



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/13513/2015

THE IMMIGRATION ACTS

Heard at Field House
On 26th July 2018

Decision & Reasons Promulgated
On 14th August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE ROBERTS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

A.A.

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr Bramble, Senior Home Office Presenting Officer

For the Respondent: Ms Foot, Counsel instructed by BHT Immigration Legal Services

Anonymity

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008

An anonymity direction was made by the First-tier Tribunal. As a protection claim, it is appropriate to continue that direction.

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal, allowing A.A.'s appeal against the Secretary of State's decision of 26th November 2015 refusing to grant him indefinite leave to remain in the UK.
2. For the purposes of this decision, I shall refer to the Secretary of State as "the Respondent" and to A.A. as "the Appellant" reflecting their positions as they were in the appeal before the First-tier Tribunal.
3. The Appellant is a citizen of Angola born 4th October 1965. He entered the United Kingdom in May 2000 and claimed asylum on entry. His application for asylum was refused in 2002 but he was granted four years exceptional leave to remain expiring on 21st June 2006. On 24th May 2006 the Appellant applied for settlement in the UK on the basis of completing four years ELR. He indicated he had a continuing fear of return to Angola. That application was refused but not until 7th November 2011. The refusal of 7th November 2011 attracted a right of appeal to the First-tier Tribunal and on 25th June 2012 an Immigration Judge upheld the Secretary of State's decision.
4. However, the Appellant was granted permission to appeal that judgment. This resulted in the Respondent agreeing to withdraw her decision of 7th November 2011 and to make a fresh decision. The fresh decision was not made until 26th November 2015 and forms the basis of the instant appeal.
5. In her decision of 26th November 2015, the Respondent refused the Appellant's application for further leave to remain, on the basis that he fell to be excluded from the protection of the Refugee Convention under Article 1(F)(a). The Respondent certified the Appellant's claim under Section 55 of the Immigration, Asylum and Nationality Act 2006 because it was said that there are serious reasons for considering that when in Angola, the Appellant had been responsible for committing a crime against peace, a war crime, or a crime against humanity as defined in the international instruments drawn up to make provision in respect of such crimes.
6. The appeal against that decision came before the First-tier Tribunal and was heard by Judge Scott-Baker in a hearing lasting over two days. In a decision promulgated on 19th December 2017 she found that the Secretary of State had not established that the exclusion clause should be applied to the Appellant and therefore found that he required international protection under the Refugee Convention. The Appellant's appeal was allowed.
7. The Secretary of State sought permission to appeal the decision. This was initially refused by the First-tier Tribunal, but was granted on a renewed application before the Upper Tribunal. An issue is raised on the grant of permission itself and I will deal with that issue further in this decision.
8. In summary the Appellant's case is that he came originally from Cabinda in the northern part of Angola. His claim is that he was forcibly recruited into the MPLA (Popular Movement for the Liberation of Angola), but escaped from the MPLA after five years' service with them. He then spent the next six years as a member of FLEC

(Front for the Liberation of the Enclave of Cabinda). He then left FLEC on account of an incident which resulted in three young men being blown up by landmines. The Appellant had been trading stolen guns for money and had involved the young men in the trade. The families of the young men blamed the Appellant for what had happened to them. Fearing retribution the Appellant moved to a place called Chiowa. However, he was caught there on a road block by government soldiers. He was without papers. His claim is that they were on a look out for deserters from the MPLA and suspected FLEC members. He was therefore arrested and taken to prison where he was beaten and tortured as a suspected member of FLEC.

9. He managed to escape detention with the help of a guard who came from Cabinda. He subsequently made his way to his sister's house in Massabi. His sister and her husband arranged for his travel to the UK. He arrived in the UK in 2000 travelling via Paris and as set out above, claimed asylum on arrival.
10. In July 2011, the War Crimes Unit of the Border Agency completed a report in relation to the Appellant. It is that report which forms the basis of the Respondent's reasons for refusing the Appellant's application. The reasons for his exclusion are detailed in that summary and are as follows:
 - the subject was a long-term member of the MPLA Armed Forces, serving from 1988 to 1993;
 - the subject saw active service in and around Cabinda, witnessing violence and abuse directed towards people both during and subsequent to fighting, especially when a prisoner was captured;
 - the subject claims he was forced to kill people including civilians;
 - the subject drove soldiers who would undertake international crimes; and
 - the subject is fully aware of the activities of the MPLA Armed Forces.
11. In coming to those conclusions, the Respondent relied upon background documents together with evidence contained in the statements made by the Appellant; namely his personal statement dated 7th June 2000 made when he first claimed asylum, his Asylum Interview Record dated 10th November 2000 and his Asylum Interview Record dated 19th August 2009. Drawing on that evidence, the Respondent refused the Appellant's application certifying the claim under S.55 Immigration Asylum and Nationality Act 2006.
12. The Appellant appealed against that decision on the grounds that the Respondent had failed to meet the burden of proving that there were serious grounds for considering that he had committed war crimes and crimes against humanity in the period during which he was conscripted into the MPLA. It was asserted in the grounds that reliance could not be placed on the self-incriminating statements made by the Appellant in 2000 and 2009. The Appellant's claim was that he did not understand the importance of the detail in his self-completed questionnaire, and that the interpreter provided by

his representatives in 2000 had embellished his answers. In 2009 his interview was conducted in English at his request, but it was only later that he realised that the answers he had given did not properly reflect what he had meant to convey. He only realised at a later stage that he should have asked for a Lingala interpreter.

13. The Appellant's appeal came before the First-tier Tribunal. Judge Scott-Baker heard evidence from the Appellant and took into account a great deal of documentary evidence. She had before her the three statements in question together with statements made by the Appellant in particular one dated 22nd May 2012 in which the Appellant resiles from the answers made in his personal statement, SEF and original asylum interview. In addition, she had the benefit of an expert's report of 23rd January 2012, and a medical report dated 12th January 2012 which outlined injuries consistent with torture. (Presumably both reports were commissioned for the hearing on 25th June 2012.)
14. In considering that evidence, the Judge made findings that she was satisfied she could not place reliance on the self-incriminatory evidence set out by the Appellant. She was satisfied that he gave a credible account before her and she accepted his evidence resiling from his previous statements. Accordingly she concluded the Respondent had failed to establish serious reasons for considering that the Appellant had committed a war crime or crimes against humanity.
15. The Respondent sought permission to appeal Judge Scott-Baker's decision on the basis that the judge had materially erred in finding that the Appellant should not be excluded from the Refugee Convention. The grounds submitted that the judge's analysis of why she accepted the Appellant's explanation that his statements made in 2000 and 2009 contain interpretation errors, was inadequately reasoned. Likewise it was said that the judge had failed to give proper reasons for accepting the Appellant's evidence resiling from the statements made in 2000 and 2009. In particular the judge had overlooked the Appellant's own evidence that in 2009 he had chosen to give evidence in English because he had felt more comfortable in doing so and wished to avoid the communication difficulties he had experienced in 2000. It was also noted that the FtTJ had acknowledged that she is not an expert in linguistic ability.
16. Further in Ground 3, it was said that the judge's findings at 152 wherein she said that, *"the Respondent accepts that the Appellant is from Cabinda ... in light of these facts it is unlikely that the Appellant would have entertained the idea of killing civilians in Cabinda"* was erroneous because it failed to take into account the Appellant's own evidence in his 2009 interview and the evidence of the expert witness.
17. Permission to appeal the FtTJ's decision was refused initially by the First-tier Tribunal. This refusal was on the basis that the Respondent had submitted the application for leave to appeal three days outside of the fourteen day timeframe set out in the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014.
18. Following the refusal by the FTT to admit the application, the Respondent renewed her application before the Upper Tribunal.

19. Permission to appeal was granted by UTJ Kopieczek and I set out below the full terms of the grant:

“NOTICE OF DECISION OF APPLICATION FOR PERMISSION TO APPEAL

It is unnecessary to hold an oral hearing of the application for permission to appeal because I consider that it can properly be dealt with on the papers.

Permission to appeal is **granted**

**REASONS
(including any decision on extending time)**

Under the Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended) the timeliness of the application for permission to the First-tier Tribunal is not relevant to my consideration of the renewed grounds of application.

I consider it arguable that notwithstanding the thoroughness of the First-tier Tribunal Judge’s decision, she erred in-law for the reasons set out in the grounds, in accepting the appellant’s explanation as to the issue with the interpreter in 2000 when he is said to have admitted war crimes, as to his interview in 2009, and in relation to the unlikelihood of the appellant having killed civilians in Cabinda. The other matters raised in the grounds are also arguable.”

20. Thus the matter comes before me to decide whether the decision of the First-tier Tribunal contains such error of law that it must be set aside and remade.

Error of Law Hearing - UT Hearing

21. Before me Mr Bramble appeared on behalf of the Secretary of State and Ms Foot for the Appellant. Mr Bramble relied on the grounds seeking permission which he said were succinct and set out the Respondent’s case fully.
22. Ms Foot handed up a Rule 24 response, together with a judgment in a judicial review application in the matter of **R (on the application of Onowu) v First-tier Tribunal IJR [2016] UKUT 00185.**
23. There were two elements to Ms Foot’s submission as contained in the Rule 24 response.
- (i) It was said that the grant of permission made by the UT was erroneous because it did not address properly the issue of whether time for appealing by the Respondent should have been extended.
 - (ii) The substantive Grounds of Appeal were without merit.
24. I find that it is convenient that I deal with the timeliness issue at this point in my decision. It is correct to note that permission to appeal the FtTJ’s decision was initially

refused in the First-tier Tribunal. It has always been accepted that the Respondent sought permission to appeal three days outside the fourteen-day time limit.

25. When the application came before the First-tier Tribunal, Judge Page refused it saying:

“There are no proper reasons given why this application has been made 3 days outside the 14 day statutory time limit for making an application for permission to appeal. The reason given by the respondent is that there were staff shortages. I am unable to extend the time limit in the absence of an acceptable reason.”

There then followed four perplexing sentences saying (I believe) that the application would have been refused anyway if it had been made in time because the judge reached conclusions open to her.

26. Permission having been refused by the First-tier Tribunal, the Respondent renewed her application before the Upper Tribunal. In a decision dated 8th June 2018 Judge Kopieczek granted permission in the terms set out in paragraph 19 above.

27. Ms Foot’s argument before me amounted to a submission saying that UTJ Kopieczek was wrong to state in his decision granting permission that the timeliness was not relevant to his consideration of the renewed grounds.

28. Relying on the judicial review application made in Onowu and on her Rule 24 response, she said it was not in the interests of justice to admit the application because a delay of three days is a significant delay. There is no special rule for public authorities and the Respondent had provided no evidence for an assertion made that the determination was only received on 2nd January 2018.

29. I find that I can deal with this matter briefly. It is on this basis. I find that it is not open to me to make a finding that it is not in the interests of justice to admit the Respondent’s application. The decision to admit the application has already been taken by UTJ Kopieczek who sets out that he has had regard to the Tribunal Procedure (Upper Tribunal) Rules 2008.

30. Ms Foot, in reality, is asking me to undertake a review of a decision made by another UT Judge, and to set aside a decision made by a judge who has set out the terms for the hearing before me having had regard to the Upper Tribunal Procedure Rules. If as she says at [8] in the Rule 24 response, she is dissatisfied with the decision taken by UTJ Kopieczek, then in my view, she would need to seek a remedy elsewhere.

31. For my part I would simply observe that the FtT determination was promulgated on 19th December 2017. It stands to reason that this is one of the busiest times of the year for postal services. In this particular instance, the fourteen-day time limit encompasses two weeks of the year containing three days of statutory public holidays. I can think of no other time of year wherein three days of public holiday fall so close to one another.

32. The Rules have always been predicated on a party to an appeal having fourteen days in which to respond. Nevertheless the Procedure Rules themselves give flexibility to extend time in exceptional circumstances. Therefore I simply observe here that the circumstances of this case could be considered to meet the flexibility provided by the Rules.
33. It follows therefore that I find that the application before me relates to the substantive issues only contained in the second paragraph of the UTJ's grant of permission.
34. Reverting to the substantive grounds, Ms Foot submitted that the FtT had properly focused on the issue before it, which was whether the Respondent had established that there were clear, credible and strong reasons for believing that the Appellant had committed a war crime/crime against humanity (Al Sirri v SSHD [2012] UKSC 54).
35. She highlighted that the Respondent's case against the Appellant was a weak one, in that it evidentially relied upon self-incriminatory statements made by the Appellant in 2000, when he had to use a South American Portuguese interpreter, and in 2009 when he was interviewed in English.
36. She submitted that the Appellant had provided an explanation of why his evidence could not be relied upon in his earlier statements. The explanation had been that there were problems with the interpreter embellishing matters in 2000 and the judge had accepted that explanation. Furthermore she had accepted the Appellant's explanation that he had experienced difficulty in 2009 when he had been interviewed in English.
37. The judge was perfectly at liberty to prefer the later explanation put forward by the Appellant in his statements dated 2012 and 2016. The weight to be afforded to the evidence is a matter for the judge alone provided that the judge had given reasons why she preferred the evidence given by the Appellant and contained in his later statements over the earlier ones. The judge had fully set out her reasons and there was no error of law disclosed. The Respondent's case amounted to no more than a disagreement with the FtTJ's findings. This was not sufficient to amount to a legal error.
38. So far as the ground 3 is concerned, Ms Foot said that the Respondent's complaint about the FtTJ's approach to the background evidence was misconceived. The Appellant's consistent history has always been that when he was picked up by the MPLA he was taken out of Cabinda and forced to serve many miles from there. At the time of his desertion he was in Caxito. He deserted from there and made his way home. The Appellant's case was, and remained, that the background documents showed that war crimes committed by the MPLA occurred after January 1993, when he is accepted to have deserted the MPLA. The judge accepted the background documentation and was correct therefore to find, as she did at [145], within the context of this account the Appellant had not been forced to shoot people in Cabinda as he had not been stationed there when in the MPLA. Taken as a whole, the judge's decision is fully sustainable.
39. Mr Bramble had no further response to make. At the end of submissions, I reserved my decision which I now give with my reasons.

Consideration

40. The focus of the Respondent's appeal in this case centres, in essence, on an argument with the FtTJ's finding whereby she accepted that the Appellant's explanation for resiling from his self-incriminatory statements made in 2000 and 2009 was credible. It is said that the judge failed to give adequate reasons for her acceptance of the Appellant's explanation. I find I am not in agreement with Mr Bramble on this point, although I can see why he makes such an argument. It could well be said that a man who changes his evidence and resiles from his former self-incriminatory statement has done so simply to avoid the consequences of those statements, and is therefore not creditworthy in any event.
41. However, in this appeal the judge was fully aware of this possibility. She specifically refers to it at [150]. Having seen and heard from the Appellant, it was her judgment that the Appellant had demonstrated that he could not fully understand the Portuguese interpreter provided for him in 2000. The reason given was that the interpreter was of South American origin and spoke a different dialect to the Angolan Portuguese or Lingala, which the Appellant understood. The Appellant only became aware in 2012 that the account in 2000 contained embellishments. All he could recall was that the interpreter had added "stuff". Despite an extensive cross examination of the Appellant by the Respondent's representative, the FtTJ accepted the Appellant's explanation that he was not aware of the contents of this interview until 2012 and that the interpreter had embellished the account. I see no error in the finding. The judge saw and heard the Appellant and credibility is a matter for her.
42. Equally she found that she had reason to believe that the Appellant was not capable of giving reliable evidence in 2009 when interviewed in English. It is correct that she draws upon her own observation when coming to her conclusion that the Appellant was not capable of giving reliable evidence in English in 2009 but again I refer to her reasoned observation on this point in [149]. She was aware that she is not an expert in linguistic ability, but the finding she was called upon to make was one for her in the exercise of her judgement.
43. I find that the FtTJ conducted a careful and thorough hearing. She spent a great deal of time examining the evidence surrounding the 2000 and 2009 statements. She sets out the Appellant's evidence at length in paragraphs [43 to 74]. A great deal of that evidence dealt with the former statements made by him. She notes what appears to be an extensive cross examination of the issues.
44. In addition, in coming to her conclusions, the FtTJ was assisted by both an expert's report and a medical legal report. She found that those reports lent credence to the Appellant's claim that the statements made by him in 2000 and 2009 were not to be relied upon.
45. This was no doubt a difficult case for the judge to decide, but she heard the appeal with the Appellant speaking his native Lingala. She was satisfied therefore, assisted by the expert evidence, that the Appellant's testimony before her was credible.

46. That being so, she concluded that the Respondent was relying on confused and unreliable answers made in 2000 and 2009, and that evidence did not meet the test in Al Sirri. She noted that cases of this nature require the Respondent to show that there was clear, credible and strong evidence sufficient to exclude the Appellant from the Refugee Convention. The conclusions reached by her were in my view reasonably and properly open to her on the evidence before her.
47. The final point to be dealt with in this decision is the complaint made in Ground 3, where it is said that the FtTJ's approach to the background documentary evidence is flawed. I find force in Ms Foot's submission that the Respondent's complaint on this point is misconceived. It has always been the Appellant's case that war crimes committed by the MPLA occurred after January 1993 when it is accepted that he had deserted the MPLA. The massacres referred to and committed in around January 1993 occurred in Luanda and not Caxito where the Appellant was stationed at the time. It has always been the Appellant's case that it was hearing about the massacres in Luanda that triggered his desertion from the MPLA. I find that paragraph [152] of the decision needs to read in the context of [144 to 146] where the judge gives reasons why she accepts that it was unlikely he had killed civilians in Cabinda. It was simply that he was not stationed there when serving in the MPLA. The judge made a clear finding on this point [145].
48. For all of the foregoing reasons therefore I conclude that the Grounds of Appeal do not disclose any errors of law in the First-tier Tribunal's decision. The sole challenge in the grounds relate to the judge's findings on exclusion under Article 1(F)(a) of the Refugee Convention. There is no challenge to the judge's finding as to the Appellant's entitlement to protection under the Refugee Convention. Accordingly, the judge's decision to allow the Appellant's appeal on asylum grounds is upheld.

Notice of Decision

The Secretary of State's appeal is accordingly dismissed. The making of the decision of the First-tier Tribunal did not involve an error on a point of law. I do not set aside the decision. The decision to allow the Appellant's appeal therefore stands.

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

C E Roberts

Date

12 August 2018

Deputy Upper Tribunal Judge Roberts