

**Upper Tribunal**

**(Immigration and Asylum Chamber) Appeal Number: HU/17134/2016**

**THE IMMIGRATION ACTS**

|  |  |
| --- | --- |
| **Heard at Field House** | **Decision & Reasons Promulgated** |
| **On 31 May 2018** | **On 12 June 2018** |
|  |  |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE LATTER**

**Between**

**Olumide olusola ogunmakinwa**

(ANONYMITY DIRECTION NOT MADE)

Appellant

**and**

**ENTRY CLEARANCE OFFICER, UKVS SHEFFIELD**

Respondent

**Representation:**

For the Appellant: Ms F Ramzam, counsel.

For the Respondent: Mr L Tarlow, Home Office Presenting Officer

**DECISION AND REASONS**

1. This is an appeal by the appellant against a decision of the First-tier Tribunal dismissing his appeal against the respondent’s decision made on 3 June 2016 refusing his application for entry clearance to join his mother, the sponsor, in the UK.

Background

2. The appellant is a citizen of Nigeria born on 5 May 1998. His mother came to the UK in 2001 and he was left in the care of her relatives. He was raised initially by his grandparents, his mother’s sister becoming involved in his care following his grandfather's death in 2007. The sponsor has not returned Nigeria to visit him since 2003, even though she has not been subject to any travel restrictions since 2011.

3. The appellant applied for entry clearance on 8 April 2016 when he was aged 17. His application was refused because, although he provided DNA results to demonstrate his relationship with his mother, this was not from an accredited laboratory. He also failed to provide a certificate issued by an approved clinic showing that he was free from infectious tuberculosis. The respondent was also not satisfied that he had shown that his mother had had sole responsibility for him or that there were any serious and compelling family or other considerations making his exclusion from the UK undesirable. The respondent went on to consider article 8 but was not satisfied that there were any exceptional circumstances which might warrant consideration of a grant of entry clearance outside the requirements of the Rules.

The hearing before the First-tier Tribunal

4. At the hearing before the First-tier Tribunal an application was made for an adjournment to enable the appellant's representatives to gather further material in support of the appeal including the original death certificate of the appellant's aunt, a tuberculosis certificate from an approved medical practitioner and copies of WhatsApp messages exchanged between the appellant and his mother. She had suffered a mini-stroke in May 2017 and it was argued that this had hindered her ability to gather material in support of the appeal.

5. The judge refused the application. She reminded herself of the Upper Tribunal decision in Nwaigwe (Adjournment: fairness) [2014] UKUT 418. She noted that the refusal decision had been made on 3 June 2016 and the appeal forms signed on 1 July 2016. She found the sponsor had had ample opportunity to gather any evidence that she wished to gather. The judge accepted that the sponsor had suffered a mini-stroke in May 2017 but that was many months after the refusal decision.

6. She noted that, even at the date of hearing (31 July 2017), no arrangements had been made to make an appointment with an approved medical practitioner for the purposes of obtaining a tuberculosis certificate. She took the view that the outcome of the appeal was unlikely to turn on the submission of an original death certificate for the appellant’s aunt when a copy was included in the bundle. The judge then said that she agreed to admit into evidence any WhatsApp or social media messages, provided they were forwarded to the Tribunal by the end of the working day, but she commented that to date (i.e. 8 August 2017 when the decision was prepared) no such messages had been received. She said that taking into account all the circumstances of the case she was satisfied that it was fair and in the interests of justice to proceed to hear the appeal [6].

7. She heard oral evidence from the sponsor and, having considered that evidence and the documentary evidence, she was not satisfied that the appellant could meet the requirements of para 297 of HC 395 or that the refusal of entry clearance amounted to a disproportionate interference with the appellant's private and family life. In any event, he had failed to produce a tuberculosis certificate from an approved medical practitioner. The appeal was dismissed accordingly.

The grounds of appeal.

8. In the grounds, it is argued that the appellant should have been granted an adjournment as there were exceptional circumstances surrounding the sponsor as her sister had suddenly passed away in February 2017 in tragic circumstances and the sponsor had been preparing to travel to Nigeria around that time as she was on compassionate leave from work. It is further argued that the appellant suffered from cerebral palsy, was a special needs child and that the sponsor bore the responsibility for him as there was no one else to care for him.

9. In her submissions Ms Ramzan adopted the grounds arguing that, in the particular circumstances in which the sponsor found herself, she did not have an ample opportunity to gather all the evidence or to obtain the relevant medical tuberculosis certificate, which had subsequently been obtained and was valid from 18 August 2017 to 18 February 2018. The WhatsApp messages and further documents, which the judge had agreed to admit on the basis that they were sent to the Tribunal by the end of the date of hearing, had in fact been submitted within that time frame but had clearly not come to the judge’s attention. She supported this submission by referring to the record of the fax transmission of 31 July 2017.

10. Mr Tarlow submitted that the judge had reached a decision properly open to her on the issue of the adjournment, whether the appellant met the requirements of the Rules and whether the refusal of entry clearance was proportionate to a legitimate aim.

Assessment of the issues.

11. So far as the refusal of the adjournment is concerned, on the basis of the facts before the judge it is difficult to see how her decision to proceed with the hearing could be categorised as unfair or unreasonable. However, there has, unbeknown to the judge, been a procedural irregularity causing unfairness. At the hearing, the judge had agreed to admit into evidence any WhatsApp or social media messages, provided they were forwarded by the end of the working day. When she prepared her decision (8 August 2017), she said that no such messages had been received. However, I accept that in fact 56 pages of documents were faxed to the Tribunal on the day of the hearing.

12. There is a fax cover sheet from the appellant's solicitors for 56 pages of documents marked for the attention of the judge and a fax transmission record showing they were sent at 4pm, 31 July 2017. Both these documents were included with the documents sent with the application for permission to appeal. There is nothing on the appeal file to indicate the receipt of the documents faxed on 31 July 2017 or that they were linked to the appeal file, but it is clear from the judge’s decision that neither the documents nor the fact that they had been sent come to her attention before she decided the appeal.

13. I am therefore satisfied that further evidence in support of the appeal was submitted to the Tribunal in accordance with the judge's directions but did not come to her attention was not taken into account. Both representative submitted, and I accept, that in these circumstances the proper course is for the appeal to be remitted to the First-tier Tribunal for a rehearing.

Decision

14. There has been a procedural irregularity amounting to an error of law such that the decision of the First-tier Tribunal should be set aside. The appeal is remitted to the First-tier Tribunal for reconsideration by way of a full rehearing by a different judge.

Signed: H J E Latter Dated: 8 June 2018

Deputy Upper Tribunal Judge Latter