



**Upper Tribunal
(Immigration and Asylum Chamber)
PA/06685/2016**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Field House
On 29th January 2018**

**Decision & Reasons Promulgated
On 12th February 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCCLURE

Between

AL

(ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Wilford Counsel instructed by Duncan Lewis Solicitors
For the Respondent: Ms Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of the DRC. An anonymity direction was made previously. Having considered all the circumstances, I make an anonymity direction.
2. This is an appeal by the appellant against the decision of First-tier Tribunal Judge Widdup.
3. The appellant first entered the United Kingdom in December 2008. He claimed asylum or humanitarian protection or relief on the grounds of Articles 2 and 3 of the ECHR but his claim was refused. Thereafter in a decision dated 26 April 2009 Immigration Judge Baker dismissed the appellant's appeal against the refusal of his claim. There was no appeal to the Upper Tribunal. It is noted that the appellant was appeal rights exhausted as of 14 April 2009.

4. The appellant remained in the United Kingdom and on 12 July 2012 further representations were made to the respondent, based in part on the original claim to asylum and in part founded on the appellant's sur place activities in the UK with APARECO, a DRC opposition political group, and other public demonstrations of political opposition to the DRC regime in the UK.
5. As part of the further representations it was alleged that there were flaws in the previous judicial decision [the Judge Baker decision] and further evidence was submitted in support of the appellant's claim. Included in that evidence was a report from a Dr Bailey from the Medical Foundation from 2012 dealing with scarring and marks on the appellant's bodies and the appellant's mental condition.
6. A new decision was issued refusing the appellant's protection and/or human rights claims on 13 June 2016. It is that decision that is the subject of the present appeal. As stated, by decision promulgated on 13 October 2017 Judge Widdup dismissed the appellant's appeal both in respect of the sur place activities with APARECO [the new elements of the appellant's claim] and as to the original claim to asylum, which had been considered in the decision of Judge Baker.
7. The appellant has applied for leave to appeal against that decision citing grounds dealing with both the original claim and the more recent claim. In granting leave the only grounds upon which leave was granted are set in the following terms: -

4 It is arguable that the judge erred in failing to consider whether the medical evidence in 2012 affected the findings of Judge Baker in 2009 and I grant permission on this ground.
8. In the previous application, considered by Judge Baker, the appellant had claimed that he would be at risk on return to the DRC by reason of his involvement with the MLC and his having been arrested because of those activities. As part of that claim the appellant alleged that he had been arrested, detained and tortured.
9. In the First -tier Tribunal the appellant was also seeking to rely upon his sur place activities in the United Kingdom. The appellant was claiming to be a significant member of APARECO, and by reason of that, if returned to the DRC, he would be at risk. In respect of the latter claim Judge Widdup considered the country guidance case of BM & others (Returnees - Criminal and Non-criminal) DRC CG [2015] UKUT 293. Having considered the guidance given in the case law the judge came to the conclusion that the appellant did not have a sufficiently significant profile or role in APARECO or in protest demonstrations in the United Kingdom such that he would come to the attention of or be of interest to the DRC authorities so that if he were returned he would be at risk by reason thereof. Judge Widdup had in paragraphs 75 to 95 considered carefully the appellant's role and activities in the United Kingdom. Clearly the judge was entitled to come to the conclusions that he did on the basis of the evidence presented.
10. In considering the decision by Judge Baker in 2009, Judge Widdup followed the guidance in the first instance given in the case of Devaseelan 2003 Imm AR 1. The guidance given establishes that the first determination is the starting point and the subsequent hearing is not an appeal from that decision. Where however there is further evidence which brings into question the findings of fact by the first Tribunal, any subsequent hearing is entitled to review the findings of fact in light of the evidence before it.

Where however there is no new evidence the findings of fact made in the original Tribunal should stand. As is evident from paragraph 50 of the decision, Judge Widdup was aware that there was further evidence, which he had to consider, evidence which was additional to the evidence originally presented.

11. I note also the case of A M (Belarus) 2014 EWCA Civ 1506, which gives some support the view that a judge is entitled to give greater weight to the evidence and findings of fact of judicial hearings nearer in point of time to the events.
12. Central to a consideration of this matter is the report by Dr Bailey in 2012 it is submitted that the judge has failed to take into account what Dr Bailey said within that report and whether that report impacts upon the decision of Judge Baker.
13. In dealing with the decision of Judge Baker I would firstly note that Judge Widdup very carefully has looked at all the elements of the appellant's account as is evident from paragraphs 52 to 74. Judge Widdup in paragraph 52 identified specific elements where Judge Baker has noted that not only was the appellant not telling the truth but where he was deliberately being dishonest and lying and where the credibility of the Appellant's claim was not accepted. Those findings stand whatever the approach taken to the evidence of Dr Bailey. There was as noted in paragraphs 58 and 59 of Judge Widdup's decision other additional evidence.
14. Judge Widdup carefully noted the findings, including those where it was clear that the appellant was being dishonest and not telling the truth as is evident from paragraph 52. Judge Widdup noted that the appellant was found to be being deliberately untruthful.
15. Judge Widdup noted that Judge Baker went on to assess the appellant's knowledge of the MLC. At various points during the course of the assessment the judge rejects the assessment made in the refusal letter that the appellant's answers in interview undermined his credibility and finds that the assertion that the answers undermine the appellant's credibility were not made out. Judge Baker was not merely making findings adverse to the appellant but making findings to the benefit the appellant.
16. Having made findings on some of the issues to the benefit of the appellant, Judge Baker finds core elements of the appellant's account are not consistent and are not credible. Judge Baker finds in paragraph 73 that parts of the appellant's account have altered fundamentally and that his statement was not consistent with what he had said in interview. Judge Baker specifically finds that the appellant has fabricated parts of his account to deal with issues that were specifically raised within the refusal letter.
17. The appellant's account of his problems began in 2006 as set out in the decision of Judge Baker at paragraph 12. At that point the appellant was claiming that he had been hit on the head by a stone in 2006 in a demonstration. Then in March 2007 he was arrested and lashed resulting injuries and marks to his back. Again the appellant was arrested and detained and on this occasion he was lashed every four hours. Finally the appellant was asserting that he had been arrested again in 2008.
18. In the version given to the Dr Bailey the injury to his head was caused when he was hit on the head by a gun whilst being arrested in 2008. The

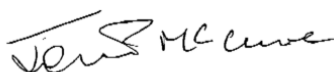
circumstances in which he received the injury to his head are clearly not the same.

19. Ultimately and perhaps most material from paragraph 82 onwards Judge Baker comments on the claims of the appellant to have returned to Kinshasa at a time when the authorities were allegedly seeking him. The appellant had made assertions that he was feeling unsafe in Congo Brazzaville by reason of the fact that the DRC authorities were seeking him but yet the appellant returned to Kinshasa in order to obtain a stamp in his passport. Not only did he return to Kinshasa but he also went to his previous address to collect personal items. Judge Baker clearly considered whether an individual would go back and determined that it was not credible that an individual would return to their previous address knowing that the authorities were looking for. It has to be noted that the appellant had given contradictory reasons for going back to Kinshasa in paragraph 84 he was going to back to pick personal items up in paragraph 85 the judge noted that he was going back to sell goods in order to have money to survive. Again the findings of fact made by Judge Baker would not have been brought into question by the medical evidence, indeed they would only emphasise the fact that an individual that had been subjected to such torture would be unlikely to return to Kinshasa and his home area.
20. It has to be accepted that within the report reference is made to the fact that the appellant has a poor memory because of the head injuries, which he had suffered. However the facts as presented to the doctor are inconsistent with the facts as presented previously before Judge Baker. It is not a situation in which the appellant is indicating he is having difficulty remembering but rather that the appellant is making positive assertions. As noted by Judge Baker the appellant was altering his account to answer issues raised.
21. It is also to be noted that Dr Bailey had commented upon the appellant's scars and marks on his back. However the marks were considered by Judge Baker.
22. In the circumstances whilst there were factors within the report by the doctor which sought to explain some of the injuries which the appellant had, Judge Baker has in part dealt with the injuries within her decision. Further to that the accounts given by the appellant are inconsistent with previous accounts and, given the fact that Judge Baker had noted that the appellant had lied, the additional discrepancies merely undermined further the credibility of the appellant's account. In the light of that even if the judge should have considered whether the report undermined the findings of fact made in the previous decision, I find that the further discrepancies merely go to undermine further the credibility and account of the appellant. Had the judge considered the medical report, I do not see that it would have brought into question the findings of fact made by Judge Baker. In the circumstances there is no material error of law.

Notice of Decision

23. I dismiss the appeal.
24. I make an anonymity direction

Signed



Date 5th February 2018

Deputy Upper Tribunal Judge McClure