



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/02789/2014

THE IMMIGRATION ACTS

Heard at Field House
On 12th August 2015

Decision & Reasons Promulgated
On 1st September 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

KKM

Appellant

and

ENTRY CLEARANCE OFFICER
(NEW DELHI)

Respondent

Representation:

For the Appellant: Mr A Bandegani, Counsel instructed by Haq Hamilton Solicitors

For the Claimant: Mr S Walker, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant appeals with permission against the decision of First-tier Tribunal Judge Scott-Baker dismissing the Appellant's appeal under the Immigration Rules and Article 8 ECHR against her decision to refuse indefinite leave to enter from Nepal as the child of her sponsoring mother.
2. The Entry Clearance Officer refused entry clearance by way of a decision dated 27 January 2014 because the Appellant had not demonstrated that his mother held sole responsibility for him because (a) responsibility for his upbringing lay with his

grandparents since 2006, (b) there was no evidence of the whereabouts of his biological father, (c) his birth certificate was only recently registered and therefore did not represent a true reflection of his age or identity, and (d) there was no evidence of a relationship between him and his sponsoring parent, such as DNA evidence and therefore, for all those reasons, he did not meet paragraph 297(i)(e) of the Immigration Rules. The application was also refused because the Appellant had not demonstrated serious and compelling family or other considerations which would make his exclusion from the UK undesirable under paragraph 297(i)(f) and finally the decision was said to be proportionate with Article 8 of the Human Rights Act 1998.

3. First-tier Tribunal Judge Scott-Baker dismissed the appeal under the immigration rules because, although the Appellant was found by her to be the child of her UK sponsoring mother (seemingly due to the production of a DNA report), and although it was found that the Appellant's biological father died in 2008, the Appellant had not established sole responsibility was held by his mother and furthermore family life could continue to be enjoyed in the manner in which it currently existed.
4. The Appellant appealed against that decision. The key ground upon which permission was primarily granted by First-tier Judge Nicholson is that as the judge had found that the biological father was dead and the Appellant was applying to join his sole remaining parent, his appeal should have succeeded under paragraph 297(i)(d) of the Immigration Rules.
5. The Respondent filed a rule 24 Reply which actively engaged with the first ground in the following terms: "The respondent notes that the appellant would succeed under either 297(i)(a) or 297(i)(d)...". The Reply however maintained that there was no clear finding on the relationship between the Appellant and his mother and the relatively recent registration of the birth certificate still gave cause for concern.
6. The Appellant's Counsel produced a Skeleton Argument at the hearing, which was read by all parties before submissions began.

Submissions

7. I queried the meaning of the phrase in the Rule 24 Reply (namely that "the appellant would succeed under either 297(i)(a) or 297(i)(d)") with Mr Walker whom indicated that he accepted that there was an error in the decision, as per the Rule 24 Reply, which was material to the outcome of the appeal. He further submitted that there was sufficient evidence before me to enable me to remake the decision on the facts as they stand. Mr Walker submitted that the only remaining matter to be disposed of was the birth certificate. He however accepted that the birth certificate's authenticity had not been challenged and that no evidence had been served by the Respondent to demonstrate the document should not be given full weight. He accepted that the statement in the Refusal of Entry Clearance was therefore merely an assertion from the Respondent reflecting doubts due to the recent registration of the birth. Mr Walker observed in relation to the DNA report that there was acknowledgement of this report at paragraph 9 of the decision and he accepted that the mother and

Appellant were found to be related at paragraph 32 of the decision, contrary to what was said in the Rule 24 Reply.

8. Mr Bandegani built upon Mr Walker's sensible concessions by submitting inter alia that the judge below had made positive credibility findings apart from the issue of sole responsibility which resulted in the appeal being dismissed under paragraph 297(i)(e). Mr Bandegani did not seek to pursue his solicitors' second ground with any vigour. He instead submitted, as did Mr Walker, that paragraph 32 of the decision made three positive findings of fact which were unchallenged and remained sound. Those findings were that the Appellant is the child of his sponsoring mother, the Appellant's biological father had died in 2008 and, no adverse inference should be drawn from the Appellant's slowness in making an application to join the sponsor in the UK. He contended that paragraph 33 showed that the judge had accepted that money was sent to Nepal for the Appellant's and the grandparents' benefit; and paragraph 35 demonstrated the acceptance of financial remittances.
9. Relying upon paragraph 12 of his Skeleton Argument, Mr Bandegani further submitted that the Respondent had not challenged the genuineness of the birth certificate, no evidence or reasons were provided to challenge the weight to be given to it and no issue was taken with its form or content either. He also submitted that no issue had been taken with the Appellant's age or identity for any other reason and the lack of an explanation for the late registration did not mean the certificate itself was automatically unreliable without more and the slowness in obtaining the birth certificate by those responsible for the child was not a good reason for the Respondent to reject the certificate. He maintained that the child was under 18 years of age at the relevant time and urged me to remake the appeal by allowing it.
10. I queried with both parties whether I needed to look at sole responsibility at all under paragraph 297(i)(e) in remaking the appeal and both representatives agreed that I did not and should focus my attention squarely upon paragraph 297(i)(d) which was a purely factual question.

Error of Law

11. I am satisfied that in considering the appeal the judge committed errors in law such that her decision should be set aside. Mr Walker made several concessions before me at the oral hearing. In my view, he was correct to do so. It was stated by Judge Nicholson in granting permission that the judge's failure to consider paragraph 297(i)(d) was a *Robinson* obvious point. Mr Bandegani submits in his Skeleton Argument that the representative had taken this point factually before the First-tier at paragraph 25 of the decision. This is true, however, it matters not whether paragraph 297(i)(d) was expressly relied upon or not. What matters is whether its omission from the judge's consideration was a material error. In my judgment, and as Mr Walker accepted, there was a material error of law as on the facts found by the First-tier, the appeal would fall to succeed under either 297(i)(a) or 297(i)(d), however the First-tier did not consider that rule substantively.

12. In my view, the judge unfortunately failed to consider a live issue before her which was dispositive and material to the outcome of the appeal. Therefore, I set aside the decision of the judge under paragraph 297(i)(e) and Article 8 although I do not interfere with her findings of fact.

Remaking the Decision

13. In remaking the decision, I must consider the circumstances appertaining at the date of the refusal decision. The standard of proof is to the civil standard and that of the balance of probability. It is for a party that makes any assertion to discharge the burden of proof in establishing their assertion, for example, in relation to the reliability of documentation. I have considered all the evidence in the appeal, including the appellant's and respondent's bundles. I heard submissions from both parties which are set out in full in my record of proceedings.

14. Paragraph 297 of the Immigration Rules is stated in the following terms:

'297. The requirements to be met by a person seeking indefinite leave to enter the United Kingdom as the child of a parent, parents or a relative present and settled or being admitted for settlement in the United Kingdom are that he:

(i) is seeking leave to enter to accompany or join a parent, parents or a relative in one of the following circumstances:

(a) both parents are present and settled in the United Kingdom; or

(b) both parents are being admitted on the same occasion for settlement; or

(c) one parent is present and settled in the United Kingdom and the other is being admitted on the same occasion for settlement; or

(d) one parent is present and settled in the United Kingdom or being admitted on the same occasion for settlement and the other parent is dead; or

(e) one parent is present and settled in the United Kingdom or being admitted on the same occasion for settlement and has had sole responsibility for the child's upbringing; or

(f) one parent or a relative is present and settled in the United Kingdom or being admitted on the same occasion for settlement and 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; and

(ii) is under the age of 18; and

(iii) is not leading an independent life, is unmarried and is not a civil partner, and has not formed an independent family unit; and

(iv) can, and will, be accommodated adequately by the parent, parents or relative the child is seeking to join without recourse to public funds in accommodation which the parent, parents or relative the child is seeking to join, own or occupy exclusively; and

(v) can, and will, be maintained adequately by the parent, parents, or relative the child is seeking to join, without recourse to public funds; and

(vi) holds a valid United Kingdom entry clearance for entry in this capacity; and

(vii) does not fall for refusal under the general grounds for refusal.'

15. As noted above, the Refusal of Entry was predicated upon paragraphs 297(i)(e) and 297(i)(f) not being met (alongside Article 8). However, no consideration was given to paragraphs 297(i)(a) or 297(i)(d) of the Immigration Rules.
16. The Respondent made comments in relation to the birth certificate however these fell under the umbrella of paragraph 297(i)(e). I observe that Mr Walker did not seek to alter the bases of the Refusal by suggesting further sub-paragraphs of rule 297 were not met and I anyhow consider those issues to be implicitly accepted by the Respondent since the outset of the appeal their never having been taken issue with.
17. It is common ground before me that the Appellant can bring himself within either paragraph 297(i)(a) or 297(i)(d) of the Immigration Rules. Under paragraph 297(i)(a) of the Immigration Rules, a child can secure indefinite leave to enter where "both parents are present and settled in the United Kingdom"; and under paragraph 297(i)(d), a child can secure indefinite leave to enter where "one parent is present and settled in the United Kingdom or being admitted on the same occasion for settlement and the other parent is dead".
18. As agreed by the parties, the sole remaining issues of quasi-contention for me to determine are, firstly, whether the mother and Appellant are related (although I observe in passing that the acceptance that the Appellant can meet either of the above two sub-paragraphs of rule 297 implies that the Respondent accepts he *is* related to the sponsor); and secondly, whether the birth certificate is a reliable document reflecting the Appellant's correct age and identity.
19. In relation to the first issue, in harmony with the judge below, I note that the Appellant has produced a DNA report which establishes that his sponsor is his biological mother. The Rule 24 Reply contends that there was no clear finding on this issue at paragraph 9, however that submission ignores paragraph 32 of the judge's decision which reveals the judge's finding that the Appellant's father died in 2008, which finding has not been challenged. For the sake of clarity and completeness, I equally find that the Appellant's father died in 2008 as evidenced in the death certificate and that the sponsor is the sole surviving biological parent of the Appellant.
20. In relation to the reliability of the birth document, I accept Mr Bandegani's submissions on this issue entirely. The Respondent did not seek to challenge the genuineness of the birth certificate in any serious way, as no evidence was provided with the Respondent's bundle to substantiate that the document should have less weight placed on it or to demonstrate that it was lacking in form or substance in any way whatsoever. It appears that the sole challenge to the weight to be given to it stems from its late creation. The mere assertion that a document is suspicious because it could have been created sooner does not render its contents susceptible to challenge. I find that the bald assertion alone does not begin to approach the burden of proof which rests upon the Respondent to demonstrate that the birth certificate is deserving of less weight. Therefore, as stated above, I find that the Appellant is the

biological child of the sponsor and the birth certificate is a belated but true reflection of the Appellant's true age and identity. For the sake of completeness I also find that the Appellant's date of birth is 11 September 1996 and that he was a child and under 18 years of age at the relevant time.

21. Turning back to paragraph 297(i)(d), I find that the Appellant's biological mother is present and settled in the UK and his biological father has died in 2008 as evidenced in the death certificate. I therefore, do not propose to deal with paragraph 297(i)(a) nor Article 8 as the appeal has succeeded on the above basis under 297(i)(d).
22. For the above reasons I set aside the judge's decision and remake the decision allowing the appeal under the immigration rules.

Decision

23. I allow the Appellant's appeal against the Respondent's decision to refuse entry clearance.

Anonymity

24. I maintain the anonymity order made below by the First-tier Tribunal.

Fee Award

25. The First-tier Tribunal did not consider making a fee award as the appeal was dismissed on all grounds. In light of this Tribunal's decision, it is appropriate for a fee award to be made against the Respondent in the sum of £140 paid.

Signed

Date

Deputy Upper Tribunal Judge Saini