



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Numbers: HU/05085/2020
HU/05088/2020
HU/08735/2020
HU/08762/2020

THE IMMIGRATION ACTS

**Heard at Field House via Teams
On 28th January 2022**

**Decision & Reasons Promulgated
On 3rd March 2022**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MS ZUKHRA VALIEVA
MASTER AKMAL ABROROV
MR AKBAR ABROROVICH ABROROV
MISS AZIZA ABROROVNA ABROROVA
(ANONYMITY DIRECTION NOT MADE)**

Respondents

Representation:

For the Appellant: Mr A McVeety, Home Office Presenting Officer
For the Respondents: Mr D Krushner, Counsel

DECISION AND REASONS

1. The application for permission to appeal was made by the Secretary of State but nonetheless I shall refer to the parties as they were described before the First-tier Tribunal, that is Ms Valieva as the first appellant and

her three children A1 (6 years old), A2 (9 years old) and A3 (12 years old). They are all nationals of Uzbekistan.

2. The Secretary of State appeals against the decision of First-tier Tribunal Judge Cockburn (“the judge”), who, having heard the appeal on 17th August 2021, allowed the appeals on 24th September 2021 against the decisions of the Secretary of State dated 27th March 2020 refusing the first appellant’s and A1’s human rights claim to remain in the UK. Additionally, there had been entry clearance applications made by A2 and A3 which were refused on 8th December 2020 and appeals were filed on the basis of Article 8 and the appeals were linked together. Those appeals were also allowed.
3. The Secretary of State in her grounds for permission to appeal asserted that there had been a procedural irregularity in the conduct of the hearing which would have made a material difference. The events which transpired during the hearing were recorded at [20] of the judge’s decision and showed that the appellant and sponsor were in the same room when they gave evidence remotely; this would have had a material impact on the hearing. The appellant and the sponsor confirmed that they had been instructed by the legal representative that they must be in separate rooms when giving evidence (see [19]). The Tribunal proceeded to hear confirmation from the sponsor of everything he had heard from the first witness as recorded at [21].
4. On the evidence heard the judge proceeded to find both witnesses credible and gave full weight to everything he had heard despite it being impossible to test in cross-examination.

Ground 2

5. There was inadequate reasoning. In respect of A2 and A3 the first appellant gave evidence that she retained sole responsibility for the children, who lived with her mother, and she said she had no contact with their father, but no Family Court documentation was produced.
6. The judge had not explained why the judge did not consider that to be relevant despite the fact that the appellant was recently divorced and there must have been a finding from the Uzbek Family Courts on a residence and contact of the children with their parents.
7. Further, the judge had made his findings entirely on the basis of the first appellant’s evidence, which was flawed in the light of the procedural impropriety outlined above.

Ground 3

8. There was a wealth of evidence about income, but no mention of bank statements and it was unclear therefore how much of the money was actually banked in the sponsor’s account. If he was furloughed as claimed,

it was unclear why the P60s submitted in support of the income showed the income remained the same before and after lockdown.

9. Additionally, there was no mention of the size of the sponsor's property except the assertions by the appellant and sponsor and no report to indicate who lived at the property and the size.
10. Given the procedural issue over the oral evidence, the finding that the property was suitable was based on oral evidence rather than readily obtainable documentation.

Ground 4

11. The judge allowed the appeal although the first appellant did not yet have leave to remain and had thus erred in law.

Analysis

12. This appeal relates to a human rights appeal not only in relation to the first appellant but also her three children, who are 12 years, 9 years and 6 years old. The two issues which arose before the First-tier Tribunal were (1) whether the first appellant had sole responsibility for A2 and A3 and secondly, whether there were exceptional circumstances. In relation to sole responsibility the judge cited at paragraph **TD (Yemen) [2006] UKAIT 00049**. The judge at paragraphs 33 and 34 stated as follows:

"33. On the basis of the first appellant's written and oral evidence, and the documentary evidence, I am prepared to accept, on balance, that she has sole responsibility for her children A2 and A3. Firstly, I accept that the children's biological father has abdicated responsibility for his children's welfare, interests, and material support.

34. Whilst I note that there is no definitive documentary evidence to support this finding, for example an order from a family court in Uzbekistan, not all child care arrangements and circumstances come about through the courts. Having had the benefit of hearing the first appellant's lengthy oral evidence, I found her to be an entirely credible witness. She gave her evidence in a clear, straightforward, and convincing fashion. She remained consistent throughout her oral evidence, and although she expanded upon her written evidence in response to questions in cross-examination, she was consistent with that evidence. She said initially her ex-husband would see the children around once every 3 months whereas now he does not visit them. He used to call them around every 5 or 6 months or so but he has not contacted them for a long time. He does not make any decisions with respect to their lives, and he does not provide any financial or emotional support. He has a

new partner, and the first appellant speculated that he wants to start a new family.”

13. From the above it can be seen that the judge relied heavily on the first appellant’s oral evidence in relation to the fact that the children’s biological father had abdicated responsibility. The judge also found that the first appellant had remained consistent throughout her oral evidence. Part of the second challenge in relation to this appeal by the Secretary of State was that the judge had not considered why no Family Court documentation was produced. Mr Krushner in his submissions stated that there were documents, but they did not relate to the childcare arrangements for the children.
14. The judge’s approach reflects the vital nature of the oral evidence given by the first appellant.
15. The judge recorded at [18] that after the first appellant had given her evidence when it was assumed that both the first appellant and the sponsor were sitting in separate rooms it transpired that the sponsor had been sitting with the first appellant throughout her oral evidence. The judge recognised at [18] that the incident gave rise to “the potential procedural unfairness against the respondent”. The judge at this point acknowledged the potential unfairness. He consigned the first appellant and the sponsor to the CVP lobby whilst the judge addressed the representatives. Mr Krushner, at the First-tier Tribunal hearing, confirmed that he had told the witnesses they should give evidence from separate places using separate connections and the Home Office Presenting Officer stated that the procedural irregularity was material because the first appellant had expanded on her written evidence concerning “her ex-husband and his behaviour and he would want to cross-examine the sponsor on his evidence of this issue”. It is evident that the responsibilities of the father and the question of his involvement with the children was a key issue, along with the maintenance and housing requirements.
16. The Home Office Presenting Officer submitted that the safest and fairest course of action would be to treat the appeal as abandoned and have it heard before a different judge.
17. Notwithstanding, at [20] the judge recorded that she was satisfied that the incident had occurred through an ‘innocent’ mistake and decided to continue with the appeal. It would also appear that the judge continued to permit the sponsor to give oral evidence although she “confirmed to the parties that the weight to attach to that evidence would be a matter for me”.
18. At [21] the sponsor also gave evidence of his knowledge of the circumstances surrounding the first appellant’s divorce. Despite Mr Krushner’s valiant attempt to save the determination, submitting that there was no rule of evidence that witnesses always had to be separate

and further to Rule 27(5) of The Tribunal Procedure (Upper Tribunal) Rules 2008 (“the UT Rules”) witnesses may be excluded, I am content that there was a procedural irregularity. The UT Rules cannot govern all instances of fairness nonetheless, the overriding objective confirms that proceedings before the Tribunal should be handled fairly, quickly and as efficiently as possible. Owing to the importance of credibility in proceedings before the Immigration and Asylum Chamber it is a convention that generally witnesses do not overhear oral evidence prior to giving their own oral evidence. Mr Krushner, abiding by this, rightly advised the appellant and sponsor not to be in the same room when giving evidence or even use the same connection. The reasons are self-evident not least that cross examination to test the consistency of the witnesses’ evidence between the witnesses will be undermined.

19. The judge proceeded with the hearing despite the protestation of the Home Office Presenting Officer as to the fairness of that approach, heard the sponsor’s evidence and made a full note of the witnesses’ oral evidence in a Record of Proceedings. The judge apparently decided to proceed with the hearing on the basis that the incident had occurred through an innocent mistake and that the evidence could not be unheard. Both of those observations were irrelevant to whether the conduct of the hearing was fair or not. There was no real justification for the continuance of the appeal owing to any exceptionality.
20. At [22] the judge decided that she would place “no weight upon the sponsor’s oral evidence”, no doubt in an effort to preclude further criticism and stave of any challenge such as has been mounted.
21. What is clear is that the Secretary of State was not given the opportunity to have both witnesses outside the room and Mr McVeety submitted that it was a clear error of law that the judge did not rule on the sponsor’s evidence. Notwithstanding that, the real difficulty is that the appellant’s evidence was critical, the sponsor heard that evidence and because the cross-examination had already taken place of the first appellant and the sponsor had overheard that evidence and the Secretary of State had framed that cross-examination of the first appellant, there was no consideration of what possible inconsistencies may have arisen between the first appellant’s evidence and that of the sponsor. Having tendered the sponsor to give oral testimony, it was then unknown if the sponsor’s evidence may have contradicted that of the first appellant. In other words, the possible inconsistencies of the first appellant’s evidence were not explored by contrast with the sponsor’s evidence; her evidence was merely accepted. The Home Office Presenting Officer was not given the opportunity to explore those inconsistencies or to reframe questioning for the first appellant because the Home Office Presenting Officer had already put his questions to the first appellant. It was impossible to know what might have been contradicted.

22. A rehearing would not solve the problem that the first appellant and the sponsor had overheard each other's evidence, but it would give the Secretary of State the opportunity to reconsider questions put in cross-examination to alleviate the procedural unfairness.
23. Further, the court has a duty to consider all the material put before it on an appeal in order to discharge its own responsibility, **Fish v General Medical Council [2012] EWHC 1269 (Admin)**. It is possible that the second witness's evidence did contain some contradictions, but it is not known because no weight was put on that evidence at all and it was not assessed, probably quite rightly, but nonetheless the judge had placed herself in an invidious position
24. The test is whether the reasonable observer would be concerned that justice had been done, see **El-Faragy [2007] EWCA Civ 1149**. What is also clear is that there is a perception of unfairness.
25. The judge heard evidence from the sponsor, who had just heard the first appellant's evidence, and clearly heard nothing to contradict it and the judge then remarked that the evidence was consistent and so gave it great weight. In view of the challenge to the documentation the oral evidence took on a greater significance. Overall, I conclude that there was a procedural error which was material and fundamentally undermines the safety of the conclusions.
26. I would observe that in relation to ground 2, in the light of a very recently contested divorce it is most unlikely that there would be no Family Court documentation in relation to the care arrangements for the children. The absence of the documentation throws the onus onto the appellant's testimony, the assessment of which, I consider flawed in the light of the procedural impropriety because the Secretary of State was denied the opportunity to test any inconsistencies. In the circumstances I conclude that it was an error for the judge to base her findings almost entirely on the first appellant's evidence.
27. Owing to my findings on grounds 1 and 2 and the relevance of credibility, which is at the heart of this appeal, I say no more about grounds 3 and 4 save that the decision in its entirety should be set aside. Owing to the nature of the error of law the matter should be remitted to the First-tier Tribunal.

Notice of Decision

The appeal of the Secretary of State is allowed. The Judge erred materially for the reasons identified. I set aside the decision of the judge pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007). Bearing in mind the nature and extent of the findings to be made the matter should be remitted to the First-tier Tribunal under section 12(2) (b) (i) of the TCE 2007 and further to 7.2 (b) of the Presidential Practice Statement.

Appeal Numbers: HU/05085/2020
HU/05088/2020
HU/08735/2020
HU/08762/2020

No anonymity direction is made.

Signed Helen Rimington

Date 22nd February 2022

Upper Tribunal Judge Rimington