Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01331/2014

THE IMMIGRATION ACTS

Heard at : IAC Birmingham	**Decisions and Reason Promulgated**
On : 30 June 2016	**On : 13 July 2016**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

MASSAMBA LUBAMBA
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr B Bedford, instructed by Sultan Lloyd Solicitors
For the Respondent: Ms H Aboni, Senior Home Office Presenting Officer

DECISION AND DIRECTIONS

1. The appellant is a citizen of the Democratic Republic of Congo (DRC), born on 2 August 1972. Following a grant of permission to appeal against the decision of the First-tier Tribunal allowing his appeal against the respondent's decision to deport him from the United Kingdom on Article 3 grounds, it was

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found, at an error of law hearing on 2 March 2016, that the Tribunal had made errors of law in its decision and the decision was set aside, to the extent set out below. Directions were made for the decision to be re-made by the Upper Tribunal.

Background

2. The appellant claims to have arrived in the United Kingdom on 3 August 1998 and on 4 August 1998 he claimed asylum. On 13 February 2001 he was granted indefinite leave to remain as a refugee. On 6 October 2003 he submitted an application for naturalisation as a British citizen, but his application was refused on 18 June 2004 because of a conviction in October 2002.

3. On 12 October 2007 the appellant was convicted of conspiracy to defraud, for which he was sentenced to four years' imprisonment. On 15 May 2008 he was notified of his liability to deportation and was invited to seek to rebut the presumption under section 72(2) of the Nationality, Immigration and Asylum Act 2002 that he constituted a danger to the community, to which he responded. On 17 February 2009 a fresh liability to deportation notice was served on the appellant as a result of the changes in legislation under which he was liable to automatic deportation under section 32(5) of the UK Borders Act 2007. He responded to that notice. On 14 January 2010 a fresh liability to deportation notice was served on the appellant, again including an invitation to rebut the presumption under section 72(2). He responded to that on 2 February 2010. On 18 March 2010 the respondent sent the appellant a notification of intention to cease refugee status, to which he responded.

4. On 29 January 2011 the respondent issued a cessation of refugee status to the appellant, and on 13 February 2011 issued a fresh liability to deportation notice. The cessation decision was subsequently withdrawn after the appellant applied for judicial review of the decision. However a further notification of intention to cease refugee status was issued on 16 December 2012, to which the appellant responded, and on 21 June 2013 the respondent again made a decision to cease the appellant's refugee status. On 3 July 2013 a fresh liability to deportation notice was sent to the appellant, again inviting him to seek to rebut the presumption under section 72(2). The appellant made further representations challenging the decision to cease refugee status, to which the respondent responded, maintaining the decision, on 11 October 2013. The appellant then lodged a further judicial review application on 10 January 2014 which, it seems, was withdrawn on 12 June 2014 when the respondent agreed to reconsider the cessation decision. In a letter dated 27 September 2014, and in a further letter dated 3 November 2014, the respondent, having undertaken a reconsideration, maintained the cessation decision of 21 June 2013.

5. In the meantime, on 25 June 2014 a deportation order was signed against the appellant and a decision made the same day that section 32(5) of the UK Borders Act 2007 applied.

6. The respondent, in making that decision, advised the appellant that he was excluded from the protection of the Refugee Convention by virtue of Article 33(2), on the basis that he had failed to rebut the presumption under section 72(2) of the Nationality, Immigration and Asylum Act 2002 that he constituted a danger to the community. He was also excluded from Humanitarian Protection. The respondent considered that the appellant was not at risk of persecution in the DRC, either on the basis of his past political activities, as a returned asylum-seeker or as a foreign national offender and rejected his Article 3 human rights claim. With regard to Article 8, paragraphs 399(a) and 399A of the immigration rules did not apply to the appellant as a result of the length of his sentence. The respondent did not accept that there were exceptional circumstances such that the appellant's right to family and/or private life outweighed the public interest in his deportation. Whilst it was accepted that the appellant had five British children living in the United Kingdom it was not accepted that he had a genuine and subsisting relationship with them or with his claimed British partner, the mother of four of his children. It was accordingly concluded that his deportation would not breach Article 8.

7. The appellant's appeal against that decision was heard in the First-tier Tribunal on 10 February 2015, before a panel consisting of First-tier Tribunal Judge Hopkins and Mr F T Jamieson, a non-legal member. The panel heard from the appellant and his eldest son and considered a witness statement from his partner who was not in attendance. The panel found that the appellant had rebutted the presumption that he was a danger to the community and they then went on to consider whether his removal to the DRC would breach the Refugee Convention, concluding that he would be at no risk on return as a result of his past political activities. However, in light of a decision of the High Court in P and R [2013] EWHC 3879 (Admin), and on the basis of his claim that members of the security forces had come to his house in the DRC after hearing of his offending in the United Kingdom, the panel concluded that the appellant would be at risk on return as a criminal deportee and accordingly allowed the appeal on Article 3 grounds. Having considered Article 8 independently of the Article 3 decision, the panel found that there were no exceptional circumstances for the purposes of paragraph 398 of the immigration rules and that the appellant's deportation would not breach his Article 8 rights.

8. The respondent sought permission to appeal to the Upper Tribunal against the panel's decision on Article 3, asserting that they were wrong to dismiss the Home Office Country Policy Bulletin which included a direct response to P & R and that they had erred in simply accepting the appellant's claim in regard to the visit to his family home by the DRC authorities.

9. In a cross-appeal challenging the panel's decision under the Refugee Convention, it was asserted in the grounds that the panel had erred by failing to take into account the appellant's position within the MPR and his escape from detention in the DRC, in concluding that he would be at no risk on return. The grounds asserted further that the panel had failed to give a proper interpretation to Article 4(5) of the Qualification Directive 2004/83 and that an

assessment of credibility was not warranted in the appellant's case, since his asylum claim had previously been accepted by the respondent.

10. Permission to appeal was granted to the respondent and the appellant on 16 March 2015 on all grounds, but primarily with respect to the latter point regarding Article 4(5).

11. Following an error of law hearing on 2 March 2016, I upheld the First-tier Tribunal's decision dismissing the appellant's claim under the Refugee Convention but set aside the decision allowing the appeal on Article 3 grounds, as follows:

> "13. Mr Bedford's initial submission was not one that had been raised previously in the grounds and he therefore applied for permission to amend the grounds. It was his submission that the automatic deportation decision preceded the cessation of the appellant's refugee status and, as such, the burden of proof lay upon the respondent to show that cessation was justified in the terms set out in Article 11(1)(e) and (2) of the Directive. Given that the UNHCR opposed the cessation of the appellant's refugee status, the respondent had failed to discharge the burden of proof and the panel had erred by failing to recognise that and by considering that the burden of proof lay upon the appellant to establish his claim. Mr Bedford also pursued the point set in the grounds relating to Article 4(5), that where the appellant had refugee status, his credibility should be accepted and should not be assessed. Mr Bedford submitted further that the panel had erred by considering risk on return on the basis that the appellant was a failed asylum seeker when he was not, and when it was clear that the appellant, when questioned on return to the DRC, would reveal that he had been a refugee in the United Kingdom. The panel were wrong to have concluded that the appellant's political party had disappeared. Mr Bedford submitted that the panel's Article 8 decision could not stand - and he applied to amend the grounds in that respect - as the appellant's circumstances, being a low risk of re-offending and having lived in his family home with his children for six years, had to be described as exceptional.
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> 14. Mr McVeety submitted that the challenge to the panel's decision with respect to the burden of proof in ceasing refugee status could not be accepted, since it had not been raised before the First-tier Tribunal. The panel had referred to the appellant's refugee status having been ceased and had therefore had that in mind, but the decision to cease refugee status had not been challenged before them. The Secretary of State was not bound by the UNHCR's views in any event. The panel had given proper reasons for concluding that the faction of the MPR which the appellant had supported had ceased to exist. The panel did not err by considering the case of BK (Failed asylum seekers) DRC CG [2007] UKAIT 00098, as they were considering all risk factors. With regard to the Secretary of State's appeal, Mr McVeety submitted that the issue of foreign national offenders had now been settled in the country guidance in BM and Others (returnees - criminal and non-criminal) (CG) [2015] UKUT 293 and the panel had therefore erred by relying on P and R even though BM post-dated their decision. The panel's acceptance of the appellant's claim in regard to the visit to his home

by the DRC authorities was erroneous, as it was based upon an acceptance of the risk identified in P and R.

15. In response, Mr Bedford submitted that the fact that there was subsequent country guidance did not mean that the panel had erred in applying the guidance before them at the time. As regards the appellant not having challenged the Secretary of State's failure to meet the burden of proof before the First-tier Tribunal, he relied upon the case of FP (Iran) v Secretary of State for the Home Department [2007] EWCA Civ 13 in asserting that appellants could not be held responsible for failings of their representatives. The respondent had erred by failing to discharge the burden of proving cessation and the panel had failed to deal with that.

Consideration and findings

16. I turn first of all to the appellant's cross-appeal. Mr Bedford's submissions bore little resemblance to the grounds initially raised and to the basis upon which permission was granted. I have nevertheless considered those grounds, but reject them as being without merit.

17. Mr Bedford's submission in regard to the panel's failure to consider the burden of proving cessation of refugee status is, in fact, misconceived. His submission was made on the basis that the relevant date of cessation post-dated the deportation decision and was 27 September 2014, which was the date when the respondent reconsidered and maintained the decision to cease refugee status, further to the commencement, and subsequent withdrawal by consent, of judicial review proceedings. However that is clearly not correct, as the letter of 27 September 2014, as with the subsequent letter of 3 November 2014 and the previous letter of 11 October 2013, was simply a response to a request for reconsideration and a decision to maintain the actual cessation decision of 21 June 2013. Accordingly the relevant date of the decision to cease refugee status was 21 June 2013. From that date the appellant ceased to be a refugee. The appellant did not have a right of appeal against that decision and the fact that he sought to judicially review the decision is a clear indication that he was aware that that was his only recourse to challenging the decision. Paragraph 16 of the panel's decision refers to an outstanding judicial review challenge, and that reflects what the Tribunal was told in the appellant's skeleton argument at paragraph 18. However there was no evidence before the panel of any ongoing judicial review proceedings and indeed this Tribunal can find no record of any outstanding judicial proceedings, the last application having been withdrawn on 12 June 2014.

18. Accordingly, at the date on which the deportation order was made, and the relevant deportation decision taken under the automatic deportation provisions in section 32(5) of the 2007 Act, namely 25 June 2014, the appellant was no longer a refugee. It was therefore not for the First-tier Tribunal to re-open or to consider the cessation decision and the fact that the respondent bears the burden of proving matters relevant to cessation was not a matter before them. Indeed it was, quite properly, not pursued before them as a matter in issue and the appellant's skeleton argument makes it quite clear that the appellant's claim under the Refugee Convention was pursued on the basis that the burden of proof lay upon the appellant (paragraph 5 of the skeleton argument). It was on that basis that

the First-tier Tribunal therefore properly considered the appellant's claim, having concluded that he had rebutted the presumption under section 72(2) and found that he was not excluded from protection under the Refugee Convention and having noted that his previously granted refugee status had been revoked.

19. Mr Bedford then pursued the ground raised with respect to Article 4(5), although that does appear to be a basis upon which to challenge the panel's decision, at least from the appellant's point of view, given that no credibility assessment was in fact made. Indeed the absence of any credibility assessment was a ground relied upon by the respondent and I shall therefore come to that later.

20. The appellant's written grounds seek to challenge the panel's assessment of risk, asserting that they failed to consider his previous position held with the MPR and the fact that he had escaped from detention. However those were clearly matters to which the panel referred and had in mind when considering whether there would be any continuing interest in him by the DRC authorities. The panel gave careful consideration, at [39], to the profile of the MPR and to the appellant's claim that the faction of the party with which he was involved was banned. Contrary to the assertion made by Mr Bedford, they gave full and proper reasons for concluding that that faction did not have a significant profile such as to lead to any ongoing adverse interest in the appellant, noting that two of the three published sources referred to in the Home Office Country of Origin Information Service report did not even note its existence.

21. Mr Bedford also challenged the panel's decision on the basis that they had assessed risk on return on the erroneous basis that the appellant was a failed asylum seeker rather than someone who had previously been recognised as a refugee in the UK. However it is clear that what the panel were doing at [41] was considering the various risk categories and, on the basis of the relevant country guidance cases dealing with returnees to the DRC, concluded that he did not fit within any of the categories of those at risk. There was no evidence before the panel to suggest that returned previously recognised refugees were at any particular risk on return and it is clear that the panel gave full and adequate consideration to the appellant's circumstances in concluding that he did not have a profile that would attract adverse attention on return to the DRC such as to lead to a risk of persecution.

22. I turn finally to Mr Bedford's challenge to the panel's findings on Article 8, again a matter never previously raised in the grounds. It is clear from [52] that the panel were considering Article 8 independently of their decision under Article 3. They considered the relevant immigration rules and statutory provisions and provided full and detailed reasons for concluding that there were no exceptional circumstances preventing the appellant's deportation for the purposes of paragraph 398 of the rules. Mr Bedford challenged that decision, but on what was no more than a disagreement with the panel's decision. The panel were clearly entitled to reach the decision that they did.

23. Accordingly, for all of these reasons, I find no errors of law in the First-tier Tribunal's decision on the appellant's grounds relating to asylum,

humanitarian protection and Article 8 and I uphold the decision in those respects and dismiss the appellant's cross-appeal.

24. I do, however, find merit in the respondent's grounds of appeal. It is clear that the panel allowed the appellant's appeal on Article 3 grounds purely on the strength of the decision in P and R, where Phillips J concluded that criminal deportees to the DRC would be detained on arrival for an indefinite period and that such detention would be in conditions which contravened Article 3. The country guidance in BM, which was decided after the appellant's appeal before the First-tier Tribunal, came to a different conclusion. Mr Bedford submitted that an error of law did not arise simply because a subsequent country guidance case differed from a previous case on the facts. However P and R was not a country guidance case and did not purport to be such. It was a judicial review decision quashing the certification, as clearly unfounded, of an application to revoke a deportation order. Accordingly, the panel were wrong to consider that they were bound to follow the decision, which is what they appeared to do, and that is particularly so when faced with a Home Office Country Policy Bulletin which was compiled as a direct response to that decision and which they nevertheless, as a result of the assumed binding nature of the decision, failed properly to consider and address and failed to accord any weight. Furthermore, the country guidance in BM makes it clear that Phillips J, in coming to the decision that he did, had relied upon information from the DRC Ambassador which had subsequently been clarified and undermined. Accordingly it seems to me that the panel's decision on the risk of return to the appellant simply as a result of his criminal offending in the UK is unsustainable and cannot stand.

25. Whilst it is the case that the panel found the risk to the appellant to arise also as a result of interest shown in him through visits to his family home in the DRC by the security services, there is merit in the respondent's assertion in the grounds that the panel erred by failing to explain why that account was simply accepted at face value, particularly in light of the appellant's history of dishonesty. Contrary to the assertion made on behalf of the appellant, I do not accept that Article 4(5) of the Directive has to be read as requiring the appellant's evidence to be accepted without more, on the basis of his asylum claim having previously been accepted. It is, furthermore, plain that the panel, in accepting the appellant's account of the visits by the security services, were influenced by the decision in P and R which concluded that the DRC authorities took an adverse interest in DRC nationals who had committed serious criminal offences abroad. For the reasons given above, the panel erred in law in placing the weight that they did upon that decision.

26. For all of these reasons I find that the First-tier Tribunal's decision to allow the appeal on Article 3 grounds has to be set aside and re-made. The Secretary of State's appeal is therefore allowed. I set aside the decision allowing the appeal on Article 3.

27. The appellant's appeal will therefore be listed for a resumed hearing in the Upper Tribunal in order for the decision to be re-made on this limited basis, namely the question of risk on return to the appellant as a person who has been convicted for criminal offences in the UK. It will be for the Upper Tribunal, in re-making the decision, to consider, and make findings

> on, the appellant's claim in respect to the visits to his family home in the DRC and it may be that the appellant would wish to give further oral evidence in that regard. Submissions will, of course, need to address the country guidance in BM."

Appeal hearing and submissions

12. The appeal then came before me for a resumed hearing on 30 June 2016, to re-make the decision on Article 3.

13. Mr Bedford raised a preliminary point, namely that with regard to [17] of my error of law decision and the judicial review proceedings referred to therein, there had in fact been such outstanding proceedings which had resulted in a grant of permission and the withdrawal by the respondent of her decision of 3 November 2014 maintaining the decision to cease refugee status. He submitted that the cessation decision had thus been withdrawn. He referred further to the immigration history at the beginning of the respondent's appeal bundle which confirmed that the revocation of refugee status had been withdrawn on 19 May 2014 pending reconsideration. Ms Aboni had no instructions that the cessation decision had been withdrawn. Mr Bedford invited me to reconsider the argument he had made previously at the error of law hearing about the deportation decision pre-dating any cessation decision and to set aside my own decision in that respect. However I did not agree to that and I set out my reasons later.

14. Mr Bedford then called the appellant to give oral evidence in regard to the claimed incident when security services visited his home after becoming aware of his criminal offending in the UK. The appellant adopted his previous statements. When asked why his previous solicitors had said in their letter of 31 March 2010, at R1 and R2 of the respondent's appeal bundle, that the incident was a recent one, when he had claimed that it occurred in 2007, the appellant said that it was because he only told his solicitors about it when he came out of prison in December 2009. His criminal offending was widely publicised and was mentioned on the BBC Birmingham News as well as being reported in the Daily Mail and the Sun newspapers. The crime was widely reported and easily accessed on the internet. When cross-examined by Ms Aboni, the appellant said that he was not aware of any incidents after 2007, but he felt that since that incident occurred almost ten years after he left the DRC and came to the UK, the same could happen now, ten years later.

15. Both parties then made submissions. Ms Aboni submitted that the appellant would not be at risk on return to the DRC and she relied upon the country guidance in BM and Others in regard to the risk to foreign national offenders. The incident in 2007 involved rogue elements of the security forces trying to extort money and was not evidence of the authorities having any adverse interest in the appellant. Mr Bedford submitted that it was reasonable to believe that there would be a resurgence of interest in the appellant. His case differed to that of BM as there had been a previous interest in him. The appellant had fled from detention and there was an unexecuted warrant against him. Furthermore, BM did not deal with those who had previously been

recognised as refugees, but only with failed asylum seekers. The DRC authorities would be aware that the appellant was previously recognised as a refugee and that would put him at risk on return.

Consideration and findings

16. I turn first of all to the preliminary point raised by Mr Bedford in regard to the decision to cease the appellant's refugee status and his assertion that that decision had been revoked. As I stated in my error of law decision at [17] and [18] it was clear to me that the decisions made by the respondent subsequent to the cessation decision of 21 June 2013 were simply decisions following an agreement to reconsider the cessation decision, but refusing to do so. The reference in the immigration history to the withdrawal of the revocation decision on 19 May 2014 was clearly an error and, it seems to me, was in fact referring to the withdrawal of the judicial review claim. It remains the case that there is no evidence that the cessation decision of 21 June 2013 has been withdrawn by the respondent and the papers produced by Mr Bedford in the most recent judicial review proceedings again show no more than that the respondent has agreed to reconsider the cessation decision, as she has done on several previous occasions, following each of which the original decision of 21 June 2013 was maintained. Accordingly I maintain my view previously expressed that the relevant date of the decision to cease refugee status was 21 June 2013 and from that date the appellant ceased to be a refugee. That was indeed the case before the First-tier Tribunal and accordingly I see no reason to go behind my decision upholding the First-tier Tribunal's decision in relation to the appellant's claim under the Refugee Convention.

17. I therefore turn to the substantive matters upon which the decision in the appeal was to be re-made, namely the risk on return to the appellant as a foreign national offender in the UK. Despite Mr Bedford's valiant attempt to suggest reasons why the appellant would be at risk, I find absolutely no merit in such a claim. The country guidance in BM makes it clear that the evidence produced before the Tribunal showed there to be no risk to a returnee simply on the basis of having offended in the UK. I consider the appellant's claim as regards an incident in December 2007, when members of the security services came to his home after becoming aware of his conviction in the UK, to be pure fiction. The appellant's account of the incident, in his statement of 30 January 2015, bears little resemblance to the account relayed by his solicitors in their letter of 31 March 2010, in which they referred to the incident as being 'recent' and made no reference to any attempt to extort money from his family. The appellant's attempted explanation for the reference to the incident being recent was not a credible one. For these reasons, and considering the appellant's history of dishonesty, I simply do not accept that such an incident occurred. However, even if it was the case that there had indeed been an attempt to extort money after the appellant's crime became known in the DRC, I would agree with Ms Aboni's submission that that did not amount to anything other than rogue elements of the security forces seizing an opportunity to make money, rather than an example of adverse interest being taken in the appellant by the security services, and there is no reason whatsoever to

consider, even to the lowest standard of proof, that there would be any interest in the appellant some ten years later.

18. Mr Bedford submitted that the appellant's case differed to the general guidance in BM in relation to foreign national offenders, in that there had been a previous adverse interest in him and that his return to the DRC would therefore cause a resurgence of that interest. However the First-tier Tribunal found, for reasons properly given, at [47], that there was no reason to believe that there would be any ongoing interest in the appellant, and there is no reason to go behind that finding. Contrary to Mr Bedford's submission, the First-tier Tribunal's findings in that respect had not been set aside by the error of law decision, as was abundantly clear by the fact that their decision under the Refugee Convention was upheld. Likewise, the argument which Mr Bedford attempted to resurrect, that the appellant would be at risk as a previously recognised refugee, had already been addressed in my error of law decision at [21].

19. Accordingly I find absolutely nothing in the country guidance in BM to support the appellant's claim to be at risk on return on any basis and neither do I find any reason to consider that the appellant would be at risk for reasons not covered by the country guidance. I do not find there to be any basis upon which the appellant could be considered to be at risk on return to the DRC. His removal to the DRC would clearly not be in breach of Article 3 of the ECHR. Since Article 3 was the only part of the decision in the appellant's appeal to be re-made, it follows that his appeal is dismissed on all grounds.

DECISION

20. The making of the decision of the First-tier Tribunal involved an error on a point of law in relation to its findings on Article 3, and the decision has accordingly been set aside in that respect. I re-make the decision by dismissing the appellant's appeal on Article 3 grounds and on all other grounds.

Signed Date13 July 2016

Upper Tribunal Judge Kebede