



UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

APPEAL NUMBER: VA/13334/2013

THE IMMIGRATION ACTS

Heard at: Field House
On: 31 July 2014
Prepared: 11 August 2014

Determination Promulgated
On: 12 August 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

ENTRY CLEARANCE OFFICER: KINGSTON

and

MASTER TAYLOR FAIRCLOUGH

Appellant

Respondent

Representation

For the Appellant: Mr C Avery, Senior Presenting Officer
For the Respondent: Mr J René, Counsel

DETERMINATION AND REASONS

1. I shall refer to the appellant as "the entry clearance officer" and to the respondent as "the claimant".
2. The claimant is a national of Jamaica, born on 2nd October 2012.
3. His appeal against the decision of the entry clearance officer refusing his application made on 6 May 2013 for entry clearance to the UK as a visitor for six months to reside with Miss Yvonne Gray, a British citizen and his guardian, was allowed in a determination promulgated on 19 May 2014, under the immigration rules.

4. The Judge had regard to the evidence of Ms Gray and Mrs Rowena Christopher, Ms Gray's mother. They attended the hearing and gave oral evidence.
5. Ms Gray is 42 years old. She is single and has no children of her own. Her mother is also a British citizen, aged 62.
6. In June 2012 Ms Gray's mother was contacted by a family friend in Jamaica who explained Ms Fairclough's situation and her intention to abort her baby. Mrs Christopher met Ms Fairclough and persuaded her to keep the baby. It was hoped that the mother would bond with the child.
7. The claimant was born on 2 October 2012 but Ms Fairclough decided to put him up for adoption. Ms Gray discussed the situation with her mother and decided to try to adopt the claimant.
8. She contacted the Child Development Agency of Jamaica and began the formal adoption procedure. She also contacted the relevant department in the London Borough of Greenwich and began a six to nine month assessment procedure administered by the Inter Country Adoption Agency.
9. Ms Gray has visited the claimant regularly in Jamaica. She has 25 days' annual leave and since October 2012 she has used virtually all the time to visit him in Jamaica. This took place in November 2012, October 2013, and March 2014. The extended family, including the claimant, met for a holiday in Florida in May 2013.
10. Ms Gray transfers £200 a month to the Williams family in Jamaica to support the claimant.
11. Ms Gray is hoping to adopt the claimant. She wishes to go about the process in the correct legal manner. The purpose of the existing application is for the claimant to come and live with Ms Gray in the UK for an extended period of time, namely six months, so that their relationship can develop further. This will assist in the formal assessment and adoption process.
12. The Judge noted the relevant immigration rules, namely paragraph 46A. He found that both Ms Gray and Mrs Christopher were honest and credible witnesses. Ms Gray wants to become the mother of the child and it seems that adopting the claimant constitutes her best chance of motherhood. She is clearly a law abiding person who has gone to some lengths and expense to follow the correct procedure. He was satisfied that she would ensure that the claimant returns to Jamaica.
13. On 12 June 2014, First-tier Tribunal Judge Nicholson granted the entry clearance officer's application for permission to appeal. The grounds of appeal contended that

the claimant had applied for entry clearance to visit a person described as her legal guardian but who was not otherwise related to her. In those circumstances, and by virtue of the Immigration Appeals (Family Visitor) Regulations 2012 - 'the 2012 Regulations' - the claimant had a restricted right of appeal confined to human rights or race discrimination grounds.

14. The Judge proceeded to allow the appeal under the rules.
15. At the hearing on 31 July 2014, Mr Avery referred to the 2012 Regulations. For the purpose of the regulations, the claimant is a member of the family of a person if the claimant is a spouse, civil partner, father, mother, son, daughter, grandfather, grandmother, grandson, granddaughter, brother or sister. In addition, the claimant is a member of the family of such a person if he is the father in law, mother in law, brother or sister in law, son or daughter in law or stepfather, stepmother, stepson, stepdaughter, stepbrother or stepsister of the person.
16. Section 88A of the Nationality, Immigration and Asylum Act 2002 provides that a person may not appeal under s.82(1) of the Act against the refusal of an application for entry clearance unless the application was made for the purpose of visiting a person of a class or description prescribed by regulations for the purpose of the subsection or entering as the dependant of a person in circumstances prescribed by regulations for the purpose of this subsection.
17. Mr Avery thus submitted that only those persons visiting their immediate family (or that of the spouse or partner) retain the right of appeal. The only other ground of appeal able to be raised in the event of a refusal of such an application is that the decision is unlawful under the Race Relations Act or pursuant to s.6 of the Human Rights Act 1998.
18. The limited jurisdictional point had been taken by the entry clearance officer, who was unrepresented at the hearing. The Judge allowed the appeal, finding that the decision appealed against was unlawful due to contravening immigration rules [15] and [13]. The Judge made no findings on the claimant's human rights or Race Relations Act discrimination claims and the record of the proceedings does not refer to any submissions on those grounds.
19. On behalf of the claimant, Mr René submitted that the sponsor has a guardianship and custody order in her favour pronounced by the Family Court of Jamaica on 10 December 2012. I note however that the court only ordered that custody of the child be granted to Ms Yvonne Gray. There is no reference to a guardianship order that was made.
20. In any event he submitted that "for intended purposes" the sponsor is the mother of the claimant and/or in the alternative holds the "quasi parental responsibility" of the claimant.

21. Mr René submitted that it was 'implicit' that the grounds of appeal as set out at B7-11 of the respondent's bundle sought to include a reference to Article 8 of the Human Rights Convention. He referred to B9 where the sponsor stated that regarding the question of whether it would be in the best interests of the claimant to spend a prolonged time in the UK, 'it stood to reason' that as the person responsible for his financial care and well being she would want to know him and build a relationship with him. It did not mean that her intention was for him to spend the entire six months here. The application envisaged a shorter three months visit. It would also allow her to get to know the claimant.
22. It cannot be reasonable to leave the claimant in Jamaica when Mrs Williams and her husband visit the UK. The claimant is their foster child. Ms Williams would not be able to avail herself of the opportunity to visit the UK unless she can travel with her foster child.
23. In her witness statement, Ms Gray stated that this is a visit for the purpose of a holiday and to allow Mrs Williams and the claimant to spend time with her and enjoy her hospitality. The purpose of a visit is simply for a holiday and not for adoption. The claimant will be in the custody and care of his primary carer, Mrs Williams, during the visit.

Assessment

24. It is not disputed that the claimant does not qualify as a member of the family of Ms Gray within the regulations. The regulations do not include a person who holds the "quasi parental responsibility" of the person concerned.
25. Further, insofar as the human rights claim is concerned, the claimant did not seek to rely on such a claim in his appeal to the First-tier Tribunal. I have had regard to the skeleton argument which only sought to deal with the issues on the merits of the respondent's assertions with regard to paragraph 46A of the immigration rules.
26. Accordingly, submissions were made that there was no evidence to support the entry clearance officer's assertion that the claimant would remain in the UK, alternatively, that it is "pure speculation". It was further asserted that the claimant did have the intention to leave the UK and this still remains the case. The sponsor has gone to great lengths to ensure that she is fully aware of the adoption process requirements in the UK and in Jamaica. This demonstrates a respect for law.
27. Nor did the Judge direct himself so as to determine the appeal on the basis that the claimant only had a limited right of appeal. The immigration decision as set out in the reasons for refusal expressly stated that the claimant's right of appeal was limited to the grounds referred to in s.84(1)(c) of the 2002 Act.

28. Nor do I regard the grounds of appeal as implicitly raising Article 8. The purpose of a visit was stated to be simply for a holiday and not for adoption. The argument based on 'inference' in this regard is not sufficient. This is a matter of jurisdiction and the claimant must set out clearly the human rights case and grounds relied on.
29. I accordingly find that the decision of the First-tier Tribunal Judge contained an error of law for the reasons set out. The Judge was not referred to the limited right of appeal. Nor did he deal with the Article 8 claim which was simply not raised. I accordingly set aside the decision of the First-tier Tribunal Judge and re-make it, dismissing the claimant's appeal.

Decisions

The determination of the First-tier Tribunal involved the making of an error on a point of law. Having set it aside I remake it dismissing the claimant's appeal

I set aside the fee award.

No anonymity direction made

Signed

Date: 11/8/2014

C R Mailer

Deputy Upper Tribunal Judge