IAC-AH-SC-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/10167/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 6 November 2014	**On 13 November 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE GIBB

Between

ENTRY CLEARANCE OFFICER, NEPAL

Appellant

and

N K
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr N Bramble, Home Office Presenting Officer
For the Respondent: Mr M Blundell, Counsel, instructed by Rashid & Rashid, Solicitors

DECISION AND REASONS

1. The appellant is a citizen of Nepal, born on 18 May 1996. He was refused entry clearance to settle in the UK with his mother and stepfather. His appeal was then allowed by Judge of the First-tier Tribunal Shamash, following a hearing at Taylor House at which the appellant's mother, stepfather, and a friend of the appellant's mother gave oral evidence. The determination was promulgated on 8 April 2014.

2. Permission to appeal was granted to the Entry Clearance Officer on 12 May 2014 by First-tier Tribunal Judge Cruthers. The grounds seeking permission to appeal had been concerned with a procedural issue, namely that the appellant's mother's friend had been present in the hearing room during the appellant's mother's evidence, had subsequently been called as a witness, and that the judge erroneously placed weight on her evidence, without taking this irregularity into account. The permission decision noted that it was arguable that the judge had attached significant weight to the evidence of the appellant's mother's friend, without explicitly considering whether the weight should have been reduced on account of what had occurred at the hearing.

3. Although the appellant in the Upper Tribunal is the Entry Clearance Officer I will refer, in this determination, to the parties as they were before the First-tier Tribunal.

4. Mr Blundell, for the appellant, produced a witness statement by David Sellwood, Counsel, who appeared for the appellant at the First-tier hearing. Attached to the witness statement was Mr Sellwood's note of the events on the day of the hearing, signed by him on that day, 27 February 2014. Mr Blundell also produced a copy of **JK (Democratic Republic of Congo) v SSHD [2007] EWCA Civ 831**, on which he relied for the proposition that asylum proceedings before an Immigration Judge are adversarial in nature.

5. Mr Bramble, for the Secretary of State, produced an attendance note written by Sarah Ramsey, Counsel, who represented the Secretary of State at the First-tier hearing. The note is dated 29 March 2014, just over a month after the hearing took place.

6. Mr Bramble, for the Secretary of State, relied on the grounds. The note from the respondent's Counsel showed that the witness had heard part of the appellant's mother's evidence. There was nothing in the judge's determination setting out these events. It was clear from the determination that weight had been placed on the witness's evidence. The silence on this issue in the determination showed that there had been a failure to consider whether less weight should be placed on the evidence in the circumstances. This was a material error because it could have altered the outcome.

7. Mr Blundell, for the appellant, made submissions as follows. The application by the ECO was based on a misunderstanding. The notes from both counsel showed that the Home Office counsel raised no objection. Relying on paragraph 20 of **JK (DRC)** the proceedings were adversarial. It was also the case that the Home Office counsel had not raised any concerns in submissions. The Home Office were therefore effectively seeking to make fresh submissions after the event, since there was no suggestion that any had been raised at the First-tier hearing.

8. In response Mr Bramble indicated that he did not disagree, but it remained uncertain on the basis of the notes from the two counsel that that had really been the position taken by counsel for the Secretary of State. Mr Blundell, for the appellant, responded by pointing to the burden being on the Secretary of State, who was bringing this appeal, to provide evidence if it was considered to be lacking.

Decision and Reasons

9. I have decided that it has not been established that there was a procedural irregularity amounting to a material error of law. As a result there is no basis for interfering with the judge's decision allowing the appeal.

10. It is perhaps unfortunate that the judge was not asked for her comments, at the stage when permission was granted. It is also unfortunate that there was no record of proceedings to be found on the file. In addition to the determination, however, I have been provided with two attendance notes from both counsel instructed to appear for the respective sides at the hearing.

11. The two notes differ in a number of respects. That by the appellant's counsel is longer and considerably more detailed. It was also written and signed on the day of the hearing. The note by counsel who appeared for the Secretary of State, in contrast, is brief, and focuses on only one issue. It was signed about a month after the hearing.

12. What both notes show is that it became clear during the appellant's mother's evidence that the friend that had accompanied her to the hearing could give relevant evidence, although no witness statement had been prepared for her. Appellant's counsel sought and was granted a brief adjournment to take instructions, and following on from this she gave evidence. In her note the Home Office counsel describes the incident as one in which the judge was "furious" with appellant's counsel for not bringing to her attention the fact that there was another person present with relevant evidence.

13. The note by the appellant's counsel includes the comment that no submissions were made by the Home Office. At the hearing before me there was some discussion of the fact that the judge's determination included a short paragraph (18) noting that she heard submissions from both parties and had taken these into account in reaching her decision.

14. I accept the submission made by Mr Blundell that these were adversarial proceedings. It appears to me to be likely, on the basis of the evidence that I have seen, that counsel for the Home Office at the hearing did not challenge the evidence given by the appellant's mother's friend, and did not make submissions, beyond the formal one of relying on the refusal. It appears to me that I can place considerable weight on the detailed notes

produced by Mr Sellwood, which were signed on the day of the hearing. It is also important to note, in my view, that there is no indication in Ms Ramsey's note that she raised any objection to the evidence being heard, or made any submissions challenging that evidence, or any other aspect of the evidence. In fact the note from the appellant's counsel is entirely silent as to her role at the hearing. The only basis for the application for permission to appeal is the section of the note where Ms Ramsey describes the judge indicating that she wanted to hear from the appellant's mother's friend, and raising the concern about her having been present.

15. If there does remain some uncertainty, in that there could potentially be further evidence to contradict that provided by Mr Sellwood, I accept the submission made on the appellant's behalf before me that it was for the Entry Clearance Officer, in seeking to establish these facts, to provide such evidence.

16. It therefore appears to me to be established, on balance of probabilities, that Home Office counsel at the hearing raised no objection to the evidence of the witness, and raised no objection to any of the evidence following the closing of that evidence, in her submissions. Given that these were adversarial proceedings the judge was not required to imagine points that might have been taken by one of the parties, but which had not been taken, and then deal with those in the determination. The judge was entitled, having raised the issue directly at the hearing with both parties, to proceed on the basis that no objection was being taken to the evidence of the witness.

17. Even if it could be said that the judge erred in law by not mentioning the issue in her determination, despite the fact that it was clear that she was aware of it because it was she that raised it at the hearing, nevertheless it appears to me that the outcome would have been the same even if no weight at all had been placed on the evidence of the third witness. What the judge accepted in her findings, based on the evidence from the appellant's mother, his stepfather, and the documentary evidence, as well as that of the witness, was that the appellant's father had never played any role in his life, having abandoned the appellant's mother when she was pregnant; that the appellant's grandfather is a long-term abusive alcoholic and the environment is unsuitable for the appellant; that the appellant's mother had been raising him as a single parent; and that the situation with the appellant's grandfather had worsened, so that both the appellant's mother and stepfather were concerned about his welfare. Looking at these findings it appears to me that the witness's evidence had some significance, in that she had helped the appellant's mother in various ways with looking after the appellant, when she was in Nepal, as a result of the appellant's grandparents' various failings. I accept that it is clear from the judge's determination that she placed weight on this evidence, but it does not appear to me to be established that the outcome

would have been different if the evidence of the witness had been entirely excluded, or given less weight.

18. In essence the point is that the Secretary of State on behalf of the Entry Clearance Officer cannot properly raise an objection at the error of law stage, having conceded the matter, and raised no such objection, at the First-tier. Appeals are often poorly prepared, for various reasons, and judges will often need to take sensible and pragmatic decisions to hear evidence without a witness statement, or with one being drafted in haste on the day. Where both sides are represented there has to be an expectation that representatives on the day will be able to respond, and raise any objections to admissibility or weight before the judge. If this opportunity has not been taken the error of law appeal system is not an arena in which to raise submissions that could have been made but were not. It also appears to me, in the alternative, that any procedural error would not in any event have been material.

19. As a separate point it would be necessary, for a procedural error amounting to an error of law to be established, to show that the judge gave no consideration to the issue of the weight to be attached to the witness's evidence because of the irregularity. The note from the appellant's counsel, however, makes it clear that she was fully aware of it, given that she raised the issue herself. The judge's silence in the determination on the issue does not therefore reflect a lack of awareness of the point, but probably reflects the fact that the Secretary of State's counsel raised no objection and did not challenge that or any other aspect of the evidence.

20. For these reasons I have decided that a material error of law has not been shown, and the judge's decision allowing the appeal should remain undisturbed.

21. Given the appellant's age I have decided that the determination should be anonymised. The First-tier Judge made no fee award, and this aspect was not challenged before me.

Notice of Decision

22. It has not established that there was a material error of law in the judge's determination, and her decision allowing the appeal therefore remains undisturbed.

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

Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant

and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date **6 November 2014**

Deputy Upper Tribunal Judge Gibb