Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/09983/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21st June 2016	**On 18th July 2016**

Before

UPPER TRIBUNAL JUDGE DEANS

Between

THE ENTRY CLEARANCE OFFICER - NAIROBI

Appellant

and

MR MICHEL KAPELA KANDOLO
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr N Bramble, Senior Home Office Presenting Officer
For the Respondent: Mr C Rahman, ATM Law Solicitors

DECISION AND REASONS

1. This is an appeal by the Entry Clearance Officer against a decision by Judge of the First-tier Tribunal Stewart dismissing an appeal against the refusal of entry clearance. Before the First-tier Tribunal the Appellant was Mr Michel Kapela Kandolo (hereinafter referred to as "the applicant"). The applicant was born on 14th June 1979 and is a national of the Democratic Republic of Congo.

2. The applicant had applied on 30th May 2014 for entry clearance to come to the UK as the spouse of a British citizen, Ms Luyindula Mongwele. The

couple were married at a church wedding in England on 2nd October 2010 and then had a civil ceremony in Kinshasa. The couple have two children, one born in April 2011 and a second born in January 2014. Both children are British citizens.

3. The applicant could not succeed under the Immigration Rules in Appendix FM because in January 2006 he had been convicted of a criminal offence in the UK and had been sentenced to imprisonment for 42 months. He therefore could not meet the suitability requirement in paragraph S-EC.1.4.(b) of Appendix FM, which states that the exclusion of the applicant from the UK is conducive to the public good because he has been convicted of an offence for which he has been sentenced to a period of imprisonment of at least twelve months but less than four years, unless a period of ten years has passed since the end of the sentence.

4. The Judge of the First-tier Tribunal considered the appeal under Article 8, having regard to the children's best interests as British citizens. Before the First-tier Tribunal it was submitted on behalf of the ECO that it was open to the Sponsor to leave the UK and go to the DRC taking the children with her. In the view of the judge the welfare of the children was neither safeguarded nor promoted by having them forego the benefits which British citizenship entitled them to in order to have the benefit of living with two parents. The judge also took into account that the Sponsor through working provides financial support for the applicant and she would face considerable uncertainty in seeking employment in DRC. It was in the best interests of the children to live in the UK and have the benefit of two parents to provide them with financial and emotional support. This outweighed the public interest.

5. In the application for permission to appeal it was pointed out on behalf of the ECO that the applicant had been charged with murder and was convicted of manslaughter. He had been deported from the UK on 7th June 2012, and had not made a voluntary departure as alleged by the Sponsor. The Tribunal did not explain why with this conviction the applicant would be suitable to live with the children and there was no professional opinion to support the Tribunal's conclusions. The Tribunal had simply disregarded the public interest in its assessment of the rights of the children.

6. Furthermore, the ECO pointed out that there was an extant deportation order in respect of the applicant and no application for a revocation of this had been made. The Tribunal's findings were irrelevant because the Tribunal had failed to address the single most important aspect of the case.

7. Permission to appeal was granted on the basis that the Judge of the First-tier Tribunal had made no reference to the applicant being subject to a deportation order and this was an arguable error of law. It was also arguable that the judge had erred by giving insufficient weight to the

public interest, particularly taking into account the criminal offence the applicant had committed.

Submissions

8. At the hearing before me Mr Bramble relied upon the grounds of the application. The conviction was live and no consideration was given to the conviction in the decision.

9. For the applicant, Mr Rahman said he had little information about the conviction. The applicant had been released and had been free in the UK for a period. According to the ECO he had been deported but there was no evidence of this.

10. In response to this Mr Bramble produced a printout from the Home Office computerised records showing that the applicant was deported on 7th June 2012.

11. Mr Rahman continued that the Presenting Officer had not relied on this point before the First-tier Tribunal, where the evidence for the applicant was that he had made a voluntary return.

12. It was pointed out that the deportation order was referred to in the review dated 27th January 2015 by the Entry Clearance Manager and this was before the First-tier Tribunal.

13. Mr Rahman continued that it was necessary to look both at the public interest and the best interests of the children. The judge had referred to the case of MF (Nigeria) [2014] EWCA Civ 1192. The Sponsor was a full-time nurse and there were two children involved. If the applicant was not allowed to enter the UK then the family would fall apart.

14. The question was raised whether the judge had given any consideration to the existence of the deportation order. Mr Rahman agreed that there was no direct reference to this in the decision but the judge had given proper reasons and relied upon the reported cases. This was a unique situation. It was not possible to formulate everything in rules. Justice was a broader concept and it was necessary to have regard to the particular context of the case. The best interests of the children were linked to the public interest and the children would be severely affected.

Discussion

15. I am satisfied that the Judge of the First-tier Tribunal erred in law and that because of this the decision of the First-tier Tribunal must be set aside. The existence of the deportation order was a relevant and material factor. It was referred to not only in the review by the Entry Clearance Manager

but also in the refusal decision itself by the ECO, dated 16th July 2014, which states in its very first sentence that the applicant is currently subject to a deportation order signed on 12th December 2006. Nevertheless, as Mr Rahman acknowledged, there is no mention of this deportation order in the judge's decision.

16. There may be occasions when it can be inferred that the judge did not mention a particular factor because the judge did not consider it to be material or did not consider that it should carry any significant weight. This is not such a case. The deportation order, because of its significance to the public interest, was bound to carry considerable weight and had to be addressed by the judge if the judge were to give adequate reasons for the decision. The judge was clearly aware that the applicant had a criminal conviction, as the judge records at paragraph 4 that the applicant had been convicted of a criminal offence on 5th January 2006 and been sentenced to imprisonment for 42 months, but nowhere does the judge address the fact that the applicant was subject to a deportation order. The failure to address the deportation order is a fundamental error in the judge's reasoning.

17. At the hearing before me Mr Rahman understandably was not able to counter this point head on but instead relied upon the judge's assessment of the best interests of the children. It may be that it is in the best interests of the children for the applicant to join his family in the UK, but in order for a proper decision to be made to this effect all relevant factors must be taken into consideration, not only under the Immigration Rules but also when carrying out the balancing exercise under Article 8. It is for this reason that the judge's decision must be set aside.

18. The application for permission to appeal contains certain further grounds that are worthy of consideration. The ECO raised the issue of whether the Sponsor was fully aware of the nature of the applicant's conviction and also the question of the applicant's suitability, given the nature of his conviction, to act as a father to the children. It was pointed out that there was no professional evidence relating to this latter point. Although these issues were not argued before me and there is nothing in the decision to show that they were argued before the First-tier Tribunal, they are nevertheless points which it might be appropriate for the parties to address in further proceedings.

19. In the circumstances the appropriate course is for the appeal to be remitted to the First-tier Tribunal for a further hearing before a different judge with no findings preserved from the decision of the First-tier Tribunal of 12th December 2015.

Conclusions

20. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

21. I set aside the decision.

22. I remit the appeal to the First-tier Tribunal for a hearing before a different judge with no findings preserved.

Anonymity

23. The First-tier Tribunal did not make an order for anonymity. I have not been asked to make such an order and I see no reason of substance for doing so.

Signed Date **18th July 2016**

Upper Tribunal Judge Deans