Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/01166/2020 (V)**

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre
Working Remotely by Skype for Business
On 11 March 2021

Decision & Reasons Promulgated
On 25 March 2021

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AKIKO TANAKA

Respondent

Representation:
For the Appellant: Mrs R Petterson, Senior Home Office Presenting Officer
For the Respondent: Mr A Joseph instructed by Vine Orchards LLP, Solicitors

DECISION AND REASONS

1. Although this is an appeal by the Secretary of State, for convenience I will refer to the parties as they appeared before the First-tier Tribunal: Akiko Tanaka (Appellant); Secretary of State (Respondent).

Introduction

2. The appellant is a citizen of Japan who was born on 27 January 1936. The appellant entered the United Kingdom on 7 July 2019 with entry clearance as a visitor valid until 7 January 2020.

3. On 10 December 2019, the appellant made an application for leave based upon her private and family life in the United Kingdom under Art 8 of the ECHR.

4. On 31 December 2019, the Secretary of State refused the appellant's application for leave and her human rights claim under Art 8 of the ECHR.

The Appeal to the First-tier Tribunal

5. The appellant appealed to the First-tier Tribunal. The appeal was heard by Judge N J Osborne on 10 September 2020. At that hearing, the appellant, her daughter Mrs Reiko Tanaka and her son-in-law, Robert Heffill gave oral evidence before the judge. The appellant, as it transpired, could not speak English and no Japanese interpreter was available at the hearing. Despite objection from the Presenting Officer, the judge allowed the appellant's son-in-law, who was in fact a qualified interpreter and spoke fluent Japanese, to interpret at the hearing for the appellant.

6. In a determination sent on 24 September 2020, Judge Osborne allowed the appellant's appeal under Art 8. The appellant relied upon the Adult Dependant Relative ("ADR") rules (Section EC-DR) in Appendix FM of the Immigration Rules (HC 395 as amended). Judge Osborne concluded that the requirements of those rules were met with the exception of the appellant not being in Japan and seeking entry clearance. The rules do not allow for an in country application (see Section EC-DR.1.1). However, in the light of his finding in relation to the Rules, Judge Osborne concluded that it was not proportionate to require the appellant to return to Japan for the sole purpose of making an application for entry clearance to the UK and, as a consequence, he allowed the appeal under Art 8 of the ECHR.

The Appeal to the Upper Tribunal

7. The Secretary of State sought permission to appeal on two grounds. First, there was a procedural irregularity in allowing the appellant's son-in-law to act as her interpreter at the hearing. Secondly, in any event, in reaching his finding that the appellant (apart from the entry clearance requirement) met the requirements of the ADR rules, the judge had failed to consider the evidence, set out in the Reasons for Refusal Letter, concerning the availability of state supported adult care provision and its availability for the appellant if she returned to Japan.

8. On 7 October 2020, the First-tier Tribunal (Judge Chohan) granted the Secretary of State permission to appeal to the Upper Tribunal (the "UT") on both grounds.

9. The appeal was listed at the Cardiff Civil Justice Centre with the UT working remotely on 11 March 2021. Mrs Petterson, who represented the Secretary of State, and Mr Joseph, who represented the appellant, joined the hearing remotely by Skype for Business.

The Submissions

10. On behalf of the Secretary of State, Mrs Petterson relied upon both grounds.

11. First, she submitted that it was procedurally unfair to allow the appellant's son-in-law to act as an interpreter for the appellant. He was a witness who, himself, gave evidence before the Tribunal. Mrs Petterson submitted that there was no real way of the judge knowing, or the Presenting Officer knowing, what had been said or not said by the appellant in her evidence or whether, in her words, some "spin" might have been put on it. She submitted that some of the evidence was in dispute, for example the level of care required on a day-to-day basis by the appellant in Japan and what would be available to her.

12. Secondly, Mrs Petterson submitted that the judge had failed to take into account the evidence in the Reasons for Refusal Letter concerning the potential availability of state supported care for the appellant. Instead, he had decided that the ADR rules were met because, on the basis of evidence submitted on behalf of the appellant, she would not be able to financially afford to live in a private care facility in Japan.

13. On behalf of the appellant, Mr Joseph submitted that the judge had taken account of the Presenting Officer's objection to the appellant's son-in-law acting as an interpreter but had dealt with the case in a practical way. He submitted that the appellant's statement (at pages 1–2 of the bundle) was brief and nothing of significance or in relation to credibility was in dispute. He submitted that the case was really about the background evidence. He submitted that the two other witnesses – the appellant's daughter and son-in-law – gave evidence about the particular level of care needed. There was no suggestion that the evidence of the appellant's daughter was in any way tainted. He submitted that there might well be a point of principle in this case but there was nothing, in fact, unfair about the approach taken by the judge.

14. Secondly, Mr Joseph submitted that the judge had dealt at paras 15 and 16 in his determination with the availability and cost of private care homes in which the appellant would have to live on return. He submitted that the Home Office had not produced any evidence to support the assertion in the decision letter concerning the availability of state funded social care. There was no evidence before the judge, Mr Joseph submitted, of what care would have to be put in place by the state. It was not enough, he submitted, for the Home Office to state in one paragraph that state care

was available and to provide a hyperlink to potential supporting evidence. He submitted that the judge had been entitled to reach the finding that he had in relation to the ADR rules and, as a consequence, to allow the appeal under Art 8 of the ECHR.

Discussion

15. In TS (Interpreters) Eritrea [2019] UKUT 352 (IAC) Lane J (President, UTIAC) said this at [1]:

> "Court and Tribunal-appointed interpreters perform a vital role in our justice system. They provide the means of communication between the judge and the other parties and participants in proceedings where a litigant or witness cannot satisfactorily communicate in the language of the court or Tribunal (usually English)".

16. In the usual case, where an appellant or other witness requires an interpreter in order to give evidence before the First-tier Tribunal or UT, the Tribunal (through HMCTS) provides an appropriate interpreter qualified to interpret in the required language and English. In TS, Lane J noted that (at [41]):

> "There is no reason of which we are aware to regard the current contractual arrangements for the provision of interpreters at Tribunal hearings as providing anything other than an appropriate set of quality controls, designed to ensure that appellants and witnesses who require an interpreter to give their evidence can do so (and be questioned about it) in a way that satisfies the requirements of justice. ... In short, the present system provides a satisfactory level of confidence that, as a general matter, interpreters who are engaged by the Immigration and Asylum Chambers to translate at hearings are adequately qualified to undertake that task".

17. As those comments make clear, it is the provision of an *independent* and appropriately *qualified* interpreter by HMCTS that provides the "confidence" that an appellant's or other witness's evidence is given at a hearing and is reliable. That confidence is not exclusively determined by the competence of the interpreter but also that interpreter's independence from the parties and, indeed, the Tribunal itself.

18. Of course, sometimes questions arise as to the accuracy of interpretation provided even by an independent and appropriately qualified interpreter provided by HMCTS. The case of TS itself was just such a case. At [41]–[51], the UT set out "general principles" when such an issue arises as to how it should be approached both by the First-tier Tribunal (if the issue arises at that time) or by the UT on appeal.

19. That, of course, is not the issue in this appeal. No direct issue is raised about the actual interpretation provided by the appellant's son-in-law. Indeed, none could be since only the appellant's son-in-law and, perhaps, the appellant herself could be aware of what was being said and translated when she was giving her evidence. But that reality is at the heart of the Secretary of State's challenge in this appeal. Mrs Petterson submits that it is unfair to allow an individual, such as the appellant's son-in-law, who is himself a witness and has an interest in the outcome of the appeal, to

act as an interpreter. There is, it is essentially being said, a lack of independence. Without that independence, neither the Secretary of State nor the judge can assess what precisely is the appellant's evidence and, when known, what relevance it should have in the appeal.

20. In this appeal, I agree that the "confidence" in the integrity of the judicial process provided by the twin pillars of independence and appropriate qualification by an interpreter are not present. Mrs Petterson founds her argument in the modern public law principle of "procedural unfairness". Whilst that is a principle which is usually deployed by an appellant or individual subject to an administrative decision under appeal, the principle is no less applicable to the other party to the proceedings, here the Secretary of State.

21. In R (Pathan) v SSHD [2020] UKSC 41, Lord Briggs identified the essential content of 'procedural unfairness' at [157]:

> ""Procedural unfairness" is a modern title for a form of unlawfulness which used to be called "breach of the rules of natural justice". That phrase collected together a number of traditional doctrines, the most important of which were the requirement that a decision should be unaffected by bias ("*nemo judex in causa sua*") and the principle espoused by the Latin tag "*audi alteram partem*" or, literally translated, "hear the other side". The rules of natural justice served originally to protect the integrity of decision-making by courts but have been applied for more than 150 years to maintain the lawfulness of administrative decision-making: see eg *Cooper v Wandsworth Board of Works* (1863) 14 CBNS 180."

22. Although Lord Briggs dissented in the outcome of the appeal, his statement of the legal principle represents common ground in the Supreme Court.

23. This case is not concerned with the first manifestation of 'procedural unfairness', namely bias (actual or apparent) by the judge or decision-maker. It concerns the latter, namely the right of both parties, and in the particular circumstances the respondent, to be fairly heard. Importantly, Lord Briggs recognised that the rules of natural justice or procedural fairness originated to "protect the integrity of decision-making by courts". That principle is, in my judgment, engaged in this appeal.

24. In this appeal, the judge, and the Secretary of State's representative, had no way of knowing precisely what was the appellant's evidence without accepting that the interpretation by the appellant's son-in-law was accurate. There was, of course, in the circumstances of this appeal no way for the judge or Presenting Officer to know whether or not that was the case. In the usual case, both the judge and the other party to the proceedings, can be confident that a witness' evidence that is given through an interpreter can be taken reliably as what the appellant (or witness) says because an independent and accredited interpreter has carried out the interpretation, subject always, of course, to an evidenced complaint that it was not accurate (see, e.g TS). In this appeal, there could not be that confidence because, whatever the qualifications of the appellant's son-in-law as an interpreter (which was asserted but not so far as I can tell established by documentation at the hearing) he was not independent: he was himself a witness in the appeal and had an interest in its outcome, quite naturally given that the appellant was his mother-in-law. In those

circumstances, the integrity of the judicial process was inevitably impugned. The evidence either had to be taken at face value (which it could not be given the absence of an independent interpreter) or discounted because of that which, in itself, would have been unfair to the appellant in the sense that she was entitled to have an opportunity to give evidence orally before the judge in order to establish her case. The only proper way of proceeding was, in my judgment, to ensure that a Japanese interpreter was provided either at this hearing or at a future adjourned hearing in order that the appellant's evidence could be given and interpreted by an independent and appropriately qualified interpreter.

25. I do not accept Mr Joseph's submission that there was no dispute on the evidence and the facts relevant to the outcome of the appeal. It was very relevant what would be the appellant's circumstances in Japan on return which, in part, turned upon her health and circumstances on return.

26. Whilst I have considerable sympathy for the judge given the position in which he found himself at the hearing, and his not unnatural desire to continue with the appeal in the most practical way in which it could be proceeded with on the day, in effect the judge deprived himself (and the Secretary of State as the other party) of the means to assess what precisely was the appellant's evidence given at the hearing. That would have arisen even if she had simply purported to adopt her witness statement and, of course, her evidence went further. Even the apparent adoption of her statement could not be relied upon without accepting that the interpretation leading to that was reliable. In the circumstances of this appeal, it simply could not be relied upon and the process by which the appellant's evidence was given resulted in procedural unfairness to the respondent and impugned the integrity of the judicial process. The judge's decision cannot stand and must be set aside. None of the judge's findings can be preserved and the appeal must be reheard *de novo*.

27. The appeal must be reheard and, if the appellant wishes to give evidence and still requires an interpreter, one must be provided by HMCTS (or at least one who is appropriately qualified and is independent of the parties) in order for her to give evidence. Her son-in-law cannot act as an interpreter as he is a person who has an interest in the outcome of the appeal and is a witness in the appellant's appeal.

28. In the light of that conclusion, it is not necessary to decide whether the Secretary of State has established ground 2. I, therefore, express no view upon it other than to anticipate that if the Secretary of State wishes to rely upon the availability of state funded social care in Japan then a judge might expect evidence, and not simply assertion in the refusal letter, to establish what, if any, is the availability of such care for the appellant on return to Japan.

Decision

29. For the above reasons, the decision of the First-tier Tribunal to allow the appellant's appeal under Art 8 involved the making of a material error of law. That decision cannot stand and is set aside.

30. Given the nature of the legal error, none of the judge's findings can be preserved. In the light of the nature and extent of fact-finding required, and having regard to para 7.2 of the Senior President's Practice Statement, the proper disposal of this appeal is to remit it to the First-tier Tribunal for a *de novo* rehearing before a judge other than Judge N J Osborne.

Signed

Andrew Grubb

17 March 2021