



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/16533/2017

THE IMMIGRATION ACTS

Heard at Birmingham Civil Justice Centre
On 5th June 2019

Decision & Reasons Promulgated
On 19th June 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

ABDUL [M]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER – SHEFFIELD

Respondent

Representation:

For the Appellant: Mr S Awal of Paradise Law Solicitors

For the Respondent: Mr C Williams, Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellant appeals against a decision of Judge Graham (the judge) of the First-tier Tribunal (the FtT) promulgated on 8th January 2019.
2. The Appellant is a male Ghanaian citizen born 12th March 1978. He applied for entry clearance to the UK to enable him to settle with his spouse [ID], a British citizen, to whom I shall refer as the Sponsor.

3. The Sponsor has two daughters, born in the UK on 19th May 2001 and 24th December 2007. The Sponsor is not their biological father. The application was made on the basis that the Appellant had met the Sponsor in the UK in February 2013. They subsequently entered into a relationship and it was contended that the Appellant had established a parental relationship with the children. In October 2016 the Appellant and Sponsor travelled to Ghana where they married on 25th October 2016.
4. The Sponsor then returned to the UK and the Appellant applied for entry clearance which was refused on 10th November 2017.
5. In summary the application was refused for the following reasons.
6. It was not accepted that the Appellant satisfied the suitability grounds under section S-EC of Appendix FM because he had failed to provide a medical report, from an approved clinic confirming that he had undergone screening for tuberculosis.
7. It was not accepted that the Appellant satisfied the eligibility requirements as the Respondent was not satisfied that his relationship with the Sponsor is genuine and subsisting and was not satisfied that they intended to live together permanently in the UK. In addition the Appellant had failed to provide evidence of his divorce from his previous spouse.
8. The financial requirements were not satisfied as the Sponsor had a gross income of less than £18,600 per year. Evidence indicated that her gross income was £12,180 per year and specified documentary evidence to prove the Sponsor's income had not been submitted.
9. It was accepted that the Appellant satisfied that English language requirement.
10. It was not accepted that the application disclosed any exceptional circumstances which would result in justifiably harsh consequences if entry clearance was refused.
11. The appeal was heard by the judge on 6th December 2018. The judge found in favour of the Appellant in that it was accepted that the required medical report had been submitted with the application for entry clearance.
12. The judge found that the Appellant and Sponsor have a genuine and subsisting relationship and they intend to live permanently together in the UK as husband and wife. The judge therefore must have accepted that the Appellant had been divorced from his previous spouse, and entered into a valid marriage with the Sponsor.
13. The judge found that the Sponsor's income was less than £18,600 per annum. The judge considered paragraph 21A of Appendix FM-SE which permits consideration as to whether there would be a credible guarantee of sustainable financial support from a third party. In this case the judge noted that there was said to be third party support from Mr Yussef Ali. However the judge noted that Mr Ali had not attended the hearing and not provided a witness statement, and therefore found that there was no credible guarantee of financial support from him.

14. The judge did not consider that the application disclosed exceptional circumstances. The judge considered whether the Appellant has “a quasi-parental relationship with the Sponsor’s children” taking into account the guidance in R on the application of RK v SSHD, IJR [2016]. The judge found that the Appellant did not have a genuine and subsisting parental relationship with the Sponsor’s children.
15. The judge considered that refusal of entry clearance was proportionate and in the public interest, taking into account that the financial requirements of the Immigration Rules could not be satisfied. The appeal was therefore dismissed.

The Application for Permission to Appeal

16. The Appellant applied for permission to appeal to the Upper Tribunal. The grounds were prepared by his solicitors and are summarised below. It was submitted that the judge erred in law in finding that the Appellant did not have a parental relationship with the Sponsor’s children. It was contended that the judge had been informed that the children’s biological father was deceased and therefore the Appellant is the de facto father of the children. During his presence in the UK the Appellant played an essential role in the upbringing of the children. The death certificate of the biological father was submitted with the application for permission to appeal which indicates that he died on 23rd November 2010.
17. It was submitted that although the judge had cited RK, she had not applied the principles contained therein.
18. It was contended that the judge had erred by failing to attach weight to the evidence of the third party supporter Mr Ali. A witness statement from Mr Ali was submitted with the application for permission to appeal.
19. It was submitted that the judge’s assessment of exceptional circumstances was flawed in that refusal of entry clearance would result in unjustifiably harsh consequences, for the Appellant, Sponsor and the children.

Permission to Appeal

20. Permission to appeal was granted by Judge Neville of the FtT in the following terms;
 - “2. The judge held that the Appellant had not established a genuine and subsisting parental relationship with the Sponsor’s children. The judge cites RK IJR [2016] UKUT 31, providing that it would be unusual for more than two individuals to have a parental relationship with a child. She then places weight on there being no evidence of the extent to which the children’s father (as named on their birth certificates) plays a part in their lives.
 3. The grounds (despite being somewhat difficult to follow) clearly argue that the judge was in error, the children’s birth father is dead. A death certificate is attached to the grounds.
 4. Despite insufficient evidence being provided to substantiate the grounds’ contention that the father’s death was communicated to the judge, applying

principles of procedural fairness, including those discussed in MM (unfairness; E & R) Sudan [2014] UKUT 00105 (IAC), the grounds are arguably correct that the involvement of the birth father never having been raised as an issue by anyone (including the Presenting Officer) it was an error of law for the judge to place then weight on the issue.

5. The other grounds are much weaker, but may be argued.”

21. Directions were issued that there should be a hearing before the Upper Tribunal to ascertain whether the FtT had erred in law such that the decision should be set aside.

The Upper Tribunal Hearing

22. At the commencement of the hearing it was apparent that Mr Williams had not received a bundle of documents containing 38 pages submitted by the Appellant. This bundle contained some documents that had not been before the FtT, such as the death certificate of the biological father, statements made by both children, and a witness statement made by Mr Ali.
23. I indicated to Mr Awal that while Mr Williams would need a copy of the skeleton argument contained within this bundle, it would presumably not be necessary to supply him with witness statements that had not been before the FtT as those documents would not be relevant when considering whether the judge had erred in law, which was a decision that should normally be taken based upon the evidence that was before the judge.
24. Mr Awal agreed that such was the case, and the hearing proceeded when Mr Williams had been given an opportunity to consider the Appellant’s skeleton argument. Mr Awal then made submissions contending that I should take into account evidence that had not been before the FtT, such as the death certificate, the witness statement from Mr Yussif, and statements made by the children which had been produced after the FtT hearing, as the judge had commented upon the absence of such statements.
25. Mr Awal submitted that he had told the judge that the biological father was deceased which if correct, would seem to negate the grant of permission which at paragraph 4, indicates that there is an arguable error of law as the death of the biological father had never been raised as an issue by anyone at the FtT hearing.
26. It was submitted that the judge had erred by failing to find that the Appellant had a parental relationship with the children. It was submitted that the judge had also erred in failing to find exceptional circumstances as unjustifiably harsh consequences would follow if entry clearance was refused.
27. While it was accepted that Mr Ali had not provided a witness statement before the FtT, I was asked to find that he had now provided such a statement, and that he could provide the necessary financial support and therefore the judge had erred in finding otherwise.

28. Mr Awal submitted that MM Sudan was authority to confirm that at an error of law hearing I could take into account, when deciding whether an FtT Judge had erred in law, witness statements that had not been considered by the judge.
29. Mr Williams submitted that the judge had not erred in law and relied upon a response submitted pursuant to rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008. This contended that the judge was entitled to find, due to an absence of evidence, that the Appellant did not have a parental relationship with the Sponsor's children, and the judge was entitled to find that a failure to meet the financial requirements of the Immigration Rules indicated that the public interest lay in refusing entry clearance.
30. Mr Williams advised that there was no reference in the notes taken by his colleague who had appeared before the judge, to indicate that the judge had been informed that the biological father was deceased. In any event Mr Williams submitted that the judge had not made a positive finding that the biological father had played a part in the children's lives.
31. It was submitted that the judge had made findings open to her to make on the evidence, and provided adequate reasons, and had not erred in law.
32. At the conclusion of oral submissions I reserved my decision.

My Conclusions and Reasons

33. I do not consider that MM Sudan is authority to indicate that at an error of law hearing, I should take into account witness statements and evidence that had not been before the judge in the FtT. In this case I find it appropriate to consider whether or not the judge erred in law, by taking into account the evidence that was before the judge.
34. I deal firstly with the financial requirements and the finding by the judge that these could not be satisfied. It is not in dispute that Mr Ali did not attend the hearing and had not provided a witness statement. The judge considered the financial requirements at paragraphs 20-27.
35. The judge found, and it is not disputed, that the Sponsor had an annual income less than £18,600. The judge considered Mr Ali at paragraphs 22-25 noting that he had submitted an identity card, a residence card, and an employment letter, together with wage slips and bank statements. The judge noted that Mr Ali had not attended the hearing and had not provided a witness statement and concluded that there was insufficient evidence to show that Mr Ali supported the appeal or that he had agreed to provide third party support. The judge recorded that the Sponsor knew very little about Mr Ali other than to say that he was a national of Belgium, and a friend of the Appellant. She did not know his address and accepted she had not had any contact with him.

36. The judge was fully entitled in the circumstances, to conclude that there was no indication of the level of financial support that Mr Ali would offer or the period over which it would be provided. The judge was unable to assess whether the third party financial support would make up the shortfall between the £18,600 required and the Sponsor's income.
37. The judge also noted that there was no indication of the financial circumstances of Mr Ali, and no details of his dependents or liabilities and outgoings. I would comment that the statement now provided does not address all of these issues.
38. The judge dealt with the financial requirements comprehensively and made findings that she was bound to make in the circumstances, and has given perfectly adequate and sustainable reasons for the findings made. This Ground of Appeal does not disclose an error of law.
39. Turning to the contention that the judge erred in considering exceptional circumstances, the judge at paragraph 29 considered the best interests of the children as a primary consideration. The judge then considered at paragraphs 30-31 whether the Appellant had a parental relationship with the Sponsor's children. I do not accept that the judge was informed that the biological father of the children was deceased. There is no reference in the judge's Record of Proceedings to her receiving this information. There is no record in the Home Office note of proceedings to this information being provided. I find that if the judge had been told at the hearing, that the biological father was deceased, she would have referred to this in her decision.
40. The finding that the judge makes in relation to the biological father is that there is no evidence before her to show the extent that the children's biological father plays in their lives. That is not an unfair finding and is not an error of law.
41. The judge is not stating that the biological father does play a role in their lives. The judge notes the lack of evidence to support the Appellant's claim that he has a genuine parental relationship with the children. The evidence that is lacking is listed at paragraph 31 and includes a lack of any evidence from the schools of the children to confirm that the Appellant collects them, or attends parents' evenings and school events. The judge also records that there is no evidence that the Appellant is on the school record as a responsible adult in relation to the children. The judge notes that the children have not submitted witness statements detailing their relationship with the Appellant. In my view the judge was entitled to conclude that the Appellant had failed to show that he had a genuine and subsisting parental relationship with the children.
42. At paragraph 32 the judge considers the Sponsor's mental health condition and notes that appointment letters have been provided but records that the medical evidence does not provide any diagnosis. The judge was entitled to find that the Sponsor's medical condition does not constitute exceptional circumstances.
43. The judge then considers proportionality and section 117B of the Nationality, Immigration and Asylum Act 2002. The judge finds that the public interest weighs in

favour of refusal of entry clearance to the UK, and does not err in law in so doing. The judge was entitled to note the relevance of the Appellant's failure to satisfy the financial requirements of the Immigration Rules.

Notice of Decision

The decision of the FtT does not disclose an error of law. I do not set aside the decision. The appeal is dismissed.

There has been no request for anonymity and I see no need to make an anonymity direction.

Signed

Date 5th June 2019

Deputy Upper Tribunal Judge M A Hall

**TO THE RESPONDENT
FEE AWARD**

The appeal is dismissed. There is no fee award.

Signed

Date 5th June 2019

Deputy Upper Tribunal Judge M A Hall