Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00608/2014

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice	**Decision & Reasons Promulgated**
On 30 November 2015	**On 11 December 2015**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MICHAEL TSHOMBE

Claimant

Representation:

For the Appellant: Mr K Norton, Home Office Presenting Officer
For the Claimant: Ms A Pickup instructed by Wilsons LLP, Solicitors

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge Colvin promulgated on 24 October 2014, in which she allowed the claimant's appeal against the decision of the Secretary of State made on 5 November 2013 to refuse to revoke a deportation order made against him.

2. The claimant is a citizen of the Democratic Republic of Congo ("DRC") born on 20 February 1989. He entered the United Kingdom on 26 September 2000, aged 11 and although refused asylum, was granted Exceptional Leave to Remain and then later Indefinite Leave to Remain on 19 October 2005. On 7 June 2010 he was convicted of ABH, possession of a prohibited weapon, threatening to kill for which he was sentenced to 4 years' imprisonment. The victim was his partner, a Congolese national, who had been granted asylum in the United Kingdom and who is the mother of his two children.

3. Following the conviction, on 6 March 2012, the Secretary of State made a deportation order against claimant; the appeal against that decision was dismissed by the First-tier Tribunal on 2 May 2012. An application for permission to appeal to the Upper Tribunal was unsuccessful. Despite representations from the claimant's representatives, on 5 November 2013 the Secretary of State refused to revoke deportation order, that decision giving rise to the appeal to the First-tier Tribunal.

4. The appeal to the First-tier Tribunal was advanced on three grounds: –

   (i) the claimant was at risk of treatment contrary to article 3 of the Human Rights Convention as a returnee with a criminal record; and/or

   (ii) the claimant was at risk of treatment contrary to article 3 of the Human Rights Convention on account of his mental ill-health; and/or,

   (iii) the claimant's deportation would be in breach of article 8 of the Human Rights Convention.

5. The First-tier Tribunal found that: –

   (i) as a returnee with a criminal record, the claimant was at risk on return to DRC of being detained and subjected to conduct amounting to a breach of article 3 [32]-[33];

   (ii) even were he not detained on return, the claimant's deportation would amount to inhuman and degrading treatment given his continuing vulnerability as identified by the doctors who had examined him, the stigma attached to the mentally ill, the absence of any experience of living there at an adult or working there, and the absence of family there [39];

   (iii) there are compelling factors over and above those described in section 117C of the Nationality, Immigration and Asylum Act 2002 such that his deportation would be disproportionate in respect of article 8 of the Human Rights Convention [49].

6. The Secretary of State sought permission to appeal on the grounds that the First-tier Tribunal erred:-

   (i) in its approach to the evidence adduced by the respondent in that inadequate reasons had been given for rejecting the Secretary of State's evidence that the risks identified in **R (P & R (DRC) & Others) v SSHD** [2013] EWHC 3879 were

not real, the reference to the expert's report being insufficient (renewed grounds [2]-[4]; initial grounds [1]-[2]);

(ii) in its approach to the claimant's mental health problems in failing to engage with the relevant jurisprudence, and in failing to resolve an evidential conflict in the medical reports (renewed grounds [5]-[7]; and, (initial grounds at [3]), failing to have regard to the requirements of the Immigration Act 2014 in considering the claimant's ties to DRC, the findings in his favour being insufficiently reasoned;

(iii) in its approach to article 8, the above errors infecting the findings on that issue (renewed grounds [9]); and, in misdirecting itself in law as to what was required to show very compelling circumstances such that deportation would be disproportionate (initial grounds [4]-[10])

7. On 7 March 2015 Upper Tribunal Judge McGeachy granted permission on all grounds.

Submissions

8. Mr Norton submitted that, in reality, at paragraph [32] of the decision, the First-tier Tribunal had, in effect, failed properly to resolve an evidential conflict between the Secretary of State's evidence and that adduce by the claimant. He submitted that this did fall within the ambit of the grounds; and, that this error was, effectively, the same error identified by the Upper Tribunal in **Lokombe (DRC: FNOs - Airport monitoring)** [2015] UKUT 627(IAC) at [17]-[18].

9. Mr Norton accepted that if he did not succeed on the challenge to the appeal being allowed on the basis the claimant was at risk as a returnee.

10. Mr Norton submitted further, that the claimant's ill health – there being no evidence that he is currently in receipt of medication – came nowhere near the threshold to engage article 3. He submitted also that the claimant's circumstances simply came nowhere near the high threshold necessary to demonstrate that, despite having been sentenced to a term of four years' imprisonment, his deportation was disproportionate.

11. Ms Pickup submitted that the points now being raised in challenge to the approach to the evidence adduced by the claimant were not covered by the grounds, these being simply a reasons challenge. She submitted that in any event, the expert's report discloses that he had been to DRC after the respondent's evidence had been gathered, and had set out proper and persuasive reasons why it was less reliable. The First-tier Tribunal had been entitled to rely on that, and the reasons for doing so were adequate.

12. Ms Pickup submitted also that in reality there was no conflict in the medical evidence, the apparent differences being attributable to changes in the claimant's condition over time, the First-tier Tribunal having properly addressed that issue. She submitted further, that in this case, unlike **Bensaid**, the trauma the claimant had

suffered (and the subsequent mental ill-health) flowed from what he had witnessed in DRC; that was attributable to failures of the state. She submitted further that the assessment of the risk in this regard was not predicated on detention on return.

13. Relying on her skeleton argument, Ms Pickup submitted that the First-tier Tribunal had engaged with the relevant case law and legislation, and had given adequate reasons for concluding that deportation was disproportionate.

14. In reply, Mr Norton submitted that the evidence of the expert was simply not capable of displacing the evidence adduced by the respondent, that being the observations of states who had returned people to the DRC.

Discussion

21. The main thrust of the Secretary of State's case as now put is a failure by the First-tier Tribunal to resolve an evidential conflict. Contrary to what was submitted by Ms Pickup, I consider that the challenge to the findings at [32]-[33] as elaborated by Mr Norton, do fall within the scope of the grounds as, on any view, the respondent's evidence as to the risk on return as set out in the February 2014 bulletin was not accepted by the judge.

22. At paragraph [32] of the decision, the First-tier Tribunal states:

> "There are clearly some contradictory points in this information before me and any assessment of these is very difficult particularly on paper without oral expert evidence. I have therefore decided not to attempt to do so but instead to make the following points:"

23. It is then, in that context said:

> - That, in the absence of a decided appeal or CG case, I have taken the view that the findings in *P & R* can reasonably be relied upon in this appeal. As Phillips J said, unless there is a clear basis for believing that the risk indicators no longer arise, a deportee returning with a criminal record is at risk of being detained and consequently being subjected to conduct amounting to a breach of article 3 due to the conditions in detention in the DRC.

24. It evident from this that the First-Tier Tribunal did not accept that the respondent's evidence as set out in length at [29]. While there is reference to the evidence of the expert, Dr Kodi, and that his evidence was based on the research mission to DRC as recently as June-July 2014, there is no analysis of why his evidence is preferred. While it is correct that his evidence postdates the evidence supplied to the Secretary of State by those states returning people to DRC, and he records why he does not consider that evidence to be reliable, there is no indication in the decision that this formed part of the judge's reasoning.

25. I accept that this case is different from **Lokombe** in that there was additional evidence in the form of expert evidence before the First-tier Tribunal, but why it was accepted and why that of the respondent was rejected, is unclear.

26. Viewing paragraph 32 as a whole, I consider that there is no proper explanation given why the respondent's evidence was rejected. In the context of the observation that there are evidential difficulties, this error is all the more serious. That there is no Country Guidance case is not a reason for not making finding on the evidence.

27. Turning to the second challenge to the findings with respect to article 3, I am not satisfied that there was any real evidential conflict between the medical reports. As is noted at [34]-[37], the reports were prepared over a period of time, the most recent report from Dr Katona indicating that there had been a relapse [35]. It cannot be said that it was "speculative" to consider whether there would be a relapse on return; that was the expert evidence of Dr Katona. Further, the difficulties which the claimant would face on return were he to become ill and the difficulties faced on return after an absence of nearly 10 years were set out in the expert evidence of Dr Kodi. It is evident from the decision at [34] that the conclusion that there would be a breach of article 3 on return was not predicated on the claimant being detained. It is

28. I do not consider that **Bensaid** [2001] ECHR 82 can be distinguished in this case in the manner submitted by Ms Pickup, given that it is not clear why the First-tier Tribunal did not engage with the decision; there is no sufficient analysis of whether the harm to the claimant would flow from actions or inaction on the part of the DRC authorities, even assuming his mental ill-health arises from what occurred there when he was a child. While I note what is said at [34] in **Bensaid**, I note also what was said at [40] –

> The Court accepts the seriousness of the applicant's medical condition. Having regard, however, to the high threshold set by Article 3, particularly where the case does not concern the direct responsibility of the Contracting State for the infliction of harm, the Court does not find that there is a sufficiently real risk that the applicant's removal in these circumstances would be contrary to the standards of Article 3.,

29. Further in **N v SSHD** [2008] ECHR 453 at [43] the Court stated:

> The Court does not exclude that there may be other very exceptional cases where the humanitarian considerations are equally compelling. However, it considers that it should maintain the high threshold set in *D v the United Kingdom* and applied in its subsequent case-law, which it regards as correct in principle, given that in such cases the alleged future harm would emanate not from the intentional acts or omissions of public authorities or non-State bodies, but instead from a naturally occurring illness and the lack of sufficient resources to deal with it in the receiving country.

30. There is, I consider, no sufficient analysis at [38] of the decision or elsewhere of why the high threshold established by article 3 in cases such as these is reached. It is not thus possible to discern why the respondent's arguments were dismissed. Given the case law applicable to article 3, and as summarised recently in **GS (India)**[2015] EWCA Civ 40. It is entirely possible that, had the First-tier Tribunal directed itself properly, that it would have come to a different conclusion on this issue.

31. In respect of the findings made in relation to article 8, while at [43] the First-tier Tribunal directed itself properly with respect to the law, at [48] there is no proper or adequate reference to the public interest in deporting the claimant. On that basis alone, the decision involves the making of an error of law. Further, it is not sufficiently clear why the factors identified are over and above what is identified in section 117C of the 2002 Act. In any event, those factors must be weighed against the public interest; there is no sufficient indication that has been done.

32. Accordingly, I am satisfied that the decision of the First-tier Tribunal did involve the making of an error of law, capable of affecting the outcome, and I set it aside.

33. Given that there has now been over a year since this matter was heard, and given that both parties submitted that it would be the appropriate course of action, I remit the matter to the First-tier Tribunal for a fresh decision on all issues.

Summary of conclusions

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

2. I remit the appeal to the First-tier Tribunal for a fresh decision on all material issues.

Signed Date: 2 December 2015

Upper Tribunal Judge Rintoul