IAC-YW-PC-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/50956/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 28 October 2014	**On 6 November 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE APPLEYARD

Between

MS MASSARAN KONE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr L Youssefian, legal representative
For the Respondent: Mr S Kandola, Home Office Presenting Officer

DECISION AND DIRECTIONS

1. No anonymity direction has previously been made in these proceedings and no reason has been put before me today why such a direction should be made. I therefore make no such direction.

2. The appellant is a citizen of the Ivory Coast. She was born on 9 October 1960. She claims to have entered the United Kingdom unlawfully in November or in the alternative September 1993 using a French identity card. By an application form dated 21 June 2012 she applied for indefinite leave to remain in the United Kingdom on the basis of her long residence. The application was submitted before the change in the length of residence requirements that took place on 9 July 2012. Accordingly the respondent considered her application under the "old" Rules contained in paragraph 276A-D of the Immigration Rules HC 395 (as amended).

3. Following the refusal of her application the appellant appealed. That appeal was heard by Judge of the First-tier Tribunal J. C. Hamilton who in a determination promulgated on 24 July 2014 dismissed it.

4. The appellant sought permission to appeal. Her application was granted by Judge of the First-tier Tribunal Saffer. The nub of why permission to appeal was granted by himn on 16 September 2014n can be gleaned from paragraph 4 of his decision which states:

> "4. The essential ground in both is that confusing and contradictory findings have been made regarding how long she had been here, and that not all matters of concern to the judge were put to her. Both grounds appear to be arguable."

5. In his oral submissions Mr Youssefian expanded on the written grounds seeking permission to appeal. Firstly it is argued that there is a failure by the judge to make clear findings. For example he cited paragraph 47 of the judge's determination where it states:

> "I need to make clear that I have not made a positive finding that the appellant is being untruthful about the length of time she has been in the UK, merely that on the evidence before me I am unable to find that she has shown that she has been in the UK as long as she claims."

He argued further that the judge erred by failing to make clear findings and reconcile issues or by failing to give adequate reasons for his findings. Moreover given the fact that the appellant's credibility was not an issue and that the evidence she gave regarding the length of her residence in the United Kingdom was not found to be untruthful Mr Youssefian argued that the judge's determination when read as a whole, fails to make sense.

6. The second ground relates to "unfairness" where it is argued that the judge, on a number of occasions, states that "no explanation was given" for particular points which the judge then holds against the appellant. In short that the appellant did not have the opportunity at the hearing of dealing with these matters which were not raised in the Reasons for Refusal Letter at the appeal hearing. It is argued that the judge ought to have given the appellant an opportunity to deal with the concerns which

the judge clearly gave weight to when coming to the conclusion that the appellant's appeal should be dismissed.

7. Mr Kandola opposed the application arguing that against the background of the appellant's dishonesty and the unreliability of much of the evidence it was to be expected that the judge would be unable to reach clear findings and that the approach set out within the determination was open to him. Further that he is not obliged to put every point to the appellant and his observations as to the matters complained of in the second ground were open to him. Mr Kandola emphasised that these were "obvious points," and as such they should have been dealt with by the appellant at the hearing.

8. I deal with the second ground first. Mr Youssefian used the example of the findings in relation to the issue of the appellant having two national insurance numbers disclosed on payslips. He argues that she was not given the opportunity by the judge, at the hearing, to deal with the issue for which there is a perfectly credible explanation in that the first national insurance number was a temporary one and the second a permanent one. Mr Kandola suggested that this issue had not been raised within the grounds seeking permission to appeal. I do not accept that as clearly the second ground refers to issues of this kind and then goes on to give only some of the examples. The appellant had an explanation for why two national insurance numbers existed and by being deprived of the opportunity to put forward her explanation, and for it to be considered by the judge, the judge has fallen into error.

9. I will add that I am also satisfied that there is inadequate reasoning for the findings and that that reasoning is far from clear. For example, again, at paragraph 47 of the judge's determination it states:

> "47. I need to make it clear that I have not made a positive finding that the appellant is being untruthful about the length of time she has been in the UK, merely that on the evidence before me I am unable to find that she has shown she has been in the UK as long as she claims. It does however mean that I do not find the appellant has shown she has been in the UK for fourteen years and therefore she does not meet the requirements of paragraphs 276A-D of the Immigration Rules."

10. On my own analysis it is clear that the decision of the First-tier Tribunal involved the making of an error on a point of law such that it must be set aside in its entirety.

11. It is also clear therefore that where the decision of the First-tier Tribunal is set aside the Upper Tribunal has power to remit the appeal to the First-tier Tribunal with directions for reconsideration of the appeal. I take account of the Practice Statement dated 10 February 2010 at 7.2 which contemplates that an appeal may be remitted to the First-tier Tribunal where the effect of the error has been to deprive a party before the First-

tier Tribunal of a fair hearing or other opportunity for the party's case to be put to and considered by the First-tier Tribunal. The nature and extent of the judicial fact-finding necessary in order to enable the decision in the appeal to be remade is such that, having regard to the overriding objective, it is appropriate to remit this case to the First-tier Tribunal.

12. This is what should happen here as the hearing that took place within the First-tier Tribunal where the First-tier Judge erred prevented the appellant from having a fair hearing.

13. Accordingly this appeal is remitted to the First-tier Tribunal for reconsideration of the appeal by a First-tier Tribunal Judge other than Judge J. C. Hamilton. None of the findings of fact made at the First-tier hearing are preserved. A de novo hearing is required.

Signed Date 4 November 2014

Deputy Upper Tribunal Judge Appleyard

DIRECTIONS

1. The substantive hearing of this appeal will take place at the Hatton Cross Hearing Centre on the first available date.

2. The time estimate is two hours.

3. Any further documentary evidence relied upon by either party is to be filed with the Tribunal and served upon the other party no later than 4pm five working days prior to the substantive hearing.

Signed Date 4 November 2014.

Deputy Upper Tribunal Judge Appleyard