



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/08797/2012

THE IMMIGRATION ACTS

Heard in North Shields
On 3rd September, 2013

Determination Sent
On 24th October 2013

Before

Upper Tribunal Judge Chalkley

Between

JUNIOR NDAKA AKUBAKELE

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms N Rasoul of Counsel
For the Respondent: Ms H Rackstraw, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of the Democratic Republic of the Congo who was born on 30th August, 1981 and who entered the United Kingdom on an unknown date. He was arrested on suspicion of having illegally entered the United Kingdom in 2008. The appellant claimed asylum in the identity of 'Kevin Masala', but left the United Kingdom before the decision was made on that application. He subsequently

claimed asylum in the Republic of Ireland in the identity of Junior 'Ndaka Akubakele' on 29th September, 2009.

2. The respondent was returned to the United Kingdom by the Government of the Republic of Ireland and then made an application for asylum in his name Junior Ndaka Akubakele.
3. The respondent refused the appellant's application and on 13th September, 2012, gave directions for his removal to the Democratic Republic of Congo. The appellant appealed that decision and his appeal was heard by First-tier Tribunal Judge Holmes who, in a determination promulgated on 9th November, 2012, found that there was no real risk that on return to the DRC the appellant would be persecuted or suffers harm. He dismissed the appellant's asylum and humanitarian protection appeal and on the same factual basis he dismissed the appellant's Article 3 appeal.
4. The judge then went on to consider the appellant's Article 8 appeal and in doing so considered *Chikwamba* [2008] UKHL 40 and *Hayat (Nature of Chikwamba principle) Pakistan* [2011] UKUT 44. He noted that the appellant had a poor immigration history and concluded that the appellant's removal was not disproportionate.
5. The appellant challenged that decision, asserting that the judge had failed to give adequate consideration to the best interests of the child and not applied the guidance set out in *Sande* [2012] UKUT, concerning the reasonableness of relocation where the appellant's partner and child are both British nationals. The judge accepted that the appellant met his partner in December 2009 and that on 19th April, 2012 the appellant's partner gave birth to their son, Darnel. The evidence before the judge was that the appellant's partner's family are all based in London.
6. I referred Miss Rackstraw to the decision of the Court of Appeal in *Secretary of State for the Home Department v Hayat (Pakistan)* [2012] EWCA Civ 105 and in particular to paragraph 30. This was a case decided on 31st July, 2012, but not apparently relied upon by either party in the hearing before First-tier Tribunal Judge Holmes.
7. Miss Rackstraw accepted, entirely properly in my view, that the judge had made an error of law in his determination.
8. I suggested to Miss Rackstraw that in the circumstances and applying the decision in *Hayat* it appeared that the proper course would be for me to allow the appellant's Article 8 appeal. She said that on the particular facts of this appellant she agreed.
9. I have produced this determination merely to record the agreement between the parties. **The appellant's human rights appeal is allowed under Article 8.**

Upper Tribunal Judge Chalkley