Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/07652/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7 February 2019	**On 27 February 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE LATTER

Between

YD
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms A Broadfoot QC and Mr R Jesurum, counsel.
For the Respondent: Mr E Tufan, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the appellant against a decision of the First-tier Tribunal dismissing his appeal against the respondent's decision of 27 July 2017 refusing to grant him asylum or humanitarian protection.

Background

2. The appellant is a citizen of Kenya born on 23 March 1965. He last arrived in the UK in 2009 and on 17 June 2010 he applied for a visa as a spouse. His application was refused as was a subsequent application made on 12 January 2011. He was served with notice that he was an illegal entrant and liable to removal on 13 September 2013. Meanwhile, two extradition requests in respect of allegations of fraud had been made by the Kenyan government in 2011 and 2013.

3. The appellant challenged both requests and an extradition hearing took place before a district judge, heard over a period of 11 days between 10 December 2012 and 23 July 2014. On 3 September 2014 the district judge dismissed all the challenges. There was an appeal to the High Court, but this was dismissed in a judgment issued on 11 December 2015. On 16 February 2016 the appellant applied for asylum claiming that the criminal proceedings against him in Kenya were politically motivated by the fact that he was an Indian Kenyan and a supporter of an opposition leader.

4. His appeal was heard by the First-tier Tribunal on 31 October 2018 and judge's decision was issued on 28 November 2018. The judge was not satisfied that the appellant was at real risk of persecution by reason of being an Indian Kenyan for the reasons set out in [33] of her decision or that the criminal proceedings in Kenya were politically motivated for the reasons set out at [36]-[39]. She, therefore, found that the appellant would not be at real risk of persecution for a Convention reason.

5. The judge went on to consider the position under article 3 noting that the district judge had found that removing the appellant to Kenya would not be a breach of article 3 on the basis of the prison conditions in which he would be held and that that decision had been upheld by the High Court. It was argued on behalf of the appellant that she should depart from those findings for the following reasons: prison conditions generally in Kenya breached article 3; there had not been a visit to the part of Kamiti prison in which the appellant would be held; the assurances given by the Kenyan government that the appellant would be held in Kamiti prison and in a single cell were unreliable as illustrated by the Kenyan authorities treatment of GD, a Kenyan citizen extradited to Kenya after assurances were given by the Kenyan government, and that, in consequence, there was a real risk that the appellant would be held elsewhere than in Kamiti prison or in conditions there which breached article 3. The respondent sought to argue that it was not open to the judge to take a different view under article 3 from the decision made by the High Court in 2015 (see [26] and [46]).

6. The judge accepted that the prison conditions in Kenya were harsh and could be life threatening and in breach of article 3. She noted the reports of the visit made by Lord Ramsbotham[1] that the prisons he had inspected in Kenya were "basically healthy" albeit with room for improvement. She

[1] Lord Ramsbotham, former HM Chief Inspector of Prisons from 1995-2001 was asked to produce a report on prison conditions in two prisons in Kenya to assist the then Home Secretary in deciding the application for extradition by the Kenyan government in respect of GD

was satisfied that Lord Ramsbotham had inspected the prison where the appellant would be held in compliance with assurances given by the Kenyan authorities. It was argued on behalf of the appellant that those assurances were unreliable in the light of the way GD had been treated when he was returned.

7. The judge was satisfied that specific assurances had been given in GD's case that on remand he would be housed in the special unit at Kamiti Maximum Prison in a single cell which he would occupy alone and that, if sentenced, he would be housed in the special units of the prison in a single cell which he would occupy alone. Evidence was produced in the form of a statement from someone describing himself as GD's lawyer but, for the reasons given in [47], the judge was not satisfied that this showed that GD had been held in shared cell accommodation in excess of one year. However, the second item of evidence on this issue was a news article dated 11 August 2017, setting out a complaint by GD that in breach of the Kenyan government's assurances, he was held in a dirty room with 11 other people.

8. At [48] the judge said:

> "… Based on this report and in the absence of anything on its face undermining its reliability and of any evidence from the respondent challenging the contents of this report I find that on return to Kenya GD was held in shared prison accommodation for six days in breach of assurances which had been given by the Kenyan government."

9. The judge then said at [49]:

> "The High Court in (the appellant's appeal) was satisfied in 2015 on the basis of Kenyan assurances that the appellant would not be held in conditions breaching article 3 of the 1950 Convention period. In light of the subsequent evidence relating to GD I find that there is a real risk that on return to Kenya the appellant would not be held in keeping with the Kenyan assurances given to the High Court but would be held in conditions breaching article 3 of the 1950 Convention."

10. The judge then set out her decision in the notice of decision as follows:

> "51. The appeal is dismissed (article 3 only)
>
> 52. The appeal on asylum grounds is dismissed.
>
> 53. The appeal on Article 2, 6 and 8 grounds was not pursued by the appellant."

The Grounds of Appeal and Submissions

11. The appellant applied for permission to appeal against this decision on the basis that the disposal was inconsistent with the judge's unchallenged findings and, therefore, unlawful. The appellant had to proceed by way of an appeal rather than an application under the slip rule in the light of the Upper Tribunal decision in Katsonga ("Slip rule"; FtT's general powers) [2016] UKUT 00028. Permission to appeal was granted by the First-tier

Tribunal on the basis that it was arguable that there was an inconsistency in the decision where on the one hand the judge appeared not to seek to challenge the decision of the High Court on extradition and found reasons why the later evidence relating to another case was less than satisfactory but found that there was a risk of a breach of article 3 but, nevertheless, dismissed the appeal. The judge said this was not an obvious slip of the pen situation as suggested in the grounds of appeal, but it was arguable that the inconsistency was such that it did amount to an arguable error of law.

12. Ms Broadfoot submitted that it was clear that the judge had mistakenly dismissed the appeal under article 3. The decision itself had been very methodical and there were clear findings that conditions in Kenyan jails were harsh and could be life-threatening [43] and that an assurance given in GD's extradition proceedings had not been kept by the Kenyan authorities [48]. On this basis, it was clear that the judge had found that the assurances given in the present case were unreliable and, in consequence, there would be a real risk of a breach of article 3. In the light of her finding that there was a real risk that the assurances given would not be complied with, it must follow, so she submitted, that a decision to allow the appeal was the only one which could properly be made. She submitted that the error had, in all likelihood, simply been a clerical error and did not in any way affect the substance of the decision.

13. Mr Tufan submitted that it was not at all clear what the judge had intended to decide. In the light of the extensive adverse findings by the judge, the appeal should not have been allowed simply on the basis of the findings at [48] and [49]. The judge’s reliance on one on-line article was not sufficient to go behind the findings of the High Court. The decision was sufficiently confused, so he submitted, to justify the merits being looked at afresh.

Assessment of the issues

14. I am satisfied that there is an error in [51] of the decision when the judge said that the article 3 appeal was dismissed. A decision to dismiss the appeal on article 3 grounds is entirely inconsistent with the judge's findings at [48] that there had been a breach of the assurances given by the Kenyan authorities in relation to GD and the conclusion in [49] that, in the light of subsequent evidence, there was a real risk that the appellant on return to Kenya would not be held in keeping with the assurances given to the High Court but would be held in conditions breaching article 3.

15. I have taken into account the comment made by the First-tier judge when granting permission to appeal that this was not an obvious slip of the pen situation as suggested in the grounds of appeal and Mr Tufan’s submission that judge’s decision is such that it is not clear what she intended to decide. However, I am satisfied that the judge's factual findings are clear and that when the decision is read as a whole the only rational conclusion can be that the judge intended to allow the appeal under article 3 and that

she simply made a clerical error in [51]. This conclusion is supported by the fact that the judge added in brackets "article 3 only" at the end of [51] and to a lesser extent by the fact that she appears to have considered whether there should be a refund of the fee award but noted that according to the records on the file no fee had been paid. There would have been no need to consider the question of a fee refund if the intention had been to dismiss the appeal in its entirety.

16. The error is an error of law requiring the decision to be set aside and remade. I also accept that the only part of the decision affected by the error is the clerical error at [51] and that the judge's findings in the body of the decision are unaffected. I have been referred to the guidance of Latham LJ in DK (Serbia) v Secretary of State [2008] 1 WLR 1246 that findings not infected by the error fall to be preserved and of Sedley LJ in Mukarkar v Secretary of State [2006] EWCA Civ 1045 that it is wrong in principle to dismantle the entire edifice of the decision if a defect can be remedied by a more limited intervention.

17. I was at one stage concerned by whether the respondent had been put at a disadvantage by the fact that an appeal has been necessary as this error could not be put right under the "slip rule" within rule 31 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014, when an amended decision would have been issued giving rise to a right of appeal. At one point in his submissions Mr Tufan raised the issue of whether the respondent had been able to appeal because he was not the loser. That was the position under the Nationality, Immigration and Asylum Act 2002 governing the right of appeal to the Immigration Appeal Tribunal (see AN (only loser can appeal) Afghanistan [2005] UKIAT 97). However, those provisions were superseded by the coming into force of s.11(2) of the Tribunals, Courts and Enforcement Act 2007 making it clear that any party to a decision has the right of appeal to the Upper Tribunal.

18. In the present case the respondent has not sought to challenge the decision by seeking permission to appeal, to maintain it on other grounds by filing a rule 24 notice setting out any grounds on which he seeks to rely or by filing a skeleton argument to challenge the substance of the judge's decision. I have also been referred to the recent reported decision in PAA (FtT: oral decision – written decision) Iraq [2019] UKUT 13, which, whilst dealing with a different issue, the effect of an oral decision given by the First-tier Tribunal inconsistent with subsequent written reasons, nonetheless confirms the importance of challenging a decision in accordance with the relevant procedure rules. No such challenge has been made.

19. The judge clearly intended to allow the appeal for reasons set out in her decision. Accordingly, I substitute a decision allowing the appeal on article 3 grounds.

Decision

20. The First-tier Tribunal erred in law and the decision is set aside. I substitute a decision allowing the appeal on article 3 grounds.

Signed: H J E Latter Dated: 21 February 2019

Deputy Upper Tribunal Judge Latter