Upper Tribunal
(Immigration and Asylum Chamber) Appeal number: HU/14518/2017

THE IMMIGRATION ACTS

Heard at:	Field House	Decision & Reasons promulgated
On	24 April 2019	On 15 May 2019

Before

Upper Tribunal Judge Gill

Between

Davies Ngure Kamau Appellant
(ANONYMITY ORDER NOT MADE)

And

The Secretary of State for the Home Department Respondent

Representation:

For the appellant: (In person).
For the respondent: Mr S Whitwell, Senior Presenting Officer.

Decision and Directions

1. The appellant, a national of Kenya born on 13 April 1971, was granted permission to appeal the decision of Judge of the First-tier Tribunal Kaler who, in a decision promulgated on 23 August 2018 following a hearing on 13 August 2018, dismissed his appeal against a decision of the respondent of 24 October 2017 to refuse leave to remain as the partner of a settled person and to refuse his human rights claim.

2. The appellant's appeal to the Upper Tribunal was heard before Deputy Upper Tribunal Judge Sheridan on 12 November 2018. In a decision promulgated on 4 December 2018, Judge Sheridan dismissed the appeal.

3. The decision of Judge Sheridan was set aside by Upper Tribunal Judge Kopieczek in a decision signed on 28 February 2019.

4. Accordingly, the appellant's appeal was re-listed for hearing before me. The issue before me was whether Judge Kaler had materially erred in law.

5. At the hearing, Mr Whitwell accepted that Judge Kaler had misapprehended the appellant's immigration history and background facts. As the grounds state, the facts are as follows:

> In June 1995, the appellant entered the United Kingdom. After four days, he left the United Kingdom and returned to Kenya. In November 1995, he re-entered the United Kingdom and claimed asylum at Heathrow. He has remained in the United Kingdom since November 1995. He has never had leave as a visitor or otherwise.

6. More importantly, Judge Kaler misapprehended the facts when she stated that the appellant had received a sentence of 9 months' imprisonment in November 2001. In fact, he received a sentence of 9 days' imprisonment on that occasion. The final paragraph on page 2 of the decision letter refers to various periods of imprisonment/detention but there is no mention of a sentence of 9 months' imprisonment although the paragraph does mention a sentence of 9 days' imprisonment.

7. In view of the above and in light of the judgments of the Supreme Court in KO (Nigeria) v SSHD [2018] UKSC 53 and the Court of Appeal in AB and AO v SSHD [2019] EWCA Civ 661, Mr Whitwell accepted that the judge had materially erred in law and that her decision should be set aside. Mr Whitwell submitted that the appropriate course of action was for the appeal to be remitted to the First-tier Tribunal. The appellant wished the Upper Tribunal to re-make the decision on his appeal.

8. I agree with Mr Whitwell that the judge had materially erred in law. My reasons are as follows:

   (i) A central issue before Judge Kaler was whether it was reasonable for the appellant's children, who were qualifying children, to leave the United Kingdom.

   (ii) It is clear from paras 35 and 37 of her decision that, in reaching her decision whether it is reasonable for the children to leave the United Kingdom, Judge Kaler took into account (at para 37) "*the cumulative effect of this appellant's persistent offending, his deception in using false names to make an asylum application to the Home Office, his failure to disclose all of his convictions and his remaining in the UK without leave for so may [sic] years*".

   (iii) It is therefore plain not only that Judge Kaler had taken into account the appellant's offending in reaching her decision on whether it was reasonable for

the appellant's children to leave the United Kingdom but also that she had in mind, inter alia, the fact that he had been sentenced to a period of 9 months' imprisonment as opposed to 9 days' imprisonment.

(iv) Judge Kaler did not have the benefit of the judgment in KO (Nigeria). Nonetheless, through no fault of her own, she materially erred in law by taking into account the matters referred to at (ii) and (iii) above in reaching her finding that it would be reasonable for the appellant's children to leave the United Kingdom.

9. Accordingly, I set aside her decision.

10. I considered whether any part of the judge's decision could be preserved. I concluded that it could not, given that the judge had misapprehended the background facts as explained at para 5, which was relevant to her assessment of the appellant's case under para 276ADE of the Immigration Rules.

11. I considered whether the decision on the appeal should be re-made in the Upper Tribunal or whether the appeal should be remitted to the First-tier Tribunal, having regard to para 7.2 of the Practice Statements for the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal (the "Practice Statements") which recognises that it may not be possible for the Upper Tribunal to proceed to re-make the decision when it is satisfied that:

> "(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
>
> (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal."

12. In my judgment, this case falls within para 7.2 (b) of the Practice Statements for the following reasons:

(i) There was a lot of evidence on file, which was submitted when the appellant was represented. Judge Kaler did not refer to the evidence in terms in her decision or, more importantly, make any findings of fact on the evidence.

(ii) Furthermore, and as I have stated, it was not possible to preserve any of her findings, whether in relation to the appellant's case under para 276ADE of the Immigration Rules or his Article 8 claim outside the Immigration Rules, in view of the errors of fact in relation to the background facts, as explained at paras 5 and 6 above.

(iii) The decision letter states that the respondent did not consider that the appellant met the suitability requirement in S-LTR.1.6. At para 17 of her decision, Judge Kaler said that the respondent is correct to say that the appellant does not meet the suitability requirement. However, this finding was based, at least in part, on her view that he had received a sentence of 9 months' imprisonment. This finding therefore cannot stand.

Accordingly, none of the judge's findings can stand.

13. I have therefore decided that the right course of action is to remit the appellant's appeal to the First-tier Tribunal.

Notice of Decision

The decision of Judge of the First-tier Tribunal Kaler involved the making of errors on points of law such that the decision is set aside in its entirety.

This appeal is remitted to the First-tier Tribunal for a hearing on the merits on all issues by a judge other than Judge of the First-tier Tribunal Kaler.

Signed Date: 6 May 2019

Upper Tribunal Judge Gill