



IAC-AH-KEW-V1

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

Appeal Number: OA/07389/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 1 March 2016**

**Decision & Reasons Promulgated
On 24 March 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

**MT (SIERRA LEONE)
(ANONYMITY DIRECTION MADE)**

Appellant

and

ENTRY CLEARANCE OFFICER - ACCRA

Respondent

Representation:

For the Appellant: Ms J Heybroek, Counsel instructed by Nasim & Co Solicitors
For the Respondent: Mr S Staunton, Specialist Appeals Team

DECISION AND REASONS

1. The appellant appeals on procedural fairness/irregularity grounds from the decision of the First-tier Tribunal (Judge J Bartlett sitting at Richmond Magistrates' Court on 2 March 2015) dismissing her appeal against the decision of an Entry Clearance Officer

to refuse her entry clearance as the child of a person present and settled here. The First-tier Tribunal did not make an anonymity direction. However, as the central issue in this appeal to the Upper Tribunal is the medical condition of the sponsor, I consider that it is appropriate that she and her sponsor are accorded anonymity for these proceedings in the Upper Tribunal.

2. The appellant is a national of Sierra Leone, whose claimed date of birth is 25 December 1994. The birth certificate relied upon as evidence of her date of birth was only issued in September 2012, shortly before she submitted an online application on 10 October 2012.
3. In her application form, the appellant said that she was under the age of 18. She had first met her sponsor on 25 December 1994 in Freetown. The last time she had seen him was on 1 January 2008. In answer to the question of how often they met, she said "not often." They kept in touch on the telephone. She was asked whether she had ever lived with her sponsor. She answered no, as he had left Sierra Leone immediately after her birth.
4. Her passport had been issued to her in Freetown on 10 September 2012. She had lived at her current residential address in Freetown for the last sixteen years. She did not have a home landline, but she had a mobile telephone number which she gave. She also had an email address at yahoo.com. Her father, the sponsor, had been born in Freetown on 18 January 1970. Her mother, Felicia, had been born in Liberia on 7 February 1970. Her father had become a British national in 2007. He had been issued with a British passport on 6 August 2007.
5. The application was accompanied by a typed letter from the sponsor, who has the same surname as the appellant. He said the decision to bring his daughter to the UK was due to his continuous ill-health in the United Kingdom, as could be verified from his doctor's report. Also, his daughter "virtually" did not have any guardian in Sierra Leone. This was because her paternal grandmother had taken the appellant to Liberia due to the appellant's mother's ill-health. Her mother, Felicia Daniel, had passed away a couple of years ago. The appellant's paternal grandmother had later decided to come back to Freetown because of the many constraints she faced in Liberia. She had arrived back in Freetown with his daughter earlier this year (2012). But she had since died, leaving his daughter with a family friend at her current address.
6. In a letter dated 30 August 2012 Dr Lwin confirmed that the sponsor had been registered with his practice since April 1995. He suffered from a severe mental health problem and spastic paraplegia and was receiving treatment from his practice and the hospital. His condition was getting worse and he needed help from another person for his care and health. The sponsor had informed him that his daughter, who was living in Sierra Leone, was keen to stay with him in the UK and to give support for his health and daily activities.

The Reasons for Refusal

7. On 7 January 2013 an Entry Clearance Officer in Accra (post reference Accra\764374) gave his reasons for refusing the appellant's application. She had submitted no evidence that she was related to her sponsor as stated. She had submitted no evidence of contact with or financial support from her sponsor. It was reasonable to expect that in a genuine, subsisting, supportive and affectionate relationship, there would be evidence of regular contact, signs of companionship, emotional support, affection and an abiding interest in each other's welfare and wellbeing. This was lacking. So he was not satisfied she was related to the sponsor as stated, and thus met the requirements of paragraph 297(i) of the Rules.
8. She stated that her mother and grandmother, with whom she had lived, were both deceased. But she had submitted no evidence of this, and so he was not satisfied she met the requirements of paragraph 297(i)(d).
9. She stated her sponsor was unemployed and in receipt of state benefits, but she had submitted no evidence of this from The Department of Work and Pensions. Therefore he was not satisfied she would be maintained adequately by her sponsor without recourse to public funds.

The Grounds of Appeal

10. In her notice of appeal, the appellant said she was providing receipts for maintenance from her dad and also providing proof of contact with her dad. She spoke with her dad on the phone twice a week and he sent her £100 every month. Her dad had spoken to her daily after her mother passed away and also when she had lost her grandmother. She did not have any other relatives remaining in Freetown. Her dad was her only living relative. She had not seen her dad since 2008, but they were in touch with each other constantly.

The Entry Clearance Manager's Review

11. On 28 February 2014 an Entry Clearance Manager gave his reasons for upholding the refusal decision despite the evidence which the appellant had provided with her notice of appeal. The appellant had provided details of her sponsor's disability benefits. He had also looked at the sponsor's bank statement submitted at the time of application. He was now satisfied that the appellant would be adequately maintained in the UK without further recourse to public funds. But he was not satisfied on the other issues raised by the Entry Clearance Officer. He noted the appellant had provided her birth certificate, but this was issued almost eighteen years after her birth. Some money transfer receipts had been submitted showing funds sent from the sponsor to the appellant between 2011 and 2012. But these all appeared to have been recently issued.
12. Death certificates for the mother and grandmother had been provided. But the mother's death certificate was issued in 2013, after the decision to refuse was taken.

He also noted that the death certificate stated that she died in 2005, yet the sponsor in his letter of 2012 said that she had died “a couple of years ago”.

13. The grandmother’s death certificate was undated and incomplete. The documents indicated that the appellant was almost 18 years old at the time the application was made, and it was not clear why she would be unable to care for herself in Sierra Leone without the supervision of another adult.

The Hearing before, and the Decision of, the First-tier Tribunal

14. Neither party was legally represented before the First-tier Tribunal. In a letter dated 15 April 2014, which I found floating loose in the file, the appellant purportedly authorised her father to act on her behalf as her non-legal representative, and asked that all correspondence should be sent through him.
15. Although the letter was purportedly written by the appellant, her signature was written in capital letters, and the address given at the top of the letter was not her home address in Freetown, but the sponsor’s address in London, E6.
16. In her subsequent decision, the judge recorded that the sponsor had not prepared a witness statement. She said she took the sponsor through the grounds on which the respondent had refused the application and asked him what he had to say on each point and what written documentation he had. She said she gave the sponsor the opportunity to say anything else that he wished.
17. At paragraph [9], she recorded that the sponsor stated he suffered from ill-health such that he could not work. Before that he had worked all the time that he was in the United Kingdom. He was in the receipt of DLA at the higher rate for care and mobility. He said the appellant would be able to look after him in the United Kingdom and that they would be able to bond more if she was here.
18. The judge gave her reasons for dismissing the appeal at paragraphs [11] to [14]. The appellant was born on 25 December 1994. The appellant would therefore have had to have been conceived approximately 40 weeks before this date, which was around the middle to the end of March 1994. However, the sponsor said he had first entered the United Kingdom in February 1993. If the date given by the sponsor was correct, it would be impossible for him to be the appellant’s father. The appellant’s application form stated that the sponsor first entered the United Kingdom on 1 April 1995. It also stated the appellant first met the sponsor on her date of birth. This contradicted the sponsor’s oral evidence that he left Sierra Leone before the appellant was born and that they had only met for the first time in 2007. These were serious inconsistencies which created issues with the veracity of the claim that the sponsor was the appellant’s father.
19. The judge found that there was very little evidence to support the claimed relationship of father and daughter. There was very little and haphazard evidence of financial support and almost no other supporting evidence. No DNA test had been provided.

20. Taking all the evidence in the round, she concluded that the appellant had failed to discharge the burden of proof in relation to establishing that the sponsor was her father.

The Application for Permission to Appeal

21. Ms Heybroek of Counsel settled the appellant's application for permission to appeal to the Upper Tribunal. In summary, she submitted the judge had failed to take full account of the appellant's mental and physical disabilities, and should have considered adjourning the case to enable the sponsor to give evidence through an intermediary. She also submitted that the judge had made inadequate findings in relation to "serious and compelling family or other reasons."

The Initial Refusal of Permission

22. On 2 June 2015 First-tier Tribunal Judge Heynes refused permission to appeal, as there was nothing in the Record of Proceedings or in the correspondence submitted to the Tribunal by the sponsor which indicated that he required an intermediary to assist him. The judge had given comprehensive reasons for concluding that the relationship between the appellant and the sponsor had not been proved.

The Eventual Grant of Permission

23. On 5 August 2015 Deputy Upper Tribunal Judge Archer granted permission to appeal on a renewed application:

The sponsor attended the oral hearing alone. There was no reference to the sponsor's mental or physical condition in the decision. The judge found that the appellant had not proved that the sponsor was her father, based upon inconsistencies between the oral evidence of the sponsor and the documentary evidence. I find that it is arguable the judge failed to follow relevant guidance in relation to the treatment of vulnerable witnesses, particularly the Joint Presidential Guidance Note number 2 of 2010. Permission to appeal is granted on all grounds.

The Grant of an Adjournment to Obtain DNA Evidence

24. The error of law hearing was originally due to take place in 2015, but the appellant's solicitors successfully applied to the Upper Tribunal for an adjournment so as to enable the appellant to obtain DNA evidence to show that she was related to the sponsor as claimed. Upper Tribunal Judge Jordan granted an adjournment for this purpose.

The Hearing in the Upper Tribunal

25. On the morning of the hearing before me to determine whether an error of law was made out, the appellant's solicitors served on the Upper Tribunal and the Specialist Appeals Team a DNA report which showed that the probability of the sponsor being the father of the appellant was extremely high, well over 99.99%.

26. On the topic of the sponsor's mental health, I pointed out that the letter from the GP in the ECO bundle did not specify the nature of the sponsor's severe mental health problem, and it did not necessarily follow that he suffered from any cognitive impairment which would affect his ability to give oral evidence. Ms Heybroek indicated that, based on her personal experience of interactions with her lay client, alarm bells should have sounded with the judge. At my invitation, she produced for my inspection the additional medical evidence that her instructing solicitors had obtained on the topic of the sponsor's medical condition.
27. In a report dated 1 February 2016, consultant psychiatrist Dr Babalola informed the appellant's GP that the sponsor had a diagnosis of paranoid schizophrenia ICD10 F20, and spastic paraparesis. He was receiving drug medication for both conditions. He had reviewed the patient in his out-patient clinic on 26 January 2016. The patient felt that overall things were generally moving at a good pace although he still experienced some auditory hallucinations. The patient said the auditory hallucinations had improved and he was able to distract himself and ignore what the voices were saying. He remained adherent with his depot and was due to have his next dose today. He was not experiencing any side effects from the medication. His appetite was good, and he was generally sleeping well and his energy and mood was normal. Unfortunately he did not do very much by the way of structural activities and he spent a lot of time at home watching TV and occasionally going to local shops. He did not interact with his family or friends very much.
28. On a mental state examination, he described the patient as being an appropriately dressed Afro-Caribbean male. He was well-kempt with reasonable eye contact and rapport. His speech was coherent, there was normal tone, rate and volume and his mood was subjectively and objectively euthymic. There was no formal thought disorder, no delusions, phobias or thoughts of suicide or homicide. He continued to experience perceptual abnormalities by way of auditory hallucinations in the second and third person making derogatory remarks about him, but there was no associated passivity or made actions and he was able to distract himself and ignore the voices: "his cognition remains intact."
29. There had been no concerns raised with regards to inappropriate behaviour towards his neighbours, which showed that he had improved mentally. On the topic of risk, there were no identifiable risks to self or others, and he remained adherent to his medication. The patient was going to be reviewed again on 21 June 2016.

Reasons for Finding an Error of Law

30. I am not persuaded that there was procedural unfairness or irregularity in the conduct of the proceedings. In particular, I am not persuaded that the sponsor presented as a vulnerable witness to Judge Bartlett such that her conduct of the proceedings breached the relevant guidance given in the Joint Presidential Guidance Note number 2 of 2010 or was otherwise irregular. Of particular significance in this regard is the report of the consultant psychiatrist who states that the sponsor's cognition remains intact. So I am not persuaded that alarm bells should have

sounded, as Ms Heybroek put it, and that the judge should have adjourned the hearing of her own motion so as to enable the sponsor to give his evidence through an intermediary.

31. However, as I explained to the parties at the hearing, I find an error of law is made out on an alternative ground. Through no fault of her own, the judge made a fundamental mistake of fact. She found that the appellant and the sponsor were not related as claimed, when in fact they are, as shown by the DNA evidence which the Upper Tribunal has allowed the appellant to obtain in order to support her error of law challenge.
32. As Mr Staunton confirmed, it is now an agreed fact that the sponsor is the appellant's father. The judge's main reason for dismissing the appeal was the appellant's failure to discharge the burden of proving the gateway requirement that the sponsor was her father. Now that the main reason for dismissing the appeal falls away, there is in retrospect a lack of adequate reasoning to underpin the conclusion that the appellant had not made out her case under the Rules, and in particular under the "exclusion undesirable" provision in Rule 297(i)(f).

The Re-Making of the Decision

33. In re-making the decision I have the benefit of additional documentary evidence that was not available to the First-tier Tribunal. This comprises the DNA report, the letter from the consultant psychiatrist, and an unsigned witness statement from the sponsor, in which he says that during the hearing in the First-tier Tribunal he could not recall dates as he has mental health issues. He also says that he is "terminally ill" and thus not in a condition that he can visit his daughter in Sierra Leone.
34. The sponsor was present at the hearing before me, but Ms Heybroek chose not to call him to give evidence. This was because, as she candidly declared, she was concerned that he would make matters worse not better. One of the particular problems that she identified in the witness statement was that the sponsor repeated the evidence which he had given to the First-tier Tribunal that he had come to the UK on 20 February 1993, whereas his daughter was born on 25 December 1994.
35. Since it is the appellant's case by way of appeal to the Upper Tribunal that the sponsor is an unreliable witness on account of his mental ill-health, I attach little weight to what is said in the unsigned witness statement. I also attach little weight to what is said in the statement for two other reasons. The first is that the sponsor was not called as a witness in order to adopt it, and so his evidence was not tested in cross-examination. A further reason for attaching little weight to it is that there are self-evident inaccuracies. As submitted by Ms Heybroek, there cannot be a gap of nearly two years between the sponsor's departure to the UK and the birth of the appellant, now that it is demonstrated that the sponsor is the appellant's father. Also, the evidence does not support the claim attributed to the sponsor that he is "terminally ill" or that his condition is getting worse day by day.

36. While the appellant has discharged the burden of proving that the sponsor is her father, she is no further forward in showing on a balance of probabilities that at the date of decision her father had been exercising sole responsibility for her upbringing. There is a stark discrepancy between the appellant's account of where she has been living for the last sixteen years as at the date of application (namely in Freetown) and the sponsor's account of her movements in the letter which he wrote in support of the application. The sponsor contradicts the appellant. He says that his daughter had gone to live in Liberia with her paternal grandmother because of her mother's ill-health, and that she had then returned to Freetown with the paternal grandmother relatively recently.
37. Also, the address which the appellant gives as her residential address for the last sixteen years in Freetown (27 B[] Street) does not match the address given in the either of the two death certificates, which is 6 S[] Street. For the avoidance of doubt, the grandmother's death certificate describes 6 S[] Street as being her usual place of residence.
38. The evidence of contact between father and daughter is remarkably thin, given that it is claimed that he has provided regular financial support to her for a number of years leading up to the date of refusal, and that they are also in regular contact over the telephone.
39. There is no documentary evidence of the father visiting the appellant in Sierra Leone in 2007 or 2008 or at all. Enclosed with the application was a photocopy of an entry visa to Nigeria dated 29 October 2008. The ECO bundle does not contain an entry visa to Sierra Leone.
40. There is also nothing to indicate that the appellant is aware of her father suffering from any form of ill-health, whether mental or physical. The limited evidence emanating from Sierra Leone is not consistent with there being a subsisting father and daughter relationship, let alone with the sponsor being solely responsible for the appellant's upbringing in the period leading up to the refusal decision, and beyond.
41. On the issue of serious and compelling family or other considerations which make exclusion of the child undesirable, Mr Staunton accepts that the considerations to be taken into account may relate either to the child and her circumstances in the country in which she lives; or to the person who is settled here. As stated in the IDIs quoted at paragraph 14 of the application for permission to appeal:

The circumstances surrounding a child must be exceptional in relation to those of other children living in that country, but ... circumstances relating to the parent here, both of an emotional and of a physical nature, may be taken into account. Such circumstances may include illness or infirmity which requires assistance.
42. On the evidence of the report of the consultant psychiatrist, the sponsor is coping adequately with his mental and physical conditions without requiring the practical assistance of his daughter. With regards to the sponsor's emotional needs, there is no satisfactory evidence that at the date of the refusal decision, or indeed leading up to

the refusal decision, the sponsor was looking to his daughter in Sierra Leone to provide him with emotional support in coping with his paranoid schizophrenia. As previously noted, the appellant appears to be wholly unaware of her father's ill-health.

43. Finally, there is no evidence as to who registered the appellant's date of birth, or as to what evidence (if any) this person brought forward so as to satisfy the authorities in Sierra Leone that the appellant was born on 25 December 1994, as opposed to some earlier date which would make her over the age of 18 at the date of her application for entry clearance. On the appellant's case, both her mother and grandmother were dead at the time of registration, and it is not suggested that the sponsor was involved in the registration of her birth.
44. In conclusion, the appellant has not discharged the burden of proving that she qualifies for entry clearance under Rule 297. By the same token, the evidence does not disclose compelling circumstances such as to justify the appellant being granted Article 8 relief outside the Rules. While the effect of the interference is to prevent the appellant from enjoying family reunion with her father, the refusal decision is plainly proportionate having regard to Section 117B of the 2002 Act and the appellant's inability to bring herself within Rule 297(i)(f).

Notice of Decision

The decision of the First-tier Tribunal contained an error of law due to a material mistake of fact, and accordingly the decision is set aside and the following decision is substituted: this appeal is dismissed under the Rules and also outside the Rules under Article 8 ECHR.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date

Deputy Upper Tribunal Judge Monson

TO THE RESPONDENT
FEE AWARD

As I have dismissed this appeal, there can be no fee award.

Signed

Date

Deputy Upper Tribunal Judge Monson