IAC-FH-CK-V2

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/17353/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13 August 2015	**On 25 August 2015**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

NT
(ANONYMITY DIRECTION MADE)

Appellant

And

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mr S Walker, Home Office Presenting Officer
For the Respondent: Mr R Ojukotola, S L A Solicitors

DECISION AND REASONS

1. The appellant (NT) is a citizen of Colombia and his date of birth is 3 December 2012. His mother, the sponsor (MT) is a citizen of Colombia with permanent residence pursuant to the Immigration (EEA) Regulations 2006 ("the 2006 Regulations").

2. The appellant made an application for entry clearance which was refused by the ECO in a decision of 11 July 2013.

3. The appellant appealed against the decision and the appeal was allowed by First-tier Tribunal Judge Majid. I set aside that decision on the basis that the judge made a material error of law for the reasons identified at paragraphs 9 – 12 of my decision of 13 April 2015.

> "9. In my view the Judge made material errors in his decision. There is no merit in the submissions made by Mr Unigwe. There was no identification by the FtT of the date of the decision. There was no proper assessment of the appeal under the relevant Immigration Rule. There was no assessment of sole responsibility (which was the basis of the appellant's case). In any event, there was no proper assessment of paragraph 297(i)(f). It is not the case that the appeal was allowed under this limb of 297 in the alternative. The judge did not identify any rule under which he purported to allow the appeal. The assessment under Article 8 is inadequate and insufficient. For these reasons I set aside the decision of Judge Majid in its entirety.
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> 10. It is a fact that the appellant's mother has been at some time legally resident in the UK and she has another son who is a British citizen. Her evidence is contained in a skeletal and inadequate witness statement. It is dated 20 October 2014. It is her evidence that she returned to Colombia when pregnant with the appellant and she gave birth to the appellant there. It is not clear from the evidence when she returned to the UK. It is not clear whether she was in the UK at the date of the decision. Her evidence is that she and the appellant have no contact with the appellant's father who is a Colombian national who lives in Chile. The appellant's mother returned to the UK, leaving the appellant with her mother in Colombia who cannot cope with him because she is elderly.
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> 11. The sponsor was not at the hearing before me. I was informed by her representative that she had returned to Colombia in order to be with her son in March of this year and it is expected that she returns on 23 April 2015.
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> 12. Mr Jarvis submitted that the matter should be remitted to the First-tier Tribunal. Mr Unigwe did not have a view. My concern is that this appeal concerns a very young child. I am concerned about the history of the case and the manner in which it has been managed by both parties. There has been non-compliance with the directions of the FtT by the Secretary of State and a failure by both parties to grapple with the issues in the case. In the light of the issues I adjourned the case for an oral hearing before me in the UT on 29 April 2015."

4. I made a number of directions including the making of an anonymity direction in the light of the appellant and his brother's age. The hearing was resumed before me on 1 July 2015. On this occasion the sponsor attended the hearing. She stated that the solicitors which were on record, had informed her that they would be unable to attend the hearing today. According to the sponsor she has paid them to attend the hearing. The usher made contact with the solicitors using a mobile number given to her by the sponsor. Initially she was informed that they were not aware of the hearing today and then she was told that a representative would attend the hearing immediately. This was 11.30am. I put the matter back in order to await the attendance of the appellant's solicitor once they had indicated on the telephone to the usher that a representative was on his way to Field House. I resumed the hearing at 12.20 as a representative had not attended by that time. The sponsor had attended

unprepared to participate fully in the proceedings without a representative. She sought an adjournment to find a representative. I was of course concerned about the excessive delay to date, but reluctantly agreed to an adjournment. At this point Mr Ojukotola arrived at the hearing. He explained that he did not have instructions or funds on account and was therefore unable to represent the appellant. He could not explain why the solicitors were still on record. This was most unimpressive particularly considering the history of the case and that it involves a young child. However, considering the overriding objective (Rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008), I maintained my decision to adjourn the matter. The hearing was adjourned to 13 August 2015.

The Evidence and the Hearing

5. The appellant relied on a bundle containing 96 documents including the sponsor's witness statement of 20th of July 2015. In addition the sponsor submitted a letter from eldest son's school confirming periods of absence as a result of visits to Colombia.

The Sponsor's Evidence

6. The sponsor relies on her witness statement of 28 July 2015 in addition she gave oral evidence at the hearing before me. Her evidence can be summarised.

7. The sponsor has permanent residence in the UK pursuant to the 2006 Regulations. She has an older son (AT) who is a British citizen and his date of birth is 4 March 2009. The father of her two sons is a Colombian national who is resident in Chile. The sponsor travelled to Colombia on 23 December 2011 to visit her mother who was unwell in addition she had arranged to meet the father of her eldest child. During her visit the sponsor fell pregnant. Under pressure from her mother the sponsor married the child's father on 3 November 2012. She gave birth to the appellant on 3 December 2012. The sponsor and her children were abandoned by her husband and father one week after the appellant's birth. He returned to Chile and has not had contact with them since. He plays no role whatsoever in the life of his children. The sponsor had wanted to return to the UK before giving birth but her pregnancy was classed as high risk she was not authorised to travel by a doctor. She made an application for the entry clearance for the appellant on 26 March 2013 and the application was refused on 11 July 2013. The sponsor returned to the UK on 23 July 2013 with her eldest son leaving the appellant behind with her elderly and unwell mother.

8. The sponsor had to return to the UK so her eldest son could continue his education here and she was compelled to leave her youngest son in the care of her mother. She has since travelled to Colombia on two occasions in order to be with him. The appellant has had health complications since his birth and on one occasion the sponsor had to return to Colombia because he was admitted to hospital for a week. Her eldest son has had extensive periods away from school as a result. The sponsor's mother's health is deteriorating and it is difficult for her to take care of the appellant.

9. Prior to travelling to Colombia in December 2011 the sponsor was employed by as a housekeeper/cleaner earning £800 a month. Whilst she was in Colombia she earned the equivalent of £400 a month from rental income from a property which she owns in Colombia. In addition she had savings in Colombia the equivalent of £3,800 and savings in the UK of £1,149.20. She resumed employment as soon as she returned to the UK and is currently earning £800 a month working as a housekeeper/cleaner.

10. The sponsor was not legally represented when she submitted her son's application and she thought that she needed to establish that she was earning £22,400. At the time her son was only three months old and she had been abandoned by her husband. This prompted her to change the date on the document from Dynamic Cleaning Ltd from 9 September 2011 to March 2013 in order to attempt to establish that she was employed at that time. However she admitted this on the telephone to the respondent and apologised accordingly.

Findings and Reasons

11. There has been considerable confusion about the date of the decision in this case. Mr Jarvis helpfully submitted a skeleton argument in accordance with directions. It is clear to me that the date of the decision in this case is 11 July 2013. Unfortunately that decision was not served on the appellant until 30 January 2014. The wrong decision was served on the appellant and to exacerbate the confusion the appellant's own solicitors have attached the wrong decision to the notice of appeal and have previously referred to it as the relevant decision. The ECO refused the application pursuant to 297 (1) (e) and (iv) of the Immigration Rules ("the Rules"). It was also concluded the sponsor had tried to mislead the ECO by changing the date of employment in a letter and it was concluded that the company for which she stated she worked was not contactable and there was no record of it. The tenancy agreement that the sponsor submitted is dated 2004 and as such could not be relied upon in support of the application. It was not accepted that the sponsor has sole responsibility of the appellant. The Entry Clearance Manager who reviewed the decision maintained it in a decision of 18 March 2014.

12. I had the benefit of hearing the sponsor gave oral evidence and I found her to be credible. I accept her evidence. There was no significant challenge to it made by Mr Walker. I take on board the issues raised by the ECO and will deal with these.

13. The Secretary of State relies on paragraph 320 (7A) of the Rules. There was no explicit reference to this in the Reasons for Refusal Letter, but deception was clearly raised as an issue. The respondent has since made it clear in Mr Jarvis' skeleton argument of 21 April 2015 that paragraph 320(7A) in issue. Mr Ojukotola submitted that the respondent's decision to rely on 320 (7A) is not in accordance with respondent's policy, but he was not able to submit or properly identify the relevant policy of IDIs on which he relied. It is obvious that the document in question is a false documents and that it was submitted by the sponsor as opposed to the appellant is not material for the purposes paragraph 320 (7A). When the sponsor was interviewed she admitted having tampered with a document and having

submitted in support of the application because she could not meet the maintenance requirement of the Rules. In accordance with AA (Nigeria) v SSHD [2010] EWCA Civ 773, it is clear to me that paragraph 320 (7A) of the Rules is engaged in this case which results in a mandatory refusal.

14. It follows that the appellant would not be able to satisfy the requirements of paragraph 297 of the Rules because he falls for refusal under the general grounds for refusal (297(vii)). However, in my view the appellant has established that 297(i)(e) of the Rules is satisfied. At the date of the application and the decision on any account, I am satisfied that the sponsor had sole responsibility for the appellant. I accept her evidence that she had effectively been abandoned by his father. At the date of the decision she was still in Colombia. In any event, having accepted the sponsor's evidence I also conclude that in this case there are serious and compelling family or other considerations which make exclusion of the child undesirable and that he would therefore satisfy 297(i)(f). I reach this conclusion based on the appellant's age. He was three months old at the date of the application and six months old at the date of the decision and this in itself amounts to a serious and compelling consideration. The arrangement that he was to be cared for by his elderly and unwell grandmother was clearly meant as a temporary arrangement. It is obvious in this case that the best interests of the appellant are served by being with his mother. I have had particular regard to the decision in Mundeba (s.55 and para 297(i) (f)) Democratic Republic of Congo [2013] UKUT 00088, but will expand on this in relation to Article 8.

15. I next turn to the issue of accommodation and maintenance pursuant to paragraph 297(iv) of the Rules. The sponsor's evidence is that at the time of the decision she was living in her own house in Colombia with her mother and her sons. There is no reason to believe that the accommodation which she described in evidence was not adequate.

16. Mr Ojukotola submitted a document which was entitled "Benefits and Pension Rates" which appeared to have been issued by the Department for Work and Pensions in April 2013. He asserted on reliance of that document that the income support level for a lone parent aged 18 or over was £72.40 and he submitted that it may be that a family premium of £17.45 should be included. In order to establish that maintenance is adequate and applicant needs to show that the resources available will meet or exceed the relevant income support level set by the United Kingdom government KA (Pakistan) [2006] UKAIT 00065. In calculating the level of resources that will be available to the appellant and family members it is based on the position after the appellant's hypothetical arrival in the United Kingdom. An appellant in an immigration appeal must be able to demonstrate either that the actual financial position on arrival will be such as to make it unnecessary to rely on benefits in order to provide a standard of living equivalent to that available on means tested benefits or that there will be no additional recourse to public funds in so relying (Yarce (adequate maintenance: benefits) [2012] UKUT 00425). The appellant carries the legal burden of proving that he meets the relevant requirements of the Rules. The sponsor's evidence is that when she returned to the UK she resumed work immediately. However the fact is that at the date of the decision she was

unemployed. Considering the adequacy of maintenance on the basis of the hypothetical situation (see above), the sponsor would be returning to the UK with her two sons without employment. However, I accept that she had property in Colombia which gave her an income that would be available on arrival plus modest savings. There was no challenge to this evidence by Mr Walker. On balance, I find the appellant is able to satisfy the maintenance requirement of the Rules.

17. The problem for the appellant is that he cannot satisfy paragraph 297 of the Rules because he falls for refusal under the general grounds of refusal. In these circumstances I must consider the case under Article 8.

18. In relation to Article 8 it is obvious that the issue turns on proportionality and this must be considered in the light of Section 117B of the 2002 Act. Having found that paragraph 297 (i) (e) and (f) are satisfied it follows in my view that the appeal should be allowed under Article 8. I have had regard to the case of Mundeba and the findings of the UT that where an immigration decision engages Article 8 rights, due regard must be had to the UN Convention on the Rights of the Child. An entry clearance decision for the admission of a child under 18 is an action concerning children undertaken by administrative authorities. At the date of the decision it was in the appellant's best interests to be with his mother and brother here in the UK. This remains the case. The appellant's brother is a British citizen. The evidence is insufficient to establish that it is in his best interests to remain here in the UK, but it is obvious that his best interests are served by remaining with his mother and for the family not to be fragmented. In addition that he is a British citizen is a strong pointer to the fact that his future lies in the UK. I accept that should the appeal be dismissed the result would be that in order for the family to be together the sponsor and her British citizen child would have to leave the UK. Should the sponsor decide to remain here for the sake of her eldest son, the family would remain fragmented and the young appellant without his mother. In relation to the sponsor's wrong doing, in a way that undermines the system of immigration control, is a factor which weighs strongly in the respondent's favour, but the children are blameless. I have taken into account that the sponsor intended to return to the UK before giving birth to the appellant but was not able to on the advice of a doctor in Colombia. I also take into account that when the sponsor made the application, the appellant was only three months old and she had effectively been abandoned by her husband.

19. The maintenance of immigration control is in the public interest. The sponsor has been dishonest. However, the family was at the date of the decision and continues to be self-supporting. This is the case whether or not I am correct about 297(iv). The sponsor asked for an interpreter at the substantive hearing, but she spoke English adequately at the hearing before me on the last occasion. She had been working in the UK before the date of the decision and was and is by any account integrated. Her status is neither unlawful nor precarious. She had at the date of the decision permanent residence here which continues. In my view the balance tips strongly in favour of the appellant in this case and the appeal is allowed under Article 8. I note that there has been significant delay caused by a number of factors in this case. Initially the respondent issued the wrong decision to the appellant and that the

sponsor may have been poorly served by her solicitors. In any event, the appellant is very young and entirely blameless.

20. The appeal is allowed. In these circumstances I take the unusual course of action and direct pursuant to section 87 (1) of the 2002 Act to direct the ECO to give effect to this decision forthwith.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Joanna McWilliam Date 21 August 2015

Upper Tribunal Judge McWilliam