



**Upper Tribunal
(Immigration and Asylum Chamber)
PA/03822/2017**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Manchester CJC

Decision & Reasons

Promulgated

On 9 April 2018

On 18 April 2018

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

FK

(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr Holmes, Counsel

For the respondent: Mr Bates, Senior Home Office Presenting Officer

DECISION AND DIRECTIONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI2008/269) an Anonymity Order is made. Unless the Upper Tribunal or Court orders otherwise, no report of any proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant. This prohibition applies to, amongst others, all parties.

1. I have anonymised the appellant's name because this decision refers to his asylum claim.

Summary of asylum claim

2. The appellant is a citizen of the Democratic Republic of Congo ('DRC') and claims that was forcibly conscripted into military service at the age 14 and was subjected to anal rape. He also claims to be gay and believes that he is at risk of persecution in the DRC for reasons relating to this, together with his desertion from the army.

Appeal proceedings

3. The appellant appealed against the respondent's decision dated 29 March 2017 refusing his asylum claim. That appeal took place at a hearing before the First-tier Tribunal on 12 July 2017. In a decision prepared on 12 July but promulgated on 21 July 2017, the First-tier Tribunal dismissed the appeal, having found the appellant's claim to be gay, as well as much of the remainder of his account, to not be credible.
4. In a decision dated 19 January 2018 Upper Tribunal Judge Smith granted permission to appeal observing that the grounds of appeal to be arguable.

Hearing

5. Mr Holmes relied upon and amplified the grounds of appeal. He focussed upon the First-tier Tribunal's failure to pay regard to the country background evidence on the use of child soldiers in the DRC and its misdirection regarding the appellant's evidence regarding his sexual orientation.
6. Mr Bates submitted that any error in failing to consider all the country background evidence was immaterial because when that is considered it does not support the proposition advanced by the appellant, that child soldiers are forcibly conscripted into the DRC army. He also argued that the First-tier Tribunal has provided reasons entirely open to it at [15(a) to (f)], for rejecting the appellant's claimed sexuality.
7. At the end of the hearing I reserved my decision, which I now provide with reasons.

Error of law discussion

Country background evidence

8. The First-tier Tribunal made it clear at [14(b)] that it 'struggled' to accept the appellant's account that he was forced to join the army when he was 14, in 2011, and said this was "*particularly the case given the objective material cited in the refusal letter relating to child labour*". That is a reference to [23] of the refusal letter in which the respondent contends that the appellant's claim of being forced to join the army at 14 is inconsistent with the background country information. Reference is then made to an online article accessed on 23 March 2017 which states, inter alia, that the child protection code

sets the minimum age for work at 16 and a Ministerial Order sets the minimum age for hazardous work at 18.

9. As Judge Smith observed when granting permission to appeal, there was other evidence relied upon by the appellant and contained in his bundle which addressed the issue of child labour in more detail and was capable of undermining the proposition advanced in the refusal letter. The First-tier Tribunal makes no mention of this evidence whatsoever. The material includes the following:
 - (i) An undated article from 'SOS Children's Villages' in which reference is made to the army and the rebels using child soldiers.
 - (ii) A UNICEF report from July 2006 that the DRC tops the list of countries where armed forces and militia groups use children as soldiers.
 - (iii) A US State Department report for 2015 in which it is said that: the government did not effectively enforce the law on forced labour, including child labour; the child protection code and Ministerial Order were insufficient to deter violations; child labour, including forced child labour remained a problem throughout the DRC.
10. Mr Bates submitted that this evidence does not establish that the army used child soldiers in 2011, when the appellant claims to have been forced to join it. This is because the articles clearly stating that child soldiers are used in the army are either undated or out of date, and the US State report makes no mention of the child soldiers in the army. Mr Bates therefore submitted that the failure to consider this evidence could not be said to be material. I do not accept that the error is immaterial. The First-tier Tribunal regarded the legal provisions in place as undermining the claim that there were child soldiers in the army. Such an approach failed to take into account: when those provisions were implemented given the appellant joined the army in 2011; the evidence that the legal provisions were not effectively enforced and child labour remained a problem; the DRC has at least in the past used child soldiers in its army albeit it is unclear if and when this stopped.
11. In my judgment, the material available to the First-tier Tribunal was capable of calling into question the country background evidence relied upon by the respondent, even if it did not wholly undermine it, and the First-tier Tribunal was obliged to address it, resolve any inconsistencies arising and then take the appropriate background evidence into account when considering the plausibility of the appellant's claim to have been forcibly conscripted to the army at 14. In failing to do so, the First-tier Tribunal has committed a material error of law.
12. The First-tier Tribunal also failed to take into account a short two-page summary of the appellant's military camp in Kinshasa, as contained in the appellant's bundle. This referred to the camp have around 40,000 inhabitants with nearly 6000 being men,

approximately 6000 women, with the remainder probably comprising children. The appellant claimed that there were about 50 gay men in the camp, and it is difficult to see how 12% (50/6000, and the number is likely to be higher if the figure for men excludes older teenage boys) could be said by the First-tier Tribunal at [15(c)] to be “*such a large*” group.

Sexuality

13. The First-tier Tribunal regarded the appellant’s claim of realising that he was attracted to men as “*somewhat unusual*” at [15(a)]. In summary he explained, that he was raped so much and for so long when forcibly recruited to the army as a child that it made him “*become gay*” and “*took away the pleasure of women*”. The First-tier Tribunal made this finding:

“I struggle to find how being anally raped would make an individual more inclined to become gay.”

14. As Mr Holmes submitted, the appellant gave an account of sustained trauma over an extended period at a young age. He described a path of sexual identity awareness that was peculiar to him. The question for the First-tier Tribunal to consider was therefore whether it was reasonably likely that this particular appellant would identify as gay, given his past and all the other relevant circumstances. There was no expert evidence or any other form of evidence to support the First-tier Tribunal’s finding that being anally raped in the circumstances claimed in the DRC would not make an individual more inclined to be gay.

15. The Asylum Policy Instruction on Sexual Orientation in Asylum Claims, 3 August 2016, states:

“Where stigmatisation may have inhibited an individual in coming to terms with their true sexual identity and openly expressing it, feelings of self-denial and shame may persist and some claimants may find it extremely difficult to talk freely and openly about the development of such identity. This may render the process of fact finding, in some cases, challenging and caseworkers should be aware that a sexual orientation claim can be linked to some of the most sensitive, intimate areas of an individual’s private life such as emotions, affections, love and companionship.

Caseworkers are required to explore the claimant’s feelings about their sexual orientation in a sensitive manner and where narratives of shame are presented, explore its impact on the claimant and what coping strategies or responses they may have adopted to deal with this, for example, whether the claimant found relief, support or guidance in religion, work, or friendships.”

16. The appellant's claim to have "*become gay*" must be seen in the context of the society he was brought up in, in which homosexuality is illegal and systematically stigmatised. No consideration appears to have been given to the impact of this upon the appellant, and in particular the manner he expressed the reasons he believed he had "*become gay*". I wholly acknowledge, as Mr Bates submitted, that the First-tier Tribunal Judge provided other reasons for not accepting the appellant's claim to be gay. However, the first reason provided was not open to her, for the reasons set out above, and it cannot be said that her assessment would have remained the same without this.

Other grounds of appeal

17. There is no need for me to address the other grounds of appeal. This is because I am satisfied that the errors of law I have identified are such that the First-tier Tribunal decision must be set aside and remitted de novo.
18. This is an appeal that turned largely on the credibility of the appellant's claim to be gay and his forced recruitment into the army as a child. When the errors identified above are considered together I am satisfied that the First-tier Tribunal's credibility assessment contains material errors of law and must be set aside.

Disposal

19. I have had regard to para 7.2 of the relevant *Senior President's Practice Statement* and the nature and extent of the factual findings required in remaking the decision, and I have decided that this is an appropriate case to remit to the First-tier Tribunal. This is because completely fresh findings of fact in relation to detailed evidence are necessary.

Decision

20. The decision of the First-tier Tribunal involved the making of a material error of law. Its decision cannot stand and is set aside.
21. The appeal shall be remade by the First-tier Tribunal de novo.

Signed:

Ms M. Plimmer
Judge of the Upper Tribunal

Date:
11 April 2018