Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: VA/49511/2011

THE IMMIGRATION ACTS

Heard at Bradford	**Determination Promulgated**
On 1st August 2013	**On 5th August 2013**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

SAFWAN PATEL

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Pipe, Counsel instructed on behalf of Khan & Co Solicitors
For the Respondent: Mr M Diwnycz, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant, Mr Safwan Patel, born on 21st June 1992 is a citizen of Zambia. The Appellant applied to the Respondent for entry clearance to enter the United Kingdom as a family visitor under paragraph 41 of HC 395 (as amended). In a notice

of immigration decision dated 17th May 2012, it was refused by the Respondent who was not satisfied that the Appellant was genuinely seeking entry as a visitor for a limited period as stated by him not exceeding six months, nor was he satisfied that he intended to leave the United Kingdom at the end of the period of the visit (paragraph 41(i) and (ii)). Further, it was stated that the Entry Clearance Officer was not satisfied that he would be maintained and accommodated whilst in the UK or meet the cost of the onward journey (paragraph 41(vi) and (vii)). Additionally, it was refused under paragraph 320(7A).

2. The basis for that decision is as follows. The Appellant had previously made an application for settlement which led the Entry Clearance Officer to doubt that his intentions were to stay for one week to attend a wedding. It is now stated that his father was funding the proposed visit and previously stated that a different person was his father and that they were deceased. The discrepancies called into question the Appellant's credibility and therefore the Entry Clearance Officer was not satisfied on the balance of probabilities, that he intended to stay the period that he had stated or that given the circumstances outlined above he would comply with the conditions of visitor entry clearance. It was also stated in the refusal letter that the Appellant's father was funding the visit and he had submitted a letter of support and a bank statement in support of the application. However as he previously stated that his father was deceased that called into question who the Sponsor actually was. The Entry Clearance Officer was not satisfied that he was related as claimed and that there was a genuine offer of sponsorship. Therefore he was not satisfied that he would be maintained and accommodated whilst in the UK or able to meet the costs of the onward journey.

3. In respect of the refusal under paragraph 320(7A) it was asserted that the Appellant had made a false representation and failed to declare facts that were material to his application which related to a previous application for settlement and the details that were contained in it.

4. Following notification of the Respondent's decision to refuse the appeal, the Appellant exercised his right of appeal to the First-tier Tribunal. He provided a number of documents before the Tribunal. Those documents were considered by the Entry Clearance Manager in a review and it was noted by him that the application was refused as the Appellant had named parents that differed to his stated parents in a previous application. It transpired that his birth parents were killed in a car accident and that he and his siblings were adopted by his uncle and aunt which he now calls his parents. The Entry Clearance Officer noted that he was prepared to accept that explanation given the documentation that had been provided and therefore set aside the element of refusal under paragraph 320(7A) of the Immigration Rules. The remaining part of the refusal was maintained.

5. The appeal was listed as a paper hearing before the First-tier Tribunal (Judge Landes). In a determination promulgated on 22nd February 2012 the judge dismissed the appeal.

6. An application was made to appeal that decision and on 28th February 2012 First-tier Tribunal Judge Grant granted permission to appeal for the following reasons:-

> "The grounds, which were in time, submit that the judge has made an irrational finding and considered immaterial matters including the previous settlement application withdrawn in 2009, made a material misdirection of law in relation to the Appellant's previous settlement application which was not judicially determined but withdrawn, and made findings contrary to the principle of fairness by taking notice of a previous application which had not been disclosed as part of the appeal bundle and which had not been the subject of a judicial determination and gave the Appellant no opportunity to comment upon the same.
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> It is arguable that in making findings upon a prior withdrawn application without enabling the Appellant to comment upon the same (paragraph 17), that the judge may have acted in a manner which is procedurally unfair amounting to an arguable error of law. The grounds may all be argued."

7. On 18th June 2012 Upper Tribunal Judge Taylor gave the following decision and directions:-

> "Having regard to all the circumstances, including the failure of the Respondent to serve within the permitted time a response, which adequately explains why the decision of the First-tier Tribunal does not contain an error of law and should not be set aside, the Upper Tribunal, pursuant to Rule 34, has decided without a hearing that the decision of the First-tier Tribunal does contain an error of law, as identified in the grant of permission, read with the grounds of application, and should be set aside and remade by the Upper Tribunal.
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> The grounds argued that there should be an oral hearing, although the previous determination was decided on the basis of the papers in the file, since there has been a previous settlement application the circumstances of which will need to be explained. The appeal will accordingly proceed to a hearing for the purpose of considering evidence relevant to the remaking of the decision and the following directions are hereby given:-
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> The parties shall prepare for the hearing on the basis that none of the findings of fact of the First-tier Tribunal shall stand. No later than seven days before the hearing the parties must serve on the Upper Tribunal and each other all documentary evidence (including witness statements) upon which they intend to rely at the hearing."

8. The matter came before the Upper Tribunal initially on 6th June 2013. At that hearing Mr Pipe appeared on behalf of the Appellant and it was clear that he had not been served with the information and bundle relating to the settlement application. Whilst they were provided to him, with the Sponsor currently out of the jurisdiction he was not able to take any instructions on this point. Thus the matter was adjourned part heard to be resumed.

9. The hearing resumed with Mr Pipe in attendance. At this hearing Mr Diwnycz, a Senior Home Office Presenting Officer appeared on behalf of the Respondent.

10. The Appellant had provided a bundle of documentation numbering 43 pages which included documentary evidence relating to the death of his parents and his subsequent adoption by the Sponsor and also included witness statements of both the Appellant and the Sponsor. A further supplemental bundle of documents was also served upon the Tribunal and the Respondent under cover of a letter dated 15th July 2013 which contained a letter from the Appellant's school dated July 12th 2013 and a supplemental witness statement from the Appellant and from the Sponsor.

11. The Tribunal heard no oral evidence as the Sponsor was currently out of the jurisdiction in Zambia caring for his mother who was unwell. In those circumstances I heard submissions from the parties.

12. Mr Pipe relied upon the skeleton argument that he had produced before the Tribunal in June and in addition made the following oral submissions. He submitted that this was a genuine visit by the Appellant. He invited the Tribunal to consider the explanation given by the Sponsor in the witness statement concerning the circumstances of the settlement application that had been made in 2009. He also invited the Tribunal to consider the statement of the Appellant at page 8 which is consistent with that statement. His circumstances at the date of decision were that he remained in Zambia as a student at the Islamic Institution and was in education. As to the matters set out in the letter dated 20th July 2009 which was sent by the Appellant's former solicitors in relation to the settlement application, he submitted that the circumstances surrounding that application had been explained further by the Appellant in his statement. At paragraph 3 of the statement he set out that at the time he was still a minor resident in Zambia and that it was his cousin and adopted brother, Maksud Patel, who was based in the United Kingdom and Sponsor for the application who instructed ASK Solicitors which had led to that letter being written. He believed that Maksud Patel may have been mistaken about the dates but in any event he did not believe there to be any real discrepancy because this was a case in which he lived amongst a very close extended family. Mr Pipe submitted that it was clear from the documentation that the application had been driven by Maksud Patel based in the United Kingdom and had in effect, reduced the carers of the Appellant to a chronology rather than taking into account what was a fluid state of affairs of care for this particular Appellant. He submitted that there was corroborative evidence of this in the supplemental bundle including the ECM decision referring to the taking of a brother to Australia. The fact that Khalil was listed as a guardian in his OA settlement application (see question 7.1) and also page 9 of the VAF stated that the Appellant was supported by his uncle Khalil. The letter, whilst it gave a strict chronology did not pay regard to what was in reality a close-knit family and that Khalil had been the lead person and the one who had been named in the adoption order. Thus he submitted that there was no inconsistency in that information and it had been fully and properly explained by the Appellant and the Sponsor.

13. Dealing with the real issue which related to intention to return, the Appellant had visited the United Kingdom on other occasions in 1998 and 2005 and also he had visited Australia and had returned at the conclusion of the visits. He was a student

at the Islamic Institute having previously attended at the LICEF School. He lives with his guardian Khalil Ahmed Patel and aunt and has a sister living separately. He also has brother Ibrahim in Zambia thus there was a wide family network and had a very good immigration history. He was now an adult involved in vocational studies and considering the evidence as a whole, the previous application, which was withdrawn did not undermine the current one.

14. Mr Diwnycz on behalf of the Secretary of State, noted that there had indeed been an agent used in 2009 to complete the form and that rather than it being a direct conflict of evidence in the settlement application it was really a matter of nuance rather than matters of substance and that he accepted that there had not been any attempt to mislead the authorities. He did not seek to resist the application any further noting that his circumstances were different and that he was now an adult applying in his own right.

15. I reserved my determination.

16. The issue in the case relates to the intention of the Appellant to return to Zambia at the conclusion of the visit and whether he is a genuine visitor. As Mr Pipe states, the issue of paragraph 320(7A) and the refusal on that ground was withdrawn by the Entry Clearance Manager following a review as it was accepted that the documents disclosed demonstrated that there had been a misunderstanding as to the Appellant's parents and their subsequent deaths and who had maintained the care of the Appellant and his siblings since that time. Similarly it is common ground between the parties that the issue of maintenance and accommodation falls away as it is accepted that the Appellant does have a Sponsor in the UK who can maintain and accommodate him.

17. The issue relates to the intention. The Entry Clearance Officer was not satisfied about the Appellant's intention relying on the previous application for settlement which it is said demonstrates a wish to remain in the UK rather than to simply visit.

18. I have therefore considered the evidence before the Tribunal and the submissions that have been made on behalf of both parties. Having done so, I find the following facts from that evidence. The Appellant's biological parents died in a car accident in 1995 (I refer to the death certificates in the bundle). The Appellant was 3 years old at the time. Following the death of his parents, the care of the Appellant and his siblings (Ibrahim and Summaya Patel) was shared by two uncles, Rashid Patel and Khalil Patel but as he spent more time with his uncle Khalil it was he who submitted an application for his adoption. The documentation before me demonstrates that on 3rd March 1998, an adoption order was made in respect of the Appellant in favour of his uncle Khalil Patel in Zambia (he was also the Appellant's uncle). It appears from the evidence that the Appellant's full time care and that of his siblings was assumed by Khalil Patel who had six children of his own, three in the United Kingdom, two in Australia and one in Zambia. It is also clear from the documents that between the years 1996 to 2008 the Appellant studied at the LICEF School and the document

demonstrates that it was his uncle Khalil who was the guardian and paid the fees for that education.

19. The circumstances which led to the settlement application are also set out in the documents before me. In 2009, Ibrahim went to Australia and his sister at that time was living independently in Zambia. Given the age and ill health of the adoptive parents, Makshud Patel in the United Kingdom took steps to Sponsor the Appellant to live in the United Kingdom. However before the application could be considered any further, Mr Mohammed Patel who had previously emigrated to Australia moved back to Zambia and was thus able to care for the Appellant. Given the change of circumstances a decision was taken to withdraw the settlement application as it was no longer necessary.

20. I have carefully considered the documents and the submissions made by the respective advocates. I am satisfied that when the previous application for settlement was made the Appellant was a minor and therefore others had taken the decision for him. The Appellant's Sponsor Maksud Patel had made the application and I am satisfied that that application was withdrawn as the Sponsor's brother Mohammed returned to Zambia and was able to look after the Appellant and therefore no reason existed for the settlement application.

21. There is an issue which relates to the contents of the letter sent by ASK Solicitors which set out a chronology of carers of the Appellant which contrasts with the account given for the visit application. I had the opportunity of considering the evidence further and in doing so, I am satisfied that there is no real conflict in the ASK letter concerning the circumstances at the time of the settlement application. It is clear that the Appellant had a close extended family in Zambia who had attempted to care for the Appellant and his siblings following the death of their parents in a road accident. It is natural that one person would be named on the adoption order which was Khalil, but I am satisfied that other family members had responsibility for his care during that time this being the cultural norm in Asian families. There is support in the documents to show Khalil Patel as the main carer. He was named as the guardian in the OA application (paragraph 7.1) and at page 9 was named as the person supporting the Appellant. He is also named between the years of 1996 to 2008 as the person paying for the Appellant's school fees. I am satisfied on the balance of probabilities that the letter from ASK solicitors setting out the chronology may have misunderstood what the position was in respect of the Appellant and I am satisfied that there was no conflict concerning who were his carers.

22. Therefore I consider the circumstances relating to this application. The Appellant is now over 18 and is a full-time student and is at an Islamic institution. He has demonstrated in the past a good immigration history having made visits to the UK previously and to Australia. On all occasions he has returned back to Zambia, his country of nationality. In addition, he has close family members, indeed they are his only family and those who are the closest to him given the circumstances of his parents' death. Thus he retains all his real familial links in Zambia. He was a minor at the time of the application for settlement and it was made on his behalf rather than

by him. I do not find that this reflects upon his credibility or his intention in the application currently before the Tribunal to visit the UK. Thus I am satisfied that he has no intention to settle in the United Kingdom and indeed there is no evidence before me that demonstrates that there are any such circumstances to support such a claim.

23. Therefore having taken into account all the evidence and for the reasons that I have given, I am satisfied that he has demonstrated that he intends to return at the conclusion of the visit, which is intended to be a short family visit and that he is a genuine visitor to the United Kingdom. In those circumstances, the appeal is allowed.

Decision

The appeal is allowed.

Signed Date 1/8/2013

Upper Tribunal Judge Reeds