IAC-AH-SC-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/02859/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8th September 2021	**On 2nd November 2021**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

L V N
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr G Dolan, counsel, instructed by FLK Solicitors
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of Judge of the First-tier Tribunal Abebrese promulgated on 17th February 2021, dismissing the appellant's protection appeal and Article 3 human rights appeal and humanitarian protection appeal, but allowing his appeal under Article 8 of the European Convention of Human Rights.

Background

2. The appellant is a citizen of the Democratic Republic of Congo, hereinafter DRC. He was born on 29th August 1991. He arrived in this country illegally in February 2002. Various applications were made on his behalf for leave to remain as the child of a settled parent in the UK, but these applications were all rejected, the last being in 2005.

3. The appellant has several criminal convictions. In August 2009 he was convicted of possession of a knife or blade or pointed article in a public place for which he received a sentence of a six month detention and training order. His most recent conviction relates to an offence that occurred in September 2014 in respect of the possession with intent to supply illegal drugs, a combination of class A and class B drugs. He was convicted on 5th December 2014 and received a sentence of 48 months, a four year prison sentence.

4. The appellant submitted a protection claim based on his fear of persecution should he be deported to the DRC. He claimed firstly that he was a member of a political group called Apareco which is an opposition organisation in the DRC. The appellant claimed that he was a genuine member of this organisation and that as a result of the position of deputy leader he held in the organisation, he would come to the adverse attention of the DRC authorities. The appellant secondly and independently claimed that he was gay and that he would face a well-founded fear of persecution in the DRC as a result of his sexual orientation.

5. In a refusal letter dated 30 January 2018 the respondent rejected the appellant's claim to be a member of Apareco and refused his protection and human rights claim. This was based primarily on vague information provided by the appellant during his substantive asylum interview. The respondent additionally rejected the appellant's claim to be gay. This was based on the absence of evidence before the respondent supporting the appellant's claim and inconsistencies in evidence given by the appellant during his interview relating to when he first realised that he was gay.

The decision of the First-tier Tribunal

6. The appeal was heard by the First-tier Tribunal via CVP on 26th January 2021. The appellant gave oral evidence, as did a Mr Livingston Moundele who was also a member of Apareco. The judge additionally heard evidence from the appellant's mother.

7. In his decision the judge set out the immigration and criminal background relating to the appellant, although I note reference was only made to the appellant's four year sentence at the very end of the judge's decision. The judge set out the grounds of appeal and referred to the burden and standard of proof.

8. The judge then summarised the evidence before him before making his findings, which began at paragraph 27. The judge first dealt with the Section 72 certificate that had been issued in the challenged decisions. The judge noted that the OASys Report relating to the appellant was dated 15th March 2017 and that it indicated that the appellant was at medium risk to the public. The judge nevertheless found that the appellant had not committed any offence since his index office in September 2014. The judge found evidence given by the appellant and his mother relating to his changed ways to be credible, although I note there is perhaps a dearth of reasoning in support of that finding, and the judge noted that the offences were committed by the appellant when he was aged between 16 and 21. Although I did not raise this with the parties this must be a factual error as the index offence was committed on 11th September 2014 and the appellant would therefore have been 23 years old at that time. Nevertheless, the judge concluded that the appellant, because of the absence of any further offending and because of the evidence provided by him and his mother was now a mature man, that he understood the seriousness of the situation and that the Section 72 certificate fell to be discharged.

9. The judge then went on to consider the appellant's claim to be gay and his claim in relation to his sur place political activities. At paragraph 28 the judge did not find the appellant's claim to be genuinely involved in political activities to be credible. The judge noted the appellant's claim to be a deputy leader in the youth wing of Apareco but noted that he only joined the party when he raised this asylum claim and found that this was in order to bolster the claim for asylum. The judge noted that the appellant had shown a lack of knowledge of the organisation in his asylum interview and that he did not give the correct name for the leader of Apareco in the UK. At paragraph 29 the judge stated that the appellant had shown a lack of knowledge of politics in the DRC and could not even name the president of the country who had been in power for many years. I pause to note, although this is a point that I did not specifically raise with the parties at the hearing, that this is inaccurate. In his interview the appellant did in fact name the president of the DRC but could not name the president's party. The judge then stated, "The appellant did call Mr Moundele to support his political activities with Apareco but I have attached little weight to his evidence because of the circumstances and timing of the appellant's claim for asylum."

10. The judge then considered the appellant's claim to be gay but found there was insufficient evidence to support this claim. The judge referred to the inconsistent evidence given by the appellant in his asylum interview as to when he first became aware of his sexual orientation. The judge noted the absence of evidence that the appellant had lived his life in this country as a gay man. It is likely that the judge meant to say as an 'openly' gay man. The judge noted the inability of the appellant to provide any evidence of a relationship he claimed to have with a man in this country called Stefan and that he had previously been in a relationship with a woman that

nearly led to marriage. The judge concluded that the appellant was not gay.

11. The judge finally considered the appellant's Article 8 claim. At paragraph 32 the judge considered whether there were very significant obstacles under paragraph 276ADE(1)(vi) of the Immigration Rules to the appellant's return to the DRC. The judge noted that the appellant had not himself returned to the DRC since arriving in this country and neither had members of his family who were living in this country. The judge noted that the appellant was approaching the age of 30 and had lived a significant part of his life in this country and would not, in the judge's view, be able to integrate into the DRC and would not have the support that he may need from his family, and his mother in particular. No further reasoning was provided by the judge as to why the appellant would be unable to integrate into the DRC.

12. At paragraph 33 the judge then considered whether there were any exceptional circumstances outside of the Immigration Rules that would render the appellant's deportation an unjustifiably harsh consequence to him or his family members. The judge noted that the appellant had a close bond with his family and would lose this if he returned to the DRC, and that he had no family members in that country. I pause to express my concern that the judge applied the 'unjustifiably harsh consequence' test in the context of a deportation decision. The judge then finally set out the requirements of Section 117C of the Nationality, Immigration and Asylum Act 2002 and then at paragraph 34 the judge said this:

> "I am of the view that the appellant is a foreign criminal who has been sentenced to a period of imprisonment of at least four years and the public interest requires that he be deported unless there are very compelling circumstances over and above those described in exceptions 1 and 2. There in my view based on the evidence compelling evidence based on the age of the appellant when he arrived in this country, and the length of time that he has been in the UK coupled with the fact that all members of his family are in the UK. I am also of the view that the appellant has not committed an offence for a considerable amount of years and that he is unlikely to do so."

13. The judge consequently dismissed the asylum and humanitarian protection appeals, but allowed the appeal under Article 8 ECHR.

The challenges to the judge's decision

14. Both parties have cross appealed. The Secretary of State has appealed the judge's decision in relation to Article 8 arguing, inter alia, that the judge made reference to the wrong legal test for an assessment of Article 8 in the context of a deportation in his decision at paragraphs 32 and 33, that the judge failed to adequately weigh up the public interest factors in determining whether there were very compelling circumstances over and above those described in Exceptions 1 and 2 under Section 117C, and that the judge did not give adequate reasons why there would be very

compelling circumstances or weigh up the relevant public interest considerations.

15. The appellant challenges the judge's decision in relation to his finding that the appellant did not face a real risk of persecution because of his sur place activities. Firstly, on the basis that no consideration was given to the evidence of Mr Moundele, and secondly, that even if the judge was entitled to find that the appellant's involvement was not genuine, there was a failure to consider whether he would face a real risk of persecution as a result of a political opinion that may be imputed to him by the authorities in the DRC based on his level of activities and involvement with Apareco in the UK.

16. The appellant also challenges the judge's findings in relation to his claim that he was not gay, primarily on the basis that the judge failed to take into account relevant evidence and that the judge did not consider the appellant's explanation, which was based on cultural characteristics, for his previous involvement and relationship with a woman.

17. Permission was granted by separate judges in relation to both sets of grounds. I have heard submissions from both Mr Dolan, representing the appellant, and Mr Avery, representing the Secretary of State. I am grateful to their focused, concise and precise submissions.

Discussion

18. The original grounds of appeal by the Secretary of State made no reference whatsoever to the judge's determination of the Section 72 certificate. No grounds were raised in the respondent's grounds sent on 23rd February 2021 and permission was not granted in respect of anything challenging the Section 72 certificate.

19. The Secretary of State now seeks to challenge the judge's findings in relation to the Section 72 certificate. This appears in a Rule 24 response dated 17th June 2021. A significant period of time has however elapsed between the grant by Judge Nightingale of permission to proceed with the appeal dated 25th February 2001 and what amounts to an attempt by the Secretary of State to amend the grounds using the Rule 24 Procedure in the Rule 24 response which is dated 17th June 2021. I am not satisfied that any adequate reason has been given for this extremely late attempt to challenge that aspect of the judge's decision. In any event I am entirely satisfied that the judge gave legally adequate reasons for discharging the Section 72 certificate. The judge took into account the OASys Report and its findings that the appellant posed a medium risk to the public. The judge was clearly aware of that finding. The judge noted however that the OASys Report was of some vintage, being issued on 15th March 2017. The judge noted the absence of any further offending by the appellant and found that the appellant had the support of his family and was now mature. Whilst that may be a generous assessment of the evidence I do

not find that it was one that was outside the reasonable conclusions open to the judge for the reasons that he gave.

20. The Secretary of State, in her Rule 24 response, accepted that the judge had erred in law in his approach to the sur place activities because the judge simply did not consider whether, even if the appellant was not genuinely involved in Apareco, there was a real risk that a political opinion could be imputed to him by the authorities on his return to the DRC, thereby putting his life a risk. This error is in my judgment material in light of **BM (returnees – criminal and non-criminal) DRC (CG) [2015] UKUT 00293 (IAC)**. This is the relevant country guidance case and it indicates that there may be a real risk of persecution to those with a significant and visible profile within Aparego, UK. The fact that the appellant appears to hold a position as deputy leader of the youth wing is something that the judge should have considered but failed to do so, and this error is in my judgment material.

21. I am additionally concerned however that the judge has attached little weight to the evidence given by Mr Livingston Moundele. The judge explained that he did this because of the circumstances and timing of the appellant's claim for asylum. There has been no engagement with the written or oral evidence given by Mr Moundele. In these circumstances I am satisfied that the judge has failed to either take into account relevant evidence or failed to adequately engage and make material findings in respect of relevant evidence.

22. I am additionally concerned that the judge has erred in law in his conclusion that the appellant was not gay. I accept that the judge did advance reasons for reaching his conclusion. These included the inconsistent evidence given by the appellant in his asylum interview, the absence of any other evidence that the appellant was living in the United Kingdom as a gay man, the absence of any evidence of his previous relationship with a man, and the fact that the appellant had previously been in a relationship with a woman. There has however been no engagement with the explanation provided by the appellant as to why he had previously been in a relationship with a woman. He maintains that this was due to cultural considerations. Whilst it may have been open to the judge to reject this explanation, it was nevertheless incumbent on the judge to at least engage with the explanation proffered by the appellant. I note that the grounds of appeal and the skeleton argument before the judge made reference to the Secretary of State's Asylum Policy Instruction on Sexual orientation in asylum claims version 6.0 dated 3rd August 2016. The judge noted at paragraph 8 of his decision that the policy stated that in considering late disclosure and credibility, consideration must be given to any possible reason for not disclosing the issue of sexuality at the first available opportunity during the screening interview, and that there may well be feelings of shame, cultural implications or painful memories, particularly those of a sexual nature. The judge simply did not engage in this instruction or consider whether there may be cultural implications for the appellant's involvement with a woman. Moreover, the judge has not

engaged in the evidence from the appellant's mother whom he previously found credible in relation to whether the appellant was a changed person. The mother, albeit reluctantly, appeared to accept that the appellant was gay. This was relevant evidence. The judge simply did not make any reference to it. The judge may well have been entitled ultimately to reject the appellant's claim, but he did not reach his conclusion through a legally sound route because he failed to take into account relevant considerations.

23. Finally, I am persuaded, despite Mr Dolan's best efforts, that the judge has materially erred in his approach to the Article 8 human rights claim. Firstly, the judge applied, at paragraphs 32 and 33, the wrong test in the context of deportation appeals. It was not at all clear to me why the judge considered paragraph 276ADE(1)(iv) or why the judge then went on, at paragraph 33, to consider whether there may be exceptional circumstances outside of the Immigration Rules. Mr Dolan indicated however that the judge did ultimately set out the correct legal test - in Section 117C(6) of the Nationality, Immigration and Asylum Act 2002 - and he drawn my attention to paragraph 34 where the judge referred to that test. Mr Dolan submits that the judge's reasoning, albeit sparse, is defensible because the judge made reference to material considerations relating to the appellant's age when he arrived in this country, the length of time he has been here and the absence of any family he has in the DRC, and that although the reasoning is sparse the judge was entitled to that conclusion.

24. I am afraid that I cannot accept that submission. The judge's assessment at paragraph 34, especially in relation to his reasoning, is wholly inadequate. There has been no adequate assessment of the significant public interest in the appellant's deportation. There has been no weighing of the appellant's offending against his personal circumstances. There has been no exploration as to why the appellant could not receive some support from his family in the UK. There has been inadequate assessment of the private life that he claims to have established in the UK. There has been inadequate assessment as to how the age at which the appellant arrived affects his ability to integrate into society in the DRC.

25. I am entirely satisfied that the judge's assessment is legally inadequate and that he has not given proper or adequate reasons for his conclusions. In these circumstances I find that the decision must be set aside in its entirety save for the judge's discharge of the Section 72 certificate. The appeal will therefore be remitted to be considered afresh by a judge other than Judge of the First-tier Tribunal Abebrese.

Notice of Decision

The making of the First-tier Tribunal's decision involved the making of an error on a point of law requiring it to be set aside, save for the First-tier Tribunal's assessment of the s.72 certificate.

The case will be remitted back to the First-tier Tribunal for a de novo hearing (save for the discharge of the s.72 certificate) before a judge other than Judge of the First-tier Tribunal Abebrese.

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.

D.Blum
Signed

20 September 2021
Date

Upper Tribunal Judge Blum