



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/07995/2012

THE IMMIGRATION ACTS

Heard at Bradford
On 5th December 2013

Determination Promulgated
On 9th January 2014

Before

UPPER TRIBUNAL JUDGE ROBERTS

Between

MISS CARINNE KABA KIMESA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Khan, of Counsel
For the Respondent: Mr M Diwnycz, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a citizen of DRC (with a disputed date of birth of 10th March 1995). She arrived in the United Kingdom on 20th January 2012 and claimed asylum on 6th March 2012, on the basis of her imputed political opinion in the DRC.
2. The factual basis of the Appellant's claim is as follows:

“She was brought up by her uncle, Thomas Luwawa, from the age of three years. She lived with him, his wife, and his three daughters in Kinshasa. Her uncle was a politician, who was a member of the UDPS. Other than this, she knew little of his work because he never discussed it. He would sometimes disappear and the appellant and his three daughters would be kept off school for a month. He never discussed the reasons for his disappearances although, on one occasions, one of his daughters told her that he had been kidnapped.

At around 4 am on a day in November 2011, four men entered the house where the appellant was living and demanded to know the whereabouts of her uncle. Her aunt told them that he was travelling away. The men left, only to return a few weeks later at the same time of the morning. This time the men searched her uncle’s bedroom. They told her aunt that if they did not find her uncle they would kill his family. Her aunt later told the appellant that she had telephoned her uncle in order to tell him what had happened, and that he had said the matter should be reported to the police. Her aunt did so, but the police simply said that she should report the matter if it happened again.

At the end of December 2011, the men returned for a third time in the early hours of the morning. This time they broke down the door and beat her aunt, causing a cut to her face and a fractured arm. Again, they threatened to kill the family if they did not find her uncle upon their return. The next day, the family went to the house of her uncle’s friend in Barumbu. Upon returning to Kinshasa to collect some of their belongings from their house in Kinshasa, her aunt was warned by neighbours that the men had returned during the family’s absence and advised her to stay away.

The appellant’s uncle returned from Paris on the 17th January 2012 and arranged for the family to stay with his friend, Alain, in Brazzaville. On the 19th January 2012, the appellant flew with Alain to the United Kingdom via Paris, in order to stay with her sister Mireille, who is a British citizen and lives in London. Her uncle advised her that his wold (sic) be the safest course of action in the circumstances”.

3. The Respondent refused her claim and the Appellant appealed that refusal. The appeal came before Judge Kelly who in a determination promulgated on 19th November 2012, dismissed the appeal on asylum and human rights grounds. At the hearing before Judge Kelly two other matters apart from the Appellant’s core asylum claim were raised. Firstly there was an age dispute. The Appellant claimed that her correct age is 10th March 1995 whereas the Respondent considered her notional age to be 1st January 1994.
4. The second matter is that the Appellant had formed a sexual relationship with man in Brixton called Ladis Kayembe who is a British citizen. A child was subsequently born on 20th November 2012 and has been registered as a British citizen.
5. Judge Kelly noted on the age dispute that there was no Merton compliant age assessment to assist him. Nevertheless he concluded the Appellant fell to be treated as an adult. Reviewing the evidence before him he came to the conclusion that the Appellant could safely return to the DRC, even as a young single mother with a newborn baby to care for.

6. In granting permission to appeal Judge Easterman said:

“The grounds seek to argue that the Judge of the First-tier Tribunal has erred in his findings in relation to the applicant’s age. In the case where the respondent had no age assessment but asserted the applicant was born on 1st January 1994.(sic) The applicant asserted she was born 10th March 1995. Having found the Respondent had lost the original birth certificate sent to them by the solicitors and found applicant(sic) to be honest and possibly to believe she was born on 10th March 1995, the Judge nonetheless concluded she was not a child because she was obviously pregnant.

It is arguable that the question of the applicant’s age when considering return to a country such as the D.R.C goes to risk on return and reasonableness of relocation and as a result would be determined at the lower standard of proof. It is unclear to me, if that is correct, given what the Judge appears to accept, on what basis he finds in favour of the Respondent on the question of age. It is also unclear what relevant the applicant’s pregnancy had when it was not being suggested that there was more than 16 months difference between the Respondent’s position on the applicant’s(sic) with the applicant claiming to be about 17½. The consideration of the applicant’s age, in my view gives rise to an article law”(sic).

Upper Tribunal Hearing

7. The matter came before Upper Tribunal Judge Reeds on 1st August 2013. In a decision issued on 14th August 2013 Judge Reeds found that the decision of Judge Kelly contained an error of law, such that it had to be set aside. In her decision Judge Reeds, after setting out the history and factual background to the Appellant’s case said,

“The matter was listed before the Upper Tribunal in accordance with the directions given. The Appellant was represented by Ms Khan , who appeared for the Appellant in the court below and the Respondent by Mr Diwnycz, Senior Home Office Presenting Officer. At the hearing, Mr Diwnycz having discussed the matter with Ms Khan prior to the hearing commencing, informed the court that the Secretary of State conceded that the decision of the First-tier Tribunal did disclose an error of law for the reasons set out in the grounds and the grant of permission to appeal and that in those circumstances, the appropriate course was for the decision of the First-tier Tribunal to be set aside”.

In the light of the concession made before me there is no basis on which I could possibly do otherwise than to accept that concession and find that the determination cannot stand as a consequence .It is therefore common ground that the judge made an error of law and that the Tribunal must substitute a fresh decision to allow or dismiss the appeal.....In the determination it is clear that he (Judge Kelly)assessed the risk to the Appellant on return on the basis that her account of events that caused her to leave were true.

It is clear from the submissions of both advocates....that the judge erred in law in his approach to the evidence concerning the central issue of the Appellants age and whether she was a minor and it is accepted that this was such as to undermine the findings of fact as a whole when assessing risk on return.....

It was agreed by both advocates that the positive credibility findings made by the judge concerning the events in DRC were not infected by the error of law and therefore should be preserved

Directions were issued for a resumed hearing at Bradford on 5th December 2013. Thus the matter came before me.

The Resumed Hearing

8. I heard submissions from both representatives. In the event it was not necessary to hear oral evidence from the Appellant. Ms Khan's submissions comprised two strands,

- (i) The Appellant's age dispute;
- (ii) Risk on return/unsafe return.

She made submissions following the lines of her helpful skeleton argument. It is correct to say that those submissions focussed in the main on the risk on return to the Appellant, rather than the age dispute. She submitted that the First-tier Tribunal Judge had not looked at what would happen to this Appellant at N'djili Airport, should she be returned to DRC. That had to be factored in to the question of risk on return. Once that was factored into the preserved positive credibility findings of Judge Kelly, it followed that the Appellant was at real risk on return as recognised by the Tribunal in the Country Guidance case of **BK (failed asylum seekers) DRC CG [2007] UKAIT 00098**.

9. Mr Diwnycz on behalf of the Respondent, with his customary fairness did not seek to press any further points or dissuade me from accepting Ms Khan's submissions. He pointed out that in any event the Respondent had conceded the Appellant's Article 8 claim since it is accepted she is now the mother of a British child.

My Findings and Reasons

10. My starting point in this appeal must be the preserved credibility findings of Judge Kelly. In paragraph 26 the Judge agrees with the Appellant's factual account which forms the basis of her claim. He says in paragraph 26 "*I therefore assess the risk to the Appellant on return to the DRC on the basis that her account of the events that caused her to leave it, are true*". He then outlines that account and adds to it in paragraph 27. In paragraph 28 he finds,

*"So far as risk of harm from her uncle's foes is concerned, I find that the appellant could safely reside anywhere within the DRC, **provided** (Judge Kelly's emphasis) that it is not a place at which her uncle is residing simultaneously"*.

The accepted basis of the Appellant's claim is therefore that she is at risk in her home area because of her uncle's involvement in UDPS. Therefore what would be her position on return to the DRC via N'djili Airport.

11. It is clear that Judge Kelly accepted that the Appellant's uncle was involved with UDPS. The Appellant had to leave the DRC because of this. It is accepted that the authorities came on three separate occasions searching for her uncle and therefore it follows that the Appellant is someone who falls into the risk category of having a political profile. If the Appellant were to be returned I am satisfied she would be an involuntary returnee. She would face questioning at the airport to ascertain anything of interest to the authorities, about her. She clearly has a higher profile than those who come within the category of being simply failed asylum seekers. There is a reasonable likelihood in this Appellant's case that because of her background relating to her uncle, she would be at risk of being of interest to the authorities and would be liable to further questioning and transfer to a detention facility.
12. Once in detention the Appellant would be at real risk of ill treatment. She would be accompanied by her young child and that would increase her vulnerability. I am reinforced in this view by **BK** where it was found,

".....the preponderance of the evidence, at least as presented to us in this appeal and (with express concession by Miss Giovannetti for the purposes of this appeal)is that once in detention away from the airport, they will be in an extremely vulnerable situation characterised by physical and verbal abuse of a serious kind. They are no longer involved in a process which can normally be negotiated by paying a bribe in circumstances which are not oppressive. They have lost their liberty and face targeted ill-treatment".

I am satisfied therefore having regard to the preserved findings of Judge Kelly and the background documents that removing this appellant would be contrary to the United Kingdom's obligations under the 1951 Refugee Convention on account of her imputed political opinion.

13. That is sufficient to dispose of this matter. In the circumstances it is not necessary to make a finding on the age dispute nor to consider further the question of internal relocation.

DECISION

14. The First-tier Tribunal erred in law. I set aside that decision and remake it. This appeal is allowed.

No order for anonymity was sought and therefore none was made.

Signature
Judge of the Upper Tribunal

Dated