



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

Appeal Number: PA/08625/2016

THE IMMIGRATION ACTS

Heard at Field House

On 31 August and 30 October 2017

**Decision &
Promulgated**

On 14 November 2017

Reasons

Before

UPPER TRIBUNAL JUDGE KEKIĆ

Between

[L D]

(ANONYMITY ORDER NOT MADE)

and

**SECRETARY OF STATE FOR THE
HOME DEPARTMENT**

Appellant

Respondent

Representation:

For the Appellant: Mr A Reza of JKR Solicitors

For the Respondent: Mr S Whitwell and Mr L Tarlow,
Senior Home Office Presenting Officers

DETERMINATION AND REASONS

- 1.** The appellant challenges the determination of a panel of the First-tier Tribunal comprised of Judges Astle and Buchanan dismissing her appeal against the respondent's refusal of 25 July 2016 to grant her protection. She is an Iranian national, born on [] 1976. The appeal was dismissed by way of a determination promulgated on 13 March

2017 following a hearing at Sheldon Court in Birmingham on 6 March 2017.

- 2.** The case has an unusual procedural background. The appellant claimed asylum on the grounds of imputed religion/political opinion. On Wednesday, 1 March 2017 (by fax at 18.12 hours), the appellant's representatives notified the Tribunal pursuant to s.120 of the Nationality, Immigration and Asylum Act 2002 that the appellant had converted to Christianity and sought permission to adduce further documentary evidence in that respect.
- 3.** When the matter came before the Tribunal, Ms I Hussain (Counsel instructed by the respondent) refused to give consent for the new matter to be considered (s. 85(5) of the NIAA 2002 applies) and the panel decided to confine the appeal hearing to the original ground of appeal as it found it had no jurisdiction to address the new matter given the stance adopted by the Secretary of State (at paragraph 2 of the determination).
- 4.** The appeal was dismissed and the appellant sought and obtained permission to appeal (from First-tier Tribunal Judge Ransley on 12 July 2017) on the basis that the Tribunal had failed to consider that the respondent had seriously breached her own procedure by failing to serve a written response to the appellant's s.120 notice and that this procedural unfairness amounted to an arguable error of law.
- 5.** In her Rule 24 response dated 25 July 2017, the respondent complained that she had not been provided with a copy of the grounds for permission and sought to have these made available. Regrettably this does not appear to have happened and when Mr Whitwell appeared for the respondent before me on 31 August 2017, he had still not received a copy. A copy was then provided and the matter proceeded when he was ready.
- 6.** Mr Reza, who had also represented the appellant at the hearing before the First-tier Tribunal, submitted that the appellant had served a s.120 notice on the parties as required prior to the appeal hearing. No written response was received from the respondent who orally refused to give her consent for the new matter to be heard at the hearing. Mr Reza submitted that the respondent had breached her own procedure in failing to provide written reasons for withholding consent and he referred me to the respondent's policy. He submitted that the appellant had been prevented from presenting her case on her sur place activities.

- 7.** Mr Whitwell responded. He pointed out that the s.120 notice had been served very late and that the appellant's bundle of evidence was received on 3 March, the Friday before the Monday hearing. He stated that the s.120 notice had been passed on to Counsel who had been instructed by the Secretary of State and he presumed she had not been able to take instructions and had decided to withhold consent herself. He observed that she could have sought an adjournment to enable the respondent to consider the new material. He pointed out that the appellant had not, however, sought an adjournment. He submitted that the purpose of s.85(5) was not to prevent evidence being submitted but to stop the respondent from being "ambushed" by new evidence and issues at hearings. He submitted, however, that there would be no prejudice to the appellant if no error of law were found as she would be able to make a fresh application which the respondent would have to consider.
- 8.** In reply, Mr Reza submitted that the appellant could not have sought an adjournment once the panel had decided it had no jurisdiction to consider the new matter. He submitted that even if consent was withheld, the respondent was still required to provide written reasons, even after the hearing as stated in the policy, and she had not done so.
- 9.** After some discussion, given the general agreement between the parties that the situation was unsatisfactory, I decided to adjourn the hearing to give the respondent an opportunity to consider her position and to clarify whether she still withheld her consent and, if so, to clarify why in writing, or whether she consented and in that case whether she wished to consider the new material before it was addressed by the Tribunal.
- 10.** Subsequently, the Tribunal received an email and skeleton argument from Mr Whitwell dated 6 September 2017 with an unreported determination of the Upper Tribunal (A R M: PA/05465/2016) dealing with a similar issue. He submitted that, as found by the Upper Tribunal, a challenge to the issue of consent was a matter for judicial review, and that the First-tier Tribunal's determination should be upheld with a finding that there was no error of law.
- 11.** The matter then came before me on 30 October 2017 where, once again, Mr Reza appeared for the appellant. Mr Tarlow represented the respondent. He indicated that the Home Office computer showed that an appellant by the same name had a case management review hearing at Taylor House in February 2018. He was unable to provide me with any further details.

- 12.** Mr Reza submitted a skeleton argument and an unreported determination of the Upper Tribunal (B A : HU/01334/2015) which took a different view on the consent issue. He submitted that the panel should have adjourned the appeal hearing to enable the respondent to follow her policy. He distinguished the appellant's case from A R M pointing out that was not a claim for protection and that appellant had not served a s.120 notice. He relied on the Upper Tribunal's Practice Directions and asked that an error of law be found and the matter be remitted to another judge of the First-tier Tribunal for a fresh hearing.
- 13.** Mr Tarlow relied on his colleague's skeleton argument and submitted that the appellant's recourse was to make a new claim for protection or to challenge the respondent's breach of policy via judicial review.
- 14.** Mr Reza responded. He submitted that the appellant wanted the matter to be dealt with as quickly as possible. He submitted that the intention of the s.120 notice should not be frustrated.
- 15.** At the conclusion of the hearing I reserved my decision which I now give.

16. Conclusions

- 17.** There is no question in my mind that the respondent has failed to follow her own guidance in the matter of giving/withholding consent. The document, Rights of Appeal Version 4.0 dated 15 November 2016, sets out the definition of a new matter and provides *inter alia*:

"Even if the new matter is not identified until shortly before or at the hearing, if it can be considered and a decision reached quickly, that should be done".

....

"If the new matter cannot be considered before the hearing....in order to make the best use of Tribunal resources, an adjournment should be sought for the Secretary of State to consider the new matter. Where possible, a single appeal should consider all matters that have been raised by the appellant".

...

"The PO must consult a Senior PO or Senior Caseworker if consent is to be refused".

...

“Where consent is refused, the SSHD will provide written reasons for refusing consent”.

...

“If the new matter is considered within 2 working days of the hearing then the revised decision will be sent to the appellant and the Tribunal no later than 4 pm on the day before the hearing”

...

“If the new matter is raised at the Tribunal hearing, written reasons will be provided for refusing consent within 2 working days of the hearing”.

- 18.** Plainly the respondent’s published procedure was not followed. There is nothing to suggest that Ms Husain took instructions from a Senior Presenting Officer or Senior Caseworker before withholding consent. There are no written reasons for the decision to refuse consent and, given that the respondent’s own guidance allows for new matters to be raised as late as the hearing itself, the time factor raised by Mr Whitwell has no bearing on the issue. The timeliness issue was also considered by the Upper Tribunal in Jaff (s.120 notice; statement of “additional grounds”) [2012] UKUT 00396 (IAC) where it was held that a statement of additional grounds made in response to a one stop notice could be made at any time up to and including the hearing of the appeal. Moreover, the respondent’s refusal to give consent goes against her own policy of dealing with all matters in a single appeal and frustrates the process of the one stop procedure. Requiring the appellant to make a fresh claim for asylum would unnecessarily waste time and resources. Mr Tarlow’s suggestion that this was an option available to the appellant does not accord with the respondent’s stated policy as cited above.
- 19.** Unreported decisions are not binding upon the Tribunal. However, in any event, Mr Reza has helpfully distinguished A R M from B A. A R M was not a claim for protection and, importantly, no s.120 notice had been filed. It cannot, therefore, be relied on by the respondent. Even if it was similar on the facts, the Tribunal’s Practice Directions state that *“it will be rare for ...arguments(s) to be capable of being made only by reference to an unreported determination”* (at 11.3). Mr Reza submitted if the Upper Tribunal had intended to give guidance, the case would have been reported. There is force in that submission.
- 20.** It is unfortunate that despite my adjournment of the last hearing, specifically so that the respondent could be consulted about her position, this was not done. The appellant has had to wait an additional two months and resources have been expended where they could have been avoided. Mr Reza properly points out that it is desirable for protection issues to be disposed of without unnecessary delay. I do not consider it desirable or sensible for the appellant to

have to make a new application for protection when the additional matters she wished to raise were put to the respondent by way of a s.120 notice.

- 21.** I find that the panel of the First-tier Tribunal erred in law in failing to appreciate that the respondent had breached her own guidance and policy in refusing consent without any written reasons. It would have been open to the panel to adjourn the matter either for a short period or until another date so that instructions could have been taken from an appropriately senior officer and/or to obtain the respondent's guidance to consider the matter for itself. There has been procedural unfairness which amounts to a material error of law.
- 22.** The appellant's grounds have not, however, challenged any of the panel's findings on the other aspect of her asylum claim. Nor were any submissions made by Mr Reza on this. Therefore, the findings made by the panel on issues apart from the new matter stand unchallenged. A decision is, however, required by the First-tier Tribunal on the new matter of the appellant's conversion and her sur place claim. It can be assumed, in all the circumstances, that the respondent will take action to comply with the terms of her guidance prior to the next hearing.

23. Decision

- 24.** The First-tier Tribunal made errors of law such that a fresh decision is required on the new matters set out above.

25. Anonymity

- 26.** No request for an anonymity order was made and I see no reason to make one.

Signed



Upper Tribunal Judge

Date: 3 November 2017

