



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

Appeal Number: PA/09735/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 11 December 2018**

**Decision & Reasons Promulgated
On 13 December 2018**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

**APMM
(ANONYMITY DIRECTION MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Panagiotopolou, Counsel, instructed by Montague Solicitors LLP

For the Respondent: Mr P Duffy, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of Judge of the First-tier Tribunal I Howard (the judge), promulgated on 24 September 2018, dismissing the appellant's appeal against the respondent's decision dated 20 July 2018 refusing his protection and human rights claim.

Background

2. The appellant, a national of the Democratic Republic of Congo (DRC), was born in 1974. He entered the UK on 21 May 2018 pursuant to a grant of entry clearance as a visitor issued on 14 February 2018. The appellant was refused leave to enter on arrival and he claimed asylum on 24 May 2018.
3. I summarise the basis of the appellant's asylum claim. In February 2011 he became an active member of the Union Pour La Democratie Et Le Progres Social (UDPS), an opposition political party. He was first detained in 2011 during an anti-government protest, taken to a police station with other protesters, stripped and beaten to such an extent that he required hospital treatment. He was subjected to harassment between 2011 and 2015 and, on one occasion, he claims to have been the victim of politically motivated looting.
4. The appellant was arrested and detained in January 2015 during another political protest, accused of plotting to kill the President, but released after 3 days on payment of a bribe made by his family and political colleagues. The appellant was again arrested in December 2016 because of his involvement in a further political protest. He was detained and beaten for a week before being released on payment of a bribe made by his wife. In his oral evidence at the First-tier Tribunal hearing he claimed to have been arrested briefly in July 2017 but was released on his way to a detention centre. He was then detained on 31 December 2017 for 12 days and sexually assaulted. The appellant was aided by prison guards in escaping in January 2018 and he travelled to his uncle's home in Kinsasha where he remained for 5 days travelling to Congo Brazaville until he came to the UK.
5. The respondent accepted the appellant's nationality but found his account incredible. The respondent noted that an application for a 'Mult D Exempt Official' visa (a diplomatic visa) was made in the name of the appellant on 15 November 2017, and that this application was withdrawn on 10 January 2018. The respondent pointed to a number of inconsistencies in the information provided by the appellant in his screening interview and his substantive asylum interview. The respondent considered the appellant's evidence relating to his position within the UDPS and the ideology of the party to be vague and generalised.
6. The appellant appealed the respondent's decision to the First-tier Tribunal pursuant to s.82 of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act).

The decision of the First-tier Tribunal

7. The judge heard oral evidence from the appellant and considered several documents including, inter alia, a statement from the appellant signed and dated 30 August 2018, a letter from Difuma Ngombo (Senior Representative of the UDPS/UK) dated 29 August

2018, an Amnesty international annual report on the DRC for 2017/2018, and the Country Policy and Information Note (CPIN) on the DRC dated November 2016. The judge did not separately set out the evidence provided by the appellant at the hearing but referred to elements of the appellant's evidence in the section headed 'Findings'.

8. There was no dispute between the parties that, if the appellant was a member of the UDPS and had previously been persecuted, he would be a refugee. From [17] to [30] the judge set out various elements of the appellant's claim and the evidence relating to those elements. The judge made short comments in relation to some of the elements but made few explicit findings of fact. One of the few examples of a clear adverse credibility finding appears at [23] where the judge did not accept that the appellant's explanation relating to the signing of a withdrawal for the diplomatic visa application.
9. At [26] the judge noted that the appellant was asked to describe the UDPS and its aims and objectives during his asylum interview but found the appellant's knowledge "... was not comprehensive" despite him being a member for 6 years, attending the monthly meetings and being involved in a mobilising role. At [27] the judge made reference to a Rule 35 report stating that the scarring on the appellant's face, abdomen, arm and legs were consistent with violent assault, but found that "nothing in the medical evidence speaks to the context of the assaults."
10. At [29] the judge found that the absence of Difuma Ngombo, who was said to be present in the UK, detracted from the weight he could attach to the UDPS letter, and noted that the appellant had amended one of the dates of his alleged detention to match that contained in the UDPS letter. At [30] the judge stated, "the foregoing are significant anomalies and inconsistencies in what should be a straightforward account. As a consequence I did not find the appellant a credible witness." The appeal was dismissed.

The challenge to the First-tier Tribunal's decision

11. The grounds contend that the judge failed to adequately reason his decision. It was not clear what the judge meant, at [26], when he found that the appellant's knowledge of the UDPS was 'not comprehensive'. The judge failed to record the appellant's full answer in interview when he was asked to describe his role as a mobiliser. The judge's finding that the Rule 35 report did not 'speak to the context of the assaults' was inaccurate as specific reference was made in the Rule 35 report to the circumstances of the assault. The judge failed to consider the appellant's credibility within the context of the country background evidence, and the judge failed to give due weight to the letter from the Senior Representative of the UDPS.

12. At the 'error of law' hearing I went through the determination in detail with both representatives. Ms Panagiotopolou relied on her grounds and submitted that the judge failed to make plain his assessment of the various elements of the appellant's account, that he failed to approach the Rule 35 report and the background evidence available to him as being supportive of the appellant's claim, and that he failed to adequately engage with the content of the UDPS letter. Mr Duffy accepted that there were problems with the determination, but submitted that the appellant's claim also contained significant problems and that the judge's findings of fact, some of which were implicit, were ultimately sustainable.
13. After due deliberation I indicated my satisfaction, albeit by the narrowest of margins, that the decision was infected by material errors on points of law.

Discussion

14. In any appeal, but particularly those involving protection claims, it is necessary for a judge to clearly set out, albeit in summary form, the evidence given at the hearing, including the oral evidence, and to make clear findings of fact in respect of the issues in dispute. It is good practice for the core findings necessary for the disposal of the appeal to be explicitly made. I am not satisfied that the judge has made clear and unambiguous findings in respect of the issues in dispute, or that he has provided adequate reasoning in support of any findings that may be said to have been necessarily implicit from reading the decision as a whole. A significant number of the paragraphs from [17] to [29] contain descriptions of the appellant's account that are devoid of any clear findings or reasoning.
15. For example, at [17] the judge records the appellant's account of his arrest in 2011. The judge notes that, when asked in interview for the name of the hospital where he received treatment, he was unable to name it. It is unclear whether the judge is drawing an adverse inference. It is likely that he is doing so but, in the absence of an explicit adverse inference, there remains some room for doubt, particularly given the absence of any explanation for an adverse finding. In his answer at Q63 the appellant said that he attended a private centre, and there was no follow-up question. In the circumstances it was necessary for the judge to make clear his adverse inference and to supply brief reasons in support.
16. At [19] the judge records the appellant's alleged detention in January 2015, noting that he was accused of plotting to kill the president and that, notwithstanding the seriousness of the allegation, he was subsequently released and heard nothing more about the allegation. Again, it is not wholly clear that the judge was drawing an adverse inference, and there was no explanation from the judge why he considered this to be a factor undermining the appellant's credibility.

17. At [21] the judge records some of the appellant's evidence relating to his detention on 31 December 2017, but notes that the Rule 35 report made no mention of sexual assault. The judge then records the appellant saying he was ashamed to do so. Once more, there are no clear adverse credibility findings and no clear reasoning in support of any implicit adverse credibility finding. Nor has the judge engaged with the appellant's claim that he was too ashamed to disclose his sexual assault when the Rule 35 report was prepared. Nor was there any reference to or consideration of the respondent's Asylum Policy Instructions on late disclosure of sexual assault. I am satisfied that this alone is a mis-direction on a point of law.
18. At [24] the judge sets out the appellant's evidence relating to his last release from detention but fails to make any clear factual findings. If the judge did find the appellant's account of his release incredible it was incumbent on him to explain why.
19. At [26] the judge found that the appellant's knowledge of the UDPS was 'not comprehensive' having regard to his answers during his asylum interview. I accept that the judge's finding is brief and unsupported by any concrete examples. I am not however persuaded that this alone would constitute an error of law. It is readily apparent from the transcript of the asylum interview that the appellant was unable to give any detail relating to the aims or ideology of the UDPS (see, for example, Qs 39 and 42). I am however concerned that the judge failed to record the appellant's full answer when asked what he meant by 'mobilising'. At Q 38 the appellant explained that, in addition to teaching people about the objectives and ideology of the party, he would ask them to attend marches, protests and meetings. This was a fuller answer than that intimated in the determination and is more in keeping with the term 'mobilising'. I am satisfied the judge failed to take into account this relevant evidence.
20. At [27] the judge seemingly draws an adverse inference on the basis that the medical evidence did not speak to the context of the assaults. I'm satisfied that this is inaccurate as the author of the Rule 35 report does give a brief description of the circumstances in which the appellant claims his injuries were caused (at F36 of the respondent's bundle). But in any event, it is not apparent from the decision that the judge approached the Rule 35 report as evidence supportive of the appellant's claimed ill-treatment given that the author of the report found the appellant's injuries consistent with their claimed causation. Whilst the judge was under no obligation to conclude that the injuries were in fact caused in the manner claimed, the judge had to at least take into account this evidence as supportive of the appellant's claim. I'm satisfied that the judge's failure to approach the Rule 35 report as evidence capable of supporting the appellant's claim constitutes a material misdirection in law.

21. Whilst the judge was undoubtedly entitled to attach less weight to the UDPS letter from Difuma Ngombo given the inability to test his evidence, the judge failed to engage with the content of the letter. There was no suggestion that the letter itself was not genuine. In his letter Mr Ngombo describes how he was contacted by the appellant's legal representatives and asked to give an accurate account of his UDPS membership and activities. Mr Ngombo describes how he contacted the General Secretary of the UDPS to obtain this information and how he was directed to the President of Federation of Tshangu, the area where the appellant was a member. The letter suggests that official UDPS investigations were undertaken to confirm the appellant's political activities. Whilst the judge was not obliged to accept these assertions it was nevertheless necessary for him to at least engage with the evidence.
22. I am additionally satisfied that the judge erred in law by failing to consider the appellant's credibility by reference to the background evidence before him. The CPIN on the DRC: 'Opposition to the government', summarised, at 2.2.1 to 2.2.3, that opposition members were harassed and arrested and prevented from holding public rallies, that the state on occasion used excessive violence to disperse political gatherings and demonstrations against the government, and that the authorities tended to be unpredictable and volatile during times of political tension and reportedly arbitrarily detained and in some cases ill-treated scores of opposition leaders and activists. This background material was consistent with the general circumstances surrounding each of the appellant's claimed arrests and periods of detention, and therefore supportive of his account. It is not apparent that the judge took this into consideration when assessing the appellant's credibility.
23. The judge does identify a number of powerful factors capable of undermining the appellant's credibility, including the factors identified at [22], [23] and [25]. However, having cumulatively considered the various legal errors described above, I am not satisfied that the judge would inevitably have found the appellant incredible. I therefore find, albeit by a very narrow margin, that the errors of law are material.
24. Both parties were in agreement that, if a material error of law was uncovered, it was appropriate to remit the matter back to the First-tier Tribunal to be heard by a different judge. Given that the identified errors of law render unsafe the judge's credibility findings, I agree that the matter should be remitted to the First-tier Tribunal to be heard by a judge other than Judge I Howard.

Notice of Decision

The decision of the First-tier Tribunal involved with the making of an error on a point of law and is set aside.

The case is remitted to the First-tier Tribunal to be heard de novo by a judge other than Judge of the First-tier Tribunal I Howard.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant in this appeal 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.



11 December 2018

Signed
Upper Tribunal Judge Blum

Date