



**Upper Tribunal
(Immigration and Asylum Chamber)
PA/04423/2017**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

Decision & Reasons

On 24 April 2018

Promulgated

On 27 April 2018

Before

UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

C B

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr P Duffy, Senior Home Office Presenting Officer

For the Respondent: Mr R Bartrum, The Migrant Law Partnership

Anonymity

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008

An anonymity order was made by the First-tier Tribunal. As this is an appeal on protection grounds, it is appropriate to continue that order. Unless and until a tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies, amongst others, to both parties. Failure to comply with this direction could lead to contempt of court proceedings.

DECISION AND REASONS

Background

1. This is an appeal by the Secretary of State. For ease of reference, I refer below to the parties as they were in the First-tier Tribunal albeit that the Secretary of State is technically the Appellant in this particular appeal. The Respondent appeals against a decision of First-tier Tribunal Judge Griffith promulgated on 2 February 2018 (“the Decision”) allowing the Appellant’s appeal against the Respondent’s decision dated 24 April 2017 refusing the Appellant’s protection claim.
2. The Appellant is a national of the Democratic Republic of Congo (“DRC”). He arrived in the UK on 15 October 1995 when he was aged three years with his mother, stepfather and a sibling. He applied for leave to remain as a dependent to his parents’ asylum claim. That was refused but he and his family were granted exceptional leave to remain until 29 July 2004.
3. The Appellant’s mother applied for further leave for him as her dependent but that was refused on 17 December 2008 when reasons were given for his deportation following convictions in June 2008 for possession of cannabis, robbery and actual bodily harm. A deportation order was signed on 26 July 2010 but then revoked based on of the Appellant’s Article 8 rights (by reference to the case of Maslov). The Appellant was granted further discretionary leave until 11 March 2015. He applied for further leave, which application was outstanding at the date of refusal of the decision here under appeal.
4. Between 2009 and 2016 the Appellant was convicted of offences including offences against the person and dishonesty. On 18 January 2016, he was convicted of possession of Class A and Class B drugs and sentenced to eighteen months’ imprisonment reduced to eight months on appeal.
5. On 26 February 2016, the Appellant made the protection claim, the refusal of which has led to this appeal. In short summary, the Appellant claims to be at risk from the authorities in DRC as a member and youth leader in the UK of the group APARECO.
6. The Appellant’s appeal was allowed on protection grounds (asylum and Article 3 ECHR) because the Judge accepted that he is likely to be considered by the authorities to be more than simply a rank and file member of APARECO and at risk on that account.
7. The Respondent appeals on the grounds that the Judge has erred when considering the risk categories set out in the relevant country guidance and, in essence, has made findings not open to her on the evidence. Specifically, the Respondent notes the limited nature of the evidence, that the Appellant said that he did not have an APARECO membership card,

was “not sure” if his activities appear on the internet and admitted that he was not a senior member or official and did not know where APARECO’s headquarters are located.

8. Permission to appeal was granted by First-tier Tribunal Judge Farrelly on 8 March 2018 in the following terms (so far as relevant):-

“... ”

[2] It is arguable that the First tier Judge materially erred in allowing the appeal on *sur place* activity given the findings at para 55 of level activity and the risk categories identified in BM and Others (returnees-criminal and non criminal) DRC CG [2015] UKUT 00293 (IAC).”

9. The matter comes before me to decide whether the Decision contains a material error of law. Both parties accepted that, if I found there to be an error of law in the Decision, given the basis of the challenge, the appeal could remain in this Tribunal for re-hearing.

Decision and Reasons

10. I begin by noting that there was very limited documentary evidence produced by the Appellant. That is limited to the Appellant’s own statement, transcripts of videos and a photograph. The Judge also had the record of the Appellant’s screening interview and substantive asylum interview and she heard oral evidence from the Appellant.

11. In relation to the protection element of the appeal, the Judge had regard to paragraph 88(iii) of the relevant country guidance case of BM and Others (returnees – criminal and non-criminal) DRC CG [2015] 00293 (IAC) (“BM”) at [54] of the Decision. That paragraph is repeated at [3] of the headnote in BM and is therefore part of the relevant country guidance. The relevant part of that passage is 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...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 perception of DRC state agents.”

12. The findings and reasoning which led the Judge to her conclusion that the Appellant falls within that risk category are as follows:

“[50]...the appellant relies on his *sur place* political activities and Article 8 to resist the respondent’s decision to deport him. Regarding his connection with APARECO, it appears he had no interest in the political and internal affairs of the DRC until he found himself in prison with other Congolese prisoners and discovered the existence of the group. He was introduced to APARECO in the UK by his mother’s boyfriend, T, in or about 2015. There is evidence of his membership in the form of a letter dated 29 December 2016 from the president of that organisation, Ernest Likiyo. The letter stated that the appellant is in charge of mobilisation and media of APARECO/Youth-London. The letter spoke of the risk and threat posed by the Kabila regime to all

members of APARECO, claiming that photographs of members of APARECO have been published. The letter claimed that several members who had been deported were all tortured and killed.

[51] In the appellant's bundle there were two photographs featuring the appellant being stills from a video, and transcripts of speeches, including one short speech from the appellant, in which he identified himself and invited people to attend an event on 15 December 2017. There were also translated transcripts from Lingala or French of two speeches from two named spokespersons in support of the march on 15 December 2017. There was also a photograph showing the appellant with others at a gathering said to be outside the Congolese Embassy in London - the location cannot be verified from the photograph. The appellant is shown with a Congolese flag across his mouth. In the video promoting the event of 15 December 2017, it is recorded that the appellant made the following speech:

“My name is [CB]. I am an active youth member of APARECO. I am basically here to invite everybody and I mean everybody and I mean from mothers fathers and children you are welcome to the event run by APARECO on 15 December from 10am to 5pm. We will be marching and protesting about the human rights violations back in the Democratic Republic of Congo outside the Congolese Embassy in the UK”

[52] As to whether that is sufficient to draw the appellant to the adverse attention of the authorities in DRC, I have considered BM and Others...

[53] At paragraph 87 of that decision, the Tribunal made specific findings addressing the risk to those considered to be opponents of the Kabila regime by reason of their *sur place* activities. The findings included that the monitoring of APARECO (UK) is likely to be undertaken by and on behalf of the DRC embassy in London and that it was likely that leaders, office bearers and spokespersons are known to the DRC UK embassy and the DRC government.”

[The Judge then set out the relevant paragraph of the headnote in BM and others to which I refer at [11] above, before continuing as follows]

“[55]In assessing whether the appellant falls within one of the risk categories, apart from the recent speech promoting the march on 15 December 2017, there is little evidence of the appellant's activities. At his interview in December 2016, he stated he had attended many rallies and to have watched himself on the APARECO TV channel. He admitted that he was not a senior person or official but said he spoke for the youth. The letter from APARECO stated that he is “in charge of mobilisation and media” of the APARECO youth.

[56] It was found in BM that the APARECO website is accessible in the DRC (paragraph 99(iv)). There is no evidence of his leafleting, but there is evidence that he has a visible profile promoting the activities of APARECO; he has been identified by name and has spoken as a member of the youth wing in support.

[57] The refusal letter suggests that the appellant joined APARECO only because his mother's boyfriend, who had been in the same situation as himself, won his case. In other words, the appellant is not sincere and is simply using a connection with APARECO to gain asylum.

I do not rule out that possibility. Regulation 6(2) of the Qualification Regulations states, however, that:

“In deciding whether a person has a well-founded fear of being persecuted, it is immaterial whether he actually possesses the racial, religious, national, social or political characteristic which attracts the persecution, provided that such a characteristic is attributed to him by the actor of persecution.”

Accordingly, whether he is sincere is immaterial; what is relevant is how the authorities in DRC will perceive him.”

13. The Judge’s conclusion is then set out at [58] as follows:

“Applying the lower standard of proof, I am satisfied, albeit on limited evidence, that the appellant falls into one of the risk categories identified in MM. This is because he has identified himself (both visually and by name) as a spokesperson for the youth wing on a medium that is acknowledged to be accessible in the DRC and is therefore likely to be viewed as more than a rank and file member...”

14. Mr Duffy was constrained to accept that the grounds might appear as a mere disagreement with the Judge’s findings. Returning to those grounds, the Judge accepted that there was limited evidence from the Appellant himself about his activities. She accepted that the Appellant was a member whether or not he had a membership card because she accepted that the organisation had vouched for him as a member ([50]). She accepted based on evidence from that organisation, findings in BM and the Appellant’s own evidence, that his speech as shown on the video would be accessible to the authorities in DRC ([50], [51], [53], [55] and [56]). The Judge took into account that the Appellant admitted that he was not a senior member or official of APARECO ([55]) but noted the Appellant’s case based on the letter from APARECO (UK) that he is in charge of “mobilisation and media” of the youth wing. The Judge took into account that the Appellant’s motives in associating himself with APARECO might not be sincere. As she noted at [57], however, the question is not whether the Appellant genuinely holds his political opinion but whether that is likely to be imputed to him by the DRC authorities.
15. Whilst I do not accept as Mr Bartram at one point submitted that the outcome of this appeal was inevitable, particularly given the limited evidence, nonetheless, I am satisfied that it cannot be argued that the Judge’s findings, reasoning and conclusion based on that evidence are perverse or irrational.
16. As Mr Bartram pointed out, based on the Decision, the Respondent knows why she has lost. There is no insufficiency of reasoning for the conclusion. The grounds merely disagree with the findings, reasons given and the conclusion reached. The grounds do not disclose an error of law.
17. For those reasons, I am satisfied that there is no error of law in the Decision. I therefore uphold the Decision.

DECISION

I am satisfied that the Decision does not contain a material error of law. I uphold the decision of First-tier Tribunal Judge Griffith promulgated on 2 February 2018 with the consequence that the Appellant's appeal stands allowed

Signed

A handwritten signature in black ink, appearing to read 'J. Smith', written in a cursive style.

Upper Tribunal Judge Smith

Dated: 25 April 2018