



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2021-001818
First-tier Tribunal No: HU/00637/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 10 March 2023

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH
DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

MICHAEL NTI BOAHEN
(NO ANONYMITY ORDER MADE)

Appellant

and

THE ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr J. Plowright, Counsel instructed by Deccan Prime Solicitors
For the Respondent: Ms A. Everett, Senior Home Office Presenting Officer

Heard at Field House on 22 December 2022

DECISION AND REASONS

1. The issue in these proceedings is whether evidence post-dating a decision of the First-tier Tribunal may be used as a basis to find that that decision involved the making of an error of law, in the absence of any other criticism of the judge's reasons or conduct.

Factual background

2. By a decision promulgated on 14 April 2021, First-tier Tribunal Judge Lingam ("the judge") dismissed an appeal brought by the appellant, a citizen of Ghana born on 13 March 2003, against the decision of the respondent dated 25 November 2019 to refuse his human rights claim, made in the form of application

for entry clearance as the dependent child of his mother, on 29 August 2019. The appeal was brought under section 82(1) of the Nationality, Immigration and Asylum Act 2002.

3. The central issue in the appeal was whether the appellant's mother, Ms Pokuaa Akua Kyeremateng, had sole responsibility for her son for the purposes of paragraph 297(i)(e) of the Immigration Rules. We refer to the appellant's mother as "the sponsor". The judge found that sponsor did not have sole responsibility for her son, rejecting her evidence that the appellant's father was estranged from the family on credibility grounds. The appellant's father was listed as an "informant" on his birth certificate issued on 13 June 2018, yet the appellant's case, through the sponsor, was that the father had left the family - and Ghana - in 2005. The sponsor's attempts to explain that obvious inconsistency simply harmed her credibility further.
4. The appellant now appeals to this tribunal, not on the basis that the judge's findings were infected with any specific error of law, but in light of post-decision evidence. On 4 June 2021, a District Court in Ghana is said to have granted "custody" of the appellant to his mother. The appellant's case before us is that the new evidence demonstrates that the sponsor does, after all, have sole responsibility for the appellant.
5. Permission to appeal was granted by First-tier Tribunal Judge I D Boyes who, without elaboration or reference to the authorities concerning post-decision materials, said that he was satisfied that there was an arguable error of law.

The law

6. On an appeal from the First-tier Tribunal, the Upper Tribunal must decide whether the making of the First-tier Tribunal's decision "involved the making of an error on a point of law" (section 12(1), Tribunals, Courts and Enforcement Act 2007).
7. Ordinarily, whether a judge fell into error is to be determined by reference to the evidence before the judge at the date of the hearing. There are some exceptions. For present purposes, the relevant authority concerning post-decision evidence is *Akter (appellate jurisdiction; E and R challenges)* [2021] UKUT 272 (IAC). The headnote states, where relevant:

“(2) A party who wishes to submit that a decision of a tribunal which is otherwise free from legal error should be disturbed on appeal on the basis identified by Carnwath LJ in *E and R v Secretary of State for the Home Department* [2004] EWCA Civ 49 should do so clearly, when seeking permission to appeal on that basis.

(3) In deciding whether the principles in *Ladd v Marshall* [1954] 1 WLR 1489, as applied by *E & R*, should be modified in exceptional circumstances, the ability to make fresh submissions to the Secretary of State, pursuant to paragraph 353 of the immigration rules, is highly material to the question of whether those principles should be diluted.”

8. *E and R* concerned the statutory jurisdiction of the Immigration Appeal Tribunal ("the IAT") but the principles concerning when a decision of a tribunal may be disturbed on the basis of a mistake of fact not due to any judicial fault remain applicable: see paras 39 to 41. In summary, an appeal may be brought on the

basis of unfairness resulting from “misunderstanding or ignorance of an established and relevant fact”, subject to the *Ladd v Marshall* [1954] 1 WLR 1489 principles. Para. 23(ii) of *E and R* summarised the *Ladd v Marshall* principles in the following terms:

“The *Ladd v Marshall* principles are, in summary: first, that the fresh evidence could not have been obtained with reasonable diligence for use at the trial; secondly, that if given, it probably would have had an important influence on the result; and, thirdly, that it is apparently credible although not necessarily incontrovertible.”

Discussion

9. By way of a preliminary observation, we have taken into account the fact that the appellant was not legally represented before the judge, and that the sponsor represented his interests as a litigant in person.
10. We have no hesitation in concluding that the new evidence is not admissible to impugn the decision of the judge, for the following reasons.
11. First, taken at its highest, the Ghanaian court order does not demonstrate that the sponsor has sole responsibility for the appellant. At its highest, all the Ghanaian court order does is demonstrate that, two months *after* the appellant had attained the age of majority (and almost three months after the hearing before the judge), custody of the appellant was “granted” to his mother (whatever that means). The criteria in *E and R* concern an “*established and relevant*” fact; on the assumption that the Ghanaian court order accurately represents the custody position of the appellant, it simply represents an evolution in the factual matrix of the case which took place after the judge’s decision. It does not represent a fact that was *established* at the time of the hearing.
12. Nor does the Ghanaian court order go to a *relevant* fact. The issues before the judge concerned whether the sponsor bore sole responsibility for the appellant when he was a child, as the appellant had already turned 18 by the date of the hearing before the judge. That custody of the appellant, an 18 year old man, may now have been “granted” to his mother in the eyes of Ghanaian law does little to address the situation that obtained when he submitted the application, or until he turned 18 in March 2021. This is especially so in light of the affidavit of Regina Boateng, the appellant’s guardian in Ghana. The document is dated 24 May 2021 and was submitted in support of the application to the Ghanaian court. It states, at para. 7, that “because of my personal reasons, I am no more interested in taken [sic] custody of [the appellant]”. The affidavit suggests that the guardian’s unwillingness to continue help is a recent development and does nothing to address the situation that obtained when the appellant was still a child.
13. Secondly, the existence of the Ghanaian court order must be viewed alongside the judge’s unchallenged adverse credibility findings, including her concerns that the appellant’s father was listed as the “informant” on his birth certificate issued in June 2018. The sponsor’s explanation, namely that Ms Boateng had been required to give his father’s details when obtaining the document lacked credibility. No details to that effect had featured in Ms Boateng’s statutory declaration submitted in support of the appeal before the judge: see paras 35, 37 and 38 of the judge’s decision.

14. The sponsor's evidence as to why a replacement birth certificate was obtained in 2018 had been inconsistent; in oral evidence, she said that the original had been destroyed along with all other personal documents in a fire, whereas in her statement she claimed it had got lost. If the document had been destroyed with many others in a fire, it was odd that the appellant's infant health records had survived the blaze, the judge found. At para. 40, the judge rejected the sponsor's evidence that the appellant's father had either abandoned the family or left Ghana altogether.
15. Thirdly, the process before the Ghanaian court was conducted on an *ex parte* basis in which the father performed no role. Ms Boateng appears to have provided an affidavit, which was accepted by the judge, and custody was granted accordingly. Ms Boateng's affidavit was very brief. It did not deal with any of the concerns identified by the judge in her decision, which was promulgated on 14 April 2021, approximately five weeks before Ms Boateng signed her affidavit on 24 May 2021, and so would have been available to the appellant and the sponsor. The judge in Ghana does not appear to have been informed that he was being invited to make an order in circumstances where a judge in this jurisdiction, the location of the person to whom he was "granting" custody, had heard evidence from the subject's mother and reached polar opposite findings. The order features no reasoning, and its recitals are very brief.
16. Fourthly, there is no expert evidence explaining how, as a matter of Ghanaian law, a young adult aged 18 may be transferred to the custody of another adult, in another jurisdiction.
17. Turning to the *Ladd v Marshall* criteria, there is no reason why the new "evidence" could not have been obtained with reasonable diligence for use at the hearing before the judge, especially given Ms Boateng's affidavit has no details concerning the claimed change in her personal circumstances which required her to make the application. Secondly, it is very unlikely that the document would have had the important influence on the result of the trial for which the appellant contends. In all likelihood, in view of the remaining and unchallenged adverse credibility findings reached by the judge, the new evidence would have been likely to have reinforced the judge's adverse findings and done nothing to assuage them. Finally, there is nothing apparently credible about the document as far as the substantive, disputed issues before the judge were concerned.
18. We therefore decline to admit the new evidence as a means to impugn the decision of the judge. The judge reached a decision on the basis of the materials before her, giving reasons that have not been challenged in these proceedings.
19. There has been no other challenge to the judge's decision, its reasons, or the conduct of the judge.
20. For the above reasons, we do not find that the decision of the First-tier Tribunal involved the making of an error of law.

Notice of Decision

The appeal is dismissed.

The decision of Judge Lingam did not involve the making of an error of law such that it must be set aside.

Case No: UI-2021-001818
First-tier Tribunal No: HU/00637/2020

Stephen H Smith
Judge of the Upper Tribunal
Immigration and Asylum Chamber
17 January 2022