IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/50956/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26 February 2016	**On 24 March 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

MASSARAN KONE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. L. Youssefian, D J Webb & Co Solicitors
For the Respondent: Ms A. Fijiwala, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Pedro promulgated on 21 August 2015 in which he refused the Appellant's appeal against the decision of the Respondent dated 21 November 2013 to remove her from the United Kingdom.

2. Permission to appeal was granted as follows:

> "It is arguable that the Judge should have considered any part of the Appellant's evidence which he in fact did find credible before proceeding to state that he was not prepared to give any weight to any uncorroborated assertions made by the Appellant.
>
> It is unclear on the basis of paragraph 9 of the decision whether the totality of the available evidence was found to have been infected on the footing described by the Judge.[.....]
>
> Given the Judge's findings stated at paragraph 9 of the decision it is unclear to what extent corroborative evidence has therefore been affected by the Judge's conclusions as to the credibility of the Appellant stated at paragraph 9."

3. The Appellant attended the hearing. I heard oral submissions from both representatives following which I reserved my decision, which I set out below with reasons.

Submissions

4. Mr. Youssefian referred me to the cases of ZH (Bangladesh) [2009] EWCA Civ 8 and Aissaoui [2008] EWCA Civ 37. He submitted that the judge had taken an erroneous approach to credibility. I was referred to paragraph [9] of the decision. The most important aspect of the Appellant's claim was her length of stay in the United Kingdom. I was referred to paragraphs [32] and [33] of MA (Somalia) [2010] UKSC 49 where it was held that an Appellant should not be dismissed because she had told lies, but that the significance of the lies varied from case to case. If the lying went to a central issue it may be more significant.

5. It was submitted that the Appellant had not told a lie about the central issue of her case. I was referred to paragraph [9] where the judge found that the Appellant was a liar because she had come to the United Kingdom illegally and she had worked here illegally. To find from the outset that she was a liar without having considered the evidence further was a material error of law.

6. The case of ZH had found that effectively the fourteen year long residence rule was an amnesty clause. In both ZH and Aissaoui the Court of Appeal had accepted that most of those applying would have been working illegally and would have assumed a false name. It was submitted that this was the whole point of the amnesty and that, if these factors were taken against the Appellant, it would render the whole of the amnesty clause pointless. If the fact that the Appellant had entered the United Kingdom illegally and assumed another ID were to be taken against her, this would put her on an unfair footing. The judge had erred in law in relying on the Appellant's previous conduct and had not taken a balanced view. No

credit had been given to the Appellant for her honest account of having entered the United Kingdom illegally and there had been no balanced assessment of her credibility.

7. It was submitted that meaningful corroboration was particularly difficult and that many applicants lacked a paper trail for obvious reasons connected to their illegal entry and illegal employment. The judge should not have expected the Appellant to be able to corroborate everything. This error of law was material.

8. In relation to the approach to the documentary evidence, it was submitted that the judge had given no weight to the photographs which were corroborative. It was submitted that he could have given them limited or little weight, but that he had erred in giving them no weight. In particular, I was referred to paragraph [11] of the decision, and to the photograph dated 28 October 1995. The judge had found that the photograph could have been taken anywhere although the Appellant had given a detailed account of when and where the photograph had been taken. I was referred to the Record of Proceedings. At the start of the hearing the Appellant had given detailed evidence relating to the photographs. This evidence was clearly corroborative, yet no weight has been attached to it.

9. It was submitted that the Respondent had raised no issue at the hearing in the First-tier Tribunal in relation to the Appellant's account of when and where this photograph had been taken. No evidence had been provided to show that the photographs had been manufactured. This was a significant error of law because this photograph could have placed the Appellant in the United Kingdom in 1995. He submitted that the Appellant had explained the context of every single photograph provided and there had been no challenge to the Appellant's evidence on this point. Some weight should have been given to these photographs. There had been no detailed or balanced assessment of the totality of the evidence relating to the photographs.

10. I was referred to the final sentence of paragraph [17] in which the judge accepts that the Appellant and her assumed identity are one and the same person. The judge finds there is no evidence that from 1999 to 2009 that the Appellant was living in the United Kingdom in her own name. I was referred to the evidence in the Appellant's supplemental bundle consisting of a postcard sent to the Appellant in 2000 to an address in Hackney to which documents in her assumed name had also been sent. I was also referred to a letter dated 14 April 1999 sent to the Appellant in her own name at the address in Hackney. It was submitted that there was evidence between 1999 and 2009 to show that the Appellant was in the United Kingdom using her own name. The judge had erred in concluding that there were no documents in her real name.

11. Mr. Youssefian submitted that there was a mischaracterisation of the approach taken to the issue of the lost documents. The Appellant was still

relying on the fact that she had submitted extensive documentary evidence from 1999 to 2012 but the documents had been lost by the Respondent. The fact that the Appellant accepted that the appeal should proceed because the Respondent had looked for the documents and not been able to find them did not mean that the point fell away. The Appellant still maintained that documentary evidence had been lost by the Respondent. The judge attached no weight to this point and gave no benefit of the doubt to the Appellant.

12. The judge had erred in failing to consider that the Reasons for Refusal Letter did not raise the point that the documentary evidence provided did not cover fourteen years. The documents established that someone had been continuously resident in the United Kingdom, but the Respondent did not accept that the Appellant and her alias were one and the same person. I was referred to the Reasons for Refusal Letter. It was submitted that at no point did the Respondent state that the documentary evidence did not show that either the Appellant or her alias had been in the United Kingdom for fourteen years. If the judge had accepted that the Appellant and her alias were the same person he should have accepted that she had been here for fourteen years. The Secretary of State did not dispute that the Appellant and her alias had been here for fourteen years, just that they were not the same person.

13. In relation to ground 3, Mr. Youssefian relied on the grounds of appeal.

14. In response Ms Fijiwala referred to the fact that there had been two determinations thus far in the Appellant's appeal and that the decision of Judge Pedro came about following the remittal to the First-tier Tribunal in October 2014. She submitted that the judge should have found that the decision was not in accordance with the law. As the decision had been made in November 2013 it should not have been made in relation to paragraph 276B. I was referred to the case of Singh [2015] EWCA Civ 74. On that basis she submitted that I should find that there was no error of law in the judge's dismissing of the appeal.

15. In relation to the first and second grounds of appeal I was referred to paragraph [8] of the decision where the judge stated that he had considered the totality of the evidence. It was submitted that the judge was entitled to make the findings that the Appellant was not credible or reliable in paragraph [9]. In relation to the case of ZH she submitted that this case did not refer to somebody having manufactured illegal identity, but just having obtained it.

16. I was referred to paragraph [10] regarding the inconsistency of her arrival date. There was nothing further to show that the Appellant had arrived in 1993. The only documentary evidence prior to 1999 consisted of one photograph. The onus lay on the Appellant to show that she was in the United Kingdom. The judge had directed himself properly regarding the photograph. There was no landmark on the photograph and it could have

been taken at any time and any place. The judge could not be certain that it was taken in the United Kingdom. Reasons were given for why the photograph was rejected. I was referred to paragraph [12]. There was nothing else prior to 1999 to place the Appellant in the United Kingdom.

17. The evidence of Miss Camara had not been challenged in the grounds of appeal. The judge had found that she was not a reliable witness and as a result he had been entitled to find that the Appellant herself was not reliable. She accepted that the judge had not found that the Appellant was not a reliable witness on the basis of the fact that he did not find Miss Camara's evidence credible, but she submitted that the Appellant's evidence was not corroborated by Miss Camara.

18. I was referred to paragraph [16]. The judge appeared to accept that the Appellant had been here between 1999 and 2008. However there was no evidence that she was here from 2009 to 2011. The point regarding the weight to be given to the lost documents had not been challenged in the grounds of appeal and had not been raised at the hearing in the First-tier Tribunal. The judge had questioned the representative about the lost documents and this issue had not been pursued. I was referred to paragraph [4] of the decision where the judge states that "it was confirmed that no other documentary evidence was to be relied on except that which was before the judge". In relation to the next available documentary evidence from Trinity College, I was referred to paragraph [17] where the judge found that the Appellant could have been coming and going between France and the United Kingdom. On consideration of all the evidence in its totality the decision was not irrational. This was a very high threshold to reach.

19. In relation to Article 8 she submitted that paragraphs [20] to [22] contained a full and proper analysis of this and she invited me to dismiss the appeal.

20. In response Mr. Youssefian submitted in relation to the case of Singh, the Respondent had not sought permission to cross-appeal on this point. Ms Fijiwala had stated that she could not have cross-appealed but this was not the case. This was precisely the situation where a Respondent could cross-appeal. He submitted that I did not have the jurisdiction to consider this point. In any event he submitted that Ms Fijiwala had conflated two issues in relation to Singh, an application under the immigration rules and an application under Article 8. It was clear from the case of Singh that it applied to a case where someone could not meet the immigration rules and so had applied under Article 8 outside the immigration rules. Singh was relevant as to whether or not the decision of the Respondent should be made outside the immigration rules under Article 8 or under the new immigration rules in place in July 2012. Singh did not apply to a case where someone had applied under paragraph 276B inside the immigration rules. HC194 made it clear that for those who had applied under the immigration rules, the rules which applied were those in force on 8 July

2012. He accepted that the Respondent was entitled and was correct to consider it under the new immigration rules as well. Little weight should be given to that submission.

21. In relation to the inconsistency regarding date of arrival, I was referred to paragraph [17] of the Appellant's witness statement which the judge had not taken into account. In relation to false ID and assumed false ID he submitted that ZH envisaged a situation where people had been using aliases. To assume an ID was to use a false document and how else would someone work in another name. I was referred to paragraph [16] of ZH. It was submitted that for the use of a false identity alone the judge had taken against the Appellant. Taking the decision as a whole, the judge had not taken a balanced approach to credibility.

Error of law decision

22. Paragraph [9] of the decision states:

"I did not find the appellant to be a credible or reliable witness. On her own admission, she did at some time enter the United Kingdom utilising another person's French identity card. Moreover, she has claimed that she has had two false French identity cards manufactured for her in the name of Denis Kone Aude. She is clearly a person who has demonstrated a blatant disregard for UK laws and immigration control to the point where she has claimed that she has had manufactured French identity cards in an alias to enable her to undertake unlawful employment in the United Kingdom. In such circumstances, I am not prepared to give any weight to any corroborated assertions made by the appellant, particularly as regards her length of stay in the United Kingdom."

23. The Appellant's entire case rests on how long she has been in the United Kingdom. The Appellant applied under paragraph 276B which requires her to show that she has had at least fourteen years' continuous residence in the United Kingdom. I have carefully considered the cases of ZH and Aissaoui. Paragraph [16] of ZH states:

"The use of a false identity, which was admitted by the appellant, was held against him. But no account was taken, as it seems to me it needed to be taken, of the reason he gave for using it: that he was afraid of being detected as an illegal immigrant. That of course compounds the illegality of his presence here, but it is a different reason from the more sinister reason for using a false identity, which is to commit frauds. While he will not have been paying tax or national insurance contributions, some recognition was also due to his evidence that he had been trying to obtain an NI number. Moreover, the evidence - which came entirely from Mr Hussain himself - did not support the immigration judge's finding of sustained deceit; the appellant had given evidence of a single date, 2001, when he had used an alias."

24. I have also taken into account paragraph [17] of ZH which found that the "comprehensive denunciation" of the appellant in that case was not "balanced and justified". It found that the judge had lost sight of the fact that this was "a case in which the appellant, by dint of 14 years' unlawful residence during which he had maintained himself by working unlawfully, had reached a point at which the Home Secretary's own rules, approved by Parliament, gave him a right to remain so long as it was not undesirable in the public interest that he should be allowed to do so".

25. I therefore find that for the judge to state that he was not prepared to give any weight to any uncorroborated assertions made by the Appellant because she had entered the United Kingdom illegally and had worked here illegally ignores the fact that the purpose of the fourteen year rule is to enable those who have been here unlawfully and who have worked unlawfully to obtain leave to remain.

26. Ms Fijiwala submitted that it was different in the Appellant's case because she had not only obtained false ID cards but had had them manufactured for her. I find that there is no significant difference between these two given the purpose for which the illegal cards are being used, which is to enable someone to work, something which is envisaged by ZH. It is clear that the judge can take account of the fact that the Appellant has entered the United Kingdom illegally, remained here illegally and worked here illegally. However, given the entire basis of the rule which is to allow such people leave to remain, to refuse to attach any weight to any of her evidence on the basis that she has done those things, is an error of law.

27. I find that the judge's approach in not relying on the Appellant's evidence unless it was corroborated is flawed. I find that, instead of taking the evidence piece by piece and weighing it in the balance, the judge has erred by refusing to accept any of the Appellant's uncorroborated evidence.

28. In relation to the claimed date of entry to the United Kingdom, the Appellant has admitted that she entered illegally in 1993. In paragraph [10] the judge sets out that the evidence of her actual date of arrival is contradictory but there is no reference to paragraph [17] of her witness statement where she explains that the error regarding November 1993 comes from her previous representatives.

29. In relation to the documentary evidence, I find that the Appellant provided evidence to corroborate her presence in the United Kingdom in 1995. However the judge gives this no weight, paragraph [11]. He states that this could have been taken at any time and at any place, whether inside or outside the United Kingdom, but he does not make any reference to the fact that in the Appellant's evidence, and as set out in his Record of Proceedings, the Appellant gave detailed evidence as to where and when this had been taken. This was corroborative evidence of the Appellant's presence in the United Kingdom, but the judge has not referred to it, and

has given it no weight. There is nothing in the decision to suggest that the Respondent's representative objected to the explanation given by the Appellant for when and where the photograph was taken. I find that to fail to make a balanced assessment of this evidence is an error of law.

30. The judge addressed whether or not the Appellant is the same person as Denise Kone Aude in paragraph [16]. He states that there were no documents produced prior to 1999, but that the documentary evidence before him showed that Denise Kone Aude had been in the United Kingdom from 1999 to 2008. The judge has not considered the evidence provided by the Appellant in the form of a postcard and a letter dated 2000 and 1999 respectively which were in the name of Massaran Kone, and which had been sent to an address in Hackney for which there was evidence relating to Denise Kone Aude. I find that there was evidence before the judge of the Appellant's presence in the United Kingdom using her own name in 1999 and 2000. This goes to the finding as to whether or not the Appellant and Denise Aude Kone are one and the same person.

31. In paragraphs [16] and [17] the judge appears to accept that the Appellant and Denise Aude Kone are one and the same person. However, there is no clear finding. It was submitted that the Secretary of State did not dispute that either Denise or the Appellant had been in the United Kingdom for fourteen years, but the Respondent did not accept that the Appellant and Denise were one and the same person. Given this, it was incumbent on the judge to make a clear finding on this point, and his failure to do so is a material error.

32. In relation to consideration Article 8, given that I have found that the judge erred in his approach to the evidence and his assessment of credibility, I find that his consideration of Article 8 is infected by these errors.

33. I have considered the Respondent's representative's submissions in relation to the incorrect application of paragraph 276B. The Respondent could have cross-appealed on this point, but she did not. I note that this decision which was made under Rule 276B has now been looked at by three separate judges, including the previous decision of the Upper Tribunal to remit the appeal back to the First-tier Tribunal, and at no point has the Respondent submitted that she had erred in considering the application under paragraph 276B.

34. In any event, I was referred to Singh which sets out HC194 in paragraph [7]. It provides that "if an application for entry clearance, leave to remain or indefinite leave to remain has been made before 9 July 2012 and the application has not been decided, it will be decided in accordance with the rules in force on 8 July 2012". This is what happened in the Appellant's case. She applied under the immigration rules for leave to remain prior to 9 July 2012. Singh is concerned with those who did not make an application under the immigration rules.

35. I am mindful that this appeal has already once been remitted to the First-tier Tribunal. However, bearing in mind paragraph 7.2 of the Practice Statement dated 10 February 2010, given the nature and extent of the fact-finding necessary to enable this appeal to be remade, having regard to the overriding objective, I find that it is appropriate to remit this case to the First-tier Tribunal.

Notice of Decision

36. The decision involves the making of a material error of law, and I set the decision aside.

37. The appeal is remitted to the First-tier Tribunal for rehearing. Judges Pedro and Hamilton are excluded.

No anonymity direction is made.

Signed Date 9 March 2016

Deputy Upper Tribunal Judge Chamberlain