



**Upper Tribunal  
(Immigration and Asylum Chamber)** Appeal Number: PA/08456/2018

**THE IMMIGRATION ACTS**

**Heard at Glasgow  
On 28<sup>th</sup> March 2019**

**Decision & Reasons  
Promulgated  
On 29<sup>th</sup> April 2019**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE DEANS**

**Between**

**MR THIERRY HABANABAKIZE**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

For the Appellant: Ms S Rashid, Advocate, instructed by Neil Barnes,  
Solicitors

For the Respondent: Mr A Govan, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. This is an appeal against a decision by Judge of the First-tier Tribunal Agnew dismissing an appeal on protection and human rights grounds.
2. The appellant is a national of Rwanda. He claims to be at risk of persecution in Rwanda after agreeing in 2017 to be one of 600 nominees of an unsuccessful presidential candidate, Diane Rwigara. According to the appellant, in October 2017 he was

detained, questioned about his support for Diane Rwigara, and ill-treated. He claimed his eight year old daughter was questioned at school by armed government agents. The judge did not find the appellant's evidence credible.

3. Permission to appeal was granted by the Upper Tribunal on grounds which were said to be that in essence it was arguable that the judge applied too high a standard of proof in finding the appellant was not credible.

### **Submissions**

4. At the beginning of the hearing it was pointed out that an additional bundle of country information had been lodged on behalf of the appellant. Mr Govan said that this evidence had not been before the First-tier Tribunal and no application had been made to admit new evidence under rule 15(2A). Ms Rashid submitted that the new evidence supported the submission that the First-tier Tribunal erred in law.
5. Ms Rashid submitted that, as set out in the grounds of the application for permission to appeal, the judge had placed unreasonable reliance on the appellant's inability to remember dates. The findings of fact made by the judge were not based on the evidence. She further submitted that the credibility findings were based on issues of which the appellant was not given fair notice and was not given an opportunity to refute.
6. Ms Rashid continued that at paragraph 15 of her decision the judge accepted that if the appellant's account was true he faced a real risk of persecution. The success of the appeal depended on the credibility of the appellant.
7. On the particular issue of unreasonable reliance upon dates, Ms Rashid submitted that the judge had founded upon the appellant's inability to remember the exact date he nominated Mrs Rwigara, the date he first met Mrs Rwigara, the date his daughter was approached at school, and the date his daughter went to live with his brother. It was unreasonable to expect the appellant to remember these dates, especially in the context of the turmoil he has described and his treatment in detention. Reliance was based on the Australian case of Kopalapillai [1998] FCA 1128 and on *Hathaway* at page 85.
8. Ms Rashid referred to the second ground of the application, in relation to paragraph 29 of the decision, where the judge made a finding without any basis in the evidence. There was no evidence on which to draw a reasonable inference and this was an error of law.

9. Ms Rashid said that the third ground, at paragraph 5 of the application, concerned matters on which the judge made findings at paragraph 33 of the decision without giving the appellant fair notice and a chance to respond. Neither at the interview nor at the hearing was the appellant asked why he took his daughter back to Rwanda after travelling with her to Goma in the DRC. He was given no opportunity to address this issue. The newly lodged country information concerned the risk to young Rwandans in Goma, where they may be accused of being rebels. Procedural fairness required that parties were given notice of the issues and an opportunity to address them, as stated in HA & TD [2010] CSIH 28 at paragraph 31. In that case an immigration judge raised an issue as to whether the signature on a document was genuine without giving the appellant notice of this issue and an opportunity to address it. This was prejudicial to the appellant. At paragraph 36 of the decision the judge made an adverse credibility finding based on a matter about which the appellant had not been asked. This concerned his attempts to travel to Uganda through DRC.
10. It was pointed out that this issue arose from paragraph 42 of the respondent's reasons for refusal letter. Ms Rashid submitted that the appellant responded to this at page 4 of his witness statement. He had not been asked about this at his interview. The negative findings were made without a legal basis. The judge applied too high a standard of proof.
11. For the respondent Mr Govan said that he opposed the appeal. The grounds of the application for permission to appeal went further than suggesting the judge applied too high a standard of proof. The application maintained that the judge made findings that no reasonable judge could make. There was a high threshold for a challenge based on rationality.
12. Turning to the appellant's lack of knowledge of dates, Mr Govan submitted that if this was the only reason for the negative credibility findings then it could be said that too much weight had been placed upon this issue. However, the judge gave a number of reasons why the appellant's evidence was not credible. It was not irrational for the judge to rely on a failure to recall dates. The appellant was well-educated and these were dates of significant events. At paragraphs 18-19 the judge records that the appellant was asked for clarification. The judge had other reasons for making adverse credibility findings, as set out at paragraphs 20, 22, 23 and 25, which all formed part of her overall assessment. Although it was said that the appellant was going through a turbulent period, there was nothing to show that the appellant was unable to recall other key facts in his account. This was a matter for the judge and there was no error in her approach. It had certainly not been shown that her decision was one which no reasonable judge would reach.

13. Mr Govan then turned to the second ground, at paragraph 4 of the application. This was concerned with the findings made by the judge from paragraph 29 onwards regarding the plausibility of the appellant's account of his attempts to leave Rwanda. A reading of paragraph 29 showed the judge did not accept why the appellant did not leave Rwanda immediately if he had the financial means to do so. This finding was open to the judge, who referred to two further attempts to leave, described at page 4 of the appellant's witness statement. In one attempt the bus from Goma to Kampala was stopped by fighting. If the appellant had not known on the first occasion he attempted to use this route that it was unsafe he knew by the second occasion. The judge's findings in relation to this were not unreasonable and a disagreement with those findings did not disclose any error.
14. Mr Govan continued that the third ground of the application concerned an issue which was raised in the refusal letter, as pointed out by the judge at paragraph 36 of her decision, and by the Presenting Officer at the hearing. In his witness statement the appellant sought to address the issues arising from paragraphs 41-42 of the refusal letter but failed to answer the questions raised. The appellant said his problems started in August 2017. He travelled to DRC on his own passport. The judge was entitled to weigh the evidence and make a finding against the appellant. The issue was clearly live at the hearing before the First-tier Tribunal. Overall the judge gave a detailed and thorough decision, which should be upheld.
15. In response Ms Rashid acknowledged that the events for which the appellant could not remember the dates were significant but this was a time of trauma and turmoil and the appellant was not writing down the dates. He had no document to look at to remind himself of the dates.
16. In respect of the second ground, Ms Rashid said there was a problem with the second half of paragraph 29 of the decision, where the judge made an assumption which was not based upon the evidence. The appellant's position was that he did not know the roads were unsafe before making the decision to make the journey through the DRC. It was speculation to say that on the second occasion he knew the road was unsafe.
17. In relation to the third ground Ms Rashid submitted that the appellant had explained the journeys he undertook and the circumstances of them. Overall three errors were identified in the application which made the adverse credibility finding unfair. Without those errors a different finding might have been made. The appropriate course was remittal.

## **Discussion**

18. If it were to be established that the Judge of the First-tier Tribunal based her credibility findings on matters of which the appellant did not have notice and an opportunity to explain, then there would be unfairness in the decision. In order to establish if this occurred, however, it is necessary to look at the judge's findings in the context both of her decision as a whole and the evidence and submissions which were before her.
19. The contention which is made in this regard in the application for permission to appeal is that the appellant did not have a chance to respond to the judge's observation to the effect that the appellant did not explain why he returned with his daughter from DRC to Rwanda rather than remain in DRC and either make further attempts to travel from there overland to Uganda or arrange to leave DRC by air.
20. The starting point for the judge's analysis of the appellant's attempts to leave Rwanda is to be found at paragraphs 41 of the respondent's refusal letter, quoted by the judge at paragraph 31 of her decision. This passage in the refusal letter summarises the appellant's account of how he left Rwanda by air on 31<sup>st</sup> December 2017 but points out that in the 2 months prior to this the appellant left Rwanda on at least 5 occasions, according to stamps in his passport. At paragraph 37 the judge listed the stamps in the appellant's passport for the last three months of 2017. At paragraph 36 the judge pointed out that the appellant made no mention of several unsuccessful attempts to travel with his daughter to Uganda until the respondent referred to the passport stamps in the refusal letter.
21. From the point of view of fairness, it is significant that after the issuing of the refusal letter on 22<sup>nd</sup> June 2018 the appellant had notice that his passport stamps from the last months of 2017 raised an issue affecting the credibility of his claim. As Mr Govan pointed out in his submission, the appellant sought to address this in his witness statement of 31<sup>st</sup> July 2018, in response to paragraphs 41-42 of the refusal letter, but his explanation was not sufficient to satisfy the judge. The judge comments in some detail on the relevant part of this statement at paragraphs 32-36 of her decision.
22. The judge records at paragraph 37 that at the hearing before the First-tier Tribunal the appellant was shown a copy of his passport containing the relevant stamps, as listed by the judge. The judge then makes a finding at paragraph 38 to the effect that she did not find the appellant's explanations plausible or satisfactory of why he kept returning to Rwanda with his daughter when he feared persecution or death. The judge points out, in particular, that on 18<sup>th</sup> December 2017 the appellant and his daughter succeeded in leaving Rwanda overland to DRC with visas in their possession

which would have allowed them to travel from DRC to the UK. Then at paragraph 39 the judge questions how the appellant was able to travel backwards and forwards from Rwanda to DRC while he was allegedly in hiding. This is a further point arising from the respondent's refusal letter. The judge points out that as the appellant's travel to the UK was funded by his brother-in-law in the UK, this funding could have been made available to fly from DRC instead of from Rwanda. These were all findings or observations which the judge was entitled to make on the evidence and submissions she received.

23. One part of Ms Rashid's response to this on behalf of the appellant was to seek to lodge further country information relating to the safety of Rwandans in DRC. However, this evidence was not produced at the hearing before the First-tier Tribunal. There was evidence before the First-tier Tribunal about the road between Goma in DRC and the Ugandan border being closed owing to fighting but this was presented as indiscriminate violence and not described as directed specifically at the appellant or at Rwandans. Where the appellant has failed to offer any explanation of his behaviour which satisfied the First-tier Tribunal, it is not sufficient for the appellant to seek to explain this to the Upper Tribunal on the basis of country information of a general nature which was not previously produced. Even if this country information were to be the subject of a proper application under rule 15(2A) and to be admitted, it does not at all fill the gaps left by the inadequacies in the appellant's own evidence of his actions and intentions.
24. The third ground of the application for permission to appeal takes one paragraph, paragraph 33, from the decision of the First-tier Tribunal and attempts to show it contains a finding based on matters of which the appellant had no notice, without looking at the surrounding part of the decision, where the emergence of the issues and the failed attempts by the appellant to respond to them are explored and analysed. When the context and background are studied there is nothing at all unfair or improper about the comments made by the judge at paragraph 33. This is an entirely different situation from that in HA & TD, relied upon by Ms Rashid, where the judge made an adverse finding about a signature on a membership card without any issue relating to the signature having been raised at the hearing. In this appeal the third ground does not disclose any error of law on the part of the First-tier Tribunal. The position in this appeal is much closer to the first case considered by the Inner House in HA & TD, where having heard the evidence the immigration judge found that the appellant had not satisfactorily explained the questions arising from it.
25. I have started my consideration with the third ground of the application because this was potentially the most significant, if it

was made out. The other two grounds may be addressed more briefly.

26. Turning to the second ground, it is said that the judge erred at paragraph 29 of the decision by drawing an adverse inference from the appellant's repeated attempts to leave Rwanda overland instead of doing straightaway what he resorted to at the end of 2017, which was bribing his way out through the airport in Rwanda. Again, it is necessary to look at this finding in the context I have set out above. The appellant failed to explain to the Judge's satisfaction why he made repeated journeys from Rwanda to DRC in last 3 months of 2017. The judge recorded at paragraph 28 the appellant's evidence that he did not try to leave Rwanda by air until he decided he had no other choice. Clearly the judge did not accept this explanation, for reasons which she sets out in succeeding paragraphs. The second ground of the application for permission to appeal is little more than an attempt to make further detailed submissions on a matter which was considered by the judge and on which the judge made properly reasoned findings based on the evidence.
27. The first ground of the application concerns the judge's findings on the appellant's inability to recall a number of significant dates. On first reading this does seem to have some weight. How could the appellant be expected to remember the precise dates of the events in question? On further examination, however, there is more to this than at first appears. The judge recorded at paragraph 18 that there were occasions when the appellant "did not answer simple questions directly but gave lengthy answers which were not to the point". At paragraph 19 the judge records that the appellant was asked about certain dates but answered by specifying only the month. It seems that in response to direct questioning at the hearing the appellant provided no more than the month in which an event occurred, he did not give even a part of the month, for example either early or late, or a day of the week, or whether towards the beginning or the end of the week. A similar issue arose at paragraph 22, when the appellant was asked the date when his daughter was questioned at school.
28. Ms Rashid suggested that the judge should have taken into account the trauma and turmoil experienced by the appellant. Mr Govan responded that this did not seem to have affected any other aspect of the appellant's recollection of events. It may be observed that in general recollection may be affected by the nature of events or the emotions surrounding them. Nevertheless, in the context of the evidence in this appeal the judge was entitled to find it surprising or damaging that the appellant should be so vague about these dates, for the reasons which she gave.

29. I have examined the judge's findings and reasons in some detail. The appellant disagrees with some of those findings and has sought to show that they were tainted by errors of law. For the reasons I have given, I am not at all persuaded that this is so. The Judge of the First-tier Tribunal assessed the evidence before her fairly and thoroughly and made findings which were based upon the evidence and supported by adequate and valid reasons.

### **Conclusions**

30. The making of the decision of the First-tier Tribunal did not involve the making of an error of law.
31. The decision dismissing the appeal shall stand.

### **Anonymity**

The First-tier Tribunal did not make a direction for anonymity. I have not been asked to make such a direction and see no reason of substance for doing so.

M E Deans  
Deputy Upper Tribunal Judge

23<sup>rd</sup> April 2019