



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

Appeal Number: HU/21300/2016

THE IMMIGRATION ACTS

Heard at Bradford

On 3 May 2018 & 31 August 2018

**Decision & Reasons
Promulgated**

On 15 November 2018

Before

UPPER TRIBUNAL JUDGE LANE

Between

**SL
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Semega-Jammeh, instructed by Beachwood Solicitors
For the Respondent: Mrs Pettersen, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, SL, was born in 1984 and is a female citizen of Ghana. She entered the United Kingdom in July 2012 with entry clearance as a visitor. Thereafter, in January 2016, she applied for further leave to remain. She claimed that she had a British child and was unable to return to Ghana.

On 22 August 2016, a decision was made to refuse her leave to remain in the United Kingdom. She appealed to the First-tier Tribunal (Judge S T Fox) which, in a decision promulgated on 7 April 2017, dismissed the appeal. The appellant now appeals, with permission, to the Upper Tribunal.

2. Following the initial hearing at Bradford on 3 May 2018, I found that the First-tier Tribunal had erred in law such that its decision fell to be set aside. Judge Fox had concluded that the appellant had failed to prove that her child is British. The appellant had given birth to the child when she had been married to a man who she claims was not the natural father (GM). GM is a Ghanaian citizen. The appellant claims that the father of her child is a British citizen, with whom she was having an affair at the time, whom I shall refer to hereafter as ES. The appellant claims that she had asked ES (who she says continues to pay her maintenance for her child) to cooperate in proving that he was the natural father of the child. However, he has refused to cooperate. Judge Fox noted that the appellant had admitted in evidence that she must have been pregnant when she arrived in the United Kingdom in 2012. The child was born in January 2013. The appellant divorced her husband GM in August 2014. Judge Fox noted that ES was not present in court before the First-tier Tribunal. The appellant is recorded as having told the judge that “[ES] was willing to help in all ways but could not give any blood sample for DNA purposes. A blood sample is not necessary for a DNA test. A simple swab in the inner cheek or a lock of hair would suffice”.
3. I find that this latter observation by Judge Fox is problematic. It is not clear from what source the judge has drawn his comments regarding DNA testing. More significantly, the judge appears to have attached weight to the fact that the appellant had been unable to obtain a sample from ES. Whilst the judge was entitled to consider whether the appellant had, in fact, sought a sample from ES, he should not have attached weight to the failure of the appellant to obtain a sample. It was not within the appellant’s power or control to obtain a sample of this kind from a third party. The fact that a sample may not have required the taking of blood is irrelevant.
4. Following the initial hearing, I told the parties that I intended to set aside the First-tier decision and issued the directions for a resumed hearing.
5. At the resumed hearing, the appellant gave evidence in English. She adopted her written evidence as her evidence-in-chief. She said she did not know why ES had refused to cooperate in the obtaining of a DNA sample. In her statement and again in her oral evidence she explained that she had asked ES to provide such a sample. Cross-examined by Mrs Pettersen, the appellant said that she is given cash on an irregular basis by ES to pay for the child.
6. In her submissions, Mrs Pettersen claimed that the oral evidence at the resumed hearing had taken the matter no further forward. Mr Semega-

Jammeh, for the appellant, submitted that the appellant had done everything that she possibly could to discharge the burden of proving that a British citizen was the father of her child.

7. The appellant was born before the amendment to the British Nationality (Proof of Paternity) Regulations which came into force in September 2015. Those Regulations now provide:

For the purposes of Section 50(9A)(c) of the British Nationality Act 1981, the prescribed requirement as to proof of paternity is that the person must satisfy the Secretary of State that he is the natural father of the child.

8. Section 50(9A) of the British Nationality Act 1981 provides:

(9A) For the purposes of this Act a child's father is—

- (a) the husband, at the time of the child's birth, of the woman who gives birth to the child, or
- (b) where a person is treated as the father of the child under section 28 of the Human Fertilisation and Embryology Act 1990 or section 35 or 36 of the Human Fertilisation and Embryology Act 2008, that person, or
 - (ba) where a person is treated as a parent of the child under section 42 or 43 of the Human Fertilisation and Embryology Act 2008, that person, or
- (c) where none of paragraphs (a) to (ba) applies, a person who satisfies prescribed requirements as to proof of paternity.]

9. The provision which applies to the child in this instance are the British Nationality (Proof of Paternity) Regulations 2006. Paragraph 2 provides:

The following requirements are prescribed as proof of paternity for the purposes of Section 50(9A)(c) of the British Nationality Act 1981 -

- (a) the person must be named as the father of the child in a birth certificate issued within one year of the date of the child's birth; or
- (b) the person must satisfy the Secretary of State that he is the father of the child.

10. ES is named as the father of the child in the birth certificate which is in the appellant's bundle of which there is an official copy dated 12 April 2015. The nationality of ES is not stated, only his place of birth (Ghana) and occupation (postman). The problem for the appellant lies in Section 50(9A) of the 1981 Act (see above). The Act provides that a child's father would be the husband at the time of the child's birth of the woman who gives birth to the child or, where that subparagraph does not apply, any person who satisfies the prescribed requirements as to proof of paternity (as already established in this case, the person whose name appears on the birth certificate of the child). However, the birth certificate only becomes relevant if the provisions of Section 50(9A)(a) do not apply. In the present case, the appellant had a husband at the time of the child's

birth. Sub-paragraph (a) therefore applies and the inclusion of ES's name on the birth certificate does not assist. The only way forward for the appellant is to prove by reference to the civil standard of the balance of probabilities that her husband at the time of the child's birth is not the natural father. Whilst I appreciate that that conclusion returns the analysis to the difficulties in obtaining evidence from ES, I am not satisfied that the appellant has discharged the burden of proof. The only evidence regarding ES which we have before us is his name appearing on a birth certificate. His nationality is not given on that birth certificate nor do we have any other proof beyond what we were told by the appellant herself, that ES is a British citizen. It is not clear from the appellant's own evidence both written and oral why she is so sure that ES is a British citizen. Even if I were to accept that the appellant is a credible and truthful witness, I consider that her evidence alone is simply inadequate to prove ES's nationality. I stress that in making that finding I am not in any way "punishing" the appellant for her failure to obtain cooperation from ES. However, in the light of the paucity of the evidence, I have concluded that the appellant has failed, on this occasion, to discharge the burden of proof.

11. The appellant's case on Article 8 ECHR is, of course, predicated upon her assertion that her child is a British citizen. Were she able to prove that fact, then she would appear to have a strong case for remaining in the United Kingdom as a carer for the child. I appreciate, however, that that consideration may not conclude the argument; the hearings before the Upper Tribunal were exclusively concerned with the nationality of the child and did not touch on matters such as the reasonableness of the child (even if he is a British citizen) returning to live with his mother in Ghana.
12. It remains open to the appellant to make a fresh application if, for example, she were able to obtain cooperation from ES; given the existence of the birth certificate, persuasive proof of ES's nationality may be sufficient on a future application to dislodge the presumption that the appellant's previous husband, GM, is the child's natural father. However, that is a matter for the appellant and her advisers.
13. In the light of my findings at [10] above, this appeal is dismissed.

Notice of Decision

14. The appellant's appeal against the decision of the Secretary of State dated 22 August 2016 is dismissed.

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 1 October 2018

Upper Tribunal Judge Lane

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed

Date 1 October 2018

Upper Tribunal Judge Lane