



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

THE IMMIGRATION ACTS

Heard at Field House

On 3 June 2014

Determination

Promulgated

On 4 June 2014

Before

UPPER TRIBUNAL JUDGE WARR

Between

ENTRY CLEARANCE OFFICER (LAGOS)

and

**OMODESIRE O IFEBAJO
(No Anonymity Direction made)**

Appellant

Respondent

Representation:

For the Appellant: Mr N Bramble Home Office Presenting Officer

For the Respondent: Mr N K Ifebajo (sponsor)

DETERMINATION AND REASONS

1. This is the appeal of the Entry Clearance Officer but for convenience I will refer to the original appellant, a citizen of Nigeria born on 5 June, 2002, as the appellant herein.

2. The sponsor is the father of the appellant. The sponsor is married to an EEA national. The sponsor and his wife live in the United Kingdom and the appellant applied for an entry clearance on 16 April, 2013 as the family member of an EEA national. This application was refused on 16 May 2013 as the respondent was not satisfied that the appellant had submitted satisfactory evidence to confirm that the appellant was related as claimed. The appellant's birth had been registered a significant number of years after the date of birth. Documents of this kind were easily generated and readily available in Nigeria. There was insufficient photographic evidence and evidence of contact with her sponsor. There was a discrepancy in the sponsor's marriage certificate which had been unexplained. The respondent was not satisfied that the appellant met the requirements of regulation 7 of the Immigration (European Economic Area) Regulations 2006.
3. The appellant appealed and her appeal came before a First-tier Judge on 13 February, 2014. The judge observed in paragraph 6 of the determination that he found that the respondent "had understandable concerns about whether the appellant was related to her father's claimed. This is particularly so given the respondent's duty to protect children."
4. In paragraph 7 of the determination the judge stated:

"In my judgement however when the sole issue is that of whether the parties are related as claimed it is unreasonable and unfair of the respondent to refuse an application for family permit without giving the appellant the opportunity to provide DNA evidence. It is not reasonable to expect all applicants to provide this evidence unless it is requested. In light of this unreasonable conduct I find the respondent's decision refusing leave without an opportunity to provide this evidence to be unlawful."
5. The judge then referred to the respondent's own guidance which was available on the respondent's website. The DNA tests were provided free of charge and under the heading "when to test?" the policy stated:
 - only for first-time Settlement or Family Reunion applications as a last resort when every other means of verifying the relationship has been exhausted; and
 - Where "related as claimed" would be the sole reason for refusal.
6. In paragraph 8 of the determination the judge stated as follows:

In the light of the fact that the decision has been made without an opportunity to provide DNA evidence I find the decision is otherwise than in accordance with the law. The effect of this decision is that decision is

revoked and the matter remains before the respondent awaiting a lawful consideration and decision."

7. In declining to make a fee award the judge did not consider a fee order to be appropriate: "although I have found the respondent should have arranged and/or requested this information prior to the decision nevertheless it could have been arranged independently by the father for the purposes of the appeal."
8. There was an application for permission to appeal which included the full child settlement guidance (SET 7.11) and it was submitted that the judge had misinterpreted the policy which did not apply in these circumstances-the appellant's application was for a family permit under the EEA regulations and there was no policy requirement to ask for a DNA test in any event.
9. Permission to appeal was refused by the First-tier Tribunal. The application was renewed and Upper Tribunal Judge Peter Lane granted permission finding it plainly arguable that the First-tier Tribunal had erred in misapplying a policy and paragraph 7 of the determination was of particular concern.
10. Mr Bramble submitted that the issue was straightforward. The judge appeared to have reversed the burden of proof. There was nothing unlawful about the decision. The policy did not apply to these circumstances of this case, a case under the EEA regulations.
11. The sponsor said he was law-abiding and referred to his grounds of appeal where he had said that he would not attempt to claim that someone was his daughter under a false pretext "when we are aware that in this age and time DNA test could be required to proof [sic] such a claim."
12. When he had made the application he assumed that there was a file in existence which would demonstrate the facts in relation to his other two children. He had made the application on the assumption that there was documentary evidence on the file.
13. At the conclusion of the submissions I reserved my decision. The appellant admits to an oversight in submitting documents in the grounds of appeal from the Entry Clearance Officer's decision. This omission would have been rectified had he been advised about it. He had recently discovered that the contact e-mail address on the application form was wrong as one letter was missing and any e-mail correspondence would have gone to the wrong person. Evidence of financial support might not be readily available on paper. The issue about the birth registration could be explained as the original that explanation had not been provided with the documentary evidence. A bag of photographs had been lost during relocation.

14. In these circumstances the First-tier Judge correctly observed the appeal could not be allowed on the merits – the respondent’s concerns were understandable.
15. It does not appear that the respondent’s policy was mentioned at the hearing – Mr Bramble was not able to confirm this from the Presenting Officer’s notes. The judge’s notes are unclear. The policy on its face plainly does not apply and no doubt the Presenting Officer would have drawn that to the judge’s attention had she been asked about it. If this was an example of post-hearing research, then it should be borne in mind that the parties have not been given a chance to comment on the fruits of such research.
16. Mr Bramble points out that the burden of proof was on the appellant. The application had numerous faults and omissions and the judge found the respondent’s concerns understandable. It does not appear that even if the policy had applied (which it plainly did not) that the respondent would have erred in failing to volunteer a DNA test since the policy was a policy of last resort: it was not a policy set up to deal with applications which contained lacunae as this application did. It could not be said that “every other means of verifying the relationship had been exhausted” given the failure to put all salient material to the respondent with the application.
17. It may also be observed that the sponsor was aware of DNA tests and could have either requested one or provided one privately. The First-tier Judge appears to acknowledge that such a test could have been arranged privately when declining to make a fee award. I agree with the observations of Judge Lane that paragraph 7 of the determination is concerning. There was nothing remotely unreasonable about the respondent’s decision or decision making process and the sponsor had had the opportunity to provide DNA evidence.
18. The decision is materially flawed in law.
19. The sponsor will no doubt wish to make a further application with all available material, supported by DNA evidence if so advised.
20. I re-make the decision:
21. The appeal of the Entry Clearance Officer is allowed; the appeal of the appellant is dismissed.

Signed

Upper Tribunal Judge Warr

3 June 2014