



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: AA/09635/2014

THE IMMIGRATION ACTS

**Heard at Bradford
On 7 July 2015**

**Determination Promulgated
On 3 September 2015**

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL CHANA

Between

**MRS LINDA KAYAYA KABENGA
(no anonymity direction made)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Ms Patel, Legal Representative

For the respondent: Mr Dwnycz, Senior Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a national of the Democratic Republic of the Congo born on 26 September 1983. She appeals to the Upper Tribunal against the determination of first-tier Tribunal Judge Dearden dated 5 January 2015 refusing her appeal against the decision of the respondent dated 7 November 2014 refusing her asylum and humanitarian protection in the United Kingdom.
2. Permission to appeal was initially refused by Senior First-tier Tribunal Judge Andrew on 29 January 2015 but granted by Upper Tribunal Judge

McWilliam on 12 May 2015. She was of the view that it was arguable that the First-tier Tribunal Judge may have erred by considering the appellant's evidence that she had been released by way of a bribe in light of the country guidance case relating to Sri Lanka and not the DRC, as he should have done. Moreover, he stated that the Judge arguably erred because he did not make a finding about whether the appellant has been raped. It is arguable that a finding about this is relevant to the credibility and generally risk on return.

3. The first-tier Tribunal Judge in her determination did not find the appellant credible. She found that the only evidence that she accepts from the appellant is that she worked at a TV station between 2003 and 2007. The Judge stated at paragraph 22 (6) "I do not believe anything that the appellant urged upon me and therefore this evidence was of limited significance and weight".
4. The Judge did not accept or find the appellant credible. He did not find the appellant's evidence that the reason why the appellant's father came to the adverse attention of the authorities in the DRC was because he wrote a report about the Reformation of the army for the President of the DRC, Laurent Kabila in 1998 or 1999. The Judge did not find it credible that the report 14 years earlier would bring the appellant's father to the adverse attention of the authorities. The Judge did not find credible that the appellant would be arrested on 27 July 2013, some 14 years after, the report had been written by her father. It is not credible that the appellant's father who was the author of the report, for 13 years prior to his death was not arrested but that the appellant would be after her father died.
5. The Judge also do not find credible, the appellant's evidence that the appellant's father who was prohibited from leaving the DRC was able to leave for South Africa when he became seriously ill.
6. The Judge found that there was no cogent evidence that the appellant, as a daughter, would know anything about the report and did not accept the situation as described. He did not find the appellant's evidence credible that she received threatening telephone calls prior to her arrest from what she refers to at the "Presidency". When the appellant decided to return the call and when she got through to the person at the other end of the phone, said to her that they did not wish to talk to her. This does not make any sense. In any event the current president of the DRC is the son of the President for whom the appellant's father worked and obviously had an affinity. Therefore the Judge found that the appellant's father, would have an affinity towards the appellant rather than a hostility.
7. The Judge did not find it credible that the appellant would give Position of the report to a church to destroy rather than destroy it herself. He stated that the appellant did not give a credible explanation, for giving this report to the church to destroy.

8. The Judge stated that the appellant claimed that she escaped from custody by means of a friend paying a bribe. Anyone released on bribery, his or her release would most likely have been recorded in such a way as to indicate that he was of no further interest, otherwise the attention of the authorities may revert to the person who received the bribe. The Judge also did not find it credible that the appellant having been released by payment of a bribe, having fled from the DRC to Congo Brazzaville and that a friend would then return to the DRC to bring the appellant's eldest daughter. The Judge stated that the appellant used a false passport in order to exit the Congo, paid for her by her school friend, Joedett and this went to her overall credibility. The Judge did not believe that the appellant was arrested and that she escaped.
9. The Judge stating that having placed all the various factors of the evidence together and having considered them cumulatively, some factors being more important than others and giving each piece of evidence the appropriate weight, was of the view that the appellant had not told the truth on any aspect of her case. He stated that the matters upon which the appellant failed to tell the truth were not minor or peripheral matters but were matters which went to the very heart of her credibility. The Judge said that he believes nothing that the appellant urged upon him other than the fact that she worked at a television station. The Judge stated that if the appellant has failed to tell him the truth about matters which go to the very heart of her case that she has failed to discharge even the lower burden of proof upon her to prove that she is of any interest to anyone if returned to the DRC.
10. The Judge relied on the country guidance case of **BK v the Secretary of State for the Home Department [2008] EWCA Civ 1322** and stated that there was no reason for him to depart from the guidance in the case. He stated that he was not minded to depart from the country guidance case despite being invited to do so by the appellant's representative Miss Patel.
11. The Judge considered the report from Freedom from Torture which was formerly known as the Medical Foundation for the care of victims of torture dated June 2014. He took into account the submissions made on behalf of the appellant that she would be a single female and is likely to be raped in the Congo. However, the Judge stated that the report is only based on the experiences of 34 women who were detained and tortured after 2006 and that it is apparent that the majority of those women were targeted for detention as a result of their political profile or that of a member of their family. The Judge stated "I have found that the appellant has no political profile and has not told the truth about the involvement of her father. I simply regard this as being too far, too wide to suggest that all women in the DRC face real risk of being raped. The Judge added, "It is noteworthy that the appellant's husband remains in the DRC".

12. The Judge dismissed the appellant's appeal under the Immigration Rules, under the humanitarian and protection provisions and Article 3 of the European Convention on Human Rights.
13. The appellant's grounds of appeals are as follows which I summarise. The appellant is a 31-year-old female from the DRC who arrived in the United Kingdom on 15 October 2014 and claimed asylum the next day for herself and her dependent daughter. The Judge failed to make findings on material matters and to consider material matters. He failed to assess the risk on return properly.
14. The Judge failed to make any findings as to whether the appellant was raped or tortured when she was detained by the DRC authorities. It was incumbent upon the Judge to consider the issue and make findings on the evidence, since it was a material part of the appellant's claim. The Judge further failed to consider whether it would be inhuman or degrading to return the appellant to the DRC, a country where she had been raped. Rape in itself can amount to persecution. Rape is propellant throughout the DRC should mean that the Judge does not have to assess the serious possibility of it re-occurring again for the appellant. The appellant should not be expected to put up with the serious possibility of being raped again even if this is part of the normal country conditions. Lord Justice Buxton in **AA Uganda [2008] EWCA Civ 579**, considered forced prostitution as being normal country conditions in Uganda. The same logic should be applied to rape in the DRC particularly where the appellant had already been raped and being made vulnerable thereby.
15. The Judge in not finding the appellant credible failed to consider the appellant's witness statements at paragraph 5 and 9 before coming to his conclusion about the report. The Judge failed to consider questions 21 and 62 of the appellant's asylum interview which explained how the appellant's father was able to leave the DRC for South Africa. The Judge failed to consider paragraph 9 of the appellant's witness statement and her answers to questions 59 to 62 and 64 to 68 of her interview.
16. The Judge stated that the current President of the DRC would have an affinity towards the appellant rather than a hostility and failed to give a proper reason for this finding. The Judge failed to consider that the appellant has not been given a proper opportunity to respond to the Judge's assertion that the appellant could have burnt the report herself rather than give it to the church.
17. The Judge considered the country guidance case of Sri Lanka and not DRC when it came to the issue of escape from prison after the payment of a bribe. The country evidence shows that bribery and corruption is rife in the DRC at every level. The Judge did not find it credible that the appellant's friend would return to the DRC to bring her eldest daughter to her where she fled to Congo Brazzaville. The appellant's friend did not return to the DRC to do this as she came to Congo Brazzaville from DRC with the appellant's eldest daughter who had been found at her neighbours.

18. The Judge found the appellant's use of a false passport distracts from the appellant's overall credibility. The Judge failed to consider that the use of a false passport whilst being behaviour that attracts s8 cannot be determinative and has to be considered in the round with all the other evidence before him. The Judge failed to consider that sometimes the only way a person can flee persecution is by using a false passport.
19. The Judge failed to take into account that the appellant's cousin helped her escape has been killed by the authorities, as stated in questions 83, 98 and 99 of her asylum interview. The judge failed to make any findings on a material aspect of the appellant's case. The Judge's findings on the appellant credibility at paragraph 22 and 23 are not sustainable. On the basis of the country material, the Judge should have departed from the country guidance case of **BK**. Furthermore, the Judge seems, at paragraph 33 to use **BK** to argue against risk on return to lone females with a young child when it is a country guidance case regarding failed asylum seekers. The Judge has not properly addressed the risk on return for the appellant as a lone female with a young child particularly bearing in mind that she has been previously subjected to sexual violence.
20. At the hearing the senior presenting officer submitted that there is no material error of law in the first-tier Tribunal Judge's determination, and that she had considered all the evidence properly and rationally. She submitted that the Judge found the appellant not to be truthful for good reasons in his determination.
21. Mr on behalf of the appellant. In his submissions said that the Immigration Judge had not fallen into error.

Discussion and findings on whether there is an error of law

22. I have given anxious scrutiny to the determination of Immigration Judge Dearden and have taken into account the grounds of appeal, the case law and the documents in the appeal. The argument before the Upper Tribunal is that the Judge has not taken into account all the evidence in assessing the appellant's credibility. It is also argued that the Judge did not make findings on material matters and did not properly take into account the background evidence on the DRC and the potential for the appellant to be raped on return having already been raped before she left the DRC.
23. I completely disagree and I find that the grounds of appeal are a mere disagreement with the Judge's findings. The Judge is a very careful determination analysed all the evidence and was entitled to find on the evidence before him that the appellant and her evidence was not credible. The Judge did not accept the appellant's evidence in any respect about the basis of her claim and said that the only fact that he accepts is that the appellant worked for a radio station and nothing more. It is implicit therefore that the Judge did not believe the appellant's evidence that she was arrested, raped and that she escaped. The Judge found that none of these events occurred. On the evidence before him the Judge was entitled

to so find. The appellant grounds of appeal are no more than a disagreement with the Judge's consideration of the evidence and the conclusion that he reached on it.

24. The appellant's asylum claim is based on her father's involvement with the previous government of Laurent Kabila in that he wrote a report for the Reformation of the army of the DRC some 14 years ago in 1998 or 1999. The Judge was entitled not to find credible that this report written some 14 years earlier would bring the appellant's father to the adverse attention of the authorities, much less his daughter after her father died. The Judge was entitled not to find credible that the appellant would be arrested on 27 July 2013, some 14 years after, the report had been written by her father. The Judge was equally entitled to find not credible that the appellant's father who was the author of the report, for 13 years prior to his death would live safely in the Congo but instead his daughter, would come to the adverse attention of the authorities and arrested after her father died for a report that her father wrote, some 14 years ago. Furthermore, it was not the appellant's evidence that she has herself a political profile. The Judge was entitled to find that the catalyst for the authorities' interest in her was not credible.
25. The Judge was entitled to find, the appellant's evidence not credible that she would give her father's report which she claims was of great significance and which put her life at risk to a church for them to burn rather than doing it herself. The Judge took into account the appellant's oral evidence when she said that she does not know why she did this and that she asked herself the same question. The Judge was more than entitled to come to the conclusion that this was not credible evidence.
26. It is not incumbent on the judge to set out every piece of evidence but it is clear from the determination which is cogent and clear that the Judge did not believe the appellant's evidence in its entirety other than the appellant worked at a TV station in the DRC.
27. The Judge was entitled to find that it was not credible that the current government, who is run by the son of Laurent Kabila, would have hostility towards the appellant given that the appellant's father worked for the father of the current President.
28. I find that the Judge was entitled not to depart from the case of **BK** as there are no circumstances in the appeal which would mandate the departure. It was urged that the Judge did not properly address the risk on return for the appellant as a lone female with a young child particularly bearing in mind that she has been previously subjected to sexual violence. The Judge did not find the appellant credible and did not accept her evidence that she was raped. Furthermore, The Judge noted that the appellant's husband remains in the DRC. This obviously meant to the Judge that the appellant would not be a sole female who has been arrested and raped being returned to the DRC. The Judge took into account the background evidence and made sustainable finding that the

appellant can be return to the DRC even as a sole female and no one in that country has an adverse interest in her.

29. I have taken into account that the Judge took into account the wrong country guidance in respect of bribes but I find that this is not a material error. The Judge did not believe the appellant evidence that she had been arrested at all or released on a bribe.
30. I find that the Judge was entitled and required to reach his conclusion based on his consideration and evaluation of the evidence as a whole. There is nothing to suggest in the determination that the judge did not take into account the appellant's explanation, witness statement and interview record.
31. I find that the Judge's reasoning is reasonable, understandable, and not perverse. In **R (Iran) v Secretary of State for the Home Department [2005] EWCA Civ 982** Brooke LJ commented on that analysis as follows:

"15. It will be noticed that the Master of the Rolls used the words "vital" and "critical" as synonyms of the word "material" which we have used above. The whole of his judgment warrants attention, because it reveals the anxiety of an appellate court not to overturn a judgment at first instance unless it really cannot understand the original judge's thought processes when he/she was making material findings."
32. I find that I have no difficulty in understanding the reasoning in the Judge's determination for why he reached his conclusions. I find that the grounds of appeal are no more than a disagreement with the Judges findings of fact and the conclusions that he drew from such findings.
33. I find that no material error of law has been established in Judge Dearden's determination. I find that the judge was entitled to conclude that the appellant is not entitled to be recognised as a refugee or to be granted humanitarian protection in this country. I uphold his decision.

DECISION

Appeal dismissed

Dated this 31st day of August 2015

Signed by,

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Mrs Chana
A Deputy Judge of the Upper Tribunal