



**Upper Tribunal
(Immigration and Asylum Chamber)**

Ewulo (effect of family permit – OFM) [2012] UKUT 00238(IAC)
THE IMMIGRATION ACTS

Heard at Field House

Determination Promulgated

On 3 July 2012

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Before

**MR JUSTICE BLAKE, PRESIDENT
UPPER TRIBUNAL JUDGE DAWSON**

Between

OLUWATOBI OLALEKAN EWULO

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Mr H. Olajuwon, Solicitor

For the Respondent: Ms C. Gough, Senior Home Office Presenting Officer

i) Where a family permit has been issued by an ECO after inquiry pursuant to regulation 12 of the Immigration (European Economic Area) Regulations 2006 and is used to enter the United Kingdom a subsequent application for a residence card is to be determined under regulation 7(3) of the Regulations.

ii) Where the validity of the issue of the family permit is not contested by the Secretary of State and the permit has not been revoked, the issue is whether there has been a material change of circumstances since arrival with the consequence that the claimant no longer qualifies as an extended family member

DETERMINATION AND REASONS

1.

Mr Ewulo is a Nigerian citizen born September 1993 and therefore 18 at the time of the hearing before us. He appeals against a decision of the First-tier Tribunal (Judge Hanes) given on 16 June 2011 dismissing his appeal from a refusal of the respondent to issue him with an EEA residence card.

2.

The material facts are as follows. Babatunde Francis Olowu born in Nigeria in July 1964 is the appellant's uncle and the younger brother of his mother, Abosede Ewolo. Mr Olowu is the appellant's sponsor. He left Nigeria in 1990 to work in Germany and subsequently became a citizen of that country. Since 2006 he has been living and working in the United Kingdom.

3.

In 2009 the appellant applied to the Entry Clearance Officer, Lagos for a family permit to join his uncle in the United Kingdom. That application was refused on a number of grounds including lack of satisfaction as to the relationship, insufficient evidence of dependency and doubts as to the ability of the sponsor to support the appellant because there was evidence that he supported a number of other people for immigration entry in the past. An appeal against that decision was dismissed in April 2010 when the sponsor both represented the appellant and gave evidence. The judge was informed by Mr. Olowu that the appellant's mother had died recently.

4.

A further application was made to the ECO, Lagos for a family permit. This was granted in September 2010 and was valid for entry before 15 March 2011. Neither we nor the First-tier judge were shown a copy of the application form or the documents submitted in support of it but from the documents made available at the appeal it is likely that they included a copy of the appellant's mother's death certificate of 19 January 2010; remittance slips from the sponsor to Nigeria for the purpose of paying for the appellant's education at Lagooz College Lagos between 20 September 2005 and July 2009 (total sum of 333,600 naira or approximately £1,313); further remittances of 332,500 naira (or approximately £1,309) for the appellant's attendance on a computer course and other material supporting the claim. The sponsor attended for interview at the High Commission. The case advanced was that the appellant's mother's marriage had broken down some years before her death and the appellant's father did not support his son but the sponsor did.

5.

Equipped with the family permit, the appellant entered the United Kingdom on 5 October 2010 and on 25 October 2010 applied for a residence card. This application was refused on 1 March 2011. The grounds for refusal included the claim that there had been a failure to provide sufficient evidence to establish that the sponsor was a qualified person within the meaning of the Immigration (European Economic Area) Regulations 2006 (SI 2006/1003) ("the Regulations"); there had been no evidence of pre-entry support of the appellant; and there had been no evidence of post-entry residence with or dependence on the sponsor.

6.

The appellant appealed this decision. Judge Hanes was satisfied that:

i)

the appellant and the sponsor were related as claimed;

ii)

the sponsor was an EEA national exercising Treaty rights as a worker;

iii)

the appellant had been living with the sponsor in his home since October 2010;

iv)

there was evidence that the sponsor had paid the appellant's school fees from 2005 to 2009.

The judge nevertheless dismissed the appeal because she was not satisfied that:-

i)

the appellant was either a member of the sponsor's household prior to admission to the United Kingdom; or

ii)

the appellant had been the dependant of the sponsor before entry. In this context he noted that there was no information as to his mother's earnings in Nigeria before she died, or from the appellant's brother aged 23.

7.

Permission to appeal to the Upper Tribunal was granted on 3 November 2011. The grounds of appeal included the submission that the respondent and the judge had misapplied the Regulations in reaching their decisions and neither had given any consideration to the fact that the ECO had already granted a family permit in Nigeria.

8.

We heard submissions on 3 July 2012 limited to this point. At the conclusion of the hearing we indicated that we were satisfied that the decision of the First-tier Tribunal included a material error of law. We would set aside the decision and re-make it by allowing the appeal. We now give our written reasons for that conclusion.

The Regulations

9.

Regulation 12 of the Regulations provides as follows:

12.—(1) An entry clearance officer must issue an EEA family permit to a person who applies for one if the person is a family member of an EEA national and—

(a) the EEA national—

(i) is residing in the UK in accordance with these Regulations; or

(ii) will be travelling to the United Kingdom within six months of the date of the application and will be an EEA national residing in the United Kingdom in accordance with these Regulations on arrival in the United Kingdom; and

(b) the family member will be accompanying the EEA national to the United Kingdom or joining him there and—

(i) is lawfully resident in an EEA State; or

(ii) would meet the requirements in the immigration rules (other than those relating to entry clearance) for leave to enter the United Kingdom as the family member of the EEA national or, in the case of direct descendants or dependent direct relatives in the ascending line of his spouse or his civil partner, as the family member of his spouse or his civil partner, were the EEA national or the spouse or civil partner a person present and settled in the United Kingdom. ¹

(2) An entry clearance officer may issue an EEA family permit to an extended family member of an EEA national who applies for one if—

(a) the relevant EEA national satisfies the condition in paragraph (1)(a);

(b) the extended family member wishes to accompany the relevant EEA national to the United Kingdom or to join him there; and

(c) in all the circumstances, it appears to the entry clearance officer appropriate to issue the EEA family permit.

(3) Where an entry clearance officer receives an application under paragraph (2) he shall undertake an extensive examination of the personal circumstances of the applicant and if he refuses the application shall give reasons justifying the refusal unless this is contrary to the interests of national security.

(4) An EEA family permit issued under this regulation shall be issued free of charge and as soon as possible.

(5) But an EEA family permit shall not be issued under this regulation if the applicant or the EEA national concerned falls to be excluded from the United Kingdom on grounds of public policy, public security or public health in accordance with regulation 21.

10.

The meaning of the term “extended family member” is given in regulation 8 in the following terms:

8.—(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) and 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 the United Kingdom in which the EEA national also resides and is dependent upon the EEA national or is a member of his household;

(b) the person satisfied the condition in paragraph (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.

11.

The Regulations seek to implement EP and Council Directive 2004/38 EC (“the Citizens Directive”). The Upper Tribunal’s decisions in *RK (OFM- membership of household-dependency) India* [2010] 421 UKUT (IAC); *MR and others (EEA - extended family members) Bangladesh* [2010] UKUT 449 (IAC) and *Moneke (EEA - OFMs) Nigeria* [2011] UKUT 341 (IAC) explained why it did not consider the requirement of the Regulations that an extended family member (or other family member (OFM) to use the language of the Directive) must reside in another EEA country other than the United Kingdom with the sponsor before admission was compatible with the Citizens Directive. In *Moneke* the Tribunal decided that pending clarification of the law in the reference to the Court of Justice we made (now Case C-83/11 *SSH D v Rahman*) Tribunal judges determining extended family member cases should consider whether there has been either dependency or membership of the household before entry to

the United Kingdom, without dismissing the application on the basis of a requirement to have resided in another EEA country other than the United Kingdom where the sponsor was also residing.

12.

We are aware that this aspect of our construction of the Citizens Directive is supported by the opinion of Advocate General Bot in Case C-83/11 *SSHD v Rahman* given on 27 March 2012; it remains to be seen whether the Court of Justice will adopt a similar approach. We further note that neither the ECO in September 2010 nor the judge considered it was necessary for this appellant to have resided in another EEA country where his sponsor was residing before entry to the United Kingdom. Plainly he has never done so. It has not been suggested by Ms Gough that we should apply this requirement and we have not done so.

13.

In the light of the above, the question for the ECO when the appellant made his second family permit application was to decide whether he was satisfied that:

i)

the sponsor was a qualified person and if so,

ii)

whether the appellant was dependent on the sponsor within the meaning of EEA law, and if so,

iii)

whether following "extensive examination" in all the circumstances of the case the issue of the permit appeared appropriate.

14.

In this case the ECO would have been aware of the previous application made to the same post and the decision on the first appeal. Despite the present absence of information as to the material that was before him when he made the decision, it is apparent that he must have been satisfied of each requirement and accepted the explanations that had given rise to previous concerns. The ECO would have been aware that dependency can be established by evidence of material support for essential living needs of the claimant; that support does not have to be either exclusive or necessary in the sense that there was no one else to provide it (see *Moneke* at [41] to [42]).

15.

Where a claimant enters the United Kingdom with the benefit of a pre-entry family permit, regulation 7(3) applies. Its terms provide:

"Subject to paragraph (4), a person who is an extended family member and has been issued with an EEA family permit..... shall be treated as the family member of the relevant EEA national for as long as he continues to satisfy the conditions in regulation 8(2)in relation to that EEA national and the permit...has not ceased to be valid or been revoked".

16.

We explored the meaning of this regulation with Ms Gough. She recognised that the regulation meant that the claimant should be treated as a family member where: the permit was properly issued and used during the period of its validity; there had been no revocation of the permit and following entry the claimant continued to satisfy the conditions in regulation 8(2). We agree and note this chimes with the terms of regulation 17(4) and (5) of the Regulations that apply where the claimant applies for the first time in country. Where there is no prior family permit the Secretary of State will have to conduct

the extensive examination on a first application for recognition of a right of residence made after entry and where a person does not fall within regulation 7(3).

17.

Ms Gough also informed us that her brief researches on the UKBA computer prior to the hearing revealed that the permit had not been revoked nor was there any concern as to its validity when issued.

Conclusions

18.

In those circumstances the task for the respondent on the application for the residence card and for the judge on appeal was somewhat narrower than the task that was in fact undertaken. It is for the respondent to raise and substantiate a ground that the permit was not validly or properly issued and/or should be revoked (see Samsam (EEA revocation and retained rights) Syria [2011] UKUT 165 (IAC) at [24] to [29]). She did not do so below and does not seek to do so before us.

19.

In the absence of any reason to believe that the family permit was not validly issued, or had been revoked, the judge in such a case should focus on whether the claimant continued to meet the requirement of regulation 8(2). In this case it is apparent that the judge found that the appellant had become a member of his sponsor's household in the UK and that would be a sufficient basis to conclude that he continued to be an extended family member although we understand that he is also dependent on his sponsor while the appellant is waiting to regularise his position and continue his studies. Equally there was an express finding that the sponsor continued to be a qualified person through his remunerative employment in the United Kingdom.

20.

In our judgment, there was no occasion to re-visit the issue of historic dependency before admission to the United Kingdom on which the ECO must have been satisfied when he issued the permit. The judge erred in law in re-examining the pre-entry eligibility for the permit on which the ECO was satisfied. Where the permit has been properly issued, has not been revoked and has been used to travel during the period of its validity, then the issue of a residence card turns on whether the holder of the family permit continues to meet the requirements for being an extended family member of a qualified person. On that issue the judge found in favour of the appellant.

21.

Accordingly, regulation 7(3) requires the respondent to treat the appellant as a family member of a qualified person and, under regulation 17(1), the issue of a residence card to such a person is mandatory.

22.

In the circumstances, we re-make the decision by allowing the appeal and direct issue of the residence card that the appellant sought.

Signed

Chamber President

Date 5 July 2012

¹ Substituted by regulation 2(4) of the Immigration (European Economic Area) (Amendment) Regulations 2011 (SI 2011/1247) and now reads: “the family member will be accompanying the EEA national to the United Kingdom or joining the EEA national there.”