Upper Tribunal
(Immigration and Asylum Chamber) Appeal no: **EA/10634/2016**

THE IMMIGRATION ACTS

At **Royal Courts of Justice** Decision & Reasons Promulgated
on **23 April 2018** On 30 April 2018

Before:

Upper Tribunal Judge
John FREEMAN

Between:

Christian ONYIGBUO

appellant

and

Secretary of State for the Home Department

respondent

Representation:
For the appellant: *Mathias Ume-Ezeoke* (counsel instructed by Kaim Todner)
For the respondent: Mr Tom Wilding

DECISION AND REASONS

This is an appeal, by the respondent to the original appeal, against the decision of the First-tier Tribunal (Judge Norris[1]), sitting at Hatton Cross on 19 January, to allow an EEA appeal by a citizen of Nigeria, born 1967. After coming here on a student visa in 2007, the appellant had first been given a residence card as the dependent extended family member of his cousin (the sponsor) on 27 September 2010. He had however been refused a permanent residence card, first in 2016, and then, following a fresh application on 7 February 2017, in the decision under appeal on 9 July 2017.

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[1] to whom I shall refer in the masculine, for lack of any personal name on the judge's decision

NOTE: (1) no anonymity direction made at first instance will continue, unless extended by me.
(2) persons under 18 are referred to by initials, and must not be further identified.

2. The respondent had not been satisfied that the appellant had been "… residing with/dependent on your EEA sponsor for 5 continuous years …". The judge had taken this case at short notice, and got no help from the appellant, and no significant help from the presenting officer (see his paragraphs 5.1 – 5.3).

3. Like the writer of the decision letter, the judge took the relevant EEA Regulations as those of 2016. Despite a suggestion to the contrary by Mr Wilding, it seems to me he was right about that: this is the transitional provision made in schedule 5 'Transitory Provisions' of the 2016 Regulations:

> 2. Between the coming into force of the provisions covered by regulation 1(2)(a) and the coming into force of the remaining provisions covered by regulation 1(2)(b) an application under the 2006 Regulations for—
> …
> (e) a permanent residence card;
> …
> made but not determined before 25th November 2016 is to be treated as having been made under the 2006 Regulations, as amended by paragraph 1 of this Schedule.

4. These are the commencement provisions in reg. 1 (2):

> (2) These Regulations come into force—
>
> (a) for the purposes of this regulation, regulation 44 and Schedule 5 (transitory provisions), on 25th November 2016;
>
> (b) for all other purposes, on 1st February 2017.

5. The result is that the application in this case would have had to be dealt with under the 2006 Regulations, if decided between those dates; but not if after the second, as it was. Whether anything will turn on this remains to be seen. The operative provisions of the 2016 Regulations for this case are in reg. 8:

> 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 a condition in paragraph (2), (3), (4) or (5).
>
> (2) The condition in this paragraph is that the person is—
>
> (a) a relative of an EEA national; and
>
> (b) …
>
> (ii) has joined the EEA national in the United Kingdom and continues to be dependent upon the EEA national, or to be a member of the EEA national's household.

6. This of course allowed the appellant to show either that he was a member of the sponsor's household at the date of the decision; or that he was dependent on him then. It is common ground on the authorities that dependency need not be one of necessity; but must at least be significant.

7. The judge made the findings of fact on dependency:

(a) between 2009 and October 2017 the appellant was living with the sponsor "according to various bills and letters addressed to him there during those years. Therefore I find that they have been living in the same household, which is a factor in assessing dependency".

(b) The appellant was receiving small sums of money annually from the sponsor.

(c) The sponsor had met larger expenses, of which no evidence remained, such as flight tickets and computer repairs. There was also evidence of a transfer of £1,500 from the sponsor to the appellant in November 2017.

(d) The judge could not accept that the sponsor had paid the appellant's tuition fees (over £17,000) in all, for lack of any bank statements in which the payments appeared.

(e) "… however overall these documents demonstrate financial dependency by the Appellant on his sponsor. I am extremely confused by the fact that the Appellant says he has put large sums of money, received on behalf of his church, through his own tax return, but I do not consider that this alters the essential point of his financial dependency on his cousin/sponsor".

(f) The judge did not accept that the sponsor was providing the appellant with necessary emotional support in a course of cancer treatment he was taking.

(g) "Nonetheless, overall and on the balance of probabilities, I find that the Appellant is dependent on his sponsor. The factors are not prescriptive and those set out in the guidance are illustrative only. Therefore, given their cohabitation in the same household, the limited expenses of the Appellant other than his student fees, his unchallenged prior dependency and the payments for his living costs, I am satisfied that he is indeed dependent …"

8. The judge had made some entirely realistic findings on individual points, against the appellant on the most significant one in financial terms (d). He had found himself unable to make any finding on other significant sums coming into the appellant's bank account (e), which left the appellant unable to establish that they were not funds of his own. It is quite clear from the terms of his findings at (a) and (g) that he would not have accepted that the appellant was significantly dependent on the sponsor, if they had not been living in the same household from 2009 till October 2017.

9. If the appellant and the sponsor had been living in the same household for the necessary five-year period, then the judge at least might have been justified in concluding that the required dependency had been established. This state of affairs had however certainly come to an end by the time the sponsor wrote his letter of 1 December 2015, saying the appellant had already decided to move out and was living on his own: the judge does not seem to have noticed this.

10. The question then is whether there was evidence to show that the appellant had been dependent on the sponsor in this way for a period of five years before that point. Mr Wilding argued that no such period could begin till the appellant's status as an extended

family member had been recognized by the issue of his first residence card on 27 September 2010. While he based his argument on the Immigration (European Economic Area) Regulations 2006, for reasons already given I regard the 2016 ones as applying to this case.

11. The relevant regulation giving a right of permanent residence is this:

> 15 (1) The following persons acquire the right to reside in the United Kingdom permanently—
> …
> (b) a family member of an EEA national who is not an EEA national but who has resided in the United Kingdom with the EEA national in accordance with these Regulations for a continuous period of five years;

12. The next point is the definition of 'family member', which for present purposes is to be found at reg. 7 (3):

> A person ("B") who is an extended family member and has been issued with an EEA family permit, a registration certificate or a residence card must be treated as a family member of A, provided—
>
> (a) B continues to satisfy the conditions in regulation 8(2), (3), (4) or (5); and
>
> (b) the EEA family permit, registration certificate or residence card remains in force.

13. It follows from this that the appellant did not fall to be treated as a family member of the sponsor's till he was first issued with a card on 27 September 2010. The next question is the date till when the judge might have been justified in accepting that he remained dependent on the sponsor, on the basis that they were living in the same household.

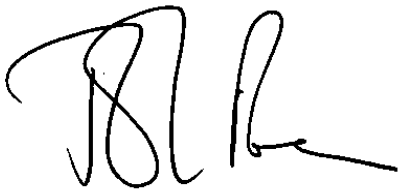
14. Here it is necessary to look at the evidence before the judge in rather more detail than he did. The judge made his finding (see **7** (a) above) in very general terms, referring to "various bills and letters" addressed to him at the sponsor's house, without going into any more explanation: as already mentioned, he got no real help from the presenting officer.

15. The academic letters enclosed with the covering letter to the application (annexe E in the respondent's bundle) clearly showed the sponsor living at Flat 13 [-], SE15 throughout the period in question (from 5 March 2010 on: see E2). However the appellant's bank statements (annexe I) have him at a quite different address (48 [-], Bexley) from when they begin on 22 August 2015.

16. It is hard to think of any explanation for this, other than that the appellant had already moved out of the sponsor's flat; even if there had been one, he did not take the opportunity of appearing before the judge and giving it, subject to cross-examination. He had said he was undergoing cancer treatment, and asked for the case to be dealt with on the papers; but he could have applied for an adjournment, and the consequences of not doing so are his own responsibility, and that of the solicitors representing him at the time.

17. The result is that there was no evidence which might have justified the judge in making a finding of dependency beyond 22 August 2015, and the appellant failed to show the necessary five years' dependency on the sponsor from 27 September 2010. The judge disregarded material evidence to that effect, and his decision is reversed.

Home Office appeal allowed: first-tier decision set aside
Appellant's appeal against refusal of permanent residence card dismissed



(a judge of the Upper Tribunal)
24/04/2018