



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/02521/2015

THE IMMIGRATION ACTS

Heard at Belfast
On 3 May 2016

Decision & Reasons Promulgated
On 1 July 2016

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

AS
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr E Peters, Counsel
For the Respondent: Mr P Duffy, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant was granted a Tier 5 visa valid from 11 September 2013 until 11 September 2014. He arrived in the UK on 25 September 2013 and claimed asylum on 22 May 2014.

2. He is a citizen of the DRC and was born on [] 1978. His asylum claim was made on the basis of his ethnicity or perceived ethnicity as a Tutsi, fearing Hutu paramilitaries, the army and the population in general. His asylum claim was rejected by the respondent and a decision made to remove him under Section 10 of the Immigration and Asylum Act 1999. His appeal against that decision came before First-tier Tribunal Judge S. T. Fox on 28 July 2015. Judge Fox ("the FtJ") dismissed the appeal on all grounds, rejecting the credibility of his claim to fear persecution on return and rejecting his account of past events in the DRC.
3. The grounds of appeal before me raise various criticisms of the FtJ's decision, asserting firstly that the FtJ had failed to deal with the standard of proof applicable in asylum appeals.
4. Various aspects of the FtJ's decision are criticised as revealing a lack of care on behalf of the FtJ, for example in terms of having said that the appellant had discharged the burden of proof in establishing his claim (in two places), yet evidently rejecting the claim and dismissing the appeal.
5. It is also suggested that the FtJ failed to have regard to relevant country guidance, namely *AB and DM (Risk categories reviewed, Tutsis added)* DRC CG [2005] UKIAT 00118 in terms of the appellant's perceived ethnicity. It is further argued that the FtJ erred in law in his rejection of the expert's report on this issue.
6. In submissions on behalf of the appellant before me Mr Peters relied on the grounds. It was submitted that notwithstanding what is said in the respondent's 'rule 24' response, the central issue was not in fact credibility but the effect of the country guidance in *AB and DM* and the expert's report.
7. In relation to the errors in the FtJ's decision, it was not sufficient to reject the criticisms simply on the basis that they are in effect 'mere typos'. Some parts of the FtJ's decision make no sense. I was referred to various aspects of the FtJ's decision in this respect.
8. So far as the expert's report is concerned, the report itself at page 26 shows the photographs of the appellant that were before the expert and colour ones were submitted to him. The expert was in a position to judge the appellant's appearance from those photographs. Similarly, the expert did not give any indication that he was not able to assess the information provided to him by the appellant simply because the appellant was interviewed over the phone.
9. So far as the standard of proof is concerned, it was conceded on behalf of the appellant that in fact at [5] there was sufficient recognition by the FtJ of the standard of proof and that ground was no longer pursued.
10. On behalf of the respondent Mr Duffy referred to the FtJ's having said at [22]-[23] that the issue of ethnicity was a matter raised by the appellant at the last moment. His credibility was a significant matter.

11. So far as the phone interview with the expert is concerned, it was not beyond the bounds of possibility that the appellant might have feigned an accent. If the appellant is not credible in terms of his ethnicity or perceived ethnicity, his whole account would be lacking in credibility. The adverse credibility findings were open to the FtJ. What weight he attached to the expert evidence was a matter for him.
12. Notwithstanding that there are errors in the FtJ's decision, one needs to consider the decision as a whole.

My conclusions

13. There is no merit in the ground in relation to the complaint about the FtJ not dealing with the standard of proof. It is dealt with at [5] and that ground of appeal was rightly abandoned.
14. It is asserted on behalf of the appellant in the grounds that the FtJ erred in giving weight to an immaterial matter, namely credibility. The grounds also suggest that the appellant's perceived credibility is of "fringe importance". It is asserted that the case turns primarily on objective evidence within the COI Report, the expert's report and case law, and not on the appellant's credibility.
15. I do not accept that this is so. Part of the appellant's account is that he was a pastor of a prayer group which was open to everyone, including Tutsi and Hutu, and other ethnicities. He says that he was attacked at a prayer group meeting in 2013, and that he was taken away and raped. He was the only Tutsi in the prayer group, all the others being Hutus. The people that attacked the appellant were two men belonging to the M23 Group, a predominantly Tutsi group.
16. The FtJ rejected the contention that the appellant would easily have been identified as a Tutsi because of his physical appearance, although not ruling out that local knowledge could have played a part in the attack. However, he noted that the perpetrators were said to be of Tutsi ethnicity and that they claimed the appellant was a traitor for being in the company of Hutu people. However, in the absence of any firm evidence that his physical appearance singled him out the FtJ concluded that there was no other reason as to why the soldiers would have perceived him to be a Tutsi. The appellant's account was that he had never seen those soldiers before. At [24] the FtJ raised the question of why no action was taken against the Hutu people at the prayer meeting.
17. Putting aside for the moment what could be described as the errors of proofreading in the FtJ's decision, the FtJ noted at [26] that the appellant was able to obtain his passport while in Kinshasa which required going out and about, and using public transport. However, he does not claim that he was physically harmed at that time, although he said that he was racially abused. The FtJ did not accept that he was racially abused because he did not accept that the appellant would automatically be perceived as a Tutsi.

18. Furthermore, the FtJ noted at [27] that the appellant moved freely in and out of the DRC, as evidenced by the stamps on his passport. This is an indication the FtJ concluded that the appellant would not be at risk of persecution from the government.
19. In terms of the appellant's claim that he would be at risk as a witness to the rape of his sisters, this was rejected by the FtJ on the basis that those incidents happened several years ago, and it is not credible that those involved would wait for eleven, six or five years to deal with the appellant once he returned to the DRC.
20. In terms of his ethnicity or perceived ethnicity the FtJ noted that the appellant appeared to have changed the emphasis in his claim to one of ethnicity, a matter which the FtJ did not accept as being credible. At [22] he concluded that the appellant had been inconsistent with respect to answers given at his screening interview and later, initially claiming that he could not return to the DRC because he and his family had been threatened by the army/FDLR for not joining up. That is not a matter that appears in his asylum interview.
21. In addition, the FtJ took into account the circumstances in which the appellant claimed asylum. He claimed asylum some eight months after his arrival in the UK and the FtJ rejected his explanation for the delay, the appellant having arrived as a Tier 5 Visa Migrant, taking up "his obligations" under the visa. The FtJ assessed his explanation for the failure to make the claim earlier and rejected it. Although I raised with the parties the issue of 's.8' and the credibility assessment in this respect, the matter was not advanced on behalf of the appellant as being a significant issue. In any event, as I have indicated, the FtJ assessed the appellant's explanation for the late claim and gave sustainable reasons for rejecting it.
22. There is an expert report from Mr Alex Ntung, which, amongst other things, concluded that the appellant would be perceived as a person of Tutsi ethnicity, and that the appellant's account was supported in this respect in terms of his accent, knowledge and background. However, the FtJ noted that the expert concluded that the appellant's physical features are not typically Hutu or Tutsi (see [72] of the expert's report).
23. The FtJ did not reject the expert evidence entirely, stating that it had some merits. However, he referred to "key issues" in which it was found to be wanting. One of these is in terms of the interviews with the appellant, the interviews apparently having taken place by phone. The FtJ, rightly in my judgement, characterises the interviews as being key elements in assessing the appellant's accent. He stated that telephone communication is not an ideal basis upon which to make such important judgements, referring to the quality of the telephone line and other factors.
24. He also referred to the fact that two photographs had been provided in order to assist in assessing the appellant's physical features. The FtJ did not consider that that was a satisfactory basis upon which to make that assessment.

25. The report from Mr Ntung does not itself reveal that the interviews with the appellant took place by phone. It would have been helpful had it done so. On the other hand, he does not indicate that he had any difficulty in hearing the appellant or making his assessment of his accent. Similarly, he did not indicate that the photographs of the appellant presented any difficulties in making an assessment of his physical features. Mr Peters suggested that colour photographs were provided to the expert, and there is no reason to doubt that this is so.
26. In any event, the FtJ also indicated that the expert's summary of observations conflicts directly with the findings of the Upper Tribunal in *BM and Others (returnees – criminal and non-criminal)* CG [2015] UKUT 293 (IAC). The FtJ referred to one particular instance of information relied on by Mr Ntung which the Upper Tribunal in *BM and Others* found could not be accepted in its entirety, being an Amnesty International Report. However, the FtJ did not explain in detail what the conflict was or is between the decision in *BM and others* and the expert's report.
27. There are a number of typographical and similar errors in the FtJ's decision. These are to be found at [9] (referring to the appellant as "her"), [18], [23], [24], [26] (using the words "in can chatter", presumably meaning 'in Kinshasa'), [32] and [37]. These are all proofreading errors which in places make the FtJ's decision difficult to understand.
28. In addition, although evidently dismissing the appeal, the FtJ said at [33] that the appellant *had* discharged the burden of proof and that his removal *would* cause the United Kingdom to be in breach of the Refugee Convention. At [39] he repeated that the respondent's decision *would* cause the United Kingdom to be in breach of the Human Rights Convention. In his concluding paragraph at [40] he said that the appellant had shown that "there are" substantial grounds to believe that he faces a real risk of suffering serious harm "on return to [blank]", leaving the country of destination unspecified.
29. It is evident that in other respects the FtJ gave careful consideration to the appellant's claim. However, the various errors I have referred to, the lack of evident care in the proofreading, and the evident 'cut and paste' approach to the concluding paragraphs, it must be said do indicate a lack of care on the part of the FtJ.
30. It is not the case that every or any error of that sort amounts to an error of law; quite the contrary. One needs to consider the decision as a whole to assess whether there is a comprehensive assessment of all the evidence. On the other hand, it must be borne in mind that in particular in an asylum claim, the utmost care should be given to the assessment of the claim and objectively speaking it must be shown that the claim has been assessed with anxious scrutiny. I am not satisfied that this has been shown in this case in the light of the errors that I have referred to.
31. Whilst the FtJ made a number of adverse credibility findings which may in other circumstances be said to have been sustainable, I am not satisfied that he gave satisfactory or legally sustainable reasons for rejecting the evidence in the expert's

report. The report is a detailed one and contains a number of positive features in favour of the appellant's claim. This all reflects on the appellant's credibility, which I do not accept as suggested on behalf of the appellant is not a central issue.

32. Accordingly, I am satisfied that the decision of the FtJ involves an error of law in the assessment of credibility and in the assessment of the expert report, requiring the decision to be set aside.
33. In the circumstances, and considering the Senior President's Practice Statement at paragraph 7.2, it is appropriate for the appeal to be remitted to the FtT for a hearing *de novo* before a judge other than First-tier Tribunal Judge S. T. Fox, with no findings of fact preserved.

Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law. Its decision is set aside and the appeal is remitted to the First-tier Tribunal for a fresh hearing before a differently constituted Tribunal.

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.

Upper Tribunal Judge Kopieczek

29/06/16