IAC-AH-DP-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00549/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 23 November 2015	**On 5 January 2016**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

GS
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms V Easty, Counsel
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of the Democratic Republic of Congo ("DRC"), born on 30 May 1994. He came before the First-tier Tribunal on 9 March 2015 in consequence of his appeal against the respondent's decision to make a deportation order against him under Section 3(5)(a) of the Immigration Act 1971.

2. That decision was made following the appellant's convictions for offences of robbery and possession of a firearm with intent to commit a relevant offence. The total sentence he received was one of six years'

imprisonment. The offences were committed on 20 July 2010 when the appellant was 16 years of age.

3. First-tier Tribunal judge K. W. Brown allowed the appeal under Article 3 of the ECHR on the basis that the appellant, as a foreign criminal, would be at real risk of Article 3 ill-treatment on return to the DRC. In the circumstances, he decided not to give consideration to the Article 8 ground of appeal.

4. The respondent sought permission to appeal against the judge's decision on two grounds. The first related to the judge's refusal to adjourn the appeal, an adjournment application having been made on behalf of the respondent to await the outcome of the Upper Tribunal's consideration of a country guidance case on the DRC in relation to the return of criminal deportees. The second ground of appeal was in terms of the judge's conclusion to the effect that the appellant would be at risk on return as a criminal deportee.

5. The appellant also sought permission to appeal in terms of the judge's failure to consider Article 8 of the ECHR.

6. Permission was granted to both parties. In relation to the respondent's application, the judge of the First-tier Tribunal who granted permission did not consider that the ground in relation to the adjournment application had any merit but expressly stated that the grounds on which permission was granted were not limited.

7. On behalf of the appellant before me, Ms Easty indicated that her appeal in relation to the Article 8 point would not be pursued if it was decided that there was no error of law in the judge's decision under Article 3. In other words, with an Article 3 decision in the appellant's favour, it would not be necessary to pursue the Article 8 appeal.

Submissions

8. I summarise the submissions of the parties before me, although the summary does not necessarily reflect the order in which the submissions were made.

9. Mr Avery at first indicated that he did not rely on the first ground on which permission was sought, namely the refusal to adjourn pending the forthcoming country guidance decision, although revived the point later in submissions.

10. However, in relation to the Article 3 point, it was submitted that the judge's reliance on the decision in *R (P and R – DRC) v Secretary of State for the Home Department* [2013] EWHC 3879 (Admin) failed to take into account the restricted nature of the hearing before Phillips J, and the fact that Phillips J's comments were *obiter*. That was a judicial review case challenging a clearly unfounded certificate. It was not a case about the return of criminal offenders to the DRC. The judge should not have treated that decision as determinative of the Article 3 issue. I was referred to *BM and Others (returnees – criminal and non-criminal) DRC CG* [2015]

UKUT 00293 (IAC) at [61] in which observations were made about the decision in *P*. In *P* the judge said that he thought the issue of the risk to criminal deportees was an issue that needed to be considered in a country guidance case.

11. Furthermore, it was submitted that the First-tier judge made no mention of the Fact-Finding Mission Report referred to in the decision letter dated 12 March 2014.

12. The First-tier judge did not sufficiently engage with the issues in terms of risk on return in Article 3 terms.

13. It was contended that the judge's citation of the Court of Appeal decision in *BK (Democratic Republic of Congo) v Secretary of State for the Home Department* [2008] EWCA Civ 1322 at [23] of the determination was in fact not the country guidance case then in existence, that being *BK (Failed asylum seekers) DRC CG* [2007] UKAIT 00098. The Court of Appeal case in fact was not dealing with any factual issues.

14. So far as the appellant's appeal on Article 8 grounds is concerned, it was accepted on behalf of the respondent that the judge did need to consider Article 8 and that on that basis there was an error of law in the decision of the First-tier Tribunal.

15. Ms Easty, in relation to the judge's decision not to adjourn the appeal, pointed out that there had previously been a refusal of an adjournment before the First-tier Tribunal. There was no principle that indicated that a hearing needed to be adjourned pending the outcome of a country guidance case. The respondent could, if she had wanted, withdrawn the decision under appeal.

16. In relation to Article 3, I was referred to the appellant's 'rule 24' response to the grant of permission. It was submitted that the principles to be derived from *P* are set out in the DRC Policy Bulletin of 22 October 2014. Ms Easty suggested that that document was before the First-tier judge, either having been provided to him at the hearing or provided to the Tribunal at an earlier hearing.

17. The restricted way in which *P* is relied on before me was not the way that the respondent's case was put before the First-tier Tribunal.

18. In relation to the *BK* point, the respondent's case is simply that the judge used the wrong citation. In any event, that decision was of "limited value" because this appellant had not applied for asylum.

19. Furthermore, it is to be remembered that the judge had before him the expert report of Dr Kodi, which informed his decision. Dr Kodi's opinion was that the appellant would be at risk on return.

20. Mr Avery in reply suggested that there was nothing to indicate that the October 2014 Bulletin was put before the judge. Certainly, nothing in the determination shows this to be the case. In any event, it would seem that the Bulletin only contains a summary of the decision in *P*, and not expressing any policy view.

21. Dr Kodi's report proceeds on the footing that any criminal returnee would be at risk of detention and ill-treatment but there was nothing in the way of any evidence to support that conclusion.

My assessment

22. It appeared at first that Mr Avery effectively abandoned the ground of appeal in relation to the refusal to adjourn although revived it later in submissions. In any event, I do not consider that there is any merit in the ground relating to the First-tier judge's refusal to adjourn the appeal.

23. It appears that an application for an adjournment had already been refused prior to the hearing before the First-tier judge and there is nothing to indicate that there was further information before the judge such as would have persuaded him to take a different view. Furthermore, there is no reason in principle why a hearing should be adjourned pending consideration by the Upper Tribunal of country guidance. Indeed sometimes, if not often, it would be wholly inappropriate to do so given that it is usually unknown when a country guidance decision will be promulgated.

24. The judge referred to the interests of justice and the "overriding objective" (in the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014.

25. If it did form part of the judge's reasons to refuse the adjournment the fact that it was submitted on behalf of the appellant that the law as it then existed was strongly in favour of the appellant, this would have been an erroneous basis upon which to refuse an adjournment. Nevertheless, I am satisfied that the judge was entitled to refuse the application for an adjournment in the exercise of his discretion and for the reasons he gave.

26. I cannot see anything to support the suggestion that the DRC Policy Bulletin dated 22 October 2014 was put before the First-tier Tribunal as suggested on behalf of the appellant. Although an extract from that document is set out in the appellant's rule 24 response, no copy of the whole document was provided to me, despite my request at the hearing for one to be provided. It is not apparent from the determination or from the judge's manuscript record of proceedings that that document was before him, or was referred to by either party.

27. In any event, it is clear from the decision letter that it was not accepted on behalf of the respondent that the appellant would be at risk of Article 3 ill-treatment as a returned criminal offender, regardless of what is stated in the Policy Bulletin. Indeed, the decision letter cites various reports which the respondent argued in the decision letter suggested that the appellant would not be at risk.

28. I do not consider that there is any merit in the complaint about the judge's incorrect citation of the decision in *BK*. The country guidance decision is of course that reported by the Upper Tribunal, and not the Court of Appeal's decision. In any event, the decision of the Court of Appeal contains a summary or synthesis of the Upper Tribunal's decision.

29. That said, I cannot see how the judge's conclusions in relation to the risk to the appellant in Article 3 terms could have been supported or fortified with reference to the country guidance decision of the Upper Tribunal in *BK*. That case only concerned failed asylum seekers and not criminal returnees. Indeed, as was said by Ms Easty in submissions, that decision would have had limited value anyway, even if the judge did refer to the decision of the Court of Appeal rather than that of the Upper Tribunal. Its limited value is a reason to conclude that it could not justifiably have informed the judge's assessment.

30. So far as the decision in *P* is concerned, I consider that there is some merit in the submissions made before me on behalf of the appellant to the effect that the argument in relation to that decision before the First-tier Tribunal was not in terms of the extent to which it should be given a restrictive interpretation, for example because it was a judicial review case concerned with a clearly unfounded certificate. Nothing in the determination reveals that there was any argument about its utility being limited for that reason. Furthermore, the decision letter does not argue for such a restrictive approach to *P*.

31. There are nevertheless good reasons to conclude that that decision in fact had only limited utility, when one considers the commentary on it in *BM and Others*, in particular at [61]. Nevertheless, it does seem to me that the respondent now relies on an argument that was never advanced before the First-tier Tribunal in relation to the decision in *P*.

32. At [26] the judge referred to the respondent's submissions to the effect that the appellant could be deported safely to the DRC, noting that there was no intention on behalf of the respondent to publicise or highlight the reasons why the appellant has been deported. He referred to the November 2012 Bulletin relied on on behalf of the respondent in terms of the extent to which a crime attracting media publicity might put a person at risk. That seems to have been the way the case was argued on behalf of the respondent, at least in part, including in the decision letter.

33. Importantly however, it is to be remembered that the judge had before him an expert report from Dr Muzong Kodi. The grounds before me do not in fact make any complaint about the judge's assessment of that expert report. Although Mr Avery sought to challenge the judge's reliance on it, I am satisfied that the judge was entitled to conclude with reference to that report that the case had been made out as to risk on return as a criminal deportee, in the particular circumstances of his case.

34. It is true that Dr Kodi's report does proceed on the footing that all offender returnees would be at risk, but there is also an individual assessment of the appellant's particular circumstances. Although the respondent's decision letter refers to the clarification of the DRC's ambassador to the UK's comments, Dr Kodi's report also engages with that clarification. The ambassador's comments suggested that there would be a risk of detention of criminal offender returnees. It could not be said therefore, that the

First-tier judge blindly accepted everything said on behalf of the appellant but rejected everything said on behalf of the respondent.

35. It seems to me to be important not to approach the question of whether the First-tier judge erred in law in terms of his assessment of the risk in Article 3 terms, with the benefit of the hindsight provided by the country guidance decision of *BM and Others*, promulgated in June 2015, and therefore after the decision of the First-tier Tribunal. It could not be said to have been an error of law for the judge to have failed to take into account country guidance which was not in existence at the date of the decision before him.

36. The judge's decision was made on the basis of the information before him. It is true that a different approach to *P* could have been adopted, and the decision in *BK* could not in fact have informed his assessment of the risk for the reasons I have given. Nevertheless, there was sufficient background material, and an expert report, which justified him in coming to the view that he did.

37. Accordingly, I am not satisfied that there is any error of law in the decision of the First-tier Tribunal and its decision to allow the appeal on Article 3 grounds is to stand.

38. Ms Easty did indicate that she would not be pursuing the appeal on Article 8 grounds in the event that no error of law was found in relation to Article 3. In those circumstances, unless within seven days of the date of the sending of this determination the appellant through his representatives makes any submissions to the contrary, I propose to decide pursuant to rule 17 of the Tribunal Procedure (Upper Tribunal) Rules 2008, that the appellant has withdrawn his case in relation to Article 8, and to which the Tribunal would consent.

39. No further order from the Upper Tribunal will be necessary in this respect because the withdrawal of the appellant's case in respect of Article 8 will take effect by default in response to that direction.

Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law. Its decision to allow the appeal on Article 3 grounds therefore stands.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Upper Tribunal Judge Kopieczek 22/12/15