



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

Appeal Number: EA/12167/2016

THE IMMIGRATION ACTS

**Heard at Field House
On 21 December 2017**

**Decision &
Promulgated
On 8 March 2018**

Reasons

Before

UPPER TRIBUNAL JUDGE CONWAY

Between

**[V O]
(NO ANONYMITY ORDER MADE)**

and

ENTRY CLEARANCE OFFICER, ACCRA

Appellant

Respondent

Representation:

For the Appellant: Ms Ripon
For the Respondent: Mr Wilding

DECISION AND REASONS

1. The appellant is a citizen of Ghana born on [] 2005. She appeals against a decision of the respondent made on 6 September 2016 to refuse her application for an EEA family permit to join [FO] in the UK as her daughter. The application was refused under regulations 7 and 21B of the Immigration (European Economic Area) Regulations 2006.

2. It was accepted that her purported mother is a Dutch national who holds a Dutch passport and is exercising treaty rights in the UK.
3. As evidence of the relationship the appellant provided a copy of her birth certificate stating her date of birth as [] 2005 in Accra and her mother as [FO].
4. However, checks made with the Ghanaian Central Registry Office indicated that the birth certificate submitted was not genuine. Thus, the respondent was not satisfied that the appellant's identity was as stated and that the Ghanaian passport provided was valid or satisfactorily established her identity and nationality.
5. The respondent noted that DNA test results and swab identification sheets from a Home Office approved testing facility had been submitted. These results stated that the appellant's likely relationship to her sponsor was her daughter. However, given that the birth certificate was not genuine, the respondent was not satisfied that the DNA test results confirmed her identity as claimed, merely her relationship.
6. The ECO was not satisfied that the appellant was the family member of an EEA national in accordance with regulation 7 and that she had fraudulently attempted to obtain a right to reside in the UK in accordance with regulation 21B(1)(d).
7. As such the requirements of regulation 12 were not met.
8. She appealed.

First tier hearing

9. Following a hearing at Taylor House on 5 September 2017, Judge of the First-Tier Devittie dismissed the appeal.
10. He noted the sponsor's evidence. In summary, that the sponsor entered the UK in 2004 on a false passport issued in the name [FT]. She remained without leave.
11. She began a relationship with a man and became pregnant by him, giving birth to the appellant in London on [] 2005. The father abandoned them soon after the birth.
12. She found it difficult to cope in the UK as a single parent and returned with the appellant to Ghana in 2005. The appellant has remained there since then.
13. In 2006 the sponsor was issued with a Dutch passport as a family member of her mother and returned to the UK, leaving the appellant in the care of an aunt. The sponsor supported her financially and visited when possible.

14. Eventually, in a position to provide the appellant with a stable home, she took advice on how to proceed with the visa application. Such resulted in the DNA test which confirmed her as the biological mother of the appellant. As she did not want to reveal the truth about her illegal history, she arranged for a birth certificate to be issued in Ghana. The date of the birth certificate and parentage were the same as shown in the UK birth certificate. The difference was her place of birth.
15. The judge's findings are at paragraph 7 to 9 of his decision.
16. At [7] he did not accept her explanation that it was necessary, even if she had entered illegally, to use the same false identity in the registration of her daughter's birth. Also, if the Ghanaian birth certificate correctly reflected the names of all the parties, why it was necessary to obtain a forged birth certificate instead of going through the normal procedures to obtain the birth certificate in accordance with Ghanaian law.
17. At [8] and [9] the judge did not attach weight to the DNA evidence having concerns about the 'chain in the transmission' of the sponsor's blood sample to the DNA company which bore a USA address. In particular that the person who identified her appears to have been based in the USA. The judge considered that the proper course, if it was necessary to engage a US DNA company 'would have been to arrange for a doctor based in the United Kingdom to take the sample blood for onward transmission to the USA'.
18. The appellant sought permission to appeal which was granted on 7 November 2017.

Error of law hearing

19. At the error of law hearing before me Mr Wilding agreed with Ms Ripon that the decision showed material error of law in that the judge failed adequately to assess the DNA evidence. Whilst he correctly noted that the company which carried out the test and provided the report has its registered address in the USA and is approved by UK visas, he was wrong in stating that '... in respect of the blood sample of the sponsor, the person who identified her would appear to have been based at the time in the United States.' Proper scrutiny of the report would have revealed that the sponsor's sample was taken at the DNA Diagnostics Centre, Glenthorne Road, London. She was identified by a sample taken at this centre in the UK and not by someone based in the USA.
20. I agreed. In giving inadequate consideration to material evidence the judge erred.
21. By consent the decision was set aside to be remade. We were able to proceed to that immediately.

22. I heard brief submissions from the representatives. Mr Wilding said that there was no dispute that the appellant is a family member under regulation 7. Nonetheless, the appellant, through the sponsor, sought to get a right to reside by the presentation of a false Ghanaian document. Such was fraudulent and regulation 21B applied. The remaining issue was whether the respondent's decision was proportionate. In that regard it should not be the case that the appellant wins as a matter of course when fraud has been shown. There was little evidence as to the appellant's circumstances in Ghana, no suggestion that she was not being cared for properly there. He asked me to dismiss the appeal.
23. Ms Ripon submitted that there was evidence that the appellant's carer, the aunt, had had enough of doing so. It was difficult to know what more evidence could be got. It was in the best interests of the child to be with her mother.

Consideration

24. In considering this matter there is no dispute that the appellant is a family member under regulation 7. The remaining issue is regulation 21B which reads:
- “(1) The abuse of a right to reside includes -*
- ...
- (d) fraudulently obtaining or attempting to obtain, or assisting another to obtain or attempt to obtain, a right to reside.*
- (2) The Secretary of State may take an EEA decision on the grounds of abuse of rights where there are reasonable grounds to suspect the abuse of a right to reside and it is proportionate to do so.”*
25. There is no suggestion that the appellant has herself fraudulently sought to obtain a right to reside. It is her mother who has been fraudulent.
26. It is not clear to me that the child can be fixed with the fraud of the mother such as to invoke regulation 21B(1)(d). I received no submissions on the matter. Even if I am wrong and it does because of the actions of the mother, I consider that it is not proportionate to refuse the application as a result of the abuse of a right to reside by the mother.
27. It is accepted that the mother is an EEA national exercising treaty rights. The appellant is her daughter and thus a family member. I see no reason to doubt her explanation as to why she submitted the false Ghanaian birth certificate. As she accepts, it was dishonest and foolish.
28. However, the child is innocent in all this. I find that it is not appropriate to punish the child for the actions of her mother.
29. I do not see that in the context of this appeal under the Regulations the conditions in Ghana and the child's situation there are relevant. Regulation

12 (1) states that an entry clearance officer “*must issue an EEA family permit to a person who applies for one if the person is a family member of an EEA national and (a) the EEA national (i) is residing in the UK in accordance with these regulations...*”

30. In any event to refuse the application for the appellant flies in the face of her actual entitlement as a family member to be with her mother.
31. The appeal succeeds.

Notice of Decision

32. The making of the decision of the First-Tier Tribunal showed material error of law. That decision is set aside and remade as follows:

The appeal is allowed under the Regulations.

No anonymity order made.

Signed

Date 07 March 2018

Upper Tribunal Judge Conway