



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: EA/03003/2019

**THE IMMIGRATION ACTS**

Heard at Field House *by Skype for Business*  
On 29 January 2021

Decision & Reasons Promulgated  
On 25 February 2021

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

PH  
(ANONYMITY DIRECTION IN FORCE)

Appellant

and

ENTRY CLEARANCE OFFICER - UKVS SHEFFIELD

Respondent

**Representation:**

For the Appellant: Mr Neal Robb, Gray & Co Solicitors

For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

**DECISION AND REASONS (V)**

1. This is an appeal against a decision of First-tier Tribunal Judge Gillespie promulgated on 15 April 2020. The judge dismissed an appeal by the appellant, a citizen of Cameroon, against a decision of the respondent to refuse his application for entry clearance in order to settle with his aunt whom I shall refer to as AH, or “the sponsor”. AH lives in Scotland with her daughter and has been recognised as a refugee by the respondent. AH shares some of the appellant’s distinctive names, so in order to ensure her continuing anonymity, I have granted this appellant anonymity, to avoid jigsaw identification.

2. The date of birth of the appellant is an issue in the proceedings.
3. By way of a preliminary procedural observation, and as noted by Judge Gillespie, although the Tribunal has categorised these proceedings as an EU appeal using an 'EA number' in the appeal reference, it is in fact a human rights appeal. Nothing turns on this but for completeness I should mention this.
4. On 4 December 2018 the appellant applied for entry clearance under paragraph 319X(ii) of the Immigration Rules, to live with the sponsor.
5. Paragraph 319X(ii) provides that the requirements for a person seeking leave in these circumstances are that:

“(ii) the relative has limited leave in the United Kingdom as a refugee or beneficiary of humanitarian protection and there are serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child’s care...”
6. In his application, the appellant claimed to have been born on 9 December 2000. That was some five days before his claimed 18<sup>th</sup> birthday on 9 December 2018. Accordingly, on the appellant’s claimed date of birth he was still a child at the time he made this application for entry clearance.
7. The respondent refused the application. The basis for the refusal was primarily because, during the asylum process, the sponsor had given dates of birth to the respondent of her relatives in Cameroon, including that of the appellant, which was at odds with the date of birth the appellant had given to the Entry Clearance Officer in his application for entry clearance. Further, the Entry Clearance Officer stated that the birth certificate he relied upon lacked clarity and reliability. The certificate date was said to be unclear, and appeared to have been altered on the basis that it had been written in a different ink to the rest of the certificate. The Entry Clearance Officer also noticed that the birthdate for the appellant on his school certificate was written in different ink to the rest of the certificate. Those concerns caused the Entry Clearance Officer to question the appellant’s assertion that he remained a child at the time the application was made.
8. In his decision, the judge noted that the sponsor had indeed given at least three different dates of birth for the appellant during the asylum process. Those were 9 March 1998, an unspecified date in December 1999 and 9 December 2000. The judge had before him a copy of the appellant’s Cameroonian passport. That document states that he was born on 9 December 2000. The judge also recorded that he had been provided with a copy of a birth certificate produced in Cameroon for the appellant and another birth certificate. Both birth certificates recorded 9 December 2000 as the appellant’s date of birth but each had been registered in different subdistricts within the administrative areas in Cameroon and had been completed in different handwriting. At [16] the judge said:

“In regard to the respondent’s assessment of the age issue the decision maker as noted said it was unclear when his birth certificate was actually issued, as the certificate date was unclear and appeared to have been altered, as it had been written in a different ink to the rest of the certificate. Similarly, the birthdate noted for his school certificate was also written in a different ink to the rest of the certificate. This caused him to doubt whether both documents accurately reflected his birthdate.”

9. The judge added:

“these original documents were not produced at the hearing so I am unable to make any finding on the issue.”

10. In the next paragraph the judge outlined his operative analysis in relation to the date of birth issue. He said:

“As noted three different dates were given, or can be inferred as noted above and there is uncertainty in regard to the birth certificate, again as noted above. Moreover, I find it implausible that a woman who had care of these three children was unable to give what he now says is his correct birthday: 9 December 2000, when she prepared her [asylum] statement with her solicitors. If he was born on that date, the millennial year, it is a very memorable one indeed.”

*Grounds of Appeal*

11. There are three grounds of appeal relating to the judge’s analysis. Only the first ground targets the date of birth issue. Grounds 2 and 3 concern the judge’s subsequent analysis relating to the substantive criteria contained in paragraph 319X of the Immigration Rules.
12. As Mr Robb realistically accepted during the hearing before me, the remaining grounds of appeal stand or fall with his success in relation to ground 1, the attempted challenge in relation to the judge’s findings of fact concerning the claimed date of birth. For those reasons it is not necessary to go into further detail in relation to grounds 2 and 3.
13. Ground 1 concerning the passport and birth certificate issue contend, first, the judge was provided with the original documents at the hearing, contrary to his assertion in the decision that he had not been provided with them. Secondly, at an earlier hearing before the First-tier Tribunal, the respondent’s representative had on that occasion revealed that he did not share the concerns of the Entry Clearance Officer relating to the discrepancy with the handwriting and ink on the birth certificates. Thirdly, the respondent had provided no reliable evidence to dispute the age provided in the appellant’s passport. The only inference possible submitted the grounds in relation to the passport was that the appellant had obtained a fraudulent passport. That was a serious allegation and one which the respondent had not provided any evidence to substantiate.

*Discussion*

14. Mr Robb relied on his written grounds of appeal and two further sets of written submissions that had been directed by the Tribunal prior to the hearing before me. Ms Everett submitted that the judge reached findings of fact which were open to him on the evidence he heard. She referred to the established doctrine principles to the high threshold to be met in the event that a finding of fact reached by a first instance judge is to be challenged, and submitted that it was entirely reasonable for the judge to look at the three dates of birth given for the appellant by the sponsor, to take into account the concerns raised by the Entry Clearance Officer concerning the quality and reliability of the birth certificates and the absence of original documentation. Those factors were considerations which were not irrational and nor were they in any way perverse.
15. In my judgment, this is a case which may be resolved relatively swiftly. At [16] when the judge said that the original documents “were not produced at the hearing”, adding that he had therefore been unable to conduct a reliability assessment in relation to them, it appears, unusually for this experienced judge, he was mistaken.
16. There were two original documents which remained on the Tribunal’s file following the First-tier Tribunal hearing, including one of the school certificates which the judge had only moments earlier in his decision said that he did not have an original copy of. I was assured by Mr Robb that full copies of all relevant documents were made available to the judge at the hearing. Most original documents were retained by Mr Robb’s firm of solicitors, and he assured me remained on the file in his premises, but nevertheless had been made available to the judge. That accords with the Tribunal’s file in relation to a hearing which took place some two weeks or so before the substantive hearing before Judge Gillespie on 8 January 2020. On that date, the matter had been adjourned and by a different judge specifically to enable the appellant to retrieve the original documents, many of which she had left at home, in order for them to be considered by the Tribunal on a future occasion. The Secretary of State’s written submissions accord with the Tribunal’s file in relation to what took place on 8 January 2020.
17. Of course, appeals to this Tribunal lie only on a point of law and not on a point of fact. However it is possible for certain mistakes of fact to amount to an error of law. So much is clear from the well-known authority of R (Iran) v the Secretary of State for the Home Department [2005] EWCA Civ 982. At [9] the Court of Appeal summarised the established bases for an appellate court or tribunal to interfere with a finding of fact reached by a first instance judge. At [(vii)], it states that an error of fact may amount to an error of law where it involves:

“Making a mistake as to a material fact which could be established by objective and uncontentious evidence, where the appellant and/or his advisors were not responsible for the mistake, and where unfairness resulted from the fact that a mistake was made.”

18. I find, therefore, that the documents *were* available to the judge at the hearing, and it was a mistake of fact for the judge to say that they were not produced. It was a corresponding mistake for the judge to conclude that he was unable to make any findings on those issues. Many of the remaining elements of the grounds of appeal set out on behalf of the appellant, in particular grounds 2 and 3 amount primarily to disagreements of fact.
19. I consider that unfairness did result from this mistake because at [17] the judge highlighted the “uncertainty in regard to the birth certificate” as one of the reasons he declined to find the documents reliable.
20. I add at this stage that Ms Everett candidly accepted in her submissions that, had it been the case that the judge made an error of fact of this nature, the submissions advanced by the Secretary of State would not apply with equal measure. She was right to acknowledge the reality of the facts of this case in that way.
21. I therefore set aside the decision of Judge Gillespie on the basis that it involved the making of an error of law as set out above and remit this appeal to the First-tier Tribunal to be reheard by a different judge. I do not preserve any of the findings of Judge Gillespie. I accept Mr Robb’s submission that the remaining elements of the judge’s analysis stand or fall with the approach taken to the age of the appellant.

### **Notice of Decision**

This appeal is allowed. The decision of Judge Gillespie involved the making of an error of law and is set aside. The proceedings are remitted to the First-tier Tribunal to be heard by a different judge with no findings of fact preserved.

No anonymity direction is made.

Signed *Stephen H Smith*

Date 4 February 2021

Upper Tribunal Judge Stephen Smith