



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/07210/2017
HU/07209/2017
PA/06137/2017

THE IMMIGRATION ACTS

Heard at Field House
On 13th December 2018

Decision & Reasons Promulgated
On 30th January 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE D E TAYLOR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

K C O O (FIRST APPELLANT)
I E O (SECOND APPELLANT)
(ANONYMITY DIRECTION MADE)

Respondents

Representation:

For the Appellant: Mr L Tarlow, Home Office Presenting Officer

For the Respondents: Miss G Loughran of Counsel instructed by Bindmans LLP

DECISION AND REASONS

1. This is the Secretary of State's appeal made against the decision of Judge McIntosh following a hearing at Taylor House on 6th March 2018.

Background

2. The claimants are citizens of Nigeria. They applied to remain in the UK both for leave to remain on the grounds of their private life and compassionate circumstances in respect of Mrs O's medical condition and because Mr O feared a return to Nigeria where he said that he would be persecuted for his political opinion.
3. In 2002, the first claimant, Mr O, applied in 2002 for a student visa to come to the UK but was refused. The following year he was granted entry clearance in the name of his father and was granted a multi-visit visa on 31st October 2003. He arrived in the UK and overstayed.
4. In 2008 he submitted an asylum claim, again using the alias of his father, and was again refused. As a consequence of having been encountered using false documents he was sentenced to four months' imprisonment in October 2008. His application for asylum was refused in February 2011, and a subsequent appeal was dismissed. Further submissions and representations were made, including judicial review proceedings, at which point the Secretary of State agreed to reconsider the previous decision. On 14th June 2016 the Secretary of State again refused and again further representations were made.
5. On 12th June 2017 a further decision to refuse him asylum was made, and it was this decision which was the subject of the appeal before the Immigration Judge.
6. The judge recorded the claimant's evidence and concluded that he had now established his true identity.
7. At paragraph 66 she wrote:-

"I have however, considered the appellant's application not in isolation, but together with the information in support of the asylum appeal. I have heard evidence in relation to the asylum appeal and read the documents in support of the appellant's asylum claim. I noted also the previous decision of Immigration Judge Kelsey, which concerned the first appellant's asylum claim, upon which Mrs O was named as a dependent (sic). I find the decision of Immigration Judge Kelsey to be distinguishable as the facts and criteria are different. I am however permitted to have regard to the judge's findings in relation to the appellant's credibility. Immigration Judge Kelsey found the appellant's credibility to be damaged due to his use of false documents, his conviction for the use of false documents and having been found in possession of false documents. Mrs O had also admitted to using false documents. At his previous appeal the appellant failed to produce evidence to verify his true identity. Within the proceedings before me the appellant had gone to great lengths to obtain evidence to verify his true identity and to confirm his continued presence in the UK from 2003. I found the evidence of the first appellant, Mr O, to be consistent with the documents he produced. I have regard to his evidence in conjunction with the background information of his asylum claim. I note that historically, as part of his case he had not been detained by the SSS but had received information in relation to his friend C. He also saw the injuries which C sustained during his detention. The appellant states that he was frightened by what he was told and what he had

seen. As a consequence, the appellant became less involved with the political activities in Nigeria. I found that part of the appellant's case to be telling and indeed feasible. I found the appellant had not sought to exaggerate the circumstances of his case".

8. The judge went on to state that it was the claimant's case that he had always had an interest in the political regime in Nigeria and that he had been repeatedly detained and tortured there, the worst instance being in 1997 when he was taken to a garrison and kept for four months. She concluded that the claimant faced a real risk of persecution for a Convention reason and allowed the appeal, allowing the second appellant's appeal in line with that of her husband as the spouse of a refugee.

The Grounds of Application

9. The Secretary of State sought permission to appeal on the grounds that the judge had made a material misdirection of law failing to correctly adhere to the principles outlined in the case of Devaseelan (Second Appeals - ECHR - Extra-Territorial Effect) Sri Lanka [2002] UKIAT 00702. There had been very little detail or analysis of the findings of the previous judge. The present judge had failed to treat those findings as the starting point when assessing the new evidence in the appeal.
10. Secondly, the judge had failed to provide reasons or any adequate reasons for finding on material matters, namely failing to provide adequate evidence-based reasons for departing from the previous determination and not providing adequate evidence-based reasons for concluding that the claimant continued to be politically active or that he was politically active in Nigeria.
11. Finally, the judge provided no proper reasons for concluding that the claimant was now a credible witness. It was not known why he had now been found to have made out his claim to the required standard of proof.
12. Permission to appeal was granted by Judge Chohan on 18th October 2018.
13. Following that grant the second claimant sought permission to appeal against the judge's decision in relation to her findings on Article 8. Permission was granted by Upper Tribunal Judge Kebede on 28th November 2018, which took Mr Tarlow by surprise since he was not aware of the claimant's cross-appeal.

Submissions

14. Mr Tarlow submitted that the judge had not properly taken into account as her starting point the findings of Immigration Judge Kelsey, and insufficient reasons had been given for departing from his conclusions. Secondly, it was unclear why the claimant had now been able to establish that he would be at risk on return.
15. Miss Loughran strenuously defended the decision submitting that the decision of Judge Kelsey was made principally because there was a lack of supporting evidence, both as to the claimant's identity and his ability to substantiate his claim to be at risk

on return to Nigeria. By contrast, before First-tier Judge McIntosh the claimant had produced four witnesses and a large number of documents which the judge was entitled to rely on for the reasons which she gave. There was medical evidence which was consistent with the claimant's case that he had been tortured in Nigeria, together with a country expert report addressing the risk which the couple would face on return as a childless couple.

16. Miss Loughran submitted that there was no general reasons challenge in the grounds which had been pleaded solely in relation to an error of law in relation to the First-tier Judge's decision.

Consideration as to whether there is an Error of Law

17. In spite of Miss Loughran's coherent arguments I am not persuaded by them.
18. First, in relation to the Devaseelan point, whilst I accept that there was far more evidence before the present judge than there had been before Judge Kelsey, and that she may have been entitled to depart from his findings, she did not in fact apply the correct test. She said that she was permitted to have regard to Judge Kelsey's findings, whereas in fact she ought to have treated them as the starting point when making credibility findings in the present case. It is not at all clear from the determination that she did treat that.
19. Second, whilst I accept that the Secretary of State's grounds could have been clearer, I am satisfied that in fact at 2b), 2g) and 2h) of the grounds, the Secretary of State was articulating a general reasons challenge.
20. It is made out. I am quite unclear from this determination as to why the judge has concluded that the claimant would be at risk on return to Nigeria were he to be returned today.
21. In Budhathoki (reasons for decisions) [2014] UKUT 00341 the Tribunal said:-

"We are not for a moment suggesting that judgments have to set out the entire *interstices* of the evidence presented or analyse every nuance between the parties. Far from it. Indeed, we should make it clear that it is generally unnecessary, unhelpful and unhealthy for First-tier Tribunal judgments to seek to rehearse every detail or issue raised in the case. This leads to judgments becoming overly long and confused. Further, it is not a proportionate approach to deciding cases. It is, however, necessary for First-tier Tribunal judges to identify and resolve the key conflicts in the evidence and explain in clear and brief terms their reasons for preferring one case to the other so that the parties can understand why they have won or lost."
22. Whilst it is clear from the determination why the judge concluded that the claimant had now established his true identity it is not at all clear why she considered that he had established that he was entitled to a grant of asylum.
23. Accordingly, the decision is set aside and will have to be remade.

24. All parties agreed that the decision on Article 8 in relation to the second claimant will be remade at the same time. I note that there have been considerable delays in this case, not least a delay of over six months (not referred to in the grounds) between the hearing of this case and the promulgation of the decision. It would be helpful therefore if it could be reheard as soon as possible.

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

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

Deborah Taylor

Signed
Deputy Upper Tribunal Judge Taylor

Date 4 January 2019