



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal number: PA/11477/2018

THE IMMIGRATION ACTS

Heard at: Field House
On 31 August 2021
via Microsoft Teams

Decision & Reasons Promulgated
On 2 September 2021

Before

Upper Tribunal Judge Gill

Between

Mr M M T
(ANONYMITY ORDER MADE)

Appellant

And

The Secretary of State for the Home Department

Respondent

Anonymity

I make an order under r.14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the appellant. No report of these proceedings shall directly or indirectly identify him. This direction applies to both the appellant and to the respondent and all other persons. Failure to comply with this direction could lead to contempt of court proceedings.

I make this order because this is a protection claim.

The parties at liberty to apply to discharge this order, with reasons.

Representation:

For the appellant: Ms A Mughal, of AMB Advocates.

For the respondent: Ms A Everett, Senior Presenting Officer.

Decision

1. The appellant, a national of the Democratic Republic of the Congo (DRC) born on 6 January 1990, appeals against a decision of Judge of the First-tier Tribunal S Gillespie (hereafter the “judge”) promulgated on 2 April 2020 following a hearing on 21 February 2020 which dismissed his appeal on asylum, humanitarian protection and human rights grounds against a decision of the respondent of 13 September 2018 by which the respondent refused his asylum and humanitarian protection claims and also refused his human rights claim.

2. The grounds (in summary) contend that the judge materially erred in law in reaching his adverse credibility assessment and also in assessing the risk arising from the appellant's *sur place* activities.

Basis of asylum claim

3. The appellant first arrived in the United Kingdom on 11 November 2017 in order to attend a three-day conference in Coventry connected with his employment with the Ministry of Fisheries and Agriculture. He did not return to the DRC immediately after the conference but remained in the United Kingdom until 15 January 2018. During the period before his return to the DRC on 15 January 2018, he became involved for the first time in the political organisation, The Alliance of Patriots for the Refoundation of the Congo (APARECO) and attended a demonstration outside the DRC embassy in London. His activities in the United Kingdom on behalf of APARECO came to the attention of the Congolese authorities after he returned in January 2018. His cousin was arrested in the DRC on 15 February 2018 and tortured into telling the authorities where he lived. The authorities went to look for the appellant at his home at 7.a.m. on the same day. His neighbour contacted him and told him what had happened. The soldiers found some 'small' APARECO leaflets at his home. The appellant did not return home. He fled to his uncle's house and then left Kinshasa at night on 11 March 2018. He crossed the river by canoe to Congo Brazzaville.
4. The appellant arrived in the United Kingdom on 13 (or 14) March 2018. Subsequent to his arrival in the United Kingdom, his original DRC passport was sent to him.

The grounds

5. The grounds contend that the judge erred in law as follows:
 - (i) Ground 1: The judge erred in his consideration of the appellant's *sur place* activities in that he failed to consider five Facebook posts and 51 photographs of the appellant attending demonstrations outside the DRC Embassy in London. He therefore erred in finding (para 39) that the appellant was an ordinary member of the APARECO in the United Kingdom.
 - (ii) Ground 2: The judge erred in his assessment of the appellant's credibility in that he erred in stating at para 10 of his decision that the original of the appellant's DRC passport had not been produced at the hearing. In fact, the original had been produced at the hearing and it had been examined by the judge.
 - (iii) Ground 3: In his assessment of the risk arising from the appellant's *sur place* activities, the judge erred (at para 29) by rejecting the risk arising from the appellant's *sur place* activities on the basis that the activities had been undertaken by the appellant because he needed time to prepare his asylum claim and to engage in some form of political activities in order to mount his asylum claim.

Assessment

6. In relation to ground 2, I have the benefit of a witness statement dated 5 July 2021 from Mr Bruno Augusto Kormann Rodrigues of Cassadys Solicitors. He represented the appellant before the judge. In his witness statement, he says that he distinctly recalled that the hearing was conducted in one of the small rooms at Taylor House and that when the issue of the passport came up in the proceedings, he informed the

judge that he was in possession of the passport. As the hearing was being conducted in a small hearing room, he was able to reach out with the passport in his hand. He handed it to the judge who then examined it. He then walked to the respondent's representative and handed the document over to her to give her an opportunity to inspect it, which she did following which she returned the passport to him.

7. Mr Rodrigues was not available at the hearing before me to give oral evidence. It appears that, by the time the appellant's file was received from Cassadys Solicitors on 17 August 2021, Mr Rodrigues had already undertaken other work commitments today. In the event that I considered it necessary for Mr Rodrigues to be available to give oral evidence, Ms Mughal asked me to adjourn the hearing.
8. Ms Mughal confirmed that she was in possession of the original of the appellant's passport. In view of the fact that the judge had stated (at para 25) "*in the absence of [the appellant's] entire passport I am not persuaded that he came back to the UK in the way he claims*", I asked Ms Mughal to show me via Teams the entire passport, page by page, which she then proceeded to do.
9. Having had an opportunity to see the passport in that way, page by page, I am satisfied that Ms Mughal was indeed in possession of a passport in the appellant's name, that it was a complete passport with no missing pages and that page 9 of the passport had a DRC entry stamp dated 15 January 2018.
10. Ms Everett informed me that she could see no reason to doubt the evidence of Mr Rodrigues that he had handed the original of the passport to the judge and that the judge had examined it.
11. I am in the position where I have to choose between the evidence of Mr Rodrigues and the fact that the judge stated in his decision that the original of the passport had not been produced at the hearing.
12. I bear in mind that the judge had stated clearly in his decision that the original of the passport had not been produced at the hearing. His record of the proceedings ("RoP") made no mention at all of the passport having been produced at the hearing.
13. I considered the possibility that the passport had been produced to the judge but the judge had failed to record that fact in his RoP. Assuming that he consulted his RoP during the preparation of his decision, which in my view it is reasonable to assume, the fact that it did not make any mention of the passport having been produced may explain why he stated that it had not been produced. On the other hand, it may also be the case that the RoP was silent on this point because the passport was not produced at the hearing, contrary to the evidence of Mr Rodrigues.
14. I concluded that I could not exclude the possibility that the judge simply omitted to mention in his RoP that the passport had been produced at the hearing and that he relied upon the fact that his RoP was silent on the point in stating in his decision that the passport had not been produced. The decision of the judge was signed on 17 March 2020, i.e. some 24-25 days after the hearing date. It is not known when he commenced preparation of his decision and therefore it is unsafe for me to assume that, when he prepared his decision, he would have had a clear recollection of events that had taken place at the hearing before him.
15. On the other hand, the evidence of Mr Rodrigues is clear. He is detailed in his recollection of events.

16. In all of the circumstances, I accept the evidence of Mr Rodrigues, notwithstanding that he was not available before me to give oral evidence, that he was in possession of the original of the appellant's passport at the hearing before the judge, that he had handed the passport to the judge and that the judge had examined it. I am therefore satisfied that the judge had simply made a mistake when he stated in his decision that the passport had not been produced.
17. I am therefore satisfied that the judge did err in law in stating, at paras 10 and 25, that the appellant's passport had not been submitted in evidence.
18. Ms Everett accepted that this error was material to the outcome. I am satisfied that it was material to the outcome.
19. Ground 2 is therefore established. For the reasons given above, I set aside the judge's entire decision. None of the findings of fact shall stand.
20. Credibility will therefore need to be re-assessed. It is not necessary for me to consider grounds 1 and 3. This is because the future risk will need to be re-assessed following a re-assessment on the merits of the credibility of the appellant's account of the basis of his asylum claim. At that stage, his *sur place* activities will fall to be re-assessed on the merits and taken into account in the assessment of the future risk.
21. The final issue is whether this appeal should be remitted to the First-tier Tribunal for a fresh hearing.
22. Given that credibility needs to be re-assessed afresh and that this is a protection claim, it is plain that this case falls within para 7.2(a) of the Practice Statements for the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal.
23. I take into account that the hearing before the judge was the second time this appeal has been heard in the First-tier Tribunal. It was first heard by Judge of the First-tier Tribunal Sangha on 3 December 2018. His decision was set aside by Deputy Upper Tribunal Judge Jordan in a decision promulgated on 2 September 2019 and the appeal remitted to the First-tier Tribunal for a fresh hearing on the merits.
24. I do not agree that this is a complicated case such that the decision on the appeal should be re-made in the Upper Tribunal. The appellant's account of the basis of his asylum claim is not complicated. The fact that two judges of the First-tier Tribunal have had their decisions set aside does not, in itself, mean that the case is complicated. Judge Jordan found that Judge Sangha had materially erred in law by failing to indicate what he made of documentary evidence that had been submitted in support of the appellant's asylum claim. I am satisfied that the judge had materially erred in law in stating that the original of the appellant's passport was not produced. These are simple errors that have no material bearing on whether or not the case is complicated.
25. If the decision on the appellant's appeal is re-made in the Upper Tribunal, the appellant will be nearer to a resolution of his case, whether that is favourable to him or not. However, he will be deprived of an opportunity to challenge an adverse decision to the Upper Tribunal, if the decision is adverse. He should not be lightly deprived of that opportunity, given that two judges of the First-tier Tribunal have made adverse credibility assessments against him.

26. In all of the circumstances, I have concluded that fairness requires that the appeal be remitted to the First-tier Tribunal for a hearing on the merits on all issues.

Notice of Decision

The decision of the First-tier Tribunal 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 Sangha and Judge of the First-tier Tribunal S Gillespie.

Upper Tribunal Judge Gill

Date: 31 August 2021

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:
2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically)**.
3. Where the person making the application is in detention under the Immigration Acts, **the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.
4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically)**.
5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.
6. The date when the decision is "sent" is that appearing on the covering letter or covering email