



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/06045/2017

**THE IMMIGRATION ACTS**

Heard at Field House  
On 3<sup>rd</sup> October 2018

Decision & Reasons Promulgated  
On 23<sup>rd</sup> October 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

v

MR D C O  
(ANONYMITY DIRECTION MADE)

Respondent

**Representation:**

For the Appellant: Mr Adebayo, Greenland Lawyers LLP

For the Respondent: Ms Willocks Briscoe, Home Office Presenting Officer

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**DECISION & REASONS**

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1. The Respondent, to whom I shall refer as the Claimant, is a national of Nigeria, born on 10.8.84. He entered the United Kingdom as a visitor in September 2010 and thereafter overstayed. He applied for leave to remain on 12 December 2013, as a result of which he was granted leave to remain until 10 August 2016.

2. On 19 July 2016, the Claimant made an in time application for further leave to remain on 19 July 2016, on the basis that he is separated from his partner but has contact with his daughter and that he was in the process of seeking an Order for contact from the Family Court. This application was refused in a decision dated 18 April 2017. The Secretary of State stated that he had written to the Claimant on 7 March 2017 requesting further information but had received no response and thus refused the application with reference to the suitability requirements: S-LTR 1.7 of the Immigration Rules. The Secretary of State was not satisfied that the Claimant had continuing involvement in his child's life.

3. The Claimant appealed against this decision on 4 May 2017. His appeal came before First tier Tribunal Judge Hanley for hearing on 9 May 2018. In a decision and reasons promulgated on 24 May 2018 he allowed the appeal.

4. The Secretary of State sought permission to appeal, in time, to the Upper Tribunal on the basis that the Judge had erred materially in law in taking into consideration a Child Arrangements Order from the Family Court, which cannot be disclosed to any third party, including the Tribunal, without express permission from the Family Court and no such permission had been provided. Thus the Judge was in breach of the Protocol on communications between the Judges of the Family Court and Immigration and Asylum Chambers of the First tier Tribunal and Upper Tribunal (hereafter the "Family Protocol"). Consequently, the Presenting Officer, Mr Vaghela, withdrew from the proceedings and the hearing and the Judge's findings were vitiated by procedural irregularity and unfairness.

5. Permission to appeal was granted by First tier Tribunal Judge I D Boyes in a decision dated 24 August 2018 on the basis that: "*the extent to which compliance with the protocol is necessary or proportionate is a matter which deserves consideration in the UT.*"

#### *Hearing*

6. At the hearing before the Upper Tribunal, Ms Willocks Briscoe served copies of the Presenting Officer's minute and a copy of the Family Protocol:

<https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Protocols/spt-pfd-joint-protocol-comms-judges-0713.pdf>

7. Ms Willocks Briscoe submitted that the Secretary of State's challenge was one based on procedural fairness; that the Judge was directed to the Duty Judge by the Presenting Officer to seek directions as he was in breach of the guidance set out in the Family Protocol. She submitted that there was also the wider consideration of the Secretary of State not being put in a position where they could potentially be compromised. When asked why the Presenting

Officer would be compromised by remaining in court to assist in the proceedings, she stated that it was clear from the guidance set out in the Protocol was not to be disclosed. Consequently, the Judge should have risen and sought a direction from the Duty Judge to the Family Court for permission to rely on the Order and that adjournment was the only option.

8. In respect of [26] of the Judge's decision to her, where the Judge indicated that he would consider the Protocol after having heard evidence and decide at that stage what directions to make, Ms Willocks Briscoe submitted that the Presenting Officer could not anticipate what would happen or be said by witnesses and on that basis proceeding with the appeal would have put the Presenting Officer in a situation of difficulty. She submitted that the Presenting Officer was careful not be seen as flouting the Family Court's position on such issues.

9. Ms Willocks Briscoe submitted that the onus was upon the Claimant's solicitors to get permission to disclose the Family Arrangements order. She submitted that one had to bear in mind that it was a float case, both in terms of the Presenting Officer's conduct and the Tribunal proceeding with the appeal. She has submitted that in effect the Secretary of State had been prevented from having the opportunity to engage given the issues raised in light of [7] of the Protocol and that fairness has to apply to all parties.

10. Ms Willocks Briscoe maintained the position that the suitability requirement finding was also in issue because the Presenting Officer had been precluded from making submissions or cross examination of the witnesses. She submitted that it was the duty of the Presenting Officer to adhere to legal restraint or consideration and in this case it was incumbent upon him to ensure the integrity of the Secretary of State to engage with the Tribunal and that the Presenting Officer had been keen to ensure that Secretary of State was not put in a compromising position to avoid contempt of Family Court.

11. In his submissions, Mr Adebayo submitted that the main reason underlying the Family Protocol was to protect the anonymity of the child and that was well protected by the Tribunal, who clearly had the child's best interests in mind. He further submitted, effectively conceding that there was an error of law, that the Claimant now had the permission of the Family Court to rely on the Order and that the decision could be re-made based on this fact.

12. In reply, Ms Willocks Briscoe submitted that the best interests of the child was always important but there was no evidence that a request to the Family Court would have taken an inordinate amount of time and that delay would not have changed anything in terms of the involvement of the father with the actual child.

*Findings in respect of the error of law*

13. The First tier Tribunal Judge held as follows at [22]-[28]:

*“22. At the outset of the hearing, Mr Vaghela said that he was unable to take part in the proceedings without evidence from the family court granting permission to the disclosure of the order dated 1 February 2017 [83-85]. He objected to the appeal proceeding.*

*23. He argued that the appellant had not served “disclosable evidence.” He said that he would be in contempt of court if he remained in the hearing room.*

*24. He agreed that the presenting officer’s unit had received the appellant’s bundle on 23 April 2018, but stated that presenting officers are not aware of the contents of the bundle until the day before the hearing.*

*25. Mr Vaghela asked to be released. I said that I was not prepared to release him because his assistance might be required during the court of the hearing, even if he did not participate through cross-examination.*

*26. I made clear to Mr Vaghela that I intended to hear evidence and that I would consider having heard evidence what directions, if any, were necessary in connection with the matters that he had raised in respect of [83-85]. It may be that on hearing evidence, I would be able to determine the appeal without regard to the order that Mr Vaghela was concerned about.*

*27. I also made a direction pursuant to procedure rule 27, which I have referred to above and the court clerk put a notice on the tribunal door notifying the public that the appeal was being held in camera. No member of the public came into the hearing room during the course of the hearing.*

*28. Mr Vaghela again pressed me to excuse him from the hearing. I did not excuse him from the hearing but he left the hearing room, in any event.”*

14. At [47] the Judge found that it was difficult to see how there had been any disclosure in public, contrary to the terms of the Child Arrangements Order. The Judge was here clearly making reference to the terms of the Order itself and not to the Family Protocol.

15. I find that, whilst the Judge took steps to protect the anonymity of the Claimant’s child by hearing the appeal in camera and anonymising the decision, there is a material error of law in the decision of the First tier Tribunal Judge on the basis that it is clear from [7] of the Family Protocol that *“documents in family proceedings cannot be disclosed to third parties including judges in the Tribunal without an order of the Family Court Judge.”* Consequently, in the absence of an order from a Family Court Judge, the Child Arrangements Order should have neither been disclosed nor considered in the First tier Tribunal. A copy of the Family Protocol is appended to this decision.

16. Consequently, the decision is flawed by reason of procedural irregularity. However, I do not consider that the Presenting Officer’s conduct in

withdrawing from the proceedings, without the consent of the Judge, was appropriate. In *Awuah and Others* (Wasted Costs Orders – HOPOs – Tribunal Powers) [2017] UKFTT 00555 (IAC) the Presidential panel held:

*“22. The framework which we have outlined and expounded above simply cannot be applied to HOPOs. They are not officers of the court. They belong to none of the regulated professional cohorts. They do not enjoy the privileges and immunities of the advocate. They are not subject to any of the detailed codes regulating the professional and ethical conduct of advocates and others and, in consequence, they lie outwith the jurisdiction of the various regulatory bodies. Stated succinctly, HOPOs are unregulated.*

*23. That is not to say that HOPOs owe no duties to the tribunal. We consider that rule 2(4) of the 2014 Rules, a discrete element of the overriding objective and its UT analogue, framed in identical terms, clearly apply to HOPOs. Thus HOPOs are subject to the positive obligations of helping the Tribunal further the overriding objective and cooperating with the Tribunal generally. The generality of these duties encompasses a potentially broad series of specific requirements and obligations many of which will be recurrent in most cases. Others may be more case sensitive.*

*24. The proposition that HOPOs are answerable to the judge or panel of judges before which they appear is in our view unassailable. It arises from the basic judicial functions and duties, in tandem with rule 2(4) of the 2014 Rules.”*

17. I find that, having made his point to the Judge and bearing in mind that the Secretary of State was already in breach of the provisions of the Family Protocol having received and presumably read the copy of the Child Arrangements Order appended to the notice of appeal, the Presenting Officer’s duty was to remain in the hearing room to assist the Tribunal. I find there was no procedural unfairness in these circumstances because the Presenting Officer chose to leave, against the wishes of the Judge and without his permission and in so doing acted disrespectfully. I find that the Presenting Officer chose not to take the opportunity to cross-examine the Respondent and make submissions.

18. I should make clear that I have, in so finding, taken into consideration the Presenting Officer’s minute, which is consistent with what took place as recorded by the First tier Tribunal Judge at [22]-[28] of the decision and reasons. However, notably, there is nothing therein to show that the Presenting Officer requested an adjournment.

19. I find that the appropriate course of action would have been to adjourn the appeal and for a request to have been made through the Principal Resident Judge for permission from the Family Court to disclose the Family Arrangements Order in accordance with the provisions of the Family Protocol.

20. Having been informed by Mr Adebayo that the Claimant had sought and obtained permission from the Family Court to disclose the Child Arrangements Order, I informed the parties that I intended to re-make the decision. Having seen the email correspondence between the Claimant and

the Judge's clerk, which was not entirely clear, I put the matter back and asked my clerk to liaise with Judge Prigg's clerk to clarify that disclosure was permitted and to permit Ms Willocks Briscoe the opportunity to prepare for cross-examination.

21. When the case came back on for hearing after the lunchtime adjournment, the clerk to Judge Prigg at Taunton County Court had confirmed in an email that the Order to disclose the Child Arrangements Order had been confirmed by the Judge.

22. Ms Willocks Briscoe informed me that, having reviewed the papers and the decision in *ET & MT* (child's best interests; *ex tempore* pilot) Nigeria [2018] UKUT 00088 (IAC) and the Secretary of State's policy: "*Family Migration: Family Life & Private Life - 10 year routes*" published on 22.2.18, there were no strong reasons to justify refusal.

#### *Decision*

23. In light of the unchallenged evidence, confirmed by the Child Arrangements Order dated 1 February 2017, that the Claimant is in regular contact with his daughter and is involved in her upbringing, I find that family life is established.

24. I find that, had the Claimant received the request for further information dated 7 March 2017, he would at that stage have provided the Secretary of State with a copy of the Child Arrangements Order, given that the absence of evidence of contact was the only substantive matter in dispute. I find that the Claimant's conduct does not fall properly for consideration under S-LTR 1.7 as I accept that he did not receive the request for further information.

25. In these circumstances, I find that the requirements of the Rules are met. Ms Willocks Briscoe helpfully conceded, in light of the recent jurisprudence and the extant Home Office policy, that there are no strong reasons to justify removal of the Claimant, which would breach his established family life with his British daughter. Thus the appeal falls to be allowed.

#### *Notice of decision*

26. I find a material error of law in the decision of the First tier Tribunal Judge. I substitute a decision upholding his decision to allow the appeal on human rights grounds (Article 8).

**Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

Unless and until a Tribunal or court directs otherwise, the Claimant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies to both parties. Failure to comply with this direction could lead to contempt of court proceedings.

*Rebecca Chapman*

Deputy Upper Tribunal Judge Chapman

19 October 2018