Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01358/2013

THE IMMIGRATION ACTS

Heard at Glasgow on 10 December 2013	**Determination issued on 18 December 2013**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

HAMED JAMES SAID

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr B Criggie, of Hamilton Burns & Co, Solicitors
For the Respondent: Mr A Mullen, Senior Home Office Presenting Officer

No anonymity order requested or made

DETERMINATION AND REASONS

1) The appellant has given various names and dates of birth. He presently identifies himself as Hamed James Said, born on 2 August 1984. He says he is from Burundi, but the respondent does not accept that he is from that country, and thinks it likely that he is from Tanzania.

2) By determination promulgated on 1 October 2013 a panel of the First-tier Tribunal comprising Judge Debra Clapham and Ms E Morton dismissed the appellant's appeal against the respondent's decision of 18 June 2013 to make a deportation order to either Burundi or Tanzania.

3) The appellant appeals to the Upper Tribunal on these grounds:

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Ground 1

… at paragraph 69 … the panel states:

There is no reason why he cannot return to Burundi or Tanzania either on his own or with his partner and children.

… The panel has erred … by inadequately reasoning their finding … the panel's reasoning is confusing and unclear especially in the light of the content of paragraph 69, the beginning of which states:

In relation to the appellant's own child we do not accept [the Presenting Officer's] assertion that even if the appellant were to be deported, the appellant could maintain family life from abroad. The case law … is quite clear. Family life cannot be achieved via remote means.

The panel has failed to give sufficient reasoning for their finding that the appellant can return to Burundi or Tanzania on his own. In doing so the panel has failed to give due consideration to the best interests of the appellant's child as per ZH (Tanzania) [2011] UK SC4.

Ground 2

… The panel … erred … at paragraph 70 … where they state:

We see no reason why she cannot continue her education and subsequent career either in Burundi or Tanzania.

There was no evidence … to indicate availability and standard of educational facilities in Burundi or Tanzania. Nor was there any evidence to demonstrate whether foreign nationals like the appellant's partner could access such institutions and at what cost. In employing speculation as to the availability of education and career prospects the panel erred in law.

Ground 3

… The panel erred … at paragraph 70 by failing to give due consideration to the appellant's partner's rights as per Beoku-Betts [2008] UKHL 39.

The panel at paragraph 65 … acknowledged their duty to consider Article 8 in terms of general jurisprudence and in particular … Boultif as confirmed by Uner. In Uner at paragraph 57 the court held that in order to assess whether an expulsion measure was necessary in a democratic society and proportionate to the legitimate aim pursued, the court was to have regard to:

… the seriousness of the difficulties which the spouse is likely to encounter in the country to which the appellant is to be expelled.

The panel have failed to consider the difficulties which the appellant's partner may face in either Burundi and Tanzania. In so doing the panel have failed to give adequate reasons for their finding that the appellant's partner can relocate with the appellant.

4) Mr Criggie said that Grounds 1 and 2 raise much the same issue, derived from different parts of the determination, criticising the panel's assessment of the reasonability of his wife and children going with him to either country. There is a child of the relationship, and his partner has a child from a previous relationship. While the appellant has not enabled his true origins to be known, that was irrelevant to the present issue, which was the same whether removal might be to Burundi or to Tanzania. There are two

children of a Somalian mother and the issue involves all three going to a country which is not their country of origin.

5) (Mr Criggie next accepted that a point mentioned in the grant of permission over whether the panel referred to an incorrect paragraph of the Immigration Rules makes no difference, because the resolution of the case depends on Article 8 considerations only. He also accepted that the judge granting permission misapprehended that the panel at paragraph 65 when referring to MS meant the Court of Appeal case with the initials MF, whereas the panel plainly had in mind MS [2013] CSOH 1. Nothing turns on the terms of the grant of permission, and these matters are mentioned here only for completeness, but it does show that if a case is worth a reference at all, it is worth providing its citation.)

6) Mr Criggie said that while Boultif and other guiding jurisprudence is mentioned in the determination, there was error not by failing to mention the correct principles of case law, but by failing to apply them correctly. The appellant's offence was committed in February 2006, nearly 8 years ago, and there had been no re-offending. The children in the case were born on 12 November 2009 and 31 October 2011. They have only ever lived in the UK. Their mother has refugee status, and is studying with a view to becoming a nurse. The criteria of Boultif were not properly addressed in the proportionality assessment, and a contrary conclusion should have been reached. The appellant's immigration history should not have been given as much adverse weight as it was. It could not be said that there were insurmountable obstacles to the appellant's partner and children moving to either Burundi or Tanzania, but it could be said to be unreasonable, and that the outcome was disproportionate.

7) Mr Mullen submitted that a great deal is now made of the time the appellant has spent in the UK, but his presence here has never been lawful, there has been no delay by the Secretary of State, and his non-removal is entirely due to his own attitude of hiding his true identity and origin. The family situation was formed entirely while his status was known to be precarious, and the prospect of deportation or removal must have been in the mind of the appellant and of his partner since they met in 2010. The appellant should not succeed simply because he had made it practically very difficult to remove him. The two children are not UK citizens. Burundi and Tanzania are both parties to the Refugee Convention, so the appellant's partner and the children could expect to be permitted to enter there with him. The grounds did not disclose any error of law but simply disagreement with the outcome on proportionality.

8) I reserved my determination.

9) In my opinion, the grounds of appeal do not disclose any more than disagreement with the panel's proportionality conclusions. They do not disclose any error of legal approach by the panel.

10) The facts of the case are plain. Deportation of the appellant (if it can ever be accomplished) would separate him from his partner and the children, if they stay in the UK. That would be a serious disruption of family life, but it is one the adult parties should always have had in mind, and it would arise only partly from the respondent's action, being also up to the decision of the family. Alternatively, if they decide that all should leave, then partner and children lose what may be the relative advantages of remaining here. The panel had to decide whether interference in either of those ways would be disproportionate to the public interest in deporting someone with the appellant's criminal history and very bad immigration history. That was quite a strong public interest. The panel was entitled to decide as it did.

11) As to such specifics as are in the grounds, the panel was correct to identify that family life could not be carried on by remote means only. That was not a principle by which the case had to succeed. It was not for the panel to investigate the likely consequences of the potential courses available to the appellant and his family. If there were disadvantages as to education and career prospects, and other difficulties to be faced, it was for the appellant to lay that information before the panel. The family does not have to decide that the children will go to Burundi or Tanzania if the appellant does; but if they do, there is nothing to suggest that that they will be any worse off than most other children there. Rather, with two parents able and willing to care and provide for them, they would no doubt be better off than many.

12) The conclusion reached was properly available to the panel, and no legal error of approach has been identified. The determination of the panel shall stand.

11 December 2013
Judge of the Upper Tribunal