Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/12646/2017

THE IMMIGRATION ACTS

Heard at Fox Court **Decision & Reasons Promulgated**
On 13th February 2019 **On 7th March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

MR MARK NTANDA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER – PRETORIA

Respondent

Representation:

For the Appellant: Ms Jane Rutaza-Babu, the Sponsor
For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant, a national of Uganda, appealed to the First-tier Tribunal against the decision by the Entry Clearance Officer to refuse entry clearance dated 15th August 2017. First-tier Tribunal Judge Moore dismissed the appeal in a decision promulgated on 10th August 2018. The Appellant now appeals with permission granted by Deputy Upper Tribunal

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Judge Davey on 11th January 2019 following a renewed application for permission to the Upper Tribunal.

2. There are two grounds of appeal, it is contended in the first ground that the First-tier Tribunal Judge erred in failing to adequately deal with the evidence in relation to the Appellant’s father’s death and his relationship to the Sponsor. It is contended in the second ground that the judge failed to properly apply the standard or proof setting the standard too high in considering the evidence as to the Appellant’s father’s death and the DNA evidence. It is further contended within that ground that the judge erred in his approach to the issue of responsibility under the Immigration Rules in that at paragraphs 21 and 22 he acknowledged that after the death of the Appellant’s father the Sponsor sent money to maintain the Appellant and employed maids to act as caretakers but sought further corroboration from the Appellant himself in relation to the issue of sole responsibility issues. It is contended that the documents produced show that the Appellant’s father was deceased, that the Appellant was the biological son of the Sponsor and that the Sponsor supported the Appellant.

3. The Entry Clearance Officer raised a number of issues in relation to the evidence. The Entry Clearance Officer considered that, because the Appellant’s birth certificate was dated 16th May 2017, approximately eighteen years after the child was born, he was not satisfied that the Appellant and Sponsor were related as claimed. The Entry Clearance Officer did not consider that the evidence provided was sufficient to establish that the Appellant’s father had died as claimed. The Entry Clearance Officer also considered that the Appellant had not established compelling family or other considerations which made his exclusion undesirable. In the circumstances, the Entry Clearance Officer was not satisfied that the Appellant had demonstrated that paragraph 297(i)(e) or (f) were satisfied.

4. There were therefore two main issues in dispute in the appeal in the First-tier Tribunal. In approaching the Appellant’s appeal the judge had therefore to decide whether the Appellant and Sponsor were related as claimed and whether the Appellant’s father had died as claimed. If it were established that the father was dead and the Sponsor is the Appellant’s mother then the Appellant meets the requirements of paragraph 297(i)(d) which sets out the requirements to be met by a person seeking indefinite leave to remain as the child of a parent present and settled in the UK where the other parent is dead. The issue of sole responsibility in paragraph 297(i)(e) only comes into play where one parent is present and settled in the UK and “has had sole responsibility for the child’s upbringing”. In circumstances where it is accepted that the Appellant’s father has died then there is no need to look at sole responsibility.

5. In this case the judge noted that the Appellant had left Uganda in 2002 leaving her two children with their biological father since he refused to consent to the children’s permanent relocation to the UK [9]. The judge noted the Sponsor’s claim that she had always played a close role in

relation to the upbringing of the children sending remittances until he died on 30th March 2017 [10]. The judge noted that the Sponsor's daughter is now married and lives an independent life [12]. The judge noted the Sponsor's evidence that she contributed to the maintenance of the family in Uganda from about 2011 but that things changed when the Appellant's father died and from that time she employed a maid to look after the Appellant and sent money to the maid to pay for school fees and for the maintenance and welfare of the Appellant. The first maid left after two or three months and a second maid was employed from April 2017 [13]. The judge considered the evidence in relation to the Appellant's father's death at paragraphs 17 to 20 and the relationship between the Appellant and the Sponsor. The judge considered that it was "odd" that the Appellant's birth certificate was issued on 16th May 2017 and the father's death certificate was issued on 17th May 2017. The judge did not accept the Sponsor's explanation that she did not know the dates when her son's birth and his father's death were registered. She said that as far as she was aware, the dates on the certificates were the dates when those certificates were processed by the registrar.

6. The judge went on to take into account the fact that there was no evidence of the Appellant's father's funeral and that the letter from the school in relation to the Appellant made no mention of the death of the Appellant's father [17]. The judge also took into account that there was no letter or witness statement from the housemaid and concluded that there was no credible evidence showing that the father of the Appellant is deceased [19].

7. In my view the judge's consideration of the issue of the father's death demonstrates that he applied a standard higher than the balance of probabilities in considering this issue. The judge had before him a death certificate issued on 17th May 2017 in relation to the death on 30th March 2017. The judge has given inadequate reasons for rejecting this death certificate basing that decision on a suspicion about the date on which it was issued. The judge has given insufficient reasons for rejecting the Sponsor's evidence as to the death of the Appellant's father. In my view the judge erred in requiring evidence about to the funeral and evidence from the person looking after the Appellant as to the death of the Appellant's father.

8. The judge has also failed to give sufficient reasons at paragraph 20 for rejecting the DNA evidence submitted confirming the relationship between the Appellant and the Sponsor. The DNA report dated 11th October 2017 was obtained after the date of the Entry Clearance decision. The judge found that there was "an absence as to the chain of custody records being provided which would demonstrate the reliability of the DNA test results and the absence of any likelihood of those results being unreliable". However, the Appellant's assertion that the DNA tests were undertaken by a company recommended by the Home Office for immigration purposes was not dealt with. There is no record in the decision of any specific challenge on the part of the Respondent to the DNA evidence obtained.

Mr Walker made no submission that the DNA evidence was open to criticism. In these circumstances I consider that the judge has applied too high a standard and has given insufficient reasons for rejecting the DNA evidence.

9. The judge went on to consider sole responsibility under paragraph 297(i)(e) of the Rules. The judge accepted that the Sponsor had regularly sent money to Uganda for the maintenance of welfare of the Appellant and his sister. However, the judge found that:

> “Up until the appellant’s father’s death it would appear that it was the father who made all the important decisions and would have ensured that his son went to school and that he was fed and cared for and looked after. Upon the death of the father I accept that the sponsor has employed maids to act as caretakers in the family home where the appellant now lives and appears to have lived all his life”.

10. The judge did not accept that the evidence from the school confirmed that the Sponsor had been in touch with the school to ascertain progress or obtain reports in relation to the Appellant [21]. However he did find at paragraph 22 that the Sponsor has for a number of years provided financial assistance and more recently had probably instructed a maid on two occasions to act as a caretaker and live at the family home with the Appellant.

11. At the hearing before me Mr Walker accepted that it appears that the judge erred at paragraph 22. The provision of paragraph 297(i)(e) requires only that the Sponsor “has had” sole responsibility for the child’s upbringing. In my view, the judge’s finding at paragraph 22 accepts that the Sponsor has had sole responsibility for the child’s upbringing since the death of his father. 297(i)(e) does not place any time restriction on sole responsibility. It may be that the Sponsor could not demonstrate that she had sole responsibility for the Appellant prior to the death of his father but it is clear from what the judge accepted at paragraph 22 that she did demonstrate that she had sole responsibility after the death of the father. I further note that the judge’s findings in relation to this matter are contradictory in that it appears that it was accepted for the purposes of the sole responsibility assessment that the child’s father had died but it was not accepted in considering the death certificate and other evidence that it had been established that he was deceased.

12. For all of the reasons set out above I consider that it has been established that the judge erred in his approach to the evidence in relation to the death of the Appellant’s father and the relationship with the Sponsor and to the assessment of sole responsibility. In these circumstances I set aside the decision in its entirety.

Remaking the Decision

13. In remaking the decision I considered the evidence before me as it was before the First-tier Tribunal and the additional oral evidence given by the Sponsor at the hearing. At the hearing the Sponsor said that prior to the death of his father and the application to enter the UK the Appellant had not needed a birth certificate and only applied for it when it became a requirement in connection with his application. She said that the birth certificate was not needed for his day-to-day living but was only required for the application. She also said that as she is not in Uganda she had had to make the arrangements for the issue of the certificates by phone. She said that at the time of the hearing in the First-tier Tribunal and since then the Appellant has been residing with a maid. She also pointed out that the DNA evidence was obtained through NorthGene, a company recommended by the Home Office.

14. I have considered the application in the context of paragraph 297 of the Immigration Rules. In my view the death certificate, along with the Sponsor's oral evidence in relation to the provenance of that certificate, is sufficient to establish that the Appellant's father died on 30th March 2017. I accept on the basis of his birth certificate and the DNA evidence that the Appellant and the Sponsor are related as claimed. In these circumstances, as the Sponsor is present and settled in the UK and the Appellant's father is dead, the Appellant meets the requirements of paragraph 297(i)(d).

15. In the alternative, accepting that the Sponsor is the Appellant's mother, on the basis of the unchallenged findings at paragraph 22 made by the First-tier Tribunal Judge I accept that, since the death of his father, the Sponsor has had sole responsibility for the child's upbringing. In reaching this conclusion I take into account the evidence of remittances contained in the Respondent's bundle. I also take into account the letter from the Appellant's school dated 17th May 2017 giving the name of the Sponsor as the first emergency contact. I also take into account the evidence from the Sponsor that she has employed a maid to look after the Appellant.

16. In my view, as at the date of the application and the date of the decision, the Appellant met the requirements of paragraph 297 of the Immigration Rules. This paragraph is compatible with Article 8 of the European Convention on Human Rights and a weighty factor in assessing the proportionality of the refusal decision. In these circumstances I find that the appeal should be allowed on human rights grounds.

Notice of Decision

The decision of the First-tier Tribunal contains a material error of law and I set it aside. I remake the decision by allowing the appeal on human rights grounds.

No anonymity direction is made.

Signed Date: 5th March 2019

A Grimes
Deputy Upper Tribunal Judge Grimes

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make no fee award because the DNA evidence was not before the decision-maker.

Signed Date: 5th March 2019

A Grimes
Deputy Upper Tribunal Judge Grimes