



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/08827/2019

THE IMMIGRATION ACTS

Decided Under Rule 34
On 4th November 2020

Decision & Reasons Promulgated
On 9th November 2020

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

OLUWAROTIMI [A]
(Anonymity Direction Not Made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS (P)

1. The appellant, a national of Nigeria, appealed against the respondent's decision of 17th April 2019 to refuse his application for entry clearance to the UK under paragraph 297 of the Immigration Rules as the child of a parent settled in the United Kingdom. Resident Judge of the First-tier Tribunal Zucker ("Judge Zucker") dismissed the appeal for the reasons set out in a decision promulgated on 31st January 2020. On 7th June 2020, Upper Tribunal Judge Allen granted permission to appeal to the Upper Tribunal.

2. On 5th August 2020, the parties were sent directions made by Upper Tribunal Judge Rimington setting out her provisional view that in light of the need to take precautions against the spread of Covid-19, it would be appropriate to determine whether the making of the First-tier Tribunal's decision involved the making of an error on a point of law, without a hearing. She made directions for the parties to file and serve further submissions and, if a party considers that a hearing is necessary, for the party to submit reasons for that view no later than 21 days after the notice was sent to the parties.
3. In written submissions dated 13th August 2020, the appellant's representatives confirm that the appellant agrees to the appeal being determined on the papers, and based upon the parties written submissions. On 17th August 2020, the respondent sent to the Upper Tribunal, by email, the respondent's rule 24 response. In the respondent's response, the respondent accepts the judge made a material error of law in his decision. I consider, firstly, whether it is appropriate to determine the appeal to the Upper Tribunal without a hearing. Rule 34(1) confers a power to do so. By r34(2), I am required to consider the views of the parties. I have borne in mind the over-riding objective and I have also considered what was said by the Supreme Court in Osborn v The Parole Board [2014] 1 AC 1115. I am satisfied that it is in accordance with the overriding objective and the interests of justice for there to be a timely determination of the question whether there is an error of law in the decision of the FtT. Taking into account the position adopted by the respondent, it is entirely appropriate for the error of law decision to be determined on the papers, to secure the proper administration of justice.
4. The respondent, rightly in my judgement, concedes the decision of Judge Zucker should be set aside, and in the circumstances I can deal with the issues very briefly.
5. In the respondent's decision of 17th April 2019, three reasons appear to have been provided for refusing the application. First, the respondent noted that in support of his application for entry clearance, the appellant had not provided the required valid medical certificate confirming that he has undergone screening for active pulmonary

tuberculosis and that he is free from this disease. Second, the respondent was not satisfied that the appellant or his sponsor were the individuals who provided their DNA samples and the respondent therefore questioned the authenticity of the results provided by DDC (DNA Diagnostic Centre). The respondent was not satisfied that the appellant and his sponsor are related as claimed. Third, the respondent was not satisfied that there are serious and compelling family or other considerations which make the appellant's exclusion undesirable. The decision to refuse the application for entry clearance was maintained following review by the Entry Clearance Manager on 16th October 2019.

6. In his decision promulgated on 31st January 2020, Judge Zucker stated that the tuberculosis screening medical certificate, was a document that the appellant was required to "*present at the time of application*", as set out in paragraph A39 and Appendix T of the immigration rules. He noted that the requirement is a mandatory one, and at paragraph [6] of his decision, stated that Article 8 is not a general dispensing power. He said that in circumstances where a fresh application can be made whilst the appellant is still a minor, the correct way to proceed is for a fresh application to be made.
7. In the respondent's rule 24 response, the respondent concedes Judge Zucker erred in failing to make findings as to the relationship between the appellant and his sponsor, and to consider whether the decision to refuse entry clearance is in the end disproportionate, when the tuberculosis screening certificate had been provided by the appellant to the Tribunal, albeit, it had not been presented at the time of application.
8. The only ground of appeal available to the appellant was that the respondent's decision is unlawful under s6 of the Human Rights Act 1998. The judgment of the Supreme Court in Agyarko -v- SSHD [2017] UKSC 11 confirms that the fact that the immigration rules cannot be met, does not absolve decision makers from carrying out a full merits-based assessment outside the rules under Article 8, where the

ultimate issue is whether a fair balance has been struck between the individual and public interest, giving due weight to the provisions of the Rules.

9. I accept that the decision of the FtT is infected by an error of law and that the appropriate course is for the decision of Judge Zucker to be set aside. As to disposal, I agree that the appropriate course is for the matter to be remitted to the FtT for hearing *de novo* with no findings preserved. I have decided that it is appropriate to remit this appeal back to the First-tier Tribunal, having considered paragraph 7.2 of the Senior President's Practice Statement of 25th September 2012. In my view, in determining the appeal, the nature and extent of any judicial fact-finding necessary will be extensive.
10. For the avoidance of any doubt, as set out in the respondent's rule 24 response, Judge Zucker did not find that the appellant and his sponsor are related as claimed. At the hearing of the appeal, the appellant will be required to address each of the reasons advanced by the respondent for refusing the application.
11. The parties will be advised of the date of the First-tier Tribunal hearing in due course.

Notice of Decision

12. The appeals are allowed and the decision of Resident Judge of the FtT Zucker promulgated on 31st January 2020 is set aside.
13. The appeal is remitted to the FtT for a fresh hearing of the appeal with no findings preserved.

Signed *V. Mandalia*

Date: 4th November 2020

Upper Tribunal Judge Mandalia