



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/10984/2014

THE IMMIGRATION ACTS

Heard at Field House, London
On the 4th November 2015

Decision & Reasons Promulgated
On 23rd November 2015

Before:

DEPUTY JUDGE OF THE UPPER TRIBUNAL MCGINTY

Between:

MISS OLUWADAMILOLA BLESSING ADENIJI
(Anonymity Direction not made)

Appellant

And

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mrs Omolola Arogundade (sponsor)

For the Respondent: Mr Walker (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the Appellant's appeal against the decision of First-tier Tribunal Judge Wright dismissing the Appellant's appeal against the Respondent's decision to refuse the Appellant entry clearance pursuant to paragraph 297(i)(e) and (f) of the Immigration Rules and dismissing her appeal on human rights grounds under Article 8.
2. The Appellant is a national of Nigeria who was born on the 16th April 1996 and who is therefore now aged 19 years old, but who was aged 17 years old as at the date of the application on the 2nd April 2014.

3. On the 2nd April 2014 the Appellant had applied for entry clearance to join her mother in the United Kingdom under paragraph 297 of the Immigration Rules. That application was refused by the Respondent on the 6th August 2014, and the Appellant appealed by means of a notice appeal dated the 12th September 2014.
4. Within the original refusal it was found that the Appellant had not provided a birth certificate or other evidence to demonstrate that she was related to her Sponsor as claimed. It was found that the Appellant lived with Margaret Lyunade, who was said to be her grandmother and that she was studying at the Reliance Secondary School, but it was said that there was no evidence of her personal situation in Nigeria and she had not provided evidence of contact with the Sponsor or proof that her Sponsor provided all of her emotional, financial and other needs, or exercised any control of the major aspects of the Appellant's life such as schooling, religion, medical care etc. such to show that the Sponsor had sole responsibility for her upbringing pursuant to paragraph 297(i)(e) of the Immigration Rules.
5. It further had not been established that there were serious and compelling family or other circumstances which would make her exclusion undesirable for the purpose of paragraph 297(i)(f). It was further found that it was being suggested that the Appellant would reside with her Sponsor at 45 [-], which was a one-bedroom property that had one other room, but that the Respondent was not satisfied that the property would not be overcrowded and that the Appellant could be accommodated without recourse to public funds, given that the Sponsor resided there with her spouse and their 3-year-old son. The application was therefore refused under paragraph 297(i)(e) - (f) and under paragraph 297(iv).
6. The Appellant sought to appeal against the Respondent's decision and that appeal came before Judge of the First-tier Tribunal Wright at Hatton Cross on the 5th June 2015. However, when the case came to be called on in the afternoon, there was no appearance by or on behalf of the Appellant, and equally with no appearance from anyone by or on behalf of the Appellant in the morning, such that First-tier Tribunal Judge Wright, after satisfying himself that the Appellant had been notified of the hearing or reasonable steps had been taken to notify her of the hearing and that it was in the interest of justice to proceed with the hearing, he proceeded to deal with the case in the Appellant's absence and Rule 28 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014.
7. The Appellant sought to appeal that decision to the Upper Tribunal and within the Grounds of Appeal it is argued that the Sponsor Mrs Arogundade did not receive the notice to attend the hearing and that she had made attempts to find out about the delay of the hearing date, but to no avail and that she was then shocked to receive a decision letter in the case and that she wished she had the opportunity to present her case and provide evidence such as DNA evidence to prove the relationship between her and her daughter, bank statements, birth certificates and accommodation arrangements etc.

8. Permission to appeal was granted by First-tier Tribunal Judge Robertson on the 29th September 2015, he indicating that the Notice of Hearing and decision was sent to the address given of the Sponsor's address and there was nothing to say that the notice of hearing had been returned as "undelivered", nor was there anything to suggest that the Sponsor had contacted the Tribunal because of the delay in being notified as claimed. But given the importance of the appeal to the Appellant, permission to appeal was granted but it was stated that it was for the Sponsor to provide evidence to establish that she did not receive the Notice of Hearing before a material error of law could be found.
9. At the appeal hearing Mrs Arogundade, the Sponsor, told me that although she had received the Notice of Pending Appeal dated the 5th November 2014, which simply indicated that the Tribunal had received her notice of appeal and that the Tribunal had asked for the Respondent to prepare the relevant documentation for the appeal which was expected to take about 15 weeks, the Tribunal would write to her after the 18th February 2015 with further details of how and when the appeal would proceed and at that stage she did not need to take any action. She told me that she had not then received the Notice of Hearing which was said to have been sent out by the Tribunal on the 7th January 2015. Although this was sent to the same address as the Notice of Pending Appeal at 45 [-], she told me that she did not understand why she did not receive the Notice of Hearing.
10. She said that sometimes her mail does get lost in the post and that sometimes post for other people comes to her house and she produced at the hearing, an envelope, not related to this appeal, but from the post office, indicating for that piece of correspondence, it had been damaged within the post, but this was not related to the appeal and dated October 2015. Therefore I have not considered that document in reaching my decision, as it is not actually relevant to the question as to whether or not she did receive the Notice of Appeal.
11. However, Mrs Arogundade did tell me that she had received also the notice of judgement sent to her at 45 Kirkham Street, and that she phoned in January to the number given on the application form. She was told that it might take a while to get a hearing date. She had not chased the matter after that. She further told me that she had now provided DNA evidence to show that she and her daughter were related as claimed, which she had sought after the decision of First-tier Tribunal Judge Wright, together with a letter from her sister-in-law indicating that her sister-in-law could provide accommodation for the Appellant at her property. However, that letter from the sister-in-law again post-dated the decision.
12. Mr Walker on behalf of the Respondent, having heard the explanation provided by Mrs Arogundade on behalf of the Appellant, did accept on the Respondent's behalf that having heard from her she did not in fact receive the Notice of Hearing listing the hearing for Friday 5th June 2015 at 10 a.m. at Hatton Cross, which he accepted was a procedural irregularity which may have had an adverse effect on the fairness of the hearing, such that

he conceded that the decision of First-tier Tribunal Judge Wright did contain a material error of law and should be set aside and the case remitted to the First-tier Tribunal to be reheard before a different First-tier Tribunal Judge. He conceded that, had the notice of hearing been sent out, then the sponsor may well have obtained the DNA evidence prior to the hearing, and also that she could have given evidence regarding matters such as the accommodation and sole responsibility to the Tribunal at the hearing, had she be notified of the same, such that it could not be said that the procedural error in her not receiving notification of the hearing would not have had a material effect on the outcome.

13. In light of these concessions made by Mr Walker on behalf of the Respondent, I do find that the Sponsor did not in fact receive the Notice of Hearing listing the hearing for the 5th June 2015, although she did receive the other documents sent to her. I do accept her explanation that post does go missing on occasion to her property, and that she does also receive post wrongly addressed to other people. I do accept given the concession made that she did not receive the notice of the hearing and that this therefore did amount to a procedural irregularity, in that had she received notification, the Sponsor could have attended to give evidence at the hearing, which may well have had an effect on the outcome of the case and that it would be unjust in such circumstances to allow the First-tier Tribunal decision to stand. I therefore do set aside the decision of First-tier Tribunal Judge Wright, given that the Sponsor did not receive notification of that hearing. However, I place no criticism on Judge Wright in respect of his decision to proceed in the absence of the Appellant, as he was not to know that in fact she had not received the notification.
14. Having set aside the decision of First-tier Tribunal Judge Wright, I remit the case back to the First-tier Tribunal to be decided before any Judge other than First-tier Tribunal Judge Wright, given that the case needs to be reheard de novo.

Notice of Decision

The decision of First-tier Tribunal Judge Wright does contain a material error of law and is set aside;

The case is remitted back to the First-tier Tribunal for rehearing, to be reheard by any Judge other than First-tier Tribunal Judge Wright.

No anonymity order was made by the First-tier Tribunal, and no such order was sought before me. No order was made in respect of anonymity.

Signed

Dated 4th November 2015

RFM'Gib

Deputy Upper Tribunal Judge McGinty