Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA050652014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8 June 2017	**On 21 June 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

RN
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms M. Cohen of Counsel instructed by Wilson Solicitors LLP
For the Respondent: Mr. N. Bramble, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Miller, promulgated on 20 December 2016, in which he dismissed the Appellant's appeal against the Respondent's decision to refuse asylum.

2. As this is an asylum appeal I make an anonymity direction.

3. Permission to appeal was granted as follows:

"The grounds assert (i) that the judge failed to reach a finding on a material issue namely whether the appellant's name identifies him as of Rwandan origin which is central to whether he would be at risk on return and (ii) failed to give sustainable reasons for rejecting the expert report in the light of the background evidence.

Albeit the judge cited **BM and Others (returnees – criminal and non-criminal) DRC CG** [2015] UKUT 00293 (IAC), the grounds are arguable in the light of **AB and DM (Risk categories reviewed – Tutsis added) DRC CG** [2005] UKIAT 00118."

4. I heard brief submissions from Ms Cohen. However, Mr. Bramble then accepted that there was a material error of law in the decision in relation to ground 1. He also accepted that, given the connection between ground 2 and ground 1, there was also a material error of law in the judge's treatment of the background evidence.

5. I stated at the hearing that I agreed that the decision involved the making of material errors of law and I set the decision aside. My full reasons are set out below.

Error of law

6. Ground 1 asserts that the judge failed to reach a finding on a material issue in the appeal, the Appellant's names. This issue is closely bound up with ground 2, the rejection of the expert evidence of Dr. Kodi in the light of the background evidence. The judge's reasons for dismissing this evidence are set out in paragraph 31. This a long paragraph in which eight separate reasons are set out, and I do not intend to repeat it here. Mr. Bramble submitted that, while at first view it would appear that the judge had conducted a thorough consideration of Dr. Kodi's report, when looking further at his findings the judge had followed the approach taken by the previous judge, Judge Gladstone. He had therefore concluded that the Appellant was not of Rwandan ethnicity.

7. The evidence of Dr. Kodi was new evidence and therefore, with reference to this evidence, the judge would have been able to depart from the findings of Judge Gladstone, taking into account the case of Devaseelan. However, by not accepting Dr. Kodi's evidence, the judge adopted Judge Gladstone's approach, and failed to grapple with the issue of the Appellant's names.

8. I was referred by Ms Cohen to the case of K [2009] EWCA Civ 302, paragraph 17. This states:

"The expressions "Rwandan connections" and "Rwandan origin" are susceptible of different shades of meaning, and are too broad in my opinion for the AIT to have intended them to define a hard-edged category of persons at risk without having

heard any argument on the point and without seeking to elaborate on what was precisely meant. A Rwandan connection may be strong, moderate or weak. In saying that, I do not wish to encourage the creation of a hierarchy of some classifications. The simple (inaudible) is that the expression is perfectly understandable and should be understood as identifying a factor which may cause a person to be at risk, depending on a fuller consideration of the nature and strength of the connection. This is not something which can be done mechanistically. The critical question is whether the person would be perceived as hostile to the regime on account of his or her Rwandan-ness, if there is such a word. That is likely to necessitate looking at a person's whole profile."

9. I find that it was necessary for the judge to make a finding regarding the Appellant's "Rwandan-ness" before going on to consider the implications of this. Clearly his names are central to this issue. As stated in paragraph [29] of K, when discussing the case of AB, "Rwandan-ness" is recognised as a risk category.

10. The judge states that "it would not appear that [Dr. Kodi] has addressed the issue of whether the appellant's names are exclusively Rwandan, or whether some Congolese have identical names" [31(ii)]. However, as pointed out by Mr. Bramble, Dr. Kodi had dealt with this issue across all three of his reports. I was referred to Dr. Kodi's third report dated 18 November 2016, paragraph 17. He states:-

"I stand by my opinion expressed in previous reports that both names are clearly of Rwandan origin. While preparing this report, on 13 November 2016, I consulted by telephone three Linguistics Professors specialising on Kinyarwanda and based respectively at the University of Kinshasa, Catholic University of Goma (Université Catholique de Goma) and the Free University of the Great Lakes Countries (Université Libre des Pays des Grands Lacs). They all confirmed my opinion that [R] and [N] are both typical Rwandan names. "

11. I was referred to Dr. Kodi's second report dated 5 August 2015, paragraph 11:

"As I stated in my previous report for this case, both names, [R] and [N], are typical Rwandan names and would be readily recognised by the Congolese as such. Moreover, both of his parents' names are typically Rwandan, which would enhance his risk since this fact would confirm his Rwandan ancestry. By just reading the Rwandan press, one notes that [R] is not only a common person's name in Rwanda but it is also the name of a town and an area of this country [...] Articles in Rwandan newspapers also show that [N] is a common name in Rwanda."

12. In his first report dated 12 September 2012 Dr. Kodi addresses the following question [3]:-

"Please refer to paragraph 53 of the appeal determination. Please comment on the Immigration Judge's findings and in particular explain whether the client's name identifies him as being of Rwandan descent."

13. In response he states: "Both names, [R] and [N], are typical Rwandan names and would be readily recognised by the Congolese as such. [R] is not only a common person's name in Rwanda, but it is also the name of a town and an area of this country. [N] is a common name in Rwanda as well."

14. I find that, contrary to the judge's statement in paragraph 31(ii), Dr. Kodi addressed the issue of the Appellant's names in all three of his reports, the earliest of which is dated 2012. He specifically addressed the issue of the Appellant's first and last names, and whether or not they are typically Rwandan. I find that the judge appears to have ignored the fact that in all three reports Dr. Kodi addressed the issue of the Appellant's names. As a result, the judge has given less weight to Dr. Kodi's evidence because of his alleged failure to address this issue. Further, Dr. Kodi was specifically referred to paragraph 53 of Judge Gladstone's determination, and has acknowledged as such in his report. This is the same paragraph to which the judge refers at [31(ii)].

15. While the judge has referred to the case of BM and Others he has failed to refer to the case of AB and DM (Risk categories reviewed – Tutsis added), where at paragraph 51 it states:

    "We confirm as continuing to be a risk category those with a nationality or perceived nationality of a state regarded as hostile to the DRC and in particular those who have or presumed to have Rwandan connections or are of Rwandan origins."

    This is further expanded in paragraph 51(ii).

16. In the skeleton argument before the First-tier Tribunal, at paragraph 33 there is a reference to the case of AM and BM, albeit that erroneously it states "AM and CM", but the reference is correct. I therefore find that the judge was referred to this case, and consequently there was evidence before him that the country guidance held that there was a risk to those with Rwandan connections. However, the judge states that Dr. Kodi's report "contains alarmist generalisations which are not supported by authoritative evidence". He refers to Dr. Kodi's evidence that the Appellant would "likely be put in harm's way" in the DRC, and that "a young man of Rwandan origin would likely be seen as a threat".

17. The grounds of appeal refer to three articles provided by the Appellant which are evidence of the anti-Rwandan attitudes in the DRC (paragraph 20c(i) to (iii)). These support Dr. Kodi's evidence. It was submitted by Mr. Bramble that it was not clear whether the judge had been directed to these and to particular parts of the bundle. However it is clear that the judge was directed to the country guidance case in relation to people of Rwandan ethnicity, so he was aware of the issue of the treatment of Rwandans in the DRC. He failed properly to deal with this case in his approach to the Appellant's ethnicity.

18. I find that, when asserting that Dr. Kodi's report contains "alarmist generalisations", the judge has ignored the background evidence and the country guidance case [31(viii)].

19. I find that the judge's finding that the expert evidence was not reliable is due to his failure to give due consideration to the content of the reports, and his failure to consider the background country evidence which was before him, including the country guidance case. The fact that the judge did not properly engage with the evidence of Dr. Kodi, and therefore failed to make a finding of the Appellant's names and his Rwandan connections, means that he then failed to deal adequately with the evidence before him regarding how the Appellant would be treated on return as a result of any Rwandan connections.

20. I find that the decision involves the making of material errors of law in the judge's failure to make a finding on the central issue of the Appellant's names and his failure properly to consider both the expert evidence, and the background evidence before him.

21. It was submitted that I should limit the scope of the remaking of this appeal as there was no appeal in relation to the judge's consideration of Article 8. However, I find that the Appellant's claims for asylum and/or protection under Articles 2 and 3, even if they are not successful, necessarily involve issues which are relevant to any Article 8 consideration. I therefore do not limit the scope on which the appeal is to be remade.

22. I have taken account of the Practice Statement dated 10 February 2010, paragraph 7.2. This contemplates that an appeal may be remitted to the First-tier Tribunal where the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for the party's case to be put to and considered by the First-tier Tribunal. Had the issue before me related exclusively to the Appellant's names, I would have considered it appropriate to remake the decision in this Tribunal. However, as was accepted by Ms Cohen and Mr. Bramble, the issue of the Appellant's names goes also to his credibility, and therefore given the nature and extent of the fact-finding necessary to enable this appeal to be remade, having regard to the overriding objective, I find that it is appropriate to remit this case to the First-tier Tribunal.

Notice of Decision

23. The decision of the First-tier Tribunal involves the making of material errors of law and I set the decision aside.

24. No findings are preserved.

25. The appeal is remitted to the First-tier Tribunal to be remade.

Directions

(1) At the hearing before me it became apparent that the Tribunal file does not contain a copy of the Appellant's bundle, which amounts to about 500 pages. I therefore direct that a consolidated bundle, to include all of the authorities and background evidence on which the Appellant intends to rely, be served on the First-tier Tribunal at least seven days in advance of the hearing.

(2) Further, given the amount of background evidence, I direct that an index of key passages be provided in order to aid the First-tier Tribunal.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 21 June 2017

Deputy Upper Tribunal Judge Chamberlain