Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: RP/00139/2018

THE IMMIGRATION ACTS

Heard at: Field House
On: 15 June 2021

Decision & Reasons Promulgated
On: 29 July 2021

Before

UPPER TRIBUNAL JUDGE ALLEN
DEPUTY UPPER TRIBUNAL JUDGE COTTON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

GN

Respondent

For the Appellant: Ms Cunha, Senior Home Office Presenting Officer
For the Respondent: Dr Chelvan, Counsel

DECISION AND REASONS

1. The Respondent is a national of the Democratic Republic of Congo (DRC), born in 1992. The Appellant appeals with permission against the decision of the First-tier Tribunal (FtT) granting the Respondent's appeal.

Background

2. The Respondent arrived in the UK in 2005, aged 12, to join his uncle. The Respondent has a partner and a daughter (referred to as XN) with

whom (the FtT Judge found) he has a genuine and subsisting relationship.

3. The Respondent has a number of previous convictions dating from 2011 to 2017. Relevant to this case is a 2017 conviction in the Crown Court sitting at Snaresbrook for a single count of acquiring criminal property. He was sentenced to 13 months imprisonment.

4. The Appellant considered that the Respondent's uncle was no longer out of favour with the government of DRC, and so determined that the basis on which the Respondent was recognised as a refugee no longer existed. Further, the Appellant concluded, the Respondent's most recent conviction triggered the "automatic" deportation provision under s32 of the UK Borders Act 2007 and so served a decision to revoke the Respondent's refugee status. The Appellant rejected the Respondent's representations that removing him from the United Kingdom (UK) would unlawfully breach his Rights under the Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention on Human Rights, or ECHR).

5. The Respondent appealed to the FtT.

The Decision of the First-tier Tribunal

6. The determination of Judge Wilding of the FtT was promulgated on the 17 March 2021. The Respondent's case was that being returned to DRC would:

    a. Breach his rights under art 3 ECHR on the basis of the extreme poverty in DRC; and would

    b. Unjustifiably interfere with his art 8 ECHR rights in two ways:

        i. In respect of his family life, it would be unduly harsh to separate him from his daughter and partner; and

        ii. In respect of his private life, there would be very significant obstacles to his integration on return to DRC.

7. The Judge determined the appeal in favour of the Respondent.

The appeal

Permission to appeal

8. Permission to appeal was granted by the FtT on the 26 March 2021 on grounds that the FtT:

    a. Arguably made an error of law by making inadequate findings in respect of the unduly harsh test; and

b. Arguably made an error of law by making inadequate findings in respect of the finding of no very significant obstacles.

Submissions before us

9. In considering whether the FtT Judge had made an error of law, we took into consideration the 'reasons for appealing' in the Appellant's application for permission to appeal dated 22 March 2021 and the Respondent's skeleton argument dated 27 May 2021.

10. Ms Cunha argued that "unduly harsh" in the sense of Exception 2 contained in s117C(5) Nationality Immigration and Asylum Act 2002 (NIAA 02) is a high test. Further, the FtT wrongly concluded that XN would have a similar upbringing to their mother (the Respondent's partner), based solely on the fact that XN's mother did not have a father when growing up. The Appellant submits that the FtT Judge did not have an evidential basis for finding that the Respondent's partner cannot afford to pay for their house without the Respondent's contribution to the household income. It was also argued that the FtT Judge failed to consider why the working hours of the Respondent's partner (a teacher) were incompatible with XN going to school or why alternative childcare arrangements were inappropriate.

11. Ms Cunha argued that the FtT had failed to make a holistic assessment on the question of undue harshness, and had relied only on the evidence of the Respondent's partner.

12. In relation to Exception 1 contained in s117C(4) NIAA 02, Ms Cunha drew our attention to the comments of the Crown Court Judge when sentencing the Respondent to 13 months imprisonment. She submitted that the FtT Judge was required to take into consideration the complete level of offending. The FtT Judge failed to address the question of very significant obstacles properly, including failing to resolve the factual dispute of whether the Respondent can speak Lingala. The Judge also failed to address the point that the Respondent has a large family in the UK with a DRC cultural context (which would make it easier to integrate on return).

13. Ms Cunha submitted that the FtT Judge identified there was an art 3 ECHR question to be resolved, but did not go on to resolve it.

14. In response, Dr Chelvan submitted that many of the Appellant's submissions before us were submissions on facts in dispute and that we should remember that we are deciding whether there was an error of law in the decision of the FtT and that this is not a rehearing. In addition, he submitted, arguments advanced for the Appellant were not raised on their application to appeal.

15. The FtT Judge made an assessment on the material and arguments before them at the time and we should be careful not to treat this

matter as a rehearing based on new arguments that the Appellant has thought of since.

16. Dr Chelvan submitted that the Appellant does not dispute [43] and [44] of the FtT judgment, which conclude that the Respondent has no family in DRC, has not lived there as an independent adult, that the situation in the DRC is extremely challenging which will have a significant impact on the Respondent's ability to integrate and establish himself and that deportation would be akin to exile.

17. Dr Chelvan submitted that paragraph 4 of his skeleton argument for the error of law hearing links to the art 3 ECHR argument. That paragraph points to the Home Office bundle page K4 which is a UNCHR response dated 18 December 2017 stating '*the SSHD had not provided 'sufficient evidence allowing it to conclude... a fundamental and durable nature there is no risk of persecution'*.

18. We remind ourselves that if the FtT Judge has not mentioned a particular piece of evidence or a submission, this does not mean that they have not taken it into consideration. Equally, we should not rush to find an error of law simply because we might have reached a different conclusion, or might have expressed ourselves differently.

Analysis

FtT consideration of Exception 1 s117C NIAA 02

19. The Appellant states that the Judge failed to take into consideration the complete level of offending when assessing whether the Respondent was socially and culturally integrated into the UK, a prerequisite for Exception 1 under s117C(4) NIAA.

20. The Appellant accepted in the FtT [37] that, were it not for the offence leading to 13 months imprisonment, she would be in difficulties arguing that the Respondent was not integrated in the UK. The Appellant's submission on a lack of integration was based on the single pillar of the criminal conviction.

21. The Judge dealt with the offending in two paragraphs. The Judge took into consideration that the Respondent has always been lawfully present in the UK, had attended school here, worked with Transport for London and was trained as a plumber.

22. The evidence before the FtT included the sentencing remarks of the Crown Court Judge. In assessing integration, the FtT Judge states at [38] that they had taken into consideration all the evidence. We find that this includes the sentencing remarks, which outline the Respondent's level of offending within the context of the offence very clearly. It was not necessary for the FtT to repeat the sentencing remarks to make it clear that the level of offending had been taken into consideration.

23. The Judge gave a slightly more detailed exposition of the Respondent's cultural and social integration. In our judgment, however, this was necessary in order to show what evidence the FtT Judge brought together when considering factors pointing towards integration in the UK.

24. We find that the Judge did take into consideration the complete level of offending.

25. In relation to the question under s117C(4)(c) of whether there would be very significant obstacles to the Respondent's integration into DRC, the Appellant argued in her reasons for appealing that the FtT Judge failed to consider that the Respondent had gained work experience and skills in the UK and speaks some French.

26. In oral submissions, Ms Cunha did not rely on the argument that the Respondent's ability to speak some French had not been considered by the FtT Judge. Instead, she advanced the argument that the FtT Judge failed to resolve a factual dispute on whether the Respondent speaks Lingala.

27. Ms Cunha submitted that the Judge highlighted at the start of the determination that the Respondent can speak Lingala. Contrary to Ms Cunha's submission, [19] of the FtT determination records that the Appellant's case was that the Respondent 'understands some Lingala'. This is not at odds with the Judge's later recounting of evidence that '[w]hilst he speaks a bit of French, he speaks no Lingala, which is the everyday language of the country' [42]. Given that a person's active knowledge of a language is invariably at least a little behind their passive knowledge of a language (even in their first language), it was not illogical for the FtT Judge to accept both of those assertions about the Respondent's ability in Lingala.

28. We find that the FtT Judge did not fail to resolve a factual dispute about the Respondent's command of Lingala, because *understanding some* Lingala and *speaking no* Lingala do not present a factual dispute.

29. With regards to the Appellant's submission that the FtT Judge failed to take into account that the Respondent has a large family in the UK with a DRC cultural context, it is correct to conclude that the Judge did not use that turn of phrase in their determination.

30. The Judge did receive oral and written evidence on the Respondent's family background. The Judge details [42] that they heard evidence about the Respondent being brought up by his uncle and being like a brother to his cousin (both of who provide a DRC cultural link). The Judge then outlines [43] how this is balanced against the lack of in-country links and familiarity with DRC.

31. The Judge could have addressed in more detail the question of whether there was a DRC cultural context in the Respondent's upbringing in the UK, and could have gone further in explaining how this factored in their analysis. However, the Judge's weighing up of the factors for and against this argument are sufficiently clear to address this point properly. We conclude that care has been taken by the Judge and the evidence as a whole has been considered by the FtT in assessing this point.

32. Accordingly, we conclude that the Judge has not erred in this respect.

FtT consideration of Exception 2 s117C(5) NIAA 02

33. The FtT determination at [29] explains that the Appellant took no issue with evidence that the Respondent's partner would find it difficult to cope financially were the Respondent to be deported. The Appellant did argue that this did not amount to undue harshness.

34. Before us the Respondent submitted that, on the evidence available, the Judge should not have concluded that the Respondent's partner would struggle financially. Having considered this submission we conclude, on balance, that the Judge was entitled to conclude there would be financial struggles. Further, this properly feeds in to the Judge's analysis of whether the impact on XN is unduly harsh.

35. On the impact of the Respondent's deportation on XN's upbringing, the Appellant correctly submits that there was no report by an independent social worker to assist the Judge. Such reports are routinely of assistance when they are provided. However, there is no obligation to provide them to the Tribunal and they are not essential to assess the impact of a parent's deportation on a child.

36. The Appellant further submitted that the evidence of XN's mother about her own upbringing was the sole source for the Judge's assessment of the impact of deportation on XN's upbringing. On reading the Judge's determination at [30-31], we take the view that this is not a faithful representation of the Judge's analysis.

37. The Judge in fact considered the evidence of both the Respondent's partner and the Respondent and, it seems to us, also drew a common-sense conclusion based on the evidence.

38. Therefore the FtT finding that deportation of the Respondent would have an unduly harsh effect on XN is not an error of law.

39. It is unclear, on the face of the FtT determination, what the basis was for the Judge's conclusion that the Respondent's partner would not be able to continue her work as a full-time primary school teacher. However, given that the Judge was justified in concluding that the effect of the Respondent's deportation would be unduly harsh

on XN, this error is not material to the conclusion that Exception 2 was made out.

FtT consideration of art 3 ECHR issues

40. The FtT Judge identified that the appeal concerned both art 3 and art 8 arguments. At [10] they noted that *'[t]he appellant's case is that to return to DRC would breach his Article 3 rights on the basis of the extreme poverty that he would face there'.* Later, at [20-21] they stated *'The crux of the claim before me is that it would be a breach of his Article 3 and 8 rights to return to the DRC... I take the Article 8 claim first'*.

41. The Judge analyses the art 8 claim from [21] through to the end of the judgment. The Judge does not, however, return to address the art 3 point. Having identified that the appeal contained an art 3 issue that required resolving, the Judge was required – in our view – to either resolve that issue, or make a finding as to why it was not necessary to resolve it. To do neither has the effect of depriving both parties of the opportunity for their case on that point to be considered by the FtT.

42. We find that this does amount to an error of law. We consider that this error of law is one that makes it appropriate for the case to be remitted to the FtT for reconsideration.

Conclusion

43. Having identified that the case required an assessment of art 3 issues, the FtT Judge made a material error of law in not resolving this.

44. We therefore remit the case to the FtT. The case is returned the case to the same Judge, and confined to determining the art 3 ECHR point.

45. There are no other material errors of law.

Anonymity Order

46. Having had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders we consider it appropriate to make an order in the following terms:

> "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 to, amongst others, both the Appellant and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings"

Decisions and Directions

47. The decision of the First-tier Tribunal is set aside for material error of law.

48. The case is remitted to the First-tier Tribunal. It is returned to the same Judge, and confined to determining the art 3 ECHR point.

49. There is an order for anonymity.

Signed D Cotton Date: 24 July 2021

Deputy Upper Tribunal Judge