



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/06503/2017

THE IMMIGRATION ACTS

Heard at Newport
On 3 May 2018

Decision & Reasons Promulgated
On 21 May 2018

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

ANM
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Alban of Fountain Solicitors

For the Respondent: Mr P Duffy, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order prohibiting the disclosure or publication of any matter likely to lead to members of the public identifying the appellant. A failure to comply with this direction could lead to Contempt of Court proceedings.

Introduction

2. The appellant is a citizen of the Democratic Republic of the Congo (DRC) who was born on [] 1987.
3. The appellant arrived in the United Kingdom on 26 February 2017 and claimed asylum.
4. On 22 June 2017, the Secretary of State refused the appellant's claims for asylum and humanitarian protection and under Art 8 of the ECHR.
5. The appellant appealed to the First-tier Tribunal. In a determination sent on 5 September 2017, Judge A D Baker dismissed the appellant's appeal on asylum and humanitarian protection grounds but allowed the appeal under Art 8 of the ECHR.
6. The appellant sought permission to appeal to the Upper Tribunal which was granted by the First-tier Tribunal (Judge Alis) on 21 October 2017.
7. On 13 November 2017, the Secretary of State filed a rule 24 notice seeking to uphold the judge's decision to dismiss the appellant's appeal on asylum and humanitarian protection grounds.

The Appellant's Claim

8. The appellant's claim was that she is a low-level member of the youth organisation, LUCHA which she joined in the DRC in January 2014. That organisation carries out demonstrations against the government's corruption and lack of employment in the country. She acted as a hostess at political meetings.
9. The appellant claimed that on 19 June 2015 she attended a demonstration against the country's electoral process and she was arrested and detained for eight days before being released.
10. Then, on 19 September 2015, she was again arrested and detained for five months during which time she was raped by guards. She claims that she escaped prison with the assistance of a guard whom, by speaking to him in Swahili, she persuaded that she was of the same ethnicity.

The Judge's Decision

11. Judge Baker heard oral evidence from the appellant. She made an adverse credibility finding and rejected the appellant's account of her detentions and her claimed activities with, and membership of, the LUCHA organisation.
12. The judge's reasoning is at paras 41–45 as follows:
 - "41. The appellants account, amplified in oral evidence, that she had managed to persuade a guard that she was of the same ethnicity as him by speaking Swahili to him so that he was prepared to run the risk of helping her escape which he did, is not credible. First is not credible that she spoke sufficient Swahili to identify herself

as of his ethnicity because she had not specified that language is one of the languages she spoke when asked about it by the respondent in interview. In any event her claim is that she spoke a few words of it only, so as to explain why she had not identified it as a language she spoke. I reject that claim. That claim as to limited language ability is inconsistent with her claimed ability speak sufficiently fluently that she could persuade the guard she was of his ethnicity such that he would help her escape.

42. I find the appellant's account also amplified in oral evidence that another individual had managed to retain a mobile phone whilst detained and use it to contact the outside world is not credible. As the detainee in the DRC it is not credible that the individual would be carefully searched and that a mobile phone could be hidden. These each go to undermine the core of her account of each of her detentions.
43. Her answers to questions 186, 199 and 200, namely giving an incorrect year for the founding of the party and claiming did not have a slogan or website were each wrong. I find also that she was unable to give at question 204 any specific notable events of the party. She was unable to name any other notable people of that organisation at questions 185 and 186 although she gave the name of one of the leaders of the party. I find there is merit in the respondent's view that it was reasonable to expect that if she'd attended official meetings as she said she would be able to name someone who was in charge of organising or chairing the meetings. The extent of the ignorance displayed by her about the party political youth movement as she describes it I find also undermines the credibility of her account of activity for and support for it.
44. Owing to my conclusions that her account is not credible of her sympathy and active support for the youth movement/ political party LUCHA and the claimed events she is not at risk on return now. She does not have a profile of adverse interest to the government authorities. She could return to her home area.
45. Taking account of all her evidence in the light of the above conclusions I conclude that her account of each of the detentions arising and her claimed activities and sympathy and membership of the LUCHA organisation is not credible".

The Appellant's Challenge

13. In her grounds of appeal, the appellant relied upon three grounds. In granting permission to appeal, Judge Alis refused permission on ground 1 and I need say no more about it.
14. Ground 2 contends that the judge erred in law by failing to consider whether the appellant was at risk as a member of a Particular Social Group ("PSG").
15. Ground 3 challenges the judge's adverse credibility finding and in particular her reasoning in paras in 41 and 43.
16. In granting permission, Judge Alis clearly granted permission on ground 2. However, he made no specific reference to ground 3. Ms Alban, who represented the appellant before me, submitted that the judge had not excluded consideration of ground 3. Mr Duffy, who represented the Secretary of State, accepted that the judge had not explicitly excluded (by refusing permission upon) ground 3. He acknowledged that the appellant was entitled to rely upon ground 3.

17. In my judgment, that is correct. Although Judge Alis made no reference to ground 3, he did not specifically refuse permission upon it. He did as regards ground 1 and he specifically granted permission on the substance of ground 2. In those circumstances, it is open to the appellant to rely upon ground 3 also.

Discussion

18. It is helpful if I consider ground 3 first. That ground challenges the judge's adverse credibility finding and her conclusion that the appellant had not established her claimed activities with, and membership of, LUCHA and that she had been detained as a consequence.
19. Although the matter was briefly raised before me, it is clear that the judge did not accept that the appellant had been raped as she claimed. The appellant's claim was, of course, that she was raped while she was in detention for the five month period beginning on 19 September 2015. The judge did not accept that the appellant had been detained as she claimed. Consequently, although the judge made no specific reference in her reasons at paras 41 to 45 to the claimed rape, in rejecting the appellant's account that she had been detained, the judge necessarily rejected her account that she had been raped during detention.
20. Ms Alban raised a number of points in relation to paras 41 and 43 of the judge's reasoning.
21. First, she submitted that in para 41 the judge had failed to take into account the appellant's explanation concerning her facility in the Swahili language. She submitted that the appellant had explained in her witness statement dated 3 August 2017 at para 17 that: "I can confirm that I did not say at my screening interview that I spoke Swahili, because I do not speak Swahili fluently. I do speak and understand it a little bit. That is the reason I did not mention it".
22. Further, Ms Alban submitted that it was not implausible that she could persuade the guard of her ethnicity based upon a "limited language ability" in Swahili.
23. Mr Duffy submitted that it was clear that in para 41 the judge had taken into account, as the appellant states in para 17 of her witness statement, that she did not speak Swahili fluently but did speak it a little. He pointed out that the judge specifically noted that: "Her claim is that she spoke a few words of it only". He submitted that it was a permissible inference for the judge to draw that given her "limited language ability" she was unlikely to be able to persuade a guard that she was of the same ethnicity as him.
24. I accept Mr Duffy's submissions. It is clear that the judge had well in mind the appellant's evidence that she did speak some Swahili. That was also what she said in her asylum interview when at question 146 she said "I began to pick up Swahili words. So I picked up a few words of Swahili" from a family member. The substance of Judge Baker's reasoning in para 41 is that, given she only spoke a few words, it is implausible that she would be able to persuade a guard that she was of his ethnicity by speaking

Swahili to him. Given her evidence that she picked up “a few words” or, as she said in para 17 of her witness statement, that she spoke and understood it “a little bit”, it was a permissible inference for the judge to draw that it was implausible or unlikely that she would be able to persuade a guard that she was of his ethnicity through her use of Swahili. That conclusion was, in my judgment, not irrational and therefore the judge’s reasoning is sustainable.

25. Secondly, Ms Alban submitted that the judge’s reasoning in para 43 was inadequate. Again, relying upon the appellant's witness statement, Ms Alban submitted that the appellant had explained that she had given the correct date of the formation of LUCHA in her interview, namely “2012” rather than “2002” (at question 186) and that the interpreter must have made a mistake. Likewise, she had explained in para 10 of her witness statement that the website was not a LUCHA website but, as she understood from one of her friends, it had been set up by a Canadian woman. Further, although the appellant was only able to name the leader of LUCHA, and no other notable people in the organisation in her interview, at para 9 of her witness statement she named a number of other witnesses.
26. Mr Duffy submitted that the appellant's explanation that the interpreter had made a mistake was raised for the first time in her witness statement in August 2017 although the interview had taken place in May 2017. It was only raised, he submitted, following the respondent's refusal letter. He submitted that the judge was entitled to take into account the factual errors made by the appellant in her asylum interview and her lack of knowledge of other notable people in the organisation apart from its leader.
27. I agree. There is no doubt that the appellant's knowledge of the LUCHA organisation was, in some respects, lacking. The party does have a slogan and, there is a LUCHA website even if, as the appellant claims in para 10 of her witness statement, it was set up by a Canadian woman. It is not suggested that the party does not have a slogan which the appellant denied. Likewise, even though the appellant has now named a number of “other notable people” in the organisation in para 9 of her witness statement, she was unable to do so at the asylum interview. The judge was entitled to take into account, for the reasons she gives at para 43, that it would be reasonable to expect the appellant to have known at the time of her interview and to have disclosed the names of those individuals. It is simply not credible, as she claims in para 9, that she could not remember any of their names at the time. Whilst the judge did not make specific reference to the appellant's explanation as to why she had named the incorrect year for the founding of LUCHA, there is no explanation why this was not raised until some four months after the interview. Even though the appellant was not at that time represented, no explanation has been offered as to why it was not until August 2017 that the contention that the mistake was that of the interpreter was raised. In any event, even if that was the case, given the totality of the judge’s reasons at paras 41–45, I am not persuaded that it would have materially affected her adverse credibility finding.
28. For these reasons, therefore, I reject ground 3 and the judge’s adverse credibility finding stands.

29. I turn now to consider ground 2.
30. Ms Alban contended that the judge was required to consider whether the appellant was at risk of rape as a member of a PSG in the DRC even if she had not been the victim of rape whilst in detention. Ms Alban submitted that that was an additional basis upon which the appellant's claim was put forward before Judge Baker.
31. In that regard, Ms Alban relied upon paras 60-62 of the Reasons for Refusal Letter where the Secretary of State considers whether the appellant would be at risk of "gender-based violence" if returned to the DRC. In particular, she relied upon para 62 where it was stated that: "Whilst it is unfortunately noted that rape in the Democratic Republic of the Congo is common and you may have been a victim to it ...". The Secretary of State then goes on to conclude that the appellant cannot succeed on this basis because "the authorities are taking steps to enforce the laws criminalising rape and other gender based violence".
32. Further, Ms Alban relied upon the skeleton argument prepared by the appellant's solicitors and contained within the appellant's bundle at pages 1-13, at paras 16-18 under the heading "Sexual violence in conflict areas - Areas of violence" where there is set out background evidence dealing with incidents of "sexual violence" in the DRC. Ms Alban was, however, unable to say whether the appellant's Counsel at the hearing specifically relied upon a risk to the appellant of sexual violence if her account was not accepted. Having consulted her file, Ms Alban was only able to point out that the judge had been referred to para 3.1.1 of the *CPI Note*, "Democratic Republic of Congo (DRC): Women fearing gender-based harm or violence" (June 2017) at pages 90-157 of the appellant's bundle which dealt with "sexual and gender-based violence" against women and states that:
- "The relevant laws are not always enforced effectively and sexual and gender-based violence remain serious and widespread problems. Patriarchal attitudes and discrimination are prevalent, and women and girls can be subject to rape and other forms of sexual violence".
33. Mr Duffy submitted that it was unclear whether this basis of claim had been relied on before the judge. He submitted, in any event, no real argument had been put to the judge why the appellant would be at risk if her account was disbelieved. He submitted that both the evidence relied on in the skeleton argument and what was said in the *CPI Note* related to "conflict areas" and the appellant was from Kinshasa which is not a conflict area. Had the judge considered this basis of claim, Mr Duffy submitted, the evidence would not establish that she was at real risk of persecution due to sexual and gender-based violence.
34. It is difficult to clearly ascertain what precisely was relied upon by the appellant's Counsel before Judge Baker. The file held by the appellant's solicitors did not assist. Likewise, the judge's Record of Proceedings is not of assistance. At para 30 of her determination the judge records the appellant's claim that:

“Her imputed her actual and imputed political opinion and her membership of a particular social group as a woman who (sic) was already experienced sexual violence individually and combined place her at real risk she claims of persecution”. (my emphasis)

That appears to found the appellant's claim exclusively in the risk to her as a member of a PSG as a woman who had previously been subject to sexual violence. Given the judge's adverse credibility finding, the appellant had not established that she had been previously subject to sexual violence and so could not succeed on that basis as a member of a PSG.

35. Likewise, para 7 of the skeleton argument (at page 3 of the appellant's bundle) finds the appellant's claim squarely upon an acceptance of her account of having been detained and subject to sexual violence by guards whilst in detention. That reflects what is said in para 6 of the skeleton argument that:

“In this case the appellant's persecution relates to her imputed political opinion, and membership of a particular social group (a woman who has experienced sexual violence)”.

36. The latter, of course, reflects what was said by the judge at para 30 which was, no doubt, a précis of what was said in the skeleton argument.

37. That said, there is material set out at paras 16–18 of the skeleton argument which relates to a more generalised the risk of sexual violence. But, as Mr Duffy submitted, this evidence – as expressly ‘flagged up’ by the heading – relates to “sexual violence in conflict areas”. The appellant does not come from a conflict area.

38. However, para 17 refers to the *USSD, Country Report on Human Rights Practices 2016* (3 March 2017) which, whilst referring to crimes of sexual violence committed “as a tactic of war”, goes on to state that:

“The crimes occurred largely in the conflict zones in North Kivu Province but also throughout the country” (my emphasis).

39. Likewise, the respondent's decision letter deals with a claim based upon a claim of “gender-based violence” (here the fear of rape) at paras 60–62.

40. Ms Alban pointed out that at para 62 the Secretary of State noted that rape in the DRC was “common” and that the appellant “may have been a victim to it”. Although Ms Alban placed some reliance on the latter phraseology as an acceptance that the appellant had been raped, that is not a permissible interpretation of what is being said in para 62. There, the Secretary of State is acknowledging the relevant element of the appellant's claim, but goes on to find that, in any event, there would be a sufficiency of protection. That said, however, the Secretary of State does refer to rape as being “common” in the DRC.

41. Clearly, the principal basis upon which the appellant's claim was put forward was that she was at risk because of her claimed involvement with LUCHA and her detention and rape in the past. Nevertheless, in my judgment, the issue of whether the appellant could succeed, if she were not believed, on the basis that she was at risk of gender-

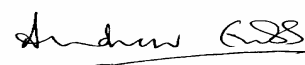
based violence on return was, at least, raised in the material both from the Secretary of State and in the skeleton argument and appellant's bundle sufficient, in my judgment, that the judge should have considered her claim on this basis.

42. Whilst there is some force in Mr Duffy's submission that the background evidence relating to risk of sexual violence is focused on the conflict areas, there is some evidence that the risk is more widespread and, as I have already pointed out, the Secretary of State himself at para 60 of the decision letter refers to rape being "common" in the DRC without restricting that statement to the conflict areas.
43. It may be that, on a full consideration of the background material, the appellant's case may not be without its difficulties. However, I am not persuaded, on the limited submissions and consideration of the background evidence at the hearing before me, that there is not an arguable issue in respect of risk on return of sexual or gender-based violence and in respect of any such risk, whether the DRC authorities provide a sufficiency of protection. In those circumstances, I am not persuaded that the failure to consider this basis of claim was not material.
44. In the result, I accept that ground 2 is made out.

Decision

45. For the above reasons, the decision of the First-tier Tribunal to dismiss the appellant's claim on asylum and humanitarian protection grounds involved the making of an error of law. That decision is set aside.
46. The decision to allow the appellant's appeal under Art 8 is not challenged and stands.
47. In the circumstances, given that the appeal now turns upon an assessment of the background evidence and any relevant findings in relation to the appellant, it is appropriate to remit the appeal to the First-tier Tribunal. However, given that all of Judge Baker's findings so far stand, I remit the appeal to the First-tier Tribunal to be heard by Judge A D Baker.
48. The sole issue to be determined is whether the appellant can succeed in her international protection claim on the basis of a real risk of sexual and gender-based violence. That assessment is to be made on the basis that the judge's adverse credibility finding and rejection of the appellant's account of what she claims occurred to her before leaving the DRC stand.

Signed



A Grubb
Judge of the Upper Tribunal
15 May 2018