IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/13627/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 22 December 2014	**On 15 January 2015**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

ARMEL NTWARI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Not represented
For the Respondent: Mr L Tarlow, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Burundi born on 19 April 1982.

2. The appeal comes before the Upper Tribunal following a hearing before the First-tier Tribunal on 27 June 2014 whereby the appeal was dismissed, with reference to the Article 8 immigration rules and Articles 3 and 8 of the ECHR. However, these simple facts belie a rather complicated background to the appeal. The salient facts, insofar as they can be deduced from the documents before me, are as follows.

3. The appellant was granted indefinite leave to remain on 8 May 2007. It appears that since the grant of ILR he returned to Burundi in 2009 and 2011. According to the asylum interview, he travelled to Jamaica in August 2012, returning to the UK on 9 January 2014. On that occasion a decision was made to cancel his leave to remain and refuse leave to enter. Because of the way some of the documents have been copied in the Tribunal file, it did at one stage appear to me that this was a decision dated 14 January 2014, but it is in fact dated 9 January 2014.

4. The appellant lodged a notice of appeal in respect of that decision. However, it would appear, from the documents on file IA/03586/2014, that the fee required for an oral hearing was not paid by the appellant. Ultimately, the Tribunal closed the file and no further action was taken on the appeal, at least at that stage. It then appears that the appellant submitted, through solicitors, a notice of appeal out of time, in respect of the same decision. On 8 April 2014 a judge of the First-tier Tribunal extended time. That decision was taken in relation to the appeal number IA/13627/2014. Those facts appear to explain why there are two appeal numbers. The first appeal, IA/03586/2014 was the appeal in respect of which no further action was taken by the Tribunal. When the appellant submitted a notice of appeal out of time, a new appeal number was created by the Tribunal, that being IA/13627/2014. In truth, they relate to the same matter.

5. On or about 22 March 2014 the appellant claimed asylum. In his grounds to the Upper Tribunal it seems that the appellant disputes that he ever made such a claim. However, whether or not the appellant thought that he was claiming asylum, the Secretary of State considered that he was making such a claim. Screening and asylum interviews were conducted. For present purposes I do not need to decide whether or not he did make a claim for asylum in 2014, that not being a matter that is material to the issues I have to determine. In any event, asylum was refused by the respondent. Following that refusal, there was a further immigration decision being a refusal of leave to enter dated 14 April 2014. It may be that there was a notice of appeal lodged in respect of that decision, although no documentation to that effect is before me.

6. Before the First-tier Tribunal there was a Case Management Review hearing ("CMR") on 13 June 2014. The appellant was not produced at that hearing, although he was legally represented. Amongst the appellant's complaints as set out in the grounds and in his skeleton argument before the Upper Tribunal is the fact that he was not produced for the CMR. At the CMR it seems that the First-tier judge who dealt with the matter was told by his legal representative that the "asylum grounds" were withdrawn and that the appeal would be argued on the basis of Article 3 (health grounds) and Article 8 (private life). This emerges from the written directions given following that CMR. The appellant complains that he did not give instructions to his representatives to withdraw the asylum grounds. On the other hand, he also states, inconsistently with

that proposition, that he never made any claim for asylum in the first place.

7. In any event, when the appeal came on for substantive hearing before the First-tier Tribunal on 27 June 2014, it proceeded on Article 3 and Article 8 grounds, and in relation to Article 8, with reference to the relevant Article 8 immigration rules.

8. Significantly, at the hearing on 27 June 2014 the appellant was no longer legally represented, although he did appear for the hearing.

9. The appellant complains about the First-tier judge's determination in terms of the narrative, for example in relation to when he had made asylum claims, agreeing only that it was correctly stated that he made an asylum claim in 2000. He contends that although he was convicted of a drugs offence in Jamaica (which prompted the cancellation of his leave on return on 9 January 2014), he contends that he did not receive a sentence of eighteen months' imprisonment but a twelve months' sentence of which he served only nine months.

10. I have referred to the question of whether or not the appellant claimed asylum in 2014. In terms of the actual sentence he received, according to the appellant's undated witness statement received by the First-tier Tribunal on 27 June 2014, he received a twelve months' sentence with a further six months in default of payment of a fine. He states that the fine was "squashed" due to good behaviour. Again, for present purposes, it does not seem to me to be particularly significant as to whether he received a sentence of twelve months or eighteen months' imprisonment, or indeed, whether he was deported from Jamaica to the UK as stated by the First-tier judge, or whether members of the Burundi community paid for his return ticket to the UK. Similarly, whether the appellant was released from prison in Jamaica through good behaviour as he originally asserted in his grounds of appeal against the decision of the First-tier Tribunal, or whether it was a combination of his good behaviour and issues of sexual abuse and bullying as he later asserted, does not seem to me to be material.

11. However, it is apparent that what has been lost sight of in the process of this appeal is that there was a decision to cancel the appellant's leave. Notice of appeal was lodged in respect of that decision, albeit that the grounds are rather formulaic.

12. Whilst the judges at the CMR and at the substantive hearing were entitled to assume that the appellant's legal representatives were acting with his authority in stating the basis on which the appeal would be advanced, it is important to remember that at the substantive hearing the appellant was no longer represented. At that hearing it does not appear that the appellant made any direct reference to the cancellation of his ILR, and did not make any complaint about what was said on his behalf at the CMR and the fact that he was not produced for that hearing. Nevertheless, equally

it does not appear that these issues were canvassed with him. It does seem to me that it was incumbent on the First-tier judge who dealt with the substantive hearing to consider the underlying basis of the appeal, being the cancellation of his leave.

13. The relevant paragraphs of the immigration rules would seem to be 321(A)(5) (cancellation of leave) and 320(2)(c) (refusal of leave to enter). At the hearing before me I canvassed with Mr Nath the question of whether the decisions under the immigration rules concerned mandatory or discretionary grounds. The submissions on behalf of the respondent at the hearing before the First-tier Tribunal referred to the mandatory nature of the refusal. On consideration of the relevant immigration rules it is apparent that the decisions concerned mandatory grounds under the above paragraphs. In the circumstances, given the mandatory nature of those decisions, it may well be that the appellant is not able to succeed on an appeal against the cancellation of leave or the refusal of leave to enter.

14. In any event, it was accepted on behalf of the respondent before me that in failing to deal with the issue of cancellation of the appellant's leave, the First-tier judge erred in law. The same could be said in respect of the refusal of leave to enter. I am satisfied that in failing to deal with those aspects of the appeal the First-tier judge erred in law. In those circumstances, the First-tier judge's decision is to be set aside. In accordance with the Practice Statement at paragraph 7.2 I consider it appropriate for the matter to be remitted to the First-tier Tribunal for a fresh hearing.

15. At that hearing, consideration will have to be given to the question of the cancellation of the appellant's leave. This may involve a consideration of the interview that took place with him at Gatwick Airport on 9 January 2014. Mr Nath confirmed that there is on the respondent's file a copy of the interview that took place with the appellant on that occasion, that interview thus far not having found its way into any of the documents put before either Tribunal.

16. I consider that the appropriate course is for the appeal to be heard *de novo*, because although certain findings of fact were made by the First-tier judge, findings need to be made on the basis of up-to-date information. It would appear unlikely that the appellant is able to meet the Article 8 immigration rules, although I make no finding in that respect, that being a matter for the First-tier Tribunal to determine.

17. So far as asylum is concerned, the grounds of appeal before the First-tier Tribunal do state at [4] that the appellant would be at risk of persecution on return to Burundi. At the hearing before the First-tier Tribunal the appellant did raise issues as to his safety in Burundi. Bearing in mind that he was not present at the CMR and that the question of risk on return was not considered by the judge who dealt with the substantive hearing, I have decided that the appellant should be permitted to argue asylum grounds if

he so chooses. My decision in this respect is consistent with what was originally advanced in the grounds of appeal on his behalf.

Decision

18. The decision of the First-tier Tribunal involved the making of an error on a point of law. The decision is therefore set aside and the appeal remitted to the First-tier Tribunal for a hearing *de novo*.

DIRECTIONS

(1) The appeal is remitted to the First-tier Tribunal for a *de novo* hearing before a judge other than First-tier Tribunal Judge Steer. No findings of fact are preserved, except as agreed between the parties.

(2) No later than 21 days before the next date of hearing the respondent is to file and serve a record of the interview that took place with the appellant on 9 January 2014 at Gatwick Airport, as well as any other disclosable documents pertaining to the decision to cancel his indefinite leave to remain.

(3) No later than 7 days before the resumed hearing before the First-tier Tribunal, the appellant's legal representatives, if any, or the appellant himself is to notify the First-tier Tribunal and the respondent whether asylum grounds are relied on. If the appellant is legally represented, a skeleton argument must be filed and served no later than 7 days before the hearing before the First-tier Tribunal.

Upper Tribunal Judge Kopieczek 13/01/15