



UPPER TRIBUNAL  
(IMMIGRATION AND ASYLUM CHAMBER)

APPEAL NUMBER: IA/12529/2015

THE IMMIGRATION ACTS

Heard at: Birmingham  
on 14 March 2016

Decision and Reasons Promulgated  
On 5<sup>th</sup> May 2016

Before

Deputy Upper Tribunal Judge Mailer

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS IYABODE ADEJOKE AKINGBOLA  
NO ANONYMITY DIRECTION MADE

Respondent

Representation

For the Appellant: Mr D Mills, Senior Home Office Presenting Officer  
For the Respondent: Mr A Akindele, solicitor, A & A Solicitors

DETERMINATION AND REASONS

1. I shall refer to the appellant as the secretary of state and to the respondent as the claimant.
2. The claimant is a citizen of Nigeria, born on 7 August 1976. She applied on 22 October 2014 for a residence card under the provisions of the Immigration (European Economic Area) Regulations 2006 (“the 2006 Regulations”) on the basis that she was the primary carer of an EEA national child exercising free movement rights in the UK as a self sufficient person.

3. In a decision promulgated on 9 June 2015, the First-tier Tribunal Judge allowed the claimant's claim under the 2006 Regulations. The Judge found that the child was an Irish citizen and is accordingly an EEA national living in the UK. He is self sufficient as his mother has access to sufficient resources not to become a burden on social assistance in the UK during the period of residence, and has comprehensive sickness insurance cover in the UK [13].
4. The secretary of state appeals with permission against that decision.
5. In granting permission, First-tier Tribunal Judge Molloy noted the grounds alleging an error of law. There has been a failure to make findings on material matters such as "sufficient resources", and in particular by failing to compare claimed income by the claimant against income support rates, housing costs and council tax payments.
6. Judge Molloy found it difficult to see where 'the physical evidence is' of the funds recorded by the First-tier Tribunal Judge in paragraph 10(iii) of the decision. The First-tier Judge at [10(vii)] expressed satisfaction that the claimant had access to the income that she avers she enjoys. She claimed to have the equivalent of £45,000 in a fixed deposit with Meetneeds Investment Services Ltd, 'but there was not in the claimant's bundle any document from that organisation supporting the claim'.
7. Judge Molloy stated that as the respondent pleaded in the grounds there was insufficient evidence to show that the claimant or her EEA sponsor could gain access to monies, specifically £45,000.
8. On behalf of the secretary of state Mr Mills submitted that the appeal related to Regulation 15A(2) of the 2006 Regulations, and in particular the requirement that the relevant EEA national is residing in the UK as a self sufficient person.
9. Regulation 4(1)(c) sets out the definition of "self sufficient person". Such a person must have sufficient resources not to become a burden on the social assistance system of the UK during his period of residence and comprehensive sickness insurance cover in the UK.
10. Regulation 4(2) states that for the purpose of paragraph 1(c), where family members of the person concerned reside in the UK, and their right to reside is dependent upon there being family members of that person –
  - (a) the requirement for that person to have sufficient resources not to become a burden on the social assistance system of the UK during his period of residence shall only be satisfied if his resources and those of the family members are sufficient to avoid him and the family members becoming such a burden;
  - (b) the requirement for that person to have comprehensive sickness insurance cover in the UK shall only be satisfied if he and his family members have such cover.

11. Paragraph 4(4) of the Regulations states that for the purposes of paragraph 1(c) and 2, the resources of the person concerned and, where applicable, any family members, are to be regarded as sufficient if
  - (a) they exceed the maximum level of resources which a British citizen and his family members may possess if he is to become eligible for social assistance under the UK benefit system; or
  - (b) paragraph (a) does not apply but, taking into account the personal situation of the person concerned and, where applicable, any family members, it appears to the decision maker that the resources of the person or persons concerned should be regarded as sufficient.
12. Family members include a primary carer as defined in Regulation 15A(7) - paragraph 4(5).
13. Mr Mills submitted that these resources cannot include income from illegal work undertaken in the UK.
14. He submitted that the Judge gave no consideration to the fact that the claimant is part of a family unit in the UK comprising a sole parent and three children. The Judge has failed at [13] to make an assessment required by Regulation 4(2)(a) as to whether or not the funds claimed by the claimant are sufficient for the family as a whole to avoid becoming a burden on the social assistance system for the duration of the sponsor's period of residence.
15. He submitted that the Judge had to consider not only whether they had resources, but whether they would be available over a period of time, i.e. for the duration of the sponsor's period of residence required by Regulation 4(2)(a). It is accordingly "forward looking".
16. He referred to the fact that the claimant entered the UK on 19 August 2014. Prior to that, she had been raised and had lived in Nigeria. She is married to Mr Kehinde Akingbola, described as a practising barrister in Nigeria. He is also said to be an investor - [10].
17. They have three children, namely a son, an Irish citizen born on 6 September 2004; and two children, both American nationals, born on 27 March 2009 and 13 January 2012.
18. The claimant arrived in the UK with her children. She and her husband decided to relocate here on the basis that they would be entitled to a derivative right of residence as she is the carer and custodian of Akindele, an Irish citizen, who is accordingly an EEA national - [10(ii)].
19. Mr Mills submitted that in those circumstances it was necessary to have regard to the relevant income support levels as applied to a parent and three children in the UK. This

amounted to £291.25 a week, as well as housing costs and council tax. That accordingly equates to more than £291 a week. No assessment however has been made regarding any of the claimant's housing costs or council tax payments.

20. No assessment has been carried out as to how long the claimed resources would be available. Further income will be available once the father comes. This is evidenced from the witness statement of the claimant set out at [10(2)].
21. They intend to reside in the UK as a family. When that happens, his income from abroad will not continue. This has not been acknowledged by the Judge.
22. Moreover, the claimant listed funds and investment that she and her husband have in Nigeria in the amount of £46,200 in the bank of which £45,000 is held as a fixed deposit with Meetneeds Investment Services Ltd. The remaining balance is held between the Guaranteed Trust Bank, First Bank of Nigeria and Barclays Bank. It is also contended that she has a house with her husband in Lagos valued at £210,000.
23. Accordingly, it appeared that all but £1,200 is held in a fixed deposit. Based on the income support calculations, that amount would last for a little over four weeks. There was accordingly insufficient evidence showing that the claimant or her sponsor could gain access to the remaining £45,000 said to be shared by her and her husband.
24. He referred to the contention in the grounds that the 'period of residence' of their son, the EEA national, the duration of which these resources must cover, was always intended to be permanent and is therefore open ended.
25. Mr Mills referred to the letter from Meetneeds Investment at P of the secretary of state's bundle. This is dated 23 September 2014. It confirms investments made with the company. Returns on investments are paid at agreed rates and due dates, until the investments are liquidated or terminated. The termination of this placement shall be by written notice received 14 days prior to the intended termination date. Confirmation shall remain valid until returned to Meetneeds Investment Services Ltd for the terms thereof are fully discharged.
26. On that basis, it was not clear how the Judge was satisfied that the resources would cover an open ended period.
27. Mr Mills noted that the appeal was considered by the First-tier Tribunal on the papers, without the benefit of any representation or submissions by either party to address these problems. The "application of the law to the facts" at [13] is brief. The Judge has not considered how long the resources would last, which depends on a proper assessment of the relevant facts, including taking into account housing costs and council tax payments. There has to be some consideration given as to how long the resources would last them and how it would be applied. In this case it has to be assessed over a lengthy period.

28. The £45,000 is a large amount but regard must be had to the fact that theirs is a large family. It may last for two years. If however they intend to remain for five years, the husband would only be able to earn an income if he were here lawfully. There is no date as to when he would come. There is no evidence as to how he would find employment. No findings have been made in this regard, and none of the problems has been addressed.
29. On behalf of the claimant, it was submitted that the decision was open to the First-tier Judge. The evidence of bank statements and fixed deposits showed that there are sufficient resources. In EEA cases, there should not be a strict approach to the evidence. There is nothing in the Home Office guidance that refers to income support levels. It is simply provided that the self-sufficiency requirement should be met.
30. Here there is some £45,000 available. This can be liquidated in two weeks. He referred to the bank statements at C1-29 of the claimant's bundle. That showed that there was income which goes into the account arising from property income. These were seen by the Judge.
31. It is not for the Judge to look forward. At the date of appeal, £45,000 was in a fixed deposit. The interest was adequate to live on. When you add all this together, there are sufficient resources. The £45,000 was part of the resources which would be available. Even if the husband decided to relocate, the status of the family would be considered at that time. It is too much to look forward over a period of several years. The Judge had to look at the circumstances before him.
32. Mr Alikndele submitted that if an error of law is found the matter should be remitted to the first-tier Tribunal for a fresh decision where the evidence and submissions can be properly considered.

### Assessment

33. It is accepted that Regulation 4(2)(a) of the 2006 Regulations requires that a self-sufficient person must be a person who has sufficient resources not to become a burden on the social assistance system of the UK during his period of residence.
34. Where family members of the person concerned reside in the UK and the right to reside is dependent upon their being family members of that person, the requirement for that person to have sufficient resources not to become a burden on the social services system of the UK during his period of residence shall only be satisfied if his resources and those of his family members are sufficient to avoid him and his family members becoming such a burden.
35. It is not possible for a claimant to rely on wages earned in the UK to assert self-sufficiency - MA and others (EU national; self sufficiency; lawful employment) Bangladesh [2006] UKAIT 00090 at [45]. A person's resources include the individual's accommodation - SG v Thameside Metropolitan Borough Council (HB) [2010] UKUT 243

at [46]. The claimant must show sufficient resources for the intended period of residence - VP v Secretary of State for Work and Pensions [2014] UKUT 32. The resources available must exist independently of any economic activity in the host Member state - Macdonald's Immigration Law and Practice, 9<sup>th</sup> ed, 14.47.

36. The Judge was required to assess the relevant period of residence in the circumstances. In that respect, I accept the submission that the Regulation must to that extent be construed as "forward looking."
37. This was an appeal decided on the papers. The First-tier Judge had regard to the evidence produced and found that the claimant and her husband have three children. She arrived with them in the UK. The claimant is not currently working in the UK but has relied on money from abroad. The income relied on is derived from her husband's work as a barrister and from other investments. She accesses this money from the UK using bank cards.
38. The Judge had regard to the claimant's assertion in her witness statement that she and her husband decided to relocate to the UK on the basis of a derivative right of residence as the carer for their child, an EEA national [10(iii)]. Moreover, she and her husband plan to move all their funds here once she has been granted status in the UK. Her husband plans to re-qualify as an English lawyer [10(v)].
39. Although the amount of £45,000 in a fixed deposit can be liquidated, the amount is finite. As at the date of decision, the evidence of funds produced showed that all but £1,200 was held in a fixed deposit. Based on income support rates at the date of hearing, an amount in excess of £300 per week for the claimant as a lone parent and her two children plus the family premium would be required. There was no reference to any of their housing costs or council tax payments that was taken into account.
40. In those circumstances, I accept the submission that the period of residence the resources must cover was intended to be permanent and is accordingly open ended. The income of the claimant's husband, derived from his employment in Nigeria was, on the evidence, shortly to cease. I have taken into account the minimum income support levels required as well as housing and Council Tax costs.
41. The claimant did not show that the finite funds available to the family was sufficient to support them for an unspecified open ended period of time. The evidence before the Judge was that they intended to reside for a long period in the UK. The Judge was accordingly required to consider whether in the circumstances the funds relied on by the claimant were sufficient for the family as a whole to avoid becoming a burden on the social assistance system for the duration of the anticipated period of residence. That was not however considered.

42. I accordingly find that the decision of the First-tier Tribunal Judge involved the making of an error on a point of law. In the circumstances I set aside the decision which will have to be remade.
43. I accept Mr Akindele's submission that this is an appropriate case to remit to the first-tier Tribunal. There has been no submission to the contrary that Mr Mills has made.
44. I have had regard to the Senior President's Practice Statement regarding the issue of remitting an appeal to the First Tier Tribunal for a fresh decision. I am satisfied that the extent of judicial fact finding which is necessary in order for the decision to be re-made, is extensive. This will be a complete re-hearing with no findings preserved. I have also had regard to the overriding objective and conclude that it would be just and fair to remit the case.
45. The appeal is accordingly remitted to the First Tier Tribunal (Birmingham) for a fresh decision to be made.

**Notice of Decision**

The decision of the First-tier Tribunal involved the making of an error of law and is set aside.

The appeal is remitted to the First Tier Tribunal (Birmingham) for a fresh decision to be made by another Judge.

No anonymity direction is made.

Signed

Date 19 April 2016

Deputy Upper Tribunal Judge Mailer