Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/00975/2012**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7 June 2017	**On 20 June 2017**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

AS
(ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr B Bundock, Counsel, instructed by Duncan Lewis & Co Solicitors
For the Respondent: Mr P Duffy, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of the DRC and his date of birth is 8 June 1956.

2. There is a protracted history which I will attempt to summarise. The Appellant arrived in the UK on 6 December 1994 and he claimed asylum. This application was refused on 18 April 1995 and his appeal was dismissed by an Adjudicator on 27 August 1996. His evidence, at that time, was that he had worked under General Beoko in Zaire and was the manager of the General's wife's coffee business and her bodyguard. He gave an account of how a road traffic accident caused the General to

turn against him. This account was rejected by the Adjudicator who found the Appellant not credible.

3. The Appellant made a fresh claim and he was granted indefinite leave to remain as a refugee on 28 November 2002. This was granted on the basis of the Appellant having been a member of the Presidential Security Division (DSP). In 1999 he was convicted on two separate occasions of common assault. Both assaults were on women whilst the Appellant was working as a taxi driver. On 11 December 2002, he was convicted, following a trial, of rape and sentenced to eight years. The victim of the rape was a stranger to the Appellant and vulnerable because she had been drinking. He did not use his job as a taxi driver to lure her into the car, but he took her to an area where she did not want to go, raped her using violence and threw her on a rubbish tip after he had finished with her. He was in custody either on remand or as a serving prisoner between 2002 and 2007. Cessation of the Appellant's refugee status was confirmed on 10 June 2008.

4. On 27 June 2008 a deportation order was made. The Appellant requested this to be revoked on the grounds that he has an EEA partner. The Respondent refused this on 7 November 2008 and the on 3 April 2009 the Appellant appealed. Removal directions were cancelled and the decision of 7 November 2008 was withdrawn. A new decision was served refusing to revoke the deportation order and certifying the Appellant's application which gave him an out of country right of appeal. Removal directions were then cancelled on a number of occasions following the issue of proceedings for judicial review.

5. The Appellant made an application on 9 October 2009 for a residence certificate under the Immigration (European Economic Area) Regulations 2006 ("the 2006 EEA Regulations") but this was rejected, and an application to the Court of Appeal was refused on 5 November 2009. Further removal directions were cancelled.

6. A series of applications were made by the Appellant in relation to his relationship with an EEA national and a number of attempts were made by the Respondent to deport the Appellant, which were cancelled following applications for judicial review resulting in a stay on removal on 29 March 2010 to enable him to marry his now wife on 15 April 2010.

7. On 17 April 2010 he was notified of liability to deport him under the 2006 EEA Regulations and a new decision to deport him was made on 27 September 2010. The Appellant appealed. His appeal was dismissed by a panel ("the first panel") on 24 March 2011. The evidence before the first panel was that he worked for the DSP during the Mbutu regime, but the first panel noted that the Appellant advanced this claim in his second witness statement after the commencement of his evidence and did not give oral evidence about this. The first panel concluded that the Appellant had not established risk on return and dismissed the appeal under the Refugee Convention and Article 3. The first panel dismissed the appeal under Article 8 and the 2006 EEA Regulations. The Appellant became appeal rights exhausted on 15 May 2011, permission to appeal having been refused by the FtT and the UT. He

made an application to judicially review the decision of the first panel and this was refused on 12 September 2012 and certified as totally without merit.

8. A further deportation order was made on 26 March 2012. The Appellant then made a fresh claim for asylum which was refused in a decision of 24 October 2012. The Respondent certified the asylum claim under Section 72 of the 2002 Act, concluded that the Appellant was excluded from humanitarian protection pursuant to paragraph 339D of the Immigration Rules, refused the Appellant's asylum claim, rejecting that he would be at risk on return and concluded that deportation was justified and proportionate on grounds of public policy, public security and public health under the 2006 EEA Regulations.

9. The Appellant appealed against this decision and his appeal was allowed under Article 3 following a hearing before a panel ("the second panel") at Taylor House on 30, 31 October and 13 November 2013. The Appellant's asylum appeal was dismissed. The second panel rejected the evidence about his political activities and that he would be at risk as a failed asylum seeker but found that he would be at risk on return as a deportee. However, this decision was subsequently set aside as it was found by the Upper Tribunal that the second panel had materially erred. The appeal then came before Judge of the First-tier Tribunal Miller ("the judge").

10. The judge dismissed the Appellant's appeal in a decision promulgated on 15 February 2017, following a hearing at Hendon Magistrates' Court on 24, 25 and 26 January 2017. In a 30-page decision, the judge dismissed the appeal on all grounds. The Appellant was granted permission, by Upper Tribunal Perkins, on 11 April 2017. The matter came before me on 7 June 2017 to determine whether or not the judge erred.

The Appellant's Evidence Before Judge Miller

11. The Appellant's claim before the judge, in a nutshell, was that he became a member of the Congolese Resistance High Council (HCRC) in 2010. In 2014 the HCRC joined several other diaspora resistance movements and formed the Alliance Des Forces Congolaises (AFC). Since 2012 his role has been that of propaganda officer. He plays a major role in the organisation. He mobilises Congolese nationals during demonstrations and despatches newsletters relating to issues that affect the DRC which he distributes these in Congolese churches, clubs and shops. His evidence was that his activities had come to the attention of the authorities as a result of videos on the internet and demonstrations outside the DRC Embassy in London. The evidence was that the vice president of the AFC was a mole acting on behalf of the Kabila regime and feeding back information to the Kabila regime.

12. The Respondent did not accept the Appellant's claim. He had originally claimed asylum, on different grounds, asserting that as a member of the PSD and had been suspected of disloyalty by the Kabila regime and was wanted. The Respondent referred to the findings of the first panel in 2011. The Respondent noted that the Appellant did not raise at the hearing before the first panel that he was involved in

any political organisation here in the UK or that he was involved in *sur place* activities. The Respondent accepted that it may be true that the Appellant joined the organisation in 2011 and engaged in some political activities, but that he had exaggerated the significance of his role and that he would not, as a result such limited activities, come to the adverse attention of the authorities.

13. The Appellant is married to an EEA national and he has adult children here. He has a daughter, J, who was born 10 October 2001. She was aged 15 at the hearing before the judge.

The Decision of Judge Miller

14. The judge heard evidence from the Appellant, Mr Fuamba (the AFC's president), Lisi Kutabikia (executive member of the AFC), a friend, LM, the Appellant's wife, BK and his daughter AS. The judge also had before her the expert evidence of Catherine Ramos and Mr Ntung and an Appellant's bundle of 859 pages. There was a skeleton argument before the judge prepared by Mr Bundock who represented the Appellant at the hearing before the judge.

15. It is necessary for the purposes of this decision, in the light of the grounds of appeal, to go through the findings of the judge in some detail. The judge did not find that the Appellant was credible for many reasons. The judge found it difficult to accept that the Appellant was not fluent in English considering the period of time and that has been here and that he had previously stated that his children are English speaking and do not speak any other language and following this the judge concluded as follows;

> "I find it very difficult to accept that he is not, in 2017, fluent in English. I further conclude, particularly having regard to other findings regarding his credibility, that his likely motivation in giving his evidence in Lingala was to afford him more opportunity to consider what answer he would give to the questions".

16. The judge attached significance to the finding of the first panel that the Appellant was not credible, in the light of the numerous discrepancies in his evidence, as found by the first panel. The basis of the Appellant's asylum claim before the judge was different to that he relied on before the first panel and which had been wholly rejected. The judge referred to the Appellant's sixth witness statement of 2 November 2016. She stated that he became a member of HCRC in 2010; however, the judge noted that there was no mention of any *sur place* activities in his first witness statement of 12 November 2010, or second of 18 February 2011 or any indication that he was opposed to the DRC authorities at that time.

17. The judge attached significance to the findings of the first panel that the Appellant has never been part of any group which is in opposition to the Kabila regime and that he would not have been perceived as such on return. The judge attached weight to the failure of the Appellant to advance a case before the first panel relating

to *sur place* activities and concluded that he only dated his activity back to 2010 as a response to the decision of the first panel.

18. The judge concluded that the Appellant sought to mislead the medical profession, having advanced evidence in 2013 before the second panel that he could only give limited information about the change in his account as a result of the psychological effects suffered as a result of his experiences in the DRC. The judge noted that the Appellant told the second panel in 2013 that he started his involvement in DRC politics in 2006/2007, but this had not been raised before the first panel in 2011 and there was no evidence to support this.

19. The judge found that there were many different examples of conflicting accounts that the Appellant has given at various times. The judge made reference to the report of Dr A Basu, a consultant forensic psychiatrist. Dr Basu examined the Appellant and concluded in his report of 4 January 2011, that the Appellant had told him that he had completed the sex offender treatment programme whilst in custody, however, the judge noted that in the Appellant's witness statement of 25 October 2013, his evidence was that he had not undertaken the course and the judge found it particularly disturbing that the Appellant told Dr Basu something which was untrue and likely to affect the assessment of whether or not he poses a risk.

20. In relation to *sur place* activities the judge stated at paragraph 104(ix) as follows

> "With regard to the evidence of sur place activities, most of the evidence submitted, in the form of videos, was before the Tribunal which heard his appeal in 2013. The other material dating from 2016, was not long before the hearing was listed in December 2016. I find there is force in the submission which was made on behalf of the respondent, namely that it is only when the appellant has a hearing coming up, that he engages in activities, or causes himself to be filmed, and that the absence of evidence relating to other periods indicates that his prime motivation is in obtaining evidence which might stop his removal, rather than because he has any degree of political commitment or involvement"

21. The judge commented on the evidence that the Appellant gave in respect of his son, C, and why he was in prison, noting that he gave several replies and that his interest was in assisting his (the Appellant's) position, rather than giving a truthful account.

22. The judge was not impressed with the Appellant's evidence about his wife. When he was asked whether she received housing, child benefit or tax credits, he replied that his wife did not receive benefits and then he stated that maybe she received child benefit. The judge found as follows

> "I would have expected him to have been fully aware of the benefits received. I was left in doubt as to whether the Appellant does live full-time with his wife, and whether the relationship is as close as presented".

23. The judge had considerable concerns relating to the Appellant's attitude, recording his evidence as follows;

> "I apologise to all the parties – my family, the judge. The apology comes from my heart. Also to the victim".

But the judge concluded that the Appellant's concern for the victim was an afterthought.

24. The judge did not find Mr Fuamba to be an impressive witness and the reasons for this are contained in paragraph 114. Likewise, she did not attach significant weight to the evidence of Miss Kutabikia or LM for reasons that can be found at paragraphs 115 and, 116. The judge acknowledged, at paragraph 105 that the Appellant's claim was now principally based on *sur place* activities in the UK and he considered the expert evidence before him. She found that the evidence of Ms Ramos had, to a large extent been overtaken by the country guidance of BM and Others (returnees) – criminal and non-criminal)) DRC CG [2005] 00293. In relation to Mr Ntung's report the judge found that despite having made "somewhat bold statements," Mr Ntung did not provide references for his assertions and his views would appear to stand in isolation from other evidence, including the COIS Report and he attached limited weight to it. The judge found at [114] that Mr Fuamba and the organisation AFC are not as significant as suggested and remarked on the lack of background evidence which would suggest otherwise. The judge went onto conclude that there was a lack of evidence relating to the group which the judge found remarkable if they were of any significance as far as the authorities in the DRC are concerned.

25. The Appellant submitted 7 pieces of what is referred to as "video" evidence. Video 1 purports to show a meeting outside the South African Embassy in London in 2012. Video 2 purports to show a panel discussion at the Selby Centre and is said to show the Appellant. Video 3 purports to show the Appellant protesting outside the French Embassy in London in 2013 or 14 in military fatigues demonstrating against Francois Hollande and during this video he gives a speech to the camera. Video 4 purports to show the Appellant at a public demonstration outside the DRC Embassy in London in 2016 and September or October 2016. Video 5 is a CD purporting to show a panel group discussion and offices at the offices of the AFC which is an online broadcast. Video 6 is a reference to an internet recording in October 2016. Video 7 purports to shows a demonstration outside the DRC Embassy in London in November 2016. The judge found as follows;

> "117 With regard to the videos, most had been shown at the hearing in 2013 before Judge Scott-Baker [the second panel]. With regard to the first one, taken at what I accept was the South African Embassy, it did not show the actual meeting which took place, whether this was with the Ambassador, or one of his staff. The appellant, somewhat surprisingly, moreover, stated that he did not know whether a South African official who was shown was the Ambassador or simply a representative. If they were introduced to the Ambassador and/or had talks with him, I am satisfied

that he would have known who it was. The film did not, in any event, appear to show anything which would damage the appellant, were it to come into the hands of the DRC authorities. In any event, I find it extremely unlikely that the video would be seen by them, since it was presumably taken by an organisation the appellant supports.

118. Only two of the videos shown were taken in 2016. - They showed the appellant, I accept, at demonstrations. However, he did not appear to show any signs of wishing to disguise his identity, and he did not say anything which might indicate that he would use or advocate force against the DRC authorities. I received no evidence which suggested that any of the material would ever reach the Kabila government or security forces in Congo, and I do not believe, notwithstanding the wholly confusing evidence regarding Mr Rukengwa, that any of the material has come into the regime's possession.

119. I would add that the appellant in this case is somebody who has come close, on a number of occasions, to being put on a plane to the DRC. - The fact that he has shown no signs of anxiety regarding being filmed, and that he has been unable to explain how material would reach the authorities, let alone show that they are in possession of any adverse material, leads me to the view that he is unknown and is, and would be, of no interest to the DRC government whatsoever."

26. In relation to *sur place* activities generally the judge found as follows

104. (xiii) With regard to his sur place activities, he was asked about videos taken between 2012 and 2016. He confirmed that there were other ones, but stated: "This is a selection". - Given that he has been at all times represented by experienced firms of solicitors, and that he, himself, is now experienced in Court hearings relating to either asylum claims or deportation orders, I am satisfied that he knows the importance of such evidence, and would not have omitted anything material to his case if it was likely to assist him.

(xiv) Finally, the appellant was asked about the fact that he had allowed himself to be filmed notwithstanding the fact that he was claiming that the authorities in the DRC were likely to see the evidence. He was asked whether it was not foolish to allow this to happen. His response was that: "I am re-claiming our right. The current government is not doing its job properly". – He appeared to be either uninterested or oblivious to the fact that he was placing himself in obvious danger (on his own account). When it was put to him that he had stated that he was "ready to die for my people", and he was asked why therefore he did not go back to fight for them, he simply replied: "Political speech".

27. The judge concluded that the Appellant is not and has never been a member or supporter of APARECO and did not have a significant and visible profile within that organisation. The judge noted that his evidence is not that he has ever been associated with APARECO, but instead the Appellant's evidence is that he has a role within the AFC. The judge concluded that there is no reason to depart from the conclusions of BM. The judge found that the Appellant would not be at risk on return to DRC.

28. In relation to deportation, the judge considered the sentencing comments made by the sentencing judge on 11 December 2002. The judge stated as follows

> "Your victim is a stranger to you, she was a vulnerable woman, in that she had been drinking, she was on her own in the early hours of the morning. While I accept that you did not use your job as a minicab driver to lure her into the car, you did nevertheless, take her to an area in which she did not want to go. You then used some violence upon her, in order to have sexual intercourse with her. That rape was, of course, an appalling physical invasion of her privacy. You added to that, the degradation of throwing her on a rubbish tip once you had finished with her".

29. The judge took into account that the Appellant pleaded not guilty and material that was before him relating to risk on return and the Appellant's attitude and rehabilitation. In 2002 the Appellant's situation was reviewed whilst he was in prison and a board which included the governor of his prison stated;

> "Earlier this year both the parole board and the seconded probation officer felt that you still present a serious risk to the public and whilst we understand that there have been difficulties associated with whether or not you are in denial of your offence and suiting you to a sex offenders' treatment programme, your solicitors have stated that you are now willing to undertake adapted SOTP which will provide a good basement for risk assessment".

30. The judge attached significance to the conclusions of the board and a NOMS report which was completed on 24 May 2009 in which the following was stated

> "[AS] has committed three offences against women (two violent and one sexual). At no time has he ever accepted culpability for his offending or shown any remorse for his actions. It is my view that [the Appellant] poses an ongoing risk to any females that enter into disagreement with him or refuse him what he would perceive as his sexual entitlement".

31. The report states further as follows;

> "[The Appellant] has never accepted his guilt and has not undertaken any offence focussed work whilst in custody. The fact that he has two previous offences of violence against women would indicate a generally detrimental view towards women and a level of misogynistic attitudes".

32. The judge attached weight to the report prepared by the Appellant's offender manager, Anthony Halls, on 23 June 2010 who stated;

> "On the occasions that I have met with [the Appellant] he has continued with his assertion that the victim was in fact a prostitute and that she fabricated the rape allegations as a way of exacting revenge for his nonpayment of her fees. During previous conversations [the Appellant] has exhibited a generally detrimental view of women as exampled by his two previous offences of assault, which were both perpetrated against female passengers in his taxi".

33. The judge attached weight to the evidence of the consultant psychiatrist Dr Basu (report dated 4 January 2011). The Appellant gave a different account of his experiences in the DRC to Dr Basu. In relation to his first conviction for common assault he denied that an assault had taken place and in respect of the second conviction the Appellant told him that he had been advised to plead guilty despite his innocence. With respect to the trigger offence the Appellant stated to Dr Basu that "temptation was human" and he rationalised the incident by telling himself that it was simply "quick business" and that he had no intention of pursuing it in order for it to become a consistent relationship. The Appellant told Dr Basu that the victim had made many such rape allegations in court but he also stated that he had a "bad conscience" after the incident. The judge noted that what the Appellant told Dr Basu about the rape was not a reflection of what happened, in particular, he said that he and the victim had gone their separate ways after the ordeal, whilst in fact the Appellant had thrown the victim on a rubbish dump. The Appellant told Dr Basu that he had completed the sex offender treatment programme whilst this was not the case.

34. The judge made reference to the decision of the first panel in 2011 which found concerns about the Appellant's attitude and rejected the submissions then made in 2011, on behalf of the Appellant that he was a "changed man". The first panel rejected this and concluded at that time that the Appellant's presence in the United Kingdom represents a genuine, present and sufficiently serious threat to the fundamental interest of society which is the protection of lone females from sexual assault or rape and it is clear that the judge attached significance to this.

35. The judge found that there was nothing in the evidence that she had seen or heard to lead her to depart from the view of the first judge. She did not accept that the Appellant had changed, particularly in the light of the lack of expert evidence from a psychiatrist or psychologist since the decision of the first judge. The judge took into account the evidence that was before the Tribunal in 2013. The Appellant's evidence was that he regretted the pain caused to the victim and that he was sorry he had caused her so much suffering. His evidence was that he had accepted responsibility and had become a better man. However, the judge had regard to the oral evidence that the Appellant gave at the hearing in 2013 which indicated that he persisted to deny the offence, particularly that recorded at paragraph 93 of the decision of the second panel which was as follows;

> "He had told Dr Basu that he had not raped the woman and there had been consensual sex with a disagreement over the fee. He said at the hearing that there had been a misunderstanding over money. He said that he had asked what had happened and he had told him what had taken place. He said that he had not left her on a rubbish tip".

36. The judge attached weight to the evidence of Lisi Kutabikia and found that it was clear from her oral evidence that she did not believe that the Appellant had committed the rape. The judge attached weight to a petition from the local church petitioning for the Appellant's early release. In that document the following is stated "we believe that he has served enough time for the alleged committed crime". The judge found that the Appellant had not been open even with those in the church about his behaviour.

37. The judge attached significance, to the fact that the Appellant was at the hearing before her aged 60 and that he was aged 46 when convicted of the rape and that he had not been convicted of any other matter since 2002. Fourteen years had passed since the conviction. However, the judge took into account that he has spent much of that time in prison and stated at para 124;

> "… that, since his release there has been an ongoing 'battle' in which he and the Respondent have been engaged, with regard to his proposed deportation. He has accordingly had every reason to be extremely careful in his behaviour".

38. The judge attached weight to the Appellant's marriage to BK but noted that he was in a relationship with her at the time that he committed the offence and that this was not a sufficiently "inhibitive factor" to prevent his behaviour. The judge attached weight to the Appellant's relationship with his children including J, but noted that he had children in 2002 but this did not stop him from offending.

39. The judge reached the following conclusions;

> "126. Having considered all the evidence in this case, I am more than satisfied that the appellant's personal conduct does still represent "a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society", that being the protection of women. I find no evidence that he has changed his attitudes towards women generally, or that he has any regret about the offence he committed, save for the problems it has caused him and his family. Although the precise level of risk may be difficult to quantity, I find that it is still significant, and that the consequences of his re-offending are likely to have a very serious impact on any victim. I find, moreover, as I have indicated above, that he is someone who is not un-intelligent, but who is prepared to tell untruths, adapt his evidence, and employ every tactical means to persuade those responsible in assessing him that he has changed. However, I find that he cannot be trusted."

40. The judge went on to consider proportionality, taking into account the Appellant's age and health and a report from the Appellant's GP of 20 August 2013. The judge concluded that if he had any significant health problems whether physical or psychological there would be evidence before him. The judge did not attach weight to the evidence of Dr Basu because he did not accept that the Appellant gave an honest account to Dr Basu or the other experts he has seen.

41. In relation to the impact on the Appellant's family the judge made findings at paragraph 127(ii);

> "With regard to the appellant's family and economic situation, I accept that removal would have an impact on his family. - None of them have indicated that they would wish to go to the DRC with him. However, I do not accept his daughter, [AS] assertion that, even if the Kabila government were no longer in office, she would not go to see him in the DRC. If this is indeed her position, I suspect that it is because the bonds between her and him are not as great as have been presented. In this regard, I refer to the appellant's relationships with his sons, M (C) (P89), S (P93), and G (P96). - None of them have updated the statements they prepared over 5 years ago. All of them, at that time, referred to needing their father and to his support and guidance. It only became apparent at the hearing that all 3 have been convicted of serious offences, which have resulted in their being further separated from him. In addition, [C] is due to be deported to the DRC himself. I do not accept that the appellant, or his wife, were in ignorance as to the proposed deportation of [C], unless again, the links between the family members are not as close as they have maintained. However, if the appellant is deported, he will, at least, have the company of one of his siblings. With regard to the appellant's wife, I find it difficult to assess how she would react to the appellant's removal. – She has, in any event, been deprived of the appellant's presence for very many years, as a result of his own criminality. As I have stated, it is not clear whether their relationship is as close as both have stated. She, in any event, comes originally from the DRC. Should she wish to visit the appellant, or even live there with him, I see no significant obstacle to this happening. I am, of course, aware of the position of [J]. She is someone who has sadly already suffered disruption in her life because of the absence of the appellant. She has also suffered from her brothers being imprisoned. However, although I accept that she is likely to miss him, she would, of course, be able to visit him in the DRC with other family members, and having regard to everything else that I have stated, I do not consider that either on its own, or in conjunction with other points which might mitigate in favour of the appellant being allowed to remain in this country, it would render his removal disproportionate".

42. The judge took into account the length of residence here and social and cultural integration. She attached weight to the fact that the Appellant had been in the UK for over 22 years and acknowledged that this was a lengthy period, but he concluded that the Appellant would not have difficulties in readjusting. Having found the

Appellant not credible, the judge was not satisfied that he does not have relatives or friends there and the fact that he chose to give evidence in Lingala suggests that despite the length of stay here he retains strong social and cultural links with DRC. The judge attached a significance to the Appellant having not worked here since 2002 and he concluded that it was unlikely that he would work again given his age and the fact that he would not be able to be employed as a cabdriver or where women might be exposed to risk. The judge concluded that in the absence of any evidence it was difficult to envisage how he would manage in the DRC, particularly with regard to employment. However, the judge concluded that he has friends who all appeared to be from the DRC they would be able to provide some assistance with finding employment.

43. The judge concluded that his presence in the UK continued to represent a genuine, present and sufficiently serious threat to the fundamental interests of society which is the protection of women from sexual assault or rape.

The Grounds of Appeal

44. There are five grounds of appeal. Grounds 1 to 3 relate to the decision under the 2006 EEA Regulations. Grounds 4 and 5 relate to the decision of the judge in relation to the Appellant's asylum claim. I will deal with ground 3 first.

Ground 3

45. It is argued that the judge erred in assessing risk and whether the Appellant continues to constitute a present and sufficiently serious threat, because at para 124 the judge failed to consider that even if the appeal was successful the Appellant would continue to have every reason to be careful. The judge also ignored the fact that many offenders are unable to control offending and that the fact this Appellant can is evidence that he is of low risk of offending. It is also asserted that the judge failed to consider the Appellant's oral evidence.

46. Mr Bundock in his skeleton argument before the judge argued that the Appellant has permanent residence. However, this was not accepted by the judge and this is not challenged in the grounds. The judge proceeded on the basis that the Appellant has the lowest level of protection afforded to him under Regulation 21, that the relevant decision was on the grounds of public policy, public security or public health and that it was not taken to serve economic means. This is not challenged in the grounds before me.

47. Like the first panel in 2011, the judge found that the personal conduct of the Appellant represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society; namely, the protection of women from sexual assault or rape.

48. It is unarguable that the judge failed to take into account the Appellant's evidence which she records at para 46, the thrust of which is that the Appellant now

understands that a woman can change her mind. However, she was entitled to reject this in the light of the extensive and persuasive evidence which supported a finding that there had been no change in the Appellant's attitude. I refer specifically to para 123 of the decision.

49. The judge was entitled to attach weight to the Board Recommendations dated 17 October 2006, the NOMS report of 24 May 2009, the Offender Manager report of 23 June 2010, what the Appellant told Dr Basu in December 2010, the findings of the first panel in 2011, the Appellant's evidence before the second panel in 2013, the evidence of Lisi Kutabikja and the church petition. This evidence did not support the Appellant's evidence of a change in attitude. Whilst the material relied on was historic (this was not a point raised in the grounds), as properly recorded by the judge there was no up to date independent assessment of risk or expert psychiatric evidence produced by the Appellant in support of his case. There is no challenge to the judge's reliance on this evidence.

50. The evidence before the judge unequivocally pointed to the Appellant continuing to deny that he had committed an extremely serious and violent rape on a stranger. Not only did the evidence support a total failure to take responsibility for the offence, but it pointed towards a pernicious attitude towards the victim. At various times, he suggested that she was a prostitute and that sex was consensual. It is worth noting the lawful and sustainable findings of the first panel in respect of risk in 2011, after the Appellant had served his sentence, and his own evidence as recently as 2013 before the second panel. It is without doubt that there was no rehabilitation of the Appellant whilst in prison and he failed to explain what had given rise to a complete turnaround in his attitude since 2013. There was no evidence of counselling, psychotherapy or psychiatric treatment.

51. In support his assertion that he had changed, the Appellant relied on his own evidence and that of his family and that he had remained out of trouble for what is, by any account, a considerable period. He was released from serving an eight-year sentence in 2007; however, shortly after that he was placed in immigration detention until 2011. The judge was wholly aware that he had not reoffended since his release and she attached significant and appropriate weight to this (see para 124).

52. The Appellant's evidence was effectively that he had a damascene conversion (which must have occurred since he gave evidence to the second panel in 2013 considering his oral evidence at that time), and he now sees the error of his ways, but his evidence was weak and wholly unsupported. This had been wholly rejected by the first panel in 2011 and not supported by his damaging evidence in 2013. The judge was aware of the Appellant's propensity to be dishonest regarding what he told Dr Basu in 2010. The judge was clearly of the view that notwithstanding the passage of time (five years), the Appellant, whilst in denial, could not be rehabilitated and it followed he remained a significant threat.

53. The grounds challenge the finding of the judge that the Appellant at para 124 that he," has accordingly every reason to be careful in his behaviour because of the

impending deportation" (see para 124). This finding was open to the judge. It should be considered in the context of the Appellant's complex immigration history, his sheer determination to remain here and again the lack of remorse and his continual denial.

54. The grounds before me seek to distinguish between an individual who has no control over his criminal behaviour and someone like the Appellant who, Mr Bundock argued, can clearly control his behaviour having remained out of trouble for many years and as such does not present a risk. I am not persuaded by this argument, particularly in the absence of any up to date expert evidence before the judge in respect of this Appellant and the risk he poses to the public. The argument may have some force if the Appellant was found to be genuinely remorseful having accepted responsibility his criminal conduct, but in this case the judge was wholly entitled to view the period of time the Appellant had remained here since his release without having been convicted of a criminal offence with scepticism. It is worth noting that the Appellant came here in 1994 and five years after he was convicted of two offences against women in 1999 and then again of the trigger offence in 2002. I am not sure from the evidence when exactly the offences were committed, but the proposition that he now presents a low risk of re-offending because he has not been convicted of an offence since 2011, in the context of the lack of rehabilitation, remorse, independent evidence and the rough timeline, is an argument that the judge was wholly entitled to reject.

55. The judge, no doubt, also had in mind the two previous offences of common assault which were committed prior to the rape (perpetrated against women whilst the Appellant was working as a taxi driver) and that there was an escalating pattern of offending as found by the first panel in 2011. In addition, Part 1 of the Sex Offenders Act of 1997 applied, given the length of sentence and the Appellant is required to register indefinitely. The judge took into account that the Appellant's family life did not prevent the Appellant from offending in 2002.

56. The judge was manifestly entitled to conclude that this Appellant continues to constitute a present and sufficiently serious threat and the argument advanced in the grounds is without merit. The judge fully appreciated that the risk of re-offending is key to appeals of this nature.

Grounds 1 and 2

57. These grounds should be dealt with together. It is asserted that the judge erred because she failed to make a finding in respect of J's best interests, failed to take into account evidence relating to J and failed to take into account material evidence relating to BK.

58. Mr Duffy conceded at the hearing before me that the judge did not make an assessment of J's best interests and I agree. I conclude that the judge did not properly consider the position of the Appellant's wife at para 127 (ii) because she did

not take into account that she was a refugee. In respect of proportionality the judge erred when considering the Appellant's wife and J specifically at para 127 (ii).

59. There is no reference in the decision to the evidence of Peter Horrocks, an Independent Social Worker, dated 24 October 2013 and that of Lesley Philips, a Child Protection Officer, at J's school, dated 13 October 2016. Whilst, I accept that J's interests are a significant factor in the proportionality assessment, they are not determinative; however, the omission by the judge is an error of law.

60. At the time of the hearing before the judge, J and her parents were living together, but this had not always been the case. Her father was sentenced when she was one. When he was released in 2011 she was aged ten. She was 15 at the date of the hearing and had been living with him since his release. There was evidence that she would visit him in custody and there is no reason to doubt this. According to the 2013 report, she suffered sleeping and eating problems and when her father was placed in immigration detention there was a downturn in educational achievement. The author of the report documents the negative long term effects on separated families generally and specifically on J. He states that a "permanent removal of her father from the UK would have a significant impact on [J's] already fragile emotional development, with likely a significant impact on both her physical development, if she were once again to stop eating and her educational development" (see para 4.28)

61. The letter from Lesley Philips states she has great concern for the welfare of the family in the event of the Appellant's deportation and that in the past there has been concern about the J's mother, but through the "tremendous support" of the Appellant J has done well at school has been settled and comfortable in her home environment. The author of the letter believes that without the Appellant's support J's education would be affected. There is an undated letter from J in the bundle in which she expresses her desire for her father to remain.

62. It is of course in J's best interests for her father to remain here with her as part of a family unit, but that is not determinative of proportionality. It is a significant factor in the Appellant's favour to which significant weight is to be attached. However, in assessing proportionality a holistic assessment needs to be carried out and in this case, I accept Mr Duffy's submission that the error is not material, because ultimately the decision to deport the Appellant is proportionate.

63. It is not a viable option for Appellant's wife or J to join the Appellant in the DRC. BK is a refugee, having been granted refugee status in Germany, and her unchallenged evidence is that she is traumatised by her experiences in the DRC. The decision to deport the Appellant will separate him from his daughter and wife and wider family here.

64. The Appellant did not produce up to date evidence in respect of J, save the letter from the Child Protection Officer. The social worker's report represents the position in 2013 and, in respect of J, it primarily focuses on the effect on her of her father being

released and then further detained shortly after. She was aged 12 at the time of the report and aged 15 at the hearing.

65. The position had changed in 2017, in so far that J was at least three years older and a certain level of maturity and age appropriate independence can be assumed from this, whilst she no doubt has also forged a closer bond with her father. The evidence of the social worker establishes that in 2013 there was a risk of reoccurrence of an eating disorder and damage to her education should her father be deported. The letter from the Child Support Officer establishes that deportation will have, in 2017, a detrimental impact on J in the context of her education and home life. This is hardly surprising. The evidence before the judge did not establish that in 2017 deportation would have a detrimental impact on her physical well-being. There was no medical evidence to support this. However, it is beyond doubt that separation from her father will be very distressing for her and her mother and wider family and that she has a history of an eating disorder. Since the report in 2013 J has continued to live with the uncertainty of her father's immigration status, but there was no up to date evidence before the judge about the impact of this on her. J has extended family here and, from the evidence, it is clear that for a period of her life she lived here with an aunt. Her mother will remain here and there is extended family here to support them. Her best interests in this case do not prevail over the threat posed by her father.

66. The grounds challenge the assessment of proportionality relating to J and the Appellant's wife. The errors made by the judge are not material to the outcome. The judge made extensive unchallenged findings on other matters (see para 127) in respect of integration, age, state of health, economic circumstances and length of residence here. These findings are relevant to the assessment of proportionality and are in favour of deportation. The judge's findings as to risk are lawful and sustainable. The judge properly directed herself in respect of the 2006 EEA Regulations (see paras 94- 97) and she properly applied them. The judge properly focused on the risk of re-offending as the central element in this case.

67. Ground 2 raises a challenge the finding of the judge in respect the Appellant's equivocal evidence about the welfare benefits that his wife receives and the conclusion (at para 127 (ii)), in respect of the quality of the marriage, but this amounts to a mere disagreement with the finding which is one that was open to the judge. However, it is immaterial to proportionality. The Appellant poses a threat in the terms expressed in Regulation 21 (5) (c), and the strongest factor in his favour, when assessing proportionality is that of J, but this is not sufficient, despite the separation of the family and negative impact on her, to outweigh the threat posed by the Appellant. It is unarguable that the quality of the relationship the Appellant enjoys with his wife would make any material difference to the outcome in this case.

Ground 4

68. The thrust of ground 4 is that the judge did not consider risk independently of credibility in respect of the Appellant's attendance at demonstrations outside the

DRC Embassy in 2016 and in so doing failed to properly consider the country guidance case of BM and that the Appellant may have been directly seen, identified and monitored at the protests which took place at the embassy's door.

69. Mr Bundock made reference to the skeleton argument which was before the judge. Paragraph 87 of BM deals with those who are considered to be opponents of the Kabila regime by reason of their *sur place* activities in the United Kingdom. It reads as follows;

> "The external opposition of APARECO to the governing regime of DRC is overt and visible. Its highest profile activities unfold in public places, accessible to all. Activities of this nature are accompanied by advance publicity […]
>
> In common with many comparable regimes throughout the world, both present and past, the DRC government has a strong interest in opposition organisations, including APARECO. Such organisations are monitored and data is recorded. This includes information about the identities of the most prominent members of such organisations, that is to say their leaders, office holders and spokespersons […]
>
> The monitoring of APARECO (UK), is likely to be undertaken by and on behalf of the DRC Embassy in London. This is the agency with the most obvious motivation to carry out and coordinate such scrutiny. Such scrutiny is likely to generate periodic reports to the DRC, in particular its ANR and DGM agencies".

70. Mr Bundock submitted that the Appellant's evidence was that he had been involved in substantial and visible *sur place* political activities since at least 2011 and that he had participated in organised protests in London which have been documented online.

71. I conclude that there is no error of law. The ground has no substance. The judge properly assessed risk on the basis that the Appellant attended the demonstrations in 2016. The judge considered the Appellant's evidence in relation to online activities and his involvement with AFC. He concluded that the AFC was not a significant organisation and that the Appellant had, in any event, exaggerated his activities and that there was no evidence that the video evidence would come to the attention of the authorities. Moreover, there is no specific coherent challenge to these conclusions or the underlying findings of the judge in respect of the evidence of the Mr Fuamba, Ms Kutabikja or LM (save the issue raised about the date of the fifth video which is raised in ground 5). In relation to the video evidence the judge found this would not put him at risk because there was no evidence that any of the material would reach the Kabila government or security forces. There is no challenge to this. The Appellant, as found by the judge, was unable to explain how the material would reach the authorities. Significantly there is no challenge to the findings in respect of the expert evidence. A proper reading of the decision makes it clear that the judge concluded that the activities in which the Appellant had taken part would not put

him at risk and would not come to the attention of the authorities. These findings are grounded in the evidence, adequately reasoned and entirely sustainable.

72. The judge accepted the Appellant attended two demonstrations outside the DRC Embassy in 2016, but did not accept the evidence in respect of the extent of his activities. The Appellant is not and has never been affiliated with APARECO or an opposition organisation of any significance and it was not accepted that he is a prominent member of any organisation. The Tribunal found in BA that monitoring of APARECO (UK) is likely to be taken by and on behalf of the DRC Embassy in London, but the background evidence does not support the contention that someone with the Appellant's profile (as found by the judge) would be monitored demonstrating outside the embassy even when wearing military fatigues. The judge may not have considered the issue of monitoring outside the embassy as a discrete issue, but no doubt this is because the background evidence does not support the assertion that this Appellant would be of any interest to the authorities and that his activities outside the embassy would have been monitored.

Ground 5

73. Mr Bundock conceded that ground 5 was not his strongest point and did not expand on this ground in oral submissions. There is a challenge to the judge's conclusions in relation to the Appellant's choice to give evidence through an interpreter. This finding must be considered in the context of the findings of the judge. However, on a proper reading of the decision, in the context of the significant and sustainable adverse credibility findings, it was not a material finding.

74. In relation to the 2011 determination, ground 5 argues that there was unfairness in the conclusion of the judge, at paragraph 104, that had the Appellant been involved in political activity in 2010, as he claimed he would have relied upon it at the hearing before the first panel, because the Appellant was not given the opportunity at the hearing before the judge to explain why it was that he did not advance such evidence at that time. There is no merit in this ground of appeal. The grounds assert that the appeal in 2011 was concerned with cessation, but that is not the case. The first panel did not have jurisdiction to determine cessation. The issues before the first panel in 2011 were the same as those before the judge in 2017. It was a matter for the Appellant and his legal representative at the time how the case was to be advanced. In any event, he chose not to give oral evidence in respect of his asylum claim (he gave live evidence at the hearing in respect of other matters) relying instead on a witness statement submitted at the eleventh hour in which he relied on his account which had previously led to the grant of asylum, namely that he had worked for the DSP and he failed to raise *sur place* activities. I do not accept that there is any unfairness arising from the judge attaching significance to this. The Appellant was properly represented at both hearings. It was a matter for him and his representatives whether he wished to advance evidence to explain the clear and obvious omission in his evidence in 2011. It is unarguable that there has been any unfairness.

75. In relation to the third issue raised in ground 5, it is asserted that the judge erred in finding that the Appellant contrived to be engaged in political activity. This is based on the judge finding that most of the evidence dated back to 2013, prior to his appeal before the second panel and the rest of the evidence related to 2016 which was before the appeal before the judge. However, this was not correct because the fifth video related to events in 2015. Whilst it may be the case that the judge was mistaken as to the date of the fifth video, this has no materiality, in the light of the extensive adverse credibility issues which are made.

Exclusion

76. The judge did not make a finding in respect of section 72 (2) of the 2002 Act or paragraph 339 of the Immigration Rules. The Secretary of state certified the claim, thus excluding the Appellant from protection under the Refugee Convention and humanitarian protection. Both parties accepted the judge had erred in this respect. Mr Bundock submitted that it was not material, unless he was able to persuade me that the judge materially erred in respect of consideration of the Appellant's asylum claim which he has failed to do. Whilst it may not be material, in the light of my conclusions, to the outcome of this appeal, the matter is outstanding and must be determined. It could have an impact on any future application the Appellant may decide to make. The matter was dealt with by Mr Bundock in the skeleton argument before the judge in which it is asserted that because the Appellant is at low risk of re-offending and does not constitute a sufficiently present or danger to the community he has rebutted the presumption. Whether or not the test is more stringent than that under the 2006 EEA Regulations is not material. The assertion that he is at low risk was not accepted by the judge and is completely undermined by the findings in the judge's conclusion that he constitutes a present and sufficiently serious threat under the 2006 EEA Regulations. It follows from the lawful and sustainable findings of the judge that the Appellant has failed to rebut the presumption that he constitutes a danger to the community of the United Kingdom and is excluded from protection under the Refugee Convention and humanitarian protection under paragraph 339D of the Rules.

Conclusion

77. The judge erred in respect of the proportionality assessment for the reasons explained, but the errors are not material. There was no error of law in respect of risk in return. Whilst the judge dismissed the Appellant's appeal on asylum grounds, there was no need to consider the appeal under the Refugee Convention because the Appellant is excluded from protection. The decision of the judge to dismiss the appeal under the 2006 Regulations and Articles 2 and 3 of the Convention is maintained.

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 their 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.

Signed *Joanna McWilliam* Date: 18 June 2017

Upper Tribunal Judge McWilliam