



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/09643/2016
EA/09647/2016

THE IMMIGRATION ACTS

Heard at Field House
On 08 August 2018

Decision & Reasons Promulgated
On 13 September 2018

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

AMARACHI JULIET NGALOZE

First Appellant

VICTOR OLDEN OBI

Second Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the first appellant:	Ms E. Ikiriko of Melrose Solicitors
For the second appellant:	No appearance
For the respondent:	Mr I. Jarvis, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants were issued with residence cards as the dependent extended family members of an EEA national on 20 April 2010. On 28 April 2016 the appellants and their EEA national sponsor applied for permanent residence cards. The respondent

refused the application in a decision dated 14 July 2016. The only reason for refusing the application was that the appellants failed to produce sufficient evidence to show that the EEA sponsor was exercising rights of free movement for a continuous period of five years.

2. The appellants appealed the respondent's decision to refuse to issue a residence card recognising permanent rights of residence as dependent extended family members of an EEA national. First-tier Tribunal Judge Cockrill ("the judge") dismissed the appeal in a decision promulgated on 19 December 2017. The appellants appeal the decision on grounds of procedural unfairness. The judge outlined what happened at the hearing as follows:

"9. At the hearing of these appeals the two appellants were present as well as Mr Boniface Obi. The appellants were represented by Miss E Ikiriko. The respondent was represented by Miss S Javed.

10. It was drawn to my attention by Miss Javed that, after the refusal letter in respect of Mr Boniface Obi, the Secretary of State had indeed granted permanent residence to Mr Boniface Obi. Patently in those circumstances there was nothing to appeal against and so the appeal of Mr Boniface Obi was duly withdrawn. That development took Miss Ikiriko completely by surprise. It seemed also that the two appellants were also in ignorance of this fundamental development. I put the case back in my list to that Miss Ikiriko could take instructions. I make absolutely plain that no application was made for an adjournment of these remaining appeals.

11. In terms of documentation, I had a set of papers produced by the respondent in relation to Mr Boniface Obi but, more particularly, a bundle was supplied for the two appellants. Copies of their respective applications were reproduced as annex A, with copies of their Nigerian passports at B. there had been a bundle supplied by the appellants' solicitors which ran to 37 pages. Understandably, the material that was supplied related to the question of the exercise of Treaty rights by Mr Boniface Obi. Both the first and second appellants had made witness statements though which were found at pages 7 and 8 for the first appellant and 5 and 6 for the second appellant.

12. Rather curiously Mr Boniface Obi did not remain in Court, when the cases of the remaining appellants proceeded. He was not a witness.

13. I took pains to explain tribunal procedure to both appellants. A decision had been reached that they wished to proceed with their appeals...."

3. The judge went on to outline the evidence given by the appellants and concluded that they were not dependent upon the sponsor and did not qualify for residence cards. He dismissed the appeal. The appellants appealed on grounds of (i) procedural unfairness and (ii) a misunderstanding of the evidence in relation to the extent of the first appellant's dependency.

4. The first appellant was represented by Miss Ikiriki at the hearing before the Upper Tribunal. She confirmed that she was not instructed by the second appellant. There was no appearance by or on behalf of the second appellant. I was satisfied that there

was evidence to show that he had been sent a notice of hearing to the last known address. There was no explanation for his non-attendance at the hearing. Given that the two appeals were likely to succeed or fail on the same issue, I was satisfied that I could proceed to determine the appeal in the second appellant's absence.

Decision and reasons

5. This is a borderline decision, but I have concluded that the circumstances of the First-tier Tribunal hearing did give rise to procedural unfairness.
6. The appellants were represented at the hearing. It is reasonable to assume that Miss Ikiriki, whilst surprised by the information raised for the first time by the Home Office Presenting Officer on the morning of the hearing, could and should have advised her clients of the possibility of applying for an adjournment. The judge gave her a fair opportunity to take instructions from her clients. No adjournment application was made. The first appellant has written a statement in support of the appeal to the Upper Tribunal in which she says that she did not want to delay the case any further. It seems that she may have been given advice about an adjournment but decided to proceed with the appeal even though she may have been advised of the potential disadvantages.
7. The appellant suggests that the EEA sponsor was told to leave the court by the judge. The judge's comment at [12] indicates that no such thing was likely to have happened. He was surprised when Mr Obi did not return to court. Quite obviously he would be a key witness if the issue of dependency had been raised at a late stage. It might well be that, having been told that his appeal had been withdrawn, he was told that he was free to leave if he so wished. The appellant and the sponsor may have misconstrued what was said. In any event, it would have been for Miss Ikiriki to advise the appellants on the importance of Mr Obi's evidence, and to ask him to remain, if she thought that he was still needed as a witness in support of the remaining appeals.
8. The judge noted that the appellants had been disadvantaged by the late information provided by the respondent. He observed that the bundle understandably did not contain evidence relating to the issue of dependency. Although it was a matter for the appellant to decide whether to apply for an adjournment, it is at least arguable that the judge should have considered whether the hearing could proceed fairly in the circumstances.
9. On the face of it the respondent's decision to issue a permanent residence card to the EEA sponsor should have been determinative of these appeals. The only reason for refusing the applications had been the failure to produce sufficient evidence to show that the sponsor had been exercising rights of free movement in accordance with the Immigration (European Economic Area) Regulations 2006 for a continuous period of five years. If the respondent raised a new issue at the hearing, the First-tier Tribunal decision does not indicate at what point it was raised and does not outline the reasons

given by the respondent for now doubting the appellants' dependency on the EEA sponsor when it had not been raised before.

10. The evidence relating to the exact course of events at the hearing is somewhat unclear. It would have been difficult for the respondent to resist an adjournment request given the late issues raised at the hearing, which disadvantaged the appellant in terms of being able to produce evidence in relation to a new issue. However, it seems that despite this disadvantage the appellant decided to proceed with the hearing. It seems unlikely that the judge would have asked Mr Obi to leave the court. It was a matter for Miss Ikiriki to advise her clients as to the best course of action. Proceeding with the hearing in such circumstances without a key witness who was at the court was not in the best interests of her clients. Although the judge was entitled to consider the fact that no adjournment application was made, it was incumbent on him to consider whether it might nevertheless have been in the interests of justice to adjourn given that the respondent had raised a completely new issue for the first time on the morning of the hearing. It was perhaps necessary to outline what reasons the respondent had given for raising this issue at such a late stage and what the reasons were for doubting continued dependency when the issue had not been raised in the original reasons for refusal letter or committed to writing in a supplementary decision letter.
11. I conclude that the cumulative effect of these matters is such to disclose an error of law. The appellants were deprived of the opportunity to adduce evidence relating to a completely new issue raised for the first time on the morning of the hearing. In such circumstances it is appropriate to remit the case for a fresh hearing before the First-tier Tribunal (see paragraph 7.2(a) Practice Statement – 25 September 2012).

DECISION

First appellant


The First-tier Tribunal decision involved the making of an error on a point of law

The decision is set aside and remitted to the First-tier Tribunal for a fresh hearing

Second appellant

The First-tier Tribunal decision involved the making of an error on a point of law

The decision is set aside and remitted to the First-tier Tribunal for a fresh hearing

Signed 
Upper Tribunal Judge Canavan

Date 10 September 2018