



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/06339/2017

THE IMMIGRATION ACTS

Heard at Field House
On 12 July 2018

Decision & Reasons Promulgated
On 13 July 2018

Before
UPPER TRIBUNAL JUDGE SMITH

Between

COLLINS SENA ADZEI LEDLUM

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr W Evans, Counsel instructed by Templeton Legal Services

For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. The Appellant appeals against a decision of First-Tier Tribunal Judge Hussain promulgated on 22 February 2018 ("the Decision") dismissing his appeal against the Respondent's decision dated 8 June 2017 refusing his application dated 4 May 2017 for entry clearance as the grandchild (and therefore family member) of his EEA (Dutch) national grandfather ("the Sponsor") who resides in the UK. The Appellant was born on 15 July 1997 and is therefore at the time of hearing before me (just) under twenty-one years old. The Appellant is a national of Ghana.

2. The Respondent refused the application for three reasons. First, he says that the Appellant is not a family member but can only be an extended family member. Second, he says that while it is accepted that the Sponsor sends money to the Appellant, it is not accepted that this amounts to dependency. The Appellant lives with his mother (the Sponsor's daughter) in a house in Ghana which she owns. Third, the Respondent was not satisfied on the evidence that the Appellant was related as claimed.
3. The Respondent reviewed his decision following the grounds of appeal and accepted that the Appellant is a "direct descendent" but still maintained that the Appellant has to show dependency or exceptional circumstances in order to qualify. The Judge rejected that argument and found that the Appellant could satisfy Regulation 7 of The Immigration (European Economic Area) Regulations 2016 ("Regulation 7") as a family member provided he was under twenty-one years (which he then was) and provided that he was related as claimed ([9] of the Decision).
4. However, the Judge went on to dismiss the appeal, finding that the Appellant was not related as claimed due to lack of evidence. It is worth noting that the Judge dealt with the appeal on the papers as he was requested to do and appears not to have appreciated that there were two sets of DNA evidence contained within the Appellant's bundle. The Judge appears to have recorded that there is DNA evidence showing that the Appellant's mother is the daughter of the Sponsor but has missed the further DNA evidence establishing that the Appellant is the son of his mother and therefore the grandson of the Sponsor.
5. Permission to appeal was initially refused by First-tier Tribunal Judge Parkes on 4 April 2018 but it was clear from that decision that the Judge was not looking at the grounds of appeal relating to this case. The refusal of permission to appeal was therefore set aside by Resident Judge Appleyard on 24 April 2018. By a decision dated 24 May 2018, permission to appeal was granted by Designated First-tier Tribunal Judge McCarthy in the following terms (so far as relevant):
 - “...[3] The grounds allege Judge Hussain erred by misunderstanding the DNA evidence of relationship. The appellant provided DNA evidence showing that he is related to his mother and further DNA evidence showing she was related to her father, the appellant's grandfather and EEA sponsor.
 - [4] The evidence before Judge Hussain included two DNA reports. The first shows that Quist John Ledlum, a Dutch national, is the father of Lillian Emefa Ledlum with a 99.99995% likelihood. The second shows that Lillian Emefa Ledlum is the mother of the appellant with a 99.95% likelihood.
 - [5] In light of this evidence, it is very arguable that Judge Hussain failed to recognise that he was provided with evidence to establish the biological relationship between the appellant and his EEA national grandfather, which required two separate DNA tests. Such a misunderstanding of the evidence is likely to be a legal error.
 - [6] In light of all the above, I grant permission to appeal.”

6. The matter comes before me to decide whether the Decision contains a material error of law and, if so, to re-make the decision or remit the appeal for rehearing to the First-Tier Tribunal.

ERROR OF LAW DECISION

7. As is eloquently set out in the grant of permission, and as I have recorded at [4] above, the Judge has missed the fact that he had before him two sets of DNA evidence and not one. Accordingly, he has misunderstood what that evidence shows. That is an error of fact.

8. Mr Evans directed my attention to the Court of Appeal's judgment in E and R v Secretary of State for the Home Department [2004] EWCA Civ 49. At [66] of the judgment, the Court of Appeal set out its approach to the issue of whether an error of fact can amount to an error of law as follows:

“In our view, the time has now come to accept that a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law, at least in those statutory contexts where the parties share an interest in co-operating to achieve the correct result. Asylum law is undoubtedly such an area. Without seeking to lay down a precise code, the ordinary requirements for a finding of unfairness are apparent from the above analysis of *CICB*. First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been “established”, in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisers) must not have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the Tribunal's reasoning.”

9. Although E and R was an asylum case, it arose from a statutory appeal before this Tribunal (or its predecessor) and I see no reason to distinguish it simply because the current case involves determination of the Appellant's status under EU law. In terms of the factors raised, the Judge has clearly misunderstood the DNA evidence for the reasons I have already given. The DNA evidence is independent evidence. Mr Melvin confirmed that the Respondent does not seek to challenge that evidence. The DNA evidence was in fact before the Judge and as such the error of law is not simply one predicated on the error of fact but is also a failure to take into account material evidence. The DNA evidence which the Judge overlooked and his finding on that evidence is clearly material to the legal issue which he had to decide. Indeed, the Judge's mistake was the sole reason for him dismissing the appeal. Accordingly, the mistake has given rise to unfairness which amounts to an error of law. As I have also noted, separately, it also gives rise to a failure to consider material evidence which is itself an error of law.

10. I therefore set aside the Decision as the grounds of appeal disclose an error of law. The Respondent has not cross-appealed against the Judge's finding at [9] of the Decision that the Appellant is entitled to a residence permit under Regulation 7 because he is under twenty-one years (at the date of the hearing before the Judge and as at the date of hearing before me) and is therefore the family member of an

EEA national exercising Treaty rights in the UK. The Appellant invited me to preserve the findings at [6] to [9] of the Decision and I do so. Those were not challenged by the Respondent either by way of cross-appeal or in a rule 24 response.

11. The findings preserved are as follows:

"[6] I first deal with the question of whether the appellant properly fell for consideration as a family member or an extended family member. The respondent took the view that the appellant was eligible to be treated only as an extended family member. However, in the grounds of appeal settled on the appellant's behalf, the following was submitted:

"The decision referred to the appellant as an extended family member, defined in Regulations. However, as the appellant is under the age of 21, he falls for consideration under Regulation 7. As a family member under Regulation 7, he does not need to show evidence of dependency as suggested in the refusal letter. It is sufficient that he is under 21 years and a direct descendent of his EEA sponsor. The refusal letter also states that the ECO is not satisfied of the family relationship, in spite of birth certificates and DNA evidence."

[7] The respondent has dealt with the grounds of appeal in the notes of review. In the review, the respondent accepts that the appellant is a direct descendent but maintains that he has to show dependency or exceptional circumstances to qualify.

[8] The respondent's review of the decision in light of the grounds of appeal suggests a lamentable lack of understanding as to the basics of the Immigration (European Economic Area) Regulations 2016. Regulation 7(1) very clearly states that a family member means a direct descendent of the EEA national. The grounds of appeal properly submit that as long as the family member is under the age of 21 and is a direct descendent, there is no requirement to show any dependency.

[9] I am satisfied therefore that the appellant (subject to what I have to say below) is a family member within the meaning of the expression in Regulation 7 of the 2016 Regulations and accordingly has to show nothing further."

12. I do however need to say something about those findings because Mr Melvin made it clear that the Respondent did not accept that those findings were legally correct. His submissions were that, either the Appellant cannot be said to be a "direct descendent" for the purposes of Regulation 7 or that Regulation 7 requires not simply that the Appellant meet the age criteria but that he also needs to show that he satisfies the requirement for dependency.

13. Dealing first with the question of whether the Appellant is a "direct descendent", a challenge to that finding would be inconsistent with the ECM's review where that is accepted as correct. Mr Melvin's submission appeared therefore to be that, even if the Appellant can be classified as a "direct descendent", he has to show not only that he is under the age of twenty-one but also that he is dependent on his grandfather. As Mr Melvin pointed out, were it otherwise, an EEA national grandparent could sponsor the coming to the UK of numerous grandchildren notwithstanding that they were living comfortably with their own parents in their country of origin. This he said, is "not rational". With respect to Mr Melvin,

whether the law as made is rational is not something I have to decide but whether the law as correctly interpreted leads to the particular result.

14. I drew Mr Melvin's attention to the case of Bigia v Entry Clearance Officer [2009] EWCA Civ 79 (which is binding on me) and in particular what is said at [4] of the judgment as follows:

"Thus, any dependant parent or grandparent of a Union citizen is a family member, as is a child or grandchild who is under 21 or a dependant of the Union citizen. They benefit from Article 3.1. On the other hand, an adult and non-dependant child is an OFM, as are less direct relatives. They enjoy the lower protection of Article 3.2(a)" [my emphasis]

15. Mr Melvin sought to persuade me that this passage still shows a requirement for dependency by reason of what is said at the start of the paragraph and in the final sentence. However, it is abundantly clear that the requirement for a parent or grandparent to be dependent stems from what is said at Article 2.2(c) of Directive 2004/38/EC ("the Directive") by way of definition of family members that a relative in the ascending line must be "dependant" whereas under Article 2.2(b) a "direct descendant" need only be under the age of twenty-one or dependent. I assume that the Directive is so qualified because there is an acceptance that in a direct family relationship between an adult and a person under twenty-one, dependency can be assumed. I can see that this may be necessarily so between a parent and child and is not necessarily the case between grandparent and grandchild. It is not though for me to surmise on the reason for the Directive being worded as it is.

16. The Court of Appeal in Bigia clearly formed the view that "direct descendent" does include direct relatives in the descending line as well as the ascending line and the judgment is binding on me. Further, in any event, as I have already observed, the ECM conceded that the Appellant is a "direct descendent".

17. Also, although in a slightly different context, Lane J had to consider as recently as last week in the case of Saeed v Secretary of State for the Home Department [2018] EWHC 1707 (Admin) who falls within the category of "a direct relative" for the purposes of derivative right of residence. In so doing, he pointed also to the case of SM (Algeria) v Entry Clearance Officer [2018] UKSC 9 where Lady Hale said the following at [22] and [23]:

"[22] However, this Court cannot simply allow the appeal and restore the order of the Upper Tribunal, on the basis that Susana's case should be considered under article 3.2(a), if in reality she falls within the definition of "family member" in article 2.2(c). In that event she enjoys the automatic rights of entry and residence conferred by the Directive. What then does "direct descendant" mean?

[23] Obviously, it refers to consanguineous children, grand-children and other blood descendants in the direct line (query whether it also refers to step-descendants). It has also been common ground in this case that it must include those descendants who have been lawfully adopted in accordance with the requirements of the host country. But there is no reason to think that it goes further than that."

18. The case law is therefore clear that a “direct descendent” includes a grandchild but would not, for example, include a nephew or niece. In relation to whether the requirement as to age is in the alternative to evidence of dependency, I have already pointed to what is said in Bigia in this regard. That case is decided by reference to the clear wording of the Directive. Indeed, the wording of Regulation 7 is, as one would expect, in precisely the same terms.
19. For that reason, the Judge was right to conclude that the Appellant is a direct descendent and a family member for the purposes of Regulation 7 for so long as he remains under the age of twenty-one years. He does not have to show also that he is dependent on his grandfather.

Re-making of the Decision

20. In light of my above reasons, I need say very little more when re-making the decision. The Appellant is the Sponsor’s direct descendant (as his grandchild) and, since he is under the age of twenty-one years as at the date of the hearing before me, satisfies Regulation 7 as the family member of an EEA national living in the UK. The Respondent has not disputed the Appellant’s grandfather’s entitlement under the EEA Regulations to sponsor the Appellant.
21. I have set aside the Judge’s finding that the Appellant is not related to the Sponsor as claimed. I re-make that finding on the basis that he is the Sponsor’s grandson as he claims.
22. It follows from the above, that the Appellant is entitled to a residence permit under Regulation 7 to reflect his entitlement under EU law to enter the UK as the family member of an EEA national exercising Treaty rights here.
23. I therefore allow the appeal.

DECISION

I am satisfied that the Decision contains a material error of law. The decision of First-tier Tribunal Judge Hussain promulgated on 22 February 2018 is set aside. I preserve the findings at [6] to [9] of the Decision. I re-make the decision. I allow the Appellant’s appeal.



Signed
Upper Tribunal Judge Smith

Dated: 12 July 2018