Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/08086/2017

THE IMMIGRATION ACTS

Heard at North Shields	**Decision & Reasons Promulgated**
On 24th September 2018	**On 6th November 2018**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

MR LAUHA KANZA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms L Brakaj, Iris Law
For the Respondent: Mr Diwnycz, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Both parties appeal with permission against the decision of First-tier Tribunal Judge Holmes promulgated on 7 December 2017 dismissing the appeal on Article 3 grounds but allowing it on Article 8 grounds.

2. The appellant is a citizen of DRC born in 1985. He entered the United Kingdom in June 1994 at the age of 8 and was treated as a dependant on his elder sister's asylum claim. The sister's protection claim was refused and her appeal was unsuccessful but she was later granted indefinite

leave to remain under the Legacy Programme in 2005. The appellant was no longer her dependant at that point, having been taken into the care of Camden Social Services in 1998. It appears that at some point Camden Social Services did apply for him to be given leave to remain, that application was refused on 16 March 2006 and there appears to be no attempt to challenge that decision.

3. On 2 March 2007 the appellant was convicted of an offence of street robbery and possession of offensive weapon and was sentenced to a term of four years' imprisonment.

4. In response to this conviction, the Secretary of State served the appellant with a notice of decision to make a deportation order. The appeal against that decision was dismissed and a deportation order was signed against the appellant on 7 October 2008. Further submissions were then made in December 2010 and treated as an application to revoke the deportation order. That decision was refused and certified pursuant to Section 94 of the 2002 Act in turn prompting judicial review proceedings which were compromised by a consent order on 21 May 2012. The result of this was a fresh decision on 29 August 2012 to refuse to revoke the deportation order on this occasion with a right of appeal. That appeal was dismissed on 26 November 2012.

5. There then followed further representations on the appellant's behalf, treated as a further application to revoke the deportation order. Again this was refused with an in-country right of appeal which was allowed on Article 3 grounds by First-tier Tribunal Judge Fisher in a decision promulgated on 28 April 2014. The appellant was then granted a discretionary leave to remain for six months until 15 May 2015. An in-time application was made to vary that leave and on 7 June 2017 the respondent issued a fresh decision to deport the appellant. The appellant was invited to respond to that which he did raising human rights grounds resulting in the decision of 4 August 2017 and it is against that decision that this appeal lies.

6. The appeal was pursued on Article 3 and Article 8 grounds, First-tier Tribunal Judge Holmes dismissing the appeal on Article 3 grounds but allowing it on Article 8 grounds.

7. The appellant was granted permission to challenge the decision on the basis that the judge had, after the hearing, and without seeking the view of the parties, gone behind and rejected some of the concessions made by the respondent (see paragraphs [17] and [18] of the decision). At the hearing before me, it was accepted by the respondent that there had been a procedural error constituting an error of law in so doing and Mr Diwnycz said that the concessions were not being withdrawn. In the circumstances, I am satisfied that the decision in respect of article 3 must be set aside and remade.

8. It was not, however, possible to do so immediately as it had transpired during the hearing that the decision granting permission to the respondent to challenge the judge's decision to allow the appeal on article 8 grounds had not been served on the appellant; and, worryingly, there was no copy of it on the court file or in the electronic records maintained by the Tribunal. It is, however, clear that Judge Birrell did consider both applications and granted permission to the respondent.

9. In the circumstances, and after consulting with the parties, I directed that the hearing be adjourned for the article 3 issue to be remade. If the decision is remade in the appellant's favour on that issue, then any error of law with respect to the article 8 issue would not be material. Accordingly, I considered it appropriate to defer consideration of that issue until the next hearing.

Remaking the Decision

10. I heard evidence from both the appellant and his partner, both of whom adopted their witness statements. In neither case were they cross-examined. Mr Diwnycz said that he had nothing to add to the case, the Secretary of State's case being that the appellant can be returned as the decision **P (DRC) v SSHD [2013] EWHC 3879** should no longer be followed in the light of **BM and Others (returnees – criminal and non-criminal) DRC CG [2015] UKUT 293** and **Lokombe (DRC: FNOs - Airport monitoring) [2015] UKUT 627.**

11. It was accepted that the appellant had not been in DRC since the age of 9 and it was accepted that there was no basis on which it could be said that there was an emergency travel document issued. There was nothing which had transpired later. He submitted that the threshold for showing an Article 3 breach in this case when there is no suggestion of action being taken by the state is very high.

12. In response Ms Brakaj submitted that this was an unusual case; the appellant's mental health had deteriorated since the judge had reached his decision and that Article 3 was on the facts of this case engaged on return as the appellant has no real recollection with DRC, no contact with any family, he no longer speaks the language and there was therefore nothing which would allow him to live in the DRC to protect himself and support himself. She submitted that the country information shows insecurity and a high level of violence and corruption; and as the appellant had never lived alone in the country before there would be a risk of violence and threats to him and there was no indication that he would be okay. She submitted that as he had not lived there before there was a possibility that he was at risk as a returnee. She accepted that she could only rely on generic evidence, but that he has no transferable skills and has no basic skills to survive in Kinshasha or elsewhere. She submitted that there is no evidence how those without a support network would survive.

13. It was not submitted, in light of **BM** or **Lokombe** that the appellant is at risk on return to Kinshasha at the point of arrival on account of his convictions; or, on the basis that he is a failed asylum seeker.

14. There is little background material before me other than that relating to the general situation in the country. As noted in **BM**, none of the previous country guidance decisions or indeed that decision held that individuals returning to DRC would be at risk of an Article 3 breach or harm serious enough to engage the Refugee Convention. Whilst there are undoubtedly serious human rights concerns arising and breaches occurring on a regular basis in DRC and that large numbers of people, in excess of 4 million, have been displaced, Ms Brakaj was unable to point me towards anything specific indicating the problems which a person in the appellant's position may find themselves on return. Rather, she invited me to infer from a general situation that he would face severe difficulties as he would be returning to a country which he did not know, of which he had little experience, and where he had no skills such as would permit him to integrate properly and would mean that he would not be at risk and would be able to get employment.

15. Much of the background material concentrates on political violence as well as the various different conflicts which arise on the periphery of the country and which result in the displacement of people within the country and also into neighbouring countries. What there is not is any of the detailed analysis that would be necessary to show that, a returnee without contacts in Kinshasha, and who does not speak the language, would in effect be reduced to destitution.

16. That is not to say that the appellant will have not difficulties on return to DRC; far from it. He is returning to a country of which he knows little, where he does not speak the language, has no means of support and no apparent means of earning a living. But there is insufficient evidence to show that this particular appellant would, given his particular circumstance in not speaking the language and having no ties with the country, be in such a difficult position that he meets the high threshold to engage Article 3. Had there been, for example, an expert report on the practical difficulties that this particular appellant would face, then my decision may well have been otherwise.

17. Accordingly, I dismiss the appeal on article 3 grounds for these reasons as I am not satisfied that removing the appellant to DRC would reach the very high threshold to engage Article 3. I do, however, accept that on the basis of the background difficulties that he would face significant hardship given the lack of ties, lack of support, lack of knowledge of how the country operates and lack of knowledge of a language of the country.

18. In the circumstances, I now consider whether the judge erred in his approach to Article 8 as is averred.

19. The respondent's case is that the judge failed properly to set out why at paragraph [54] he had concluded that there were very compelling circumstances over and above those described in Exception 2 having concluded that Exception 2 does apply; and, erred in allowing the appeal pursuant to Article 8.

20. The respondent challenged that decision on the grounds that the judge had erred:

    (i) In making an assumption that the appellant would have been granted indefinite leave to remain if an application had been made at the correct time, an assumption that should not have formed part of his assessment;

    (ii) In concluding that there were very compelling circumstances in this case, particularly as no children are involved, noting that the judge had not found the appellant would be unable to relocate given his language abilities possible family support and absence of medical issues and as the appellant's partner's ill-health was not a very compelling circumstance, and the passage of time and delay had not been sufficient to outweigh or diminish public interest;

    (iii) in failing to give clear reasons why the appeal was to be allowed and how the high threshold of very compelling circumstances was met noting that in CT (Vietnam) [2016] EWCA Civ 488 at [19] only the strongest Article 8 claims will outweigh the public interest in deporting someone sentenced to at least four years imprisonment as it will almost always be proportionate to deport.

21. I do not consider that the judge erred in observing that it was likely that the appellant would have been granted indefinite leave to remain in line with his sister had things been done properly. That was an observation open a judge who has many years of experience in this jurisdiction. In any event, there is no proper indication that this was taken into account in any event in the appellant's favour in reaching a conclusion. The respondent has therefore not shown that this even if it were an error, it formed a material part of the analysis or otherwise gave rise to a right of appeal

22. The Secretary of State does not challenge the finding at [53] that Exception 2 was met. There is a difficulty in the Secretary of State's grounds in that to undermine the judge's findings, he relies on findings by the judge regarding possible family support, absence of medical issues and language ability upon which the respondent no longer relies. On the contrary, before me the Secretary of State maintained the concessions made and recorded that there was no evidence of family support available to him in DRC, no evidence of any fluency in the language relevant to the daily life in DRC. That position undermines significantly the respondent's argument as to materiality of any error.

23. While the judge has in his decision referred to section 117B (6) of the 2002 Act in assessing proportionality, that is clearly a typographical error given that the judge properly directs himself with regard to Section 117C (6) at paragraph [55] of his decision.

24. It is sufficiently clear from the judge's decision that he took into account the seriousness of the offence [52]; it also must be born in mind that what is set out in [53] and [54] of the decision are summaries of the findings reached previously. The judge set out a number of factors which are over and above those of the Exception 2 test [41]. There is no direct challenge to the finding that that test is met. Nor for that matter is there a challenge to the finding that the appellant's partner could not safely relocate to DRC [39] and it is also of note that the effect of ME on the partner and the support and assistance from the appellant that she depends upon was neither challenged, commented upon or explored in cross-examination [40]. There is no challenge to the judge's findings of the strong personal relationships [42 to 43] or the fact the appellant had not offended for the past eleven years.

25. Added to that should be, in assessing materiality of any error, the fact that the Secretary of State now accepts the appellant has nobody to return to in DRC, has no fluency in a relevant language, and that he left the country at the age of 8. In that respect

26. It is also to be noted that the Secretary of State now says that there is no suggestion the appellant's partner would be able to cope if the appellant was deported yet that was not the case put to the judge and no disagreement was made as to her evidence that she would not.

27. I consider that viewing the evidence as a whole, and bearing in mind that what is set out at paragraphs [54] and [55] are summaries of the earlier findings, that the judge has given adequate reasons for concluding that there were on the particular and highly unusual facts of this case very compelling circumstances such that deportation was not proportionate. If anything, given the respondent's concessions, the appellant's case stronger given that he faces deportation to a country he left at the age of 8 some 24 years ago where he has no family support and does not speak the language.

Notice of Decision

The First-tier Tribunal's decision to dismiss the appeal on article 3 grounds involved the making of an error of law. I remake the decision in respect of article 3 by dismissing the appeal on that basis, albeit for different reasons.

I uphold the First-tier Tribunal's decision to allow the appeal on article 8 grounds.

I am not satisfied that it would be appropriate to maintain the anonymity order made, given that the appellant's crimes are a matter of public record.

Signed Date: 17 October 2018

Upper Tribunal Judge Rintoul