



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/27515/2016

THE IMMIGRATION ACTS

Heard at Field House
On 20th July 2018

Decision & Reasons Promulgated
On 20th August 2018

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

LAURENCE CLARKSON
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER - SHEFFIELD

Respondent

Representation:

For the Appellant: Mr Sesay, pro bono
For the Respondent: Ms Kiss, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Sierra Leone born on 24 August 1998. His appeal against the refusal of entry clearance as a family member under paragraphs 352A and 319V of the Immigration Rules (pre-flight family reunion) was dismissed on human rights grounds by First-tier Tribunal Judge Zahed on 19 January 2018.
2. Permission to appeal was granted by P J M Hollingworth on the following ground: "It is arguable the absence of a decision as to funding prior to the hearing taking place has led to difficulty in the presentation of the case and that unfairness arises on that footing."

Submissions

3. Mr Sesay submitted the refusal of an adjournment was unfair because the Appellant could not get legal representation. This amounted to a procedural error. The merits of the case were not material. If the Appellant had had legal representation he could have been assisted with submitting evidence to support his case. It was not open to the judge to find that there had been a lack of contact for ten years. The Sponsor had feared persecution, he had since had contact with the Appellant having visited him in the Gambia and there were photographs of that visit in the bundle before the judge. There was also evidence of WhatsApp conversations and other matters on the Sponsor's mobile phone.
4. Mr Sesay relied on SH (Afghanistan) [2011] EWCA Civ 1284 and submitted that it was fundamental the Appellant had an opportunity to respond to an adverse decision. There was a witness statement before the judge and the Sponsor would have been able to collate evidence of actual contact and put these matters before the judge had he had legal representation. Mr Sesay confirmed that the judge's findings at paragraph 11 were correct, but the judge had failed to take into account evidence of contact, namely visits to Gambia, telephone conversations and WhatsApp. Mr Sesay also produced a number of money transfer receipts, however on viewing those receipts none of them showed money passing from the Sponsor to the Appellant. Mr Sesay submitted that had the judge granted the adjournment this would have enabled the Sponsor to have prepared a statement dealing with the evidence and explaining it properly before the judge.
5. Ms Kiss submitted that the evidence now submitted did not assist the Appellant. He had the benefit of representation pro bono. At the time of the hearing before the First-tier Tribunal he was unable to say when he would be able to obtain representation. In any event, the Appellant could not meet the Immigration Rules and this reflected on the human rights situation. The Appellant was aged 20 at the time of the decision, and the evidence submitted now did not show a close relationship. The relationship was that of uncle and nephew and the Appellant had been living with a cousin who had cared for him since his mother died. There was an absence of family life between the Appellant and the Sponsor and an absence of evidence to show more than normal emotional ties even though the Sponsor had since had the benefit of legal advice. The hearing before the First-tier Tribunal was ten months ago.
6. In response, Mr Sesay submitted that legal aid was refused yesterday on 19 July 2018. The Appellant was a minor at the date of his application and whilst it was accepted that he could not satisfy the Immigration Rules, the Sponsor was a de facto parent because of the circumstances. The Appellant and Sponsor were part of the same household until the tragic death of the Appellant's mother. If the Sponsor was not considered to be a de facto parent, then he was certainly a psychological parent pre-flight. The Appellant through the Sponsor had not been given an opportunity to represent his case properly.

Grounds of appeal

7. The grounds of appeal were submitted by Mr Graham, the Appellant's Sponsor. He states:

- "1. I attended the hearing on 17.10.17 to ask for the appeal to be adjourned as I applied for legal aid funding to the legal aid directly. I did not receive a decision in time for my appeal. I told the Judge that I was not represented because my legal aid application was not decided. The judge said it was alright to proceed because the Home Office was not also represented. He asked me a few questions which I answered. This case was difficult for me and I did not have money to pay lawyers. I wanted the case adjourned so that I will be represented when legal aid was in place.
2. During the hearing I had a bundle of documents which I said to the judge that I had. He took only a copy of two pages of my screening interview note. The judge saw that Lawrence (sic) was named as my dependant although his date of birth was wrongly put in the interview notes (it is 24 not 14). He asked if I was in contact with Lawrence which I said yes. I took the receipts and money transfers, correspondence and informed the judge that I travel to Gambia to meet Lawrence as I was a refugee and could not travel to Sierra Leone. I had evidence of contact which I offered to show the judge but the judge said it was not necessary to look at it. He only took copy of two pages of my screening interview and said he will send this when he sends his decision. I did not receive this with the decision.
3. I feel that I did not have an opportunity to put my case. I feel that it was unfair for the judge not to have considered my evidence which I have and not to adjourn the hearing as I have all the documents that the judge referred to as missing in his decision. This is the reason that I wanted the case adjourned.

I would ask for permission to appeal the decision of the judge which also took too long to arrive".

The judge's findings

8. The judge made the following findings.

- "2. The ECO refused the application because the ECO noted in the appellant's application form that the sponsor is the appellant's uncle. The ECO found that as such the appellant did not qualify for entry clearance under the rules relating to pre-flight family reunion as the appellant was not the sponsor's spouse, partner or dependent child.
3. The ECO also considered the appellant's application under the requirements relating to leave to enter or remain in the United Kingdom as

the parent, grandparent or other dependent relative of a person with limited leave to enter or remain in the United Kingdom as a refugee under paragraph 319V of the Immigration Rules. The ECO found that as the appellant was not a parent, grandparent, son, brother or uncle of his sponsor, he did not qualify for entry clearance under paragraph 319V of the Immigration Rules.

4. The framework for appeals established by the Immigration Act 2014 against refusal of protection and human rights claims came fully into force on 6 April 2015. The Appellant made his application after that date and the refusal decision was made on 1st October 2016 thus the only grounds of appeal are on protection claim and human rights grounds.
5. The appellant appealed that decision and submitted grounds of appeal. The appellant has submitted a bundle of documents for the hearing including the appellant's application form; the sponsor's pay slips, NatWest Bank statements and Asylum Screening Interview; and the Notice of Immigration Decision. The respondent has also submitted a bundle of documents including the ECM review which upheld the decision.
6. I have taken into account all of the documentary evidence in reaching my decision including those not mentioned in this decision and reasons.
- ...
9. The Sponsor stated in evidence that his sister and (sic) died and he had promised her that he would look after her children. He stated he sent the children with his cousin to look after. The Sponsor stated that he had not formally adopted the appellant but had promised his sister that he would look after him. I find on the evidence before me that no form of adoption had taken place.
10. I note that in the appellant's application form at Question 76 'What is their relationship to you?' The answer given is Uncle. I further note that the sponsor in his screening interview writes the name and date of birth incorrectly as Lawrence Clarkson with a date of birth of 14-8-1998. I find that this detracts from the sponsor's credibility that he has adopted the appellant as his son
11. The sponsor has been unable to provide any evidence that he has had any contact or been financially responsible for the Appellant. I find on the evidence before me that the appellant has been looked after (sic) their mother's cousin. I find that the Appellant cannot succeed under the Immigration Rules, as he is not the dependent child of the sponsor. The sponsor is the appellant's uncle.

12. The appellant cannot succeed under the Immigration Rules; the appellant is the sponsor's nephew and is now 20 years old. The appellant has not lived with the sponsor for over ten years. I find that there is no family life between the appellant and the sponsor as the appellant is the sponsor's adult nephew and I find that Article 8 is not engaged in this appeal. I dismiss the human rights appeal".

Discussion and conclusions

9. At the outset of the hearing, Mr Sesay submitted that the Sponsor had submitted a bundle of evidence, which the judge had failed to refer to. This evidence was not on the court file. I gave Mr Sesay time to consult with the Sponsor as to what evidence the Sponsor claimed the judge had failed to take into account and what evidence he had that would be relevant to the appeal on Article 8 grounds.
10. When the proceedings resumed the Sponsor produced the money transfer receipts, which were dealt with in submissions. There was only one receipt that was sent to Laurence Clarkson and it did not identify the sender. There were no receipts showing that money was sent from Mr Graham to the Appellant, Laurence Clarkson, and one of the receipts was dated 2019.
11. Mr Graham addressed me at the conclusion of the hearing and stated that he showed the First-tier judge these receipts and evidence that he had visited the Appellant in the Gambia on four separate occasions. He also stated that he had evidence of these visits in his passport. It is not clear from the court file that these matters were indeed before the judge and it is open to the Appellant to make a further entry clearance application submitting all the necessary evidence.
12. The decision dismissing the appeal on human rights grounds is challenged on the basis that the refusal of the adjournment was unfair. However, I am satisfied that this is not the case. The application for legal aid was undecided and it was not apparent, at the hearing before the First-tier Tribunal, whether the Sponsor would be able to obtain legal representation. It was not appropriate for the judge to adjourn the appeal in this case to await the outcome of an application for legal aid because the claim lacked merit and the situation was unlikely to have changed by the date of the adjourned hearing. In any event, legal aid was refused. An adjournment would not have put the Sponsor in any better position since he stated that he was unable to pay for legal representation.
13. The Appellant was represented at the hearing before me on a pro bono basis and he has been given the opportunity to put forward evidence to show that, had the judge adjourned the appeal at his request, he would have been able to succeed on the facts. However, it is clear that the Appellant's appeal could not succeed on its facts.
14. The judge's findings at paragraph 12 that the Appellant is the Sponsor's nephew and is now 20 years old and the Appellant has not lived with the Sponsor for over ten years was not in dispute. Even accepting the Sponsor's evidence of contact in the form of

four visits and sending money, this is insufficient to show that the Appellant and Sponsor had established family life. It is not sufficient to show more than normal emotional ties.

15. The argument made by Mr Sesay is that, had the Appellant had the benefit of legal representation, he would have been able to put this evidence in a more favourable light before the Tribunal. Unfortunately, that does not change the factual situation. The Appellant could not succeed under the Immigration Rules. The evidence was insufficient to establish family life.
16. Alternatively, even if family life was accepted on the basis of visits and the Sponsor's claim that he had promised the Appellant's mother that he would take care of him and therefore he was in effect his de facto parent, the refusal of entry clearance was proportionate in the circumstances given that the Appellant was now an adult and could not satisfy the Immigration Rules. On the Sponsor's own evidence he was not the Appellant's father and he had not adopted the Appellant. The Appellant's claim taken at its highest could not succeed under the Rules or on human rights grounds.
17. The judge considered all relevant matters and his findings were open to him on the evidence before him. The refusal of the adjournment was not unfair. There was no arguable error of law in the decision. The Appellant has had the opportunity to put forward further evidence but is still unable to show that the judge would have come to a different decision had an adjournment been granted.
18. I appreciate the promise made by Mr Graham to the Appellant's mother and the difficult situation he finds himself in. It is open to the Appellant to make a further application for entry clearance providing sufficient evidence to show that he either satisfies the Immigration Rules or that the refusal of entry clearance would breach Article 8.
19. For the reasons given, I find that there was no error of law in the decision of 19 January 2018 and I dismiss the Appellant's appeal.

Notice of decision

Appeal dismissed

No anonymity direction is made.

J Frances

Signed:

Date: 9 August 2018

Upper Tribunal Judge Frances

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

J Frances

Signed:

Date: 9 August 2018

Upper Tribunal Judge Frances