Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01105/2014

THE IMMIGRATION ACTS

Heard at Field House, London	**Decision & Reasons Promulgated**
On 15 September 2015	**On 23 September 2015**

Before

The President, The Hon. Mr Justice McCloskey
and Upper Tribunal Judge Reeds

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

BCT

Respondent

Representation:
Appellant: Mr S Walker, Senior Office Home Presenting Officer
Respondent: Mr M Schwenk, of Counsel, instructed by Parker Rhodes Hickmotts Solicitors

DETERMINATION AND REASONS

1. The Appellant is aged 27 years and a citizen of DRC. On 05 October 2012 the Appellant received the conventional notification on behalf of the Secretary of State for the Home Department (the "*Secretary of State*") that he was liable to be deported from the United Kingdom under section 32(5) of the UK Borders Act 2007 and was invited to show cause why deportation should not occur. This appeal has its origins in the ensuing

decision made on behalf of the Secretary of State, dated 19 March 2013, which rejected the case made by the Appellant and confirmed that section 32(5) would apply.

2. The Appellant appealed to the First-tier Tribunal (the "*FtT*") successfully. The issue for the Judge was whether the Appellant's case came within either, or both, of the statutory exceptions which disapply the automatic deportation provisions where it is demonstrated that deportation would infringe ECHR rights or contravene the obligations of the United Kingdom under the Refugee Convention. The Judge resolved both issues in the Appellant's favour, allowing his appeal on each of these grounds. His reasons for acceding to the asylum ground of appeal are expressed in the following terms:

> "I have considered the policy bulletin and the bundle of objective evidence …
>
> I have considered the High Court decision in the case of P. This Appellant on account of his convictions and the length of time he has been absent from DRC since he was aged 17 years would be questioned by professional, skilled and experienced immigration officers and there is a real and substantial risk that his offending which resulted in a sentence of more than 12 months would have been reported in some form and readily identified through internet searches. He would not be able to hide the fact of this convictions in the face of interrogation designed to elicit that very fact. There would be a real and substantial risk that as a criminal deportee he would be subjected to further imprisonment and ill treatment if returned to DRC. I have considered the policy bulletin and even allowing for the further objective material there is no certainty that interrogation would be a case of asking him some questions to clarify his situation rather than some form of violence that would include ill treatment or torture ….
>
> I therefore find that he is at risk of persecution or serious harm on return to DRC and internal relocation is not viable, as he would be detained upon arrival."

In the immediately ensuing paragraph, the Judge stated:

> "The Appellant has also made a claim under the Human Rights Act. The Appellant claims his return would be a breach of Articles 2 and 3 of the ECHR. The facts upon which he relies are identical to those in his application under the Qualification Regulations [sic] and to [sic] humanitarian protection."

Followed by:

> "Given my conclusions I find the decision appealed against would cause the United Kingdom to be in breach of the law or [sic] its obligations under the 1950 Convention."

3. Permission to appeal to the Upper Tribunal was granted in respect of each of the grounds canvassed on behalf of the Secretary of State. These were, respectively:

(a) The Judge's conclusion in respect of asylum was unsustainable since the status of foreign criminal did not render the Respondent a

member of a particular social group for the purposes of the Refugee Convention.

(b) The Judge "*... failed to provide adequate reasons why the* [Respondent's] *offence will be known to the authorities when his offence was not high profile ....* [and in any event] *.... as stated in the Home Offices Country Policy bulletin of February 2014 .... the* [DRC authorities] *are not interested in the criminal activities of their nationals outside of the* [DRC] *even if it is known and therefore would not have an interest .... The Tribunal has simply dismissed this bulletin .. with barely any consideration ...*

Furthermore, the Home Office has now published an updated version of this Policy bulletin on 22 October 2014 which reinforces the previous bulletin and clearly shows that the [Respondent] *would not be at risk on return ... "*

There followed an error of law hearing before the Upper Tribunal.

4. By its decision dated 27 February 2015 the Upper Tribunal held that the decision of the FtT is vitiated by material error of law. The substance of the error found is identifiable in the following excerpts:

> "While the Judge stated that he had regard to the Policy bulletin, there is no analysis of the new material contained ....
>
> It is insufficient in my judgment to merely recite it ... It was incumbent on the Judge to analyse and engage with that new evidence ....
>
> There was no critique of the material and why, if it merited no weight, that was the case."

While it was acknowledged that, in principle, one course open to the FtT was to reject the evidence in question on a properly reasoned basis this did not occur. Finally, certain of the FtT's findings were preserved.

5. The final determination of the appeal was, properly, deferred on the ground that the Upper Tribunal was, at that time, scheduled to hear a group of specially selected appeals with a view to promulgating a new country guidance decision in respect of DRC. The conjoined appeals were duly heard, giving rise to the decision in BM and Others (Returnees: Criminal and Non-Criminal) DRC CG [2015] 293 (IAC). As the title indicates, this decision has the designation of country guidance. It decided as follows:

(i) A national of DRC who has acquired the status of foreign national offender in the United Kingdom is not, simply by virtue of such status, exposed to a real risk of persecution or serious harm or treatment proscribed by Article 3 ECHR in the event of enforced return to the DRC.

(ii) A national of the DRC whose attempts to acquire refugee status in the United Kingdom have been unsuccessful is not, without more, exposed to a real risk of persecution or serious harm for proscribed

treatment contrary to Article 3 ECHR in the event of enforced return to DRC.

(iii) A national of the DRC who has a significant and visible profile within the 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 … in MM [2007] UK AIT 00023. Those belonging to this category include persons who are, or are perceived to be, leaders, office bearers or spokes persons. 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.

(iv) 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.

6. In one of the conjoined appeals the Upper Tribunal made a separate reported decision. See BM (False Passport) [2015] UKUT 467 (IAC). In this case, the Tribunal took the opportunity to emphasise that a person claiming to belong to any of the aforementioned 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 and individual prominence [and others] and how these matters impact on the individual claimant.

DECISION

7. At the hearing we drew to the attention of the parties' representatives the Upper Tribunal Immigration and Asylum Chamber Guidance Note 2011, number 2. The subject matter of this instrument is reporting decisions of this Chamber. We highlighted in particular paragraph 11, which we need not reproduce. In short, since the decision in BM and Others has the designation, or kite mark, of Country Guidance ("*CG*"), it is, at this moment in time, binding on us. Mr Schwenk, on behalf of the Appellant, confirmed, in response to the pre-hearing case management directions, that there is no application to adduce any fresh evidence and, further, that in this remaking exercise the Appellant would not be adducing any evidence at all.

8. Mr Schwenk concurred with the Tribunal's assessment of his skeleton argument, namely that this does not bring the appeal within any of the categories identified in paragraph 11 of the Practice Direction which would enable this Tribunal to reconsider the decision in BM and Others. In short, there is absent from the equation any fresh evidence or any subsequent decision addressing further issues not considered in BM. Mr Schwenk

further confirmed that the contentions formulated in his skeleton argument are based on certain of the grounds upon which permission to the Court of Appeal has been sought in BM. We append hereto the decision of the Upper Tribunal refusing such application. We draw attention particularly to the conclusion that it –

> "… falls measurably short of satisfying the appeal test viz the requirement that the application for permission raises some important point of principle or practice or generates some other compelling reason warranting the grant of permission."

Mr Schwenk indicated that his instructions are that the Appellant BBM has applied to the Court of Appeal for permission to appeal. Relying on this fact, he requested that this appeal be adjourned.

9. We ruled against the adjournment application, mainly on the basis of the manifestly unpromising grounds upon which BBM is seeking permission to appeal and having regard to the uncompromising terms in which permission was refused by the Upper Tribunal. We consider it timely to draw attention to the following statement of Jackson LJ in AB (Sudan) – v – SSHD [2013] ECWA Civ 921, at [32]:

> "In my view the power to stay immigration cases pending a future appellate decision in other litigation is a power which must be exercised cautiously and only when, in the interests of justice, it is necessary to do so. It may be necessary to grant a stay if the impending appellate decision is likely to have a critical impact on the current litigation. If courts or tribunals exercise their power to stay cases too freely, the immigration system (which is already overloaded with work) will become even more clogged up."

This statement is informed by its full context: see [24]-[32] and [50]-[51].

10. We proceeded to determine the appeal substantively. In pronouncing our decision, we noted the acknowledgement of Mr Schwenk, properly made, that his client's case does not fit within any of the risk categories declared in BBM. Accordingly, giving effect to Guidance Note 2011 no 2, we allow the Secretary of State's appeal. The effect of this is that the FtT should have dismissed the Respondent's appeal and we remake its decision accordingly.

Signed: Lord McCloskey

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 15 September 2015

APPENDIX

IN THE UPPER TRIBUNAL (Immigration and Asylum Chamber)

APPLICATION FOR PERMISSION TO APPEAL TO THE COURT OF APPEAL

Appeal No: DA/01135/2013

BBM (DRC)

Appellant

v

Secretary of State for the Home Department

Respondent

Heard before: The President, The Honourable Mr Justice McCloskey and Upper Tribunal Judge Jordan

Final date of hearing: 28 April 2015

Nature of hearing: Appeal by the Appellant to the Upper Tribunal from the First-tier Tribunal

Date of notification of determination: 02 June 2015

Result of hearing: Appeal dismissed.

Decision

The application for permission to appeal to the Court of Appeal is refused. Please see attached.

Signed: Lowell McCloskey.

President of the Upper Tribunal Dated: 09 July 2015

BBM (DRC) – SSHD

Appeal No.: DA 01135 2013

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1. The first ground challenges the Tribunal's evaluation of a discrete segment of evidence. It fails to recognise that it was incumbent on the Tribunal to interpret and evaluate the evidence. This is what the Tribunal did in its decision. The standard for intervention on this issue is that of irrationality (see Edwards v Bairstow [1956] AC …) it is considered that the Tribunal's evaluation of this evidence and its associated findings fall comfortably within the bounds of the standard of rationality.

2. The second ground is, in principle, indistinguishable from the first and, hence, the same response is appropriate.

3. This is a "cherry picking" ground which fails to consider the determination as a whole, overlooks the basis upon which this Appellant's case was made, neglects the generic findings and conclusions of the Tribunal and airbrushes [100] of the determination.

4. The issue of law framed in this ground arises in a vacuum, given that there was no "contest" between the *"unduly harsh"* criterion in paragraph 398(b) of the Immigration Rules and that of *"very compelling circumstances"* in paragraph 398(a). This issue simply did not arise. Furthermore, this ground is advanced without any reference whatsoever to authority, in circumstances where there is substantial Court of Appeal guidance on the *"very compelling circumstances"* standard.

Conclusion

5. For the reasons digested above it is concluded that this application for permission to appeal to the Court of Appeal falls measurably short of satisfying the second appeal test *viz* the requirement that the application for permission raises some important point of principle or practice or generates some other compelling reason warranting the grant of permission.