Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: OA/15930/2012
OA/15931/2012

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17th December 2014	**On 2nd January 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

(1) MISS NDEY NJIE
(2) MISS NAMIE NJIE
(ANONYMITY DIRECTIONS NOT MADE)

Appellants

and

ENTRY CLEARANCE OFFICER - ACCRA

Respondent

Representation:

For the Appellants: Mr Y Darboe (Solicitor)
For the Respondent: Mr P Nath, (HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge NMK Lawrence, promulgated on 27th August 2014, following a hearing at Hatton Cross on 19th August 2014. In the determination, the Judge dismissed the appeals of Miss Ndey Njie and Miss Namie Njie. The Appellants

subsequently applied for, and were granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellants

2. The Appellants are two sibling sisters. Both are nationals of the Gambia. The first Appellant was born on 17th June 1999 and the second Appellant was born on 14th July 1997. These are their stated dates of birth. On 21st June 2012, they made applications to enter the UK as dependent daughters of Ms Amie Faye (their alleged sponsoring mother) who is also a national of the Gambia, but is now married to Mr Sheiffo Samateh, who has acquired Belgium nationality since his own arrival from the Gambia, thus giving both of them the right to reside permanently in the UK.

The Appellants' Claim

3. The Appellants' claim is that they can show that their relationship with their sponsoring mother, Ms Amie Faye, by virtue of their recorded registration in the register of births in the Gambia, in the birth certificate that was issued subsequently, and most importantly, in the DNA evidence that was produced, after doubts were raised with respect to the registration of their births. The DNA evidence is compelling evidence because it is from a body accredited by both the Home Office and the Ministry of Justice.

The Judge's Findings

4. The Judge dismissed the Appellants' appeal, after the Respondent challenged the relationship between the Appellants and their sponsoring mother, Ms Amie Faye. The Judge did so on the basis that he was not satisfied that the DNA tests results had not been tampered with by the Appellants' representative. Second, the Judge was not satisfied that the children's birth certificates were genuine. Third, the Judge was not satisfied that the birth registers were what they purported to be given that the Appellants' representative, Mr Darboe of Windfall Solicitors, had made contradictory submissions. In his concluding remarks, the Judge stated that,

> "the mere submissions of her report bearing the title 'DNA tests results' is insufficient unless there is evidence of continuity and evidence that the samples did not suffer the risk of contamination at any stage. There is no such evidence before me. I therefore do not find I could attach any weight to these reports" (paragraph 18).

5. The Judge went on to conclude that the Appellants had been unable to demonstrate that they are related to the Sponsor as claimed, for the purposes of Regulation 7 of the 2006 EEA Regulations, and accordingly had failed to discharge the burden of proof upon them.

Grounds of Application

6. The grounds of application make a number of clear and succinct points. First, the DNA test was conducted with the "DNA Diagnostic Centre" (DDC), which is an internationally recognised organisation, with officers in both the UK and the USA. Their reports are accepted routinely by the Home Office and the courts in the UK.

7. Second, the Judge was specifically referred to this fact and only observed that, "I am unable to comment" (at paragraph 18 of the determination).

8. Third, the Judge had to make a finding on the reliability of the DNA report, given that it was from a genuine provider accredited by both the Home Office and the Ministry of Justice, and the failure to do this contravene the well-established stricture in **Mohd Amin [1992] Imm AR 367**.

9. Fourth, the Judge was preoccupied with his perceived suspicion of the Appellant's representative's behaviour and failed to give adequate attention to the evidence before him.

10. Fifth, the Judge's preoccupation with the representative's behaviour (at paragraphs 13 to 14) were simply inaccurate because the representative had obtained the DNA results in order to submit it to the court and it was simply unreasonable to assume that he would have any interest in forwarding that information from the court.

11. Sixth, following the Judge's findings, the Appellants' representative contacted the DDC, who on 4th September 2014, wrote to confirm the reliability of their report and the contents therein.

12. Seventh, it had never been alleged by the Respondent (or even by the Judge) that the Appellant's documents were forged or lacking in authenticity. They were issued by the Gambian authorities and the passports (also issued by the Gambian authorities) confirmed the very details in the birth certificates as well. The passports were not contested.

13. Eighth, in the circumstances any issue with respect to how the Gambian authorities kept their records, and how they referenced them, was irrelevant, unless it could be demonstrated by the Respondent Secretary of State that the documents produced were indeed forgeries.

14. Finally, this was a case where the two Appellant children, being born in 1997 and 1999 had found themselves in a situation where the register of births in Gambia had been lost or misplaced or destroyed by the authorities. A new register of births was started from the year 2000. The Appellants' details were on the new register that was started in 2000, but did refer to the actual date of birth (which has always remained consistent) of 1997 and 1999. The Appellants' representative, Mr Darboe, had sought to explain to the Judge that the birth registers are kept at the registry office and that any person who requires another copy simply goes to the registry office and obtains a copy from that office. The Judge

contested the submission on the basis that there was no evidence that the old register had been lost.

15. The final Ground of Appeal is that there was no need for the Appellants' representative to produce such evidence because the ECM also stated in the review of the decision of the ECO that,

> "In support of this the Appellants provided letters from the register of births and deaths in the Gambia and new birth certificates registered in 2012. I note that the letter states that the births were registered in 1997 and 1999 but that the records had been lost and were not under the custody of the registrar".

Mr Darboe submitted that this was all he needed to show to prove that it was indeed the case, and was accepted by the ECM, that the old register had been lost and new birth certificates were registered in 2012. Moreover, the letter from the registrar himself in the Gambia stated that, "according to the Births, Deaths and Marriages Act 1980, laws of the Gambia, when the details of birth are no longer in the records, the registrar allows a new registration, which is the issue with the said Applicant".

16. On 6th November 2014, permission to appeal was granted by the Tribunal.

Submissions

17. At the hearing before me on 7th December 2014, Mr Darboe explained that the starting point in this appeal must be the ECM's review (contained in the Respondent's bundle) of 25th February 2014. This shows that there was, for the reasons that the Judge had himself gone into, some doubt about the registration of births, which had arisen naturally in consequence of the original register being misplaced. The ECM accordingly records that,

> "In the Grounds of Appeal it was asserted that the Appellants were related to their mother as claimed. It was also stated that the birth certificates provided were genuine. In support of this the Appellants provided letters from the registrar of births and deaths in the Gambia and new birth certificates registered in 2012. I note that the letter states that the births were registered in 1997 and 1999 but that the records had been lost and were not under the custody of the registrar. However, they have not explained how they would know the registration numbers for when the births were claimed to have been first registered (for the issue of the first certificates provided with the applications) if the records were not in their custody. Also they have not explained why if the first certificates were accurate and issued correctly that they issued further certificates for the registration in 2012. Furthermore, they have not explained why the registrar initially issued year 2000 certificates with the registration details when the births registered were from the 1990s. Given all of

> this, I am caused to doubt the information contained in the birth certificates and the accuracy. This in turn causes me to doubt the relationships between the Appellants and their claimed mother. It was also stated that to prove that the Appellants were related to their mother they were ready to take a DNA test. However, as noted above, the onus is on the Appellants to discharge the burden of proof and not on the Entry Clearance Officer."

18. It was as a result of this ECM review, which flagged up concerns about the register of births, that the Appellants then commissioned a DNA report. The DNA report shows, on a balance of probabilities test, that the children are related as claimed. Mr Darboe submitted that it was wrong for the Judge to then seek satisfaction about the authenticity of the DNA report, especially given that such doubts had not been raised by the Respondent authority, and particularly given that the report came from an authorised source that was internationally recognised, and routinely acknowledged by the UK system.

19. Mr Darboe submitted that the Judge's misgivings at paragraph 16 of the determination that, "I have not been provided with cogent evidence that the process of taking the samples, whichever part of the body, was intact and free from contamination" were justified (at paragraph 16). This is because if one looks at the DDC "client identification consent form", which is signed by the sampler, and dated 6th August 2014, it expressly states that,

> "I hereby affirm that I have properly identified this patient. I have collected the specimen and labelled the container and packaged properly in the presence of the patient. The specimen is clearly labelled with the patient's name, date of birth, and date of collection. The specimen has not been tampered with and was never left unattended. I have packaged the specimen securely for shipment".

This was then signed off by "M. Douglas". In the event, therefore, the Judge was simply wrong to cast doubt on the samples taken and to challenge the findings made on the basis that it was for the Appellant to demonstrate that there had been no tampering with this material.

20. For his part, Mr Nath submitted that the Judge had given reasons for his concern at paragraphs 14, 15, and 16. He is entitled to doubt the authenticity of the reports provided before him. Unless it could be said that the matters that he flags up were wrongly identified by him as being incongruous, it must be concluded that the findings made by him were open to him.

21. In reply, Mr Darboe submitted that even if what Mr Nath said was correct, the details in the passport, which is also issued by the Gambian authorities, were identical to the details issued in the birth certificates. They show the date of birth. They show the place of birth. The reality was that the date of birth had never been contested of the two Appellants.

What was in dispute was whether these two Appellants were related to their sponsoring mother, Ms Amie Faye, in the way contended. It was for this reason that a DNA report was commissioned and this now confirmed, beyond all reasonable doubt, that they were related as claimed. Neither the birth nor the age of the two Appellants has ever been directly questioned.

Error of Law

22. I am satisfied that the making of the decision by the Judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision (see Section 12(2) of TCEA 2007). My reasons are as follows. First, the Judge had to make a finding on the singularly most important piece of evidence that went to the relationship between the sponsoring mother, Ms Amie Faye, and these two Appellant children. This was a DNA report. Mr Darboe (see paragraph 18) invited the Judge to make a finding. The Judge commented that, "I am unable to comment" (see paragraph 18). The failure to make a finding of fact in relation to this report is an error of law. A decision maker must decide that which he has to and disregard that which he must. In this case, as the ECM's review makes quite clear, the only reason why the Appellants proceeded to get a DNA report, was because of doubts raised with relation to the registration of births, and the ECM at that stage had said that he had not had sight of the DNA report, which was produced before the Judge, and required a finding of fact to be made by him.

23. Second, and even more importantly there is no rule of law to the effect that, "the mere submissions of the report bearing the title 'DNA Tests Results' is insufficient unless there is evidence of continuity and evidence that the samples did not suffer the risk of contamination at any stage" (see paragraph 18). It is for the Appellant to produce evidence, which on a balance of probabilities, goes to proving that which they must prove. It is for the Respondent authority, should they wish to challenge that evidence, to produce grounds for showing that there has been a deception, a forgery, or otherwise fraudulent behaviour. The Appellant is not required to prove a negative. The Appellant does not have to show that he did not tamper with evidence material to his case. To elevate this proposition to the level of rule of law is an error of law.

Remaking the Decision

24. I have remade the decision on the basis of the evidence before the original Judge, the evidence before me today, and the submissions that I have heard today. I have done so notwithstanding Mr Nath's submissions that I should adjourn this matter, following a finding of whether or not there was an error of law, for the substantive hearing to be argued later, whereupon the Respondent authority can make enquiries about the evidence submitted, including that contained in the DNA report. The reason I have not heeded this submission is that the evidence relating to the registrar of births and deaths, produced by Omar Ceesay (see paragraph 9) which the

Judge takes issue with (at paragraphs 9 to 11) was evidence in the Respondent's bundle, and has long been known to the Respondent such that enquiries could have been made long before now.

25. In point of fact, this evidence has not been directly challenged as being fraudulent by the Respondent authorities.

26. Second, the Procedure Rules make it quite clear that the overriding objective is met by the fair and expeditious despatch of a court business. All the evidence that is to be called is before this Tribunal and the Tribunal is well able to deal with it without any further adjournment.

27. That being so, and having considered the matter fully, I am allowing this appeal for the following reasons. The only issue in this appeal is the relationship of these two Appellants with the sponsoring mother, Ms Amie Faye. It is accepted that the original register of birth was unavailable. The reason is given by the registrar in his letter who, in referring to the Births, Deaths and Marriages Act 1990, states that "when the details are no longer in records, the registrar allows a new registration, which is the issue with the said Applicant". Why this should not be in the records is not a matter that these Appellants are able to answer. As Mr Darboe repeatedly stated before me, all that a person in the Applicant's position can do is to repeatedly return back to the office of the register of births and deaths and request for information. The information is what it was.

28. What is important is that once that information was found to be such as would not satisfy the authorities in the UK, the Appellants procured a DNA test result. This was procured from the DNA Diagnostic Centre (DDC), an internationally recognised organisation, which has offices both in the UK and USA. When the DNA test report is issued by the DDC, it shows the "probability of maternity" at 99.99997% with respect to Ndey Njie, and it shows the "probability of maternity" of 99.9998% for Namie Njie. The Appellants only have to prove their claim on a balance of probabilities. This is the civil standard of proof. Arguably the DNA report proves their case beyond all reasonable doubt. There is nothing in the DNA test report that is remotely suspicious and no issue has been taken by the Respondent authority. Were an issue to be taken, it has not shown, as a result of any enquiry undertaken, that these reports, issued by an internationally recognised organisation, are fraudulent.

29. However, there is an even better reason. Following the determination of Judge Lawrence, which was promulgated on 27th August 2014, Mr Darboe promptly wrote through his firm of solicitors to the DDC asking them to comment on the DNA report. One might have thought that this was not a matter for him. He had done all he had to do for the purposes of proving his case on a balance of probabilities. If doubts were to be cast on the DNA report the obligation to so do fell on the Respondent authority.

30. Nevertheless, to his credit, Mr Darboe wrote to the DDC. In a reply dated 4th September 2014, the concerns of the Judge are specifically answered. For example, it is stated that,

> "Dr Adama Sallah in Gambia collected Ndey Njie and Namie samples. The tested parties were appropriately identified at the time of the sample collection. Passports for the Appellants were copied and sent back with the samples. I have enclosed the DNA testing report with the chain of custody documentation".

The Judge had also raised concerns about the nature of the samples. The letter for September 2014 explains that,

> "The samples taken for Ms Faye and the children are mouth swabs. The case reference of CC116950 is to identify the legal maternity test for mother and two children. We do not provide individual case reference numbers for individual clients. (which answers the concerns of the Judge at paragraph 16 of the determination)

The report then goes on to say that

> "The DNA kits are sent to a certified doctor in the Gambia by courier. Mouth samples are taken and securely placed with tamper proof tape. They are sealed and sent back to us in the UK by courier with their tracking number. The client did not have any access to the samples; therefore there has been no contamination or tampering".

This a complete answer to any suggestion of contamination or tampering. All in all, therefore, the Appellants prove their case on a balance of probabilities, and this appeal must be allowed.

Notice of Decision

31. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original Judge. I remake the decision as follows. This appeal is allowed for both Appellants.

No anonymity order is made.

Signed Date

Deputy Upper Tribunal Judge Juss 2nd January 2015