



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-000801

First-tier Tribunal No: HU/52430/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 20th of December 2024

Before

UPPER TRIBUNAL JUDGE NEVILLE
DEPUTY UPPER TRIBUNAL JUDGE WELSH

Between

NANA KWASI APPIAH

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Kannangara of Counsel

For the Respondent: Ms Nolan, Senior Home Office Presenting Officer

Heard at Field House on 4 November 2024

DECISION AND REASONS

Introduction

1. This is an appeal against a decision of First-tier Tribunal Judge Mulholland (“the Judge”), promulgated on 6 November 2023. By that decision, the Judge dismissed the Appellant’s appeal against the decision of the Respondent to refuse his human rights claim.

Factual background

2. The Appellant, a national of Ghana, applied for entry clearance to join his father in the United Kingdom (“UK”) relying upon paragraph 297(i)(e) of the Immigration Rules. In summary, the factual basis of his application was that his father and mother had shared responsibility for him until 2019, at which point his father

assumed sole responsibility because the Appellant's mother had decided that she could no longer care for the Appellant. As result, the Appellant went to live with a relative of his father. This relative is now no longer living in Ghana and so the Appellant is currently living with one of his schoolteachers. At all material times, the Appellant's father has lived in the UK.

3. In refusing the application, the Respondent stated that it was not accepted that the Appellant's father has sole responsibility for the Appellant because (i) the father has at all times lived in the UK (ii) the Appellant had lived with his mother before moving in with a relative of his father and (iii) there was a "lack of evidence provided regarding your mother". In the Respondent's Review, dated 27 August 2023, the Respondent maintained that sole responsibility had not been demonstrated because insufficient evidence had been submitted to demonstrate that the Appellant's mother is no longer involved in the Appellant's life. In particular, the Respondent noted:
 - (1) the evidence submitted demonstrated only limited contact between the Appellant and his father;
 - (2) no clear explanation had been given as to why the Appellant's mother was no longer able to care for the Appellant; and
 - (3) a school report from 2019 made references to the Appellant's mother, which was consistent with the mother still being involved in the Appellant's life.

The decision of the Judge

4. Having assessed the evidence at [25-44] and reminding herself at [14-15] of the decision of the Upper Tribunal in TD (Paragraph 297(i): 'sole responsibility') Yemen [2006] UKAIT 0004, the Judge concluded at [45]:

"... I am satisfied that the Appellant has not discharged the burden of proof to demonstrate that his father has sole responsibility for him. I find that the statements are self-serving and I attach little weight to the letters from the school for the reasons given before. I accept that [the sponsor] has made payments towards [the Appellant's] upkeep, communicates and visits him from time to time but I cannot accept that [the Appellant] was living with an aunt and then a teacher because of an insufficiency of evidence. Accordingly, I am not satisfied that his mother is no longer involved in his care and upbringing and I find the account that she has vanished to be incredible".

The grounds of appeal and grant of permission

5. The grounds of appeal are very poorly drafted. There are, as we understand it, four grounds. We have redrafted them in an attempt to make them comprehensible:
 - (1) Ground 1 - the Judge "erred in law in assessing the evidence". The error identified is that the Judge treated the academic references as if they were personal references. As a result, the Judge improperly drew adverse inferences as to the credibility of the Appellant's account from the absence of information about the Appellant's mother in those references.
 - (2) Ground 2 - at [28] the Judge has attached no weight to the school reports on the basis that she doubted their authenticity but, in so doing, failed to take

into account that the documents “were verified by the Respondent on consideration of the application”.

- (3) Ground 3 - the Judge erred in her application of TD (Yemen) and/or reached an irrational conclusion on the evidence.
- (4) Ground 4 - the Judge erred in requiring sole responsibility to be demonstrated for a particular length of time before paragraph 297 of the Immigration Rules could be satisfied (contrary to Nwadu v SSHD [2001] INLR 2).

6. In granting permission to appeal on all grounds, Upper Tribunal Kamara identified a ‘Robinson obvious’ point on procedural fairness:

Insomuch as the points made in the original grounds are relied upon, the reasoning of the Judge who previously refused permission is not wrong to describe the grounds as disagreement.

Nonetheless, out of an abundance of caution given that the Appellant is a child, while not explicitly mentioned in the grounds, it is arguable that the Judge’s comments on the individual documents were not ventilated at the hearing. There is no reference in the decision to the Judge’s series of concerns being put to counsel or to the sponsor to address. If this was the case, the hearing was, arguably, unfair.

There is some merit in the points made in the grounds as to the Judge’s findings and accordingly permission is not refused on any ground.

Upper Tribunal hearing

7. We heard oral submissions from both advocates. During the course of this decision, we address the points they made. We note at this point that Mr Kannangara conceded that there is no merit in Ground 4 because the Judge had not imported a time/duration requirement into the test of sole responsibility.

Discussion and conclusions

Procedural fairness

8. The Appellant adduced various documents from his aunt, his school and his schoolteacher in support of his case on sole responsibility. The Judge noted that these documents “confirm the role and interest that the father plays in the Appellant’s education and upbringing” [26]. The Judge placed either no weight or little weight on these documents because she doubted their veracity. We summarise her key findings below:

- (1) At [27] the Judge considered a letter from the Appellant’s school. She stated that the fact that the contact address for the school was a PO Box “causes me to question this document”. She further took into account that (i) the document made no mention of the Appellant’s mother and (ii) “letters of this type are easily produced on a word processor”.
- (2) The Judge considered the school reports, noting that -
 - (i) no reason had been given as to why they had not been sent electronically to the Appellant’s father [28];

- (ii) “they were handwritten upon a template and could be easily produced and self-serving” [28];
 - (iii) she doubted their veracity at [35] because the language used by the head teacher was inconsistent with that which would be expected of someone in that occupation [35];
 - (iv) these documents “can easily be produced on a word processor” [42];
 - (v) were the contents of these reports were adverse to the Appellant’s case, the Judge relied upon them. At [34] she noted an entry which described the Appellant as a “mummy’s boy”.
- (3) At [29], the Judge noted that a letter from the school failed to make any mention of the Appellant’s mother.
- (4) At [36] the Judge noted that an offer for admission for the year 2021 recorded the Appellant’s father’s name but not his address.
9. Ms Nolan submitted that the Appellant had not produced any evidence that these matters were not in fact raised by the Judge with the sponsor or the advocates at the hearing (the assertion to us by Mr Kannagara, who appeared in the First-tier Tribunal, not being evidence).
10. We provided Ms Nolan with a copy of the judgment of the Court of Appeal in Abdi v The Entry Clearance Officer [2023] EWCA 1455. In that case, one of the grounds considered by the Court of Appeal was that “the Upper Tribunal erred in law by holding that there had been no or no material procedural fairness before the FtT notwithstanding that the FtT decided the appeal against the Appellants on the basis of a matter that had not been raised by the Respondent and of which the FtT gave the Appellants no notice” [16(1)].
11. The Respondent submitted to the Court of Appeal that there was no evidence before the Upper Tribunal that the contentious matters had not been put to the Appellants at the hearing and so there was no evidential basis for the Upper Tribunal Judge to reach any other conclusion than that there was no procedural unfairness. The Court of Appeal rejected this argument and we note the following from the judgment:
- (1) The grounds of appeal clearly pleaded the FtT Judge had failed to put various matters to the Appellants and so the Respondent would have been well aware of what was being asserted [19].
 - (2) In these circumstances, the Respondent ought to have filed a Rule 24 reply to the grounds because, whilst the provisions of Rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (“the Rules”) do not make the filing of a Rule 24 response mandatory in these circumstances, the obligation stems from the application of the overriding objective. The Court stated that it is only by the filing of a Rule 24 reply that the nature and extent of the factual dispute between the parties can “be identified in a way which enables the preparations to be made for it to be resolved at the appeal hearing, if necessary by evidence, so as to avoid unnecessary delay and expense. If resolution of any dispute necessitates a witness statement from counsel, that will give rise to particular consequences which may include new counsel been instructed to conduct the appeal ...” [20].
 - (3) The Appellants were not obliged to adduce evidence, whether in the form of a witness statement from Counsel or a transcript of the hearing, to support the

ground of appeal given the point relied upon was simply a matter of whether an issue had or had not been put to the Appellants. The Court stated that requiring the Appellants to pay for a transcript, or requiring Counsel to prepare a witness statement, would cause unnecessary delay and expense given the Respondent was not positively asserting that the matters had in fact been put to the Appellants [24].

12. Having reviewed that judgment, Ms Nolan submitted that it can be distinguished on the basis that, in this appeal, it was the Permission Judge, not the Appellant, who had raised the ground of appeal.
13. We do not consider that distinction to be one of significance. The grant of permission on the procedural unfairness ground was clear: it was on the basis that matters relating to the veracity of the documentary evidence had not been put to the sponsor, or raised with the advocates. In these circumstances, we are of the view that the overriding objective required the Respondent to file a Rule 24 reply stating whether the factual premise upon which permission had been granted was disputed. This would not have entailed any expense for the Respondent; the advocate who appeared in the First-tier Tribunal could simply have been asked whether the matter was raised by the Judge. No application was made to us by the Respondent to adjourn in order for any such enquiry to be made.
14. We are satisfied that the Judge did not put these matters to the sponsor or raise these issues with the advocates at the hearing. We reach this conclusion because Mr Kannangara's assertion that they were not is supported by evidence, namely:
 - (1) the Judge summarised the oral evidence of the sponsor and no reference is made to these issues within that summary [4];
 - (2) the Judge summarised the submissions of both representatives and no reference is made to these issues within that summary [5-6]; and
 - (3) when setting out her reasoning on these matters, the Judge makes no reference to any contrary submissions having been made by the Appellant's counsel.
15. We turn now to the question of whether the failure to put these matters led to procedural unfairness such that the decision is tainted by an error of law. We have reviewed the principles that can be derived from case law, which are helpfully summarised in Abdi at [29-33]. We apply those principles in reaching our decision. We conclude that it was unfair because:
 - (1) These issues were not raised by the Respondent, either in the reasons for refusal decision or in the Respondent's Review. In these circumstances, the Appellant and his legal team would not have been on notice that the veracity of the documentation was going to be called into question.
 - (2) It was not obvious from the face of the documents that their veracity would be a matter that the Judge would wish to consider. There can be circumstances - such as when documents are, on the face of them, inconsistent with each other, or inconsistent with the statement of a witness - when an Appellant could be expected to address reliability/credibility irrespective of whether the Respondent has raised any such issue. In such circumstances, an Appellant

can have little cause for complaint if the Judge makes adverse findings without having raised the issue at the hearing. However, this is not such a case. Whatever the merits of the points taken by the Judge, they are not points that we consider the Appellant could reasonably have been expected to anticipate and address.

- (3) The Judge’s findings on these issues were significant in the context of her overall finding that the accounts of the Appellant and his father were not credible. The Judge stated at [14] that the witness statement evidence “could be self-serving”. She stated that because of this, “I look to objective evidence to support their statements, as I would expect significant evidence bearing in mind the Appellants for this claim to have provided for him since his arrival in the United Kingdom in 2005”.
16. For the reasons we conclude that the hearing was tainted by procedural unfairness such that the decision cannot stand. Given our conclusion, it follows that no findings of fact can be retained and we therefore do not go on to consider the remaining grounds of appeal.

Notice of Decision

17. The decision of the First-tier Tribunal involved the making of a material error of law and we set aside the decision.
18. We conclude that the appropriate forum for remaking is the First-tier Tribunal (not to be listed before First-tier Tribunal Judge Mulholland) because the error of law identified is such that no findings of fact can be preserved and the Appellant was deprived of a fair hearing. In reaching this decision, we apply paragraph 7.2 of the Senior President’s Practice Statement and take into account the submissions of both advocates.

C E Welsh
Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

8 December 2024