Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/06985/2018 (V)
EA/07020/2018 (V)
EA/07000/2018 (V)
EA/07457/2018 (V)

THE IMMIGRATION ACTS

Heard at Field House via Skype for Business	**Decision & Reasons Promulgated**
On 20 October 2020	**On 4 November 2020**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

MR IGNATIUS [N]
MISS MIRABEL [N]
MISS SANDRA [N]
[J N]

Appellants

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr P Uzoechina, Legal Representative, Patterson & Co
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION

BACKGROUND

1. By a decision promulgated on 13 February 2020 ("the Decision"), I found an error of law in the decision of First-tier Tribunal Judge Cohen promulgated on 9 July 2019. I therefore set aside that decision and gave directions for the re-making of the decision. My error of law decision is appended hereto for ease of reference.

2. My directions were extended by Upper Tribunal Judge Gill on 3 April 2020. The Appellants filed further evidence on 18 May 2020. I refer to that evidence hereafter as [ABS/xx]. I also have a bundle of evidence which was before the First-tier Tribunal which I refer to as [AB/xx]. Unfortunately, Mr Melvin did not have access to either the initial or supplementary bundle as he did not have the Home Office file. He had asked the Appellants' representatives to send that to him electronically but Mr Uzoechina said that this had only been requested on the day before the hearing and in any event he did not know how to scan in and send a full bundle.

3. Although I accept that Mr Melvin was working remotely and not in the Respondent's offices, the Respondent had ample notice of the hearing and I fail to understand why she is unable to arrange for files to be sent to those dealing with hearings. As it was, we managed to avoid an adjournment by Mr Uzoechina presenting the evidence fully in oral submissions followed by a summary of that evidence by me so that both sides could agree what the evidence showed. Mr Melvin was then able to make submissions about it.

4. Mr Melvin also provided submissions in writing on the day before the hearing which I have read and to which I have regard.

5. The hearing took place via Skype for Business. Both representatives confirmed that they were able to follow the hearing throughout and there were no technical difficulties. Mrs [N] (the mother of the Appellants) also attended remotely but took no part in the hearing. Mr Uzoechina did not seek to call her to give evidence. No witness statement was in any event provided from her (nor indeed from any of the Appellants or the EEA Sponsor).

THE ISSUES AND LEGAL FRAMEWORK

6. The factual background to this case is adequately set out at [1] to [3] of the Decision which also identifies at [26] the issues which I need to determine. For ease of reference, those can be summarised as follows:

    (1) Is the EEA Sponsor exercising Treaty rights? If he is, then the Fourth Appellant is entitled to succeed. This issue was narrowed by Mr Melvin's written submissions as the Respondent now concedes the issue regarding the genuineness and marginality of employment. In other words, it is now accepted by the Respondent that the EEA

Sponsor's employment can be relied upon as an exercise of Treaty rights, provided he remains in the UK exercising those rights.

(2) If the EEA Sponsor is found to be exercising Treaty rights, is the Second Appellant entitled to succeed on the basis that she was aged under 21 years at the date of the Respondent's decision although is now aged 22 years or does she have to show dependency on the EEA Sponsor and/or her mother?

(3) Assuming that the EEA Sponsor is found to be exercising Treaty rights, are the First and Third Appellants (and if necessary, the Second Appellant) dependent on him and/or their mother?

7. It is not necessary for me to set out the case-law regarding the assessment of genuineness of employment given the Respondent's concession. In any event, that issue is covered by what I say at [12] to [18] of the Decision.

8. In relation to the second issue as set out above, Mr Uzoechina submitted that the relevant date was the date of application. When I asked him to provide authority to support that proposition, he directed my attention to section 85 Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") which, until 2014, drew a distinction between the evidence which could be considered by the Tribunal in an entry clearance case and that in an in-country case. That section was amended by the Immigration Act 2014 and no longer draws that distinction. As such, Mr Uzoechina's reliance on this section is misconceived. In any event, although this is an out of country right of appeal it is against the refusal of an EEA family permit under the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations") and whilst the EEA Regulations do incorporate parts of the 2002 Act, they also contain their own provisions regarding appeal rights as I come to below.

9. Mr Uzoechina relied also on the case of Papajorgji (EEA spouse – marriage of convenience) Greece [UKUT] 00038(IAC). Although he did not cite any particular passage in support of his argument in this regard (nor even take me to the case), he appears to have had in mind the following (taken from the Commission's Communication annexed to the judgment):

> "Measures taken by Member States to fight against marriages of convenience may not be such as to deter EU citizens and their family members from making use of their right to free movement or unduly encroach on their legitimate rights. They must not undermine the effectiveness of Community law or discriminate on grounds of nationality."

10. I accept of course that, for the time being at least, family members of an EEA national enjoy the right to join that national in the UK exercising their rights in EU law and that member States must not place undue restrictions on the effectiveness of the rights under EU law. Mr Uzoechina did not however draw my attention to

any provision of EU law which says anything about the relevant date for assessing whether a person is or is not a family member for the purposes of the EEA Regulations.

11. By contrast, the EEA Regulations include at Schedule 2 reference to the way in which the 2002 Act applies to appeals as follows:

> "**SCHEDULE 2**
>
> **APPEALS TO THE FIRST-TIER TRIBUNAL**
>
> **1.** The following provisions of, or made under, the 2002 Act have effect in relation to an appeal under these Regulations to the First-tier Tribunal as if it were an appeal against a decision of the Secretary of State under section 82(1) of the 2002 Act (right of appeal to the Tribunal)—
>
> > section 84 (grounds of appeal), as though the sole permitted grounds of appeal were that the decision breaches the appellant's rights under the EU Treaties in respect of entry to or residence in the United Kingdom ("an EU ground of appeal"); …"

12. As that paragraph makes clear, the question is whether the refusal of the family permit "breaches" (present tense) an appellant's rights. Accordingly, that question has to be determined as at the date of the hearing. That question can only be considered at that time if that is also the relevant date for assessment whether the appellant has (or continues) to have that right. It follows that the Second Appellant (as the First and Third Appellants) can only succeed if they continue to be family members notwithstanding that they are now aged twenty-one years or over.

13. Mr Uzoechina did not make any legal submissions concerning the test of dependency but, since this is now the central issue in these appeals, and in order to set the evidence in its legal context, I refer briefly to what I consider to be the most relevant cases. The two relevant cases emerging from the CJEU are Flora May Reyes v Migrationsverket EU:C:2014:16 ("Reyes") and Jia v Migrationsverket [2007] QB 545 ("Jia"). The first concerns, as here, a child who was over 21 years and needed to establish dependency. The second concerns the parents of an EEA national who, similarly, needed to show that they were dependent on their son. The issues which arose for determination in those cases were not those which arise here.

14. For that reason, and for ease of reference, I turn directly to the Court of Appeal's judgment in Lim v ECO (Manila) [2015] EWCA Civ 1383 ("Lim") where the Court cited from Reyes and Jia and made the following observations which have some relevance to these appeals:

> "24. The case [Reyes] concerned a 25-year-old Philippine national who said that she had been unable to find work in the Philippines. She was financially supported by her mother, who had become a German citizen,

and her mother's cohabiting partner, a Norwegian citizen, who both resided in Sweden. The first question in the reference by the Swedish court was, in essence, whether, in order to be regarded as dependent and so fall within the concept of family member, a direct descendant had to show that he had tried without success to find employment in his country of origin or to obtain a subsistence allowance or some other means of supporting himself. Both the Advocate General and the Court held that this was not necessary, which was of course entirely in accordance with the earlier authorities. The Advocate General summarised his conclusions as follows (paragraph 69):

> 'On a proper construction of Article 2(2(c) of Directive 2004/38/EC of [the Citizens Directive] ... any member of the family of a Union citizen who, for whatever reason, proves unable to support himself in his country of origin and in fact finds himself in such a situation of dependence that the material support provided by the Union citizen is necessary for his subsistence, is to be considered to be a 'dependant'. As regards members of the nuclear family deemed to be dependants, such a situation must really exist and may be proved by any means.'

So the reason why the party cannot support himself or herself is irrelevant; the fact that he or she cannot do so is critical. This is inconsistent with the notion that dependency is established merely from the fact that material support is provided. The court essentially adopted the same approach, it said this:

> '20. In that regard, it must be noted that, in order for a direct descendant, who is 21 years old or older, of a Union citizen to be regarded as being a 'dependant' of that citizen within the meaning of Article 2(2)(c) of Directive 2004/38, the existence of a situation of real dependence must be established (see, to that effect, Jia, paragraph 42).
>
> 21. That dependent status is the result of a factual situation characterised by the fact that material support for that family member is provided by the Union citizen who has exercised his right of free movement or by his spouse (see, to that effect, Jia, paragraph 35).
>
> 22. In order to determine the existence of such dependence, the host Member State must assess whether, having regard to his financial and social conditions, the direct descendant who is 21 years old or older, of a Union citizen, is not in a position to support himself. The need for material support must exist in the State of origin of that descendant or the State whence he came at the time when he applies to join that citizen (see, to that effect, Jia paragraph 37).
>
> 23. However, there is no need to determine the reasons for that dependence or therefore for the recourse to that support. That interpretation is dictated in particular by the principle according to

> which the provisions, such as Directive 2004/38, establishing the free movement of Union citizens, which constitute one of the foundations of the European Union, must be construed broadly (see, to that effect, Jia, paragraph 36 and the case-law cited).
>
> 24. The fact that, in circumstances such as those in question in the main proceedings, a Union citizen regularly, for a significant period, pays sum of money to that descendant, necessary in order for him to support himself in the State of origin, is such as to show that the descendant is in a real situation of dependence vis-à-vis that citizen.
>
> 25. In those circumstances, that descendant cannot be required, in addition, to establish that he has tried without success to find work or obtain subsistence support from the authorities of his country of origin and/or otherwise tried to support himself.
>
> 26. The requirement for such additional evidence, which is not easy to provide in practice, as the Advocate General noted in point 60 of his Opinion, is likely to make it excessively difficult for that descendant to obtain the right of residence in the host Member State, while the facts described in paragraph 24 of this judgment already show that a real dependence exists. Accordingly, that requirement is likely to deprive Articles 2(2)(c) and 7 of Directive 2004/38 of their proper effect.
>
> 27. Furthermore, it is not excluded that that requirement obliges that descendant to take more complicated steps, such as trying to obtain various certificates stating that he has not found any work or obtained any social allowance, than that of obtaining a document of the competent authority of the State of origin or the State from which the applicant came attesting to the existence of a situation of dependence. The Court has already held that such a document cannot constitute a condition for the issue of a residence permit (Jia paragraph 42).'

25. In my judgment, this makes it unambiguously clear that it is not enough simply to show that financial support is in fact provided by the EU citizen to the family member. There are numerous references in these paragraphs which are only consistent with a notion that the family member must need this support from his or her relatives in order to meet his or her basic needs. For example, paragraph 20 refers to the existence of 'a situation of real dependence' which must be established; paragraph 22 is even more striking and refers to the need for material support in the state of origin of the descendant 'who is not in a position to support himself'; and paragraph 24 requires that financial support must be 'necessary' for the putative dependant to support himself in the state of origin. It is also pertinent to note that in paragraph 22, in the context of considering the Citizens Directive, the court specifically approved the test adopted in Jia at paragraph 37, namely that:

> 'The need for material support must exist in the State of origin of those relatives or the State whence they came at the time when they apply to join the Community national.'"

15. It might appear at first blush from that last sentence that the date at which support needs to be assessed is at the date when a person applies to join the EEA national or that national's spouse. That might appear to undermine the conclusion I reached above regarding the relevant date to assess dependency (in relation to the Second Appellant). It does not. That has to be read in the context of a distinction being drawn between the situation in the country of origin and that in the member State.

16. With those observations in mind, I therefore turn to assess the evidence under the headings of the issues which I have identified set in the context of the legal framework.

THE EVIDENCE, ASSESSMENT OF EVIDENCE AND FINDINGS

The Sponsor's Employment

17. As I identified at [10] of the Decision, Judge Cohen accepted the genuineness of the EEA Sponsor's employment based on the documents before him. That finding was not at issue at the error of law stage. Judge Cohen's finding is set out at [10] of my earlier decision and I adopt that finding. Accordingly, it is accepted that the EEA Sponsor earned £5747.21 in the tax year to April 2018. There are some bank statements in the Appellant's bundle ([AB/8] and AB/12]) which show income in the region of £350-£400 per month after April 2018. There is no evidence post-dating August 2018 that I have been able to find save for confirmation from the Director of Zone One Cleaning & Allied Services Ltd dated 4 June 2019 (not in the bundle) confirming the accuracy of her handwritten annotations on the letter dated 30 April 2019 (at [AB/1]) which show that the EEA Sponsor's employment was transferred to that company following the dissolution of Zone One Cleaning Ltd in 2017. It is on that basis that Judge Cohen was prepared to accept that the EEA Sponsor remained in the UK exercising Treaty rights as at the date of the hearing before him on 11 June 2019.

18. I am of course considering these appeals over one year on from Judge Cohen's decision and no further evidence has been provided from the EEA Sponsor or in relation to his employment. However, I was informed by Mr Uzoechina on instructions that the EEA Sponsor's employment remains as it was previously. I have no evidence from the Respondent that the position has changed and, as I have already said, the Respondent did not challenge the Judge's finding in this regard. The issue at error of law stage was whether the EEA Sponsor's employment is marginal rather than genuine and effective, but that issue was conceded by Mr Melvin for this hearing. It is therefore perhaps unsurprising that

the Appellants did not consider it necessary to update the evidence in relation to the EEA Sponsor's continued employment for the hearing before me.

19. One of the reasons why I found an error of law in Judge Cohen's decision was because he had not taken into account the earnings of the Appellants' mother. Her earnings are evidenced at [AB/40-43]. The most recent evidence is the P60 for the tax year to April 2018 which shows income of £22,275.20 for that tax year. Again, there is no updating evidence but, again, Mr Uzoechina confirmed that her employment position remains the same.

20. Of course, the sole issue for me is whether "the [Respondent's] decision breaches the [Appellants'] rights under the EU Treaties in respect of entry to or residence in the United Kingdom". Whilst I have already concluded that the determinative date for assessment of that issue is the date of the hearing before me, I consider that I can rely on the earlier findings as to the genuineness of the employment of the EEA Sponsor when reaching my decision. If that position is later proved to have changed, as a matter of fact, that is something which the Respondent may take into account when considering whether to issue the EEA Family Permit.

21. It follows from the foregoing, though, that on the basis of the current position as I understand it to be, the Fourth Appellant, [JN], is entitled to succeed in her appeal as she was and is a child aged under 21 years of the spouse of an EEA Sponsor exercising Treaty rights in the UK.

The position of the Second Appellant

22. I have set out the slightly different factual position of the Second Appellant, Mirabel [N], at [20] of the Decision and I identify the relevance of that different position as Issue (2) at [6] above. I have explained at [8] to [12] above why I consider the relevant date for assessment of her position to be the date of the hearing before me. She is therefore aged 21 years or more at the relevant date (in fact now aged 22 years) and therefore, in order to succeed, she, as the First and Third Appellants needs to show that she is dependent on her EEA national stepfather or her mother. I therefore turn to consider the evidence of dependency put forward by the First, Second and Third Appellants.

Dependency of the First, Second and Third Appellants

23. I begin my discussion of this issue with a schedule of the evidence before me. That evidence consists largely if not solely of money transfers. There is no witness statement from the Appellants nor even from their mother. The money transfers are sometimes calculated in sterling but a number of the transfers are expressed only in Nigerian Naira. Where that is so and although the burden of proof lies on the Appellants in this regard and they should have provided evidence to show the calculation of those amounts in sterling, I have been prepared to agree an approximate calculation based on the amounts shown in other money transfers in

roughly the same period. I have indicated in the schedules below where the calculation is based on an approximation. The other complicating factor in the evidence is that the transfers generally show the dates expressed in the US form – that is to say month followed by day rather than vice versa. I have therefore assumed that all transfers are dated in that way. When setting out the amounts or approximate calculations, I have ignored the fees. Some of the transfers are duplicates of others and therefore in some instances, two document references are given.

First Appellant: Chidi Ignatius [N]
28 February 2018 ([AB/88-89]): NGN 500,000 (approx. £1200)
10 May 2018 ([AB/90]): NGN 49,500 (approx. £100)
6 July 2018 ([AB/91]): NGN 47,100 (approx. £100)
1 October 2018 ([AB/83-84]): NGN 47,400 (approx. £100)
1 November 2018 ([AB/85-87]): NGN 93,200 (approx. £200)
24 November 2018 ([AB/79-80]): NGN139,500 (approx. £300)
1 December 2018 ([AB/81-82]): NGN 46,500 (approx. £100)
31 January 2019 ([AB/75&76]): NGN 46,232.31 (£100)
1 March 2019 ([AB/74]): NGN 46,521.42 (£100)
21 March 2019 ([AB/77A]): NGN 46,130.45 (£100)
30 March 2019 ([AB/78]): NGN 45,958.22 (£100)
2 April 2019 ([AB/77A]): NGN 276,730.88 (£600)
3 May 2019 ([AB/77]): NGN 45,963.28 (£100)
31 August 2019 (ABS/4]): NGN 42,874.38 (£100)
2 September 2019 (ABS/5]): NGN 257,246.26 (£600)
29 September 2019 ([ABS/3]): NGN 43,358.48 (£100)
14 April 2020 ([ABS/2 &2A]): NGN 46,799.90 (£100)
30 April 2020 ([ABS/1]): NGN 50,000 (approx. £100)

Second Appellant: Mirabel Chioma [N]
8 January 2016 ([AB/128] – illegible): NGN 93,750 (approx. £200)
13 April 2017 ([AB/133]): NGN 49,000 (approx. £100)
12 May 2017 ([AB/132]): NGN 49,500 (approx. £100)
3 October 2017 ([AB/131]): NGN 241,500 (approx. £500)
3 November 2017 ([AB/130]): NGN 47,200 (approx. £100)
23 December 2017 ([AB/129]): NGN 47,600 (approx. £100)
4 January 2018 ([AB/134]): NGN 47,800 (approx. £100)
1 October 2018 ([AB/135-8]): NGN 47,400 (approx. £100)
1 November 2018 ([AB/139-140]): NGN 93,200 (approx. £200)
22 December 2018 ([AB/141-142]): NGN 46,000 (approx. £100)
31 January 2019 ([AB/143]): NGN 46,232.31 (£100)
1 March 2019 ([AB/144 & 146]): NGN 46,521.42 (£100)
31 March 2019 ([AB/148]): NGN 45,958.22 (£100)
30 April 2019 ([AB/145 & 147]): NGN 45947.99 (£100)
31 August 2019 ([ABS/8]): NGN 42,874.38 (£100)

29 September 2019 ([ABS/9 -11]): NGN 43,376.67 (£100)
28 October 2019 ([ABS/12]): NGN 45,358.04 (£100)
29 November 2019 ([ABS/13]): NGN 68,295 (£150)
28 February 2020 ([ABS/14]): NGN 90,487.72 (£200)
30 April 2020 ([ABS/7]): NGN 150,000 (approx. £300)

Third Appellant: Sandra Chiamaka [N]
26 February 2014 ([AB/99]): NGN 112,800 (£400)
14 April 2014 ([AB/98]): NGN 229,600 (£800)
29 July 2016 ([AB/101-102] – illegible): NGN 97,800 (approx. £200)
28 October 2016 ([AB/100]): NGN 53,700 (approx. £100)
28 January 2017 ([AB/103]): NGN 120,000 (approx. £250)
2 March 2017 ([AB/104]): NGN 51,200 (approx. £100)
1 June 2017 ([AB/105]): NGN 48,000 (approx. £100)
5 July 2017 ([AB/106): NGN 92,000 (approx. £200)
1 November 2017 ([AB/113]): NGN 141,300 (approx. £300)
4 December 2017 ([AB/114]): NGN 47,600 (approx. £100)
31 January 2018 ([AB/115]): NGN 502,000 (approx. £1200)
14 March 2018 ([AB/116]): NGN 75,000 (approx. £150)
10 September 2018 ([AB/107-108]): NGN 92,400 (approx. £200)
26 October 2018 ([AB/109-110]): NGN 47,100 (approx. £100)
8 November 2018 ([AB/111-112]): NGN 46,700 (approx. £100)
1 December 2018 ([AB/117]): NGN 46,500 (approx. £100)
31 January 2019 ([AB/118A & 121]): NGN 92,464.62 (£200)
1 March 2019 ([AB/118B & 119-120]): NGN 232,607.10 (£500)
5 March 2019 ([AB/118C]): NGN 232,461.66 (£500)
30 April 2019 ([AB/118D]): NGN 45,947.99 (£100)

24. In summary, therefore, the evidence shows that the Appellants' mother transferred to the First Appellant £2100 in 2018, £1900 in 2019 and £200 in 2020, to the Second Appellant £200 in 2016, £900 in 2017, £500 in 2018, £850 in 2019 and £500 in 2020 and, finally, to the Third Appellant £1200 in 2014, £300 in 2016, £1050 in 2017, £1850 in 2018, and £1300 in 2019. The dates and amounts fluctuate during the period and as between the Appellants although I accept that there is some pattern in the individual amounts transferred (ie those are generally in multiples of £100).

25. What is missing however is any evidence of the use to which that money is put once received and that it is required by the Appellants to fund their basic needs. In this regard, Mr Uzoechina submitted that it must follow that they require these funds as all three of these Appellants are students.

26. In this regard, at [AB/71] there is a copy of "Student Personal Information" from the University of Nigeria, Nsukka showing that the First Appellant was, in 2012, studying medicine at that university. That document is consistent with the

membership card at [AB/73]. I accept that the First Appellant's application form in 2018 indicates that he was, at that date, continuing with that study. I accept also that the document at [AB/71] shows that the First Appellant's mother was his sponsor albeit there is no evidence that she has paid his fees in that or any other year. However, the document at [AB/72] which shows an offer of admission for the course printed in April 2013 indicates that the course is of six years' duration. That is not inconsistent with the application form but would suggest that the First Appellant completed his studies in 2018 or, at the latest, 2019. There is no evidence as to his current position in terms of his studies or employment.

27. In relation to the Second Appellant, a document at [AB/125] indicates that she was studying dentistry also at the University of Nigeria, Nsukka in 2015-2016. That is consistent with the document at [AB/126] which indicates that the Second Appellant was admitted in 2015-2016 and would graduate in 2020-21. That information is not though consistent with her application form where it is stated that she was (in 2018) a student of information technology at "Yaba Tech". There is no witness statement clarifying that apparent discrepancy nor explaining how long that latter course was to last.

28. In relation to the Third Appellant, a document at [AB/96] indicates that she was provisionally offered admission to Nnamdi Azikiwe University, Awka for 2017/2018 to study law. The course is said to be of four years' duration. That is consistent with the student card at [AB/95]. However, it is not consistent with the Fourth Appellant's application form (submitted in August 2018) which states that she is a student of engineering at "Yaba Tech". Again, there is no witness statement clarifying that apparent discrepancy nor explaining, if that latter is the correct information, how long that latter course is to last.

29. I accept that all the Appellants say in their application forms that they are supported by their mother and dependent on her. However, there is very limited information about their expenses. The First Appellant says that his living expenses are NGN 100,000 per month (which roughly equates to £200 and is less than the amount which his mother was transferring on a regular basis), and the Second and Third Appellants both give their expenses as NGN 30,000 which I accept is less than their mother was transferring at that time but there is no further detail setting out to what those expenses relate. As Mr Melvin pointed out, all three Appellants give their address as living with their grandmother in a house in Lagos which it appears is owned by their mother. Mr Uzoechina queried whether that could be right, at least so far as the First Appellant is concerned, as he said that it would not be possible to live in Lagos and study at the University of Nigeria which is at some distance from Lagos. He said therefore that I should assume that the First Appellant was living away from home and likewise those other Appellants who are studying at institutions outside Lagos.

30. It is not though for me to assume anything or indeed speculate as to what the position was or is either at the date of application or at the date of the hearing before me. The burden is on the Appellants to show that, as at the date of the hearing, they are dependent on their mother. Even if I was prepared to accept that the evidence tends to show that they were dependent in 2018 (which I am not due to the paucity of such evidence), there is no evidence of the current position. There is no evidence to show that all three of these Appellants remain students and not in employment. There is no evidence whether they receive financial support from elsewhere, for example from their grandmother or their father. Mr Uzoechina said that their father was not in contact with them, but I only have his word for that; it is not of course for a legal representative to give evidence on behalf of his clients.

31. Finally, I come back to the guidance given by the Court of Appeal in Lim (see [14] above). It is not enough simply to provide information that payments are being made. There must be evidence that those payments are needed by the recipient to meet his or her basic needs. In these cases, there is no such evidence. To find otherwise on the very limited information provided in the application forms in 2018 (which information is in any event dated some two years' ago and is itself insufficient) would amount to speculation.

32. For those reasons, the First, Second and Third Appellants have failed to show that they are dependent on their mother and/or the EEA Sponsor. For that reason, they do not fall within the definition of a family member within Regulation 7 of the EEA Regulations and their appeals therefore fail.

SUMMARY OF CONCLUSIONS

33. In spite of the lack of up-to-date evidence as at date of hearing, I have accepted that the EEA Sponsor is exercising Treaty rights in the UK. It is now accepted by the Respondent that the evidence shows that his employment is not marginal and is effective.

34. The Fourth Appellant is accepted to be the child of the spouse of the EEA Sponsor. She remains under the age of 21 years. On the premise that the EEA Sponsor does continue to exercise Treaty rights in the UK (which may need to be checked before the EEA family permit is issued), the Fourth Appellant succeeds in her appeal. She is the family member of the EEA Sponsor as the child of that person's spouse aged under 21 years.

35. Although the Second Appellant was aged under 21 years at the date of her application, she is now aged over 21 years. The relevant date to assess whether she is a family member under regulation 7 of the EEA Regulations is date of hearing. The Second Appellant therefore needs to demonstrate that she remains dependent on the EEA Sponsor and/or his spouse (her mother) in order to succeed.

36. Similarly, the First and Third Appellants who are and were both aged over 21 years at all relevant dates, need to show that they are dependent on the EEA Sponsor and/or his spouse (their mother).

37. The First, Second and Third Appellants having failed to establish their dependency on the EEA Sponsor and/or his spouse (their mother). They do not therefore qualify as family members for the purposes of regulation 7 of the EEA Regulations. Their appeals therefore fail.

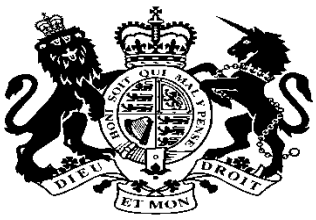
DECISION

The appeal of the Fourth Appellant ([JN]) is allowed.

The appeals of the First, Second and Third Appellants (Ignatius, Mirabel and Sandra) are dismissed

Signed *L K Smith* Dated: 29 October 2020
Upper Tribunal Judge Smith

APPENDIX: ERROR OF LAW DECISION



Upper Tribunal
(Immigration and Asylum Chamber)

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EA/07020/2018
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THE IMMIGRATION ACTS

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On Monday 10 February 2020

Determination Promulgated

……13 February 2020

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Representation:
For the Appellants: Mr P Uzoechina, Legal Representative, Patterson & Co
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

ERROR OF LAW DECISION AND DIRECTIONS

BACKGROUND

1. The Appellants appeal against a decision of First-tier Tribunal Judge Cohen promulgated on 9 July 2019 ("the Decision") dismissing their appeals against the Respondent's decisions dated on 13 and 19 September 2018 refusing each of them an EEA family permit as the stepchildren of an EEA National, Mr Pina de Cruz ("the Sponsor"), a Portuguese national to whom their mother is married.

2. The Respondent's decisions were made under the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations") and not as the Judge appears to have thought the 2006 Regulations. The Respondent's decisions were made by an Entry Clearance Officer and were confirmed by an Entry Clearance Manager. The reason for the refusals were that the Sponsor is not a qualified person as his employment was not considered to be genuine and/or was considered to be marginal and not effective. The First to Third Appellants are all now aged over 21 years. The First and Third Appellants were also aged 21 years or over as at the date of the Respondent's decisions. The Respondent considered their applications on the basis that they needed to show dependency on the Sponsor. That was not accepted either.

3. The Appellants are all nationals of Nigeria where they continue to reside. As will become apparent, their ages are material. The applications were made between 12 and 15 August 2018. The First Appellant (Ignatius) was born on 9 September 1996. He was therefore aged 21 years at date of application and 22 years at date of the Decision. The Second Appellant (Mirabel) was born on 15 June 1998. She was therefore aged 20 years as at date of application and 21 years as at date of the Decision. The Third Appellant (Sandra) was born on 26 May 1995. She was aged 23 years at date of application and 24 years at date of the Decision. The Fourth Appellant ([JN]) was born on 30 March 2003 and was therefore aged 15 years at date of application and 16 years at date of the Decision.

4. The Judge concluded that the Sponsor's employment was marginal and not effective, essentially because his earnings did not meet the HMRC primary earnings threshold. He therefore concluded that the Sponsor was not a qualified person. He also concluded that the Appellants had not shown that they were dependent on the Sponsor.

5. The Appellants appealed on five grounds as follows:

   Ground 1: The Judge is said to have erred by considering the facts as at date of hearing. The Appellants rely on s85(5) Nationality, Immigration and Asylum Act 2002. The version relied upon is that prior to amendment by the Immigration Act 2014.

   Ground 2: The Judge is said to have erred by considering the appeals of the Second and Fourth Appellants under the wrong provision of the EEA Regulations as both were under the age of 21 at date of application.

Ground 3: The Appellants accept that the First and Third Appellants were above 21 years at date of their applications and therefore contend that regulation 8 of the EEA Regulations applied. They say that the Judge erred by rejecting evidence of payments by their mother as showing dependency for the purposes of the EEA Regulations.

Ground 3a: The Judge is said to have erred in his conclusion that the Sponsor's employment was marginal and that therefore the Sponsor was not a qualified person.

Ground 4: The Judge is said to have unlawfully failed to consider the Appellants' family lives with their mother and the Sponsor.

6. Permission to appeal was refused by First-tier Tribunal Judge J M Holmes on 15 October 2019 in the following terms so far as relevant:

> "…3. The grounds identify no arguable error of law in the finding that the EEA national sponsor's employment at the date of application, date of decision, and date of hearing was so marginal in value that the Appellants had failed to demonstrate that he was a qualified person exercising Treaty rights in the UK at those dates. It follows that each of the appeals were bound to fail on this point alone."

7. The Appellants renewed their applications for permission on all grounds. Those applications came before UTJ Grubb who, in a decision dated 11 December 2019, extended time for the applications and granted the applications in part only for the following reasons:

> "…4. Ground 3a is arguable. It is arguable that the judge applied the wrong approach as to whether the sponsor was a 'worker' under EU law and so wrongly found that the sponsor was a 'qualified person' in para [13]. The yardstick for determining whether the employment was 'marginal' was arguably wrong based upon HMRC's Primary Earning threshold.
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> 5. Grounds 2 and 3 are also arguable. In particular, the 2nd and 4th appellants were under 21 (just in the case of the 2nd appellant) at the date of the hearing. If so, they did not need to show dependency on the sponsor (step-father) or his spouse (their mother) to come within the definition of 'family member' in reg 7(1)(b).
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> 6. Ground 1 is not arguable. The judge was correct, applying s.85(4) of the NIA Act 2002 to consider the facts as at the date of hearing. The ground, seeking to differentiate the position in entry clearance cases, would seem to be based upon the now repealed position in s.85(5) before the Immigration Act 2014.
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> 7. Ground 4 is also not arguable. Art 8 did not arise in this appeal which was only against a decision under the EEA Regulations: the appeal was restricted to EU grounds (see Amirteymour v SSHD [2017] EWCA Civ 353 and para 1 of Schedule 1 to the 2016 EEA Regulations).

> 8. For these reasons, permission to appeal is granted on Grounds 2, 3 and 3a but is refused on Grounds 1 and 4"

8. The appeals therefore come before me to determine whether there is an error of law which is material and, if I so find, to either re-make the decision myself or remit the appeals to the First-tier Tribunal to do so.

DISCUSSION

Ground 3a

9. I begin with ground 3a as, unless the Appellants can establish that the Sponsor is a qualified person, none of them can succeed.

10. The Respondent had challenged the genuineness of the Sponsor's employment based on what were said to be discrepancies within the documents provided. The Judge however accepted that he worked as he claimed. The Judge made the following findings in this regard:

> "13. I accept that the sponsor worked for the first company and subsequently for the 2nd company after the transfer of business under the TUPE Regulations. However, the sponsor has demonstrated ltd [sic] earnings from his employment. In the tax year ended 5 April 2018 he demonstrates gross income of £5747.21. I have not been provided with his P60 for the tax year ended April 2019. I note that the sponsor's employment must not be marginal. In order to be considered ineffective [sic] employment, the sponsor is expected to reach the HMRC primary earnings threshold (PET) on a consistent basis throughout the period of their employment. The current PET is £157 per week gross or £680 per month gross equivalent to £8164 per annum. The sponsor's earnings do not meet this threshold. In these circumstances I find that the sponsor's employment is marginal and therefore that he is not a qualified national and that he is not exercising Treaty Rights in the UK. For this reason I find that the appellants' appeals under the Regulations are bound to fail."

11. Mr Uzoechina relied on two documents in support of the Appellant's contention that this was an inadequate and unlawful conclusion on the evidence.

12. First, he directed my attention to the Respondent's published guidance entitled "European Economic Area nationals: qualified persons" published on 20 November 2018 ("the Guidance"). I note that there is no indication that the Guidance was before Judge Cohen. However, I consider it appropriate nonetheless to take into account the Respondent's published position as to when employment can be said to be marginal and not effective. This appears at page [12] of the Guidance as follows:

> "**Assessing whether the EEA national is a worker**

While there is no minimum amount of hours which an EEA national must be employed for in order to qualify as a worker, the employment must be genuine and effective and not marginal or supplementary.

Effective work may have no formal contract but should have:

- Something that is recognisably a labour contract
- An employer
- Agreement between the employer and employee that the worker will perform certain tasks
- Confirmation the employer will pay or offer services (such as free accommodation) or goods for the tasks performed.

Marginal means the work involves so little time and money that it is unrelated to the lifestyle of the worker. It is supplementary because the worker is clearly spending most of their time on something else, not work.

For example a student who works behind the student union bar for 2 hours a week is actually a student, their work is marginal and supplementary to their actual role as a student.

You must carefully assess each case on its own merits to see whether the EEA national's claimed employment is genuine and effective.

Relevant considerations include:

- Whether there is a genuine employer-employee relationship
- Whether there is an employment contract
- Whether the work is regular or intermittent
- How long the EEA national has been employed for
- Number of hours worked
- Level of earnings"

13. The Guidance then sets out two examples. Mr Tufan submitted that the second is closer to this case. That may be so in terms of the level of earnings but the facts of the employment there are very different.

14. Mr Uzoechina next took me to the CJEU judgment in Levin v Staatssecretaris van Justitie [1982] EUECJ R-53/81 (23 March 1982). Mr Uzoechina relied in particular on [2] of the headnote which reads as follows:

> "The provisions of Community Law relating to freedom of movement for workers also cover a national of a Member State who pursues, within the territory of another Member State, an activity as an employed person which yields an income lower than that which, in the latter State, is considered as the minimum required for subsistence, whether that person supplements the income from his activity as an employed person with other income so as to arrive at that minimum or is satisfied with means of support lower than the

said minimum, provided that he pursues an activity as an employed person which is effective and genuine."

15. That part of the headnote is based on [16] of the judgment which reads as follows:

> "It follows that the concepts of 'worker' and 'activity as an employed person' 'must be interpreted as meaning that the rules relating to freedom of movement for workers also concern persons who pursue or wish to pursue an activity as an employed person on a part-time basis only and who, by virtue of that fact obtain or would obtain only remuneration lower than the minimum guaranteed remuneration in the sector under consideration. In this regard, no distinction may be made between those who wish to make do with their income from such an activity and those who supplement that income with other income, whether the latter is derived from property or from the employment of a member of their family who accompanies them."

16. Mr Tufan, for his part, relied on a decision of the Upper Tribunal (Administrative Appeals Chamber), DV v HMRC [2017] UKUT 155 (AAC) and in particular what is said at [15] to [17] of the decision. I pause to observe that this decision is made in the context of considering whether a Judge of the First-tier Tribunal had erred in dismissing the appellant's appeal. The relevant part of the decision relied upon by the Respondent is as follows:

> "15. The tribunal did not adopt the sort of arithmetical approach to the relative amounts of earnings and benefits which Mr Kelly criticised it for. The tribunal considered the Appellant's finances in the round as indicating the level of income she required and the extent to which the Big Issue income provided a real contribution towards it. The relevance of the state benefits was that they formed the bulk of what the Appellant relied on. Her earnings were a top-up but were not 'meaningful' income. The conclusion was supported by the tribunal's finding that the Appellant did not keep sales records and was vague about how much her business generated. That is an unexceptionable approach, as illustrated by that of Upper Tribunal Judge Ward in HMRC v HD and GP [2017] UKUT 11 (AA) at paragraphs 21 and 22.
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> 16. I also reject Mr Kelly's submission that the tribunal treated the low level of remuneration as determinative. The statement of reasons demonstrates a careful assessment of all relevant factors. The tribunal found that the Appellant had built the business up to the current level of sales but they had since remained constant (and there was no suggestion that sales were likely to increase). The Appellant worked 40 hours a week, sold only 40 magazines and made a profit of less than £2 per hour. In all the circumstances the tribunal was entitled to conclude that the Appellant's business was not viable. Mr Kelly agreed that productivity was relevant but says that it is not clear what the tribunal meant by 'unviable'. I disagree. The meaning is clear from the tribunal's reasons which I have summarised. Moreover although motive is irrelevant where the economic activity is genuine and effective, the reason for continuing with an activity, particularly where that activity is not economically viable, can be relevant to the decision whether it is genuine and effective. The tribunal noted that the Appellant had said that she was not interested in earning more, whether through employment or other self-

> employment. On the evidence, she did not need to do so because of the state benefits that she received.
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> 17. It was open to the tribunal to conclude, in the light of all the evidence, that the business was a means to obtaining benefits and that the income from it was no more than a 'useful and necessary addition' to that income in the sense explained at paragraph 24 of the statement of reasons."

17. I do not consider that this decision assists the Respondent in this case. First, as is evident from the passage cited, the context is very different. The appellant's main income in that case was from benefits supplemented by small amounts of earnings by way of self-employment. Here, as was submitted by Mr Uzoechina, the Sponsor is employed albeit on a part-time basis and his earnings from employment are his only income. I was taken to his bank statements at [AB/7-8 and 11-23] which corroborate that submission. When I enquired how he and the Appellants' mother were maintaining themselves in that case, I was told that the Appellants' mother also works. There is evidence of that in the Appellants' bundle. That is consistent with the other permissible routes of income envisaged by the CJEU in Levin. The second reason that I do not consider that the AAC decision assists is because it is only the Upper Tribunal's consideration whether an error of law exists in a particular set of circumstances which, I repeat, are very different to the instant case. Third and in any event what is said by the Upper Tribunal there about the First-tier Tribunal Judge's reasoning in that case demonstrates that the Judge there had considered wider factors and, in particular, had not "treated the low level of remuneration as determinative" as Judge Cohen did in this case.

18. I also have regard to the Guidance even though that was not before Judge Cohen. The factors there set out are consistent with the holistic approach to the issue whether employment is marginal as advocated by the CJEU in Levin. I am therefore satisfied that the Appellants have demonstrated that Judge Cohen fell into error by failing to consider all the relevant elements of the Sponsor's employment when reaching the conclusion that the employment was marginal and not effective. In the alternative, the reasons given are insufficient to justify the conclusion and fail to take into account all the evidence.

19. That is though not the end of the matter as I now need to consider whether the error made is material which requires consideration of the Appellants' other two grounds.

Grounds 2 and 3

20. I can deal very shortly with the appeals of the Second and Fourth Appellants. Regulation 7(1)(b) of the EEA Regulations provides that a family member includes the dependent of the spouse of an EEA national aged under 21 years. There is no requirement to show dependency. Although I accept that Regulation 7 does not specify at what point in time age has to be established, that is irrelevant for the

purposes of the Fourth Appellant and may be irrelevant for the purposes also of the Second Appellant as she was also aged under 21 years at date of the Respondent's decision although had turned 21 by the time of the Decision. In any event, however, that was not the basis on which Judge Cohen determined her case and the point requires further argument.

21. I turn now to the position of the First and Third Appellants which is more nuanced. On any view, both were aged 21 years or over at the date of application, decision and date of hearing. The Judge dealt with the position of all the Appellants in relation to dependency at [14] of the Decision as follows:

> "Furthermore, the appellants need to demonstrate that they are mainly financially dependent upon the sponsor. I have not been provided with any evidence concerning the appellants' circumstances in Nigeria. I note that the eldest appellant is 23 years old. Money transfers show that the transfers are made by the appellant's mother rather than the sponsor. The sponsor is low paid. I am not satisfied that the appellants demonstrated that they are mainly financially dependent upon the sponsor for their essential needs."

22. Those findings are clearly in error in relation to the Fourth Appellant who remains under the age of 21 years. They do not consider the point of when the age of the Second Appellant needs to be assessed for these purposes. As such, they are also in error in relation to her appeal.

23. Turning then to the First and Third Appellants, the way in which the Appellants' ground 3 is pleaded assumes that Regulation 8 applies to their case. It is said that the First and Third Appellants fall within the category of extended family members irrespective whether the dependency is on the Sponsor or their mother, his spouse. That is incorrect. Regulation 8(2) of the EEA Regulations makes plain that dependency within that regulation has to be on the EEA national and not his spouse. That is confirmed by the Court of Appeal's judgment in Fatima v Secretary of State for the Home Department [2019] EWCA Civ 124. If the First and Third Appellants are required to demonstrate that they are extended family members, therefore, the money transfers from their mother could not evidence that (as the Judge found). Mr Uzoechina's endeavours to show that the money in fact emanated from the Sponsor came to nought particularly when it was clear that what he said was a joint bank account used to make payments was shown to be an account in the sole name of the Sponsor.

24. However, there is a separate question whether the First and Third Appellants, notwithstanding that they are (and were) aged 21 or over at all relevant times, can still fall within the definition of family members in Regulation 7 as that includes not simply children aged under 21 years but also children who are dependent on the EEA national or his spouse. Accordingly, if the First and Third Appellants are able to establish dependency on their mother, this may be sufficient for the purposes of Regulation 7. That issue was not however considered by the Judge and there is therefore no finding as to what the evidence shows.

CONCLUSIONS

25. For the foregoing reasons, I accept that there is an error of law made in relation to all the Appellants.

26. Although I had indicated at the hearing that I was inclined to remit these appeals if I found an error of law, I have reconsidered that position. The issues in this case are narrow as the above discussion demonstrates. They are limited to whether the Sponsor's employment is marginal and ineffective, and whether the First and Third Appellants are able to establish dependency on the Sponsor and/or their mother. There may also be an issue in relation to the Second Appellant as to the point in time at which the facts must be assessed in an EEA appeal but, in her case also, if she does not fall within the definition of a family member automatically based on age, she may be able to do so if she is able to demonstrate the requisite level of dependency.

27. For those reasons, I have concluded that it is appropriate to retain the appeals in this Tribunal. Now that the issues which remain to be resolved are clarified by my decision, and in particular now that the Appellants understand that it is appropriate to rely on evidence which post-dates the Respondent's decisions, I have given directions to permit them to adduce such evidence prior to a resumed hearing.

DECISION

The First-tier Tribunal Decision involves the making of a material error on a point of law. I therefore set aside the First-tier Tribunal Decision of Judge Cohen promulgated on 9 July 2019. I make the following directions for the re-making of the decision.

DIRECTIONS

1. **Within 28 days from the date when this decision is sent, the Appellants shall file with the Tribunal and serve on the Respondent any further evidence on which they rely.**

2. **The resumed hearing will be listed on the first available date after 35 days from the date when this decision is sent. Time estimate is half a day.**

Signed Dated: 12 February 2020
Upper Tribunal Judge Smith