



**Upper Tribunal
(Immigration and Asylum Chamber)**
PA/00465/2015

Appeal Number:

THE IMMIGRATION ACTS

Heard at Newport

On 31st March 2016

**Decision &
Promulgated**

On 18th April 2016

Reasons

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**J K
(ANONYMITY DIRECTION MADE)**

Respondent

Representation:

For the Appellant: Mr I Richards, Home Office Presenting Officer

For the Respondent: Mr W Rees instructed by Hoole & Co Solicitors

DETERMINATION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698), I make an anonymity order. Unless the Upper Tribunal or Court directs otherwise, no report of these proceedings shall directly or indirectly identify the Respondent (JK). This direction applies to both the

appellant and to the respondent and a failure to comply with this direction could lead to Contempt of Court proceedings.

2. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal (Judge N J Osborne) allowing the respondent's appeal against the Secretary of State's decision of 27 June 2015 to refuse his international protection claim.
3. For convenience, I will refer to the parties as they appeared before the First-tier Tribunal.

Background

4. The appellant is a citizen of the Democratic Republic of Congo (DRC) who was born on [] 1990. On 21 May 2013, the appellant was convicted at the [] Crown Court, [] of possession/control of identity documents with intent and was sentence to 12 months imprisonment.
5. That conviction triggered the automatic deportation provisions in the UK Borders Act 2007. On 16 August 2013, the appellant made an asylum and human rights claim. On 19 March 2015, a decision to deport the appellant was made. However, the appellant's asylum and human rights claim remained outstanding. On 27 June 2015, a further decision to deport the appellant was made and his international protection and human rights claims were refused. A deportation order was made against him as a "foreign criminal" on 22 June 2015.

The appeal to the First-tier Tribunal

6. The appellant appealed against the refusal of his protection and human rights claims under s.82(3) of the Nationality, Immigration and Asylum Act 2002 (as amended by the Immigration Act 2014).
7. The basis of the appellant's claim for international protection was that he was a refugee because he would be at risk on return to the DRC because of his political activities in the UK where he was a member of APARECO and because he would be at risk of imprisonment as having left the DRC with false documents. The appellant relied upon the country guidance case of BM and Others (Returnees – Criminal and Non-Criminal) DRC CG [2015] UKUT 293.
8. In relation to the first basis of his claim, the risk category recognised by the Tribunal in BM and Others and summarised in paragraph 3 of the headnote of that case as follows:

"A national of the DRC who has a significant and visible profile within APARECO (UK) is, in the event of returning to his country of origin, at real risk of persecution for a Convention reason or serious harm or treatment proscribed by Article 3 ECHR by virtue of falling within one of the risk categories identified by the Upper Tribunal in MM (UDPS Members – Risk on Return) Democratic Republic of Congo CG 2007 UKAIT 00023. Those belonging to this category include persons who are, or are perceived to be,

leaders, office bearers or spokespersons. As a general rule, mere rank and file members are unlikely to fall within this category. However, each case will be fact sensitive, with particular attention directed to the likely knowledge and perceptions of DRC state agents.”

9. Judge Osborne accepted the appellant’s evidence that he had joined APARECO (UK) and had been involved in that organisation as an active member albeit for a relatively short period of time before the hearing. At para 32, Judge Osborne summarised his findings and conclusion that the appellant fell within the risk category set out in para 3 of the headnote in BM and Others as follows:

“...Although none of those individuals appeared to give evidence, the documentary evidence from three different individuals within the organisation is at least consistent evidence that the Appellant has joined APARECO and has been given an organising role within the city of Bristol. I have seen photographs of the Appellant engaged in local activities in Wales for APARECO. At least one of those photographs has been uploaded onto the internet. It shows the Appellant with others, including Oliver whom the Appellant has enlisted in Bristol within the last month. Although the Appellant has not yet had the opportunity of carrying out any significant activities on behalf of APARECO, I find that he may well be perceived to be a leader, office bearer or spokesperson at least within the Bristol/Wales and the West area as he has already attended publicised meetings in Cardiff and successfully enlisted at least one member in Bristol. To that extent the Appellant fulfils the requirements of headnote 3 of BM and Others (see above).”

10. In relation to the second basis upon which the appellant claimed to fear persecution on return to the DRC, the appellant relied upon paragraph 4 of the headnote in BM and Others that he would be at risk of imprisonment in breach of Article 3 as a result of leaving the DRC on a false passport. The headnote is in the following terms:

“The DRC authorities have an interest in certain types of convicted or suspected offenders, namely those who have unexecuted prison sentences in the DRC or in respect of whom there are unexecuted arrest warrants in the DRC or who allegedly committed an offence, such as document fraud, when departing the DRC. Such persons are at real risk of imprisonment for lengthy periods and, hence, of treatment proscribed by Article 3 ECHR.”

11. Judge Osborne dealt with this aspect of the appellant’s case at paras 33-34 as follows:

“33. Yet further, as I have already found that the Appellant is a DRC national and as I find to that standard which has to be applied in these appeals that his account fits with the background information that relates to children being captured and forced into labour for periods of years in the DRC by various armed groups including the FDLR, I further find that taken in the round with the rest of the Appellant’s evidence, it is likely that the Appellant left DRC with

false documents. That being the case the Appellant may well be perceived by the DRC authorities as having committed document fraud when departing the DRC. In those circumstances the Appellant is a person who is at real risk of imprisonment for lengthy periods and of treatment proscribed by Article 3 ECHR.

34. It is well-documented in the objective information that prison conditions are severe and life-threatening. During 2010 the UN Secretary General Ban Ki Moon reported to the UN Security Council that the prison system required urgent reform as it continued to be characterised by catastrophic conditions of detention, including severe overcrowding and lack of medical facilities, and that in several instances, detainees died from starvation. The penal system was underfunded and most prisons were overcrowded, poorly maintained and lacked sanitation facilities. I find that detention and/or imprisonment in such an establishment would in itself be likely to amount to persecution. “

12. Consequently, Judge Osborne allowed the appellant’s appeal on the basis that his deportation would breach the UK’s obligations under the 1951 Refugee Convention.

The appeal to the Upper Tribunal

13. The Secretary of State sought permission to appeal to the Upper Tribunal on two grounds.
14. First, the Judge had been wrong to find that the appellant’s activities in the UK with APARECO (UK) amounted to “a significant and visible profile” which would come to the “likely knowledge and perceptions of DRC state agents” so as to fall within the risk category in paragraph 3 of the headnote in BM and Others.
15. Secondly, the Judge had been wrong to find that, merely because the appellant had exited the DRC using false documents put him within the risk category identified in paragraph 4 of the headnote in BM and Others. The Judge’s decision was inconsistent with the approach set out by the Upper Tribunal in BM (False Passport) DRC [2015] UKUT 467 (IAC) where the Upper Tribunal had required an “intense focus” on a number of matters and had found that merely to have left on a false passport would not without more bring an individual within the relevant risk category in BM and Others.
16. On 17 September 2015, the First-tier Tribunal (Judge Grant-Hutchison) granted the Secretary of State permission to appeal on both grounds.
17. Thus, the appeal came before me.

The Submissions

18. On behalf of the Secretary of State, Mr Richards submitted that the Judge’s conclusion in paragraph 32 of his determination that the appellant fell within the risk category of someone who had a “significant and visible

profile” within APARECO (UK) was inconsistent with his finding that the appellant had not as yet had an opportunity to carry out “any significant activities on behalf of APARECO”. Mr Richards submitted that the Judge had erred in law in concluding that the appellant fell within this risk category and his decision should be set aside.

19. Mr Richards did not seek to rely further on the second ground.
20. On behalf of the appellant, Mr Rees submitted that the Judge was entitled to find that the appellant fell within the risk category based upon his involvement with APARECO in the UK. The Judge had specifically considered that the appellant had only been involved for a short period but he had considered all relevant factors and had correctly identified the risk category set out in para 3 of the headnote in BM and Others. He referred me to para 87 of BM and Others in respect of the monitoring of *sur place* activities in the UK by the DRC authorities. Mr Rees submitted that the Judge had been entitled to find that the appellant would be perceived as a leader or spokesman and that his involvement would be known to the authorities given, at least one photograph had been uploaded onto the internet. Mr Rees submitted that the Secretary of State’s challenge was in essence one of irrationality and, having properly directed himself and having taken into account all relevant factors, he submitted that it could not be said that the Judge’s finding that the appellant fell within the risk category in para 3 of the headnote in BM and Others was irrational.
21. In respect of the second basis upon which Judge Osborne found in the appellant’s favour, Mr Rees submitted that the Judge was entitled to conclude that the appellant fell within the risk category because he had used false documentation to leave the DRC.

Discussion

22. I deal first with the Judge’s conclusion in paragraph 32 and the Secretary of State’s first ground challenging that conclusion.
23. I have already set out the relevant risk category summarised in para 3 of the headnote in BM and Others. That risk category includes a person who has a “significant and visible profile” with APARECO (UK). That category includes persons “who are, or who are perceived to be leaders, office bearers and spokesman. The category does not, however, include mere rank and file members”. The Upper Tribunal recognised that the assessment of risk was inevitably “fact sensitive” and particular attention had been directed to the likely knowledge and perception of DRC state agents.
24. There is no doubt that Judge Osborne had well in mind in reaching his decision the country guidance case of BM and Others and the relevant risk category identified by the UT in para 88(iii) of its determination (and summarised in para 3 of the headnote). The Judge accepted the evidence

before him that the appellant had joined APARECO in the UK and had an organising role within the city of Bristol and had engaged in local activities in Wales. He had attended publicised meetings and had successfully enlisted at least one new member. He had an organising role and there were photographs of the appellant, one of which (at least) had been uploaded onto the internet.

25. None of those factual findings are challenged by the Secretary of State. What is challenged is the Judge's conclusion that this fell within the rubric of the relevant risk category. That challenge is, as Mr Rees submitted, one of irrationality. That is, it must be shown that no reasonable Judge properly directing him or herself could have reached the conclusion that on the facts (not challenged) the appellant was a person who has a "significant and visible profile" within APARECO (UK) and there is a real risk that he will come to the attention of the DRC authorities as such.
26. Judge Osborne was clearly aware that the risk did not run to a "mere rank and file member". In my judgement, Judge Osborne was entitled to conclude that the appellant was more than that. He had an organising role and had enlisted at least one new member. The evidence, which the Judge accepted, was that the appellant on joining the association was asked to mobilise potential members in Bristol where there were currently no members. Again that evidence is not challenged. Also, the appellant's evidence was that he had approached in the street approximately fifty people with "glossy APARECO publicity cards" and had succeeded in attracting and signing up one member. Again, the Judge's acceptance of that evidence is not challenged.
27. In [87] of BM and Others the Upper Tribunal dealt with the interest of the DRC authorities in *sur place* activities involving APARECO and the monitoring undertaken, in particular in the UK:

"87. We address the discrete question of risk to those who are considered to be opponents of the Kabila regime by reason of their *sur place* activities in the United Kingdom. In addressing and determining this question, we make the following specific findings:

- (i) APARECO is a cohesive, structured organisation which has its main base in France and strong basis in certain other European countries, including the United Kingdom. It also operates in Canada and the United States.
- (ii) APARECO is implacably opposed to the regime of President Kabila which has governed DRC during the past decade. Its overarching aims are the defeat of this regime and the re-establishment of the state on a different basis.
- (iii) APARECO has no overt presence in DRC, where it operates underground.
- (iv) The external opposition of APARECO to the governing regime of DRC is overt and visible. Its highest profile activities unfold

in public places, accessible to all. Activities of this nature are accompanied by advance publicity.

- (v) In common with many comparable regimes throughout the world, both present and past, the DRC Government has a strong interest in opposition organisations, including APARECO. Such organisations are monitored and data is recorded. This includes information about the identities of the most prominent members of such organisations, that is to say their leaders, office holders and spokespersons.
- (vi) The monitoring of APARECO (UK) is likely to be undertaken by and on behalf of the DRC Embassy in London. This is the agency with the most obvious motivation to carry out and co-ordinate such scrutiny. Such scrutiny is likely to generate periodic reports to the DRC Government, in particular its ANR and DGM agencies.
- (vii) It is likely that the leaders, office bearers and spokespersons of APARECO (UK) are known to the DRC UK Embassy and the DRC Government, in particular ANR and DGM."

28. There, in particular, the monitoring of APARECO (UK) is noted and that its "leaders, office bearers and spokesmen" are likely to be known to the DRC embassy in the UK and, as a result, the authorities in the DRC. In my judgement, given that the Judge's finding that the appellant has a significant visible profile in APARECO (UK) was properly open to him on the evidence, it was not irrational to find that there was a risk of him being perceived as a "leader, office bearer or spokesperson". Those findings are consistent with BM and Others. Having regard to [87(vi) and (vii)], the judge was entitled to find that there is a real risk that the appellant's activities will be (or will become) known to the DRC authorities and that the consequent risk of harm to him will arise on return to the DRC.
29. I reject ground 1 of the Secretary of State's grounds of appeal
30. In my judgement for these reasons, Judge Osborne was entitled to find that the appellant fell within the risk category identified in paragraph 3 of the headnote of BM and Others. That finding was not irrational or otherwise unsustainable in law.
31. Turning to ground 2, Mr Richards did not seek to pursue this with any vigour before me. Indeed any error by the Judge in concluding that the appellant fell within the risk category in paragraph 4 of the headnote in BM and Others is immaterial given that I have already concluded that he was entitled to find in the appellant's favour on the basis of the risk category in para 3 of the headnote.
32. That said, however, I do not consider that the Judge's finding in relation to the risk category in para 4 of the headnote in BM and Others is not sustainable in law in the light of the Upper Tribunal's decision in BM (False Passport) to which the Judge was not referred. The headnote of that decision is in the following terms:

“The mere fact that an asylum claimant utilised a false passport or kindred document in departing the DRC will not without more engage the risk category specified in [119(iv) of BM and Others (Returnees: Criminal and Non-Criminal)] DRC CG [2015] 293 (IAC). The application of this guidance will be dependent upon the fact sensitive context of the individual case. The Tribunal will consider, inter alia, the likely state of knowledge of the DRC authorities pertaining to the person in question. A person claiming to belong to any of the risk categories will not be at risk of persecution unless likely to come to the attention of the DRC authorities. Thus in every case there will be an intense focus on matters such as publicity, individual prominence, possession of a passport, the standard emergency travel document arrangements (where these apply) and how these matters impact on the individual claimant.”

33. If the appellant’s claim is stripped of his involvement with APARECO in the UK, in my judgement, the appellant is someone who does not fall within the risk category in para 119(iv) of BM and Others (summarised in para 4 of the headnote) since he is a person who would simply be a returnee who left the DRC on a false passport.
34. Of course, in reality, given the Judge’s sustainable findings on the appellant’s political involvement in the UK, he would not be a simple returnee of that sort. However, as a discreet basis for concluding that the appellant would be at risk on return, the Judge’s reasoning in paras 33 and 34 of his determination (which I set out above) is inconsistent with BM and others as explained in BM (False Passport) since the only basis that he would be at risk is because he exited the DRC using a false passport. Were that the only basis upon which he claimed to be at risk on return to the DRC, then his claim could not succeed. However, the Judge’s error is not material to the decision as the appellant properly succeeded in establishing he fell within the risk category based upon his political activities in the UK with APARECO.

Decision

35. For the above reasons, the decision of the First-tier Tribunal to allow the appellant’s appeal against the refusal of his protection claim on the basis that his deportation to the DRC would breach the Refugee Convention did not involve a material error of law and that decision stands.
36. Accordingly, the Secretary of State’s appeal to the Upper Tribunal is dismissed.

Signed

A Grubb

Judge of the Upper Tribunal

Date: