



**Upper Tribunal  
(Immigration and Asylum Chamber)  
HU/07467/2016**

**Appeal Number:**

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 30 November 2017**

**Decision & Reasons  
Promulgated  
On 11 January 2018**

**Before**

**UPPER TRIBUNAL JUDGE PITT**

**Between**

**MR LIBIYA BIRARA  
(ANONYMITY ORDER NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mrs A Mughal of Montague Solicitors LLP

For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. This is an appeal against the decision dated 18 August 2017 of First-tier Tribunal Judge James which refused the Article 8 appeal of the appellant.
2. The background to this matter is that the appellant came to the UK from the Democratic Republic of Congo (DRC) in 2000. He married a British national and they had a child together in 2005. The appellant returned to DRC on 2 December 2007. He obtained entry clearance as a spouse and returned to the UK on 16 January 2008. He had leave as a spouse until 14

December 2009. The relationship with his wife broke down but on 21 May 2010 he was granted discretionary leave to remain on the basis of his family life with his child. That leave continued until 21 May 2013. The appellant then obtained further grants of leave to remain outside of the Immigration Rules from 26 March 2014 until 30 June 2015 in order for him to progress family proceedings concerning contact with his child.

3. On 9 December 2015 the appellant made a further application for leave to remain on family and private life grounds. That application was refused on 3 March 2016 and the appeal against the refusal came before First-tier Tribunal Judge James on 17 July 2017. At the hearing, no evidence was heard although the appellant and his sister were present and the judge heard only submissions from the legal representatives.
4. The appellant's case before the First-tier Tribunal was that he wished to remain in the United Kingdom in order to continue his relationship with his biological child. It was not disputed, however, that an order of the Family Court permitted him indirect contact only by way of letters or cards or a small gift on only four occasions per year; see [10] of the decision.
5. The appellant also brought his case on the basis that he had become a father figure to his nephews and nieces who were the children of his biological brother who had died in October 2015. The appellant maintained that he had moved in with this family after his brother's death and taken up an important role in the children's lives. He provided letters from his deceased brother's wife and three of her children in support of that claim.
6. Concerning the children of the appellant's deceased brother, the respondent maintained on page 5 of 8 of the refusal letter that:

"... there is no official evidence to prove that their dependency on you goes beyond that of normal uncle, niece and nephew ties. If you were to leave the UK it is not accepted that their mother ... and the children will be left without any support in the UK as they will have extended family members, friends, schools and the NHS for assistance should it be required."
7. The appeal was refused, the First-tier Tribunal finding amongst other matters that the evidence of the appellant's relationship with his brother's family was not credible.
8. The first ground submits that a procedural error arose in the approach the judge took to the evidence concerning the family of the appellant's brother. It is argued for the appellant that at the hearing the respondent made a concession that the evidence concerning the brother's family was not challenged. It had only been agreed for the appellant that the appeal could proceed on submissions where that was so. Evidence from the appellant and his sister who attended was not called because Counsel for the appellant understood the evidence concerning the brother's children was not challenged. No application was made for an adjournment for the sister-in-law and her children to attend to give oral evidence for the same reason. The evidence of a genuine and strong family life between the

applicant and his brother's family should have been accepted by the judge but was not; see [12-15].

9. I was provided with the judge's response to this ground, her record of proceedings, the Home Office Presenting Officer's (HOPO) note of the hearing and a statement from Counsel for the appellant at the First-tier Tribunal hearing.

10. The judge's response to the written ground states in paragraph 2:

"During discussions with the parties prior to the substantive hearing commencing, the HOPO confirmed she did not challenge the DNA report submitted. However the HOPO confirmed she was to challenge a number of claims made in the documents submitted and did not accept the assertions made therein. She also relied on the reasons for refusal."

The judge goes on to give her view that there was no application to adjourn or "intimation" of such an application. On page 2 of her response she recollected "raising the issue of lack of documentary evidence adduced by the Appellant of family life with his nephews/nieces generally". She goes on to indicate again on page 2 that no adjournment application was made and no "further concessions made by the HOPO, other than the agreement not to challenge the DNA report findings" and that both "legal representatives confirmed they were content for the matter to proceed with the hearing based on submissions only".

11. The judge's record of proceedings sets out in the second box on page 2, referring to what appear to be preliminary discussions, that the HOPO did not challenge the DNA evidence but that "[o]ther points challenged re docs".

12. The record of proceedings then sets out the submissions made for the appellant concerning his brother's family which include:

"Note evidence was unchallenged today and therefore summarise what establishes for art 8 ..."

and

"... I would say on evidence unchallenged meets that definition"

13. These statements in the judge's record of proceedings appear to me to indicate that, rightly or wrongly, Counsel for the appellant made it clear in her oral submissions that it was her position that the appeal was being heard on the basis that the evidence on the brothers' family was not challenged.

14. The record of proceedings sets out the HOPO's submissions on page 3, which read, unamended,:

"NO witness statement for SIL [sister-in-law]. He has his SITER here but no SIL and nieces and nephews not here - even though one is an adult. So much for this emotional bond. He is the uncle but he is not the father and

they do have a mother. So removal of the appellant not detrimental affect to them.”

15. The judge’s record of proceedings then goes on to record a response to this challenge to the evidence on the brother’s family made by the appellant’s Counsel:

“In my submission not adjourn as evidence not been challenged, and clear evidence sort of bond he has with his nieces and like a father them. Supported by the letters in particular of the children – confirm that. K of respondent’s bundle.

Precariousness – children themselves make the same references, Been very supportive, and played NB role. Clear from letter.”

16. Notwithstanding the submissions by the HOPO that the claim of a strong relationship was not made out, it appears that Counsel for the appellant maintained her position that a concession had been made to the effect that the evidence on the brother’s family was not open to challenge in this way.
17. The Home Office Presenting Officer’s note of the hearing indicates in the third paragraph, again unamended:

“- rep said she wont ask for adj request if app is not called to give evidence hopo opposed adj request but was happy to continue without evidence being called – but highlighted to IJ that credibility was not accepted of app and subs made with evidence we have in bundle”

The note goes on to indicate that she queried the evidence on the brother’s family where none of them had attended.

18. I was also provided with a letter dated 23 November 2017 from the Home Office Specialist Appeals Team which stated that when the HOPO, Ms Syed, was contacted about the hearing she confirmed “that she did not concede credibility at the hearing” and relied on her note of the hearing to that effect.
19. The appellant’s representative’s note of the hearing is entitled “Draft agreed summary note” but it was clarified at the hearing before me that it had not been agreed by the respondent.
20. The note states that at the outset of the hearing day Counsel for the appellant indicated to the judge that there was the possibility of seeking an adjournment for the sister-in-law and nephews to attend the hearing. This would appear to be consistent with the HOPO’s note; see [17] above.
21. In paragraph 6 of her note, Counsel then records a conversation with the HOPO prior to the hearing after she provided a letter from the appellant’s sister who was present:

“Ms Syed then confirmed that she would not challenge the contents of the letter (and also indicated that she would not challenge much of the evidence submitted in any event)”.

22. Paragraph 8 of Counsel’s note reads as follows:

“Mr (sic) Syed then indicated that she would not ask any questions in cross-examination, and the matter could be dealt with on submissions. Counsel for the Appellant stated that, on the basis that this was the case, and that the evidence was thus unchallenged, she would not apply for an adjournment”.

23. In paragraph 10 the note refers to Counsel’s submission at the hearing that the evidence on the brother’s family was “unchallenged” and that “the judge should accept that he plays a parental role for all the children.”

24. Counsel’s note goes on to record in paragraph 11 the HOPO’s submission, thus:

“Miss Syed, in her submissions confirmed that the relationship between the Appellant and his nephews and nieces was not in dispute. ... She noted that none of the Appellant’s nieces and nephews present. She submitted that there was nothing exceptional in the case. She submitted that, although the Appellant had been there for his nephews since the loss of his brother, in any event the children had a mother, and if the Appellant left the UK this would not have a detrimental effect on them, and the relationship could continue from overseas”.

25. The note goes on to indicate in paragraph 12 that Counsel responded:

“... arguing that it would not be proper of Ms Syed to make submissions about the non-attendance of the other family members, given she had indicated that she would not challenge the evidence”.

This response from Counsel, albeit recorded somewhat differently, is consistent with the judge’s record of proceedings set out in [15] above.

26. My reading of these different records of what was said at the hearing leads to the following conclusions. Counsel for the appellant proceeded on the basis that the evidence regarding the brother’s family was not challenged by the respondent. That was her genuine understanding of what had been agreed. That was not an unreasonable position where the matter proceeded on submissions only even though witnesses were present. She made it clear that she was proceeding on that basis in her initial submission; see [12] above. When the HOPO did go on to challenge the strength of the evidence on the brother’s family in her submission, Counsel’s response indicated that she remained of the view that this was not a correct approach where that evidence “had not been challenged” and that there was therefore still no need for an adjournment; see [15] and [25] above.

27. Certainly, the judge and the HOPO also appear to have had a genuine and not unreasonable view that the evidence on the brother’s family had not been conceded, regardless of the hearing proceeding on the basis of

submissions only. Counsel's initial submission and clear objection to the HOPO's challenge to the evidence that made it clear that there was, at the least, a lack of clarity as to the basis on which the appeal should be decided, however. Counsel might have taken this further in her response but in my judgment an analysis of the records of the hearing show that as of Counsel's closing submission and the end of the hearing, the correct approach to the evidence on the brother's family had not been settled clearly.

28. Without criticism attracting to any of those at the hearing who all appear to have acted in good faith, I am satisfied that the uncertainty as to the basis on which the evidence was to be approached and which led to adverse findings on material which the appellant considered unchallenged and might otherwise have addressed, either himself or by way of an adjournment request for others to be present, is a procedural error of sufficient materiality requiring the appeal to set aside and remade *de novo*.
29. It is not necessary to address the other grounds of appeal which go to the merits of the decision where the procedural irregularity challenge has been made out.

### **Notice of Decision**

30. The decision of the First-tier Tribunal Judge does disclose a material error on a point of law and is set aside to be re-made in the First-tier Tribunal.
31. The appeal will be re-made at Hatton Cross hearing centre before a Judge other than First-tier Tribunal James.

Signed:   
Upper Tribunal Judge Pitt

Date: 8 January 2018