



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

Appeal number: AA/06092/2014

THE IMMIGRATION ACTS

**Heard at Field House
On January 29, 2015**

**Decision & Reasons Promulgated
On February 3, 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

S M

(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr MacKensie, Counsel, instructed by Kesar & Co Solicitors

For the Respondent: Mr Shiliday (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. The appellant is a citizen of the Democratic Republic of Congo. The appellant claimed asylum on July 31, 2013 but in a refusal letter dated August 8, 2014 a decision was taken to refuse her asylum under paragraph 336 HC 395. At the same time the respondent exercised her discretion to grant the appellant limited leave to enter or remain in the United Kingdom outside of the Immigration Rules in accordance with published Home Office Asylum Policy Instruction on Discretionary Leave. The appellant appealed under section 83(2) of the Nationality, Immigration and Asylum Act 2002 on August 22, 2014. .

2. The matter came before Judge of the First-tier Tribunal Vaudin d'Imecourt (hereinafter referred to as the "FtTJ") on September 29, 2014 and in a decision promulgated on November 18, 2014 he dismissed the appeal for asylum, humanitarian protection and human rights.
3. The appellant lodged grounds of appeal on December 2, 2014. She submitted the FtTJ erred by refusing her appeal. In particular, she submitted the FtTJ had erred:
 - a. In her approach to credibility by failing to apply the benefit of the doubt and make allowances for the appellant's age.
 - b. Making findings that ignored the objective evidence on languages.
 - c. Making adverse findings against the appellant with regard to having contact with her family in circumstances where the respondent had granted her Discretionary leave on basis she had no family to be returned to.
4. Judge of the First-tier Tribunal White granted permission to appeal on December 12, 2014 finding there were arguable errors in law because:
 - a. The respondent accepted the appellant was an unaccompanied minor.
 - b. The FtTJ arguably failed in assessing her credibility to give adequate consideration to the fact she was a minor and instead finding she was a "mature, intelligent young woman".
 - c. The FtTJ arguably failed to take into account the respondent's duty to trace family.
5. The appellant was not in attendance in court but was represented as set out above.

ERROR OF LAW SUBMISSIONS

6. Mr MacKensie adopted the grounds and submitted as follows:
 - a. He referred me to paragraphs [38] to [42] of AA (unattended children) Afghanistan CG [2012] 00016 (IAC) for the approach to be taken when assessing the credibility of a minor and how the court applied those principles to the facts of that case at paragraph [110].
 - b. He submitted the FtTJ had to make allowances for the child's age and the difficulties the child may have due to lack of knowledge, maturity and experience and the FtTJ must not impose his own views of what was plausible. He submitted the FtTJ erred because he failed to do this and found that she was an astute young lady.
 - c. He further submitted that the appellant was in a catch 22 situation. If she gave inconsistent evidence then this would be held against her but by being consistent the FtTJ found her to be an astute, intelligent young woman.
 - d. The FtTJ erred by finding she was told what to say but was never asked if that was the case.

- e. The FtTJ claimed to have considered her account against the background evidence but he had not. In paragraph [39] he made an adverse finding about the appellant stating she would have known what the M23 men were saying when in fact there are over four hundred languages spoken in the DRC.
 - f. The FtTJ held it against the appellant that she remembered a day in history that had nothing to do with her family but he also found she was an astute young girl. These two findings are inconsistent.
 - g. The FtTJ wrongly found her claim about her father remaining incredible because he failed to have regard to her age and the fact she may not know why her father remained in the house.
 - h. The FtTJ wrongly rejected her departure explanation to be fabricated.
 - i. The FtTJ wrongly rejected her claim that it was pure coincidence that she ended up in the same as country as her aunt as this failed to take into account the appellant did not remember the priest or church who helped her until prompted to by the FtTJ.
 - j. The respondent granted her Discretionary Leave and should not have found she would be able to contact family members in the DRC.
7. Mr Shiliday adopted the Rule 24 response dated December 31, 2014. He submitted that Mr MacKensie's submissions amounted to nothing more than a mere disagreement. The FtTJ may have made some contentious findings but those findings were open to him on the evidence. In particular, he submitted:
- a. The FtTJ erred with regard to the date the M23 group invaded Angola as it was November 20, 2013 and not 2012 but this was not a date that meant anything to the appellant. Whilst Mr Shiliday did not necessary agree with his finding it was something that was open to him in light of the findings he made about the father.
 - b. Whilst it was preferable to put the issue about language to the appellant this was not an argument raised by the respondent and it would have been inappropriate for the FtTJ to question the appellant about it. The FtTJ was entitled to ask her questions but he could not put an alternative case to that advanced by the FtTJ. He came to a conclusion on the evidence before him that was open to him.
 - c. The FtTJ made it clear in his determination particularly in paragraph [36] when he commenced his findings that he had regard to the appellant's age both when she came to the United Kingdom and at the date of hearing. He had the benefit of hearing and seeing her give evidence and he was entitled to make findings about her evidence. His conclusion in paragraph [41] that she was a "mature, intelligent young woman" was open to him and was not contrary to the advice given in AA.
 - d. The FtTJ did not believe the appellant's account and concluded she had learnt an account to give. In the alternative he concluded that it lacked credibility that

the appellant's father would have remained. The fact it was the appellant giving this evidence did not alter the fact he did not accept the claim. He assessed what she had to say and found that if what had been claimed had happened the appellant's father would not have returned to the house. This was open to him.

- e. Although Judge of the First-tier White referred to the respondent's failure to trace the appellant's family this had not been pursued today. The appellant's claim had been her family were killed as she heard two shots and fled. The respondent could not trace family that she claimed had been killed. The FtTJ concluded her account was a fabrication and was entitled to question why she had made no attempt to find her family. The fact she had been granted Discretionary Leave was not an acceptance of her claim. The respondent's policy was to grant unaccompanied minors Discretionary leave until they were 17 ½ years old.
 - f. There was no error in law.
8. Mr MacKensie reminded me that there were two issues I had to consider. Was the decision rational and was the decision fair. He submitted the FtTJ erred on both fronts and the decision should be set aside and remitted back to the First-tier Tribunal.
9. I reserved my decision and if there was an error in law I would remit the matter back to the First-tier Tribunal for a fresh hearing.

ERROR OF LAW ASSESSMENT

10. The FtTJ spent a considerable amount of time preparing this decision although it is arguable that thirty pages reciting the contents of the appellant's two interviews, her statement, oral evidence and the solicitor's covering letter is somewhat excessive especially when his conclusion in paragraph [37] was that she managed to remain consistent. The verbose opening of the determination set the background for the findings he made between pages 32 and 34 of the determination.
11. Mr MacKensie quite properly submitted this appeal was about whether the decision was rational and fair. He submitted:
- a. The decision was unfair because the appellant did not give the appellant the benefit of the doubt in her evidence and failed to put some of his adverse findings to her.
 - b. The decision was not rational because he made findings that were contrary to the evidence presented.
12. Mr MacKensie reminded me that the Tribunal in AA had set out the approach to be taken when assessing the credibility of a child witness. Factors that should be taken into account include:

- a. The appellant's background
 - b. Her gender
 - c. Her age
 - d. Her maturity
 - e. Objective indications of risk as against the appellant's state of mind and understanding of the situation
 - f. The benefit of the doubt should be applied more generously
 - g. It may be necessary for an examiner to assume a greater burden of proof in child cases.
13. The appellant's original representative brought the decision of AA to the attention of the FtTJ and he invited the FtTJ to find the appellant a credible witness in light of that case.
14. Paragraphs [35] and [36] set the backdrop to his assessment of the claim. The FtTJ made it clear that he considered the relevant country and background evidence and importantly he took into account the appellant's age at interview and hearing and he went onto say in paragraph [36] that he made allowance for her age and he concluded by saying-
- "... I have not lost sight of the fact that the appellant is exactly that, a child, and I have made every allowance for that fact."
15. The FtTJ then proceeded to explain how the appellant gave her evidence and commented that she gave evidence in French, which he understood fully, and his impression was she was a "very astute and intelligent mature young woman who overall managed to remain consistent in the account she had given throughout."
16. Contrary to Mr MacKensie's submission I am satisfied the FtTJ demonstrated through his thorough record of the proceedings that he had regard to the appellant's gender, age, maturity and background. The tribunal in AA also made clear that the benefit of the doubt should be more in the appellant's favour with the respondent assuming a greater burden. In paragraph [39] of his decision the FtTJ made clear that he considered the appellant's account against the objective background.
17. The rationale of the FtTJ's findings was challenged and in particular on two premises:
- a. It was wrong for the FtTJ to conclude the appellant should have understood what the men from M23 and her father were discussing.
 - b. The FtTJ was wrong to conclude that as there was no reason for her to remember the date of November 20, 2012 that she must have been told this date.

18. The FtTJ had the opportunity to listen to all her evidence and to assess it. Mr MacKensie pointed out to me that there are over four hundred languages spoken in the DRC and therefore it was not open to the FtTJ to find she would have understood the conversation between her father and the men. However, his assessment of that evidence was alongside other aspects of her evidence and having considered all of the evidence he reached findings that clearly were open to him. She did not appear to suggest her father spoke a language she did not understand at any other time and consequently it was just as open to the FtTJ to find she would have understood what was said as against she would not have understood. Similarly, the FtTJ was entitled to reject her claim her father decided to remain in the house after May 9, 2013. The fact the appellant is a child does not mean that everything she said was credible. The FtTJ had to assess the evidence and make findings and even after allowing for the "AA" factors he made negative findings about her account. To say those findings were not open is perverse as the logic of that submission is that everything a child asylum seeker says must be accepted unless there is clear evidence to disprove it.
19. The FtTJ found as implausible her claims of what happened. He accepted she was consistent but being consistent does not necessarily mean the account is plausible. It is a catch 22 situation but it is a situation that many asylum seekers face. If their account is inconsistent it is rejected and if it is consistent then it may not be what happened. The FtTJ has to consider the evidence carefully even more so when the appellant is a child.
20. The FtTJ went onto consider her claims further in paragraphs [40] and [41] and rejected the claims for the reasons given. He considered how the appellant came to be in the United Kingdom and found that it was more than a coincidence that she came to the very country where she had an aunt who had also claimed asylum in "strikingly similar circumstances" and who also received support from the priest who years later also helped the appellant and who passed to the appellant her mother's bible that just happened to contain the aunt's UK telephone number.
21. The FtTJ carefully considered the evidence and made findings open to him. The fact the appellant was a child was considered but ultimately the FtTJ found too many adverse findings that did not have anything to do with her age or maturity but was simply to do with the fact he did not find the account at all credible. From the FtTJ's perspective this was not a finely balanced decision, which should have resulted in the benefit of the doubt being in the appellant's favour.
22. Finally, it was argued that the respondent's decision to grant the appellant Discretionary Leave was inconsistent with the suggestion the appellant could have made enquiries about her family. The granting of Discretionary Leave is recognition she is an unaccompanied minor who claimed she had no family. The respondent's policy is to grant Discretionary Leave but this is governed by paragraphs 352ZE to 352ZF of the Immigration Rules. The appellant met the criteria and was granted leave accordingly. The respondent rejected the appellant's claim and it was therefore open to the FtTJ to make the findings he did on possible contact with family although

I am satisfied the appellant's claim was rejected because her account on what she said happened was rejected.

23. I therefore find there has been no error in law and the original decision shall stand.

Decision

24. The decision of the First-tier Tribunal did not disclose an error in law. I uphold the original decision.

25. Under Rule 14(1) The Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended) an appellant can be granted anonymity throughout these proceedings, unless and until a tribunal or court directs otherwise. No order was made in the First-tier but in view of the appellant's age I do make an anonymity order with all the consequences that flow from such a direction.

Signed:

Dated: **January 29, 2015**

Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT

I uphold the original decision on fees.

Signed:

Dated: **January 29, 2015**

Deputy Upper Tribunal Judge Alis