IAC-HW-AM-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/10352/2011

THE IMMIGRATION ACTS

Heard at Manchester	**Determination Promulgated**
On 16 October 2014	**On 28 November 2014**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

SYLVA TUMBA BAKAFUA
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Medley-Daley, Solicitor
For the Respondent: Mr Harrison, Senior Home Office Presenting Officer.

DETERMINATION AND REASONS

1. The appellant, who is a citizen of the Democratic Republic of Congo, appeals with permission against the determination of First-tier Tribunal Judge M Davies promulgated on 20 May 2013, dismissing his appeal against the decision of the respondent made on 2 August 2011 to refuse his claim for asylum and to give directions for his removal to Pakistan.

2. The appellant's case is that he is a former employee of the DRC's National Intelligence Agency ("ANR") who was involved in the gross abuses of

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human rights carried out by that organisation, including torture. His case is that he had been compiling a dossier on their activities, intending to pass this to an NGO to bring attention to the abuses, but the ANR learned of his activities, detained and tortured him, and that it was only through personal contacts that he was able to procure his release. He escaped from where he was being held to Uganda, and from there travelled to the United Kingdom where he claimed asylum.

3. The respondent accepted the appellant's account of working for the ANR, and of the activities in which he had participated. On that basis she considered that he was excluded from the Refugee Convention by virtue of Article 1F. She did not, however, accept his account of compiling a dossier, or that this had been discovered by the ANR; nor did she accept that he had been detained or tortured by them. On that basis, she considered that he would not be at risk on return, either as failed asylum-seeker or otherwise.

4. The appeal against that decision first came before the First-tier Tribunal on 11 October 2011 when First-tier Tribunal Judge Irvine dismissed the appeal. He did so on the basis that although he accepted the appellant's account of working for the ANR and the activities in which he had participated (and thus he fell to be excluded from the Refugee Convention), he did not accept the claim that he had attempted to compile a dossier or that this had been discovered, or that he had been arrested, detained or ill-treated by the ANR as a result. In doing so he rejected the medical evidence adduced by the appellant in support of his claim to have been tortured.

5. Permission to appeal to the Upper Tribunal was on 31 January 2012 granted by Upper Tribunal Judge Storey, primarily on the basis that Judge Irvine's rejection of the medical evidence was arguably in error.

6. The appeal then came before Deputy Upper Tribunal Judge Pickup on 17 January 2013. He concluded that Judge Irvine's decision did involve the making of an error of law. The matter was remitted to the First-tier Tribunal but Judge Irvine's findings in relation to article 1 F were preserved, it being stated that;

> The issue to be determined is in relation to articles 2 & 3 only. For clarity, I make it clear that the new issue raised by the appellant as to risk on return as a failed asylum seeker and defect from the ANR may be argued in any new hearing.

7. On 8 May 2013 the appeal was then heard again by First-tier Tribunal Judge M Davies who had before him (see pages 1-6 of the appellant's bundle) an additional report from Alex Ntung addressing directly the risk to the appellant as a former employee of ANR and the risk to him on return as such; and, as a failed asylum seeker. That issue is more particularly dealt with in an email from Mr Ntung dated 2 April 2013 at page 7.

8. Judge Davies dismissed the appeal finding that he did not accept the appellant's account of seeking to compile a dossier, or of this being discovered by the ANR [66]-[78]. He accepted that the appellant would be returned as a failed asylum-seeker [79] but concluded that he had left DRC trough normal immigration channels and could return in the same way. He stated [79}:

> There is no reason or any evidence to suggest that those at the ANR would suspect that the appellant had given information in connection with his claim for international protection which would damage that organisation. As I have found I believed that aspect of the Appellant's claim to be completely fabricated, I do not accepted therefore that the conditions in which the Appellant would or may be kept in during his interrogation upon return to the DRC would amount to treatment which breached rights under Article 3. It follows that I do not accept the he would be imprisoned and therefore subjected to treatment which amounts to a breach of his rights under article 3"

9. The appellant sought permission to appeal to the Upper Tribunal on the grounds that Judge Davies erred in law:

   (a) In failing to consider adequately the expert evidence of Alex Ntung [3] and in particular the evidence that if the appellant had disclosed ANR activities to a foreign government, that would be considered a crime against the state [6]; and, that the evidence of Mr Ntung is evidence that the ANR would suspect that the ANR would suspect he had disclosed evidence of torture

   (b) In finding that the appellant could return through normal immigration channels as the evidence is that he has no passport [5];

   (c) In considering that the conditions in which the appellant would be detained would not breach article 3 when it was the respondent's policy that detention would breach article 3 [7], that observation applying to any detention [8], there being no qualification on length.

   (d) In considering the earlier determination of Judge Irvine when that contained a material error in its consideration of credibility [12] as doing do compromised his independent assessment of credibility

10. On 10 June 2013 First-tier Tribunal Judge Froom granted permission on all grounds and it is on that basis that the appeal came before me.

11. On 20 June 2013, the respondent replied to the grant of permission in a letter pursuant to rule 24. In that, it is stated:

> 2. The respondent does not oppose the appellant's application for permission to appeal, as he did not consider the expert evidence on a material point in question, the fact that the appellant's revealing that the ANR were involved in torture to a foreign government would essentially make him a traitor,

subjecting him to detention for committing a crime. Arguably the Judge should have considered this issue, even if he then went on to reject this.

The Hearing on 16 October 2014

12. It is regrettable that there has been such a delay in listing this case; all the more so given the terms of the letter referred to above.

13. It is evident from Judge Davies determination, and in particular from the passage set out above, that he did not have regard to the evidence of Alex Ntung which relates to the specific dangers the appellant faces on return as a former member of the ANR. It is also evident that he did not, in concluding that the appellant would return through normal channels, take into account that he would not be returning on his own passport; nor, given the evidence that detention conditions in DRC breaches article 3, is the conclusion that this appellant's detention would not engage that article adequately reasoned. I am satisfied that, for the reasons set out in the grounds of appeal, and which Mr Harrison accepted, that the decision of Judge Davies did involve the making of an error of law and I set it aside insofar as it relates to the risk on return; the findings of fact with respect to the appellant's activities in DRC and travels to the UK are preserved. I announced this decision, and that I would proceed to remake Judge Davies' decision

Remaking the Decision

14. I heard submissions from both representatives; I also had before me copies of the respondent's most recent Policy Bulletin dated 18 February 2014.

15. Mr Medley-Daley submitted that on the basis of the evidence set out in the Policy Bulletin supplied by the respondent it is likely that the appellant would be questioned on return in the process of being given a travel document and that material would be sent back to Kinshasa. He submitted that it is likely in the circumstances of this case, given the evidence of Mr Ntung that this appellant would be of interest on return. He submitted that it was likely that the appellant would be at risk as an ANR employee on return and that he would not be able to lie about the details he had disclosed or the information that he had given about the activities carried out by the ANR.

16. Mr Harrison relied on the refusal letter and the policy document issued in February 2014. He made no submissions regarding the evidence of Mr Ntung but submitted that there was no reason to suppose that the appellant would be asked about what he had done in the United Kingdom or whether he had worked for the ANR. He submitted further that it was unlikely the ANR would have an adverse interest in him and that he would be able to gain the protection of the person who had got him a job in the ANR in the first place someone who had been able to protect him in the past. He submitted further that the appellant would be able to relocate to a part of the country where he would not be put in risk.

17. In reply Mr Medley-Daley submitted that the appellant's position could be distinguished from that of others given that he had worked for the ANR.

Findings

18. The respondent's concession that the appellant had worked for the ANR and was involved in its activities, including involvement with ill-treatment of prisoners is significant; given the serious discrepancies in the remainder of his claim it is perhaps a surprising concession; had it not been for that concession, it is unlikely that the judges who have heard his appeal would have accepted that aspect rejecting as they have the remainder of his claim. Nonetheless, I must assess the risk to the appellant on the basis of the facts conceded by the respondent and in doing so, the evidence about the ANR, its activities and methods must be considered.

19. It is to be borne in mind that the ANR as set out in the Country of Origin Information Report on DRC 9 March 2012, at paragraph 9.01 says that it is responsible for internal and external security. It is said [9.24] to be the most professional of the different security services and it has its own detention centres [1.38]. While its remit appears to be to investigate crimes against security of the state [9.39] they act outside these powers, making arbitrary arrest of opposition supporters, civil society activists and journalists and also people suspected of criminal offences with no impact on state security. It appears also [13.01] that some of the facilities they run are illegal and suspects are held incommunicado.

20. It is evident from the material set out in the Fact-Finding Mission to Kinshasa conducted between 18 and 28 June 2012, published by UK Border Agency in November 2012 at section 2.10 to 2.104 that the ANR are operating at the airport. That is consistent with the material set out at Appendix A of the Home Office's DRC Policy Bulletin where the German Government responded that in specific cases the ANR do carry out checks.

21. No suggestion was made that the decision of the Upper Tribunal in **BK (failed asylum seekers) DRC CG [2007] UKAIT 00098** is no longer relevant. Indeed, the respondent notes in her Policy Bulletin that its conclusions are still valid. It follows from this that it is likely that the appellant will be questioned on return. It has to be borne in mind that it is accepted that the appellant's identity will be checked and information forwarded to Kinshasa as part of the process of obtaining a travel document for his return – see the Home Office's Policy Bulletin [4.10] to [4.13].

22. The appellant is a former employee of the ANR, a body responsible for the DRC's internal and external security, and his details as a possible returnee will have been sent to DRC. The ANR have a presence at the airport to which he will be returned, and it is known that he will be questioned on return.

23. I consider that in the circumstances that it is reasonably likely that the ANR would be alerted to his possible return and that there is a risk that they would stop him at the airport. He has been out of the country for several years and as a security service it is scarcely likely that they would not wish to question him. It is inevitable that he will be asked what he has been doing here; he will not be able to lie, and will have to explain that he claimed asylum and had told the UK authorities about his activities.

24. I am satisfied on the basis of the evidence of Mr Ntung, none of which is challenged, that there is a risk that the appellant could be seen as having damaged the organisation's reputation by making a claim for asylum and disclosing its activities. This is, I accept, likely to result in him being detained by the ANR in one of its own facilities to which there is no access and which, as is accepted, constitute conditions likely to breach Article 3 either by the existence of the prisons in themselves or the likelihood of ill-treatment perpetrated by the ANR.

25. While I note Mr Harrison's submission that the ANR would not likely to be suspicious of the appellant, I find that this is contrary to the unchallenged evidence of Mr Ntung. I also find it improbable that the appellant's sponsor within the ANR would be in a position to assist him in any meaningful way. Given that the appellant's fear is of the agents of the state, and that the ANR are likely to detain him on arrival, relocation to an area of DRC where he would not be at risk is not a viable option.

26. For these reasons, I am satisfied that the appellant is likely on return to DRC to be subjected to treatment of sufficient severity to engage Article 3 of the Human Rights Convention. Accordingly, on that basis, I remake the appeal by allowing the appeal on that basis.

SUMMARY OF CONCLUSIONS

1. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.

2. I remake the decision by allowing the appeal on Article 3 Grounds.

Signed Date: **28 November 2014**

Upper Tribunal Judge Rintoul