



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/01554/2013

THE IMMIGRATION ACTS

Heard at Columbus House, Newport
On 18 February 2014

Determination Promulgated
On 27 February 2014
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Before

UPPER TRIBUNAL JUDGE POOLE

Between

MR F L
(ANONYMITY ORDER MAINTAINED)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Plowright of Counsel
For the Respondent: Mr Irwin Richards, Home Office Presenting Officer

DECISION WITH REASONS

1. The appellant is a citizen of the DRC born 9 April 1984. The appellant originally appealed against a notice of decision to refuse to revoke a deportation order. That appeal came before Judge of the First-tier Tribunal Pirodda and a non-legal member at a hearing at Birmingham on 14 November 2013. Both parties were represented.

Mr Plowright appeared for the appellant. In a determination dated 18 November the panel dismissed the appellant's appeal. In reaching its conclusions the panel found that neither the appellant nor his witnesses were credible.

2. The appellant sought leave to appeal that decision. Mr Plowright drafted the grounds seeking leave. Those grounds contained some 28 paragraphs divided into three separate grounds.
3. Ground 1 challenged the credibility findings, describing them as "unsafe". This allegation is explained by reference to the panel's own reference to Section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 given that this Section was not referred to in the respondent's original decision. The allegation also refers to the panel's conclusions at paragraph 65 of the determination and with regard to the panel's failure to deal with evidence regarding the appellant's claimed abstinence from drugs.
4. It was also suggested that the panel failed to properly deal with documentary evidence from the appellant's wife and with regard to their claimed subsisting relationship.
5. It is alleged that at paragraph 70 of the determination the panel found that the appellant and his witnesses were not "witnesses of truth" and gave no reason.
6. The second ground is that the panel failed to properly engage with Article 8 ECHR and that at no point does the panel properly engage the best interests of the children. Doubt is raised in the grounds regarding the panel's consideration of "proportionality".
7. The ground further alleges that the panel had not properly engaged with the immigration history of the appellant in that he arrived in the United Kingdom when he was 5.
8. Ground 3 alleges that the panel appeared not to have engaged with Mr Plowright's submissions made to them.
10. In granting leave to appeal another Judge of the First-tier Tribunal engaged with the grounds and came to the conclusion:-

"For reasons explained in the application for permission at considerable length all the grounds are arguable. The application for permission is granted."

11. Hence the matter appears before me sitting in the Upper Tribunal.
12. Mr Plowright simply submitted that he relied upon the grounds as drafted but he did produce further documents alleging an additional error based upon the appellant's risk of return to DRC.

13. Mr Richards in response objected to the additional grounds. It was never suggested during the original appeal that the appellant would be at risk. Mr Richards noted that no Rule 24 response had been filed but he opposed the appeal. The panel were entitled to consider the effect of Section 8 of the 2004 Act and they were entitled to come to conclusions with regard to credibility. Mr Richards took issue with Mr Plowright regarding the word "proportionality". The word proportional was used by the panel. The best interests of the children had been dealt with and the panel had carried out a proper balancing act and found that the decision was proportionate in the circumstances. There was no error of law and the appeal should be dismissed.
14. Mr Plowright made no response save for accepting that the word proportional was used.
15. At this stage I indicated that I did consider, for the reasons to be set out herein, that a material error of law was contained within the determination. I indicated that as the findings on credibility could not be sustained it appeared to me to be a proper case under the Senior President's Direction to remit the matter back to the First-tier Tribunal for rehearing.
16. I now propose to set out my reasons for reaching a conclusion that the panel's determination contained a material error of law.
17. A reading of the determination as a whole shows that the panel's views were based to a very large extent on the credibility of the appellant and his two witnesses. At paragraph 10 of the determination the panel referred themselves to Section 8 of the 2004 Act. That reference is perfectly proper. However, no reference was made to that section in the respondent's decision and, more importantly, there was no suggestion during the course of the hearing that they were going to refer themselves to that Section. That Section contains various scenarios for when Section 8 should be considered. Fairness dictates that an appellant should be given the opportunity to address that particular scenario or scenarios that might well cause Section 8 to be appropriate. The determination is silent as to which scenario the panel felt applied.
18. At paragraph 70 of the determination the panel make findings with regard to the credibility of the appellant and both his witnesses (his wife and mother) but no real explanation is given as to why the panel considered those persons to be lacking in credibility in the evidence they gave.
19. Again, during the course of the examination of the evidence the panel drew conclusions from letters written by the appellant's wife. Whilst these letters contained reference to instability within the marriage, the letters also contained declarations of love and a willingness to make the relationship work.
20. These three aspects bring into doubt the findings made by the panel as to credibility. For these reasons those findings are unsafe and the conclusions must be set aside.

21. It is not necessary nor appropriate for me to comment further on the determination or the grounds of appeal save to say that the panel's treatment of any Article 8 claim is equally unsafe and that claim must be looked at afresh.
22. As referred to above I am satisfied that by reason of paragraph 7.2 of the Senior President's Practice Statement it is appropriate to remit the case to the First-tier Tribunal. Any directions for the listing thereof shall be at the discretion of the appropriate Resident Judge.
23. As an anonymity direction has already been made and no further application was made to me I maintain that direction.

Signed

Date

Upper Tribunal Judge N Poole