IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-002327

First-tier Tribunal No: EA/07410/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

8th September 2023

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

DEREK ESHUN TRAWELI

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mr Antwi-Boasiako, legal representative of Midland Solictors
For the Respondent: Mr Melvin, Senior Presenting Officer

Heard at Field House on 29 August 2023

DECISION AND REASONS

1. The appellant appeals with the permission of First-tier Tribunal Judge Hatton against the decision of First-tier Tribunal Judge Jepson ("the judge"). By his decision of 15 March 2023, Judge Jepson dismissed the appellant's appeal against the respondent's refusal of his application for entry clearance under Appendix EU (FP) of the Immigration Rules.

Background

2. The appellant is a Ghanaian national who was born on 1 February 2001. On 18 February 2022, he made an application for a family permit in order to join his claimed father, Ibrahim Traweli, an Italian national who was born on 11 November 1970 and lives in Northampton. The application was supported by a number of

documents including a copy of the appellant's Ghanaian birth certificate and various remittance slips. There was also a DNA report from a company called Genoma, based in Rome, which suggested a greater than 99% likelihood of the appellant and the sponsor being related as claimed. This DNA report, which I shall refer to as 'the Genoma report' was dated 7 February 2022.

3. The application was refused by the respondent on 23 July 2022. There was a single reason given for the refusal, which was that the respondent was not satisfied that the appellant was the family member of a relevant EEA citizen. She reached that decision because the appellant's birth certificate had been issued in 2011 and evidence from the US Department of State indicated that birth registrations which were not made within a year of birth could be accomplished on demand with little or not supporting documentation required. She made no mention of the Genoma report.

The Appeal to the First-tier Tribunal

4. The appellant appealed to the First-tier Tribunal. In his grounds of appeal, he submitted that the respondent had produced no Document Verification Report ("DVR") in order to substantiate her concerns about the birth certificate. It was also submitted that the respondent had simply ignored the DNA report. He requested an oral hearing.

5. The appeal came before the judge, sitting in Birmingham, on 8 March 2023. The sponsor did not appear and there was no representative for the appellant. A Presenting Officer (not Mr Melvin) represented the Entry Clearance Officer. The judge decided to hear the appeal in the absence of the sponsor and any representative, having confirmed that the notice of hearing was sent to the sponsor's last known address. The judge heard a submission from the Presenting Officer and reserved his decision.

6. In his reserved decision, the judge recorded that the Presenting Officer has argued that the DNA report did not meet 'Home Office requirements'. The Presenting Officer had provided the judge with a copy of some guidance on DNA reports from gov.uk. The laboratory was not on the list of approved sites and there was no detail provided concerning the identity of the sample providers and how that was established.

7. The judge agreed with these submissions. He attached little weight to the DNA report for that reason, and he also accepted the respondent's criticism of the birth certificate, noting that the appellant had offered no explanation for the delay between his birth and his registration. He dismissed the appeal, finding that the appellant and the sponsor had not established on the balance of probabilities that they were related as claimed.

The Appeal to the Upper Tribunal

8. The appellant appealed to the Upper Tribunal. The grounds are commendably concise. It was submitted that the respondent had not provided a DVR to prove that the birth certificate could not be relied upon, especially when it was

supported by the 'unapproved' DNA report. The appellant sought permission to provide an 'approved' DNA report.

9. Judge Hatton considered these grounds to be arguable. He noted that the gov.uk guidance had been relied upon for the first time at the hearing and he doubted whether the judge was correct to hold that this was procedurally fair merely because the document was publicly available. He considered it arguable that the judge should have adjourned the hearing to give the appellant an opportunity to address this new concern. Judge Hatton also saw merit in the suggestion that the appellant should be afforded an opportunity to obtain a new DNA report in the circumstances.
10. In preparation for the hearing, the appellant's solicitors filed a new DNA report from a company called DNA Diagnostics Center, stating that the probability of paternity is 99.99999998%.

Submissions

11. Mr Melvin filed a skeleton argument in response to the appellant's appeal. Having spoken to Mr Antwi-Boasiako so as to ensure that I understood the way in which he put his case, I turned to Mr Melvin for his submissions.

12. Mr Melvin submitted that the ECO would have considered all of the documentary evidence submitted with the application, including the Genoma report, even if no mention was made of that repot. There was an obvious difficulty with that report and the appellant's solicitors ought to have recognised that the report was from an unapproved provider and arranged for another report. The birth certificate was obviously deserving of little weight for the reasons given by the ECO and the judge had been correct so to find. In the circumstances, and recalling what was said by Lewison LJ in *Volpi v Volpi* [2022] EWCA Civ 464; [2022] 4 WLR 48, the judge was entitled to attach little weight to the documentary evidence of the relationship and to find that the appellant and the sponsor were not related as claimed.

13. I indicated at the conclusion of Mr Melvin's submissions that I did not need to hear from Mr Antwi-Bosiako in response and that I was satisfied that the judge's decision was vitiated by procedural error. I invited submissions on the relief which should follow.

14. Mr Antwi-Boasiako invited me to remake the decision immediately. Mr Melvin was also content that I should do so. He stated that he had no submissions on the DDC report and that the ECO understood that the Tribunal might find that evidence was sufficient to conclude the appeal.

15. I indicated that the decision on the appeal would be remade by allowing it. My reasons for doing so are as follows.

Analysis

(i) The FtT's Error

16. Despite Mr Melvin's submissions to the contrary, I am wholly satisfied that the judge reached his decision by a procedurally unfair route. As I have recorded above, the ECO had taken one point in the decision. She had concluded that she could not rely on the birth certificate because documents issued many years after a birth were unreliable. She had given perfectly sound reasons for that concern. Oddly, however, the ECO ignored the other document which was said to confirm the relationship between the appellant and the sponsor: the Genoma report. Mr Melvin was able to confirm that this document had been in front of the ECO and he invited me to conclude that she must have considered it.

17. Whether or not the ECO considered the Genoma report, the fact remains that she said nothing about it. That silence caused the appellant to maintain in his grounds of appeal to the FtT that the ECO had simply ignored a document which was probative of the relationship.

18. When the matter came on for hearing before the judge, he noted that there was no appearance from anyone on the appellant's side. He checked that the notice of hearing had been properly served and he decided to proceed in the appellant's absence. All of these steps were properly taken and the judge cannot be criticised for proceeding with the hearing at the outset. That changed, however, when the Presenting Officer produced the gov.uk guidance on DNA reports. That guidance and the submissions which were based upon it represented a completely new objection to the Genoma report, which had previously been unchallenged.

19. A judge in the First-tier Tribunal has a discretion as to whether to proceed with a hearing when one party is not in attendance. That discretion is not merely to be exercised at the start of the hearing; it is to be kept under review, as is clear from 19.64 of the current edition of *Macdonald's Immigration Law and Practice*. Where, as here, a new point is taken by the represented party, the judge should consider whether the correct course is still to determine the appeal in the absence of the party in question. In some circumstances, the only fair course will be to adjourn the appeal so that notice can be given of the new point which is taken by the represented party. In my judgment, the judge fell into error in failing to keep his discretion under review, and he erred in failing to adjourn the hearing in order that the appellant could be alerted to the new point which was taken against him. It is in the nature of a fair hearing that a party is forewarned of the case against them. Where, as here, the appellant hung his hat to a significant extent on the Genoma report, it was not procedurally fair for him to learn of the concerns about that report only when he received the decision of the judge.

20. I am not persuaded by Mr Melvin's submission that it was for the appellant's solicitors to recognise for themselves the difficulty with the Genoma report and to commission a new report. DNA testing is not cheap. Where the ECO had said nothing about the DNA report, it was perfectly proper for the solicitors to proceed on the basis that this evidence had been ignored and not to advise the appellant (or, more likely, the sponsor) that there was no need for any further DNA evidence.

21. Nor am I persuaded by the judge's suggestion that the appellant was not prejudiced by the new point because the gov.uk guidance on which the Presenting Officer relied is in the public domain. So much material is now in the public domain and the fact that a document is available on the internet is not a panacea for what would otherwise be obvious procedural unfairness.

22. In my judgment, therefore, the decision of the judge was vitiated by procedural unfairness and must be set aside.

(ii) Remaking the Decision on the Appeal

23. The advocates agreed that I was able to remake the decision on the appeal without further ado. I agree. The DDC report confirms that the appellant is the sponsor's son. DDC is an approved organisation and the samples were plainly taken in a manner which confirmed the identities of the appellant and the sponsor. Mr Melvin quite rightly said nothing about this new report. That resolves the single issue taken by the ECO against the appellant. Mr Melvin did not seek to invoke the principle in *R v IAT ex parte Kwok-on-Tong* [1981] Imm AR 214 so as to submit that there is any other reason why the appellant is unable to meet the requirements of the Immigration Rules.

Notice of Decision

The decision of the FtT involved the making of an error on a point of law and is set aside. I remake the decision on the appeal by allowing it under the Immigration Rules.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

29 August 2023