Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/18459/2018

THE IMMIGRATION ACTS

At Manchester Civil Justice Centre	**Decision & Reasons Promulgated**
On 11th February 2020	**On 2nd March 2020**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

MZ
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: **Mr Khan, Counsel instructed by Montague Solicitors**
For the Respondent: **Mr McVeety, Senior Home Office Presenting Officer**

DECISION AND DIRECTIONS

1. The Appellant is a national of the Democratic Republic of Congo born in 1974. He appeals with permission against the decision of the First-tier Tribunal (Judge R Sullivan) to dismiss his appeal.

2. The decision under appeal before the First-tier Tribunal was the Respondent's decision of the 23rd August 2018 to refuse to grant the Appellant leave on human rights grounds, and in so doing refuse to revoke the Deportation Order signed against him back in 2008. The Deportation

Order had followed the Appellant's conviction for 'seeking leave to remain by deception', for which he had received a sentence of nine months' imprisonment and a recommendation that he be deported. I return to the circumstances of that conviction below, but it suffices to note here that this appeal concerned:

a) an application to revoke a deportation order;

b) which had been made following a recommendation by the Crown Court under s.3(6) of the Immigration Act 1971; *and*

c) the appeal was brought under s82(1) of Nationality, Immigration and Asylum Act 2002 on human rights and protection grounds.

3. The case for the Appellant before the First-tier Tribunal was that regardless of the merits of his 'historical' asylum claim (earlier appeals against the decision to refuse asylum had been dismissed), today he had a well-founded fear of persecution in the DRC because he had left the country illegally using a false passport, and had been convicted as a result. In appearing for the Appellant Counsel Mr Batten made an application for an adjournment so that this argument could be researched and developed, but that application having been refused Mr Batten made submissions and placed reliance on the reported decision of the Upper Tribunal in BM & Other (returnees – criminal and non-criminal) DRC CG [2015] UKUT 00293, the salient part of which is set out in the headnote:

> "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".

4. In respect of the human rights limb of his appeal the Appellant argued that his deportation would, in addition to amounting to a violation of Article 3 (see above), be a disproportionate interference with his Article 8 family life in this country, a family life consisting of his relationships with his wife and two children.

The Decision of the First-tier Tribunal

5. In respect of the protection grounds the Tribunal placed a *Devaseelan*[1] reliance on the decision of two earlier Tribunals[2], who had both rejected the 'historical' claim to be at risk as a result of involvement in Congolese opposition group the BDK. As to the new argument raised by Mr Batten,

[1] Devaseelan v Secretary of State for the Home Department [2002] UKIAT 00702

[2] The decision of Immigration Judge RA Price dated the 19th September 2007, and the decision of First-tier Tribunal Judge Davies dated 7th July 2014

that the Appellant could be at risk in the DRC because he used a false passport to get out of the country, the Tribunal found as follows:

i) That at the time that the Appellant left the DRC there was no known risk to persons using false documents;

ii) That there was no evidence that he did in fact use a false passport to exit the country;

iii) There is no reason to believe that the Appellant would have come to the attention of the Congolese authorities for his use of a false passport;

iv) Counsel did not bring to the Tribunal's attention the 'addendum' decision of BM (false passport) DCR [2015] UKUT 00467 (IAC).

Having made those findings the Tribunal concluded that the Appellant would not be suspected by the DRC authorities of having used a false document. Their focus is on catching radical opponents of the government and the Appellant is not one of those. No risk therefore arose.

6. As for the Appellant's human rights the Tribunal accepted that he enjoys a genuine and subsisting parental relationship with his two children, at least one of whom is a 'qualifying'[3] child because she has been in the United Kingdom for a continuous period in excess of seven years. The children have been granted leave to remain in the United Kingdom on the basis that their mother has leave to remain because she is now the parent to a third, British, child. The determination then sets out, at paragraph 38 that the "key question, so far as section 117C of the 2002 Act and paragraph 398 of the Rules are concerned, is whether the effect of the Appellant's deportation on [his qualifying daughter] would be unduly harsh". Following that self-direction the Tribunal finds that it would not, and the appeal is duly dismissed.

The Grounds of Appeal

7. Mr Batten, who appeared at first instance, drafted the grounds. In essence he asserts therein that he, and those instructing him, had only received instructions very shortly before the hearing, and that his ability to present the case was thereby compromised. In particular it is pleaded that Counsel needed more time to research and present the 'BM' point and that "on the face of it there is at least a serious possibility that he came to this country on a false passport".

8. The grounds also make some trite observations about the burden and standard of proof in asylum appeals, but since no ground is actually developed, I disregard these paragraphs.

[3] Section 117D Nationality, Immigration and Asylum Act 2002

My Findings on 'Error of Law'

9. At a hearing on the 3rd June 2019 I heard submissions on whether the Decision of the First-tier Tribunal was flawed for material error of law. As I set out in my decision of that day, it was. As I explain herein, the grounds as argued were without merit; there were however two discrete reasons why the decision of the First-tier Tribunal could not stand.

10. There was no arguable error of law in the First-tier Tribunal not adjourning so that further instructions could be taken on the 'BM' point. I so find because it is very difficult to see what further elaboration might have been made to the submission made at the hearing. There was in this case an undisturbed finding of fact that the Appellant *did* leave the DRC on a passport to which he was not entitled: see §27(ii) of the determination of Judge Price. The Upper Tribunal had given guidance on whether individuals returning to the DRC might be at risk on return in those circumstances in BM (returnees – criminal and non-criminal) and BM (false passport). The grounds do not explain what more the Tribunal might have needed to know. I can therefore find no arguable unfairness or irrationality in its decision to press ahead with the hearing.

11. That finding notwithstanding, Mr McVeety for the Respondent accepted that the First-tier Tribunal decision was nevertheless flawed for a more fundamental error of law: the First-tier Tribunal's failure to have regard to, or set out, the basic legal framework applicable to this appeal.

12. This appeal was brought under s82 of the Nationality, Immigration and Asylum Act 2002 on the grounds that the Appellant's deportation would breach the United Kingdom's obligations under both the Refugee Convention and the European Convention on Human Rights. Insofar as the Tribunal put these matters at the forefront of its decision-making, it was plainly right to do so. The background to this matter was however the application to revoke the deportation order. That was important because it should have led the Tribunal to assess the matter in the context of the relevant published policy, as set out in part 13 of the Immigration Rules.

13. Paragraphs 390 – 391A of the Rules set out the approach to be taken when considering an application to revoke a deportation order. Paragraph 390 sets out the general principles to be applied in all cases:

> 390. An application for revocation of a deportation order will be considered in the light of all the circumstances including the following:
>
> (i) the grounds on which the order was made;
>
> (ii) any representations made in support of revocation;
>
> (iii) the interests of the community, including the maintenance of an effective immigration control;

(iv) the interests of the applicant, including any compassionate circumstances.

14. Paragraph 390A sets out additional tests where paragraph 398 of the Rules applies:

> 390A. Where paragraph 398 applies the Secretary of State will consider whether paragraph 399 or 399A applies and, if it does not, it will only be in exceptional circumstances that the public interest in maintaining the deportation order will be outweighed by other factors.

15. And paragraph 391A deals with situations in which it doesn't:

> 391A. In other cases, revocation of the order will not normally be authorised unless the situation has been materially altered, either by a change of circumstances since the order was made, or by fresh information coming to light which was not before the appellate authorities or the Secretary of State. The passage of time since the person was deported may also in itself amount to such a change of circumstances as to warrant revocation of the order.

16. The first question for the Tribunal here was therefore whether 398 – and by extension 390A – applied to the Appellant's case. Paragraph 398 reads:

> 398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and
>
> (a) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;
>
> (b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or
>
> (c) the deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law, the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.

17. It is not in issue that the Appellant comes under neither (a) nor (b) above: his sentence was one of 9 months imprisonment. Is it arguable that he fell under (c)? At paragraph 48 of the refusal letter the Respondent asserted that he did as follows:

> "Your deportation is conducive to the public good and in the public interest because you have been convicted of an offence which has caused serious harm as reflected in the court recommendation for deportation. Therefore, in accordance with paragraph 398 of the Immigration Rules, the public interest requires your deportation unless an exception to deportation applies…."

18. I note as an aside that this was not of course the basis upon which the Respondent had originally made the order, which refers specifically to section 3(6) Immigration Act 1971. Nevertheless, that was the Respondent's position before the First-tier Tribunal. It is well established that in 'conducive' deportations it is for the First-tier Tribunal to determine, having regard to all available evidence, whether or not the Respondent has actually established that the conditions for deportation are met: Bah v Secretary of State for the Home Department (EO(Turkey)-liability to deport). In Bah a Presidential panel of the Upper Tribunal held that it is for the First-tier Tribunal decision maker to decide:

> "whether on the facts established viewed as a whole the conduct, character or associations reach such a level of seriousness as to justify a decision to deport"

19. As Mr McVeety agreed, it is not apparent from the determination of the First-tier Tribunal whether the Tribunal understood that to be its task: it simply proceeded on the basis that the conviction itself meant that the Appellant was a 'foreign criminal', that his offending caused serious harm, and that his deportation was conducive to the public good. From there the Tribunal proceeded to consider the Appellant's human rights through the prism of paragraph 399 of the Rules (or as it is expressed in the determination, s117C of the Nationality, Immigration and Asylum Act 2002), and the "undue harshness" test. As the Respondent accepts, this was an error of law. Unless and until the Tribunal had satisfied itself that the Appellant did in fact fall within 398(c) the appeal should never have proceeded on that basis. The omission in the reasoning was important because if the Tribunal, having regard to the facts, had decided that the Appellant's sole conviction, some 12 years ago, was not offending that "caused serious harm", it would have reverted to the more general revocation provisions in the rules, at paragraphs 390 and 391A.

20. It was on this basis that the Respondent agreed the First-tier Tribunal to have erred.

21. In my written decision of the 3rd June 2019 I referred to a second *Robinson* obvious error. The background to the Appellant's offending is set out in the Respondent's explanatory statement at the beginning of his bundle. It notes that on the 13th December 2006 a male claiming to be a Kapesa Ngombi presented himself at the British High Commission in Kinshasa and applied for entry clearance to the United Kingdom. On the 16th April 2007 a male using the Appellant's name [MZ] arrived at the Asylum Screening Unit in Croydon and claimed asylum. The fingerprint database revealed that MZ and Kapesa Ngombi were one and the same. The explanatory statement then says this:

> "The facts of the case were put forward to the appellant, he elected to make a full and frank admission to the offence he had committed. He stated that his true identity is of [MZ] … He admitted that he was fully aware that it was wrong to deceive government officials on several occasions, but claimed he was scared for his life"

22. These were the facts that led to the Appellant entering, upon legal advice, a plea of guilty to a charge of 'seeking leave to remain in the United Kingdom by means of deception'. He was convicted at Croydon Magistrates' on the 22nd May 2007. On the 30th July 2008 he was sentenced to 9 months' imprisonment, and a recommendation was made for his deportation. Thus by the time his asylum appeal came before the First-tier Tribunal (Immigration Judge RA Price) in September 2007 he had already been convicted of deception and sentenced to imprisonment. That this weighed heavily in that Tribunal's deliberations is reflected in the fact that of the seven reasons it gives for rejecting the claim, four are concerned with the Appellant's deception and conviction. It is not apparent from the sentencing remarks of the Magistrate, or the decision of Judge Price, that any consideration was ever given to whether the Appellant might have an *Adimi*[4] defence under Article 31 of the Refugee Convention and section 31 of the Immigration and Asylum Act 1999:

> **Defences based on Article 31(1) of the Refugee Convention.**
>
> (1) It is a defence for a refugee charged with an offence to which this section applies to show that, having come to the United Kingdom directly from a country where his life or freedom was threatened (within the meaning of the Refugee Convention), he—
>
> (a) presented himself to the authorities in the United Kingdom without delay;
>
> (b) showed good cause for his illegal entry or presence; and
>
> (c) made a claim for asylum as soon as was reasonably practicable after his arrival in the United Kingdom.

[4] R (ex parte) Adimi (FC) v Uxbridge Magistrates Court [1999] EWHC Admin 765

I should add that whilst the defence itself was not discussed, the Magistrate was clearly aware of the Appellant's purpose in using the document: "you have pleaded guilty to seeking leave to remain in the United Kingdom as a refugee by means which you knew included deception" (sentencing remarks, 5th July 2007).

23. Because that statutory defence is only open to 'refugees'[5] the guidance to prosecutors has, since its introduction, consistently been that these cases should not be pursued until the final determination of whether the accused is in fact a refugee. The reason for that is all too apparent from the chronology of this case. Absent a finding that he required protection, the Appellant could not rely upon the defence; conversely the conviction appears to have played a material role in the decision to deny the Appellant the very protection that he sought. This in turn has arguably infected subsequent consideration of the Appellant's claims: in July 2014 First-tier Tribunal Judge Davies placed the Appellant's conviction for deception at the forefront of his deliberations [see §24 of that decision], as did the Tribunal in this instance.

24. I am unable to say whether the s31 *Adimi* defence would have succeeded had it been argued before Croydon Magistrates, or whether on the facts, it should have done[6]. What I am able to say is that this unfortunate chronology was clearly part and parcel of the evidence before the First-tier Tribunal, and that it was clearly relevant to the global appraisal required by paragraph 390 of the Rules, but neglected in this determination.

25. For all of these reasons, I set the decision of the First-tier Tribunal aside. In light of my observations, I considered it appropriate to adjourn the re-making in order that the Respondent would have time to consider the points I had made about the *Adimi* chronology. I therefore directed that the Respondent should consider the terms of the deportation order, and paragraph 48 of the refusal letter, and to set out in writing on what basis the deportation order is maintained. It is extremely unfortunate that over seven months have elapsed since the initial hearing of this matter, and those directions have still not been followed. Mr McVeety could offer apology, but no explanation as to why. Before me he acknowledged that following Bah it was for me to determine whether or not the Respondent had demonstrated that the conduct of the Appellant was such that deportation action was justified. That being so, he invited me to proceed to remaking the appeal without any further delay.

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[5] s31(6) Immigration and Asylum Act 1999.

[6] The persistent failure of the CPS and courts to recognise that section 31 exists, or that it reflects the UKs international obligations under Article 31 of the Refugee Convention has been subject of commentary by both academia and the higher courts: see for instance article by Aliverti, A at https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2017/03/prosecuting and the decision of the Court of Appeal in Mateta [2013] EWCA Crim 1372.

The Deportation Decision

26. As I have set out above, the Appellant was made the subject of a deportation order on the 17th April 2008. That conviction arose from the Appellant's use of a false passport to obtain a visa and enter the United Kingdom.

27. The Appellant now asks that the deportation order against him be revoked.

28. I have set out the legal framework above: the relevant considerations are set out in Part 13 of the Immigration Rules. The first question is whether paragraph 398 applies to the Appellant. If it does, and he cannot bring himself within one of the relevant 'exceptions', then the presumption would be that the deportation order should continue to be enforced.

29. I am satisfied that none of the alternative provisions within paragraph 398 apply. Sub paragraph (a) does not apply because the Appellant has not been subject to a sentence of at least 4 years. Sub paragraph (b) does not apply because the Appellant has not been subject to a sentence of at less than 4 years but at least 12 months. The only possible route by which paragraph 398 could be engaged would be (c):

> "(c) the deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law…"

30. Mr McVeety accepted that the wording of that rule notwithstanding, in the context of this appeal it is in fact a matter for this Tribunal to consider whether or not the Appellant's offending caused "serious harm", taking all relevant considerations into account, and giving due weight to the public interest and the Secretary of State's expression of where that lies: Bah applied.

31. The Appellant was convicted of a single offence of deception, arising from his use of someone else's passport to facilitate his entry to the United Kingdom in 2007. In Bah the Tribunal directed that decision makers should consider "whether on the facts established viewed as a whole the conduct character or associations reach such a level of seriousness as to justify a decision to deport", and in considering that matter:

> "the judge will take account of any lawful policy of the Secretary of State relevant to the exercise of the discretion to deport and whether the discretion has been exercised in accordance with that policy"

32. Mr McVeety did not contest my conclusion that there has been in this case a significant procedural impropriety in that the Appellant's prosecution preceded consideration of his asylum claim. He acknowledged that the cart had been put before the horse, and that 13 years later it would be

impracticable, if not impossible, to say whether the Appellant in fact had an *Adimi* defence (as on the facts, he has consistently asserted). Mr McVeety accordingly accepted that the procedure adopted in this case was contrary to established Home Office policy, and that no consideration appears to have been given to that matter when the Secretary of State refused to revoke the deportation order. It is inevitable in these circumstances that that the weight to be attached to the offence itself – and to the Magistrates' recommendation – is considerably reduced. It is against that background that before me the Secretary of State offered no submissions on whether the offending had caused "serious harm". Having had regard to all of the particular circumstances in this case, I cannot be satisfied that that test is met. Accordingly I am not satisfied that paragraph 398 of the rules has any application to the Appellant's case.

33. In these circumstances, and applying the criteria in paragraph 390 I am satisfied that the Deportation Order signed on the 17th April 2008 should now be revoked. The grounds on which the order was made, and the interests of the community in maintaining it, now appear very dubious indeed. The use of fraudulent documents is ordinarily a serious offence but the offence must be seen in context. The context here is that the Appellant used that document to obtain a visa, and to facilitate his departure from a country where he claims his life and/or liberty were at risk. The procedural safeguards which exist to ensure that it is that claim which must be considered first were ignored. But for that error it is not possible to say whether all that followed – the refusal of asylum, the deportation order, the dismissed appeals – would ever have occurred.

Article 8

34. The Appellant has successfully demonstrated that the deportation order should be revoked. It does however remain the case that he has no extant leave to remain in this country. He seeks such leave to remain on human rights grounds. This is one limb of the right of appeal before me, brought under s82(1)(b) of the Nationality, Immigration and Asylum Act 2002 (as amended):

> *82 Right of appeal to the Tribunal*
>
> (1) A person ("P") may appeal to the Tribunal where—
>
> (a) the Secretary of State has decided to refuse a protection claim made by P,
>
> (b) the Secretary of State has decided to refuse a human rights claim made by P, or
>
> (c) the Secretary of State has decided to revoke P's protection status.

35. The only ground of appeal open to the Appellant is that set out at s84 (2): "an appeal under section 82(1)(b) (refusal of human rights claim) must be brought on the ground that the decision is unlawful under section 6 of the Human Rights Act 1998".

36. Section 6(1) of the HRA 1998 provides that "it is unlawful for a public authority to act in a way which is incompatible with a Convention right". The 'act' with which I am concerned is not the decision to deport. The 'act', as s82(1)(b) makes clear, is the decision to refuse a human rights claim.

37. I therefore proceed to consider the Appellant's 'human rights claim' in light of what might be termed the residual public interest in refusing him leave: the fact that he never, since the day that he arrived in 2008, had leave to be in this country. That is a matter that must be weighed in the balance: s117B(1) Nationality, Immigration and Asylum Act 2002, as does the fact that the Appellant is not financially independent. As Mr McVeety realistically accepted, none of that, and indeed any other factor highlighted in s117B, will in fact be of any relevance in a case where the Appellant is accepted to have a genuine and subsisting parental relationship with a qualifying child, and it is not 'reasonable' to accept that child to leave: s117B(6) Nationality, Immigration and Asylum Act 2002 applied. This was in fact the unchallenged finding of the First-tier Tribunal: for the avoidance of doubt it was a finding well made. The child in question has two younger siblings, one of whom is British and cannot be expected to leave the United Kingdom, either as a matter of law or practicality, since her father remains here and as far as I am aware has no intention of relocating to the DRC. It would not by any measure be 'reasonable' to split these sisters up. It would not be reasonable to expect the Appellant's eldest daughter to leave the United Kingdom. Applying KO (Nigeria) [2018] UKSC 53 it follows that the public interest does not require the Appellant's removal.

38. The appeal is therefore allowed on human rights grounds.

Protection

39. Before me Mr Khan pursued two discrete claims for protection.

40. The first related to the unchallenged finding of fact that the Appellant left the DRC on a passport to which he was not entitled. That passport, in the name of Kapesa Ngombi, is said to have been a diplomatic passport. Mr Khan relied upon the decision in BM to submit that this factor in itself could place the Appellant at a real risk of harm.

41. I have had regard to the following:

- BM & Other (returnees – criminal and non-criminal) DRC CG [2015] UKUT 00293 (IAC)
- BM (false passport) DCR [2015] UKUT 00467 (IAC)

- The updated Country of Origin Information Report *Democratic Republic of Congo: Unsuccessful asylum seekers* (January 2020)

42. The part of BM (returnees) that Mr Khan relied upon is this:

> *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****.*

43. As I have alluded to above, however, this was not the end of the matter. The Tribunal followed that guidance with BM (false passport) which clarified the position:

> *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.*

44. There was no credible evidence placed before me to indicate that the Congolese authorities knew or have become aware that the Appellant used the false passport. Accordingly I am satisfied that no risk of harm can be said to arise. My conclusion is reinforced by the most recent evidence on the matter, produced at 9.2.3 of the CPIN which indicates that EASO is not aware of any evidence to indicate that the DRC authorities would have any means of knowing that someone had used a false instrument in this way.

45. The second basis upon which Mr Khan advanced a protection claim was that the Appellant has, over the course of approximately the past year, been involved with Congolese opposition group APARECO. I heard evidence from both the Appellant and his comrade from that organisation Mr Angbakadolo. They consistently stated that the Appellant has become involved because he has become disillusioned with the opposition groups that formerly held his allegiance, not least because the leader of one is now seen as a 'collaborator' with the Kinshasa government. APARECO campaign for human rights in Congo and against the complicity in, and cover up of, genocide in the region. A recent campaign has concerned the DRC

government's grant of immunity to *genocidaires* from Rwanda. A lot of people are really upset about that. I was told that the Appellant belongs to Liverpool branch. He has attended one demonstration outside the DRC embassy in London and another two elsewhere. He helped to organise these protests as part of a team.

46. I see no reason to reject the Appellant's evidence that he is a member of APARECO. It is consistent with, and supported by, the evidence of Mr Angbakadolo. I have applied those findings to 'country guidance' given by the Upper Tribunal in BM (returnees):

> *"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".*

47. Having applied that guidance I am unable to conclude that the Appellant is someone who is at any risk. He is not a leader, an office-bearer or a spokesperson. He has been a member for about one year and has attended three protests, as well as meetings of his local branch. There is nothing before me to suggest that these limited activities would have come to the attention of the Congolese authorities. Nor is there any reason to believe that he would be considered to be an activist.

48. It follows that the protection claim must fail on each of the alternative limbs upon which it was advanced.

Anonymity

49. The Appellant's case rests in part on the presence in the United Kingdom of his two children. As such I am satisfied, having had regard to the guidance in the *Presidential Guidance Note No 1 of 2013: Anonymity Orders*, that it would be appropriate to make an order in accordance with Rule 14 of the *Tribunal Procedure (Upper Tribunal) Rules 2008* in the following terms:

> "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 to, amongst others, both the Appellant and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings"

Decisions

50. The decision of the First-tier Tribunal is set aside.

51. I re-make the decision in the appeal as follows:
"The appeal is allowed on human rights grounds.
The appeal is dismissed on protection grounds"

52. There is an order for anonymity.

Upper Tribunal Judge Bruce
14th February 2020