



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Numbers: IA/31679/2013  
IA/31749/2013

**THE IMMIGRATION ACTS**

Heard at Field House  
On 20 January 2015

Decision & Reasons Promulgated  
On 17 March 2015

Before

UPPER TRIBUNAL JUDGE O'CONNOR

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

(1) DG

(2) SG

(ANONYMITY DIRECTION MADE)

Respondents

**Representation:**

For the Appellant: Mr C Avery, Senior Presenting Officer

For the Respondents: Ms L Targett-Parker, instructed by Davjunnel Solicitors

**DECISION AND REASONS**

**Introduction**

1. The Secretary of State is the appellant before the Upper Tribunal. I shall refer herein to DG as the first claimant and SG as the second claimant.
2. An anonymity direction is made pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure or publication of documents or information relating to the proceedings or any matter likely to lead members of the public to be able to identify the claimants.
3. Both claimants are citizens of Nigeria and are siblings, the first born on 23 April 1994 and the second on 4 May 1998. On 12 December 2012 the claimants each applied for an EEA residence card as extended family members their uncle, AW. These

applications were refused by the Secretary of State in decisions dated 8 July 2013, it being concluded therein that it had not been demonstrated that:

- (i) the claimants were related to AW as claimed, or at all;
- (ii) they had been dependent on AW in Nigeria immediately prior to entering the United Kingdom; or
- (iii) they had been dependent on AW since their arrival in the United Kingdom.

### **Error of Law**

4. The claimants appealed to the First-tier Tribunal. Their appeals were heard by First-tier Tribunal Judge Khan on 28 January 2014 and allowed in a determination promulgated on 18 February 2014. By way of a decision of 9 April 2014, First-tier Tribunal Judge Brunnen granted the Secretary of State permission to appeal to the Upper Tribunal and, consequently, the appeals came before me on 8 August 2014. Having heard submissions from the parties I concluded, in a decision of 11 August 2014, that the First-tier Tribunal's determination should be set aside as a consequence of it containing errors of law capable of affecting the outcome of the appeal. I did so broadly for the following reasons:

"[12] Moving on to the second of the written grounds of appeal, by way of a letter of 4 August 2014 the Secretary of State sought the Tribunal's permission to amend this ground so as to include the submission that:

"No consideration has been given as to when ... [AW] acquired citizenship of an EEA state and thus whether any historic dependence/membership of household qualified ..."

[13] I granted the Secretary of State permission to rely on this additional ground, which in reality was no more than a re-focusing of the ground that was originally pleaded. Mr Talacchi did not seek an adjournment in order to marshal the claimants' response to it...

[18] The claimants' submit that the evidence before the First-tier Tribunal plainly demonstrated that the sponsor was the spouse of an EEA national as long ago as 4 October 2005, because on this date the Secretary of State granted him an EEA family permit as the spouse of an EEA national (see page 15 of the claimants' bundle). It was further observed that the accepted evidence before the First-tier Tribunal was that the dependency by the claimants on the sponsor began in the summer of 2005 and that the claimants did not move to the United Kingdom until January 2006.

[19] Whilst the claimants are correct in these submissions, this does not of itself meet the point made by the Secretary of State. It is not sufficient for the purposes of Regulation 8(2) to demonstrate dependence on the spouse of an EEA national, dependency must be on an EEA national. This is a point that appears to have been lost on the claimants. It is also entirely unclear whether Judge Khan properly directed himself in this regard. In paragraph 14 of his determination the Judge initially refers to the fact of the sponsor being a family member of an EEA national, but immediately thereafter reference is made to him being an EEA national.

[20] There was no evidence before the First-tier Tribunal as to when, if ever, the sponsor became an EEA national, and there is no finding in Judge Khan's determination on this issue. If the sponsor has never become an EEA national then Judge Khan was required to give consideration to the dependency by the claimants on the sponsor's wife. Such consideration is however wholly lacking in the determination. This issue cannot be resolved by simply saying that the sponsor was married to an EEA national and therefore any dependence on him must also be dependence on his wife. The fact that this is so can be seen from the Court of Appeal's judgment in Soares v the Secretary of State for the Home Department [2013] EWCA Civ 575. Each case is fact specific and there has been no analysis of relevant facts relating to this issue by Judge Khan.

[21] For this reason I conclude that the First-tier Tribunal's determination contains an error on a point of law that leads me to set it aside.

[22] There was also a further ground that the Secretary of State sought to pursue in her letter of 4 August 2014 i.e. that the First-tier Tribunal erred in allowing the appeals outright given that the Secretary of State had not considered the exercise of her discretion pursuant to Regulation 17(4) of the 2006 EEA Regulations.

[23] This ground is now academic given what I say above. Nevertheless for the sake of completeness I once again give permission to the Secretary of State to rely on it, and conclude that this ground is made out.

[24] Unlike family members, where the issuing of an EEA residence card is merely confirmatory of a right of residence that already exists, the issue of an EEA residence card to an extended family member creates the right of residence. This is clear from the structure of the 2006 EEA Regulations, and in particular regulations 13 and 14 thereof, which set out the personal features required for an individual to have an initial and extended right of residence in the United Kingdom. The fact that a person may meet the requirements of regulation 8 of the 2006 Regulations is not determinative of the question of whether or not an EEA residence card should be issued. The grant of such a card is a matter of discretion for the Secretary of State as is made clear by the terms of regulation 17(4) of the EEA Regulations.

[25] Given that the Secretary of State has not engaged with the exercise of her discretion under regulation 17(4) it is not a matter upon which the Tribunal can come to a conclusion upon for itself. At its highest if it is found that these claimants meet the requirements of regulation 8 of the 2006 Regulations the appeal would have to be allowed to the extent that their applications remain outstanding before the Secretary of State for her to consider the exercise of her discretion to grant them EEA residence cards pursuant to regulation 17(4) of the 2006 Regulations.

[26] It is clear from reading paragraph 16 of the determination that that Judge Khan failed to recognise this fact and, consequently, in my conclusion he also fell into error in this regard."

5. Having come to the above decision I directed that (i) the decision on appeal would be re-made by the Upper Tribunal (ii) the findings of fact made by the First-tier Tribunal in relation to the claimants' relationship to their uncle, and their dependency on him - both prior to and after the claimants' arrival in the United Kingdom - were to be maintained and (iii) that the issue for the Upper Tribunal to determine would be

whether the claimants had been dependent on, or a member of the household of, an *EEA national* both immediately prior, and subsequent, to their arrival in the United Kingdom – such directions being given for the reasons set out in my decision of 11 August.

### **Re-making of decision**

6. The appeals came back before me on 31 October 2014 for determination of the aforementioned issues. However, despite specific directions having been given as to the further progress of the appeal, both parties raised new issues at that hearing that the other party had been unprepared to deal with. In such circumstances I once again adjourned the hearing and issued further directions with the aim of ensuring that a just decision could be reached in relation to the appeals at the earliest opportunity.
7. The matter came back before me on 20 January 2015.

### **Facts**

8. The following facts are preserved from the First-tier Tribunal's determination:
  - (i) The claimants are the nieces of AW;
  - (ii) The claimants have each been dependent on AW since 2005;
  - (iii) The claimants arrived in the United Kingdom on 20 January 2006.
9. It is also not in dispute that AW married Mrs AW in 2001 and that Mrs AW was, at that time and is still, a joint Cypriot and British national.
10. It is not now contended by the claimants, and neither could it be in light of the amended definition of an EEA national set out in regulation 2 of the Immigration (European Economic Area) Regulations 2006/1003 ("2006 EEA Regulations"), that they can rely upon a dependency on Mrs AW for the purposes of establishing a right to reside in the United Kingdom pursuant to those Regulations. In short, as a consequence of her being a dual national with one of her nationalities being British, she is not to be treated as an EEA national for the purposes of the application of the 2006 EEA Regulations.

### **Legal Background**

11. It is necessary at this stage to set out briefly the regulations that are pertinent to a decision in this appeal. Regulation 8 of the 2006 EEA Regulations is headed "Extended Family Member".

Regulation 8(1) reads:

“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) and who satisfies the conditions in paragraph (2), (3), (4) or (5).”

Regulation 8(2) continues:

“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 the United Kingdom and is dependent upon the EEA national or is a member of his household;
- (b) the person satisfied the condition in (a) and is accompanying the EEA national to the United Kingdom or wishes to join him there; or
- (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.”

And then Regulation 8(6) says:

“In these Regulations ‘relevant EEA national’ means, in relation to an extended family member, the EEA national who is or whose spouse or civil partner is the relative of the extended family member for the purpose of paragraph (2), (3) or (4) or the EEA national who is the partner of the extended family member for the purposes of paragraph (5).”

12. Turning to the regulations relating to the issuing of an EEA residence card, these are found in regulation 17 of the 2006 EEA Regulations - the relevant provision in this appeal being regulation 17(4) which reads:

“The Secretary of State may issue a residence card to an extended family member not falling within Regulation 7(3) who is not an EEA national on application if -

- (a) the relevant EEA national in relation to the extended family member is a qualified person or an EEA national with a permanent right of residence under Regulation 15; and
- (b) in all the circumstances it appears to the Secretary of State appropriate that to issue the residence card.”

### Discussion and Decision

13. I have before me a certified copy a Cypriot passport in AW's name, such passport having been issued on 22 May 2009. On the basis of this evidence I am prepared to accept that it has been demonstrated to the balance of probabilities that AW became an EEA national on 22 May 2009, as claimed.
14. The consequence of this is that the claimants cannot rely upon any dependency on AW prior to 22 May 2009 in seeking to establish that they meet the requirements of regulation 8 of the 2006 EEA Regulations. For the purposes of regulation 8 there must

be a dependency on an EEA national and AW did not become an EEA national until 22 May 2009.

15. This though is not where the claimants' case rests because each claimant maintains that (a) they were dependent on AW during their visit to Nigeria between 20 October 2009 and 12 December 2009 and (b) they were "residing in" Nigeria at that time for the purposes of regulation 8(2)(a) of the 2006 Regulations.
16. The Secretary of State disputes (i) that the claimants were dependent on AW during their visit to Nigeria in 2009 and (ii) that they were 'residing in' that country for the purposes of the 2006 EEA Regulations at that time.
17. Taking the issues in turn, the First-tier Tribunal accepted that AW took over responsibility for the claimants care in the summer of 2005, and that they eventually joined him in the United Kingdom in 2006 - when they came here as visitors and did not leave as required. It was further accepted that they have lived with AW in his family home since that time, and that "*no-one else is responsible for looking after them*".
18. Although the First-tier Tribunal did not specifically consider the issue of whether the claimants were dependent on AW during their visit to Nigeria in 2009, because this issue did not arise before it, my consideration of such issue must nevertheless be informed by those findings that the FtT did make and which were subsequently preserved.
19. When the claimants visited Nigeria in 2009 they would have been just 15 and 11 years old respectively. At that age they were highly unlikely to be self sufficient, and must have been dependent on someone for financial support. The claimants' biological father had passed away by this time, and AW's evidence was that their mother was struggling, and continues to struggle, financially. This evidence is consistent with the evidence provided by the claimants' mother in her statement of 12 December 2014, which points to the death of the claimants' father as an event significantly worsening her financial position.
20. It is unfortunate that neither the claimants' mother, nor AW, gave direct evidence as to how the claimants were funded and upon whom they were dependent whilst they were in Nigeria in 2009. Nevertheless, on the basis of the findings made by the First-tier Tribunal, and in particular the acceptance that AW has been the claimants long term carer and the person who has undertaken responsibility for them since late 2005, as well as the findings and other evidence relating to the death of the claimants' father in 2008 and the financial difficulties that their mother found herself in after her husband's death, I am prepared to accept on the balance of probabilities that the claimants were dependent on AW during their trip to Nigeria in 2009.
21. Moving on, I must also consider whether the claimants' dependency on AW during their visit to Nigeria in 2009 is a dependency that can be relied upon for the purposes of establishing that they meet the requirements of regulation 8(2) of the 2006 EEA Regulations.

22. Mr Avery submits that (a) the claimants' approach to the interpretation and application of regulation 8(2) is not supported either by (i) the natural and ordinary meaning of the term 'residing in' or (ii) the purpose behind such Regulations and Directive 2004/38/EC - such purpose, it is said, being to facilitate the free movement of EU citizens (and their families), (b) regulation 8(2) of the 2006 EEA Regulations requires an applicant to have a degree of permanency of stay in the country from which they have come and (c) if the claimants are correct in their submissions then the application of regulation 8(2) would be open to abuse.
23. Consideration of the terms of the EU Directive 2004/38/EC ("the Directive"), which was transposed into United Kingdom law by the 2006 EEA Regulations, assists in assessing how regulation 8(2) should be interpreted and applied.
24. The Directive regulates the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. The CJEU has held that the purpose of this Directive, which aims to facilitate the exercise of the fundamental right of residence of EU citizens in a Member State other than that of which they are a national, requires a broad interpretation.
25. Article 3(2) of the Directive provides:

"3(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 reasons:

(a) any other family members, irrespective of their nationality, not falling under the definition in point 2 Article 2 [which defines family members] who, **in the country from which they have come**, are dependents or members of the household of the Union citizen having the primary right of residence..." (emphasis added)
26. It can be seen that on a plain reading of Article 3(2) it requires a dependency to be demonstrated by 'other family members' in the country from which they have come. It is clear from Article 6 of the Directive's preamble that the objective of Article 3(2) is to maintain the unity of the family in the broader sense by facilitating entry and residence for persons who are not included in the definition of family members of the Union citizen contained in Article 2(2) but who nevertheless maintain close and stable family ties with a Union citizen on account of specific factual circumstances, such as economic dependence (See SSHD v Rahman [2012] 3 CMLR 55 at [32]).
27. It is in the context of all that I have set out above that regulation 8 of the 2006 EEA Regulations must be viewed and considered.
28. In my view, when seen in the aforementioned context, the term 'residing in' found in regulation 8(2)(a) does not import the degree of permanence, or an intention to reside permanently, that Mr Avery advocates it must, and I can see no principled basis for deriving such a conclusion from either the Directive or its recitals, or from the authority of the CJEU or the higher courts of the United Kingdom.

29. As to Mr Avery's submission that the Regulations and Directive would be open to abuse if interpreted in the manner suggested by the claimants, and that it should therefore not be so interpreted; if such abuse is established in any particular case then either the EU 'abuse of rights' principle and/or regulation 21B of the 2006 EEA Regulations could be invoked against the 'abuser' in order to deprive such person of what would otherwise be the benefit of the Regulations and/or Directive - each providing a sufficiently robust mechanism to protect against the possibility of such abuse. In the instant matter the Secretary of State has not suggested that the claimants' situation is characterised by any abuse of rights.
30. Having considered the specific circumstances of these claimants, and given what I have said above, it is my conclusion that the claimants were 'residing in' Nigeria for the purposes of regulation 8(2)(a) when they visited that country between 20 October 2009 and 12 December 2009, and that each claimant was dependent on AW during such time. Since their return to the UK the claimants have both continuously lived in AW's household and also been dependent on him. There is now no dispute that AW has, at all material times, been a 'qualified person'.
31. Consequently, I find that the claimants are 'extended family members' of an EEA national for the purposes of regulation 8 of the 2006 EEA Regulations..
32. The fact that the claimants are extended family members does not of itself give them a right to remain in the United Kingdom. The provision of an EEA residence card to extended family members is not confirmatory of a right that they have already acquired, it is the creation of a right and is discretionary - as identified by regulation 17(4) of the 2006 EEA regulations. The Secretary of State has not thus far considered the exercise of discretion under regulation 17(4) and it is not for the Tribunal to consider such discretion for itself in the absence of the Secretary of State having first done so. Given that the Secretary of State has not yet undertaken a task that she is required to undertake by the 2006 EEA Regulations, her decisions refusing the claimants an EEA residence card are decisions which are not in accordance with the law.
33. Having already set aside the First-tier Tribunal's decision, I now substitute a decision allowing the claimants' appeals for the reasons given above; with the effect that the claimants' applications for an EEA residence card remain outstanding before the Secretary of State awaiting a lawful decision.

Signed:



Upper Tribunal Judge O'Connor

Date: 2 March 2015