IAC-TH-CP-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01280/2014

THE IMMIGRATION ACTS

Heard at the Royal Courts of Justice	**Decision & Reasons Promulgated**
On 3rd August 2015	**On 10th August 2015**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

MR SOMWE KONGOLO
(ANONYMITY DIRECTION NOT MADE OR ASKED FOR)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Kevin Smyth, Solicitor instructed by Kesar & Co Solicitors
For the Respondent: Mr T Wilding, Senior Presenting Officer

DECISION AND DIRECTIONS

1. This is an appeal by the Appellant against a decision of the First-tier Tribunal (Judge Eldridge) who, in a determination promulgated on 13th April 2015 dismissed his appeal against the decision of the Secretary of State to make a deportation order against him by virtue of Section 32(5) of the UK Borders Act 2007.

2. The Appellant is a national of the Democratic Republic of Congo (hereinafter referred to as the "DRC") and was born on 11th September 1982. His immigration history can be briefly summarised. He arrived in the United Kingdom on 7th February 2008 at the age of 25, using a false passport from the Republic of South Africa. He claimed asylum on arrival at the port and was granted temporary admission and was required to report. However he did not do so and was listed as an absconder.

3. On 15th January 2011 his claim for asylum was refused and on 11th March 2011 his appeal against that decision was dismissed by the First-tier Tribunal (Judge Griffiths). He became appeal rights exhausted on 28th March 2011.

4. The Appellant is a subject of a deportation order as a result of his conviction and sentence on 10th March 2014 at Wood Green Crown Court for possession of a controlled drug with intent to supply, namely class B, nine counts of possession of articles for use in fraud and possession with intent to supply class A drugs (cocaine). He was sentenced to a period of three years' imprisonment for the drugs offence relating to the supply of cocaine and for the other drugs offences, he received a concurrent sentence of twelve months. For the offences involving counterfeit driving licence and credit cards and chequebooks he was sentenced to twelve months' imprisonment to be served consecutive to the other sentences, making a total sentence of four years.

5. The Appellant relies upon the exception to be found in Section 33 of the UK Borders Act 2007 that his removal pursuant to the deportation order would breach his rights under Article 3 or on grounds of humanitarian protection and Article 8 of the ECHR.

6. The appeal came before the First-tier Tribunal on 31st March 2015. The judge heard oral evidence from the Appellant and also from his brother and in a determination promulgated on 13th April 2014 dismissed his appeal on all grounds. This was a case in which the Appellant's representatives advanced a number of legal issues, firstly that as a failed asylum seeker he would be at risk of persecution or serious harm contrary to Article 3 or in the alternative, relying upon the decision of Phillips J in the Administrative Court in **R (on the application of P) (DRC) v the SSHD [2013] EWHC 3879** that as a criminal deportee, he would similarly be at risk of Article 3 serious harm. This was based on the decision and the evidence before Mr Justice Phillips relating to the issue of criminal deportees facing detention upon return, that such conditions of detention breached Article 3 and that there was a real risk that his status as a criminal deportee would be revealed. The case was also advanced on the basis of humanitarian protection grounds on the basis of the country conditions of the Appellant's home area in the North Kivu province.

7. As to the issues relating to Article 8, it was asserted that his removal to the DRC would be a disproportionate breach of Article 8. However it is not in dispute that by reason of his conviction and sentence of four years, this

Appellant fell within paragraph 398(b) and therefore the public interest in his deportation would only be outweighed in Article 8 terms "by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A". In that regard, at [40] the judge reached the conclusion that on the issues of private and family life, under 399 he did not have a child in the UK and did not have a genuine and subsisting relationship with a partner. Furthermore he could not avail himself of paragraph 399A in respect of his private life for the reasons given at [40] therefore at [41–48] when considering whether the Appellant could show "very compelling reasons" he reached the conclusion after a careful balance that he had not demonstrated that there were such very compelling reasons.

8. Consequently the judge dismissed his appeal.

9. The Appellant sought permission to appeal that decision and on 11th May 2015 Upper Tribunal Judge Martin (sitting as a judge of the First-tier Tribunal) granted permission.

10. The grounds upon which permission was granted were as follows:-

> "It is arguable, as asserted in the grounds that the judge ought to have considered the risks to the Appellant on return as a convicted criminal following the decision of the High Court in **R (on the application of P) (DRC) v the SSHD [2013] EWHC 3879 (Admin)**."

11. The grant of permission only dealt with Ground 1 being advanced on behalf of the Appellant there being three grounds in total being advanced on his behalf. Grounds 2 and 3 related to the asserted failure to determine whether the Appellant was at risk of serious harm in his home area and Ground 3 which was linked to Ground 2 was the failure to apply the correct legal test for internal relocation. However it was common ground before this Tribunal by both advocates that in light of the decision of the Tribunal in **Ferrer** that whilst the grant of permission did not deal with the other grounds as set out, this did not mean that permission had not been granted or that it was not open to Mr Smyth to put any arguments forward in respect of those grounds. Consequently I heard submissions based on Grounds 2 and 3.

12. It was conceded on behalf of the Appellant that Ground 1, which dealt with the risk of return to foreign national offenders, could not succeed in the light of the decision of **BM and Others (returnees – criminal and non-criminal) DRC CG [2015] UKUT 00293 (IAC)**.

13. In relation to Ground 1 it was submitted that the judge failed to engage with the argument advanced relating to the issue of humanitarian protection and in particular by reference to his home area in the North Kivu province. He referred the Tribunal to the UNHCR position document within the bundle dated September 2014 and the updated information from the UNHCR which had not changed the position. In particular he made reference to the human rights abuses relating to civilians within that

area, issues relating to displacement and the UNHCR's conclusion based on that evidence. He submitted that whilst the judge at [38] acknowledged UNHCR report, there was no engagement with the evidence as a whole as to the issue of humanitarian protection or any analysis of whether this Appellant would be at serious harm if returned to his home area. He submitted it was incumbent upon the judge to make clear findings upon the risk in his home area and that paragraph [38] did not make such findings. Nor did the judge explicitly say that he accepted that the Appellant would be at any risk of harm in his home area.

14. In this respect he submitted that it was material to Ground 3 and the failure to consider internal relocation. The judge, in essence made reference to the UNHCR report but considered that he did not see any evidence to suggest that the Appellant could not remain in or around the capital or relocate to an area other than the Kivus. Thus he submitted that that failed to consider the legal test of reasonableness of return or whether it would be unduly harsh for the Appellant to relocate to an area other than that of his home area and that such issues should be considered against the particular personal circumstances of this Appellant.

15. In this regard, he referred to the medical evidence in which it was undisputed that this Appellant had a psychotic illness for which he continued to receive treatment [26]. The fact that he had a psychotic illness was not in dispute although the severity of it was [24]. It also should be considered in the light of the finding at [25] that there were no relatives or other people to whom he could turn to for support were he to be removed to the DRC. There was some evidence in the bundle relating to medical health provision in Kinshasa [COIR Report] but there was no consideration of those legal tests when considering the particular circumstances of this Appellant.

16. Mr Wilding by way of a reply submitted that the reliance upon humanitarian protection was set out in the skeleton argument that there did not appear to be any submissions made as to the "sliding scale" or any reference to the decision of **Elgafaji** of the CJEU and that it was insufficient to rely upon the UNHCR report in any event. He made reference to the two factors identified; including his medical condition and the lack of family in the DRC and whilst there was no challenge in the Appellant's grounds to the assessment of the medical evidence, the finding at [25] was that he had no such relatives but that did not deal with the witness statement of the Appellant in which he made reference to having two brothers and a sister and that he was in contact with someone who travelled to and from the Congo who had given him that information. Thus he submitted that he would not have succeeded to show that there was any risk in his home area to justify a grant of subsidiary protection. He further submitted that the thrust of the case before the First-tier Tribunal related to the risk as a foreign national offender and not upon the issue of humanitarian protection. Furthermore, there was evidence that his mother was still in the DRC at the screening interview for his original claim he said his mother and siblings are still alive and therefore the finding at [26] only

considered his uncle and aunt and was not inconsistent with any finding made by the First-tier Tribunal. He however accepted that there was no determination before the Tribunal which related to the dismissal of the Appellant's previous claim and thus it was not known on what basis it was either dismissed or what findings of fact were made in relation to the Appellant and his family circumstances.

17. Dealing with the third ground, at paragraph 38 he submitted there was a strong finding that there was no evidence that he could not relocate to Kinshasa. The medical evidence was unchallenged and there was no reason why he could not relocate to Kinshasa and that the finding at [38] was sufficient to discharge the legal test in that respect.

18. Mr Smyth by way of response submitted that the finding as to family relatives did not simply include his uncle and aunt but at [25] the judge accepted that there were no relatives or other people to whom he would turn for support were he to be removed. He conceded that the determination of the First-tier Tribunal that originally made findings of fact upon the Appellant's asylum claim had not been provided to the judge although reference to it had been made in the skeleton argument, that was a clear finding made and was relevant to both the issue of humanitarian protection and in the alternative to the issue of relocation. Furthermore, paragraph 38 could not possibly be said to deal with the issue of reasonableness of return in the context of this Appellant's particular circumstances and his mental health. There was no reference to page 280 (of the COIR Report) for DRC dealing with mental health provision.

19. Having heard the arguments of the parties I am satisfied that the judge erred in law in the ways addressed to me by Mr Smyth on behalf of the Appellant and as set out in the grounds. The issue of humanitarian protection based on a return to his home area was raised in the skeleton argument at paragraphs 20–26 and are set out in paragraph 339C of the Rules and Article 15(c) of the Qualification Directive. Whilst paragraph 339(c) of the Immigration Rules (iv) makes reference to exclusion from the grant of humanitarian protection, I observe that the issue of exclusion was not raised by the Secretary of State based on his criminal conviction however this is because the issue of humanitarian protection was not originally raised before the Secretary of State but was first raised before the Tribunal. Serious harm in this case relied upon "(iv) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict." (see paragraph 21 of the skeleton argument). In this context there was evidence before the First-tier Tribunal comprising of the current UNHCR position in relation to returns to North Kivu (the area from which the Appellant is from) dated September 2014 and also updated. The report urges states not to forcibly return to the DRC persons originating from those areas without the security and human rights situation having improved considerably. The report makes reference to the violence and the extensive displacement. The evidence in the Appellant's bundle from

pages 178–191 provided further country information relating to the DRC and in particular to the killings and human rights violations against civilians and the effects of displacement upon them. The report of the UNHCR made reference to the effect upon civilians by the armed conflict and made reference to the widespread and serious human rights abuses.

20. At [37] the judge, having considered the background evidence at 178–191 reached the conclusion that the evidence in the bundle did nothing to address specific concerns regarding returning foreign criminals and whilst the judge did not have the advantage of the Upper Tribunal's decision in **BM and Others** [as cited] his conclusions reached on the evidence at paragraphs 31 to 37 were conclusions that was entirely open to him and subsequently confirmed in BM (and others).

21. However the relevant paragraph identified by both advocates is paragraph [38] in which the judge dealt with the issue of humanitarian protection and purported to deal with the issue of relocation. The judge said this:-

> "38. The Appellant also seeks to rely on a claim for humanitarian protection on the basis of his demographic profile and home area. He says he is from North Kivu. He would be returned to Kinshasa, a considerable distance from the main conflict areas. I have read the UNHCR report relied upon by the Appellant (pages 184–188). I do not see any evidence to suggest that the Appellant may not remain in or around the capital or relocate to an area other than the Kivus."

However, there was no analysis of the country materials or the legal test relevant to humanitarian protection or any consideration of Article 15(c) as to whether there was no consideration of serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict. Whilst Mr Wilding submits that the evidence did not support a finding of internal armed conflict, the concept of threat is broad enough to capture any situation of indiscriminate violence whether caused by one or more armed factions or by a state, which reached the level described by the CJEU in **Elgafaji** and that the armed conflict need not be exceptional but that there must be an intensity of indiscriminate violence great enough to meet the test in **Elgafaji**. Article 15(c) requires the threat to be serious and that the threat must result from indiscriminate acts of violence and that the existence of such acts affecting the individual civilians must be a reality. The Tribunal in **HM and Others (Article 15(c)) Iraq CG [2012]** considered the law in this respect and that what lay behind Article 15(c) was the need to enable those who are likely to be caught up in indiscriminate violence so as to suffer death or injury to be able to obtain subsidiary protection (at [38] the decision makes reference to **Elgafaji** and that the more the applicant is able to show that he is specifically affected by reason of factors particular to his personal circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection).

Mr Smyth submits that the Appellant's mental health condition and lack of family support in the area are relevant personal characteristics of this Appellant.

There is no analysis of the material relating to the Appellant's home area and all that is said at [38] is that the evidence did not suggest that the Appellant may not remain in or around the capital or relocate to an area other than the Kivus. Whilst the judge made reference to having considered the UNHCR report, there was no analysis of that report or the other material in the context of the position of the home area. The only conclusion drawn is that the country materials did not say that he would not be able to relocate to another area other than the Kivus.

22. Even if it could be said that on a reading of paragraph 38 by implication the judge was stating that the Appellant would be at serious harm in his home area, the judge would then be required to consider the issue of relocation and the reasonableness of return to another area. In this respect there is no proper consideration of the issue of internal relocation at paragraph 38 or from the determination when read as a whole. If, it is legitimate to infer from [38] that he considered the Appellant could not return to his home area, the judge was required to apply the provisions of Article 8 of the Qualification Directive and paragraph 399(O)(i) and (ii). In making that assessment he was required to have regard to the general circumstances prevailing in this part of the country and to the personal circumstances of the person concerned (see **Januzi [2006] UKHL 5**). In that case Baroness Hale drew on a UNHCR document which considered that the task was a holistic one looking at the circumstances of the particular person involved including psychological health conditions, the family and social situations and survival capacities. Paragraph 38 could not properly be said to engage with any analysis upon either the issue of relocation as reasonable or whether it would be unduly harsh by reference to the Appellant's personal characteristics and the evidence and in particular in the light of the judge's findings at [25] that he had no relatives or others that he could return to for support.

23. I have therefore reached the conclusion that the decision cannot stand and it should be set aside. Both parties have submitted before me that in the event of an error of law being found on both Grounds 2 and 3 that the appropriate course would be for the appeal to be remitted to the First-tier Tribunal as further oral evidence will be required from the Appellant upon these issues and that in the light of his medical condition an updated medical report will be required. Whilst it is not the ordinary practice to remit cases to the First-tier Tribunal, I have considered that this is a course that should be adopted having heard the submissions of both advocates and having considered the evidence. I observe that the First-tier Tribunal did not have a copy of the determination setting out the findings of fact made by Judge Griffiths relating to the Appellant's original asylum claim in 2011 and that such a determination was a relevant document and should be provided when this matter is heard by the First-tier Tribunal. The

determination should be provided by either the Appellant's solicitors or by the Secretary of State or in default by the Tribunal.

Notice of Decision

The decision is to be set aside and remitted to the First-tier Tribunal for a hearing in accordance with Section 12(2)(b) of the Tribunals, Courts and Enforcement Act and the Practice Statement of 10th February 2010 (as amended).

No anonymity direction is made.

Signed Date 4th August 2015

Upper Tribunal Judge Reeds