Upper Tribunal
(Immigration and Asylum Chamber)

Ihemedu (OFMs – meaning) Nigeria [2011] UKUT 00340(IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 16 May 2011	**17 August 2011**

Before

SENIOR IMMIGRATION JUDGE STOREY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ADEPOJU OLADAPO IHEMEDU

Respondent

Representation:

For the Respondent/Claimant: Mr O Yehinni, Solicitor, Supreme Solicitors
For the Appellant/SSHD: Ms J Isherwood, Home Office Presenting Officer

i) Article 3(2) of Directive 2004/38/EC ("Citizens Directive") treats other family members ("OFMs") as a residual category and, in contrast to close family

members ("CFMs") within the meaning of Article 2(2), does not limit it to particular types of relatives (plus spouses or civil partners). There is nothing in the Immigration (European Economic Area) Regulations 2006 akin to the Immigration Appeals (Family Visitor) Regulations 2003 which in our domestic immigration law seeks to specify exhaustively the categories of family relationship that can qualify a person. Only relatives are covered, albeit with focus on those relatives with whom the Union citizen has significant factual ties.

ii) An important consideration in the context of an OFM/extended family member case is that if a claimant had come to the UK without applying for a family permit from abroad (for which provision is made in reg 12 of the Immigration (European Economic Area) Regulations 2006), this will mean that the UK authorities have been prevented from conducting the extensive examination of the individual's personal circumstances envisaged by reg 12(3) and in the course of such an examination check the documentation submitted. If an applicant chooses not to apply from abroad for a family permit under reg 12 of the 2006 Regulations, thereby denying the UK authorities an opportunity to check documentation in the country concerned, he cannot expect any relaxation in the burden of proof that applies to him when seeking to establish an EEA right.

iii) Regulation 17(4) makes the issue of a residence card to an OFM/extended family member a matter of discretion. Where the Secretary of State has not yet exercised that discretion the most an Immigration Judge is entitled to do is to allow the appeal as being not in accordance with the law leaving the matter of whether to exercise this discretion in the appellant's favour or not to the Secretary of State.

DETERMINATION AND REASONS

1. The respondent (hereafter "the Claimant") is a citizen of Nigeria. On 5 November 2010 the appellant (hereafter "the Secretary of State") made a decision refusing to grant him a residence card pursuant to the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations"). His application for such a card was based on his being a cousin and hence an "extended family member" of his sponsor, Mr John Kenneth Ihemedu, a Belgian national born in Nigeria in November 1973. The respondent did not accept the two were related as claimed. The Claimant appealed.

2. In a determination notified on 21 January 2011 First-tier Tribunal judge, Immigration Judge Somerville, noted the Claimant's evidence that he had gone to Belgium to live with the sponsor in 2008, that he could not find a job there and so had decided to come to the United Kingdom illegally. The IJ also noted the sponsor's evidence that he had lived in Belgium since 2002 and that between 2002 and 2005 he was financially supporting the Claimant. Having set out their evidence the IJ went on to make a finding that the two were related as

claimed (para 15) and that the Claimant was residing with the sponsor and was dependent on him. The IJ said he had seen a lease agreement relating to the property in the United Kingdom in which the sponsor, the sponsor's half brother and the claimant were all named as co-tenants. That sufficed for him to find the Claimant and sponsor were residing together in the UK. As to dependency, the IJ wrote: "…given that the [Claimant] is in the United Kingdom illegally, I accept that he does not and indeed cannot work here and therefore I further accept that he is dependent on the sponsor". At para 17 the IJ concluded:

> "For these reasons I find that the [Claimant] is an extended family member of an EEA national who is in the UK exercising Treaty rights and is therefore entitled to a residence card".

3. Earlier, at para 13, the IJ had noted a submission by Mr Yehinni (who also represented the Claimant then) that the Claimant, the sponsor and the sponsor's half-brother had all applied at the same time but only the claimant had been refused a residence permit.

4. The Secretary of State was successful in obtaining a grant of permission to appeal to the Upper Tribunal. The Secretary of State's grounds were twofold: first it was contended that the IJ had failed to address the concerns raised by the Secretary of State in the refusal letter about the evidence the claimant had submitted as to the claimed relationship; secondly, it was argued that the IJ had misdirected himself in failing to make a finding concerning whether the claimant had been dependent on the sponsor both prior to and since arrival in the United Kingdom. In relation to prior dependency abroad, the grounds cited Article 10(2)(e) of Directive 2004/38/EC ("the Citizens Directive") which stipulates that in cases falling under Article 3(2)(a) [which deals with "Other Family Members" (OFMs)] applicants must produce "a document issued by the relevant authority in the country of origin or country from which they are arriving certifying that they are dependants or members of the household of the Union citizen…" The Senior Immigration Judge who granted permission to appeal noted that it was also arguable that the IJ may have incorrectly applied the guidance given in the Upper Tribunal case of RK (OFM-membership of household – dependency) India [2010] UKUT 421 (IAC).

5. At the hearing Ms Isherwood for the Secretary of State relied on the grounds emphasising that the IJ had not made a finding on whether the claimant was dependent on the sponsor abroad and had not shown that the claimant met the reg 8(2) requirement that he be someone "accompanying or joining" the sponsor. Mr Yekkini submitted that as there was no Home Office Presenting Officer present at the hearing before the IJ, the IJ was entitled to treat the evidence he heard from the Claimant and sponsor as credible and this had dealt with dependency both abroad and in the UK. In the claimant's bundle there was documentary evidence showing that the Claimant and the sponsor had resided together both in Nigeria and in Belgium. Following Case C-127/08 Metock it did not matter whether the claimant arrived in the UK before or after the sponsor or legally or illegally. The fact that the sponsor's half-brother had been granted a residence card on the same documents was a separate reason that the IJ could have used, if he had wished, to justify allowing the appeal. In

reply Miss Isherwood confirmed that the Claimant's half-brother had been granted a residence card at the same time as the sponsor.

Legal framework

6. The relevant legal provisions distinguish between Article 2(2) family members or close family members (whom I shall term CFMs) on the one hand and (OFMs)/extended family members on the other. Dealing with CFMs, Article 2(2) of the Citizens Directive states:

> "'Family member' means:
>
> (a) the spouse;
>
> (b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage … ;
>
> (c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);
>
> (d) the dependant direct relatives in the ascending line and those of the spouse or partner as defined in point (b)."

7. The corresponding provision of the 2006 Regulations, reg 7 (1) states in it relevant parts that:

> " …for the purposes of these Regulations the following persons shall be treated as the family members of another person –
>
> (a) his spouse or his civil partner;
> (b) direct descendants of his, his spouse or his civil partner who are –
> (i) under 21; or
> (ii) dependants of his, his spouse or his civil partner;
> (c) dependent direct relatives in his ascending line or that of his spouse or his civil partner;
> (d) a person who is to be treated as the family member of that other person under paragraph (3)".

8. Dealing with OFMs/extended family members, Article 3 of the Directive provides:

> "1. This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.
>
> 2. Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:

(a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family members by the Union citizen;

(b) the partner with whom the Union citizen has a durable relationship, duly attested.

The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people."

9. Up until 2 June 2011 the corresponding regulation in the 2006 Regulations, regulation 8, headed "Extended family members" stipulated at 8(2):

"(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 an EEA State 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."

My assessment

10. I have no hesitation in finding that the IJ materially erred in law. In the refusal letter the Secretary of State stated that the documentation submitted by the claimant to prove his relationship with the sponsor and his dependency on him both prior to arriving in the UK and since was insufficient. Despite that clear rejection the IJ did not even make a finding on whether the claimant had been dependent on the sponsor prior to arrival in the UK. The suggestion made by Mr Yehenni that the IJ made clear that his summary of the claimant's and sponsor's evidence about prior dependency/household membership in Nigeria and Belgium also doubled as his findings on these matters, does not withstand scrutiny. The IJ prefaced his summary of such matters with the caveat: "Save for the matters to which I refer below the facts of this appeal are not in dispute". If he meant by that that there was no dispute about the claimant's claimed relationship with and dependency on the sponsor abroad, that was simply wrong. And in the absence of any concessions made by the Secretary of State, he was obliged, not simply to summarise the evidence, but to make findings on all relevant aspects of it. The IJ did go on to find (1) that the claimant was a cousin of the sponsor; and (2) that the claimant was residing with the sponsor in the UK and was dependent on him in the UK. But nothing else.

11. Whilst current case law on the issue of precisely where and when an OFM must show dependency prior to arrival in the UK is not wholly settled (cf Bigia & Ors [2009] EWCA Civ 79; MR and Others (EEA extended family members) Bangladesh [2010] UKUT 449 (IAC); and RK), the authorities are unanimous in considering that prior dependency is one of the requirements set out in reg 8 of the 2006 Regulations. Hence the failure of the IJ to make a proper finding on this matter was a material error of law.

12. There are also aspects of the IJ's reasoning in relation to the claimant's claimed dependency in the UK and/or membership of the EEA principal's household in the UK which are also questionable, but it is unnecessary to address those. The fact, however, that the IJ went on at para 17 to find that the claimant was entitled to a residence card for the sole reason that he was an extended family member (see above para 2) is another plain error. Regulation 17(4) of the 2006 Regulations confers on the decision-maker discretion as to whether a person found to be an OFM/extended family member is to be granted a residence card. In exercising that discretion matters such as whether an applicant has entered the UK lawfully or otherwise are plainly relevant (although not necessarily determinative: see YB (EEA reg 17(4) – proper approach) Ivory Coast [2008] UKAIT 00062 and Aladeselu and Others (2006 Regs – reg 8) Nigeria [2011] UKUT 00253 (IAC)). But in this case the Secretary of State had not yet exercised that discretion and so the most the IJ was entitled to do was allow the appeal as being not in accordance with the law leaving the matter of whether to exercise the reg 17(4) discretion in his favour to the Secretary of State: see Yau Yak Wah [1982] Imm AR 16; MO (reg 17(4) EEA Regs) Iraq [2008] UKAIT 00061. Given the fundamental nature of the two errors of law identified above I hereby set aside his decision.

13. Both representatives indicated that if I found the IJ had materially erred in law I should proceed to remake the decision without further ado. Both relied on the evidence as it was before the IJ and their subsequent submissions. I shall deal below with the issue of to what extent it remains appropriate to preserve any of the IJ's findings of fact.

14. Ms Isherwood clarified that it was accepted that the sponsor has been and is exercising Treaty rights in the UK and that he had been issued residence documentation in view of that fact. She also accepted that the sponsor's half-brother had also been issued a residence card at the same time as had he.

15. In reply to my question as to whether the claimant was going to take the opportunity to give oral evidence (as directions made following the grant of permission provided) Mr Yehinni confirmed that the claimant wished to rely on the evidence already given in documentary and oral form to the IJ.

Meaning of other family members/extended family members

16. The first matter to be addressed is whether the claimant has shown he is a cousin of the sponsor. Two observations are in order. One is that the respondent did not dispute that if the claimant was the sponsor's cousin that

that was a qualifying relationship for the purposes of reg 8. That must be right. Article 3(2) of the Directive treats "Other Family Members" as a residual category and, in contrast to CFMs within the meaning of Article 2(2), does not limit it to particular types of relatives (plus spouses or civil partners). There is nothing in the 2006 Regulations akin to the Immigration Appeals (Family Visitor) Regulations 2003 which in our domestic immigration law seeks to specify exhaustively the categories of family relationship that can qualify a person. Recital 5 refers to the need for the position of OFMs to be examined with a view to the maintenance of "the unity of the family in a broader sense" and for such examination to consider "their relationship with the Union citizen or any other circumstances, such as their financial or physical dependence on the Union citizen", so clearly only relatives are covered, albeit with focus on those relatives with whom the Union citizen has significant factual ties. In this respect these provisions closely resemble those set out in the EU legislation in place prior to the coming into force of the Citizens Directive. Article 10(1) of Regulation No. 1612/68 accorded residence rights to close family members. Article 10(2) stated that "Member States shall facilitate the admission of any member of the family not coming within the provisions of para 1 if dependent on the worker referred to above or living under his roof in the country whence he comes." Regulation 8 of the 2006 Regulations is in similar but not identical terms. Whereas Article 3(2) differentiates between OFMs and partners in a durable relationship, reg 8 includes both within the definition of "extended family members". The European Casework Instructions (as updated May 2011) state that:

> "Regulation 8 of the 2006 Regulations covers extended family members (for example, brothers, sisters, aunts and cousins). It also covers direct family members (such as parents or children over the age 21) who have failed to provide evidence for financial dependencies."

This formulation does not seek to define the class of "extended family members" exhaustively. None of the leading textbooks consider that either the OFM or extended family member category is limited to only certain kinds of relatives or family members. It is noteworthy that in the instant case the Secretary of State accepted the sponsor's half-brother as an extended family member.

17. The other observation is this. Whilst I have found that the IJ erred in law in more than one respect the matter of the relationship between the claimant and the sponsor was something that he did address in the light of the evidence. He pointed out that the refusal letter had simply declined to accept the documents submitted as sufficient evidence of the relationship because "this department requires genuine birth/marriage certificates as evidence of the relationship" and that at the hearing the Presenting Officer had not cross-examined the claimant on the documentation he had presented, confining herself to asking why original birth certificates had not been produced. Counterbalancing that, in addition to hearing from both the claimant as to their relationship, the IJ also looked at the family tree they had submitted. When considering this aspect of the case I have also to bear in mind that the only express basis for challenging the IJ's finding on the relationship related to his alleged misapplication of the correct standard of proof, but that challenge is entirely unsupported and flies in

the face of the IJ's own identification of the correct standard at para 6. The alleged failure of the IJ to state "on balance" why the documents produced by the claimant were acceptable is belied by the terms of the IJ's assessment at para 14. I do not consider it would be right, therefore, to interfere in this particular finding of the IJ.

Dependency and membership of the household

18. Like Article 3(2), reg 8 requires an OFM to demonstrate what I shall call prior connection with an EEA principal, i.e. connection either in the form of prior dependency on or prior membership of the household of the EEA national/Union citizen. As stated succinctly by the Tribunal in RK at para 16, "… OFMs must show dependency or membership of the household of the Union citizen "in the country of origin or the country from which they are arriving". It is to be observed that for CFMs there is also provision in Article 2(2) for dependents in the ascending or descending line who are over 21, but, unlike OFMs, they are not required to show prior dependency abroad, only current dependency: see Pedro [2009] EWCA Civ 1358. For CFMs there is no provision for household members or indeed for persons who have serious health difficulties.

19. Turning to the evidence in this case, I do not consider that the claimant has discharged the burden on him of showing either that he was dependent on the sponsor prior to arrival or that he was a member of the sponsor's household prior to arrival. There is not even evidence that the sponsor was an EEA national earlier than April 2008 (the date shown on his Belgian ID card) and if he only became Belgian in 2008 then that would mean that evidence relating to the claimant being a member of his household or dependent on him before that time would not be relevant in any event: both Article 3(2) and reg 8 make clear it has to be dependency on someone who is a Union citizen/EEA national. Even leaving aside this difficulty, the state of the evidence is still quite unsatisfactory. There is before me the record of the evidence the claimant and sponsor gave to the IJ in which both claim both types of prior connection. However, their evidence differed on the matter of when the claimant went to Belgium (the claimant stating 2008, the sponsor stating 2007). Further, the claimant only admitted to having arrived in the UK illegally under cross-examination. These discrepancies are made more significant by the fact that the claimant has produced only very scant documentary evidence to substantiate his and the sponsor's claims about prior connections and events over this period. The documentary evidence relating to connections abroad consisted in a energy bill made out to the sponsor at an address in Lagos dated November 2006 and a tenancy agreement at an address in Lagos covering the period 28 October 1999 - 29 October 2001 naming the Claimant and sponsor as co-tenants. In the claimant's bundle there was also a document in French identifying the claimant and sponsor as co-tenants at an address in Belgium circa January 2007.

20. I note in addition that despite the ground of appeal raising a clear challenge to the sufficiency of the evidence relating to prior connections, the Claimant

has not sought to adduce any further documentary evidence. The sponsor in his evidence referred to his having been able to support the claimant financially between 2002-2005 from his father's money over which he had been given control, but no documentary evidence has been adduced to show that. The documents identifying the Claimant and the sponsor as joint tenants do not of themselves show that the sponsor was the head of the household (as required by Bigia & Others and RK). Even if it were considered (contrary to Bigia & Others) that the dependency requirement does not necessarily import *recen*t dependency (see MR and Others (EEA extended family members) Bangladesh [2010] UKUT 449 (IAC) (04)), the documents relating to the sponsor's financial means during the relevant periods relied on (2002-2005 in Nigeria and 2007/8 in Belgium) were non-existent. Certainly the energy bill proves nothing. An important further consideration in the context of an OFM/extended family member case is that if the claimant had applied for a family permit from Nigeria or Belgium (for which provision is made in reg 12 of the 2006 Regulations), the UK authorities would have been in a position to conduct an extensive examination of the individual's personal circumstances (reg 12(3)) and in the course of such an examination check the documentation submitted. If an applicant chooses to not to apply from abroad for a family permit under reg 12 of the 2006 Regulations, thereby denying the UK authorities an opportunity to check documentation in the country concerned, he cannot expect any relaxation in the burden of proof that applies to him when seeking to establish an EEA right.

21. For the above reasons I am not satisfied that the claimant has shown he meets the reg 8 requirements of prior connection and his appeal is dismissed for that reason. In view of this conclusion it is not necessary for me to make a finding on whether he does meet the additional requirement set out in reg 8 of being able to show that he is either a dependent or a household member of the sponsor in the United Kingdom.

22. In light of what has been mentioned earlier in this determination it may assist to make three further observations.

Article 10(2)(e) of the Citizens Directive

23. The first concerns the contention in the Secretary of State's grounds that in order to show prior dependency a claimant must comply with the requirements of Article 10(2)(e) of the Citizens Directive, which requires a document issued by the relevant authority in the country of origin or country from which they are arriving certifying that they are dependants or members of the household of the Union citizen. That is indeed a requirement set out in Article 10, but it is not replicated in the 2006 Regulations. The latter merely require that a person prove it without specifying how. Whether that makes much practical difference is another matter. It is of course the case that where provisions of the EEA Regulations are more generous than the Directive, it is they, rather than those of the Directive which must be applied: see Article 37; but the Secretary of State makes clear in communications with applicants that documentary evidence is required.

Accompanying or joining and lawful presence

24. The second concerns Ms Isherwood's submission that the Claimant had to lose under the Regulations because he had failed to show he was accompanying or joining the sponsor as required by reg 8(2)(b) (see also reg 12(2)(b)) or that he was lawfully present in the United Kingdom. She pointed out that the evidence left unclear whether the claimant had arrived before or after the sponsor and so the claimant had not shown it was after.

25. On both these matters it will suffice to refer to the recent Tribunal decision in Aladeselu and Others (2006 Regs – reg 8) Nigeria [2011] UKUT 00253 (IAC) whose headnote states:

> "*1. For the purposes of establishing whether a person qualifies as an Other Family Member (OFM)/extended family member under regulation 8 of the Immigration (European Economic Area) Regulations 2006, the requirement that they accompany or join the Union citizen/EEA national exercising Treaty rights must be read as encompassing both those who have arrived before and those who have arrived after the Union citizen/EEA national sponsor. "*
>
> *2. The 2006 Regulations do not impose a requirement that an OFM/extended family member must be present in the United Kingdom lawfully.*
>
> *3. But in the context of the exercise of regulation 17(4) discretion as to whether to issue a residence card, matters relating to how and when an OFM/extended family member arrives in a host Member State are not irrelevant."*

26. Finally the IJ's statement at para 16 of this determination concerning dependency - "given that the[claimant] is in the United Kingdom illegally I accept that he does not and indeed cannot work here and therefore I further accept that he is dependent on the sponsor" - is questionable. Being in the UK illegally does not establish, without more, that a person does not as a matter of fact work and thereby avoid dependency. In EU law, dependency is a question of fact: see Case C-316/85 Lebon [1987] ECR 2811, Case C-200/02 Chen [2005] QB 325and Case C-1/05 Jia [2007] QB 545. If there is a reason to consider that earnings from illegal employment would not count for the purposes of assessing whether a person is a dependent for the purposes of the Citizens Directive they have yet to be stated by the Court. Nevertheless, even if a claimant were considered unable to show dependency because of earnings from illegal employment he might still be able to qualify as a member of the household. As noted earlier the Tribunal in RK and other cases has made clear that the two categories, dependants and members of the household, are alternative categories.

27. Near the end of the hearing I said to the parties that it was not immediately obvious why the Secretary of State had reached a decision in favour of the sponsor's half-brother but a negative decision in relation to the claimant, when they had applied on the same application form and had relied (seemingly) on the same evidence in respect of the sponsor's affairs. The reason for the different decisions is not immediately obvious. However, I do not have before me the evidence that was produced by the half-brother and/ or the sponsor to prove their relationship, nor do I have any evidence relating to any prior connection or United Kingdom connection asserted to exist between them. I do not know, either, whether the Secretary of State decided that the half-brother was an OFM because of his dependency or his membership of the sponsor's household. Given these unknowns I do not consider it would be safe to draw any conclusions. All that can be said is that *if* in fact there were no significant differences in the legal and substantive reasons why the half-brother was granted residence documentation then, on the principle that like cases should be treated alike, the Secretary of State may wish to reconsider the claimant's case in the light of my finding (different from that made by the respondent originally) that the claimant is an OFM/extended family member of the sponsor.

28. For the above reasons:

The First-tier Tribunal materially erred in law and its decision is set aside.

The decision I remake is to dismiss the claimant's appeal against the decision of the Secretary of State to refuse to grant him a residence card.

Signed

Senior Immigration Judge Storey
(Judge of the Upper Tribunal)