at paragraph 4 of his skeleton argument. He submitted that the test for dependency is whether, without the support of the EEA national, the Appellants would be able to meet their essential needs but that dependency need not be of necessity. The issues that the Tribunal was asked to consider were firstly, whilst in Nigeria was the relationship between the Appellants and the EEA national one of dependency and whether the relationship at the date of the hearing was one of dependency in the United Kingdom?
29. Dealing with dependency in Nigeria, he has submitted that the witnesses and the Appellants (but not John who was not present) had all given evidence to the effect that when their aunt and uncle were in Germany money had been supplied to them to the family in Nigeria. The evidence was consistent in this respect and that contrary to the submission made by the Respondent, that the Appellants had given evidence that they would have struggled without the extra income which was used for their basic things such as clothes and food. The consistent evidence of the Second and Third Appellants was that even with the money the family were merely managing and that the Third Appellant had said in her evidence that the family,

would not have managed without that income. He submitted that the evidence if accepted would establish dependency.

30. As to the points raised in **Soares**, in this case it did not apply because the evidence established that the Mr Tofa and Mrs Nwabude were a married couple and their money was marital property and that commonsense would prevail that they did not have separate financial arrangements and that the money from their union was used together. He invited the Tribunal to accept the evidence of the Appellants and the witnesses noting that it had been consistent, both internally and between the various witness but also credible. The witnesses had not been in the same room together with they had given evidence and cross-examination had been internally consistent. He further reminded the Tribunal that their evidence had been accepted at first instance and had been unchallenged by the Respondent with the First-tier Tribunal Judge finding that all the witnesses had been credible witnesses. Whilst he accepted that the burden of proof remained upon the Appellants, it was important to consider the context of the present proceedings and how this issue had now arisen. The submission made by the Respondent that there had been no documentary evidence by Western Union must be considered in the light of the fact that the relevant period dated back to a decade ago and that the focus of the case at the various dates prior to this hearing had been on support in the United Kingdom and that this had been the issue that had been remitted by the Court of Appeal to the Upper Tribunal and no other issue. He said that the evidence of the witnesses ought to be accepted because of their credibility and that the lack of documentation can only be relevant if for some reason they were not credible witnesses and their own evidence was inadequate. He submitted that this is not a case where the information ought to have been so readily available that its absence was a cause for suspicion. Furthermore, the criticism made that the support would not have been needed in Nigeria if their parents are now able to pay the course fees. As it is said dependents need not be of necessity and therefore the question was whether the support of the EEA national and spouse were used to meet basic needs why not that was so.
31. As the determination of Judge Chandler set out the factual scenario showing that financial support had been given before the period in the United Kingdom (25) and (27) and support the oral evidence given by the Appellants, given the relationship of the financial support it did not take much persuasion that the support continued when Mrs Nwabude was not part of the household and when she had married Mr Tofa. This was not a case where any missing documentation was so remarkable that it would cause any doubt of their evidence; it should not be seen in a negative light bearing in mind the consistency and credibility of the witnesses' evidence generally. He submitted that looking at the evidence that the money was used to pay for the basic needs which came from the evidence of Mrs Nwabude supported by the practical effect of the evidence from the Appellants. He submitted there was a margin of error for the evidence given when concerning the Appellants when they were teenagers but even then they had given telling evidence that this money was necessary and thus met their basic needs because even with that money the household was just managing. Given the support that Mrs Nwabude and Mr Tofa

give all three Appellants in the UK, the Tribunal should accept their evidence that they were also sending money enough to make the difference. The evidence was “to support with feeding the family”. Mrs Nwabude’s evidence and answers concerning the provision of clothes when living in the household, she talked in terms of the cultural expectation and that that was another factor to take into account and that the money was used to “feed the family”. He submitted that the question of dependency of whether it was necessary or whether it was a “lifestyle choice” apply equally to dependency and that if the family had chosen to spend money on other things, it could still make them dependent upon Mrs Nwabude and Mr Tofa.

32. In respect of dependency in the United Kingdom, there did not appear to be any issue about that now bearing in mind what Mr Wardle had said based on the evidence of the Appellants and the remittances that had been provided and the factual account that had been accepted by the First-tier Tribunal which led to the conclusion that they were dependent upon them in the United Kingdom. The evidence was clear that they would have been unable to meet the basic requirements living in the United Kingdom without the support given by their uncle and aunt and the evidence of existence of the support was set out clear in the bank statements. The court was also entitled to take into account not only the significant financial benefit to the Appellants being able to reside at their aunt’s house on vacations from university and the emotional support that was clearly given and evidenced during the hearing. Therefore it was submitted that the Appellants would not have been able to support themselves whilst studying full-time without the assistance of their relatives and that they were entitled to concentrate on their studies and rely on the support that they have referred to. Mr Thorne submitted that as that evidence was documented and credible that that also had an affect as to their general credibility and should be taken into account when considering also the evidence relating to the period outside of the United Kingdom. He invited the Tribunal to allow the appeals.
33. I reserved my decision.

#### Conclusions:

34. There is no dispute between the parties as to the issues that the Tribunal must decide in the appeals. It is common ground between the parties that it is accepted that in order for the Appellants to succeed under the Directive 2004/38-EC and/or the Immigration (European Economic Area) Regulations 2006 (as amended) that they must first demonstrate that they were a dependent of the relevant EEA national when they were residing in a country other than the United Kingdom and have since joined the EEA national in the United Kingdom and continue to be dependent upon him. As Mr Thorne has set out at paragraph 9 of the skeleton argument, the issues can be distilled as follows; whilst in Nigeria was the relationship between the Appellants and the EEA national one of dependency and is the relationship one of dependency in the United Kingdom at the date of the hearing.
35. In the oral submissions Mr Wardle and those of Mr Thorne it was common ground that if the Appellants have demonstrated that the support provided met their

essential needs and the test of dependency, the evidence in that respect had been that the support had come through the aunt from the EEA national, Mr Tofa, and if that was correct, the point set out at paragraph 12 of the skeleton argument (of Mr Wardle) referring to the decision of **Soares v SSHD [2013] EWCA Civ** did not apply.

36. Furthermore, as noted from the factual account given earlier the First Appellant, John Chuma Obodozie, had left the United Kingdom. Paragraph 4(2) of Schedule 2 to the 2006 Regulations deals with appeals under Section 82 of the Nationality, Immigration and Asylum Act 2002. It states that an appeal under Section 82(1) (or under the equivalent parts of the 1993, 1996 or 1999 Acts) is abandoned if the applicant has been issued with a registration certificate, residence card, certificate certifying permanent residence of a permanent residence card. However, it is also noted that an appeal under the EEA Regulations is not abandoned solely because the Appellant leave the United Kingdom (see Regulation 25(4) of the 2006 Regulations). The fact that he is not present in the United Kingdom does not mean that his appeal his abandoned and still needs to be determined.

37. The Regulations state:-

“8. ‘Extended family member’

- (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) 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 ‘a country other than in the United Kingdom’ ... and is dependent upon the EEA national or is a member of his household;
  - ...
  - (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.”

38. The meaning of dependency within Article 3 of the Directive 2004/28/EC and the 2006 Regulations are set out in a number of decisions of the Upper Tribunal and the Court of Appeal drawing on the Court of Justice cases (see **Moneke (EEA - OMFs) Nigeria [2011] UKUIT 00341 (IAC)**) which drew on the Court of Justice cases such as **Lebon C-216/85 [1987] ECR2811** and **Jia v Migrationsverket Case C-1/05**; and **Pedro [2004] EWCA Civ 1358** and **SM (India) v ECO (Mumbai) [2009] EWCA Civ 1426**.

39. It is plain from those decisions that dependency is not the same as mere receipt of some financial assistance from the Sponsor (see **Moneke [41]** and that dependency in the sense is by the Court of Justice in the case of **Lebon** (see **SM India**) as cited). The

court's approach to the meaning of dependency is that it must be genuine, and not contrived and that its interpretation must be informed by the principle of effectiveness (see **MR and Others (EEA extended family members) Bangladesh [2010] UKUT 449**). The skeleton arguments of both advocates make general observations concerning the test of dependency, namely, that it is a purely factual test, that the questions of dependency must not be reduced to a bare calculation of financial dependency but should be construed broadly to involve a holistic examination of a number of factors, including financial, physical and social conditions, so as to establish whether is dependence that is genuine. The essential focus should be on the nature of the relationships concerned and on whether it is one characterised by a situation of dependence based on an examination of all the factual circumstances, bearing in mind the underlying objective and maintaining the unity of the family. A recent case from the Upper Tribunal **Lim (EEA - dependency) [2013] UKUT (IAC)** see [21] made reference the overriding principle established by the jurisprudence of the Court of Justice that dependency is a matter of fact and the reasons (for it) are irrelevant (see [22] of **Lebon** and [36] in **Jia**). As Lord Justice Goldring observed in **Pedro** at [62]:

“As **Lebon** made clear, whether someone has the status of a dependant family member is a question of fact, such a status is characterised by the material support for that family member provided by the union national who has exercised his free right of movement. Why the family member is dependent does not matter.”

As the Upper Tribunal observed, the only qualification the Court of Justice has ever made to that principle is that there must not be an abusive right. Accordingly subject only to there being no abusive rights, the jurisprudence allows for dependency of choice. The Upper Tribunal rejected this submission by the Respondent that dependency would only arise if a claimant could show that he could not support himself at the minimal level of subsistence see [23] and found that for dependency to arise it is not necessary for a person to be wholly or even mainly dependent. If a person requires material support for essential needs in part that is sufficient see [24] of **Lim**.

40. I have therefore considered the two issues that are outlined by the parties, firstly whether the Appellants demonstrated they were dependants of a relevant EEA national when they were residing in a country other than the United Kingdom and have since joined the EEA national in the United Kingdom and continued to be dependent upon him.
41. In making an assessment of the evidence as a whole I have considered a number of matters. The Appellants (but not John who was not giving evidence) Mr Tofa and Mrs Nwabude have all given evidence before me and all have consistently stated that when their uncle and aunt were in Germany that money was supplied by them to the family in Nigeria. The thrust of the evidence from those who received it, was that without the extra finance the family would have struggled. The evidence of the Second and Third Appellants was that even with that money the family just managed. In this case the witnesses have all been consistent in their evidence. They

had all been subject to cross-examination and no discrepancies arose from the cross-examination concerning the consistency of their evidence. Mr Wardle on behalf of the Respondent conceded at paragraph 8, the evidence from the Appellants who were there in Nigeria, would know of their own circumstances, is that things would have been difficult without the financial assistance of their aunt and her husband. However the submission made is that there was no documentary evidence to support this proposition and relied on the decision of **Moneke and Others** (as cited).

42. There can be no dispute that the burden lies on the Appellants to prove their case and that such evidence of dependency must be cogent evidence. The decision of **Moneke** (as cited) highlights as an issue that when "Other Family Member" applications are made in-country, judges should scrutinise the evidence to satisfy themselves that the burden of proof has been discharged. It is further highlighted in that case that "such scrutiny is particularly important where the inference from the immigration history is that the Appellants are prepared to mislead and misrepresent their intentions to immigration officials."
43. In the decision of **Moneke** the Tribunal expressed concerns not only concerning the documentary evidence but importantly that the oral evidence of the Appellants in that case was found to be "implausible as to material parts and flawed by inconsistencies" (see paragraph 23 of **Moneke**). None of those criticisms can be applied to the evidence of the two Appellants, their aunt and their uncle in this case; all have given entirely plausible and credible evidence and it cannot be said that their evidence was characterised by any form of inconsistency.
44. Similarly, there has been no misrepresentations made by any of the witnesses at any time during the period that they have been resident in the United Kingdom; to the contrary they have given evidence before two judges and their evidence has been accepted as wholly credible. In this respect the Appellants' evidence was accepted by the First-tier Tribunal (Judge Chandler) who at paragraph 25 made a finding that "all the witnesses were credible witnesses" before him. In respect of the Appellants and their immigration history at paragraph 27 he stated:-

"I find that the Appellants are here legally as students and from the evidence before me I can say that they are a credit to their family and educational establishments they have attended and are now attending."

Indeed, as submitted by Mr Thorne, their evidence was unchallenged by the Secretary of State both before the First-tier Tribunal and the Upper Tribunal and that the First-tier Tribunal's determination's findings were preserved by the statement of reasons. One of the preserved findings is of particular relevance to the period in question which was that it was found as a fact that Mrs Nwabude for at least two years contributed funds to the household and to the Appellants directly in the period before she left Nigeria. The evidence before the Tribunal is that she was able to do so via the assistance of Mr Tofa who is her husband. I would not find anything unusual about that; as Mr Thorne submits they were a married couple and were mixing and were sharing their money as many married couples do. Mr Tofa provided

accommodation and contribution to the Appellants' support also in the United Kingdom (see paragraph 25).

45. Having considered this in summary I find that the evidence of the witnesses has been consistent and no obvious discrepancies have been identified. There is no suggestion of any kind that the Appellants have sought to mislead or misinterpret their intentions to immigration officials. As I have said, indeed to the contrary all have been found to be entirely truthful and credible witnesses whose evidence was not challenged before the First-tier Tribunal nor the Upper Tribunal. Positive findings of fact were made by the First-tier Tribunal concerning their credibility and in the case of Mrs Nwabude a finding that was preserved concerned her financial contributions that were made to the household in Nigeria. These matters are in strict contrast to the Appellants in Moneke.
46. I further take into account that the issue of dependency in Nigeria had not been identified as an issue by the Respondent at any time; either before the Tribunal or before the Court of Appeal (indeed as can be seen from the issues in the agreed statement of reasons). The Court of Appeal did not identify this as a live issue and it was only identified before the Upper Tribunal at a late stage. In those circumstances it seems to me that the focus of all the parties and the various judicial officers who have considered the case has been on the support given in the United Kingdom and whether a period of residence in a non-EEA state could even be relevant and that this Tribunal should accept their evidence of dependency in the most unusual circumstances of the case given that the evidence they are now being asked to provide dates back to a decade ago and that the problems the parties have had in producing documents in support is obvious.
47. Furthermore, in this case the lack of documentary evidence is relevant only if some areas of their oral evidence is inadequate as in the sense of the decision in Moneke, it being inconsistent and implausible.
48. I have given careful consideration to the evidence and the competing arguments and to the matters outlined above. Drawing together those matters, I find that I can accept their evidence and place weight upon it as for understandable reasons they were not aware of the requirement as it is now understood to be required and cannot be criticised for failing to collect evidence given the length of time that had been elapsed and the difficulties that they have outlined to me in obtaining it and the fact that the relevant period was many years ago. The fact that the witnesses have all been found to be credible and consistent witnesses by two other judges both before the First-tier Tribunal and their evidence was accepted before the Upper Tribunal, and their evidence had previously not been challenged, and they have given consistent and credible evidence before this Tribunal I find these are factors that I should take into account in making an assessment concerning the past dependency in Nigeria.
49. There is no dispute now concerning the issues originally identified by the Court of Appeal namely whether the Appellants are dependent upon the EEA national during



his residence in the United Kingdom. The Appellants have provided credible and consistent evidence in respect of this issue and also documentary evidence in support in the form of bank statements. Mr Wardle on behalf of the Respondent in his closing submissions, whilst not formally conceding the point, stated that given the evidence he had not explored the issue of dependency in the United Kingdom as he could see merit in the Appellants' case that the remittances had been paid as they had stated and the evidence as a whole demonstrated that they remained dependent on the EEA national despite living in university accommodation which was only during the time of their studies.

50. For the reasons that I shall go on to state, I am satisfied on the balance of probabilities that the Appellants have demonstrated that they have been dependent on the EEA national, Mr Tofa and Mrs Nwabude during their time in the United Kingdom and their evidence in this respect was credible, consistent and supported by the documentary evidence that has been produced. This is an additional factor that I take into account in my assessment of their evidence in its totality and find that this further reinforces their general credibility as witnesses of truth when considering the first issue of support and dependency in Nigeria.
51. I therefore make the following findings of fact. In 2001 Mrs Nwabude (the Appellants' aunt) married Mr Tofa in Nigeria. The evidence before me demonstrates that between 2001 and 2003 the Appellants were all living in Nigeria with their aunt Mrs Nwabude and their parents and living in the same household. I am satisfied that their aunt had been providing financial and emotional support whilst living in Nigeria (see the letter dated 7<sup>th</sup> August 2009). In this respect the preserved finding at paragraph 25 is of relevance where it was found that for at least two years Mrs Nwabude was working and contributed funds to the household.
52. After her marriage she remained in Nigeria and I accept the oral evidence of Mrs Nwabude that her spouse Mr Tofa in Germany provided money to her via Western Union and via others who were travelling to Nigeria. She stated in her evidence that she was in employment at that time in estate management. The method in which money was brought to Nigeria is a common method. The evidence from both witnesses was that it was a cheaper way of bringing money into Nigeria and that this was a common way of ensuring that the financial remittances were provided. Both Mrs Nwabude and Mr Tofa gave evidence to this effect and I accept their account. Their evidence also before the court was that the family could not manage without that help and that the money was used to provide provisions for school. At that time, the evidence demonstrates before me that the Appellants were at boarding school and Mrs Nwabude said that she would send money and the provision was used for school and for support for such things as clothing and feeding. In this respect Mr Tofa's evidence is relevant. In cross-examination he stated that he did give them financial support in Nigeria. The way in which the money was sent was he explained, that he would send the money directly to his wife who would send the money to the children through her bank account. That I find is credible evidence bearing in mind that the unchallenged evidence concerning the issue of dependency in the United Kingdom demonstrated that the bank statements were used in that

way also. He further said that the family needed assistance whilst in Nigeria and he supported them.

53. In 2003 Mrs Nwabude joined her husband in Germany. On 14<sup>th</sup> August 2003 the First Appellant John, entered the United Kingdom on a student visa that was valid between 2003 and 2005 with limited leave to remain and then was later renewed in 2005 until 2009. In October 2009 he sought a residence card. The two twin sisters remained in Nigeria with their parents. The evidence before me demonstrates that their aunt Mrs Nwabude in Germany continued to send money. The money came mostly from Mr Tofa because at that stage she was not working. Again, the method in which money was provided was by some payments by Western Union but in the main by people who were travelling to Nigeria as this was a way that would enable the money to reach them in full without paying any form of charges. The evidence of Mr Tofa was that when John was in the UK studying he sent money back to him. Mrs Nwabude said that things were tough for the family and that she wanted to help the family. There has been no submission made as to why the family would wish to help their other extended family members. The evidence before me was that this is common amongst African households as it is culturally accepted that each family member will do what they can to assist, advise and support other family members. The evidence before me concerning the situation in the United Kingdom is the same; in which Mrs Nwabude has taken over the role of the twins' mother and their consistent evidence before this Tribunal is that Mrs Nwabude and to a lesser extent Mr Tofa have given them the emotional support and guidance that they do not have because their parents are living in Nigeria. That gives some understanding of the relationships between them.
54. The evidence of Mr Tofa which I accept, was that he had provided his wife with financial support between 2001 and 2003 (when his wife came to Germany). The money that he had sent through friends and also through Western Union was used to support the family, her sister and children. He said that when his wife came to Germany he sent money to the family and it came from his resources. The evidence to support this was that he was in employment and worked as a support worker in Germany. His evidence was that he was still supporting them up until the current day.
55. His evidence was that he had secured an identification card dated 27<sup>th</sup> November 2003 however he became a citizen before that date but could not provide a date or any documentary evidence of that date.
56. I have set that evidence against the evidence of the Appellants concerning the circumstances in Nigeria. Margaret gave evidence that she lived with her aunt and her parents when in Nigeria. Her aunt had entered university in 1996 but she returned during holidays. In 2001 she described being at school with her aunt sending her money and that she had last lived with them in Satellite Town in 2003. Indeed that date and those circumstances were independently confirmed by the evidence of Mary Jane. She said that Mrs Nwabude her aunt had contributed money to the household and when she was married to Mr Tofa he would provide money for

them also. She was asked in evidence whether without the money would things have been difficult for the family? Her evidence was clear and unequivocal she said that it would have been difficult without the money. Mary Jane also said that this time when she was in her teens she remembered that money was being given from Mr Tofa and that the money was used for their basic needs such as rent and for food. Both witnesses said that when their aunt left they were just managing although both did say that they did not know much about the family's finances only what they could see themselves.

57. Further evidence about their circumstances in Nigeria was elicited in oral evidence. Mary Jane was asked how important the money was for the family. She said "We were managing with the money I don't think we could have managed without it." After her aunt left, Mary Jane also said that her aunt had sent money that had come from her husband after she left and they were managing but things were "not so fine". It was clear that despite her younger age the contributions that were being made were important ones. She also confirmed the evidence of Mrs Nwabude and Mr Tofa as to the arrangements in which money had been made and was aware that money had been brought over by people who were visiting Nigeria.
58. On 4<sup>th</sup> April 2005 Mr Tofa came to the United Kingdom to work. I also accept that on 26<sup>th</sup> August 2006 Mrs Nwabude came to join him following the grant of a residence card. Also in August 2006 the Second and Third Appellants came to the United Kingdom on student visas.
59. For the reasons that I have set out, I am satisfied on the balance of probabilities the Appellants have demonstrated that they were dependent upon the EEA national when they were in Nigeria. I have not found that dependency to be mere receipt of some financial assistance from the Sponsor but have found in the terms of the case law that it was genuine support that was used for their essential needs; those needs being food, clothing and other financial outgoings that were required. Whilst Mr Wardle submits that the parents were able to provide their school fees, the evidence before me is that the family members have each sought to contribute to the family finances as a whole and that whilst the parents have chosen to pay the school fees, in order for the Appellants to continue their education, that has left the other essential items to be paid for by the other family members namely Mrs Nwabude and Mr Tofa. It is apparent from the evidence that educating the Appellants has been seen as a most important family aim in this appeal. That can be seen by the level of education that they have attained whilst in the United Kingdom. As the case in Lim demonstrates it is not necessary for a person to be wholly or even mainly dependent and that a person who requires material support for essential needs in part that is sufficient to satisfy the test. I have therefore reached the conclusion for the reasons given that they have demonstrated dependency.
60. As to the issue of dependency in the United Kingdom, as noted earlier in the determination, Mr Wardle did not make any submissions regarding this issue. I find from the evidence the Appellants have demonstrated that they have been dependent upon Mr Tofa and Mrs Nwabude whilst they have been resident in the United

Kingdom. In respect of their history, the following findings are made. In respect of the Second and Third Appellants they came to the United Kingdom on student visas in August 2006. In Margaret's case in September she began to study A levels and between 2006 and 2007 she studied AS levels at college and then in 2008 her A levels. She became a student at Imperial College studying Electrical Engineering and then switched to Management as part of the course. Between 2008 and 2011 she was undertaking an Engineering Degree. In respect of Mary Jane in 2006 she studied a BTEC in Business and in 2008 to 2011 was at the University of York. She graduated in 2011 and began a Masters in Financial Management at the University of St Andrews. She lived at her aunt's house between university and her next course and between January 2013 and December 2013 she is undertaking a Postgraduate Computer Course. My understanding of the evidence in respect of John is that he left the United Kingdom in September 2011 to undertake a Medical Degree at the University of St George.

61. The evidence that was before the First-tier Tribunal and the Upper Tribunal has not changed. The Appellants from 2006 onwards have lived with their aunt and uncle during the periods of time that they have not been studying. It is plain from the evidence that they were and are supported financially and emotionally by Mr and Mrs Tofa during their time in the United Kingdom. In terms of financial contributions, the documentary evidence exhibited in the bundles demonstrates that they were provided with sums of money of approximately £300 per month from the resources of Mr Tofa and Mrs Nwabude. The schedule of relevant payments set out in the Appellants' skeleton argument are consistent with the payments shown in the respective bank accounts of Margaret Obodozie, Mary Obodozie and John Obodozie. It is clear that none of the Appellants have any other source of income and that whilst their parents pay for their educational fees, the other essential needs are met by Mrs Nwabude and Mr Tofa. The evidence before me demonstrates that during the vacation periods they are accommodated, fed and looked after and are also given the financial support that I have referred to. That amounts in my judgment to material support which is evidenced not only by their oral evidence but also by the documentary evidence. Indeed the oral evidence that has been given is consistent with the payments into their bank accounts. It is also plain from their evidence, which I accept, that certainly in the case of the two girls they have derived emotional support from Mrs Nwabude who has stood in for their mother whilst they have been resident in the United Kingdom for a lengthy period. Their evidence before me was that they considered their home to be with her and that they were able to discuss matters of personal importance with Mrs Nwabude. I do not find that they could have been able to support themselves while studying full-time without the assistance of Mr Tofa and Mrs Nwabude their uncle and aunt and that this was an arrangement that the family as a whole have carried out for a significant period of time.
62. In conclusion, I am satisfied on the balance of probabilities that the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants have demonstrated dependency upon the Union Citizen Mr Tofa, in their country of origin or the country from which they arrived and that they are

dependant upon the Union citizen in the United Kingdom for the reasons set out above.

63. I am required to consider the position of John separately. It is common ground between the advocates that John is in a different position to that of his sisters. He has not given evidence for the purposes of this appeal as he has been studying outside the UK since September 2011. As I understand the evidence he has embarked upon an internship in the Philippines.
64. On the findings set out earlier in this determination, prior to him coming to the United Kingdom on the 14<sup>th</sup> August 2003, he was receiving financial support for his essential needs as were his sisters from Mr Tofa and Mrs Nwabude. However, as submitted by Mr Wardle, he cannot succeed in his appeal. The relevant issue in his case relates to the date upon which Mr Tofa acquired the status of a Union Citizen. As the decision in Moneke states that "a person claiming to be an OFM under Article 3(2) of Directive 2004/38/EC may either be a dependant or a member of the household of the EEA national: they are alternative ways of qualifying as an OFM. In either case the dependency or membership of the household must be on a person who is an EEA national at the material time. For this reason it is essential that tribunal judges establish when the sponsor acquired EEA nationality."
65. Therefore judges are required to establish upon evidence, the date when a sponsor acquired EEA nationality because to qualify under the Regulations, dependency must be on an EEA national who has that status at the material time. Thus dependency or membership of a household that preceded the sponsor becoming an EEA national would not be sufficient. It is necessary for the pre entry dependency to be on the EEA national and not a person who subsequently became an EEA national. The only document submitted by Mr Tofa to evidence his status is a German Identification Card dated 27<sup>th</sup> November 2003. He has not produced any other document to evidence the date upon which he acquired EEA citizenship. Whilst I have resolved the issue of documents in favour of the witnesses, that was because of the length of time that had elapsed and the consequent difficulties there were in obtaining them. The same does not apply to documents relevant to citizenship as this issue was made clear between the hearing in November and June and Mr Tofa has had sufficient time to obtain documents in respect of his citizenship from the German authorities. Therefore whilst I have found prior dependency in Nigeria I respect of John, it was not upon an EEA national as the evidence as to the date of citizenship is 27<sup>th</sup> November 2003 and he could not provide any documentary evidence of an earlier date. John came to the UK on the 14<sup>th</sup> August 2003 before Mr Tofa became a Union citizen and therefore any support or dependency before then could not have been on an EEA national as he did not acquire that until 27<sup>th</sup> November 2003. His appeal therefore fails.
66. The findings made that the 2<sup>nd</sup> and 3<sup>rd</sup> Appellant's come within Regulation 8 does not confer upon them any substantive right to residence in the UK. Regulation 17(4)

of the Immigration (European Economic Area) Regulations 2006(as amended) makes the issue of a residence card to an OFM/extended family member a matter of discretion. Where the Secretary of State has not yet exercised that discretion the most an Immigration Judge is entitled to do is to allow the appeal as being not in accordance with the law. Whilst it is a matter for the discretion of the Secretary of State such discretion should be exercised by taking into account the factual findings made by this Tribunal.

Decision:

The appeal of the First Appellant is dismissed under the Immigration (European Economic Area) Regulations 2006 (as amended).

The appeals of the 2nd and 3<sup>rd</sup> Appellants are allowed to the extent that their cases are remitted to the Respondent under Regulation 17(4).

Signed

Date

Upper Tribunal Judge Reeds