Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/00091/2019

THE IMMIGRATION ACTS

Heard at Manchester Civil Justice Centre
On 28 October 2019

Decision & Reasons Promulgated
On 20 November 2019

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

J B
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr G L C Brown, instructed by Arshed & Co solicitors
For the Respondent: Mr McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge Durance, promulgated on 9 April 2019. That was an appeal under the Nationality, Immigration and Asylum Act 2002 against the decision of the respondent made on 7 December 2018 to refuse his claim for asylum.

2. The appellant is a citizen of the Democratic Republic of the Congo ("DRC"), born in 1954. He served in the army, eventually becoming a finance director in 1996 and in that capacity, was asked to organise wages

© CROWN COPYRIGHT 2019

to be paid to Rwandan civilians who were to be infiltrated into the army in a clandestine manner. That was on the orders of the then president. He had refused to do so and was suspended from his post. He was appointed to another unit in Kinshasa in February 2018 when he was summoned by intelligence services. He was then arrested, detained but, was able to escape and fled to the United Kingdom.

3. The respondent did not accept that the appellant had had problems with the DRC military or that he had come into difficulty owing to a failure to carry out an order, did not accept that he was wanted by the authorities and given inconsistencies in his accounts nor did she accept the appellant's account of how he was able to escape from a vehicle transferring him between prisons or as to how he was able to leave the country.

4. On appeal, the judge heard evidence from the appellant. He also had the benefit of a bundle of background material and in addition to that, an expert report provided by Dr Mullen. In addition, the appellant's case was supported by a number of documents indicative of service in the army and a telegram referring to his desertion from the armed forces amongst others.

5. The judge found that :-

   (i) the appellant's account was not credible;

   (ii) the appellant's account that there was a clandestine programme to assimilate 250 souls of Rwandan ethnicity into the army of the DRC is implausible, an expert report provided by the appellant indicating that his account was not supported by the evidence on the ground, the events described by the appellant only being sourced to websites which are described as extremist and to peddled conspiracy theories;

   (iii) the account of the escape and events leading up to the appellant's flight from the DRC lacked credibility;

   (iv) the appellant did not travel on a false passport;

   (v) the appellant can return to the DRC giving insufficient evidence to permit departure from relevant country guidance.

6. The appellant challenged the decision on the grounds that the judge had erred in

   > "Failing … to acknowledge … a very major implied concession to the appellant's position, in that he was indeed a colonel in the DRC Army and, as such a deserter. Second that a failure to making a clear finding of fact and key aspects of the evidence is an error of law and it is on that basis the appellant faced persecution."

7. In submissions, Mr Brown emphasised a failure to make a finding on a material fact, not least as this was supported by a substantial amount of additional evidence covering a number of years, which was supportive of

the appellant's account of having served in the DRC Army for a number of years.

8. In response, Mr McVeety submitted that in fact the judge had so that he did not accept anything in the appeal of account (see paragraph 51). Further, he submitted that the entire core to the appellant's claim was that he had deserted or left his post owing to a failure to carry out an order which resulted in sanctions being imposed on him. Given that that had been disbelieved then there was no basis on which it could be said that he had been forced to leave the military and accordingly there was no basis on which it could be said that he had deserted. He submitted that it was unnecessary to find alternative reasons for him leaving the army as undoubtedly in his case.

9. In response Mr Brown drew attention to the telegram recording the appellant's desertion for it had been referred to in the refusal letter at paragraph 32. He said that no weight had been attached for instance it had not been dated again that was clearly not the case now it was evident it was dated 8 March 2018.

10. It cannot properly be said that, as the grounds aver, there was an implied concession as to the appellant's rank as a colonel in the DRC Army. Mr Brown did not press the point. There is no acceptance of this fact in the refusal letter nor any express concession to that effect. It cannot be said there was any concession to that effect set out in the determination of the First-tier Tribunal or that it had been made by the respondent's representative at that hearing. Further, the judge summarises his conclusions at [28] and this does not include any acceptance of service in the military and at [51] the judge said this:

> "I note from the findings above, that the appellant's case has been rejected in its entirety. What is notable about this case is that the account is not only subjectively devious but is considered by the experts to be positioned on the ground to which it is only endorsed by those who peddle conspiracy theories and extremist views. That indicates that the appellant has manufactured his claim. This is a relevant conclusion. This is not a case where there is some kernel of proof that the appellant has embellished or re-exaggerated. That is of relevance given "of McCluskey J[1] (super)."

11. There is a clear finding that the judge rejected the entirety of the claim. There is no challenge to that finding (or indeed the credibility findings); all that is challenged in the grounds is a failure to make a finding as to whether or not the appellant was a serving military officer. I do not consider that a failure to do so was material. The case as presented was not that the appellant was at risk of being treated as a deserter per se, but that he had left the army because of a specific set of circumstances, that is a refusal to follow what he considered to be an unlawful order resulting in his transfer, investigation and imprisonment. Mr McVeety submitted, the judge did not accept this account; there is no challenge to that finding;

---

[1] See **BM (false passport) DRC [2015] UKUT 00467 (IAC)**.

and there is therefore no finding, nor was the judge required to make a finding as to if there were any other reasons why the appellant had ceased to form part of the DRC armed forces or why. Given that, there is no challenge to any of the other credibility findings and in this case in particular the evidence of the expert was against the appellant and the judge concluded that the account had been fabricated (which is not challenged) it cannot be said that any failure not to make any findings as to whether the appellant was in the army was material.

12. There are several ways in which the appellant could have left the army. He could, given his age, have retired or he may have been discharged. Any finding that he had deserted or was being sought by the state will be for him to prove. Given that the judge had found that the appellant was not being sought by the state, again a finding which is unchallenged, it cannot be said that any failure to reach a conclusion about the rank or whether he had deserted is material. The allegation that he deserted the army (or would be seen as having done so) cannot be taken in isolation to the other findings of fact.

13. There is little merit in the submission that the judge erred with respect to the telegram, a better copy of which is now produced. I accept that it appears to show it was issued 8 March 2018 but I find it adds nothing to the overall picture. The judge had given cogent and compelling reasons for concluding that the appellant had not told the truth and had, as noted above, concluded that the appellant was not at risk from the authorities. He had good reason to reject the telegram's reliability as evidence and I was satisfied the error was material. Accordingly, for these reasons, I find that the decision of the First-tier Tribunal did not involve the making of an error of law and I uphold it.

Notice of Decision

1. The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold it.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 11 November 2019

Upper Tribunal Judge Rintoul