Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/01274/2013**

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 29th June 2017	**On 30th October 2017**

Before

UPPER TRIBUNAL JUDGE COKER

Between

BN
(ANONYMITY DIRECTION MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Chirico, instructed by Elder Rahimi solicitors
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant/parties in this determination identified as BN. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings

1. In a decision issued on 9th May 2014 the Upper Tribunal (the Hon Mrs Justice Andrews DBE and UTJ O'Connor) set aside the decision of a First-tier Tribunal panel promulgated on 3 March 2014 dismissing BN's appeal against a deportation order on asylum and human rights grounds. The Upper Tribunal concluded that there had been a material error of law by the First-tier Tribunal panel (First-tier Tribunal Judge Corben and Mrs R M Bray JP) in failing to have regard to the judgment of Phillips J in *R(P(DRC)) v SSHD* [2013] EWHC 3879

compounded by a failure to have regard to the guidance given by the Supreme Court in *SSHD v RT (Zimbabwe)* [2013] 1AC 152 ("a person cannot be expected to lie in order to avoid persecution") and that it was irrational for the First-tier Tribunal panel to find that the only way in which the DRC authorities could learn that a person had committed a serious crime was if the conviction had attracted significant media attention.

2. The Upper Tribunal did not take a decision on the remaining grounds of appeal pleaded save to indicate that they were troubled by the way in which the First-tier Tribunal panel dealt with the application of *Maslov v Austria* [2008] ECHR 1638/03 to the factual matrix of this appellant; that there was some force in the criticism by the appellant of the way in which the risk of his reoffending was assessed and the rejection of the probation officer's views without adequate explanation. The Upper Tribunal said that although they considered the Article 8 claim to be weak they did not "shut him out" from arguing it.

3. The Upper Tribunal stated (paragraph 33) that other than the finding that the appellant

> "was unlikely to be detained for a lengthy period on his return to the DRC (which is inextricably bound up with the question whether he faces a risk of persecution as a criminal deportee), the First-tier Tribunal's findings of fact and credibility will stand undisturbed."

4. The Upper Tribunal decision setting aside the First-tier Tribunal decision is lengthy. A copy is attached but I summarise below the outline background of BN and the findings of fact and credibility made by the First-tier Tribunal.

5. BN is a citizen of the DRC born on 28th September 1992. BN arrived in the UK in 2005 to join his mother, an unsuccessful asylum seeker. BN would have been aged 12 or 13 on arrival. He was granted indefinite leave to remain on 14th November 2008, aged 16.

6. On 19th April 2011 BN was convicted of two offences of assaulting a police officer for which he received a Community Order with requirement of curfew for 2 months, which he breached, and on 17th June 2011 he was sentenced to an additional week subject to curfew. On 31st August 2012, he was convicted of affray and unlawful wounding for an offence on 29th September 2011; on 2nd November 2012, he was sentenced to concurrent sentences of 30 months and 12 months' detention. On 31st May 2013 a deportation order was signed (s32(5) UK Borders Act 2007). On 5th January 2017, he was sentenced for an offence committed on 27th September 2015. The judge's sentencing remarks were not produced by the respondent and nor was his list of convictions as recorded but the appellant's witness statement says he received a Community Order of 12 months with 150 hours of community service and 40 days of rehabilitation activity organised by probation.

7. The findings of fact made by the First-tier Tribunal are:

   (i) His father was a high-ranking officer in the army of the DRC and as a result BN and his family received heavy security whilst in the DRC.

(ii) Life was very difficult for BN and his mother in the UK during the period after her asylum claim was refused and her appeal rights exhausted: they were living hand-to-mouth in different parts of the country including Portsmouth and London. This made BN and his mother vulnerable to unscrupulous elements and the situation may well have frustrated and angered him.

(iii) During the academic year 2006-7 BN attended secondary school but struggled to cope; although referred to an educational psychologist and assessed as suffering from PTSD the suggestion he attend group therapy came to nought because the psychologist went on sick leave.

(iv) In 2008 (aged 15) he, together with two of his older brothers and his two sisters who had joined him and his mother, were accommodated in Barnsley by the respondent. His mother found it very difficult to deal with him.

(v) Shortly after this, BN's mother was granted indefinite leave to remain and he was granted leave in line on 14th November 2008. BN then 'fled' Barnsley and returned to London where he stayed with a friend. He retained contact with his mother and siblings. Although his mother relocated to London in 2010, he remained living with his friend and the friend's mother.

(vi) BN's mother's evidence that she had sustained domestic violence at the hands of BN's father was not credible.

(vii) BN's evidence that he had been a victim of his father's violence in the past was not credible.

(viii) BN is not at risk of being persecuted as a member of his father's family.

Hearing on 29th June 2017

8. BN relied upon the documents he had filed before the First-tier Tribunal and a supplementary bundle of 40 pages filed for the hearing on 29th June; the skeleton arguments by Mr Chirico dated 17th January 2016 and 28th June 2017 (with annexes); the chronology prepared for the First-tier Tribunal (loose); a letter dated 11 July 2012 from Mary Glindon MP to Hani and a letter from HE Barnabe-Kikaya-bin-Karubi DRC Ambassador) dated 16th August 2012 to Mary Glindon MP (both loose). I also had the respondent's bundle.

9. There was some discussion as to the scope of the appeal given the terms of the Upper Tribunal decision setting aside the First-tier Tribunal decision. Mr Chirico withdrew reliance upon the ground of appeal

> "the respondent had failed in her decision the subject of the appeal to have regard to material of which she was aware relating to his treatment whilst in the UK… the respondent's decision is not in accordance with the law for that reason and should be set aside"

because, he acknowledged, that he was satisfied that the Upper Tribunal was properly placed to determine the appeal before it. He also confirmed that he would not be relying upon submissions that domestic violence from the father amounted to an Article 3/Refugee Convention breach but would be relying upon further evidence to dislodge the finding by the First-tier Tribunal that neither he nor his mother had sustained domestic violence at the hands of the father/husband to support a claim under Article 8. Mr Avery confirmed he would

be relying upon the findings of the First-tier Tribunal that neither BN nor his mother had been victims of domestic violence.

10. There was considerable new evidence offered by the appellant. I confirmed that in the light of this I would be revisiting the findings of the First-tier Tribunal and, applying the principles of *Devaseelan,* would consider whether and the extent to which the evidence before me was such that findings of the First-tier Tribunal were to be revisited and remade.

11. I heard oral evidence from BN, in English, and submissions from Mr Chirico and Mr Avery. I reserved my decision.

Additional evidence

12. Under cover of a letter dated 12th July 2017 BN's solicitors sought permission to adduce further evidence arising, they submitted, from submissions made by Mr Avery at the hearing on 29th June. The further evidence consisted of a note from Mr Chirico, a letter from BN's Reducing Reoffending Worker (Miriam Khan) dated 11th July 2017, a letter from BN's responsible Officer at South Yorkshire Community Rehabilitation Company (Sarah Askew) dated 7th July 2017 and a letter from Dr Maloney dated 4th July 2017. I directed that I was minded to admit that evidence, but that the respondent had leave to make such submissions as she wished in connection therewith by 15th August 2017 failing which I would take the documents into account in reaching my decision. The respondent did not make any submissions regarding that evidence and nor did she object to it being admitted.

13. The letters from Ms Khan and Ms Askew set out the attempts made by the appellant to access mental health services and that he has now, eventually, been referred for mental health assessment.

14. The letter from Dr Maloney states that he had not seen the First-tier Tribunal decision but had seen the decision of the Upper Tribunal setting aside that decision which included considerable reference to the credibility findings. He confirmed that since then, he had now read the First-tier Tribunal decision and that the Upper Tribunal decision had accurately recorded the credibility issues from the First-tier Tribunal as he understood them and that he was thus aware of the substance when he wrote his earlier report; that having read the actual First-tier Tribunal decision did not affect those conclusions. He expanded on some of his conclusions both specifically and in general in terms of disclosure of traumatic events.

15. Since the First-tier Tribunal decision was set aside, the appellant has been convicted of a further offence of assault occasioning actual bodily harm on 27th September 2015 (the day before his 24th birthday). He was convicted after a trial on 25th November 2016 and sentenced, after a pre-sentence report, on 5th January 2017. The judge's sentencing remarks were not produced by the respondent and nor was the list of his convictions but the appellant's witness statement says he received a Community Order of 12 months with 150 hours of community service and 40 days of rehabilitation activity organised by probation.

16. The fact that a community penalty was imposed for an assault indicates the sentencing judge did not consider that the offence, in the light of the mitigation advanced, was so serious that only a custodial sentence could be justified; nevertheless 150 hours community service does indicate a finding of a high level of culpability and, of course, the public interest requires deportation save to the extent that an exception provided by s33 of the 2007 Act permits a departure from the mandatory obligation contained in s32(5) to make a deportation order.

Refugee and Article 3 non-medical claim

17. The basis of the asylum claim is that, taken cumulatively, BN would be returning to DRC (i) as a failed asylum seeker who was reasonably likely to have left the DRC illegally; (ii) as a returnee with convictions for violent offences; (iii) as a person with mental illness that would render him less able to deal with any interaction or questioning with the authorities which would increase his vulnerability to harm. He would, it is submitted be likely to be identified as the son of a person who had claimed to be in political opposition (even though her asylum claim was unsuccessful) who had indefinite leave to remain and he had come to the UK to join her and was ultimately granted leave to remain in line. It was submitted that he was a member of a PSG – those who had left DRC illegally, convicted criminal and a person with mental illness.

18. *BM and Others (returnees – criminal and non-criminal) DRC CG* [2015] 00293 (IAC) held, *inter alia*, that

> A national of the Democratic Republic of Congo ("DRC") who has acquired the status of foreign national offender in the United Kingdom is not, simply by virtue of such status, exposed to a real risk of persecution or serious harm or treatment proscribed by Article 3 ECHR in the event of enforced return to the DRC.
>
> A national of the DRC whose attempts to acquire refugee status in the United Kingdom have been unsuccessful is not, without more, exposed to a real risk of persecution or serious harm or proscribed treatment contrary to Article 3 ECHR in the event of enforced return to DRC.

19. *BM (false passport) DRC* [2015] UKUT 00467 (IAC) held, *inter alia*,

> The mere fact that an asylum claimant utilised a false passport or kindred document in departing the DRC will not without more engage the risk category specified in [119(iv)] of BM and Others (Returnees: Criminal and Non-Criminal) DRC CG [2015] 293 (IAC). The application of this guidance will be dependent upon the fact sensitive context of the individual case. The Tribunal will consider, inter alia, the likely state of knowledge of the DRC authorities pertaining to the person in question. A person claiming to belong to any of the risk categories will not be at risk of persecution unless likely to come to the attention of the DRC authorities.

20. Mr Chirico submitted, on behalf of the appellant, that the report by Dr Muzong Kodi, produced after a visit to the DRC in March-April 2017 (post-dating the CG by some 2 years) was a sufficient basis upon which to depart from the Country Guidance, particularly when considered in the context of the cumulative factors relevant to this appellant namely that he had in all likelihood left illegally and his criminal offending would come to light because of his likely inability to withstand questioning.

21. Mr Avery, on behalf of the respondent, submitted that the appellant does not fall into any of the risk categories, his mother's asylum claim was not accepted and her appeal failed, he could not be held responsible for his departure from DRC as a minor, he had no political activity and he would be of no interest to the authorities. Dr Kodi's report was not, he submitted, sufficient to overturn the CG. In particular, the report relied upon un-named sources and no corroborative evidence.

22. Dr Kennes, whose expert evidence was before the Tribunal in *BM CG*, was not cross examined and the Tribunal noted that his sources were impossible to test. The Tribunal said one of the main weaknesses of Dr Kennes' evidence was the absence of any evidence supporting the thesis that all or certain foreign national offenders would be a focus of the DRC authorities. After a very detailed analysis of all the evidence that was before it with regard to foreign national offenders, the Tribunal was unequivocal in its conclusion that there was no evidence that a failed asylum seeker or foreign national offender was at risk of persecution or serious harm.

23. Dr Kodi in his report states

> 1. From my experience and my expert knowledge of the DRC as well as the discussions I had with immigration officers and human rights activists during my latest visit to the DRC (March-April 2017), I can confirm that, as I said in my previous report, because of his convictions in the UK, [BN] would be risk being arrested on arrival and subjected to inhuman and degrading treatment and even being killed.
> ……
> 6. Fuelled by the ongoing political crisis, tensions are very high in the country and confrontations between the national security forces and rebels have resulted in hundreds of casualties, including among policemen and soldiers[1]. Two UN investigators who were operating in the much troubled Kasai region, were kidnapped and decapitated by an unknown armed group[2]. The latter are, therefore on the lookout for any potential troublemakers[3]. So, because of his profile as a foreign national offender, the national security forces would consider [BN] as a potential threat to security and a possible recruit for the much feared Kuluna street gangs. He would be at great risk of being arrested on arrival in Kinshasa, subjected to inhumane and degrading treatment like scores of opposition political party members, leaders as well as followers, and even representatives of civil society organisations and apolitical youth movements[4].
> 7. ……The Immigration Attaché who, according to the Home Office, has been based at the DRC's Embassy to the UK, undertakes interviews of prospective returnees for redocumentation and likely reports to the DGM in Kinshasa[5]. It is likely therefore, that the information gathered by the Immigration Attaché in London would be passed on to their DGM colleagues in Kinshasa. The interrogation that he would undergo on arrival in Kinshasa would likely confirm this information, which might put him in harm's way. He would then risk being detained in inhumane conditions, tortured or even killed.
> …..
> 9. All the immigration Officials and all the human rights activists, as they had done on previous occasions, confirmed separately that all foreign national offenders are systematically arrested and incarcerated in Congolese main prisons and smaller detention centres, where living conditions are appalling[6]. To explain the Congolese authorities attitude toward foreign national offenders, they referred to the worsening security situation in the country with ongoing fighting between national security forces and various armed groups ….They also

[1] Radio Okapi…
[2] Radio Okapi….
[3] Radio Okapi…
[4] See, for instance, Amnesty International , ….2016…
[5] Home office, Country Policy Bulletin …2014…
[6] MONUSCO … deaths in detention centres March 2013…

mentioned the government's concern about banditry in the cities, especially that fuelled by the Kuluna street gangs. The determination of the Congolese government to root out the Kuluna by any means possible was confirmed recently in the declaration made by the newly appointed commander of the national police in Kinshasa[7]. Their assertions are widely supported by reports by the media and human rights organisations which provide evidence that, in the brutal crackdown on banditry in Kinshasa and the rest of the country, numerous human rights violations have been committed by the police including arbitrary arrest, disappearances and extra judicial executions[8].

10. Since the DRC Government is cracking down on all types of criminals in the country, it is likely that [BN] as a convicted criminal would be arrested on arrival in Kinshasa and would not be allowed to settle down in the country and risk reoffending in the already much troubled country.
11. …the information I collected…confirms that failed asylum seekers returned to the DRC are interrogated on arrival in Kinshasa and are likely to be detained…
12. ….as a convicted criminal, [BN] would likely be perceived as a possible recruit of the Kuluna criminal gangs that continue to rob, maim and kill citizens in various areas of the DRC. This would be another reason for the authorities to detain him. the Kuluna criminal gangs continue to be a matter of great concern for the authorities and the citizens, especially in Kinshasa[9].

24. The footnote references of Dr Kodi in some instances pre-date *BM CG*. Operation Likofi was considered in *BM CG* (paragraph 70) and the conclusion reached that it was

> "a crackdown accompanied by significant violence, carried out in a concerted police operation in 2014 against organised street gangs in an endeavour to eradicate all kinds of street crime…..it is not possible to extrapolate from the circumstances of this operation a risk faced by returnees, whatever their background. It was clearly directed against criminal gangs then operation and did not entail a more widespread campaign against all those with a past criminal record. AI has devised a thesis, or has formulated a mere opinion, which in our view, fails to engage with the nature, purpose, vintage and duration of this discrete police operation…"

25. Dr Kodi's 2017 report back-refers to his report of 6 October 2015. As in his 2017 report, he relies upon interviews with un-named immigration officials and human rights activists who, he says, all confirmed that a foreign criminal would be at risk of being arrested, tortured or even killed on arrival in Kinshasa. He disagrees with the conclusion reached in *BM CG* that foreign criminals are not so treated. He made similar statements in his 2015 report to those made in the 2017 report regarding return as a failed asylum seeker and potential perception as a candidate for Kuluna street gangs.

26. The OHCHR report 28 February 2016 considered human rights violations in the context of the events of 16 December 2016. The report documents the unlawful killing of demonstrators and the large-scale arrest and detention of those suspected of planning or participating in demonstrations. The report states that UNJHRO considers that most people detained were arrested arbitrarily whilst peacefully protesting therefore exercising their legitimate right to peaceful assembly. UNJHRO reports documenting a high number of human rights violations targeting opposition leaders, civil society activists and journalist and other media workers.

[7] Radio Okapi …19 April 2017…
[8] Radio Okapi..23 March 2017..Operation Likofi..
[9] Radio Okapi..24 August 2015..

27. The respondent has not disputed that there is a real risk the appellant left DRC without genuine documentation but she submits that he was a child at the time and even if it comes to the attention of the authorities through the redocumentation process or questioning on arrival that he left without unlawfully, it is insufficient, relying upon *BM*, to result in the appellant being at risk of serious harm.

28. The reports by Dr Kodi suffer from the same difficulties as the report by Dr Kennes and the AI report in *BM CG* – the assertions are not based upon any individual cases, there is no assessment of the nature of the crime committed by a foreign criminal that could lead to arrest, the lack of detail of the interviews undertaken, the lack of detail about the individuals he interviewed and the general expression of untested opinion. Although Dr Kodi is clearly an expert, the information in his report is not a sufficient basis to depart from the current Country Guidance of *BM CG* and *BM*. The appellant was a child when he left the DRC; he has no political activity or interest; his mother, albeit a former asylum seeker, is a failed asylum seeker and if information is known about her by the DRC authorities it will also be known that her claim was unsuccessful. The notion that all foreign criminals are at risk of arrest and detention is not sustainable. The report makes no distinction between someone for example who is convicted of driving without due care and attention and someone who is convicted of manslaughter and the huge range in between. There is simply no sustainable evidence of anyone being arrested and detained because they are a foreign criminal. Likewise, there was no evidence before me on how the Kaluna street gangs recruit individuals whether forcibly or not or on what basis this appellant would be at risk or be perceived to be at risk of such recruitment. The possibility of him voluntarily joining such a gang and thus becoming at risk of unlawful killing cannot be a legitimate basis for an asylum claim; voluntarily placing himself outside the law does not entitle him to asylum because the DRC authorities themselves behave unlawfully in their response to criminal gangs. It is not a situation similar to having to hide his political opinions.

29. Although the applicant, on the basis of the medical evidence, may well be unable to deal with questioning as easily as someone without his mental health problems, the information that would become known to the authorities on that questioning cannot be categorised as resulting in a real risk of being persecuted for a Convention reason.

30. I do not find the material relied upon is such as to depart from the First-tier Tribunal finding that the appellant will not be at risk of being persecuted for a Convention reason on return to the DRC. I dismiss his appeal on asylum and Article 3 (non-medical) grounds.

Article 3 and medical issues

31. Mr Avery submitted that the medical evidence relied upon does not support a departure from the findings of the First-tier Tribunal that the appellant had not been a witness to domestic violence meted out to his mother by his father or that the appellant himself had not been the victim of domestic violence. The psychological reports conclude, he submits, varying degrees of PTSD. He submitted that the findings of Dr Maloney that although at low risk of suicide in

the UK, that risk increases to moderate possibly high if removed were not sustainable and depends upon the appellant having made a credible claim as to his past experiences. He submitted that the appellant had failed to engage with the NHS in his area and was not receiving any treatment. He made reference to the fact that his siblings had not been affected as he claims to have been by his history. He submitted that to lay the blame of the lack of medical treatment at the feet of the respondent was not sustainable – the references to that effect in *GS* were obiter and cannot be said to be determinative of how a State should act.

32. The up-dating medical report from Dr Maloney dated 15th May 2017 describes a young man with "good affective range", repeatedly showing signs of sadness and distress but supressing them in order to continue the conversation. There was, he says, nothing to indicate any disorder of thought, perception or belief suggestive of a psychotic illness. He says that by the time of the first report he wrote (22 January 2015), the appellant had modified his lifestyle considerably. By the date of this report the appellant had been convicted of an offence that occurred on 27th September 2015 which arose out of an incident at a birthday party. Dr Maloney says

> 6.21 He thus currently meets the criteria for post-traumatic stress disorder (PTSD)…
> 6.22 It is a complex situation. As the traumas occurred during his developmental years they have had a significant effect on his personality development. The overarousal component of the PTSD has previously led him into conflict with others, leading to criminal convictions, and thus imperilling his safety and security in the UK. He currently has to deal with the emotional consequences of uncertainty as to status, and may in due course face significant disruption to his life, and a period of strenuous adaptation, which he is poorly equipped to deal with, as will be discussed below.
> 6.23 Although personality factors also affect his psychological state, other positive aspects of his personality appear to have come into play to stabilise his situation….his overall levels of interpersonal and behavioural disturbance are low, and he does not meet the criteria for a personality disorder: although his problems are significant, they are currently being kept in control due to his character strengths.
> 6.24 In regards to his PTSD and the reoffending in 2015: it appears that the offence involved a violent outburst with perceived abusive authority figures, as part of which he bit them. It is noteworthy that his description of standing up against his father, given during our first meeting, was as follows:
>
> > *'The first time I used violence was towards my dad. I hit him with something. I remember biting him, he picked me up, chucked me down the stairs, that's all I remember. After that I became overprotective of my mum and my sisters.'*
>
> 6.25 The similarities in terms of his sense of protecting a female by biting (a primitive physiological response) raises the possibility that a significant and specific trigger for this most recent offence (and possibly others) was a re-constellation of his feelings of having to struggle with coercive male authority in defence of a woman, arising from childhood experiences. This may merit further exploration in a therapeutic context. He did not make this association himself.
> ……
> 6.29 I thus had no reason to suspect that he was fabricating or exaggerating psychiatric symptoms for effect.

This is significant evidence because, at paragraph 6.22 of his report, Dr Maloney sets out a clear expert medical opinion that the appellant suffered from mental health difficulties "leading to criminal convictions". This expert opinion is echoed in the pre-sentence report prepared in respect of this appellant (see below at

[43]) in which it was accepted that much of the appellant's "problematic behaviours is a direct result of his mental health issues".

33. The medical evidence relied upon by the appellant is detailed and is not simply one report prepared after one consultation through an interpreter. Dr Maloney was aware of the conclusions of the First-tier Tribunal judge and has specifically addressed the matter of late disclosure. Although Mr Avery refers to the lack of trauma found in the appellant's siblings who would have witnessed the same violence, it does not follow that all members of a family suffer the same symptoms or consequences from similar acts. All individuals perceive, and react to, situations differently. Dr Maloney is a specialist and has considerable and extensive experience. His first report was before the First-tier Tribunal and the First-tier Tribunal judge considered it and the other evidence before him and reached a conclusion that the appellant's account of the abuse to himself and to his mother was not credible. I take that as my starting point and place considerable weight upon that finding, taken in the light of the evidence before the First-tier Tribunal judge. Nevertheless, the subsequent report and letter from Dr Maloney do, I find, undermine that finding to the extent that I am satisfied, on the totality of the evidence now available, that the appellant did witness his father's domestic abuse directed at his mother, that his father did assault him and there was considerable violence witnessed by the appellant. I note and accept Dr Maloney's statement that the trauma he has sustained occurred during his developmental years and this had a significant effect on his personality development.

34. Dr Maloney was unable to provide evidence of the facilities available in DRC for treatment of the appellant. Dr Kodi offers the opinion that if arrested and detained he would be deprived of any medical treatment. As I have found earlier, I do not accept the appellant would be arrested and/or detained on arrival or subsequently. The issue is whether he would be able to access such treatment as is available. Dr Kodi's updated report dated 4th May 2017 sets out the limited availability of psychiatric services. His report draws on the World Health Organisation report as referred to in a Refugee Council Report, an IRIN report of 5 January 2016 and the UKBA COI report dated 9 March 2016. The Refugee Council report he refers to is stated to say that an out-patient consultation in a public institution costs US$15 to US$20 whilst the annual average earnings in DRC is in the region of US$190. A US$3000 deposit is required. Dr Kodi states that the appellant would be unlikely to be able to access the medicine, medical care and family support he requires. He states that it is possible to communicate by mobile telephone and internet.

35. Dr Maloney records that the appellant lives at his brother's home but does not see him a great deal. He doesn't talk to his mother or sister about his emotional or psychological problems.

36. There was no additional significant more up to date information before me about the availability of medical treatment in the DRC. In Dr Maloney's opinion, which I accept, the appellant requires treatment of three types: pharmacological, psychotherapeutic and psychosocial. He states that pharmacological treatment can offer helpful symptomatic relief and although it does not treat the underlying problems can

> "go some way to allowing an individual to function more effectively, with less intrusive distress".

He states that in the appellant's case much is determined by social issues and medication is not the mainstay of treatment. Dr Maloney describes the psychotherapeutic aspects of treatment and states that

> "It will be important that he is not offered psychological support, and then support withdrawn once he has allowed himself to feel dependent….he currently faces enforced removal to DR Congo, with considerable attendant losses, and he fears for the future. In such a situation, the most that psychotherapy can offer is some immediate relief through emotional ventilation, supportive relationship, and attention to devising strategies for daily life."

Dr Maloney refers to psychosocial treatment being the mainstay of treatment which would aim to

> "remove or ameliorate those social factors that have caused and are promoting and maintaining the disorder….Solely from the perspective of his psychiatric treatment, he would be well served by secure status and ability to remain in the UK where he can re-establish himself occupationally and/or educationally and feel safe and secure in his relationships."

37. Dr Maloney states, and again I accept this,

> "he has applied himself to overcoming his problems through self-control, and reading self-help books….if he were able to remain in the UK, and engage in psychological treatment, and get a job and/or resume education, his prognosis would be good….The re-experiencing component of his PTSD relates directly to life in Congo….he will need a high level of emotional and psychological support in any further therapeutic steps forward he takes. To some extent this support will be able to come from his family, but he will also need to engage with robust professional help….He will continue to benefit from the support of close family…If placed in a situation of duress the risks are that his mood will deteriorate, his capacity for self-control will reduce, and on the basis of his past history he may revert to self-destructive substance abuse. His disorder causes subjective distress, and impacts on functional capacity, which he is overcoming by an effort of will…..By virtue of his current psychiatric state, which is likely to worsen on return, he will be less able than normal to fend for himself in any adverse circumstances that might arise. Even in the absence of specific major adverse events occurring, he is likely to have difficulties in re-integrating into society and rebuilding his life, due to the specific impairments noted above."

38. It was not submitted and there is no question but that the appellant does not meet the threshold in *N v SSHD* [2005] 2 AC 296, *N v United Kingdom* (2008) 47 EHRR 885 and *GS and others* [2015] 1WLR 3312 such as would enable Article 3 protection to be granted. Mr Chirico submitted that *Paposhvilli v Belgium* [2016] EHRR 1113 amended this threshold such that the protection available under Article 3 was increased and that the appellant fell within this. Mr Paposhvilli was not a 'deathbed" case although he was very seriously ill with leukaemia and other illnesses. The Grand Chamber revisited the *D v UK* exception and, submitted Mr Chirico, concluded that where there were very exceptional circumstances, protection was available. In particular, he referred to [183] which reads as follows:

> "The Court considers that the 'other very exceptional cases' within the meaning of the judgment in [*N v UK*] which may raise an issue under Article 3 should be understood to

> refer to situations involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy."

Mr Chirico submitted there were procedural aspects to be undertaken which included that although the evidential burden lies upon an applicant, where evidence is adduced of risk then it is for the returning authorities to dispel doubts raised and that such enquiries are to be made prior to removal.

39. There are, according to Dr Kodi, medical facilities available in the DRC to treat the appellant. They are not as widespread or as sophisticated as those available in the UK but nor are they non-existent or not appropriate. The tenor of Dr Kodi's report is that access is available but at a cost. Although Dr Kodi states the appellant would not be able to access family support he requires this is not reflected in Dr Maloney's report.

40. I am satisfied that neither the procedural aspects of *Paposhvilli* nor the wider access to Article 3 applies to this appellant. There is mention of a suicide risk in Dr Maloney's first report and this is further explored in the up-dated report. He assesses the risk of suicide as moderate and possibly high and that this should be considered and reassessed, if faced with enforced removal. Of course, the appellant will suffer on return to DRC and there are serious issues arising because of his PTSD and return to the DRC but these do not, on the evidence before me, reach the level at which it can be said that

> "substantial grounds have been shown for believing that he….would face a real risk….of being exposed to a serious, rapid and irreversible decline in his…state of health resulting in extreme suffering or to a significant reduction in life expectancy."

The evidence was that he would continue to receive support from his family, that he would be able to maintain contact with them, family members were employed. Dr Maloney set out what treatment he should receive; Dr Kodi refers to treatment being available at a cost. Dr Kodi states that the appellant "would not have access to suicide support services". It is difficult to reconcile this with his earlier statement that treatment is available, albeit at a cost and I do not accept that there is a total lack of support available for someone who can pay. I find that the burden has not shifted to the respondent to make enquiries as to the nature and availability of treatment in the DRC, if such a burden does indeed exist. I am also satisfied that in any event, Dr Maloney's report does not support a conclusion that the appellant would, on return to the DRC suffer a decline in his health that would lead to extreme suffering or significant reduction in life expectancy.

Article 8

41. The appellant arrived in the UK in 2005 – the exact date is unknown. He was granted indefinite leave to remain on 14th November 2008. Although he has now been resident in the UK for more than half his life, he was unlawfully resident until 14th November 2008 and cannot therefore successfully claim that

he has been lawfully resident for more than half his life – a prerequisite to fall within Exception 1 of s117C(4)(a) NIAA 2002.

42. It was not submitted that the appellant has established family life with his mother and/or siblings such as engage Article 8 however it is plain that the relationship that he has with those family members is an integral part of his private life and must be taken into account in assessing his right to respect for his private and family life. Similarly, the impact upon his family members is an element that has to be taken into account. In the appellant's case, that impact has, however, little if not negligible weight. His relationship with his family members is not a dependant relationship in any way, either him on them or them on him. The family members are, from the evidence, in touch with him and care for him in an emotional, financial or any other sense but there is and will be little impact upon either their daily lives or his other than sorrow if he is deported. There is evidence that at least two of his family members are employed although the level of their income is not given. On his deportation, there will therefore be a financial cost to them in terms of payment for medical services and daily support, at least initially.

43. The pre-sentence report dated 30 December 2016 says

> "While I am of the opinion that much of [BN's] problematic behaviour is a direct result of his mental health issues, his attitudes in terms of the events leading up to his current offence display some anti-social elements to his behaviour….
> ….OGRS score…indicates a medium risk of re-offending…
> ….Likelihood of serious re-offending over the next two years is assessed…as low…..
> ….assessed as posing a medium risk of serious harm."

44. From the evidence, the appellant was separated from his mother without notice or warning in the DRC. He thought she had abandoned him. The re-establishment of contact after his (probably unlawful) entry to the UK was compounded by his emotional difficulties and his mother's precarious immigration status. He was separated from his mother for some considerable time and had no contact with her. He was witness to violence to his mother and was himself the subject of violence. Given the nature of his father's employment he was surrounded by violence that required heavy security to be in place. He records having a real sense of being in danger. The DRC at the time he was there (and now) is a violent place.

45. The evidence is that between 2005 and 2008 the appellant, with his mother moved numerous times. There is reference to racism and to the appellant being attacked – the alleged perpetrators were charged but not convicted. During the academic year 2006/7 the appellant was referred to a psychologist, assessed as suffering from PTSD and referred for therapy but the referral did not result in any treatment or continuing care. In 2008, after the grant of indefinite leave to remain, the appellant ran away from Barnsley where he was living with his mother and became homeless in London. Since then he has been unable, despite attempts, to access medical treatment until very recently because of homelessness and inability to register with a GP. The evidence before me supports the conclusion that it is only very recently that issues of GP registration have been resolved and an appointment for mental health assessment obtained.

46. The current medical evidence confirms that with appropriate treatment the appellant will be able to recover from the traumas he has sustained which have been, according to both Dr Maloney and the probation officer, the root cause of his criminal offending.

47. The OASys report was completed on 6th June 2013. From the evidence, it seems this was completed as a result of a video interview, not face to face. Although the appellant disputes the content of some of the report, and there is evidence from a prison officer at Feltham which is very supportive and positive, I have taken the OASys report generally at face value save where the evidence indicates otherwise. The report includes a reference to the appellant continuing to deny the offence for which that report was commissioned. The report refers to problems during his childhood and negative memories about his father because of violence towards his mother. The report also states that there are no current psychological problems. The report refers to the appellant acknowledging that he had witnessed some horrific incidents of violence in the Congo including a stabbing and that he sometimes experiences flashbacks. This does not reflect the detailed consideration given by Dr Maloney and the fact that he was referred for treatment aged 14 or so because of a PTSD diagnosis. Nor is this supported by the report from Probation. It is surprising that with those references in the OASys report, that no further investigation was undertaken or that the conclusion could be drawn that there were no psychological problems. I am satisfied that the current medical evidence, taken with the most recent probation report and the references to the difficulties in obtaining treatment previously are evidence of long term psychological problems arising out of his time in the DRC, the violence he has witnessed and the living arrangements in the UK from after his arrival until his first imprisonment. I am satisfied that the evidence (medical, probation, support workers) supports a conclusion that had he received the treatment and referral he was diagnosed as requiring in 2006/7 the violent criminality may not have occurred.

48. Mr Chirico submitted that although the appellant did not become settled until 2008, the extent to which little weight is to be given to his previous precarious residence should be modified because he had been brought to the UK, as a child, in circumstances over which he had no control. I accept that proposition.

49. Taken together, the appellant's offending criminality, all committed after he became an adult, that he will be able to access medical treatment in the DRC, that he does not have a partner or children in the UK, that his deportation, although it will have an effect on him and his family in terms of separation, is not significantly out of the ordinary for families who are separated for many reasons do not and cannot, in themselves or cumulatively, amount to very compelling reasons such as not to require his deportation.

50. The appellant's mental health is a factor in the consideration of Article 8 and the proportionality of deportation, even though it does not reach the Article 3 threshold. Mr Avery did not dispute or challenge the medical evidence and the professional opinion of the probation officer that there was a direct causal link between the appellant's mental health and his criminal offending. Nor did he dispute the evidence that the appellant had been diagnosed with PTSD but that there had been no follow through in terms of treatment whether from the school,

social services or the respondent. Nor did he make submissions in connection with the additional evidence that I have admitted.

51. Mr Avery did dispute Mr Chirico's submission that it was a failure on the respondent's part to enable the appellant to access medical treatment after diagnosis with PTSD in the 2006/7 academic year and thereafter. Mr Avery submitted that the psychological evidence was weak and did not sustain the submission that treatment had been required since 2006/7 and that in any event the respondent could not be held responsible for the lack of treatment. In my judgment, both positions are inappropriate. The appellant does not seek to blame the SSHD for the fact that he should have been referred sooner for the support and treatment that would have addressed the mental health difficulties that are now said to have led to his criminal offending behaviour. He simply points to the fact that such support was not provided and suggests that if it had been, he may well not have committed those offences that now put him at risk of deportation. Mr Chirico referred to the Convention on the Rights of the Child and in particular Article 19[10] and that the obligations of the state did not end on adulthood[11].

52. I am satisfied from the evidence before me that there is a casual link between the appellant's criminality and his lack of access to mental health services which he was diagnosed as requiring whilst a child. I am satisfied, from the evidence, that, having been diagnosed with PTSD in 2006/7, the appellant was unable to access required treatment for a variety of reasons including moving between accommodation and thus geographical areas at short notice at the instigation of the respondent, inability to register with a GP because of the transient nature of accommodation and his status, lack of co-ordination between those who had dealings with the appellant and his family which should have resulted in an awareness of the mental health problems and the diagnosis that treatment was required. A difficulty is that mental health services for children (and adults) are in short supply and there have been many reports of the lack of availability having potential long-term effects on society both financially and otherwise. In this

[10] ***Article 19***

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

[11] ***Article 39***

States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

particular instance, this appellant has been directly affected by the lack of provision of mental health services, which had been identified as being needed, and the lack of which has, on the evidence before me, contributed significantly to his criminality. The appellant has, through his own strength of character, confronted many of his problematic issues. He has not re-offended since 2015. His offences are violent offences and he committed a further offence despite knowing he was subject to a deportation order. I recognise it could be said that having recognised and started to deal with his problems despite the lack of access to medical treatment will mean that returning him to the DRC will not be as problematic for him as it would have been had this self-identification not occurred and this has also to be factored in; although this is also an indication of the likely recovery by the appellant if he receives the treatment Dr Maloney has advised.

53. The deportation of foreign criminals is not, of course restricted solely to an assessment of an individual's criminality but also forms part of the respondent's policy in her assessment generally as to the deterrence of other criminals and criminality. This appellant has been convicted of violent crimes and in the normal course of events it would be hard to see how the mandatory obligations of the SSHD to deport foreign criminals, it being in the public interest to do so, could be avoided. But the consideration of deterrence is not a fixed value; it is consideration from the perspective of an observer appraised of all the salient facts. In the particular circumstances of this appellant, no rational observer fully appraised of the facts not least that the mental health problems experienced by the appellant that went untreated notwithstanding diagnosis when he was a child and are the undisputed causal root of his offending, could properly conclude that the deterrent effect of removing such an appellant would be cogent. Although obviously one cannot be certain that he would not have committed offences had he received treatment, the evidence is such that the weight to be given to the deterrent effect of deporting this particular foreign criminal is not as cogent and compelling as generally will be the case.

54. Critical to this appellant is the evidence that his criminality is directly related to his mental health problems for which he has not received treatment despite being diagnosed at an early age as requiring it. That fact, combined with the violence he witnessed and was the subject of, the lack of further offences since 2015, the probation officer's report, the positive character references, that he has made credible and laudable efforts to address his mental health problems himself even though he has been unable to access professional help, the difficulties he will have in reintegrating into the DRC having left as a child so many years ago and the limited deterrent effect do, in my opinion, amount to very compelling circumstances such as to outweigh the significant public interest in the deportation of foreign criminals, as is now enshrined in s117C(1).

55. Of course, if the appellant were to re-offend or fail to take advantage of treatment offered then it would be a very different matter. His non-removal pursuant to the deportation order will be an opportunity for him to take advantage of the chances being offered to him now and to access treatment that he was previously not given.

56. It follows that I find there are very compelling reasons for the public interest to be outweighed in the deportation of this appellant and I allow his appeal.

Conclusions:

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

The decision of the First-tier Tribunal was set aside and I remake the decision by allowing it.

Anonymity

The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I continue that order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

Date 27th October 2017

Upper Tribunal Judge Coker