Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/02004/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5 December 2014	**On 9 December 2014**
Oral judgment	

Before

UPPER TRIBUNAL JUDGE HANSON

Between

MR YAYA CONDE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Symes, Counsel instructed by Elder Rahimi Solicitors
For the Respondent: Ms Isherwood, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the appellant against the decision of First-tier Tribunal Judge Bartlett, promulgated on 25 September 2014 following hearings at Taylor House on 18 March, 25 June and 9 September 2014, in which that Tribunal dismissed the appellant's appeal on both Immigration Rules and human rights grounds against the decision of the Secretary of State dated 20 September 2013 to refuse to revoke a deportation order made against him.

2. The pleaded grounds contain six separate heads of challenge to the determination and although the Tribunal is grateful to Mr Symes for focusing his submissions on those he considers to be most relevant to the issues and in recognition of the fact that the grounds in places merge into each other, I will go through each matter separately but attempting to avoid repetition wherever possible.

3. The starting point in any challenge of this nature is the determination itself. It is a lengthy, detailed document containing a number of headings which assist the reader to understand the issues in the mind of the judge when deciding the merits of the case. There is, for example, a detailed discussion of the applicable law in what is another time of flux following the passing of the 2014 Act and relevant provisions and there impact upon the Immigration Rules.

4. Ground 1 noted that the appeal was brought in relation to paragraph 390 of the Immigration Rules. Paragraph 390 is the relevant Rule setting out the criteria to be considered when an application is made for the revocation of a deportation order. Paragraph 390 states that any such application will be considered in the light of all the circumstances including the following:

   (i) the grounds on which the order was made;

   (ii) any representations made in support of revocation;

   (iii) the interests of the community, including the maintenance of an effective immigration control;

   (iv) the interests of the applicant, including any compassionate circumstances.

5. I find no arguable merit in the submission that paragraph 390 was not in the mind of the judge. There is specific reference to paragraph 390 in paragraph 127 of the determination and to the fact that in the judge's mind all relevant issues set out in that paragraph of the Rules have been properly considered. This is supported by a reading of the determination.

6. The judge also noted in paragraph 72 that it was agreed with the appellant's representative at the commencement of the hearing that the issue in respect of Article 8 would turn upon whether the failure by the respondent to remove the appellant from the United Kingdom over a period since 24 June 2008 amounted to a disproportionate interference in his private life. If that is the basis on which the case was advanced by the appellant and the basis on which the issues were considered by the judge, no material misdirection or legal error is established.

7. The judge clearly took care to ensure that the appellant had the opportunity to put forward the evidence he intended to rely upon as

demonstrated by the number of hearings and adjournments for the reasons set out in the papers. All evidence and information made available was clearly considered with the required degree of anxious scrutiny and the judge has given reasons for the findings made. Whether those findings are tainted by legal error is a matter that is at the forefront of my mind.

8. The passage of time referred to by Mr Symes in relation to paragraph 391A was also a matter of which the judge was clearly aware by reference to his recording of the chronology of time in the United Kingdom and what has occurred since. The Rule does not say that that is a determinative issue as in fact the last line of 391A is that the passage of time since the person was deported may (my emphasis) also in itself amount to such a change of circumstances such as to warrant revocation of the order. The word 'may' shows it is not an absolute but a discretionary issue that the Tribunal needed to consider and I find they did. There is no arguable merit in the challenge on ground 1 as pleaded.

9. In relation to ground 2, this deals with the reason why the deportation order has never been enforced and relates to difficulties that it is accepted the Secretary of State has had in securing an emergency travel document (ETD) to secure the appellant's removal to Guinea.

10. The witness evidence of the claimant, and I look at his statement at page 13 of his bundle referred to me by Mr Symes, confirms that the appellant did go to the Guinean Embassy in Kilburn on 14 July 2011 as he wanted someone there to be a witness of what had happened. He states in that statement that he went there to try and secure a travel document but was told that the embassy did not have enough evidence to prove that he is Guinean and so they could not give him a travel document. There appears nothing unlawful or perverse in a state entity saying that unless you prove you are a national of this state we will not recognise you as such or give you a document permitting entry through our borders.

11. The judge noted the progress made, or lack of it, and came to the conclusion when considering the evidence in the round that one reason that no progress had been made and additional information not provided was because the appellant was deliberately being obstructive; a 'failure to cooperate finding'. The grounds submit that that was a finding not open to the judge suggesting it was in some way perverse or irrational.

12. The judge's starting point was the determination of Judge Whiting referred to in paragraph 84 of the determination under challenge whose findings were not challenged. The Judge records it was common ground that the findings of fact made by Judge Whiting were being relied upon in the appeal process. A number of specific findings were made including a finding that the claim before Judge Whiting regarding the grounds on which the appellant sought international protection as a refugee lacked credibility. Judge Whiting effectively found that the appellant had

attempted to secure such status on grounds that had not been shown to be truthful.

13. The First-tier Judge whose decision is under challenge noted that the appellant wished to remain in the United Kingdom and accepted the respondent's contention that it was not in the appellant's best interest to be truthful with regard to his circumstances.

14. I accept there appears to be conflict between an individual going to the embassy to try and secure a travel document to enable him to return home and a finding that he was not doing everything he could to secure such return as he wished to remain in the United Kingdom. It is not irrational to conclude that a person who has made a claim for international protection might have been doing that to secure leave to remain or to prevent removal. Such a finding has been made in relation to this individual.

15. The fact the appellant does not want to return to Guinea and his evidence as to a complete lack of knowledge as to the details of the whereabouts of cousins and uncles, and his claim in general, is specifically commented upon in paragraph 90 of the determination. His evidence before the judge has not been found to be credible on a balance of probabilities, effectively a finding that the appellant had not made out or discharged the burden of proof upon him to the required standard to show that he had done everything he possibly could be expected to do to assist the Guinean Embassy in proving that he is entitled to an ETD.

16. That finding cannot be said to be perverse or irrational as it is clear from his witness evidence that having gone to the embassy in 2011, and being told that insufficient evidence was available, he appears to have done very little. There was no evidence that he had done anything of any great consequence before the First-tier Tribunal to resolve that issue. He was therefore a person who had been found to have lied, a person who it appears did make an attempt to secure a travel document in 2011, but a person who thereafter had done very little or nothing to actively cooperate with the Guinean authorities to enable an ETD to be secured.

17. Although not a document in existence before the First-tier Tribunal, Elder Rahimi has now written to the Guinean Embassy in a letter dated 24 October 2014 setting out details of the paternal and maternal family. There was insufficient material before the First-tier Tribunal to show that that information in such detail had been provided or to show that his aunt who was contacted after the adjournment could not provide information to assist the Guinean authorities. Even if the finding as to adverse intent to the appellant's detriment is harsh, it arguably was one available to the judge on the basis of the information made available to him. The finding is that the appellant had not discharged the burden of proof upon him to the required standard to show he had done all he could reasonably be

expected to do. That finding is a sustainably finding not affected by any legal error material to the decision on the facts of his case.

18. In relation to Mr Symes' submission that the relevance of the adverse finding could be to the proportionality balance outside the Rules, i.e. that the judge's mind was so tainted by such a finding that what follows is unsustainable, I do not find such an assertion to be substantiated when the determination is read in full.

19. Ground 3 refers to adverse findings against the appellant to the effect that he had deliberately withheld information to the Guineaian Embassy. I have dealt with that above and do not need to repeat those findings.

20. Ground 4 relating to the challenge to the judge's finding that the appellant would at least know the districts in which the cousins and uncles resided is noted but again that crosses over the boundary of observations I have made previously. What is also of interest is that in the letter Elder Rahimi recently wrote to the embassy, although the current whereabouts of the family members are stated to be not known or deceased, the districts in which they were born is included which appears to be information known to the appellant and communicated to his solicitors. I do not find that it has been established in ground 4 as pleaded that there is any material error that would enable me to interfere with the decision made.

21. Ground 5 challenges the nationality issues.

22. Ground 6 challenges the reliance by the First-tier Judge on the case of **AR & FW** suggesting that it needed to be distinguished on its facts from the instant case. That was a case submitted, according to the determination, by the appellant himself or his representatives. The judge did distinguish that case on the facts and made perfectly lawful and credible findings as to why the weight he was invited to place upon the findings of the Court of Appeal in that case was not as Mr Hodson had suggested.

23. Ground 7 is generalistic and lacks specificity. If one looks at paragraphs 34 and 35 there is a challenge to the Article 8 assessment which is stated to be flawed independently of other reasons identified, but in light of the fact that I find that the judge did consider all the material with the required degree of care, that that material was insufficient to make out the case that was advanced to the judge in relation to time in the United Kingdom or private life, and that the judge did give adequate reasons for findings made, I am not satisfied it has been made out on an arguable basis or otherwise that the judge did not undertake the Article 8 proportionality assessment properly.

24. As it is a properly undertaken proportionality assessment the only basis of challenge is on public law grounds and no public law grounds have been established sufficient to enable me to interfere with this decision. The Court of Appeal have made it clear on numerous occasions that the Upper

Tribunal should not interfere with the decision of the First-tier Tribunal, whether they would make the decision in the same terms or not, unless there is clear evidence of a material legal error. The test is whether the decision made was within the range of those the judge was permitted to make on the evidence available to him. It is my finding that it has not been established on the facts that this decision was outside the range of permissible findings.

25. For that reason no error material to the decision to dismiss the appeal has been established before the Upper Tribunal today. The determination must stand.

Notice of Decision

The appeal is dismissed.

No anonymity direction is made.

Signed Date

Upper Tribunal Judge Hanson