Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/12995/2019 (V)

THE IMMIGRATION ACTS

Heard remotely on Skype for Business	**Decision & Reasons Promulgated**
On 5 March 2021	**On 16 March 2021**
Extempore	

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

KASSIM BWULE KASASA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr S Walker, Senior Home Office Presenting Officer
For the Respondent: Mr C Sultan, Counsel, instructed by KSRI Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State, with permission, against the decision of First-tier Tribunal Judge Herbert ("the judge"), promulgated on 27 September 2019, by which he allowed Mr Kasasa's appeal against the Secretary of State's refusal of his human rights claim.

2. The human rights claim was essentially based on a prolonged period of residence in the United Kingdom (since 2001), a fair amount of which was

on a lawful basis as a student, the ties that Mr Kasasa had established in this country, and the absence of ties with his country of origin, Uganda.

3. At the hearing before the judge Mr Kasasa, for some unknown reason, did not attend and it appears as though there was no Home Office Presenting Officer either, although that is unclear because the judge failed to state the position at the outset of his decision and reasons document.

4. The judge appeared to accept that Mr Kasasa had come to the United Kingdom as a young child and then returned to Uganda at the age of 6. At paragraph 27 the judge stated that:

> "It may well be that he [Mr Kasasa] ought to have indefinite leave to remain stamped on his Passport as clearly as his other siblings have had, although their documentation is not in the bundle before me."

5. Nothing more is said about this.

6. At paragraph 29 the judge made reference to paragraph 276ADE of the Immigration Rules (this must presumably relate to 276ADE(1)(vi)) and stated that Mr Kasasa would be able to succeed if he could show that there were "some obstacles to his returning to Uganda". In the next paragraph the judge refers to "insurmountable obstacles" and goes on to describe these as "very real obstacles to reintegration into life in (the) country of origin".

7. At paragraph 31 the judge found that there was just "efficient" evidence notwithstanding the absence of the Appellant at the hearing that he had been in the United Kingdom since 2001, that Uganda was a "much changed place", and that there was "no evidence before me that the Appellant has any accommodation, employment or means of support in Uganda". The judge thought it was "certainly possible" that Mr Kasasa's brother might be able to support him on return, but it was more difficult for such support to be given when the parties were geographically separated by several thousand miles.

8. At paragraph 32, the judge found that it would be "extremely hard" for Mr Kasasa to obtain employment and accommodation. He found that it "may possibly" be the case that some extended family members are still living in Uganda, but that was, said the judge, "simply speculation".

9. The judge then went on to refer to "rule 117" and took a number of factors into account before concluding that Mr Kasasa should succeed.

10. Whilst his conclusions do not appear to be based in any material way on what was described as the "Windrush scandal", the judge nonetheless felt it appropriate to comment in paragraph 38 that the "culture of the Home Office may well have affected the decision making process of many cases including that possibly of this Appellant".

11. Ultimately, the judge purported to allow the appeal "under the Immigration Rules" as well as in respect of Article 8.

12. The Secretary of State's grounds of appeal challenge the judge's decision in two core respects. First, it was said that the judge reversed the burden of proof in respect of relevant matters. Second, the judge erred his approach to paragraph 276ADE(1)(vi) of the Rules.

13. Permission was granted by First-tier Tribunal Judge Fisher on 1 July 2020.

14. A rule 24 response, dated 24 August 2020, was submitted by Mr Kasasa's representatives.

15. At the hearing before me, Mr Walker relied on the grounds of appeal.

16. Mr Sultan submitted that the judge had not reversed the burden of proof and that the Secretary of State had failed to provide any evidence to show that relevant family members of Mr Kasasa were not in fact residing in the United Kingdom. He also submitted that the judge had taken relevant considerations into account and that it made no difference that the judge had referred to "insurmountable obstacles", rather than "very significant obstacles." The judge had in fact considered matters under section 117B of the Nationality, Immigration and Asylum Act 2002. The Windrush issue played no material part in the judge's considerations.

17. Both representatives agreed that Mr Kasasa's leave to remain in the United Kingdom ended on 5 May 2011 when an application for further leave to remain was refused by the Secretary of State.

18. I conclude that the judge has materially erred in law in several respects, as set out in the Secretary of State's grounds of appeal.

19. Paragraph 26 of the judge's decision represents a fairly standard recitation of the burden and standard of proof applicable in cases such as the present. However, what is important is not simply a statement of the location of the burden but its application in practice. With reference to paragraphs 31 and 32 of the judge's decision, I conclude that he has effectively reversed that burden of proof b requiring the Secretary of State to have adduced evidence to show either that Mr Kasasa *would have* accommodation, employment or means of support in Uganda, or to show that he *did not* have any extended family members in that country. It was of course for Mr Kasasa himself to prove that he would not have access to basic living requirements, means of support, or any extended family members living in Uganda. This is an error of law.

20. I note with reference to Mr Kasasa's witness statement that whilst he had asserted that his father and a number of siblings resided in the United Kingdom, nothing was said about an absence of extended family members living in Uganda. Thus, there was no evidence from Mr Kasasa on which the judge could have concluded that there were no family members in that country.

21. The error of law is material.

22. Turning to the issue of paragraph 276ADE(1)(vi) of the Rules, the judge has erred in several respects. At paragraph 29 he refers to the need to show "some obstacles": that is plainly wrong in law and casts doubt on the relevant threshold subsequently applied. There is then a reference to "insurmountable obstacles" in the next paragraph. That too is wrong in law. However, I do take on board the point raised in the rule 24 response that this particular threshold may indeed be higher or at least the same as the "very significant obstacles" test.

23. Yet this does not cure the erroneous approach adopted by the judge. He simply does not engage with the core issue of "integration", as this term has been authoritatively construed by the Court of Appeal in Kamara [2016] EWCA Civ 813; [2016] 4 WLR 152. There is no engagement whatsoever with what "integration" entails and its objective nature. In respect of this issue, I have already mentioned the reversal of the burden of proof as regards the possibility of obtaining accommodation, employment or means of support in Uganda. In addition to this first error, the judge has entirely failed to deal with possible means of support from relatives living in the United Kingdom including the brother. Indeed, the judge himself had stated that it was "certainly possible" for such support to be given. The fact that there may be a geographical separation between the supporter and the individual in receipt of that support is entirely beside the point, absent any exceptional circumstances, none of which have been identified by the judge in this case.

24. The judge has entirely failed to explain why he regarded Uganda as being a "much changed place" since Mr Kasasa's departure in 2001. The judge has failed to explain why it would in his view be "extremely hard" for Mr Kasasa to obtain employment and/or accommodation in Uganda. There are no findings in respect of Mr Kasasa's health or ability to work in the sense of there being very significant obstacles to him finding reasonable employment and to establish a reasonable level of existence within a reasonable period of time on return to his country of origin, a country in which he has spent a large proportion of his life.

25. These errors fatally undermine the core element of the judge's reasoning in this case.

26. I make the following additional observations. It is surprising, to say the least, that the judge keeps referring to "rule 117", rather than section 117B of the 2002 Act. He has also failed to properly engage with the mandatory considerations set out therein, although this is not an element of my conclusions on the errors of law.

27. Finally, in my view, the judge's comments in paragraph 38 relating to the Windrush issue are inappropriate. I do not say this lightly. What the judge has effectively done is to imply that there was some bias or bad faith element to the decision-making process in Mr Kasasa's case. There was

absolutely no evidence whatsoever to suggest that this was in fact so. The judge has in my view engaged in impermissible speculation and he simply should not have said what he did.

28. As a final comment, it is also surprising that the judge purported to allow the appeal "under the Immigration Rules". The First-tier Tribunal has had no such jurisdiction for a number of years now.

29. The judge's decision is set aside.

30. In my view, this appeal has to be remitted to the First-tier Tribunal. There needs to be clear findings of fact in the context of a proper consideration of the relevant legal framework. The judge's allusion to the family history of Mr Kasasa's connections to the United Kingdom, as referenced at paragraph 27, needs to be properly explored in due course and the extent of the fact-finding involved therein means that remittal is appropriate in all the circumstances.

31. This appeal was therefore remitted to the First-tier Tribunal with no preserved findings of fact.

Notice of decision

32. The Secretary of State's appeal to the Upper Tribunal is allowed.

33. The decision of the First-tier Tribunal contains errors of law and it is set aside.

34. Mr Kasasa's appeal is remitted to the First-tier Tribunal.

35. No anonymity direction is made.

Directions to the First-tier Tribunal

1) This appeal is remitted to the First-tier Tribunal for a complete re-hearing with no preserved findings of fact;

2) The remitted appeal shall not be heard by First-tier Tribunal Judge Herbert.

Signed H Norton-Taylor Date: 9 March 2021

Upper Tribunal Judge Norton-Taylor