



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

Appeal Number: OA/22877/2012

THE IMMIGRATION ACTS

Heard at Field House

On 4 August 2014

Determination

Promulgated

On 15 September 2014

Before

UPPER TRIBUNAL JUDGE ESHUN

Between

DAVID AYOMIKUN KOIKI

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Ms J Victor-Mazeli, Counsel instructed by Nasim & Co Solicitors

For the Respondent: Mr I Jarvis, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant has been granted permission to appeal the determination of First-tier Tribunal Judge McIntosh dismissing his appeal against the decision of the respondent, made on 9 October 2012, to refuse to grant him entry clearance into the United Kingdom as the child of a relative

present and settled in the UK pursuant to paragraph 297 of the Immigration Rules, as amended.

2. The appellant is a citizen of Nigeria born on 16 January 2007. His case is that his mother, Miss Olajumoke Koiki, died on 1 April 2012. Following her death, a sister, his maternal aunt, Miss Kuye Olufolake Olubusola, who is present and settled in the United Kingdom has been responsible for his care. The Entry Clearance Officer noted that the birth certificate which had been submitted in support of the application, purporting to officially record the appellant's birth details was dated 13 April 2012, five years after his birth and approximately twelve days after the death of his mother.
3. The respondent observed that there was no explanation for the delay registering the appellant's birth, there was no photographic evidence that the appellant had met his sponsor, or that she had been responsible for the appellant following the death of his mother. It was also noted that at the time of his application the appellant continued to reside with his father in Nigeria, notwithstanding his current ill-health referred to by a letter from Lagos General Hospital. Most significantly, was the fact that the appellant had failed to provide supporting evidence that he was in fact the nephew of Miss Kuye Olufolake Olubusola. In those circumstances the Entry Clearance Officer was not satisfied that the appellant was able to meet the requirements of paragraph 297 of the Immigration Rules.
4. On 17 April 2013, the Entry Clearance Manager (ECM) reviewed the appellant's application. He had the benefit of further documentary evidence in the form of copies of the sponsor's mortgage account, payslips, correspondence with Lagos General Hospital, photographs of the appellant and his sponsor, copies of passport details and confirmation of travel tickets where the sponsor and her mother travelled to Nigeria.
5. The Entry Clearance Officer was not satisfied, having regard to the grounds of appeal and the additional evidence that the sponsor had sole responsibility of the appellant, as he continued to reside with his father. He noted that the appellant's father continued to receive regular out-patient treatment from Lagos General Hospital for a condition that existed prior to the appellant's mother. The condition the appellant's father suffered from at the date of the decision was asthma and hypertension. The Entry Clearance Officer remained to be satisfied that the appellant and the sponsor were in fact related as claimed.
6. At the hearing Ms Olubusola said that she and the appellant's mother were sisters. Prior to the death of her sister, she felt there was no need to bring the appellant to the UK. She regularly visited the appellant and his mother and would travel to Nigeria two or three times a year. Following the death of her sister, she was prepared to do whatever she could to keep the appellant safe and maintain him until the age of majority. To date she has

sent regular remittances to the appellant to meet his living expenses including his attendance at formal college.

7. She is employed as a nurse. She was confident that her mother, the appellant's grandmother, would support her in caring for the appellant. She has three dependent children, aged 17 and twins aged 15. The appellant would be accommodated within her family home, a 5-bedroom privately owned semi-detached house. She was questioned about formally adopting the appellant, she said she was concerned that the appellant's father would feel marginalised and in the circumstances decided against the course of action.
8. The sponsor subsequently obtained a DNA report dated 21 February 2014 which concluded that the evidence provides weak support for the claimed relationship between Olufolake Olubusola Kuye and David Ayomikun Koiki. The DNA said that the most likely relationship is aunt and nephew or grandmother and grandchild or more distantly related. The DNA results are 2.6 times more likely if Olufolake Olubusola Kuye is related to David Ayomikun Koiki as an aunt or grandmother or more likely distant relative than if they were unrelated.
9. In addition to the DNA evidence Miss Olubusola produced a school report. It was noted by the school that the appellant required support academically and that since the death of his mother his concentration at school has deteriorated and his appearance at school diminished. A letter from Shokem Private School recommended that the appellant should be cared for by his maternal family.
10. The appellant's father, Mr Koiki Oluwasegun Lateef provided a letter of consent expressly permitting the sponsor and the maternal grandmother to have the day-to-day care of his son, David. He stated that due to his ill-health he was unable to give the appellant proper care. He referred to his diagnosis of asthma and hypertension as the debilitating condition which prevented him from caring for his son.
11. There was a letter from the Okiki Clinic and Maternity Hospital dated 26 November 2013 in which the medical specialist confirmed a history of ill-health and a diagnosis of Cerebro Vascular Accident (stroke). It was confirmed that he was placed on medication and at the time of writing Mr Lateef was still suffering from paralysis of the left half of his body.
12. The judge found the sponsor Ms Olubusola to be a credible and consistent witness. The judge noted that the DNA report although inconclusive, indicated that the evidence of the proposition that the appellant and the sponsor were related as aunt and nephew was weak. The sponsor could not explain why the results had indicated a weak support of the relationship claimed.

13. The judge found that the appellant has a surviving parent in Nigeria and was at times supported by his maternal grandmother when she visited Nigeria. The school reports indicated that the appellant has been adversely affected by the death of his mother. However, there was no evidence as to what impact separation from his father may have on the appellant. Consequently she found that the appellant failed to meet the requirements of paragraph 297.
14. The judge then considered the appeal in accordance with Section 55 of the Borders, Citizenship and Immigration Act 2009 and what is in the best interest of the child. The sponsor said in evidence that she would be able to care for the appellant with the support of her mother and children. There was no evidence from the respondent to suggest that the sponsor was unable to provide good enough practical care for the application. However the judge found that it is not simply a matter of the practical care required by the appellant but there are also emotional aspects which should be taken into account. She found that in the absence of expert evidence to the contrary, it is in the best interest of the appellant to remain in the care of his birth parents. The appellant's surviving parent remains in Nigeria and the appellant is able to reside with him save for one occasion when his father was hospitalised for a period of two weeks. The sponsor confirmed in evidence that her mother, the maternal grandmother, returned to Nigeria and during her holiday provided supporting care for the appellant. She found that the appellant is able to reside with his birth father in Nigeria and is emotionally and financially supported by his extended family. In the circumstances she found that there are no serious and compelling reasons which make the exclusion of the appellant undesirable.
15. With regard to Article 8 the judge found that the appellant has an established life in Nigeria with his father and extended family members. The decision to refuse the appellant entry clearance is not in breach of the Immigration Rules and does not give rise to a breach of the United Kingdom's obligations under the Human Rights Act.
16. Counsel relying on the grounds argued that the judge relied on the DNA evidence which was inconclusive as to the relationship between the appellant and the sponsor. Nevertheless the judge should have gone on to consider other evidence such as the sponsor's evidence, the affidavit of the appellant's grandmother and the letter of consent from the appellant's father which would have enabled her to find that the sponsor and the appellant are related as claimed, that is nephew and aunt.
17. It was further argued that the judge was wrong to find that there are no serious and compelling reasons which make the exclusion of the appellant undesirable. The judge noted that the appellant's father provided a letter of consent for the sponsor and grandmother to have the day-to-day care of the appellant due to his ill-health. In the appellant's bundle was a letter showing that the appellant has been in and out of hospital following his

stroke. The letter dated 26 November 2013 said that the father is partially paralysed. Because he is in and out of hospital he is unable to give practical or emotional care to the appellant. The conclusion should have been that on the evidence he could not care for his son.

18. With regard to the first point, I accept Mr Jarvis's argument that it is a red herring. This is because if the judge had not treated the relationship as that of being aunt and nephew for the purposes of paragraph 297(i)(f), she would not have gone on to consider the second requirement which is whether there are serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care.
19. The judge found that the appellant's exclusion was not undesirable following concentration of all the evidence that was before her. I find that evidence of the appellant's father's stroke was given in a letter dated 26 November 2013. That was the day it was said the appellant's father suffered a stroke and became partially paralysed. This evidence postdated the respondent's decision which was made on 9 October 2012. At the date of decision the appellant's father suffered from asthma and hypertension. That was the evidence contained in his letter of consent which was before the Entry Clearance Officer and the letter dated 10 April 2012 from the Lagos State General Hospital. That letter stated that he had suffered three episodes of asthmatic attack in the last two months following recurrent exposure to dust which led to his admission in hospital for two weeks. The letter said he was unfit but did not expand on this. The letter did not say that he was unfit to look after his son.
20. The judge accepted in the absence of evidence from the respondent that the sponsor is able to provide good enough practical care for the appellant. The judge found in the absence of expert evidence to the contrary that it is in the best interests of the child to remain in the care of his surviving parent which is his father with whom he is residing. I find on the evidence that the judge made a finding that was open to her.
21. I find that on the evidence before the judge, her decision does not disclose an error of law. Whilst the evidence that his father has suffered a stroke and is now partially paralysed, might have made a difference to this decision, that evidence postdated the Entry Clearance Officer's decision. The judge could only consider the evidence that was before the respondent at the date of his decision.
22. The judge's decision dismissing the appellant's appeal shall stand.

Signed

Date

Upper Tribunal Judge Eshun