Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/01737/2015**

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision & Reasons Promulgated**
on 2 August 2017	**on 16 October 2017**

Before

MR C M G OCKELTON, VICE PRESIDENT
DEPUTY JUDGE OF THE UPPER TRIBUNAL DEANS

Between

MISS FATOU JANE CEESAY

Appellant

and

ENTRY CLEARANCE OFFICER, BANJUL

Respondent

Representation:

For the Appellant: Ms H Kujabi, Sponsor
For the Respondent: Mr M Diwnycz, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision by Judge of the First-tier Tribunal Malcolm dismissing an appeal against a refusal of entry clearance.

2. The appellant is a national of the Gambia. She is now aged 20 but at the date of her application she was under 18 years of age. The refusal decision against which the appeal to the First-tier Tribunal was brought was made on 18 June 2015.

3. Before us the appellant was represented by her mother, Mrs Haddy Kujabi, who was the sponsor of her application. Mrs Kujabi was accompanied by and assisted by a friend, Mr Foday Sanneh.

4. The appellant sought entry clearance to join her mother in the UK. The Judge of the First-tier Tribunal was not satisfied that the appellant and her mother

were related as claimed and, in addition, that the appellant's mother had had sole responsibility for her upbringing.

5. Permission to appeal was granted by the Upper Tribunal on the basis that it was arguable that the judge materially erred in law in finding that the appellant had failed to prove her relationship with her mother in light of the evidence before the judge, which included a birth certificate dated 23 December 2014, an affidavit from the appellant's aunt, the sponsor's witness statement and oral evidence, flight tickets to Gambia and a copy of the sponsor's passport containing stamps.

6. A rule 24 notice was lodged on behalf of the respondent. This stated that the grounds of appeal were largely based upon evidence which post-dated the decision of 18 June 2015 and were simply an attempt to re-argue the case. The Judge of the First-tier Tribunal gave cogent reasons for finding that the evidence fell short of establishing the relationship between the appellant and the sponsor.

7. The Judge of the First-tier Tribunal expressed concern that the appellant's birth certificate was dated 23 December 2014. The judge was given an explanation for this date in an affidavit from the appellant's aunt. The appellant's original birth certificate did not give her middle name. The appellant's middle name was given to her when she started school to distinguish her from other pupils with the same first and last names as her. The judge considered that this discrepancy over the appellant's name raised an issue of identity. The original birth certificate was not produced to support the explanation, although according to the sponsor it had been found within the last few days. The sponsor was aware of the possibility of providing DNA evidence but had chosen not to do so. The sponsor maintained that she had sought to produce a card recording her pregnancy but this card had been lost in the post. The judge concluded that the appellant had been made aware of the issues in the appeal but had failed to provide additional evidence. The appellant had not provided sufficient evidence to satisfy the judge that she was related as claimed to the sponsor.

8. In relation to the issue of sole responsibility the judge concluded that the sponsor's evidence of visits and payments made was not conclusive. There were no details given of any decision making by the sponsor on important matters in the appellant's life and there were no detailed insights by the sponsor into the appellant's day-to-day life.

9. Although we were provided with additional documentary evidence on behalf of the appellant, including the result of DNA tests, we have to approach the issue of whether the Judge of the First-tier Tribunal erred in law on the basis of the evidence which was before the Judge of the First-tier Tribunal and to which the Tribunal was entitled to have regard. On the question of the relationship between the appellant and the sponsor we are concerned by the

judge's references in paragraphs 45, 46 and 48 to whether "sufficient" evidence had been provided. In particular, the judge's conclusion expressed at paragraph 48 was set out entirely in terms of an alleged failure to provide "sufficient" evidence.

10. The question of the relationship between the appellant and the sponsor was not a matter to be decided according to some arbitrary standard. The approach the judge should have taken was to look at the evidence adduced on behalf of the appellant and decide whether it was credible and reliable. If the judge had found that the evidence could be relied upon, it was more than adequate to show the existence of the claimed relationship. If there were unexplained discrepancies in the evidence which led the judge to conclude that no reliance could be placed upon it, then the judge would have been entitled to find that the relationship was not shown to be as claimed.

11. There is an indication that the judge started with the proper approach, at paragraph 45, by referring to an alleged discrepancy in respect of the appellant's original birth certificate. In making findings, however, the judge departed from the proper approach by referring to whether there was sufficient evidence. We consider that by so doing the judge erred in law. The judge did not give proper and adequate reasons for finding the appellant had not shown she was related to the appellant as claimed. Because of this, the decision of the Judge of the First-tier Tribunal is set aside.

12. Having set aside the decision of the Judge of the First-tier Tribunal, we consider that there is enough evidence before us to re-make the decision. Although the DNA evidence was not before the original decision-maker or the First-tier Tribunal it may be taken into account as appertaining to the circumstances at the date of decision. Mr Diwnycz suggested that the DNA report was incomplete but having studied the report, which states on its face how many pages it should contain, we are prepared to accept it.

13. In relation to the birth certificate, the sponsor explained that the first birth certificate, referred to as a "nursing certificate", was issued by the hospital at the time of the appellant's birth. This record of the birth could then be used to obtain an official birth certificate at a later date. For our part we are puzzled as to why the date the birth certificate was issued should have been considered so significant by the respondent. In general terms a birth certificate may be issued by the proper authorities at any time, for example to replace a lost or missing certificate, and the date of issue is not necessarily an indication of a lack of reliability. Having regard to the evidence and to the explanations given we are satisfied that the appellant and the sponsor are related as claimed.

14. We approach the issue of sole responsibility in accordance with the decision in TD (Yemen) [2006] UKAIT 00049. Mr Diwnycz referred us to an affidavit of 3 March 2015 by the appellant's aunt referring to herself as the appellant's

guardian. Mr Diwnycz suggested that this document reflected a court decision in relation to the appellant but there was nothing on the face of the document to indicate that it had been prepared for the purposes of court proceedings. It seemed to be no more than a document recording a family arrangement whereby the aunt would involve herself in the appellant's care while the sponsor was abroad.

15. The evidence before us was that the appellant's father has had no contact with her since 2005 and takes no responsibility for her. We were informed that the appellant's aunt, who was caring for her, relocated to Benin in 2016 and the appellant now lives with a friend. Of course, this change post-dates the decision appealed against.

16. The sponsor explained that when she came to the UK with her husband she intended that the appellant would join her once she had indefinite leave to remain. Sadly her husband died in 2012 shortly after the sponsor obtained indefinite leave and the sponsor had to delay applying for the appellant to join her. The sponsor maintained that she had remained responsible for the appellant and the arrangement with her sister was only that the sister would provide care. The sponsor made decisions about her daughter and provided money for her, including paying for tuition.

17. We note that the sponsor visited Gambia in 2009, 2013 and 2014. On each occasion she stayed with her sister and the appellant. The sponsor's evidence is that she speaks to the appellant every 2-3 days and they also contact each other by WhatsApp.

18. We are satisfied that there was before us evidence of a close relationship between the sponsor and the appellant maintained by visits, electronic communication and sending money. We are satisfied that while the sponsor's sister was caring for the appellant on a day-to-day basis the sponsor was nevertheless responsible for major decisions such as those concerning the appellant's education and place of residence. The reference by the appellant's aunt describing herself as the appellant's guardian was never intended to be more than a temporary arrangement, as it was intended from the start that the appellant would join the sponsor in the UK as soon as circumstances permitted. As we have found, the sponsor is the appellant's mother and we are satisfied that she had sole responsibility for the appellant.

19. The two remaining issues in the appeal are maintenance and accommodation. On accommodation the evidence before us was that the sponsor lives in a two bedroom flat with a living room and dining room. The sponsor lives in the flat with her other two children, a boy and a girl aged 9 and 10. On the basis of this evidence we are satisfied that there would be adequate accommodation for the appellant.

20. In relation to maintenance the evidence indicates that the sponsor has only a modest income with which to support herself and her children. Her Halifax bank statement dated 28 April 2015 showed a credit balance of £6,163. The refusal decision was dated 18 June 2015 and the appellant's 18th birthday was a week later on 25 June 2015. It was therefore necessary for the sponsor to show that she was able to support the appellant for no more than one week, until her 18th birthday. On the basis of the sum available to the sponsor in her Halifax account we are satisfied that the sponsor would have been able to maintain the appellant for this period.

21. On the findings we have made the appellant meets the relevant requirements of paragraph 297 of the Immigration Rules and her appeal is therefore allowed.

22. As the appellant meets the requirements of the Immigration Rules, we do not need to consider whether she would be entitled to succeed under Article 8. In any event, where the requirements of the Immigration Rules are met it is difficult to envisage any public interest in refusing the appellant entry to the UK.

Conclusions

The making of the decision of the Judge of the First-tier Tribunal involved the making of an error on a point of law.

We set aside the decision.

We re-make the decision by allowing the appeal.

Anonymity

The First-tier Tribunal did not make an anonymity direction. We have not been asked to make such a direction and see no reason of substance for doing so.

Fee Award (N.B. This is not part of the decision.)

No fee award is made. Although we have evidence before us showing that the test of sole responsibility is met some of this evidence was produced for the purpose of the appeal and was not before the Entry Clearance Officer. Without all the evidence now before us the ECO would have had difficulty in finding the requirement of the sponsor having sole responsibility for the appellant was met.

Deputy Judge of the Upper Tribunal Deans 21st September 2017