



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/01778/2017

THE IMMIGRATION ACTS

Heard at Manchester
On 29th June 2018

Decision & Reasons Promulgated
On 29th August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE FARRELLY

Between

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(ANONYMITY DIRECTION MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr P J Lewis, Counsel, instructed by Birnberg Peirce and Partners.

For the respondent: Mr. A Tan, Home Office Presenting Officer.

DETERMINATION AND REASONS

Introduction

1. The appellant is a national of Kenya, born in []. He is a talented footballer who played for a Premier team in his home country. He said that he had been approached in 2009 by members of a drug gang wanting him to transport

drugs as he was due to travel abroad. He avoided doing so by leaving early. Subsequently, members of the gang were arrested, and he believes they would think he reported them to the police.

2. He felt that members of the gang had been watching him and noticed things moved in his flat. He said that there was a fire at his home in 2011 and believed the gang was behind this. In June 2014 he returned to his flat and when he opened the door was electrocuted. He again believed the drug gang was behind it. He told the police, but they were unhelpful. He told his coach who suggested he seek protection in the United Kingdom where Everton football club have expressed an interest in him. He came to the United Kingdom on a visit Visa in or around August 2014. He made a claim for protection shortly afterwards. He says he cannot relocate in Kenya because he has a high profile.
3. The respondent refused his claim in February 2016. The claim did not engage the Refugee Convention. It was pointed out that he was able to remain in his area and although he claimed he was in hiding he was still out playing football. He sought to support his claim using various documents including a statement from a neighbour who relayed the account of the electrocution. He also produced a document from the police about his complaint. The respondent placed limited reliance upon this information, questioning its provenance. In any event, there was sufficient protection for the appellant in Kenyan and that relocation was a viable option.

The First tier Tribunal

4. His appeal was heard by First-tier Tribunal Judge Devlin at Manchester on 6 September 2017. In a decision promulgated on 12 October 2017 it was dismissed. In support of his appeal the appellant again provided various letters of support and an expert report about drug trafficking in Kenya. The judge set out the events at hearing and analysed the evidence in considerable detail. At paragraph 281 onwards the judge set out his conclusions.
5. The judge felt the expert report provided only limited support for the appellant's account. The judge acknowledged the appellant's account was broadly consistent throughout but did refer to discrepancies. The appellant had submitted a medical report and the judge accepted he had suffered electrical burns and referred to the various testimonials submitted as to the appellant's character.
6. At paragraph 301 the judge concluded that the appellant had suffered a terrible ordeal in Kenyan in 2014. The judge accepted he had been electrocuted in June 2014. However, notwithstanding the broad consistency of the account; its congruence with the expert report; the country information, and the documentary evidence, the judge did not accept the appellant was

credible. The judge referred to the appellant engaging in deception in obtaining a visit Visa when he never intended returning to Kenya. Regard was also had to the appellant's article 8 rights and the judge concluded his removal was proportionate.

The Upper Tribunal

7. Permission to appeal was granted on the basis the judge did not give appropriate weight to the fact the claim had been considered under the fast-track system which was subsequently found to be deficient; the judge did not give adequate weight to the expert report and misapplied article 8.
8. It was argued in the grounds that whilst the judge self-directed there was no need for corroborative evidence in reality he did so; yet repeatedly rejected the corroborative evidence that was provided.
9. The judge had commented that the letter from the neighbour about the electrocution had not been authenticated. The appellant had also produced a statement from his father to the effect that after he had left he started to receive threatening telephone calls. Again, the judge commented that the statement had not been signed nor authenticated. Counsel had advised the judge that it had been taken over the telephone from Kenya by another member of Chambers. The judge considered this an inadvisable practice. The judge allowed an adjournment so that further details could be obtained. Counsel then was able to produce a copy of an email from the Counsel who recorded the statement who as it turns out was Mr Lewis who appears today. The judge then said that Counsel would not have been able to satisfy themselves as to the identity of the caller.
10. It was argued the judge erred in rejecting the expert report on the basis it did not contain examples more specific to the appellant's situation. The judge had also referred to the lack of detail in the appellant's response without having regard to the fact his claim was being processed under the fast-track procedure.
11. The grounds of appeal had referred to the appellant's integration and that he had undertaken work in the community in a deprived area of Liverpool. It was contended that the judge failed to have adequate regard to this in carrying out the article 8 assessment.
12. At hearing, Mr Lewis acknowledge the detail in the judge's decision but for all that submitted that the judge did not properly assess the evidence. The judge, notwithstanding his self-direction, did require corroborative evidence and when corroborative evidence was provided sought to have corroborative evidence of that evidence. By way of example of the standard set by the judge he referred to the statement from the appellant's father. He took the statement

over the telephone for the purposes of a judicial review. The judge deals with this at paragraph 61 and questions how he knew this in fact was the appellant's father. Mr P J Lewis submitted that this was expecting too high a standard in respect of provenance. The same approach was repeated at paragraph 50 in relation to the statement provided from the appellant's neighbour. The judge had been provided with the envelope bearing Kenyan stamps in which this letter was said to have arrived. The judge made a factual error in stating this envelope had not been provided but in any event was wrong to discount the evidence because the signature had not been otherwise authenticated.

13. At paragraph 55 to 60 the judge adopts the same approach in relation to the evidence from the police in Kenya. This was a police report which contained details of the police station which could have been checked by the respondent as it was submitted in advance.
14. At paragraph 66 through to 83 the judge recounts the expert evidence and at paragraph 281 sets out his conclusions. This detailed report supported the consistency of the appellant's account with what was known about events in Kenya. The judge discounts the report on the basis the examples given do not match the appellant's profile whereas in fact there were very similar situations described. On the appellant's account he was 14 years of age were approached by the gang and the judge faulted the report because the examples did not fit the appellant's profile exactly or confirm that gangs used electrocution and so forth.
15. I was referred to paragraph 137 on of the decision which consists of an analysis of 5 questions the appellant was asked over the following 4 pages. Counsel said this was not put to the appellant for comment at hearing. The answers to these questions were open to interpretation. The judge then saw these answers as being a discrepancy which undermined the appellant's entire account. This was in contrast to the comment at paragraph 199 that the appellant's account overall was consistent.
16. Regarding article 8 the judge does refer to the appellant's involvement in the local community in Liverpool but did not reflect this in the public interest considerations.
17. Mr. Tan, in reply, made the point that it was common in immigration appeals to see documentation being endorsed by 3rd parties to confirm its veracity. Such endorsement could go to the weight to be attached to the documentation and the judge was entitled to refer to this. He submitted that this particular appeal turned upon an evaluation of disparate pieces of the evidence including the evidence from the appellant's father and his neighbour as well as the expert report. He aptly described it as 'the little crumbs that make up the pie'. He said the judgement read as a monologue in which the judge

expresses his thoughts as he goes along on the different pieces of evidence. The judge refers to factors, at times favourable to the appellant, and then other times, to unfavourable elements. He did acknowledge in respect of the letter from the appellant's father that it was not the judge's role to speculate about false documentation being used. However, the absence of authentication did not mean the judge excluded the evidence but affected the weight to be attached to it.

18. Mr. Tan said that the judge evaluated the appellant's own account with the documents. I was referred to paragraphs 137 to 148, 150, 161, 165 to 173 and later at paragraph 238, 254 and 291 to 297. In those paragraphs the judge compares the appellant's evidence with documents produced. At paragraph 283 to 285 the judge deals with the expert report and it was open to the judge to find shortcomings in the report.
19. Regarding points not being put to the appellant Mr. Tan said it was open to the judge to make observations and to be expected to put everything to an appellant would be an undue fetter. It was at paragraph 288 onwards that the judge addresses the core of the claim.
20. Regarding the claim being in the fast-track procedure, this point had not been raised before the judge. The judge was however aware he was in the fast-track system when setting out his immigration history. The criticism of that system dealt with people who had been detained, assessed and had their appeals dealt with whilst in custody. This was not the situation here. The appellant's interview took place towards the end of his period of detention and he had adequate time subsequently to consult with his representatives. His representative was present during his asylum interview and there was no indication he was unhappy with the process.
21. Regarding article 8 and the appellant's contributions to the community: this was acknowledged by the judge who referred to the case of R -v- Bakhtaur Singh [1986] 1 WLR 910 and concluded that the appellant's activities could not be equated with the situation there.
22. In response, Mr P J Lewis said that the reference by the presenting officer to the judge turning to the core of the claim at paragraph 288 onwards was premised upon what had taken place earlier at paragraph 138. He emphasised how those questions were open to interpretation.

Conclusions

23. First-tier Tribunal Judge Devlin has obviously given the appeal the most careful consideration. However, it is my conclusion despite the considerable effort which has gone into preparing the decision it is unsafe.

24. I find the judge has imposed too high a standard upon the appellant in the analysis of the evidence. If anything, there has been an over analysis of the material. In certain situations it is common to have authentication of documents from 3rd countries. At times such declarations do not advance matters much further because it cannot be determined how reliable the authentication is. I find the judge's treatment of the statement from the appellant's father and neighbour goes beyond what could reasonably be expected in terms of formal proofs. Whilst the judge correctly self directs that there is no requirement for corroboration, in practice the judge appears to require corroboration and then when corroboration is provided questions its authenticity. I appreciate entirely it was a matter for the judge to decide what weight to be attached to evidence. However, repeatedly it appears that too high a burden was being placed upon the appellant. I find the same can be said in the way the judge treated the expert report. If the report did not give a specific example akin to the appellant's situation this should not have detracted from the weight to be attached to the report which generally supported the consistency of the account.
25. I do find force in the points made by Mr P J Lewis in relation to paragraph 138 of the decision. The appellant's responses are open to interpretation. It also has to be borne in mind that he was 14 years of age at the time of the approach. The judge is required to analyse the evidence but in situations such as this I find there is an obligation to give the appellant a chance to respond to the concerns that the judge has. Clearly the judge's view of the answers formed a significant part of the judge's conclusions.
26. In conclusion, whilst I acknowledge the effort which has gone into preparing this decision I find there is merit in the points made by Counsel on behalf of the appellant. It is my conclusion that those points illustrate the decision is unsafe because of the way the judge dealt with the evidence. There is less merit in the arguments made in relation to article 8.

Decision.

The decision of First-tier Tribunal Judge Devlin materially errs in law and set aside. The matter is remitted for a de novo hearing in the First-tier Tribunal.

Francis J Farrelly

Deputy Upper Tribunal Judge

Directions.

1. Relist for a de novo hearing of all matters in the First-tier Tribunal in Manchester excluding First-tier Tribunal Judge Devlin .
2. An interpreter is not required.
3. The appellant's representatives should prepare an updated appeal bundle. Whilst it is a matter for them as to how they proceed with the appeal from the present proceedings it would appear beneficial if they considered the following:
 - (a) authentication of the documents provided from Kenyan where possible.
 - (b) Confirmation as to when the appellant was in boarding school in Kenya after being approached .
 - (c) It was indicated the country expert may be called as a witness but that is a matter for the appellant's representatives.
 - (d) In terms of the appellant's article 8 claim, he is now in a relationship and relevant documentation should be provided.
4. The appellant's completed appeal bundle should be lodged no later than 2 weeks before the hearing date.
5. It is anticipated the hearing would take no more than 2 and a half hours.

Francis J Farrelly...

Deputy Upper Tribunal Judge

Date: 16.08.2018