



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: DA/00610/2014

THE IMMIGRATION ACTS

Heard at Bradford

On 25th September 2014

**Determination
Promulgated**

On 16th October 2014

Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AWAZI MWINYI

Respondent

Representation:

For the Appellant: Mr M Diwnycz, Home Office Presenting Officer

For the Respondent: Ms C Mair of Counsel instructed by Paragon Law

DETERMINATION AND REASONS

1. This is the Secretary of State's appeal against the decision of Judge Deardon and Dr Deputy Judge Barros made following a hearing at Bradford on 8th July, 2014.

Background

2. The claimant is a citizen of the Democratic Republic of Congo born on 15th May 1989. On 26th October 2011 he was convicted of offences of assault occasioning actual bodily harm and possession of an offensive weapon. He was sentenced to two terms of imprisonment to run concurrently for a total of 21 months.

Procedural history

3. This matter first came before the Tribunal on 17th December, 2012. The Presenting Officer that day requested an adjournment on the basis that he had been ambushed by the late service of an expert report by Dr Aguilar on the claimant's ethnicity. The judge indicated that she was prepared to give the Presenting Officer adequate time to consider the report but said that thereafter she intended to proceed. At that stage the Home Office withdrew the decision.
4. A fresh decision was made in November 2013.
5. In February 2014 that decision was withdrawn in the light of the case of R (on the application of P) (DRC) v SSHD and R (on the application of R) (DRC) v SSHD [2013] EWHC 3879.
6. A third decision, and the one before the panel was made on 26th March, 2014.
7. On 23rd June, 2014 the POU asked for the case to be adjourned pending the reporting of a country guidance case. The request was made by a Senior Presenting Officer who said that he had been assigned to present the appeal. He said that it was expected that the country guidance case would be heard and promulgated before the end of the year.
8. On 25th June 2014 the adjournment request was refused by the resident judge.
9. On the morning of the hearing the judge received a letter from the POU in Leeds which he set out in full. It states:

"I write to inform you that due to sudden illness no Presenting Officer will be available to present the list in Court 7 today, 8th July 2014. On behalf of the Home Office I wish to seek an adjournment on the case of Awazi Mwinyi (DA/00610/2014). The absence of a Presenting Officer should not be taken as an indication that any aspect of this appeal is conceded by the Secretary of State. The panel is invited to take into account the contents of the Home Office bundle and to dismiss the appeal accordingly. Please accept my sincere apologies for the inconvenience caused by the absence of a Presenting Officer for this list."

10. The judge heard submissions from counsel for the claimant. She told him that Dr Aguilar, the expert, was on the train from St. Andrew's in Scotland and was expected to arrive at the hearing centre to give evidence later in the morning. She said that the Home Office were a large organisation and it would not have been unreasonable to have expected them to have fielded either counsel or an alternative Presenting Officer at short notice. She also confirmed that there was no country guidance case pending on the DRC on the Upper Tribunal's case management system.
11. The judge wrote as follows:

“We considered the application to adjourn which had been made by the Secretary of State in light of the further representations made by Ms Mair on behalf of the appellant. We considered the application of Rules 4 and 21 of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and noted that a written application to adjourn the proceedings had already been made and refused by the regional senior Immigration Judge. Having considered all the factors cumulatively we decided that it was appropriate for the proceedings to continue. We therefore refused the application to adjourn.”
12. The judge heard evidence from the claimant and considered the submissions. He relied on the judgment in P & R and, on that basis, found that the claimant was a member of a particular social group, being a criminal deportee who had been sentenced to a period of at least twelve months' imprisonment, and would be journeying back to the DRC. As such, and on the basis of the conclusions of Mr Justice Phillips in P & R, he concluded that he would be at risk on return. The claimant would be interrogated on arrival by professional, skilled and experienced immigration officials. He would not be able to hide the fact of his conviction and that would result in a real and substantial risk that, in common with other criminal deportees, he would be subjected to imprisonment and ill-treatment.

The Grounds of Application

13. The Secretary of State sought permission to appeal on the grounds that the judge had erred in deciding to proceed with the appeal without any representation from the Secretary of State. The Presenting Officer's attendance was entirely out of control of the Secretary of State and cover was not available at such short notice.
14. Second, the judge erred in relying on the case of P & R. The Home Office has now published a Country Policy Bulletin which updates the policy on return to the DRC in the light of that judgment. The UK Government is confident that the new information confirmed their view that foreign national offenders or failed asylum seekers do not on the basis of their conviction in the UK face any real risk on return. The Tribunal, moreover, had failed to provide any assessment as to why the authorities in the DRC would ever know about his conviction.

15. Permission to appeal was granted by Designated Judge Appleyard on 5th August 2014.

Submissions

16. Mr Diwnycz relied on his grounds. He said that the file was enormous and needed two days' preparation because of its potential complexity. There was no way that the POU could field a substitute. The case had been assigned to him personally because it had been decided that it was complex enough to need a Senior Presenting Officer; the panel would have been aware of that fact because of the letter on the file.
17. Ms Mair submitted that it was open to the judge to decide that the proper course was to proceed. She reminded me of the history of this appeal and the past conduct of the Secretary of State in withdrawing two previous decisions and then attempting to have the appeal postponed on the basis of a claimed pending country guidance case which had still not been listed. Arguably the conduct of the Secretary of State in December 2012, in seeking to have an appeal adjourned and, when that attempt failed, withdrawing the decision, amounted to abuse of process. The judge's decision to proceed must be considered in the context of the fact that this was the third attempt by the Secretary of State to have the matter adjourned after a third decision.
18. The claim of risk on the grounds of particular social group was raised two and a half months earlier at the CMR and whilst it was accepted that the report was not available until very late in the day, the parties knew what the report would say.
19. It was not clear to the panel on the day that the case had been deemed too complex to be given to colleagues, nor that a particular individual was tied to the case. Moreover there was real prejudice to the claimant who was in detention.
20. So far as Ground 2 was concerned she said that the judge had been right to consider this appeal in the light of the decision in P & K. The judge had considered how the convictions would come to light. All of the evidence before the judge was in the reports which were before Mr Justice Phillips.

Findings and Conclusions

21. The rules which govern the judge's decision are Rule 4 and 21 of the Asylum and Immigration Tribunal (Procedure) Rules 2005.
22. Rule 4 states:

"The overriding objective of these Rules is to secure that proceedings before the Tribunal are handled as fairly, quickly and efficiently as possible and, where appropriate, that members of the Tribunal have responsibility for ensuring this, in the interests of the parties to the proceedings and the wider public interest."

23. Rule 21 states:

“The Tribunal must not adjourn a hearing on the application of a party unless satisfied that the appeal or application cannot otherwise be justly determined.”

24. It is clear that the judge had the relevant rules in mind, since he cited both and said that he had considered all the factors cumulatively. On the evidence before the judge it cannot properly be said that he was not entitled to reach the conclusion that the proper application of them favoured proceeding with the appeal.

25. The procedural history of this matter is quite extraordinary. The Secretary of State has made three decisions, having withdrawn two, the first after a failed application to adjourn and the second in the light of P & R although it was re-made on broadly the same terms as before.

26. The judge was entitled to take into account the procedural history in deciding whether the overriding objective of the Rules would properly be met by acceding to another adjournment request.

27. Most importantly, the evidence upon which the Presenting Officer now relies was not before him. The adjournment request from the Presenting Officers' Unit did not state that this was a case which was so complex that it needed two days' preparation. It did not state that a Senior Presenting Officer had been assigned personally to prepare it because of the importance of the matter to the Secretary of State. The request was made in standard terms without any reference to matters now relied upon.

28. Whilst it may have been difficult for the Secretary of State to field a suitable Presenting Officer to present the appeal at short notice, it could not have been difficult for her to instruct one of the six or seven Presenting Officers who were in the building at the time to come into court and to explain the position to the judge. The importance which she now ascribes to the case is belied by her actions on the day.

29. So far as Ground 2 is concerned Mr Diwnycz made no submissions. It is without merit. It was for the judge to decide how much weight to put on the case of P & R. Moreover Mr Justice Phillips granted the Secretary of State permission to appeal to the Court of Appeal against his decision but it seems that the Secretary of State decided to withdraw her appeal and elected to re-make the decision in P's case.

30. The judge dealt with the issue of disclosure to the DRC authorities at paragraph 20 of the determination.

Decision

31. The original judge did not err in law. His decision stands. The claimant's appeal is allowed.

Signed

Date

Upper Tribunal Judge Taylor