Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/02446/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 6 January 2020	**On 10 February 2020**

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

A R N
(ANONYMITY DIRECTION MADE)

Respondent

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the Respondent to this appeal or members of her family. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

Representation
For the Appellant: Ms A Everett, Senior Home Office Presenting Officer
For the Respondent: Ms A Nazami, Counsel, instructed by Alfred James Solicitors

DECISION AND REASONS

Introduction

1. For ease of reference I shall refer to the Appellant in this appeal before the Upper Tribunal as the Secretary of State, and to the Respondent as the Claimant.

2. The First-tier Tribunal made an anonymity direction in this case. I have maintained it in the Upper Tribunal because this appeal concerns minor children who have been the subject of social services involvement and Family Court proceedings.

3. This is an appeal by the Secretary of State against the decision of First-tier Tribunal Judge Herbert OBE ("the judge"), promulgated on 14 August 2019, in which he allowed the Claimant's appeal against the Secretary of State's decision of 25 January 2019, refusing her human rights claim.

4. The Claimant, a citizen of Uganda, had arrived in the United Kingdom in August 2002 as a visitor. She overstayed. The human rights claim was made on 24 August 2018. In essence, the Claimant's human rights claim was based on the following matters. She was, and still is, married to a Burundi national without status in this country. She relied in part upon her relationship with him. Of much greater significance was a claim to be the *de facto* carer for her sister's to minor children, effectively acting *in loco parentis*. This was said to be because her sister suffered from a significant mental health illness and was unable to adequately care for the children. In addition, the sister's partner lived and worked abroad for the great majority of the time. The claim was that without her presence in the United Kingdom, it was highly likely that the two minor children would be taken into care by the local authority, and this would be wholly contrary to their best interests.

The judge's decision

5. The judge concluded that there would be no danger to the Claimant herself if she were to return to Uganda, nor would there be any significant obstacles to her husband accompanying her ([29]-[30]).

6. He then turned to the core aspect of the Claimant's case, namely her involvement in the care of her sister's children. The judge found that the Claimant and her husband were in effect the day-to-day carers of children, notwithstanding the absence of an order from the Family Court stating this to be so. The judge regarded the Claimant as a wholly credible witness ([32], [36], and [39]) and made reference to corroborative documentary evidence before him, including materials from social services, the Family Court (a matter to which I will return in due course), and medical reports concerning the Claimant's sister. The judge found that the Claimant was the "primary care" of the two children and that the sister's ability to provide adequate care was "extremely limited". He made a clear finding

that, “but for the presence of the [Claimant] in this household they [the two children] would almost certainly have been in full-time foster care under the auspices of a full care order under the (sic) Children’s Act 1989.” Having regard to a Family Court order of December 2017, the judge was of the view that the Claimant and husband played a “crucial role” in the lives of the children.

7. Having concluded that the Claimant could not succeed with reference to the Article 8-related Immigration Rules, the judge went on to consider whether there were any “exceptional circumstances” in the case. With regard to the facts of what he described as a “highly unusual case”, the judge concluded that the sister’s mental fragility (which included the risk of psychotic episodes being triggered by stressful events), he concluded that the Claimant’s removal from the household would be likely to trigger a significant mental health deterioration on the part of the sister, with “disastrous” consequences for the two children. On this basis, the appeal was allowed “under Article 8 of the ECHR” (the judge also purportedly allowed the appeal “under the immigration rules”, but that of course is an error, albeit wholly immaterial).

8. Of real significance in the appeal to the Upper Tribunal is a procedural step taken by the judge of his own volition and set out in [18] of his decision. Having noted the absence of up to date evidence from social services concerning the two children, he said the following:

> “I expressed my concern about this but stated that the appellant’s representative should make an urgent request of his instructing solicitor to contact [the relevant local authority] to either get an oral update of the position to be placed in a statement of truth before me or get a letter from [the relevant local authority] giving their summary of the situation.”

9. Somewhat unfortunately, no formal direction to this effect is set out at the end of the decision, and nothing further is said as to whether the Secretary of State’s representative expressed any view on this course of action.

The grounds of appeal and grant of permission

10. There are three grounds of appeal: first, that the judge erred by placing too much weight on the Claimant’s own evidence; second, that he erred in reaching conclusions that were not based upon up to date evidence; third, that the Secretary of State had not had an opportunity to see or respond to the post-hearing evidence requested by the judge

11. Permission to appeal was granted by First-tier Tribunal Judge Bristow on 19 November 2019.

The hearing

12. At the outset of the hearing, it was established that the Claimant’s solicitors had in fact submitted evidence post-hearing, as requested by the judge. A supplementary bundle of evidence relating to the two children,

containing specifically of a document entitled “Local authority social work evidence template”, dated 28 November 2017, and a Care Plan, dated 29 November 2017, was sent in to the Taylor House hearing centre under cover of letter dated 30 July 2019.

13. Ms Everett confirmed that the Secretary of State had not received this evidence. She submitted that the judge had acted with procedural unfairness by failing to direct the Claimant’s solicitors to serve any further evidence on the Secretary of State and by failing to invite either further written submissions based on evidence or indeed to have reconvened the hearing for oral submissions. It was, she submitted, very difficult to say that this further evidence was immaterial when the Secretary of State and not even had a chance to consider it: it might be that additional issues/questions arose.

14. Ms Nizami submitted that the post-hearing evidence was not “new” in a sense of it being updated from that which had already been before the judge. The judge had not made specific reference to this evidence in his decision. It was quite possible that he had not even seen it himself before sending his decision for promulgation. It was submitted that the new evidence was immaterial to the outcome of the appeal.

15. At the hearing itself it was near impossible to resolve the question of whether the judge might have seen the new evidence and potentially taken into account when making his decision. In all the circumstances, I reserved my decision on the error of law issue, indicating that I would endeavour to discover whether or not the judge in fact had the new evidence before him when promulgating his decision.

Decision on error of law

16. The procedural unfairness issue is put forward in ground 3 and I shall deal with this matter first.

17. The situation arising in this appeal is unsatisfactory. Having taken it upon himself to seek post-hearing evidence, the judge should have issued clear directions (either at the end of his decision or separately), providing timeframes and, importantly, an opportunity for the Secretary of State to either comment by way of written submissions or request a further oral hearing. This was not done. In addition, within the body of his decision, the judge has not specifically stated whether or not he had received and considered the post-hearing evidence.

18. After the hearing I requested a printout from the ARIA database (used by the First-tier Tribunal and the Upper Tribunal to log all events during the course of an appeal through the system). The information contained therein (which I am satisfied is entirely reliable) indicates that although the judge’s decision is dated 23 July 2019, it was not in fact sent for promulgation until 14 August 2019. During the interim period, the post-hearing evidence from the Claimant had been received at the hearing

centre and, it seems, forwarded onto the judge prior to the promulgation date. It is impossible to say for certain whether or not he in fact received that evidence, or, if he did, whether he read it prior to sending his decision for promulgation.

19. In order to avoid what would very likely be relatively significant delays in attempting to either contact the judge directly or send out the ARIA printout to the parties and ask for comments thereon, on 15 January 2020 I issued directions to the parties, requiring the Claimant's representatives to serve the evidence in question on the Secretary of State and for the Secretary of State to then respond with any submissions on whether the evidence had any impact on the existence of a material error of law (the directions are annexed to my decision).

20. In the event, the Claimant's representatives complied with the directions, but the Secretary of State did not. There is no evidence to suggest that the Secretary of State did not receive the directions.

21. In all the circumstances, I have concluded that I am in a position to make a decision on the error of law issue without any further delay.

22. In my judgment the manner in which the judge sought the further evidence from the Claimant was, on the face of it, procedurally unfair. What he should have done was to direct that the evidence be served on the Secretary of State and then to either invite further written submissions from the parties on that evidence or to consider reconvening hearing for oral submissions.

23. However, having considered the judge's decision as a whole and read for myself the new evidence, I am satisfied that the unfair procedure adopted by the judge in respect of that evidence played no material part in his decision on the appeal itself. I say this for the following reasons.

24. First, it is in my view very unlikely that the judge actually saw the new evidence prior to sending his decision for promulgation. I appreciate that the ARIA printout does not decisively settle that question, but the absence of any reference, express or implicit, to that evidence in the decision is a strong indicator.

25. Second, even if the judge did see the evidence, the absence of a reference to it or even an indication that aspects of the two documents were taken account of when reaching the conclusions, satisfies me that the judge did not in fact take it into account. The references to documentary evidence upon which the judge did rely relate only to the bundle that was before him at the hearing. As noted in my directions of 15 January 2020, the evidence was also not updated, in the sense that it related back to 2017. Therefore, the whole purpose of the judge seeking the evidence was not achieved and this is an additional indicator that it was not taken into account.

26. Third, the Secretary of State has had the opportunity to see and consider the new evidence but has failed to provide any response on the question of whether the unfair procedure adopted by the judge had any bearing on his decision.

27. On this analysis, ground 3 does not disclose a material error of law.

28. There are no errors in respect of grounds 1 and 2. The judge was clearly entitled to take account of the Claimant's own evidence. This evidence addressed the current circumstances of the family unit, not simply historical matters. The judge was fully entitled to find the Claimant to be a credible witness. Further, as the judge himself stated within his decision, he did have relevant documentary evidence before him (quite apart from the post-hearing evidence, even if it was indeed seen by him prior to promulgation). The documentary evidence contained in the original bundle, although somewhat dated by the time of the hearing, was nonetheless probative, and the judge was entitled to place due weight upon it.

29. What I have just said flows into my assessment of ground 2. The judge was not basing his findings purely on out of date evidence. He had taken into account the Claimant's *own* evidence (which went to the current position of the family) and was entitled to have found that to be reliable.

30. It follows from the above that the Secretary of State's appeal to the Upper Tribunal is dismissed and the judge's decision shall stand.

The Family Court documents

31. I have already mentioned the presence of Family Court documents in the evidence before the First-tier Tribunal and the Upper Tribunal. It does not appear as though permission to disclose these documents was obtained from the relevant Family Court. If this is so, certain consequences may arise. The Claimant's solicitors are to provide a written explanation relating to the disclosure of the Family Court documents.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of a material error on a point of law.

The Secretary of State's appeal to the Upper Tribunal is dismissed.

The decision of the First-tier Tribunal stands.

Direction to the Claimant's legal representatives

1) **No later than <u>10 days</u> after this decision is sent out to the parties, the Claimant's legal representatives shall file with the Upper Tribunal (and marked for the attention of Upper Tribunal Judge Norton-Taylor) a written explanation relating to the production of the Family Court documents to the First-tier Tribunal and the Upper Tribunal, addressing in particular whether or not permission to make that disclosure was obtained by the Family Court.**

Signed Date: 6 February 2020

Upper Tribunal Judge Norton-Taylor

ANNEX: DIRECTIONS OF 15 JANUARY 2020

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/02446/2019

THE IMMIGRATION ACTS

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

A R N

Respondent

DIRECTIONS NOTICE

1. Following the error of law hearing on 6 January 2020 and further information obtained from the Upper Tribunal's database in respect of the evidence submitted by Ms A R N to the First-tier Tribunal post-hearing, it remains unclear whether the judge in fact saw that evidence or, if he did, whether it was taken into account when making the decision. It is to be noted that the judge makes no reference to the 'new' evidence in his decision and that that evidence was not 'updated' in the sense intended by the judge when seeking it (see [18] of the decision. The evidence in fact dates from late 2017).

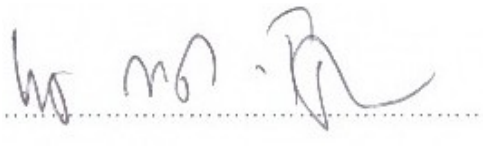
2. In all the circumstances, it is appropriate to issue directions prior to a decision on error of law.

3. It is intended that the Upper Tribunal will make a decision on error of law without holding a further hearing.

Directions

1) No later than 5 days from the issuance of these directions, Ms A R N shall serve on the Secretary of State the additional evidence previously submitted to the First-tier Tribunal under cover of letter 30 July 2019;

2) <u>No later than 7 days</u> thereafter, the Secretary of State shall file and serve written submissions on the impact of this evidence on the question of error of law.



Signed Date: 15 January 2020

Upper Tribunal Judge Norton-Taylor