



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

Appeal Numbers:
AA/04524/2014
AA/04656/2014

THE IMMIGRATION ACTS

Heard at: Field House

On: 7th November 2014

**Determination
Promulgated**

On 12th November 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE BRUCE

Between

Secretary of State for the Home Department

Appellant

and

**Evenlyn Elenge
Happiness Devin Elenge
(no anonymity direction made)**

Respondents

For the Appellant: Mr Kandola, Senior Home Office Presenting Officer
For the Respondent: Ms Wilkins, Counsel instructed by Sutovic and Hartigan

DETERMINATION AND REASONS

1. The Respondents are both nationals of the Democratic Republic of Congo. They are respectively a mother and her minor son, now two years old. On the 21st August 2014 the First-tier Tribunal (Judge Holt) allowed their linked appeals against the Secretary of State's decision

to refuse asylum¹. The Secretary of State now has permission² to appeal that decision.

2. The First Respondent arrived in the UK in 2001 and claimed asylum on the grounds that she had a well-founded fear of persecution in the DRC because of her political activity and that of her father. She stated that her father was a legal advisor for Jean-Pierre Bemba and that she faced serious harm as a result. That claim was rejected and on the 21st October 2002 an Adjudicator Mr K.R Moore dismissed the appeal, finding the account given to be implausible. The matter came back before the then Immigration Appellate Authority in February 2004 and the appeal was once again dismissed, this time by Adjudicator Mr K.Brown. Mr Brown made negative credibility findings in respect of both the appellant before him (the First Respondent) and her sister, Ms Moke.
3. In March 2013 fresh representations were made on the Respondents' behalf. These raised issues as to the return of asylum seekers *per se* but in particular to lone women at risk of sexual violence, and to a lone woman with a young baby.
4. On the 13th June 2014 the Secretary of State apparently agreed to treat these representations as a fresh claim. The refusal letter sets out extracts from the previous determination of Adjudicator Mr Brown and finds no risk to the Respondent arising from her historical claim or the matter of return as a failed asylum seeker. There is no analysis of her claim to be at risk as a lone female with a young child. The First Respondent was granted discretionary leave to remain until the 12th June 2016, with the Second Respondent subsequently being granted leave in line with her. Mr Kandola indicated that this grant was not formally a 'Legacy' grant but was on the basis of her long residence in the UK.
5. The Respondents appealed to the First-tier Tribunal. The basis of their appeals was that they would face a real risk of harm in the DRC today for their membership of a particular social group: she lone women with young children, he an infant or an infant separated from his parent. The case was, in essence, that the First Respondent had no family left in Congo, had no idea how she would find or pay for housing, or how, with a young child to look after, she would manage to find work to pay for basic necessities. She would be exposed to a real risk of sexual violence and/or trafficking and/or being forced into prostitution. The First Respondent was also afraid that on re-entry to DRC she would be detained and questioned and that could entail her being separated from her child.

¹ Both Respondents have been granted limited leave to remain until the 12th December 2016. Their appeals to the First-tier Tribunal were brought under section 83 (2) of the Nationality, Immigration and Asylum Act 2002 on asylum grounds alone.

² Granted by First-tier Tribunal Judge Grant on the 18th September 2014

6. In respect of both of these matters the Respondents relied on evidence from the First Respondent's sister, Ms Moke, who was able to give a first-hand account of the problems she had encountered when she returned to Congo on a visit in 2011. She said that she had been constantly aware of the danger she faced as a lone woman, that were armed gang roaming the street and that these gangs frequently targeted western "returnees" to attack and extort money from them. As she was leaving the country the *Direction Generale de Migration Congo* (DGM) had picked her out from the queue (leaving her five year old child on her own) and confiscated her British passport. They were menacing and she was afraid that she was going to be transferred to detention. She had retained a copy of her passport and contacted the British embassy using her mobile phone. It was only when the officials realised what she was doing that they returned the passport to her. She was also able to tell the Tribunal about the amount of women she saw working as prostitutes, and destitute street children.
7. Judge Holt found Ms Moke's evidence to be "thoughtful, articulate and nuanced", elsewhere to be "very detailed and articulate" and described her as a "particularly compelling and forceful witness" who left Judge Holt in "no doubt" that she was telling the truth. The determination notes that Ms Moke is a psychiatric nurse registered with the Nursing and Midwifery Council and that as such the Tribunal felt able to attach significant weight to her evidence (as she is a regulated professional).
8. Having had regard to Ms Moke's evidence, and the country background information including the US State Department, OHCHR, Voice of America News, Interpress Services News Agency, Save the Children UNCHR and UNICEF Judge Holt determined that the Respondents would face a real risk of harm in the DRC today for reasons of their membership of a particular social group: "I find that the risk faced by the appellant and her son as a single mother and child is sexual and gender-based violence, forced prostitution and destitution". She made other findings favourable to the Respondents, including that they would face a real risk as failed asylum seekers.
9. The Secretary of State now appeals the decision of Judge Holt on the following grounds:
 - i) Failure to follow the country guidance in BK (Failed Asylum Seekers) DRC CG [2007] UKAIT 00098
 - ii) Failure to apply Devaseelan [2002] UKIAT 00712. There were two previous determinations in respect of the First Respondent which contained assessments of her credibility and in the case of the 2004 determination, that of her sister. This should have

been the starting point in the present appeal;

- iii) There was a failure to resolve conflicts in the evidence and deal with the reasons why the Secretary of State contended the First Respondent could not be believed;
- iv) The appeal had been allowed on “asylum, humanitarian protection and human rights grounds”. In fact there was no power to allow it on human rights grounds since this was an appeal brought under section 83(3) of the Nationality, Immigration and Asylum Act 2002;

Error of Law

Country Guidance

10. The Secretary of State contends that the First-tier Tribunal erred in failing to apply the extant country guidance of BK, in particular the findings in that case that there is no risk to failed asylum seekers being returned to Congo.
11. It is clear that the Tribunal has regard to BK, since it is referred to (in fact the Court of Appeal decision in the same case) at paragraph 19. At paragraph 20 the determination records that the Respondents’ representative had relied on objective country material upon which they submitted the Tribunal could depart from BK, it being over six years old at the date of the hearing. It is however apparent from the paragraphs which follow that the Tribunal was not actually concerned with the risk to failed asylum seekers *per se*, but to the particular challenges faced by *these* appellants. Paragraph 21 sets out country background material from Save the Children and the COIR on the position of children in Congo, in particular the risk of trafficking, poor health and welfare standards and the risk of violence against children. At paragraphs 22 to 34 the Tribunal addresses the situation for women returnees. Although at 41 the Tribunal does find a real risk to the First Respondent as a “failed asylum seeker” she goes on to make a discrete finding as to the risk she faces a member of the particular social group “a single woman with a very young child”. There is no challenge in the grounds of appeal to that finding or that formulation. If there was any error in reaching findings contrary to those in BK about failed asylum seekers, in this case it is entirely immaterial.

Devaseelan/ Failure to resolve conflicts in the evidence

12. In 2004 an Adjudicator made negative credibility findings about Ms Moke. The Secretary of State relies on that decision and submits that there was a “failure to resolve conflicts in the evidence”. In fact

these are two sides of the same coin. The submission is essentially that the Respondent and her sisters had not been believed by a previous Tribunal and in those circumstances they could not be relied upon as witnesses of truth in the present case. The reasons for refusal letter had set out two paragraphs from the 2004 determination in which Ms Moke was criticised. Those should have formed the starting point for Judge Holt's consideration. That she did not put these findings, determinative of the evidence at the date that they were made, at the forefront of her reasoning, meant that the positive findings in respect of Ms Moke's evidence were all flawed.

13. The relevant paragraphs from Mr Brown's determination were 37, 38 and 40. Paragraph 37 is the general conclusion reached: "I have many concerns about the appellant's evidence and the evidence provided by her sister". The first concern is set out at 38, there being a discrepancy in that the sister did not mention the appellant having been arrested at the same time as her. The second is that neither could recall any details about their father's business, which Mr Brown considered "beyond belief".

14. It is clear that Judge Holt was aware of those conclusions. They form the backbone of the refusal letter and were relied upon in submissions before her. That she has had regard to both the letter and the oral submissions is specifically recorded in the determination at paragraphs 11 and 12. The fact that the earlier appeals were dismissed is at 15, and at 16 the Judge expressly directs herself to Devaseelan:

"I find that the principles in Devaseelan [2002] UKIAT 00702 apply to the 1st appellant's case. That case says, inter alia, that matters arising since the first appellate decision, and facts that were not relevant to the issues before the first immigration judge can be determined by the second. Therefore I cannot reconsider matters that were decided in the February 2004 appeal and will confine myself to matters which have arisen since"

15. It is therefore far from clear that Judge Holt ignored the findings of the earlier Tribunal. It is true that she does not preface her assessment of Ms Moke's evidence with the words "I remind myself that this witness was not believed by an earlier Tribunal", but it might be thought obvious from the extract set out above that she had it in mind. The subject matter of this appeal was entirely different from the subject matter of the earlier appeal. It was directed at a matter which had not been before the 2004 or 2002 Tribunals: the particular vulnerability of the First Respondent arising from the birth of the Second Respondent. Even if it could be said to be an error not to have made the statement I have just posited, it is clear from the detailed and comprehensive credibility findings that Judge Holt accepted Ms

Moke's evidence about these new matters. For these reasons I find no error of law in the approach taken to her evidence.

16. As to the Respondent's own evidence, it is correct to say that this had been comprehensively demolished by earlier Tribunals. That is immaterial, since the appeal has been allowed on the facts that she is a woman, and her son a young child, neither of which were contested. Mr Kandola questioned how the Tribunal could have properly reached the conclusion that the Respondents had no family left in the DRC, when the earlier Tribunal had expressly found that they had. These decisions are now 12 and 10 years old, and clearly it might be expected that there might be some change in circumstances in that time: Judge Holt has accepted the evidence of Ms Moke on this point and for the reasons she sets out, she was entitled to do so. I would also observe that this was not a matter raised in the grounds of appeal, and that no application was made to widen their scope.
17. I find these grounds are not made out.

Scope of Appeal

18. At paragraph 11 of the determination the First-tier Tribunal records that the First Respondent has been granted leave to remain in the UK until December 2016. The Second Respondent was granted leave in line with his mother and these appeals were both brought under s83(2). It would appear that the Tribunal had forgotten this by the time that the conclusions at paragraph 45 were drawn, since the appeal is allowed on "asylum, humanitarian protection and human rights grounds". There are two errors here. If the Respondents are refugees they are not entitled to humanitarian protection. There was no scope to consider human rights in this s83 appeal. I set that paragraph aside and remake it as follows: "the appeals are allowed on asylum grounds".

Decisions

19. The determination of the First-tier Tribunal contains an error of law as identified at paragraph 18 above and it is set-aside only to that extent. All remaining findings are upheld and preserved. I remake the decision by allowing both appeals on asylum grounds.
20. There was no request for an anonymity direction and I see no reason to make one.

Deputy Upper Tribunal Judge Bruce

8th November

2014