Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/05857/2016**

HU/05861/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 16 March 2018	**On 20 March 2018**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

MIMI AKOUSA BOAFO
REGINALD KWABINA BOAFO
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

ENTRY CLEARANCE OFFICER - SHEFO

Respondent

Representation:

For the Appellants: Miss F Allen, Counsel instructed by Polpitya & Co
For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. The Appellants appeal against the decision of First-tier Tribunal Judge M A Khan promulgated on 13 July 2017 ("the Decision"). By the Decision the Judge dismissed the Appellants' appeals against the Respondent's decisions dated 28 January 2016 refusing their applications for entry clearance to join their father ("the Sponsor") in the UK and rejecting their Article 8 human rights claims.

2. The Judge did not accept that the Sponsor was in fact the Appellants' father. He also found that the Sponsor did not have sole responsibility for the Appellants as a parent and there were no exceptional and compelling circumstances justifying the Appellants' entry to the UK. He found therefore that the Respondent's decisions did not breach the Appellants' rights under Article 8 ECHR. On that basis he dismissed both appeals.

3. In relation to the first of those issues, namely the Sponsor's relationship to the Appellants, the Appellants sought an adjournment of the First-tier Tribunal hearing in order to provide DNA evidence which was expected to be forthcoming very shortly. The Judge refused that adjournment request. The DNA evidence was in fact available the day after the hearing (22 June) and was sent to the Tribunal on 23 June; therefore, before the Decision was promulgated. As appears from the Tribunal file, however, although the DNA report was in fact faxed to the IAC at Hatton Cross on 23 June, it did find its way to the file until 7 August 2017 and the only document printed to the file is the covering letter. There is no copy of the DNA report on file. I am though prepared to accept what is implicit from the grounds of appeal, namely that the DNA report shows that the Sponsor is the Appellants' father.

4. The refusal to adjourn the hearing and the failure to take the DNA report into account forms the principal ground of appeal. There are two further, subsidiary grounds which challenge the Judge's finding that the Appellants attend boarding school and that the Judge misquoted an e-mail on which the Second Appellant relies to show the Sponsor's involvement in his education.

5. Permission to appeal was granted by First-tier Tribunal Judge Birrell on 24 December 2017 in the following terms (so far as relevant):-

> "...[2] The grounds assert that the Judge erred in that there was procedural unfairness in refusing an adjournment to obtain DNA evidence and failing to consider the DNA evidence submitted the day after the date of hearing but before the promulgation of the decision;
>
> [3] The assessment of the merits of adjournment request at paragraph 7 is very brief with no reference to any guiding principles. It is unclear whether the DNA evidence was ever sent to the Judge. The grounds disclose arguable errors of law."

6. The matter comes before me to assess whether the Decision does disclose an error of law and to re-make the decision or remit to the First-tier Tribunal for re-hearing.

Discussion and conclusions

7. Miss Allen indicated at the outset that, following discussions between herself and Mr Walker, the Respondent conceded that the failure to adjourn constituted an error of law and that the appeals should, for that reason, be remitted to the First-tier Tribunal for re-hearing. Mr Walker confirmed that position.

8. Miss Allen directed my attention to [23] of the Decision where the Judge said this:-

> "[23] Relationship between appellants and the sponsor is disputed by the respondent, the documents provided in support of the claimed relationships are wholly unreliable, they do not, on the balance of probabilities establish the relationship between the appellants and the sponsor."

As is clear from that paragraph, therefore, the finding that the Appellants were not related to the Sponsor as claimed forms part of the Judge's reasoning.

9. The Judge dealt with the adjournment request as follows:-

> "[5] Ms Allen of Counsel for the appellants' made an application for an adjournment on the grounds that the relationship is in dispute in this case and that a DNA test report is in process of being adduced as evidence to establish the relationship.
> [6] Ms Chopra of Counsel for the respondent opposed the adjournment request stating that the refusal is dated 28/01/2016 which is nearly 18 months.
> [7] Ms Allen could not say why it has taken her instructing solicitor so long to request a DNA evidence. I refused to adjourn the matter on the grounds that those instructing Ms Allen have had more than sufficient time to provide evidence in support of this case. It is in the interest of fairness and justice that the case should proceed to hearing."

10. The Appellants rely in their grounds of appeal against the Decision on the case of Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC). The headnote in that case reads as follows:-

> *"If a Tribunal refuses to accede to an adjournment request, such decision could, in principle, be erroneous in law in several respects: these include a failure to take into account all material considerations; permitting immaterial considerations to intrude; denying the party concerned a fair hearing; failing to apply the correct test; and acting irrationally. In practice, in most cases the question will be whether the refusal deprived the affected party of his right to a fair hearing. Where an adjournment refusal is challenged on fairness grounds, it is important to recognise that the question for the Upper Tribunal is not whether the FtT acted reasonably. Rather, the test to be applied is that of fairness: was there any deprivation of the affected party's right to a fair hearing? See SH (Afghanistan) v Secretary of State for the Home Department [2011] EWCA Civ 1284."*

11. Whilst I do not consider the Judge's failure to refer to that case when considering the adjournment request as fatal, the Judge needed to show that he had considered the impact of the refusal to adjourn on the fairness of the hearing for the Appellants. Whilst he was entitled to take into account the Appellants' failure to seek out the DNA evidence at an earlier stage, he did not for example take into account that the production of that evidence was expected very shortly and that an

adjournment of the appeal was therefore likely to be of very short duration. He could have considered (but did not) whether a direction could be made to permit the Appellants to adduce the DNA evidence after the hearing and before the Decision was made, thereby ensuring that if the DNA evidence was submitted, it would have been filed expressly in accordance with that direction and might have therefore reached the file before the Decision was taken. He might have considered (but did not) whether he should simply assume in the absence of evidence but in the interests of fairness that the Appellants are related as they claim and gone on to consider the other issues. In that way, even without an adjournment, the Decision might have remained sustainable based on the other findings as to sole responsibility.

12. As it is, though, the taking into account of the lack of DNA evidence having refused a short adjournment precisely for the purpose of producing that evidence and a finding that this was fatal to their case is unfair to the Appellants. For that reason, I accept that the Respondent's concession is one which should be accepted.

13. I would not have found an error on account of the Judge's failure to take into account the DNA evidence as it is clear from the file that the evidence was not brought to the Judge's attention prior to promulgation of the Decision. Similarly, I would not have found an error in relation to the e-mail relied upon by the Second Appellant. The Judge's summary of that evidence at [25] is a fair one. I do accept though that the Judge was not entitled to find in the same paragraph that the Appellants attend boarding school. They may well do so; I do not know. However, there is insufficient evidence before the Judge to show that they do and this amounts to impermissible speculation. I do not in any event retain any of the Judge's findings.

14. I discussed with the parties whether it was appropriate to remit the appeals or whether the decision could be re-taken in this Tribunal. Both parties were adamant that the appeals should be remitted.

15. I have had regard to the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal. That reads as follows:-

> "[7.2] The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:-
>
> (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
>
> (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal."

16. In this case, in light of what I say at [11] and [12] above, the effect of the error has been to deprive the Appellants of a fair hearing. Accordingly, the appropriate course is to remit the appeals to the First-tier Tribunal for a fresh hearing before a Judge other than M A Khan. When preparing these appeals for re-hearing, the Appellants should note that the DNA report on which reliance is placed does not appear on the Tribunal's file and that a further copy of that will therefore need to be lodged in advance of the hearing.

DECISION

I am satisfied that the Decision involves the making of a material error on a point of law. The Decision of First-tier Tribunal Judge M A Khan promulgated on 13 July 2017 is set aside. The appeal is remitted to the First-tier Tribunal for re-hearing before a different Judge.

Signed Dated: 19 March 2018

Upper Tribunal Judge Smith