Upper Tribunal
(Immigration and Asylum Chamber)

Moneke (EEA – OFMs – assessment of evidence) Nigeria [2011] UKUT 00430 (IAC)

THE IMMIGRATION ACTS

Heard at Field House **Determination Promulgated**

On 5 October 2011

…………………………………

Before

MR JUSTICE BLAKE, PRESIDENT

UPPER TRIBUNAL JUDGE STOREY

Between

TONIA OBY MONEKE

FIDELIS CHUKWUALOKA MONEKE

Appellants

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellants: Ms R Akther, instructed by Time and Co Solicitors

For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

This determination should be read in conjunction with Moneke and others (EEA – OFMs) Nigeria [2011] UKUT 00341 (IAC).

In determining appeals regarding OFM applications made in country, Immigration Judges should scrutinise with some care the supporting evidence, in order to satisfy themselves that the burden of proof demonstrating eligibility has been discharged.

In the present case, the Upper Tribunal was not satisfied by the evidence because:

a) There were substantial gaps in the evidence produced by the appellants despite the opportunity afforded to submit further material in the light of our previous decision.

b) The appellants produced no documentary evidence to support their claims: (i) to have been provided with financial support by their sponsor to meet their essential living needs when the sponsor was in Germany or before that in Nigeria; (ii) that they lived in the sponsor's household in Nigeria;

(iii) that they were in apprenticeships with nil earnings in Nigeria; (iv) the amount of material support they needed to meet their essential living needs.

c) The oral evidence was implausible as to material parts and flawed by inconsistencies.

d) Both appellants misrepresented their intentions when seeking to enter as visitors.

DETERMINATION AND REASONS

1.
On 22 August 2011 we gave our decision and reasons for setting aside the decision of the First-tier Tribunal dismissing the appeal of both appellants. We directed that we proposed to re-make them after hearing evidence. A bundle of material was submitted on 12 September. On 5 October, we heard the evidence of both appellants and their sponsor Anselem Egboh and heard submissions from Ms Akther and Mr. Melvyn.

2.
At the outset of the hearing a short clip of material was submitted by Mr Melvyn of an entry clearance application made by Tonia Moneke in 2006. We considered an objection by Ms Akther that it was too late to receive this material but, having given her an opportunity to take instructions upon it, we concluded that it was relevant to the issues in the case, and since it consisted of what Tonia Moneke had said in 2006 in support of her application it should not have taken her by surprise, she was in a position to comment on it in cross examination, and accordingly could be relied upon.

3.
It is common ground in the light of the issues examined at the previous hearing, that the burden lies on both appellants to satisfy us on the balance of probabilities that they qualify for consideration as other family members ("OFMs") of their cousin Anselem Egboh within the terms of the Immigration (European Economic Area) Regulations 2006 ("the Regulations") as amended and as we have interpreted them in the light of the Citizens Directive 2004/28/EC ("the Directive") which they seek to implement.

4.
It is now established to our satisfaction that Mr. Egboh left Nigeria for Germany in 1997. In October 2002 he obtained German citizenship, apparently by virtue of marriage to a German national, and has subsequently exercised Treaty rights as such as an EU citizen in the United Kingdom. We are prepared to assume that Mr. Egboh is the cousin of both appellants as claimed, he being the son of the appellants' mother's brother. He is, therefore, a relative of the appellants; the question is whether they have satisfied us that they were his dependants or members of his household.

5.
The appellants advance their case on the principal basis that they are dependants of Mr. Egboh within the meaning of the Regulations. The case they present is as follows. The appellants and their parents came from the north of Nigeria and had a family home at Nnewi in Anambra state. The appellants' father owned land and also a business specialising in motor vehicle parts in that area. All parties state that in about 1974 when he was aged seven, Mr. Egboh came to live with the appellants' family at Nnewi. He subsequently came to work as an apprentice in the appellants' father's motors spares business and in about 1990 when the father was beginning to become unwell he sold the business and donated the proceeds to Mr. Egboh who started his own business. Mr. Egboh then moved to Lagos, Nigeria and rented property at 6 Ola-Ogsin Street, Ebzite-Metta (West), Lagos until 2006 when it was surrendered to the landlord. The appellants state that in 1993 when they were aged approximately 17 and 15 respectively they both moved to Mr. Egboh's rented premises in Lagos and stayed there until

they came to the United Kingdom. They state that from 1993 onwards Mr. Egboh paid for the premises in which they lived, supported them at school and through apprenticeships that both entered into. He was the only or dominant contributor to their essential living needs and has continued to provide for them in the United Kingdom. Accordingly they both qualify as dependants.

6.

In any event, they qualify as members of Mr. Egboh's household, since they were physically present in the household belonging to Mr. Egboh for the critical period from October 2002 when he became a Union Citizen until the entry of the appellants into the United Kingdom.

7.

In opposition to this appeal the respondent submits as follows:-

(i)

The appellants and the sponsor are unreliable and untruthful witnesses.

(ii)

There is a complete absence of any documentary support for the central assertion of fact relating to dependency and membership of the household and that absence is particularly surprising given the Tribunal's directions following its earlier ruling as to what needed to be established in this case.

(iii)

There is no reliable evidence as to when either appellant entered the United Kingdom or the circumstances in which they did so but if each entered as a visitor as they claim then it is apparent that at the time of entry they had no intention of returning to Nigeria and such entry was therefore obtained by fraud, irrespective of the subsequent breach of the conditions of their entry by remaining without authority. Such conduct both taints reliability of their unsupported oral testimony and in any event gives rise to discretionary refusal of their application under regulation 17 even if (which is not admitted) they qualified as other family members (OFMs).

(iv)

The appellants' account of what they were doing in Nigeria before coming to the United Kingdom is inherently implausible.

(v)

Tonia Moneke's account is directly contradicted by what she stated were her circumstances when she applied for visitor entry clearance in April 2006.

(vi)

There are significant discrepancies of detail between the appellants and between them and their sponsor.

(vii)

Overall this evidence should be rejected as unreliable and the appellants have not substantiated on the balance of probabilities that they qualify for admission as OFMs.

(viii)

If, contrary to the above, it is concluded that they have, the case should be remitted to the Secretary of State to consider the exercise of the regulation 17(4) discretion in the light of their immigration history.

8.

We can indicate at the outset of this determination that in the light of our assessment of the evidence as a whole we accept the respondent's submissions. We are not satisfied that the appellants have established on the balance of probabilities that they were either the dependents or members of the household of Mr. Egboh prior to their arrival in the United Kingdom. We accordingly dismiss the appeal without remitting it to the respondent for consideration of the exercise of discretion under regulation 17. We now give our reasons for doing so.

9.

First, we have examined the witness statements on which the appellants rely in the light of the previous witness statements and the record of evidence submitted to a First-tier Tribunal. A striking feature of the material taken as a whole, but more particularly the most recent material, is that there is a complete absence of detail of the level of support that Mr. Egboh is said to have provided to the appellants, the amount of the rent or other description of the living arrangements at the house in Lagos in which they are alleged to have lived. There is no information about the nature and duration of the respective apprenticeships that the appellants are alleged to have undertaken in Lagos with a textile worker and electrical firm respectively. There is no detail as to how much the appellants needed to live on, whether any other family members supported them and scant information about how the sponsor sent money from Germany, how often and what for.

10.

We accept that the appellants come from the north of Nigeria. They produced some photographs from 1973/4 of themselves and Mr. Egboh as children apparently in that area of Nigeria. We have no details of their education there or standard of living. We consider it implausible that they would have both relocated to Lagos in 1993 at a young age given that both their parents remained alive at that time. We accept that the appellants' father died in 2004 of heart disease at the age of 69. We do not accept that the appellants were living away from their family home for 11 years before that event. In his witness statement the sponsor seems to indicate that he promised the appellants' father that he would look after them shortly before his death but the oral account was that he had done so since 1993. We have seen no evidence of a business in Nigeria from 1990 to 1997 that would have enabled him to do so, bank statements or anything else by way of support.

11.

Tonia Moneke says that her schooling in Lagos was paid for by the sponsor. Her claim is that she was still undertaking her West African Educational Certificates (WECA the equivalent of 'O' Level) in June 2004 when she was aged 29. She has not explained why she did not complete this educational stage many years before. She says that during this time she was trained as an apprentice in making clothes and textiles with a lady who had a shop in the front of the apartment building that she occupied in Lagos. She had to pay for this privilege and she did not receive any wages for it. She has produced no evidence from this lady and was apparently in this apprenticeship from October 2002 until she came to the United Kingdom in April 2006. It appears to us improbable that a family whose father owned a motor spares business and land in the north of Nigeria, and who had a cousin who was earning money as a well paid production line worker in Germany from 1997 would have devoted themselves at all or for so long to such unrewarding activity as she described.

12.

Fidelis Moneke says equally that he was engaged from 1999 to 2005 in an apprenticeship at Lagos with an electrical retail goods company as a trainee. He says he was not paid whilst undergoing such an apprenticeship, obtained no formal or informal qualifications and produced no supporting evidence of any sort of the identity of the company and the period of apprenticeship. He says he was not

interested in motor spares that was his father's and his cousin's business in Nigeria respectively. Again we consider it implausible that a family who had the resources this one did and the apparent ability to access the wages of a cousin working in Germany would have spent so long in such unrewarding activity.

13.
In Tonia's case the implausible and unsupported account is undermined by her entry clearance application. In the application form which she signed she stated that she was a self-employed businesswoman at the address given in Lagos since May 2002. She describes her business as buying and selling textiles. She now seeks to explain those statements on the basis that whilst an unpaid apprentice to the lady clothing worker previously described, she used to buy some textiles in the market for turning into clothes and made a modest profit, not sufficient to live on when doing so. We do not accept that explanation. She either had a substantial degree of self sufficiency in Nigeria before coming to this country, or she has lied in her entry clearance application.

14.
There are other curiosities arising from her application. She gave her permanent home address as an address as 22 Road House, 5 Kado Estate, Abuja. Her correspondence address she indicated should be the same. She told us, however, that this was not her permanent home but the address of a cousin that she used for correspondence purposes as her Lagos address was unreliable in respect of mail delivery. She did not say this in her application form when the form asked two separate questions. It seems to us improbable that if she was indeed living and trading in Lagos she would have left communication on a important matter to her cousin in Abuja. If she had concerns about security in Lagos she could have used a post office box in Lagos. Mr. Egboh told us at one point in his evidence that he used such a post office box in Lagos.

15.
The sponsor identified in Ms. Moneke's application form was a claimed uncle, a Mr. Durie, who lived in Barnet. She was thus not relying upon her cousin Mr. Egboh to support her in her proposed studies. By inference Mr. Egboh was not in the United Kingdom in 2006. We have not heard from Mr. Durie in any form although the appellant accepted that he knew all about her family background in Nigeria. The appellant's entry clearance application was refused and on review in September 2006 the ECO was not satisfied that the appellant had presented original documentation as to her college and academic record. The appellant claims that she had sent original documentation to the agency that she was required to use to handle the visa application and she assumes that they had not passed on such material to the High Commission. We do not accept that explanation of the lack of original documents noted by the reviewing officer.

16.
Tonia Moneke had told us that she had visited the United Kingdom with a valid entry clearance in 2003 and came again in 2006 at a time when her student entry clearance was outstanding. Her Nigerian passport throughout this period is not available for examination. She states that she lost it in 2006 or 2007. The loss was not reported to the police and she did not apply for a new one to the Nigerian High Commission until 2008. Having regard to the bureaucracy involved, she did not see the need to do so until she was preparing to make the present application. It is alleged that the passport was lost when a bag was stolen. Her indifference to the loss of such important documentation for a foreign national in the United Kingdom is inherently unlikely. Its improbability was enhanced when we came to learn from Fidelis Moneke's evidence that the passport on which he claims he entered the United Kingdom as a visitor in 2005 was also lost on the same occasion as it was in the same bag. He

again did not report the loss to the police and he apparently did not consider the matter significant enough to do so.

17.
Fidelis Moneke in answer to questions by the Tribunal indicated that before his sister arrived in the United Kingdom he had encouraged her to come here permanently to reside with their supportive cousin the sponsor, as he was then doing because he had nothing to go back to in Nigeria. Tonia Moneke denied the suggestion that she had no intention of returning to Nigeria at the time of her visit, although she accepted that the house in which she had claimed to be living in Lagos for the previous thirteen years had been handed over to the landlord before her departure for the United Kingdom and she would have nowhere to return to in Nigeria at the time of her entry. We are satisfied that the proper inference from this evidence is that Tonia had no intention of returning to Nigeria when she arrived here and any representation made that she was only intending a short visit would therefore have been false.

18.
There is a problem of chronology between the evidence of Tonia, Fidelis and Mr. Egboh. Fidelis says he came in 2005 on a visit visa and overstayed. He overstayed because he had moved in with his cousin Mr. Egboh and that was a change of circumstance. He communicated with his sister before she came in 2006. Mr. Egboh told us that he did not arrive in the United Kingdom until 2007. He said that both his cousins were studying or continued being apprentices in Nigeria until that time or shortly before. We have already observed that the fact that Tonia did not use Mr. Egboh as a sponsor in her April 2006 entry clearance application is some indication that he was not in the United Kingdom then. We conclude that whenever they arrived in the United Kingdom, their presence here had no connection with Mr. Egboh. It may be the case that they have been living with him since about 2008 but that would not suffice to make them either dependants or members of his household within the Regulations for reasons we have given in our earlier decision. They need to demonstrate eligibility as an OFM before arrival in the United Kingdom.

19.
There were further inconsistencies between them about the nature of the premises in Lagos. Tonia said that the flat that she and her brother lived in was on the first floor with shop premises below; the rent was 40,000 Naira in 2005 paid annually and she believed the landlord’s name was Tunde Ajemobe. Fidelis was present when this evidence was given and concurred but felt unable to make an estimate of how many other apartments there were in the building, although he said that his flat had three rooms. Mr. Egboh says the premises were on the ground floor with a shop in front of them. There were no other apartments in the building. He did not remember the name of his landlord although he had been renting the premises for some sixteen years from him. He agreed the rent was 40,000 Naira annually.

20.
Mr Egboh says that throughout his time in Germany he was providing on average 200 Deutschmarks a month or, once Germany joined the Euro, some 150 to 180 Euros and these were sent through a friend who had provided a witness statement but had not previously been mentioned when the matter was before the First-tier Tribunal. The assessment of these sums was made for the first time in cross examination and as already noted the previous witness statement was singularly absent of any such details. Mr. Egboh states that he used to return annually from Germany to Lagos and did so each year in 2002, 2003, 2004, 2005 and 2006. When asked where he stayed he said that he did not usually stay in the rented premises when he returned as they were occupied by his cousins though he visited them

on each occasion. When asked similar questions, Tonia indicated that Mr. Egboh had visited in 2003 and she thought again in 2005.

21.
The appellants and sponsor contend that the explanation for the complete absence of any form of any supporting documentation for wages in Germany, remittances to Nigeria, payments of rent in Lagos, payments for college studies in Lagos, certificates of academic achievement in Nigeria, evidence of businesses conducted in Nigeria, or evidence of apprenticeships of both appellants in Nigeria is the African customary ways of doing things. We do not accept this. We further do not accept Mr. Egboh's account that he lost all documents to do with his employment and businesses in Germany from 1997 to 2007 when he left them with a friend who mislaid them. Even in a society that may not record all financial transactions, material corroborating an account of an extensive social history by way of receipts, evidence of occupation, photograph of social activities in the premises in Lagos and the like, as well as statements from reliable informants might have reasonably been expected where the burden is upon the appellants to substantiate the claims they make and where the words of Article 10(2)(e) of the Directive contemplate some form of official documentation supporting the relationship be available: "a document issued by the relevant authority in the country…certifying…".

22.
We have already explained in our previous decision why it is important that in OFM applications made in country, Immigration Judges should scrutinise with some care the existence of sufficient reliable information to satisfy them that the burden of proof of demonstrating eligibility has indeed been discharged. 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.

23.
In summary, there were substantial gaps in the evidence produced by the appellants despite the opportunity afforded to submit further material in the light of our previous decision. They produced no documentary evidence to support their claims: (i) to have been provided with financial support by their sponsor to meet their essential living needs when the sponsor was in Germany or before that in Nigeria; (ii) that they lived in the sponsor's household in Nigeria; (iii) that they were in apprenticeships with nil earnings in Nigeria; (iv) of the amount of material support they needed to meet their essential living needs. Their oral evidence was implausible as to material parts and flawed by inconsistencies. We conclude that both appellants misrepresented their intentions when seeking to enter as visitors.

24.
We reach a different conclusion from the First-tier judge, because he gave no detailed consideration to the elements the appellants needed to demonstrate in order to qualify as dependents, and did not have the benefit of seeing the account of the witnesses tested as we have had. It was unfortunate and frankly unacceptable that there was no Presenting Officer at the First-tier hearing and there had been no submission of material to challenge the appellants' account. Whatever other call on scarce resources there may be, it is of considerable importance that disputed applications are properly tested and opposed.

25.
For all these reasons we are not satisfied with the evidence that the appellants presented to us; they have not made out their case and this appeal is dismissed.

Signed

Mr Justice Blake

President of the Upper Tribunal,

Immigration and Asylum Chamber