Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/40371/2013
IA/46240/2013
IA/49378/2013
IA/49382/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 27th October 2014	**On 5th December 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

Mr Godfrey Edojariogba
Mrs Bridget Edojariogba
Miss Oghenetega Elfred Edojariogba
Miss Kevwe Emilia Edojariogba
(Anonymity Direction Not Made)

Respondents

Representation:

For the Appellant: Mr Omonirube, instructed by JDS Solicitors.
For the Respondent: Mr T Melvin, Home Office Presenting Officer

DECISION AND REASONS

1. The application for permission to appeal was made by the Secretary of State but nonetheless I shall refer to the parties as they were described before the First Tier Tribunal that is Mr Edojariogba and his dependents as the appellants and the Secretary of State as the respondent.

2. The appellants appealed the decision of the Secretary of State further to Regulation 8(2) of the EEA Regulations refusing the appellants residence

cards as confirmation of the right to reside in the UK as the extended family members of an EEA national that is the sister of the first appellant, Mrs Anthea Edojariogba 'who is now a Dutch national'. The appellants entered the UK in 2012. The refusal dated 24th September 2013 asserted that there was no evidence that the appellants were dependent on the EEA sponsor immediately prior to entering the UK as required under Regulation 8(2)(a).

3. In a determination dated 26th August 2014 First Tier Tribunal Judge Cockrill allowed the appellants' appeals on all grounds. The respondent made an application for permission to appeal contending that the Judge failed to make findings on a relevant and material issue, failed to properly apply the standard of proof and made a misdirection in law in allowing the appeal outright. Despite the fact that the sponsor relied on was the sister of the first appellant there was no indication of when she became an EEA national. The judge had not applied the correct burden of proof as the determination indicated he was unclear about aspects of the evidence and he had allowed the appeal outright, all of which were errors of law.

4. The following extract from **Dauhoo EEA Regulations –reg(8)(2) [2012] UKUT 79 IAC** sets out the requirements in respect of Regulation 8(2) of the EEA Regulations.

'10. It may help to clarify these requirements in the following way. Under the reg 8(2) scheme, a person can succeed in establishing that he or she is an "extended family member" in any one of four different ways, each of which requires proving a relevant connection both prior to arrival in the UK and in the UK:

i. prior dependency and present dependency

ii. prior membership of a household and present membership of a household

iii. prior dependency and present membership of a household;

iv. prior membership of a household and present dependency.

11. It is not necessary, therefore, to show prior and present connection in the same capacity: dependency- dependency or household membership-household membership, i.e. (i) or (ii) above. A person may also qualify if able to show (iii) or (iv).

12. Although the above scheme is consistent with case law, it is fair to consider one possible semantic objection to it. It might be said that the use of the present tense verb "continues" in reg 8(2)(c) denotes that a person can only

meet the requirement to show present dependency if that is a "continued dependency" and, likewise, that a person can only meet the requirement to show present membership of an EEA national's household if that is a "continued membership". If that reading were correct, then permutations (iii) and (iv) above would be impermissible. However, such an interpretation cannot be correct. Leaving aside that if the drafters had intended the meaning of reg 8(2)(c) to be restricted in this way they would have said so, reg 8(2), being an attempt to transpose Article 3(2)(a) of Directive 2004/38/EC, must be construed purposively so as to be compatible as far as is possible with that provision. Article 3 provides:

"1. This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.
2. Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:

> *(a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family members by the Union citizen;*
> *(b) the partner with whom the Union citizen has a durable relationship, duly attested.*

The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people."

5. The key issue here is that there was no finding as to when the sponsor became a Dutch national and the case was put forward on the basis that it was the sponsor sister of the first appellant who had supported the appellants since prior to their arrival in the UK. The evidence on this was minimal and not addressed in the determination. Indeed the judge at [42] stated that this evidence should have been brought out and was not. Indeed the relationship between the sponsor and her 'partner' in Holland who was a Dutch national was not made clear at the relevant time. Both Article 3(2) and reg 8 make clear it has to be dependency on someone who is a Union citizen/EEA national. **Ihemedu (OFMs – meaning) Nigeria** [2011] UKUT 00340(IAC).

6. The judge stated at [42] *'what was not brought out in the proceedings and really it ought to have been brought out was the exact date when the EEA*

national sponsor gained her citizenship of the Netherlands'. This was critical in relation to the dependency issue.

7. The findings in relation to the timing, level and nature of the financial support, which are critical, are not clear or adequate. The judge himself expressed doubt about the evidence. The judge referred to the burden of proof being on the appellant and the relevant standard of proof and recorded at [41] that he had '*some disquiet by the fact that there has been some conflict in the evidence which I heard most notably between the account given by the First Appellant and that provided by the sponsor'*.

8. The judge recorded '*in my overall assessment and judgment [the appellant] has tried to exaggerate the extent of the contribution made by the EEA national sponsor*'. There was evidence of '*some documentation which, taken at face value, would be supportive of the account provided by the sponsor that she had supplied funds for the benefit of the First Appellant for an appreciable period from 2003 through until 2005*' [41].

9. The judge accepted [42] that

'*when she started working from July 2004 onwards the sponsor was in a position then to make the payments that have been recorded. They weren't enormous sums but I do find as a fact that they were made with some regularity about 100 Euros per month as an average. It is difficult to know really the full financial situation of the First Appellant but what I accept specifically is that there was a payment made for one year's course fees and that was in 2005*'.

and

'*Although the state of the evidence is not terribly good, I am satisfied on balance that the sponsor did make that specific payment for the benefit of the First Appellant and thereafter in the two following years made payments to the First Appellant just to assist him supplementing his income*'.

10. Further the judge stated '*the documentation does not support the long term financial support from the sponsor as it ends in August 2005'* [43] but then proceeds [44] '*what I am prepared to accept, although as I say the matter is not well documented is that there was a period from 2004 through until 2005 particularly when there were financial contributions made by the sponsor to the First Appellant of sufficient sum, as I see it, with sufficient regularity, to mean that the First appellant was dependent upon those sums. The picture presented is that he did not have a lot of money and he did need help and support for things like the course fee. He has also required help and support in meeting things like his rent and there has been enough evidence adduced to show a sufficient measure of support by the sponsor for the first appellant to show that he was dependant upon her before he came to this country*'.

11. That conclusion, however, was not supported by the evidence given as the judge recorded earlier in the determination that the appellant's wife gave evidence of the assistance with rent *after* they came to the UK. As **Moneke (EEA OFMs - assessment of evidence)** [2011] UKUT 00341(IAC) makes clear judges must scrutinise the existence of sufficient reliable information to satisfy themselves that the burden or proof had been demonstrated. The judge was not assisted in this task by the confused presentation and conflicts within the evidence.

12. For example, the judge only accepted that there was a payment made for one year course fees and that was in 2005. Thereafter, however, the judge accepted 'on balance' that the sponsor did make 'in the following two years, made payments to the First Appellant just to assist him *supplementing his income'* [42]. This appeared to contradict what the judge stated in [41] where it was accepted that the payments were for fees and ceased in 2005. (I note that there also appears to be an issue of lapsed dependency. **Bigia v ECO [2009] EWCA Civ 79** confirms the *'requirement of very recent dependency or household membership. Historic but lapsed dependency or membership is irrelevant to the Directive policy of removing obstacles to the Union citizen's freedom of movement and residence rights').*

13. Lastly**, Ihemedu** adds that '*Regulation 17(4) 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 leaving the matter of whether to exercise this discretion in the appellant's favour or not to the Secretary of State'.* Mr Omonirube accepted that there was an error of law in the judge allowing the appeal outright and the matter should be put before the Secretary of State in order for her to exercise her discretion.

14. For the above reasons I find that there were errors of law and I set aside the determination of Judge Cockerill.

15. The Judge erred materially for the reasons identified. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007). Bearing in mind the nature and extent of the findings to be made the matter should be remitted to the First-tier Tribunal under section 12(2) (b) (ii) of the TCE 2007 and further to 7.2 (b) of the Presidential Practice Statement

Signed Date 3rd December 2014

Deputy Upper Tribunal Judge Rimington