



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/12795/2019

THE IMMIGRATION ACTS

Heard at Birmingham
On 18th August 2020

Decision & Reasons Promulgated
On 24th August 2020

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

MR ADERSONE LWABEYA

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Pipe, instructed by Maya & Co Solicitors
For the Respondent: Mrs H Aboni, Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a national of the Democratic Republic of the Congo. He appealed the respondent's decision dated 17th April 2019 to refuse his application for leave to enter the UK to join his father. The appeal to the First-tier Tribunal ("FtT") was dismissed by FtT Judge Fowell for reasons set out in a decision promulgated on 19th February 2020.

2. Permission to appeal to the Upper Tribunal was granted by FtT Judge Shaerf on 19th May 2020. The matter comes before me to determine whether the decision of FtT Judge Fowell is vitiated by a material error of law, and if so, to remake the decision. The hearing before me on 18th August 2020 took the form of a remote hearing using skype for business. Neither party objected, and I was satisfied that it was in the interests of justice and in accordance with the overriding objective to proceed with a remote hearing because of the present need to take precautions against the spread of Covid-19, and to avoid delay. I was satisfied that a remote hearing would ensure the matter is dealt with fairly and justly in a way that is proportionate to the importance of the case, the complexity of the issues that arise, and the anticipated costs and resources of the parties. At the end of the hearing I was satisfied that both parties had been able to participate fully in the proceedings and no technical issues arose during the course of the hearing.
3. The issues at the heart of the appeal were whether the appellant's father has had sole responsibility for his upbringing or there are serious and compelling family or other considerations which make exclusion of the appellant undesirable.
4. Judge Fowell noted at paragraph [26] of his decision that the appellant's mother is Mrs Mujinga Kadima. He refers to an official record of paternity that was at page 18 of the appellant's bundle. Judge Fowell understood that document to establish that the appellant's mother was present in January 2012 when the Deed of Recognition of Paternity was issued by the Public Records Office in the Municipality of Limete. Judge Fowell considered the information set out in that document, against the claim made by the appellant and his father that the appellant's mother has had no involvement in the appellant's life since the age of about two. Having noted that the document confirms that the appellant's mother was there in January 2012 when the document was issued, shortly before the appellant's father left for the UK, Judge Fowell concluded it is more likely that the appellant was brought up by his mother in Kinshasa until his father left to come to the UK. Following on from that conclusion, Judge Fowell

went on to conclude that it is more likely that the appellant has continued to be cared for by his mother, and that the “clear record” of the appellant’s mother’s continued involvement in her son’s life undermines the evidential value of other documents relied upon by the appellant.

5. Mr Pipe accepts the language of the Deed of Recognition of Paternity is ambiguous but submits that on a careful reading of the document, the document demonstrates that the appellant’s father attended together with the appellant’s maternal and paternal grandmothers. The appellant’s grandmothers were witnesses and the deed was signed by the appellant’s father in their presence, and in the presence of the Public Records Officer. Mr Pipe submits that the reference in the deed to “*With Mrs. Mujinga Kadima ...*” immediately after the names of the two children, properly construed, is a reference to the appellant’s father being recognised with paternity of the children (*who are then named*) “*With Mrs. Mujinga Kadima..*”. That is not to say that Mrs Mujinga Kadima was present, but to say that they are the children of Mr Anderson Lwaba Lwabeya and Mrs Mujinga Kadima. Mr Pipe submits that the judge proceeds upon an erroneous reading of the documents and if there was any concern as to how that document should be read, that is a matter that should have been put to the appellant during the course of the hearing and he should have been offered an opportunity to respond. That is a material error of law that has infected the judge’s consideration of the claim and the findings that then followed.
6. Having been carefully taken through the relevant documents that were in the appellant’s bundle, Mrs Abhoni, rightly in my judgement, conceded that the judge may well have misunderstood the Deed of Recognition of Paternity, and the documents is capable of being read in the way contended for by Mr Pipe. She accepts that the appellant was given no opportunity to deal with any concerns that arise from the way in which the document has been read by Judge Fowell. She conceded there is a material error of law in the decision of the First-tier Tribunal and that the decision should therefore be set aside and the appeal should be re-heard afresh.

7. I am quite satisfied that the judge failed to afford the appellant any opportunity to address concerns that he may have had arising from his reading of the Deed of Recognition of Paternity, and whether the appellant's mother was present when that Deed was executed. The findings and conclusions reached by Judge Fowell flow from his understanding that the document demonstrates the appellant's mother was present in January 2012, whereas, the Deed of Recognition of Paternity is capable of being rationally read in the way suggested by Mr Pipe. If it is read in the way Mr Pipe submits it should be read, I can have no confidence that the judge would have reached the same conclusion. All the findings and conclusions reached by the Judge flow from his understanding that the appellant's mother was present when the deed was executed in January 2012. In my judgement the decision of Judge Fowell is infected by a material error of law and must be set aside.
8. As to disposal of the appeal, I have decided that it is appropriate to remit this appeal back to the First-tier Tribunal, having considered paragraph 7.2 of the Senior President's Practice Statement of 25th September 2012. In my view, in determining the appeal, the nature and extent of any judicial fact-finding necessary will be extensive.
9. The decision of First-tier Tribunal Judge Fowell promulgated on 19th February 2020 is therefore set aside, and the appeal is remitted for rehearing before the First-tier Tribunal *de novo*, with no findings preserved. The parties will be notified of a hearing date in due course.

Notice of Decision

10. The appeal against the decision of FtT Judge Fowell is allowed, and the decision of Judge Fowell is set aside.
11. The appeal is remitted for rehearing before the First-tier Tribunal, with no findings preserved.

V. Mandalia



Upper Tribunal Judge Mandalia
Date 18th August 2020