IAC-AH-DP-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/09809/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 30 November 2015	**On 5 January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant/Respondent

and

MR SABIR MOHAMUD MOHAMED
(ANONYMITY DIRECTION NOT MADE)

Respondent/Appellant

Representation:
For the Appellant: Unrepresented
For the Respondent: Ms Emma Savage, a Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. In the decision below I will continue to refer to the parties by their designations before the First-tier Tribunal (FtT) so that the respondent to this appeal will continue to be referred to as “the appellant” and the appellant before this appeal– the Secretary of State for the Home Department- will be continued to be referred to as “the respondent”.

2. This case last came before me at Field House on 21 August 2015 when I found a material error of law in the decision of the FtT but directed a

© CROWN COPYRIGHT 2016

further hearing at which the ultimate disposal of the appeal would be decided. Following that hearing a material error of law in the decision of the FtT was found and the hearing on 30 November 2015 was to determine the ultimate disposal before the Upper Tribunal.

Background

3. The appellant is a Somalian national born on 10 April 2003. It is claimed that he is the son of Isse Oreji Ahmed Isse, who admits travelling to the UK in 2003 on forged documents. It is claimed that the appellant is the son of Mr Dawilbeyt, Ms Isse's former partner. Ms Isse claims to have met Mr Dawilbeyt on 15 February 2002, having come to the UK originally in 2000. It seems that Ms Isse claims that following the birth of her child on 10 April 2003 she travelled back to Somalia with her newborn son later that year. He has remained there ever since.

4. On 9 June 2014 the appellant applied for entry clearance to the UK as the son of parents settled here. On 1 July 2014 the Entry Clearance Officer (ECO) refused that application because he was not satisfied that the appellant demonstrated that he met the requirements of the Immigration Rules. No evidence had been supplied that the appellant was related to Ms Isse and Mr Dawilbeyt as claimed. Accordingly, the ECO did not consider that the requirements of paragraph 297(i) (a) of the Immigration Rules to be met. That sub-paragraph provides that both parents must be present and settled in the UK.

5. The appellant appealed to the First-tier Tribunal, claiming that the decision was neither in accordance with the Immigration Rules nor Article 8 of the ECHR. He contended that the respondent ought to have granted him indefinite leave to remain (ILR). Both parents of the appellant were British citizens residing in the UK. Furthermore, the appellant relied on DNA evidence establishing paternity. This was obtained using DNA sampling despatched to the British Embassy in Nairobi (the appellant currently resides in Nigeria). Both parents had provided a mouth swab in the UK. The grounds recite the fact that the appellant had not been given an opportunity to provide his own mouth sample and therefore had to rely on other evidence. At the date of the grounds final DNA analysis was therefore awaited. Nevertheless, the appellant maintained that he was the child of the UK sponsors, that the respondent had not considered adequately the DNA evidence or awaited its conclusions and the refusal was not in accordance with the law. The Entry Clearance Manager (ECM) carried out a review of the decision in the light of the appeal but having reviewed the evidence placed before the ECO concluded that he had been right to reach the decision he had reached. It seems that the ECM review was not conducted until 3 November 2014 as the appeal had not been lodged in time.

6. Eventually (on 28 August 2014) a DNA report was received from Cellmark. At page 10 of the additional bundle of documents (filed by the appellant) that evidence confirms that, based on a medical certificate for the

appellant, it was almost certain that the appellant was the child of the two UK sponsors.

7. Nevertheless, the respondent maintained before me that the child's date of birth did not coincide with a date that the sponsors were in Somalia, indeed they had not been there since 2000. Therefore, the child could not have been theirs. This discrepancy had not been explained.

The Appeal Proceedings

8. Following the hearing at Hatton Cross on 23 March 2015 Immigration Judge Amin (the Immigration Judge) found the DNA evidence convincing. He found that if there had been any doubt about the identity of the appellant Cellmark would have "raised the issue". The evidence was that Isse had supplied a sample to her doctor on 24 April 2014 and provided her passport as her identification document. Mr Dawilbeyt had given a sample on the same date and also produced his passport. Although the TB certificate was criticised by the respondent's representative as not being a valid form of identification nevertheless the Immigration Judge was satisfied that on balance of probabilities the author of the Cellmark report had been provided with correct samples and had been able to identify paternity correctly.

9. Following consideration of the grounds of appeal to the Upper Tribunal by the respondent permission was given to appeal by Judge of the First-tier Tribunal Cruthers because he thought that uncritical acceptance of the DNA evidence did not deal with the other discrepancies in the case. In particular, the respondent's representative before the FtT (Mr Ali) had raised concerns over the reliability of the appellant's mother's evidence. In particular, Ms Isse, had not given a reliable account and have propensity to breach Immigration Rules and commit immigration offences. It appeared that the respondent's concerns had not even been considered by the Immigration Judge. Had they been considered there would have been considerable doubt cast on the parental relationship between the appellant and his sponsor parents which rendered the whole decision fundamentally flawed.

10. Having been given permission to appeal on the basis that these points were at least arguable I decided following a hearing at Field House on 21 August 2015 that a full examination of the circumstances in which the material was provided to the expert at Cellmark was needed before a proper conclusion could be reached. It appeared that the decision of the FtT contained a material error of law in failing to properly consider the respondent's concerns. Accordingly, I directed that there should be a further hearing.

The Hearing

11. The hearing took place at Field House on 30 November 2015.

12. Ms Savage explained that because the chronology did not make sense (the appellant having been born approximately three years after his parents left Somalia) there were significant concerns as to the reliability of the DNA evidence. Clearly, as I pointed out, the DNA evidence must relate to a child of the sponsors. However, it did not follow Ms Savage said, that the DNA evidence must relate to this appellant, given the facts summarised above.

13. I heard briefly from both Ms Isse and Mr Dawilbeyt who told me that their son was being cared for at the date of the hearing by relatives in Kenya. Mr Dawilbeyt explained that he had been in the UK since 1997 and had been given indefinite leave to remain in 2000. He had become a British citizen in February 2003 and in April 2003 his son was born.

14. Ms Savage again submitted that the TB certificate was not reliable and did not fall within a class of documents for establishing paternity that should be accepted. The appellant's father would not have gone to Somalia at all between 2000 and 2003 and could not, therefore, possibly have been the appellant's father.

15. At the end of the hearing I reserved my decision which I will give after summarising the issues below.

<u>Discussion</u>

16. It seems that there are three issues which need to be resolved before it is possible to reach a conclusion as to the parentage of the appellant. This is the only sub-paragraph of paragraph 297 of the Immigration Rules that is disputed in the case; the respondent accepts the other requirements for settlement are met.

17. The first issue relates to Isse's movements early in the new millennium. Her witness statement says nothing about when she first came to the UK but it seems to have been around 2000. Mr Dawilbeyt does not say when he came to the UK either but said in evidence that he first came here in 1997 and was given refugee status in 1998. Neither of them appear to have gone back to Somalia between 2000 and 2003. There were no documents confirming when Isse ever returned to Somalia. Clearly she was there in April 2003 if she was able to give birth to the appellant.

18. The commencement of the relationship between Isse and Mr Dawilbeyt is barely any clearer. He claims to have met his wife Amina Abikar on 5 January 2002 yet to have met and married Isse the following month. The divorce to Mrs Abikar was not concluded until November 2008.

19. There are no travel documents confirming Isse's return to Somalia to have her child and she was only able to say that she used forged documents to return here in November 2003. This casts considerable doubt on the credibility of her evidence.

<u>Conclusions</u>

20. The evidence on behalf of the sponsors is confusing and in my view failed to show on the balance of probabilities that they were in a relationship with one another from 2002 onwards as claimed. In particular, Dawilbeyt claims the relationship began in February 2002. This would have been only one month after he married Ms Abikar. In addition, Isse's immigration history is very unclear. She appears to have come to the UK seeking asylum in about 2000. First of all, I find it surprising that she would wish to return to the country in which she claims to have suffered persecution (Somalia). Secondly, and importantly, there is no documentary evidence to confirm her return to Somalia nor her presence there between February 2002, when her relationship with Dawilbeyt is said to have begun, and April 2003, when she claims to have given birth to the appellant. There is a lack of detail as to the movements of Isse and Dawilbeyt during the material period.

21. Isse admits travelling on false documents to Somalia in November 2003 to see her mother, who she claims was ill. This undermines the truthfulness of her evidence generally. The DNA report by Cellmark is based on a TB report prepared for the appellant and is not a valid identification document for these purposes. Isse's questionable credibility has led me to conclude that the DNA evidence here is not as foolproof as the Immigration Judge suggested and indeed cannot be relied on as indicating that the appellant's parents are Dawilbeyt and Isse. The evidence only suggests that the child who was subjected to the DNA analysis is likely to be a child of Dawilbeyt and Isse. The evidence summarised above suggests considerable doubt as to whether the person who is linked to the sponsors by his DNA is in fact the appellant.

Notice of Decision

Having carefully reviewed the evidence before the FtT having on the last occasion found a material error of law I have decided that the decision of the FtT must be set aside. I substitute the decision of the Upper Tribunal which is to dismiss the appellant's appeal against the decision of the ECO to refuse entry clearance in this case.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Hanbury

TO THE RESPONDENT
FEE AWARD

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

Signed Date

Deputy Upper Tribunal Judge Hanbury