



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/10839/2017

THE IMMIGRATION ACTS

Heard at Field House
On 17th May 2018

Decision & Reasons Promulgated
On 31st May 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE D E TAYLOR

Between

YVONNE [N]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr H Ti, a Solicitor of Kesar & Co Solicitors

For the Respondent: Mr I Jarvis, HOPO

DECISION AND REASONS

1. This is the appellant's appeal against the decision of Judge Colvin made following a hearing at Taylor House on 23rd November 2017.

Background

2. The appellant is a citizen of Uganda born on [] 1999. She came to the UK in September 2012 with her cousin and claimed asylum. She was granted discretionary leave as an unaccompanied asylum seeker child until 19th February 2017 when she applied for

further leave. It was the refusal of this leave which was the subject of the appeal before Judge Colvin.

3. Judge Colvin dismissed the appellant's appeal against the decision to refuse her asylum but allowed the appeal on Article 8 grounds. There is no challenge by the respondent to the Article 8 decision.
4. The appellant claimed that she would be at risk on return to Uganda as a lone woman at risk of sexual violence and trafficking.
5. The appellant claimed, and it was accepted, that her mother had died in 2003 and her father abandoned her in 2005 when he went to live in Kenya with his new wife. She then lived with her cousin Ritah Mbazira's family until 2010, when her aunt and uncle died and she was looked after by her cousin and a younger brother and sister. In 2012 the brother and sister were left with a family friend and Ritah paid for an agent to take her and the appellant to the UK.
6. They both claimed asylum. Ritah was similarly refused and her appeal against the refusal was dismissed on 26th January 2017. A copy of that determination was not available at the hearing. However the judge told the parties that she would make every effort to obtain it and in fact she did. According to the note of the hearing provided by the representative Henry Ti the Immigration Judge asked him to email the decision to her. However it appears that she obtained it through other means since Mr Ti told me that he still had not obtained a copy of the decision.
7. The judge referred to that decision in her determination. She said that at paragraph 38 it was found, on the evidence, that Ritah was in touch with her siblings and her mother's friend with whom the younger children had been left, and she was likely to have some practical and emotional support from them although not financial support. She also had an uncle in Uganda.
8. The judge wrote as follows:

"I refer to this decision of the cousin on the grounds that the issue of whether the appellant has support in Uganda is necessarily entwined with that of her cousin. She lived with her cousin's family for some five years (2005 to 2010) and then was looked after by her cousin who was three years older than herself until they both travelled together to the UK in 2012 when Ritah was aged 16 and the appellant aged 13. They have both had asylum claims dismissed and whilst Ritah did not attend to give oral evidence in the appellant's appeal she did submit two written statements in support as referred to above. The dismissal of the cousin's appeal appears not to have been the subject of any further appeal and although I am told that Ritah is considering making a fresh human rights claim she has yet to do so. This means that at the date of this hearing I am bound to consider the fact that the appellant's cousin has no immigration status in the UK and therefore the position put forward by the respondent that the appellant and her cousin could return to Uganda together is a reasonable and viable option. And as it was found

that Ritah has some support in Uganda it is reasonable to assume that this is likely to extend to the appellant as well at least in the initial stages of return.”

9. The judge then concluded:

“These risks of course would be more pertinent to the appellant’s situation if she indeed was returning alone to Uganda without any support at all. However I have found that as at the date of the hearing she and her cousin can return together and there is some support for them in Uganda. In these circumstances I do not find that the appellant is a member of a particular social group for the purposes of the Refugee Convention or that she is at risk of ill-treatment at Article 3 level.”

The Grounds of Application

10. The appellant sought permission to appeal. It was argued that the judge had erred by failing to make clear that she was setting aside a position agreed by the parties and by failing to invite submissions thereon. At the hearing it was accepted that the existence of subjective risks was not in dispute and the sole issue in relation to the protection claim was the question of sufficiency of protection.
11. The judge had not acted fairly when she gave no indication during the hearing that she intended to set aside the position agreed between the parties.
12. Second it was argued that the judge was wrong to rely on the decision in Ritah’s case which was an unreported decision of an appeal to which the appellant was not a party. The appellant had been deprived of an opportunity to respond to the findings made in that determination.
13. Finally the judge had erred by confining her risk assessment only for the initial stages of return and failed to explain why she believed that there would be no risk beyond that initial stage.
14. Permission to appeal was initially refused by Judge Lever but granted upon reapplication by Deputy Upper Tribunal Judge Saini on 26th February 2018.
15. On 19th April 2018 the Secretary of State filed a reply defending the determination.

Submissions

16. At the hearing Mr Ti relied on his grounds and submitted that the judge had erred in law for the reasons set out in his grounds. He took me to the reasons for refusal letter. In that letter he said there was a concession that trafficking might exist in Uganda although it was illegal and the Ugandan government provides protection services and prosecutes people traffickers. It was considered that they would be willing and able to provide protection should the appellant require it.
17. He acknowledged that the position of the respondent as set out in the refusal letter was that the appellant could return to Uganda with her cousin. However the

comments about the cousin were made in the context of a decision on the reasonableness of return and not the sufficiency of protection available to the appellant.

18. Mr Ti relied on the case of Kalidas (agreed facts – best practice) [2012] UKUT 00327 which held that judges could only look behind factual concessions in exceptional circumstances and if the scope of a concession was unclear the judge must draw that to the attention of the representatives.
19. Mr Ti argued that the judge had acted unfairly by giving the appellant no chance to respond to the findings in the determination of Ritah Mbaziira. The only time the judge raised the issue of her returning with her cousin was in the context of whether the appellant would still be considered a member of a particular social group namely lone females returning to Uganda, and not in the context of whether her return would reduce the risk for the appellant. The judge was therefore deviating from the reasons for refusal letter without giving the appellant a chance to respond. She had adopted wholesale and without question the finding that Ritah was in touch with friends and relatives in Uganda. She had not given any indication that she had treated the findings in Ritah's appeal merely as a starting point or that she was aware that there might be good reason to depart from the earlier findings, which were more than ten months prior to the hearing of the appellant's appeal; the possibility that they did not necessarily apply any more was not considered by the judge. Although she had made it known that she intended to have sight of the appeal decision there was no indication whatsoever of what she intended to adopt from that earlier decision. It therefore would not have been reasonable to expect the appellant to address all possible issues which might arise.
20. Finally he argued that the judge had wrongfully confined her assessment to the risk at the initial stages of return and failed to explain why she believed that there would be no risk beyond those initial stages.
21. Mr Jarvis defended the determination. He submitted that the appellant had always been aware that it was the respondent's case that she could return to Uganda with her cousin. It was not a new issue. He disputed that there had been any concession in the reasons for refusal letter. The Secretary of State had set out his understanding of the claim and why he believed that the appellant would not be at risk. In any event the cousin had received the determination and the appellant therefore had access to it. There was nothing in that determination which could reasonably have caused her surprise.

Findings and Conclusions

22. First, the appellant argues that the judge went behind a concession and agreed position between the parties that the appellant had a subjective fear of a return. Mr Ti drew my attention to paragraph 36 cited above where the judge concluded that she could return together with her cousin and that there was support for them in Uganda. However, that is not a finding that the appellant did not have any subjective fear of a return. Indeed the judge records that the respondent accepted that the appellant had a genuine

subjective fear. Accordingly the reference to Kalidas is not applicable in this case. Since no concession has been made the judge has not gone behind it.

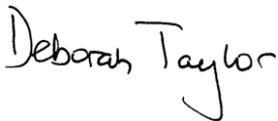
23. I find that the judge did not make a finding on an issue not in dispute.
24. So far as the procedural fairness point is concerned, the appellant has lost sight of the fact that the burden lies with her to prove her case. It was always open to her to call on her cousin to give evidence. Her cousin would have been aware that the respondent believed that she had friends and relatives in Uganda. Mr Ti said that he still had not had sight of the determination in Ritah's case, and the respondent should have produced it. However it has always been in Ritah's possession and it is mystifying why it has not made its way to the appellant's representatives, given that the two are in very close contact.
25. The appellant could reasonably have been expected to know what the respondent's case was both from the reasons for refusal letter and from the determination.
26. The appellant has been aware from the outset that the respondent believed that she could return to Uganda with Ritah. This is set out clearly from paragraphs 36 to 40 of the refusal letter. Whilst it is true, in the reasons for refusal letter, that the reference to the cousin was in the paragraphs dealing with reasonableness of return, there is nothing unclear or unlawful or unfair about the judge relying on those paragraphs to decide that the appellant would not in fact be at risk. It is not open to Mr Ti to now argue that the fact that the cousin could return with the appellant was only relied on by the respondent in the context of defeating an asylum claim on the basis of being a lone woman and not in the context of reducing the risk to her. The respondent is entitled to rely on those findings both in the context of reasonableness of return and in the context of obviating the risk.
27. This was not an issue which could properly have taken the appellant by surprise and upon which she was deprived of an opportunity to make representations.
28. It seems to have been agreed between the parties that the decision of the First-tier Tribunal in the cousin's case was relevant and that the Immigration Judge would rely on it. Indeed according to the note provided by Mr Ti it seems to have been the understanding that he would email the decision to the judge himself.
29. The judge was entitled to rely on the previous determination because it stands as an unchallenged assessment of the facts as at the time they were made. Ritah would have been aware of those findings, and chose not to attend the hearing. But her evidence was always going to be material. If it was the appellant's case that those facts have changed then she could have called her cousin to say so. Mr Ti said that there was no way that they could have guessed that this point was going to be relied on by the judge but it is quite obvious that it would be relevant to the appellant's case, and wrong to say that she was not on notice of the issue.

30. In any event the judge did not solely dismiss the appeal on the basis that she would have the support of relatives in Uganda. The judge noted that she had undertaken secondary education in the UK, had work experience here and that policy and practical changes being pursued by the Ugandan government meant that there was increasingly more protection for women at risk of trafficking including the assistance of a number of women's organisations.
31. Finally, so far as the criticism that the judge only decided upon the risk in the initial stages of return, it is unfounded. The appellant's case was that she would be at risk because the State did not provide a sufficiency of protection and she did not have any resources of her own. However the judge found that she could have access to a support network and that there were other factors that would assist her in the longer term.

Notice of Decision

The original judge did not err in law. Her decision stands. The appellant's appeal is dismissed.

No anonymity direction is made.



Signed

Date 28 May 2018

Deputy Upper Tribunal Judge Taylor