IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/02202/2013

THE IMMIGRATION ACTS

Heard at The Royal Courts of Justice	**Determination Promulgated**
On 23 March 2015	**On 29 April 2015**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

MR EUBEN BEN KAYOMBO

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms V Mascord, Legal Representative, Lawrence Lupin Solicitors
For the Respondent: Mr K Norton, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of the DRC, born on 8 April 1991. On 25 October 2013 a decision was made by the respondent to make a deportation order against the appellant under the automatic deportation provisions of the UK Borders Act 2007. That decision followed the appellant's convictions on 9 May 2012 for offences of possession of class A and B drugs with intent to supply, for which he received a sentence on 17 May 2012 of three years and six months' imprisonment.

2. The appellant appealed against that decision to the First-tier Tribunal and his appeal was heard by First-tier Tribunal Judge Vaudin d'Imécourt and First-tier Tribunal Judge Flynn at a hearing on 29 and 30 October 2014. The Panel of the First-tier Tribunal dismissed the appeal.

3. One of the issues in the appeal concerned whether the appellant would be at risk on return to the DRC from the authorities, as a foreign criminal. It was, in summary, submitted that returning the appellant would give rise to a real risk of serious harm because he would be identified as a foreign criminal and detained in conditions likely to give rise to inhuman or degrading treatment. The First-tier Tribunal rejected that contention.

4. The sole ground of appeal against the First-tier Tribunal's decision concerns its assessment of the risk on return in that specific regard.

Submissions

5. Ms Mascord relied on the grounds of appeal. She referred to the decision in P v Secretary of State for the Home Department [2013] EWHC 3879 (Admin). In summary, it was submitted that the First-tier Tribunal did not deal with the arguments advanced on behalf of the appellant in relation to that decision and did not give adequate reasons for departing from it. Reference was made to Phillips J's findings on risk in that decision, with reference to criminal deportees. It was submitted that the First-tier Tribunal wrongly considered what Ms Mascord referred to as the 'OGN' for October 2014 (and which the Panel described as a Bulletin), entitled it to depart from the findings in P. Submissions had been made to the First-tier Tribunal as to what weight should be given to the Bulletin but the First-tier Tribunal did not engage with those submissions.

6. It was submitted that there were no reasons as to why the Bulletin should be preferred to the reasons given in P. Although the respondent's 'rule 24' response relies on the decision in BCT v Secretary of State for the Home Department [2014] EWHC 4265 (Admin), that is not a pertinent case given that it is a decision about unlawful detention.

7. Mr Norton submitted that Phillips J gave his decision on the basis of the evidence that was before him. However, the February 2014 Bulletin was a response to that decision and the October 2014 Bulletin added to it. The First-tier Tribunal came to the same decision, in effect, as that in BCT, albeit that that decision came after the First-tier Tribunal's decision.

8. In BCT it was concluded that the evidence did not establish the risk contended for. In any event, even without reference to BCT the new evidence did not show an Article 3 risk.

9. In reply Ms Mascord re-emphasised the submissions given earlier, reiterating that it is difficult to extract from the First-tier Tribunal's determination what the reasons

were for its conclusions in terms of risk. BCT was not considering the same test for returns and whether there was a real risk of harm.

10. It was further submitted that the issue of materiality of the error of law is a live one given the pending country guidance case by the Upper Tribunal on the DRC.

My assessment

11. The sole ground of appeal against the decision of the First-tier Tribunal concerns its conclusion to the effect that there would be no risk to the appellant on return to the DRC as a foreign criminal. In P, as quoted in detail by the First-tier Tribunal, Phillips J stated as follows:

> "52. In the case of criminal deportees to DRC, it is clear that they will be interrogated on arrival, no doubt by professional, skilled and experienced immigration officials. According to the French embassy, those officials are specifically looking out for criminal deportees and no doubt able to probe for information and look for signs which would demonstrate that a returnee has been imprisoned in the United Kingdom. There would seem to be an obvious and serious risk that a criminal deportee such as P would not be able to hide the fact of his convictions in the face of interrogation designed to elicit that very fact.
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> 53. Further, it must be assumed that immigration officials in the DRC are able to conduct internet searches in relation to a person they are interrogating. There must be a real and substantial risk that an offence which attracted a custodial sentence of 12 months or more (so as to give rise to automatic deportation) will have been reported in some form, even if the case did not generate substantial publicity. It would not seem to matter whether DRC nationality was mentioned in any report if the person was named. It is also relevant to note in this context that the FFM report recorded evidence from the police in Kinshasa that the DGM sends a team to the United Kingdom to identify Congolese who are to be returned to the DRC and that '*the same team who had identified them abroad (including the UK) welcome them here*'.
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> 54. In the light of the above discussion, and with considerable regret given the nature and extent of P's criminal record in this country, I am satisfied that P's application to revoke the Deportation Order made against him cannot be considered to be clearly unfounded. As the Defendant's decision to the contrary was based on the same undisputed evidence of the attitude of the DRC authorities which I have considered, it necessarily follows that I find that decision to be irrational. Indeed, in my judgment there is a real and substantial risk that P, in common with other criminal deportees (who have served the sentences imposed on them for their crimes in this country), would be subjected to further imprisonment and ill-treatment if returned to the DRC."

12. The First-tier Tribunal pointed out at [122] that P was deciding the issue of a "clearly unfounded" certificate in respect of an application to revoke a deportation order. The First-tier Tribunal concluded that Phillips J did not conclude that any foreign criminal would be at risk on return to the DRC, merely that this was a "viable possibility" which should be decided in the light of the evidence.

13. Before the First-tier Tribunal a Home Office Bulletin dated 22 October 2014 was relied on on behalf of the respondent. The Tribunal made reference to some content

of the Bulletin, in particular letters dated October 2014 from the British Embassy in Kinshasa, clarifying the procedure on return to the DRC. It quoted from Annex D. As set out in the determination Annex D states as follows:

> "If an individual has committed a violent crime, for example sexual assault, DGM [Direction Générale de Migration] will record this information so that if a crime is later committed in DRC, an investigation can be carried out to determine whether it is linked to the person who is returned. Certain countries have data sharing arrangements with DGM in which they provide this information on those who they are returning. This will not prevent DGM from allowing that person back into the country. Because the person has not committed a crime in the DRC, they are free to go."

14. At [110] the Tribunal gave a detailed summary of the submissions made on behalf of the appellant in relation to the Bulletin, the decision in P, and her arguments in terms of the extent to which the information in the Bulletin revealed that there was no risk to persons in the appellant's situation, and no risk to the appellant in particular.

15. At [123] the Panel noted that Ms Mascord submitted that the Bulletin of 22 October 2014 was new evidence to which the Panel should give no weight but it disagreed with her submission. As already indicated, the Panel referred to Annex D of the Bulletin, and at [125] stated that on behalf of the appellant there was no evidence to counter the contents of Annex D.

16. The Panel rejected the suggestion that P was binding on it. It noted that it was a "relevant authority" which it had considered carefully. The Panel concluded that Phillips J did not decide that all foreign criminals returned to the DRC have a real risk of detention in conditions that breach Article 3, stating that his decision was that the argument could not be said to be 'clearly unfounded'.

17. With specific reference to the appellant before them, it was noted that the appellant's offences were not violent and did not extend to any criminal activity in the DRC. It concluded that there were no strong grounds to conclude that he would face a real risk of torture or inhuman or degrading treatment on return to the DRC. Although the appellant had said that a DRC official in the UK had been unable to provide a guarantee of his safety (when he was interviewed) the Panel concluded that a guarantee of safety is not an appropriate standard or yardstick.

18. I do not consider that there is any error of law in the terms advanced on behalf of the appellant with respect to the First-tier Tribunal not having articulated in detail its reasons for rejecting the submissions made on behalf of the appellant concerning the Bulletin. As already indicated, the Panel set out a detailed summary of the submissions made on behalf of the appellant and in my judgement it could not realistically be said that the Panel did not have those arguments in mind in reasoning that the appellant would not be at risk on return for the reasons advanced. It is plain that the Panel did engage with the issue with reference to the decision in P, the further material put before it, and the arguments advanced on behalf of the appellant. It was not necessary for the Panel to deal specifically with each and every strand of the arguments advanced.

19. In the grounds before the Upper Tribunal there is a summary of the arguments that it is said undermine the information in the October 2014 Bulletin. However, even if it could be said that the Panel erred in law by not explaining more fully its reasons for rejecting the arguments advanced on behalf of the appellant, that is not an error of law which requires the decision to be set aside. The Tribunal was entitled to conclude on the basis of the evidence put before it, that the appellant would not be at risk of Article 3 ill-treatment on return to the DRC.

20. Relevant to the question of the materiality of any error of law made by the First-tier Tribunal, is the decision in BCT. In that case Neil Garnham QC, sitting as a Deputy High Court Judge, considered the decision in P and what it said about the risk to foreign criminals on return to the DRC. At [42] he stated as follows:

> "It is right, as Mr Waite submits, that the issue in the case was whether the Secretary of State's certificate to the effect that P's claim was 'clearly unfounded' was flawed; it was not a decision on the merits of P's Article 3 EHCR argument. Technically, Mr Waite is right to assert that the decision was obiter as to the question of whether there was, in fact, a real risk of ill-treatment upon return."

21. At [43] he said that in the absence of new evidence it would be necessary to assume that P would be detained on return to DRC and that he would be imprisoned or detained in or near Kinshasa and that his detention would be a breach of Article 3. He considered then whether the Secretary of State had obtained new evidence of sufficient weight to make a reassessment of the conditions on likely return possible and justifiable. He then referred to the February 2014 DRC Policy Bulletin and its contents.

22. One of the points made in the grounds before me was also advanced before the judge in BCT, as indicated at [48] of that decision, namely the issue of an anonymous source at the DGM. In relation to that argument and others, the judge concluded that since the quashing of the certificate in P's case, the Secretary of State had obtained what amounts to assurances at a senior level in the Congolese government that the management of returning foreign national offenders is no different from the management of returning failed asylum-seekers, about whom there had previously been no concerns. At [51] the 'anonymity' argument was rejected.

23. Finally, at [55] it was stated that the decision in P meant that the Secretary of State had to consider her position and reassess the evidence as to the consequences of a return to the DRC. Within a relatively short period of time new material had emerged, notably the discussion between the Foreign Office and the Directeur Central de la Chancellerie at the DGM which suggested that the position may not be as concerning as the Ambassador had described. Thereafter, there was a realistic prospect of effective removals to the DRC and, in fact, in October 2014 such removals commenced.

24. Although it is true that that case of BCT was concerned with the question of the legality of detention, by the same token the decision in P was concerned with a "clearly unfounded" certificate. In any event, whilst the decision in BCT was not

before the First-tier Tribunal in the appeal with which I am concerned, its decision and consideration of what seems to be identical evidence, reinforces my view that even if there was an error of law by the First-tier Tribunal it is not an error of law that is material to the outcome of the appeal.

25. Ms Mascord suggested that the question of materiality ought to await the outcome of the expected country guidance case by the Upper Tribunal. However, I do not agree with that proposition. Putting aside my primary view which is that there is no error of law in the decision of the First-tier Tribunal, even on the question of materiality that is an issue that can be resolved with reference to the evidence that was before the First-tier Tribunal, and should be so resolved. What the Upper Tribunal may or may not decide in a decision yet to be promulgated at some uncertain time in the future, is not a basis for deferring the question of materiality.

Decision

26. The decision of the First-tier Tribunal did not involve the making of an error on a point of law. The decision to dismiss the appeal therefore stands.

Upper Tribunal Judge Kopieczek 23/04/15