



IAC-FH-AR-V2

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

Appeal Number: DA/00895/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 1st February, 2016**

**Determination & Reasons
Promulgated
On 1st April, 2016**

Before

Upper Tribunal Judge Chalkley

Between

[K T]

~~(ANONYMITY DIRECTION NOT MADE)~~

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

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

For the Respondent: Ms R Chapman, instructed by Asylum Aid

DETERMINATION AND REASONS

1. In this appeal the Secretary of State for the Home Department is the appellant and to avoid confusion I am going to refer to her as being, "the

claimant.” The respondent is a citizen of the Democratic Republic of Congo who was born on [], 1970.

Immigration History

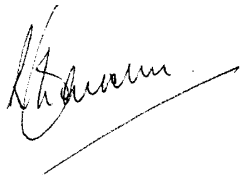
2. The respondent arrived in the United Kingdom on 8th October, 1993 and claimed asylum. His application was refused and on 23rd June, 1999 the respondent was granted exceptional leave to remain until 23rd June, 2003. His leave to remain was subsequently extended until 23rd June, 2006.
3. On 3rd March, 2003, the respondent was convicted of theft, of two counts of forgery and of attempting to obtain property by deception. As a result he was made the subject of four community punishment orders.
4. On 9th January, 2004 the respondent was convicted of conspiracy to fraud, handling stolen goods, obtaining pecuniary advantage by deception for another and two counts of obtaining property by deception. In respect of these offences he was sentenced to three consecutive sentences of six months' imprisonment.
5. On 25 April, 2006 the respondent submitted an application for further leave to remain which was refused by the claimant on 13 June, 2007.
6. On 20 October, 2006 the respondent was convicted of five counts of false accounting and sentenced to a period of nine months' imprisonment. He was notified of his liability to deportation on 7 October, 2006 and was detained on 18 February, 2007.
7. On 21 March, 2007 the claimant decided to reconsider the respondent's asylum claim. This was refused on 13 April, 2007 and the respondent was noted that the claimant had decided to make a deportation order against him. His appeal against deportation was dismissed in a determination promulgated on 16 August, 2007 and his appeal rights were exhausted on 28 January, 2008.
8. The claimant signed a deportation order in respect of the respondent under Section 5(1) Immigration Act 1971 on 19 February, 2008.
9. It appears that the respondent then absconded to avoid removal. In any event, the respondent did not leave the United Kingdom.
10. By a letter dated 27 June, 2013, the respondent's representatives responded to a letter from the claimant requesting up-to-date information about the respondent and made application for revocation of the deportation order on refugee and asylum grounds. They asserted that he had been an active member of the Congolese Resistance Council since February, 2009 and that his *sur place* activities meant that he would be at risk on return to DRC.

11. Further submissions were made on 17 April, 2014.
12. The claimant refused to revoke the deportation order in a letter dated 1 May, 2014.
13. The claimant appealed and his appeal was heard by First-tier Tribunal Judge Flynn at hearings on 2 December, 2014 and 7 February, 2015.
14. The judge allowed the respondent's appeal, finding that it would be unduly harsh to expect the respondent's daughter to grow up without a father and unduly harsh to expect the respondent's step-daughter to leave the UK where she has spent the whole of her life and to relocate to the Democratic Republic of Congo.
15. The claimant challenged the determination and in granting permission to appeal First-tier Tribunal Judge Davidge said this:-
 - “2. The judge recites at length the evidence given at the oral hearing and in the matter of two or three paragraphs at page 22 of the decision makes a finding in respect of the test of ‘unduly harsh.’ Other than a bare assertion there appears to be no reasoning in the context of a confused self-direction as it appears that the judge was conducting a proportionality exercise and reaches [her] conclusion on the basis of a reduction in the weight to be attributed to the public interest.
 3. The judge did not have the benefit of the case of Chege (Section 107D – Article 8 - Approach) [2015] UKUT 00165 (IAC).”
16. Mr Avery relied on the grounds and suggested that the judge had failed to provide any reason as to why it would be unduly harsh. When considering the question of children under paragraph 399(a) the Tribunal needed to look at both limbs of paragraph 399(a) for each child. The judge appears to have been influenced by the delay, but of course the respondent's appeal rights in respect of the deportation order were exhausted in 2008, when he should have left the country. In actual fact he appears to have absconded in 2008 and did not come to light again until 2012. It was only after he came to light in 2012 that he applied for revocation of a deportation order and made his claim for asylum. Mr Avery suggested that the judge was wrong in her approach and simply gave inadequate reasons for finding that it would be unduly harsh.
17. Ms Chapman drew my attention to paragraph 109 of the determination and pointed out that the respondent's partner had given evidence that she would not take the children to the DRC were the appellant to be removed. Further reasoning is given at paragraph 113 and 114 of the determination.
18. I asked Ms Chapman if she could explain to me what reasons the judge had given for finding that the respondent's removal would make it unduly harsh for either of the children and she told me that she accepted that the judge could have said more. She asked whether it would have made any material difference had full reasons been given? At paragraph 105 the

judge concluded that it was conducive to the public good under paragraph 398C and took into account the public interest. She suggested that were I not with her the matter should be remitted to be heard again by First-tier Tribunal Judge Flynn who would be asked to look at the matter in the light of up-to-date jurisprudence.

19. I have concluded that the judge did err by failing to give adequate reasons for finding that it would be unduly harsh for the respondent's daughter and step-daughter to grow up in the United Kingdom without his presence. I accept that it is possible that another judge may reach the same conclusion, but the judge should have given clear reasons for the finding so that anyone reading the determination would understand the reasons for it. I have concluded that the respondent's appeal against revocation of the deportation order should be heard afresh by a judge other than First-tier Tribunal Judge Flynn. The respondent's asylum appeal has been dismissed and there was no challenge to that decision, so that that part of it shall stand.

No anonymity direction is made.

A handwritten signature in black ink, appearing to read 'Chalkley', with a long horizontal stroke extending to the right.

Upper Tribunal Judge Chalkley