



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

Appeal Number: PA/01594/2018

THE IMMIGRATION ACTS

**Heard at Manchester CJC
On 13th November 2018**

**Decision & Reasons
Promulgated
On 08th February 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

**SERGE MARTIN BOUKOULOU
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss G Thomas (Solicitor)

For the Respondent: Mr C Bates (Senior Home Office Presenting Officer)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Birrell, promulgated on 15th August 2018, following a hearing at Manchester Piccadilly on 10th August 2018. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Congo, and was born on 6th October 1975. He appealed against the decision of the Respondent dated 14th January 2018, refusing his application for asylum and for humanitarian protection, pursuant to paragraph 339C of HC 395.

The Appellant's Claim

3. The essence of the Appellant's claim is that he used to work as a police officer, and fell in disfavour with the ruling regime, and believes his uncle (his father's cousin) was poisoned by the government, and that they are also now attempting to poison him. He claims that he is at risk were he to return back to Congo.

The Judge's Finding

4. The judge summarised the Appellant's situation and considered, how the Appellant had entered the UK on a visitor's visa, when he had claimed to have been an actor and a comedian, which he said he undertook as activities on a part-time basis, in addition to being a police officer. The judge went on to consider the Appellant's account, and the documentation that had been furnished in his favour (from paragraph 22 onwards).
5. It was the Appellant's case that he received the documents about the predicament he was being put into from his wife and from his former boss in the secret service with whom he has remained friendly. However, (at paragraph 24) the judge did not consider that the Appellant's former boss would assist in this way, given the Appellant's claim that the ruthlessness of the regime was such, that they had poisoned his uncle, and attempted to poison him.
6. In relation to how the Appellant procured the documents, there was an investigation of this issue before the Tribunal.

"The Appellant initially said that he had received them from the colonel who had remained friendly with him in the security services, but he had deleted the documents because all secret service phones were under surveillance. When questioned further, he said that it was the colonel who would delete the message which then automatically deleted it from his phone. I am a regular user of WhatsApp and pointed out to the Appellant that I know that this is not the case and I note that there is certainly no evidence before me to suggest that this is the case. I am satisfied that the Appellant was simply being untruthful about the problems of all the documentation and therefore I attach little weight to it" (paragraph 25).

7. The judge also then went on to consider the claim that the Appellant's uncle had been poisoned, and that he himself was at risk of being poisoned in the same way. The judge rejected this completely. He did so on the basis that the ailments that the Appellant himself exhibited, were

medically shown to have been the cause of other related conditions (see paragraphs 26 to 28). The appeal was dismissed.

Grounds of Application

8. The grounds of application essentially state that, in suggesting that the judge herself was a regular user of WhatsApp, she could not accept that the messages on the Appellant's phone could be deleted by the sender once they were sent to him (see paragraph 6 of the grounds).as the Appellant had contended. Second, it was said that the judge was wrong to have failed to consider the Appellant's own explanation as to how his former boss would assist him in providing the necessary documents (paragraph 11).
9. On 20th September 2018, permission to appeal was granted by the Tribunal on the basis that, in view of the contention that the judge arrived at findings which were based on "her own knowledge and her own perception as to material matters", it was arguably the case that judge took into account immaterial considerations, namely, her

"... own understanding as to whether a message might automatically be deleted from the Appellant's phone. The judge's understanding of the matters was arguably an immaterial consideration and the judge arguably descended into the arena. The application for permission is granted".

Submissions

10. At the hearing before me, Miss Thomas, narrowed down the focus of her submissions to precisely this question, namely, that the judge had effectively allocated to herself the status of an expert, giving a view as to how the WhatsApp messages are deleted, and whether such a deletion at one end necessarily also deletes the message at the other end, and this was not something that was open to the judge to do. Secondly, she submitted that whereas the judge had gone on to find the Appellant to have been wanting of credibility in other respects, the plain fact remained that the judge's view in relation to how the WhatsApp message system operated, had infected her findings in relation to all the other findings as well. The decision, accordingly, was unsafe, and it should be set aside.
11. For his part, Mr Bates submitted that it was entirely fair for the judge to say in open court, and in the presence of well-known Counsel in this jurisdiction (as the Appellant was represented by Miss Geeta Patel) that the Appellant's account was not credible where he suggested that the deleting of a message by the sender would also delete the message at the Appellant's end as well. The fact remained, submitted Mr Bates, that the Appellant had begun this entire account by giving entirely conflicting explanations about how he received the documentation. Indeed, the judge was herself clear in stating that "even Miss Patel described in her final submission 'a confused account' of why he could not show them messages and documents on his phone" (paragraph 25). Given that this

was the case, there was no error of law of any materiality. Indeed, submitted Mr Bates, it would have been altogether different if the judge had raised these matters only in the determination, without giving the parties the opportunity to explain them during the course of the hearing.

12. In reply, Miss Thomas submitted that be that as it may, the judge's use of language in terms that, "I am a regular user of WhatsApp and pointed out to the Appellant that I note that this was not the case ..." (paragraph 25) showed that she had stepped into the arena, in precisely the way in which the grant of permission had suggested, and made a finding against the Appellant, which ultimately infected findings across the board in relation to this Appellant.

No Error of Law

13. I am satisfied that the making of the decision by the judge did not involve the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision. My reasons are as follows. First, that this is a case where the Appellant had himself begun by giving a convoluted account as to how he had received the documents and why they were no longer available. He himself had said that he had deleted them at first. When challenged further, he said that it was the sender, the Colonel, who deleted them. When he was expressly told that this could not be the case, and that "there is certainly no evidence before me to suggest that this is the case" (paragraph 25), the Appellant did not deal with this. It is not clear what his evidence was thereafter. It is not clear what his explanation was thereafter. One can only assume, that he gave none. This is why the judge concluded that the Appellant had given an untruthful account and that for this reason she would "attach little weight to it". This was not to say that the judge completely disregarded it. It was simply to say that she would attach little weight to it. In effect, therefore, the judge had given the Appellant some credence for the account that he had given.
14. Second, the Appellant's case was also that his uncle had been poisoned and that he himself also was at risk of being poisoned. The judge comprehensively rejected this on the basis of the medical evidence that was before her. First, there was the evidence from the Dalton Hospital dated 25th October 2017 which confirmed that the Appellant's recurrent abdominal pain was on account of "a failed drainage of an intra-abdominal collection" and the CT scans revealed "distal ileitis with inflammatory changes suggestive of TB ileitis with failed drainage" (paragraph 26). The judge even went on to consider more recent evidence from the Birmingham Hospital dated 2nd April 2018 which confirmed all of this, and added that the Appellant was "having adhesions as a result of an appendectomy. There is no suggestion of poison" (paragraph 27). Third, the judge then went on to consider the claim that the Appellant's uncle, Thomas Mayinda, had also been poisoned to death. However, this person had attended hospitals in France for regular treatment. The evidence from there showed that "Mayinda died following a vascular stroke". The

Appellant states that there were Articles showing that it could have been a vascular stroke or it could have been poisoning. However, the judge explained that there was no evidential basis for this (paragraph 27). Finally, the Appellant gave an inconsistent and conflicting account about his own occupation. He claimed to have been a police officer. But then he also ended up procuring a visa to the UK where he described himself only as an actor and a comedian. By the time that the hearing occurred, he had also said that he was a journalist and a novelist in his spare time (paragraph 29). He claimed that his Bank Account had been frozen after he arrived in the UK. However, as the judge found, "I find it incredible that someone who had been arrested, detained and tortured on three to four occasions by the current regime as an opponent of the regime would continue to be employed in the security services" (paragraph 30), which was the Appellant's claim, if he said that he worked as a police officer, a matter that he did not disclose to the visa authorities in the UK. All in all, therefore, the findings made by the judge, were entirely open to her. The decision that she arrived at was comprehensive, clear, and entirely fair to the Appellant.

Notice of Decision

15. The decision of the First-tier Tribunal did not involve the making of an error of law. The decision shall stand.
16. No anonymity direction is made.
17. The appeal is dismissed.

Signed

Date

Deputy Upper Tribunal Judge Juss

6th February 2019