



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

Appeal Number: DA/01930/2013

THE IMMIGRATION ACTS

Heard at Bradford

On 10 February 2015

**Decision & Reasons
Promulgated**

On 27 February 2015

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr Jarvis, a Senior Home Office Presenting Officer

For the Respondent: Miss Khan, instructed by Howells, Solicitors

DECISION AND REASONS

1. The respondent, MS, claims to be a citizen of the Democratic Republic of Congo (DRC) having been born in 1977. I shall hereafter refer to the appellant as the respondent and the respondent as the appellant (as they appeared respectively before the First-tier Tribunal).
2. On 30 August 2013, the respondent refused to revoke a deportation order in respect of the appellant. The appellant appealed against that decision of the First-tier Tribunal (Judge Shimmin; Dr De Barros) which, in a

determination promulgated on 18 February 2014, allowed the appeal. The Secretary of State now appeals, with permission, to the Upper Tribunal.

3. The appellant had a lengthy litigation history. This history has been summarised by the First-tier Tribunal as follows:

“The appellant claims to be a citizen of the DRC. She claims to have one brother, Sammy, born in 1987 and two sisters, Bernadette born in 1982 and Liliane born on the 18 November, 1982. She married Kiyega Sadonge, a pastor of the Rehema Church. The couple had four children, Flavian born 18 August, 1997, Sarah born 20 December, 1999, Glorie born 15 September, 2001 and Sandra born 3 February, 2003. Liliane, her child, Gedeon Shema born 29 January, 1997, and the appellant’s children had refugee status in Uganda and have been resettled in Sweden.

The appellant believes the appellant is Christine Nankya Mpoza, a Ugandan national, born 12 July, 1976.

The appellant arrived in the United Kingdom on 1 June 2005 and on the following day she claimed asylum. The basis of her claim was that she would be at real risk of persecution because of race (Banyamulenge/Tutsi). She further claimed to be involved in women's rights groups that raised awareness of sexual violence. Asylum was refused on 15 July, 2005. It was reconsidered and on 23 September, 2005 again refused. The appellant appealed against the refusal and that was dismissed in a determination by Immigration Judge Thornton promulgated 16 March, 2006. The appellant sought Judicial Review in the High Court but that was refused on 17 October, 2006.

On 20 August, 2008 the appellant pleaded guilty to three counts of possession of false documents and was sentenced to 12 months imprisonment.

On 30 July, 2008 a Deportation Order was signed but revoked following further representations. On 23 October, 2009 a decision was made to make a Deportation Order and to refuse the asylum application. On 13 November, 2009 an appeal was lodged against deportation. The appeal was heard on 20 January, 2010 before a Panel including Immigration Judge Reed which upheld the respondent's decision. The appellant sought Judicial Review in the High Court and this was refused on 1 October 2010.

On 10 July, 2012 an Emergency Travel Document interview was conducted in which the appellant claimed to be a national of the DRC. The Ugandan authorities agreed to issue the appellant with a travel document on 29 November, 2012. Further representations were submitted by the appellant and refused on 22 February, 2013 certified with an out of country right of appeal.

On 16 May, 2013 a supplementary decision was made to refuse to revoke the Deportation Order certified with an out of country right of appeal. On 14 June, 2013 further representations were submitted as part of a Judicial Review application. On 30 August, 2013 a decision was made to refuse to revoke the deportation with an in country right of appeal.

It is the appellant’s appeal against that refusal to revoke the deportation order that comes before us.”

4. The First-tier Tribunal recorded an application made by the Secretary of State at the hearing and its outcome as follows:

“Mr Diwnycz sought leave to withdraw the concession that the appellant and four of her children were related as claimed. This concession was made in the the respondent had made in the reasons for refusal letter of 30 August, 2013. The law (**NR (Jamaica)** [2009] EWCA Civ 856) permits the respondent to withdraw a concession. The children are in Sweden with the appellant's sister, Liliane. The reason for the withdrawal was that there had been a DNA test on only two of the children and the sister had not been excluded as the potential mother. The appellant had a background of negative credibility findings and criminal matters, including forged documentation. Mr Diwnycz asked us to find that although the probability of maternity in the case of each child was 99.99% the likelihood of relationship was much less than normally seen in such reports. They showed that one of the children was 11,000 times more likely if the appellant is related as mother than if they are unrelated and 35 times more likely if the appellant is related as mother than as an aunt or grandmother. In the case of the other child the multiples were 130,000 times and 68 times. Mr Diwnycz submitted that there should have been tests on the other two children and their aunt, who, as the appellant's sister, will be biologically similar. It was not known if the sister and appellant were twins; that would make the likelihood of similar results much greater.

Ms Khan argued that the concession was rightly made as the maternity probability was 99.99%, well above the requirement of reasonable likelihood. Furthermore, the DNA report addresses the aunt/grandmother situation. The children were important in the appeal because their birthplace is Bukavu, DRC and they are nationals. That would place the appellant in the DRC that the dates of birth of the children. There had only been two tests carried out because of funding restrictions. The aunt had been born in 1982 and the appellant in 1977. These dates had been given from an early stage and the aunt's evidence of her date of birth is contained in the document from Sweden. The respondent had made the concession in August 2013 it was very late in the day to withdraw it. However, if the withdrawal was allowed no application for adjournment would be asked for.

We adjourned to consider our decision. We concluded that we preferred the respondent's arguments and allowed the withdrawal of the concession on the relationship between the appellant and her claimed children.”

5. The Tribunal went on [16] to identify “the sole issue in this appeal [as] the ethnicity and nationality of the appellant.” The Tribunal noted that Mr Diwnycz (the Home Office Presenting Officer) “advanced no submissions regarding the appellant's contention that, if it was found that she was Banyam Uenge and a national of the DRC ... that she would be at real risk of serious harm on return to the DRC.” The Tribunal was also aware that there had been two previous determinations by Judges Thornton and Reed respectively who had applied the principles of *Devaseelan* [2002] UKIAT 00702. The appellant had given oral evidence in Swahili before the First-tier Tribunal which also heard from the expert witness for the appellant, Dr Erik Kennes. Dr Kennes had produced a number of reports dated 19 December 2009, 14 February 2013, 15 August 2013 and 29 January 2014 respectively.
6. In a thorough and detailed determination, the Tribunal concluded that the appellant had proved, to the necessary standard of proof, that she was a

DRC national of Banyam Ulenge ethnicity and allowed its appeal under the Refugee Convention, the Qualification Directive and the ECHR [Article 3].

7. At a hearing before the Upper Tribunal on 4 June 2014, directions had been given with which the parties have complied. I had the amended grounds of the Secretary of State drafted by Mr Jarvis, the Senior Home Office Presenting Officer who appeared before me on 10 February 2015 at Bradford. I had Miss Khan's response to those grounds. Miss Khan informed me at the outset of the hearing that she did not wish to take any further issue with the admission of the application for permission to appeal and the extension of time granted by Judge McClure. Likewise, she did not offer any objection to the Secretary of State amending her grounds in accordance with Mr Jarvis' draft.
8. Mr Jarvis submitted that the First-tier Tribunal determination had not followed *Devaseelan* and had also erred in its approach to the expert evidence of Dr Kennes. I shall deal with the remaining amended grounds of appeal in the order in which they were set out in Mr Jarvis' draft.
9. At [111] the First-tier Tribunal had written:

"The further evidence which was not before the earlier Tribunals includes documents which indicate that the appellant's children, her sister and her sisters' child are nationals of the DRC and were born in Bukavu. The documentation shows that the UNHCR and the Refugee Law Project at the Faculty of Law, Makerere University have undertaken investigations in respect of the family and they are satisfied that they are Congolese nationals."
10. The Secretary of State challenges the "considerable weight" placed by the Tribunal upon the UNHCR and RLP (Refugee Law Project) documents. The Tribunal had failed to deal with that evidence in accordance with the principles of *Tanveer Ahmed (2002) UKIAT 00439**. At the 2010 Tribunal (Judge Reed) had seen the UNHCR letters and the RLP evidence but the First-tier Tribunal in 2014 had failed to take that into account. The Tribunal had failed also to:

"...factor into their assessment the undisputed evidence that the appellant had previously been convicted for the use of documentary deception and had already found to have relied upon an unreliable birth certificate. [Judge Thornton's determination]."
11. I am not persuaded that the Tribunal has fallen into the errors at [111] Mr Jarvis seeks to identify. The Tribunal noted that the evidence in question "indicates" and also "shows" matters upon which the appellant seeks to rely; the Tribunal has done little more than describe what the evidence purports to prove. I am satisfied that the evidence described at [111] has been considered by the Tribunal as part of the totality of the evidence and before it reached any conclusions. I am not satisfied that [111] indicates, the respondent submits, an uncritical acceptance of the evidence described.
12. The appellant's original ID card could not be produced before the First-tier Tribunal. The original document had, however, been seen by Judge Thornton. At [102] the Tribunal noted:

“The appellant was shown a copy of the appellant's old Zairian identity card. He confirmed that it was the same card as used in Mobutu's time and that his spouse had one. No new cards had been printed since 1988 and most cards became worn out after a couple of years. After it became worn it was usual to write over the printing on the card to make it more readable. Without seeing the original it was even more difficult to judge whether it was a real or fake document. From the copy it seemed to him that there were not two layers of writing but that the existing writing had just been exaggerated. It would be visible if the characters had been changed and they had not.”

The grounds criticise the Tribunal for failing to give proper weight to Judge Thornton's observations in 2006 given that she had seen the original card and not simply the copy which had been seen by the First-tier Tribunal and Dr Kennes.

13. As I have noted above, the Tribunal recorded the fact that Dr Kennes had been reluctant to identify whether the ID card was “real or fake” without having the opportunity of seeing the original. Dr Kennes gave opinion evidence as an expert is entitled to do on the basis of the materials available to him. It was for the First-tier Tribunal to decide how much weight, in turn, to give to Dr Kennes' opinion evidence. The Tribunal was not obliged to prefer the findings of Judge Thornton to the opinions of Dr Kennes simply because the former had seen an original document which the latter had not seen.
14. Ground 7 challenges the Tribunal's approach to expert evidence generally. Dr Kennes had relied upon the opinion of a third party, Mr Maneno, so there was no proper basis for the Tribunal stating at [108] that it had been able to reach findings on the basis of Dr Kennes' opinion “alone”. Mr Maneno, who had given information to Dr Kennes regarding the appellant's language and dialect, had not been called to give evidence. Although Mr Maneno was not a court interpreter, the respondent relied on *AA (language diagnosis: use of interpreters) Somalia* [2008] UKAIT 00029 in particular at [7] and [10]:

“7. It is difficult to make specific comment on the detailed issues arising in KS and SA, without fuller information than appears in the determinations themselves. In fact the Vice President whose comments are reported in SA was the same person who ordered reconsideration in the present case; and the Chairman of the Tribunal in SA was the same as the Chairman of the Tribunal in KS. It may be, therefore, that any such practice as alleged by Mr. Schwenk is not in fact widespread in the Tribunal. Whether or not it is widespread, we are quite clear that in circumstances such as in the present case it ought not to be adopted, and we are also certain that nobody should have assumed that it was part of the function of the Court Interpreter to resolve an issue of this sort. We come to that conclusion for two separate reasons. The first relates to the function and expertise of an interpreter. An interpreter's function is to comprehend and communicate, not to assess or analyse. A person's skills in interpretation lie in his ability to understand what is being said to him in one language (or dialect) and communicate it accurately in another language (or dialect). It is simply wrong to say that the abilities of an interpreter necessarily import an ability to distinguish accurately between different dialects and to be able to attribute dialects to

different sources. A person whose first language is French may attain standards of near perfection in English interpretation, without being able to say with accuracy whether he is dealing with a person from Ipswich or Indiana, or even with a person whose own first language was not English. As an interpreter he may widen his vocabulary base and his understanding of different accents and dialects so that he can cope with whatever version of English is used by the person for whom he is interpreting, without needing or wanting or being required to consider or work out what the dialect is, but merely to do his own job of understanding and communicating. Of course an interpreter *may* know (or think he knows) something about the type of language or dialect the person for whom he is interpreting is using: but that is quite a different matter. It is not part of his function as interpreter.

....

10. We see no reason to dissent from the Tribunal's observation in SA and others that an expert who speaks a particular language or dialect is more likely to be able to provide evidence of whether another person speaks that language or dialect than is a person who does not have that linguistic competence. But it does not follow from that (and we venture to suggest that nobody could think it followed from that) that every person who speaks a particular language or dialect is to be regarded as an expert, able to assess whether some other person that language or dialect, or, if not, what dialect is being spoken."

15. The previous expert (Mr Ngombo) had given evidence regarding the appellant's dialect which was "diametrically opposed" to that of Mr Maneno. The Tribunal had failed to resolve the contradiction.
16. It was the task of the Tribunal to consider each item of evidence and to apportion weight to it as may be appropriate. It was then required to consider the evidence as a totality before reaching any conclusion. I am satisfied the Tribunal did exactly that. The apportionment of weight to, for example, Dr Kennes' expert evidence was a matter for the Tribunal. The Tribunal was aware that the opinion of Dr Kennes had been informed by the opinions of a third party (Mr Maneno). There is nothing particularly unusual about that. Dr Kennes has, except where he has given reasons for not doing so, identified the sources of the information upon which he has based his own opinions and, given the expert's own acknowledged expertise in matters relating to DRC (an expertise not challenged before the First-tier Tribunal), it was open to the Tribunal to attach weight to his evidence. This is not an instance where the expert has purportedly given an opinion on a matter outside his knowledge or expertise; he has used his own expert knowledge of DRC to evaluate the information given to him by Mr Maneno. I do not accept, as the grounds assert, that the First-tier Tribunal abdicated the task of reaching a determination in this case to Dr Kennes. An illustration of the correct methodology applied by the Tribunal appears at [101]:

"It was put to Dr Kennes that, as stated by Judge Reed (paragraph 73) that the appellant demonstrated some knowledge of life in the DRC but this could have been acquired by the time spent there or from others. In response he stated that the appellant's knowledge of the area of South Kivu and Bukavu is so detailed and accurate that someone could not learn this by heart when she was from another country. The combination of the different

elements of knowledge are so specific that it can only be acquired by someone living in Bukavu for an extended period of at least 10 years.”

17. I consider that Dr Kennes’ comments recorded in that paragraph are entirely within the range of opinion evidence which an expert witness may legitimately give. I do not accept the Secretary of State’s submission that, because Dr Kennes’ himself was not from Bukavu, his opinion is “absurd”.
18. The remainder of ground 7 challenges the Tribunal’s treatment of Dr Kennes’ evidence in a similar manner. Dr Kennes gave his opinion on the appellant’s claim to have been raped and tortured. Dr Kennes referred to the opinion of “unnamed university professor in Kinshasa” who, in turn, had given an opinion on the payment of bribes which may have been necessary to bring about the appellant’s transfer from prison to hospital. I do not consider the Tribunal erred by accepting Dr Kennes’ explanation for refraining from identifying some of his sources nor is it clear that Dr Kennes relies uncritically upon the unnamed professor’s opinion in reaching his own rather different assessment of the appellant’s account. Judge Reeds did not believe the appellant’s account of having been transferred to the hospital but he had not seen the later reports of Dr Kennes nor did he have the opportunity of hearing that expert give oral evidence under cross-examination. The evidence considered by the First-tier Tribunal differed from that considered by Judge Reed, and accordingly I see no difficulty arising from the fact that the Tribunal reached a different conclusion as to the credibility of the appellant’s account.
19. Ground 8 addresses the medical evidence of Dr Huws. The Tribunal considered Dr Huws’ evidence at [114-117]:

“The inconsistencies may be explained by the appellant's medical condition. We have before us the psychiatric report of Dr Rohdri Huws which is undated but reports that he saw the appellant on 11 December, 2013 with the aid of a professional interpreter. Neither Dr Huws’ qualifications nor his opinion were challenged by the respondent.

A summary of his opinion is that the appellant is suffering from a depressive illness of moderate severity. She also has sexual dysfunction which would be typically seen following prolonged sexual abuse. She has a number of post-dramatic symptoms but they do not meet the criteria for post-dramatic stress disorder. Dr Huws is of the opinion that her psychological state is better now than it was around 2007 when she took an overdose with the intention of killing herself. He reviewed the reports which were before Judge Reed and he believes they contain enough evidence for a definitive diagnosis of PTSD. He believes that at this period she was suffering from post dramatic stress disorder that responded to psychological treatment in conjunction with the news that her children were safe. Taking into account her story and the content of the symptoms at the time he is of the opinion that the post dramatic stress disorder was highly consistent with being sequelae of the experiences she described in the Congo.

Dr Huws states that a feature of PTSD is dissociation where the mind shuts off thoughts and memories that are too traumatic and this can lead to minor inconsistencies in recounting a story. Memories that are too traumatic can be reconstructed and this can be part of the therapeutic process of recovery

from PTSD. In the light of this evidence we find that the PTSD at the time may explain some of the inconsistencies in her story.

We bear in mind that this report was not before Judges Thornton or Reed and that weighty evidence such as this, from a consultant psychiatrist, is often needed before a Tribunal is willing to make a finding that an appellant's evidence is unreliable because of mental illness."

20. The grounds complain that Dr Huws had based his opinion entirely upon the appellant's account which two previous judges had rejected. It was clear from the passages of the Tribunal's determination which I have quoted above [especially 117] that the Tribunal was well aware that there were problems with the appellant's account of past events. However, it was open to the Tribunal to accept Dr Huws' explanation for the inconsistencies in the appellant's story (that they arose as a result of the PTSD from which she suffered). Indeed, at [114] it is clear that the Tribunal relied upon Dr Huws' report to reconcile the same inconsistencies in the appellant's account which had led Judges Thornton and Reed to reject her evidence. It was open to the Tribunal to give weight to Dr Huws' report; the Tribunal was not obliged, as the grounds suggest, to reject or attach little weight to Dr Huws' evidence because it was based in part on the appellant's account of past events. There was nothing to suggest that Dr Huws had not been made aware of the inconsistencies in the appellant's evidence; indeed, his report sought to explain why they had occurred.
21. *Devaseelan*, as a starred decision of the Tribunal, bound the First-tier Tribunal but I am not satisfied that the First-tier Tribunal has fallen into error in its treatment of any of the evidence upon which it based its decision. The Tribunal was alive to the difficulties in the appellant's case, not least the fact that her credibility had been rejected by two previous judges. I am satisfied that it has, through its detailed analysis, reached an outcome which was available to it. In the circumstances, the Secretary of State's appeal is dismissed.

Notice of Decision

This appeal is dismissed.

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 their 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 26 February 2015

Upper Tribunal Judge Clive Lane