Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: RP/00032/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 30 April 2019	**On 3 June 2019**

Before

Upper Tribunal Judge Craig
Upper Tribunal Judge Pickup

Between

Secretary of State for the Home Department

Appellant

and

FA
[Anonymity direction made]

Claimant

Representation:
For the claimant: Mr D Sellwood, instructed by Birnberg Pierce & Partners
For the respondent: Mr T Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269), we make an anonymity direction. 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 appellant(s).

1. This is a decision to which both judges have contributed.

2. This is the Secretary of State's appeal against the decision of First-tier Tribunal Judge Bart-Stewart promulgated 22.11.18, dismissing on asylum and humanitarian protection grounds the claimant's appeal against the decision of 6.2.17 to terminate his refugee status and to deport him from the UK, but allowing the appeal on articles 3 & 8 ECHR grounds. For ease of reference I will refer to the Secretary of State (who was the original respondent) as "the Secretary of State" and to FA (who the original respondent) as the "claimant."

3. First-tier Tribunal Judge Hodgkinson granted permission to appeal to the Secretary of State on 12.12.18.

4. The claimant cross appealed against the dismissal of the appeal on refugee grounds but permission was refused in the First-tier Tribunal by Designated First-Tier Tribunal Judge Woodcraft on 7.1.19 and in the Upper Tribunal by Upper Tribunal Judge Smith on 8.3.19.

5. It follows that the only valid appeal before the Upper Tribunal is that of the Secretary of State against the decision allowing the appeal on articles 3 and 8 grounds. However, the claimant has served a Rule 24 reply, which we have carefully considered.

6. Whilst the claimant was legally represented at the appeal hearing, he chose not to attend.

7. At the conclusion of the oral submissions before us, both parties sought and were granted permission to lodge and serve within 14 days further legal case authorities touching on the issue as to whether it is open to a tribunal to find that a potential deportee would be at risk on return of treatment infringing article 3 rights because of a claimed reasonable likelihood that he would go on to commit criminal offences, thereby resulting in his punishment and incarceration in a country of return where the treatment of detained persons has been held to be inhuman and infringing article 3 ECHR. The claimant also sought and was granted permission to cite further legal case authority relevant to the issue of delay raised by the Home Office in argument at the hearing but not foreshadowed in its submitted grounds.

8. The claimant's further submissions, dated 13.5.19, were received by the tribunal on 14.5.19. The appellant's further submissions, dated 14.5.19, were received by the tribunal on 14.5.19. The claimant then made yet further submissions, dated 15.5.19, we have carefully considered the respective submissions.

Error of Law

9. In an otherwise careful and detailed consideration of the relevant issues by the First-tier Tribunal, for the reasons set out below we have found

such error of law in the making of the decision of the First-tier Tribunal as to require it to be set aside and remade by remitting the appeal to the First-tier Tribunal on the articles 3 and 8 ECHR issue only.

10. We remind ourselves that the issue is not whether we or another judge would have made the same decision as the First-tier Tribunal but whether the decision made in relation to Articles 3 and 8 is sustainable.

11. Having heard detailed submissions from both Mr Lindsay for the Secretary of State as appellant and Mr Sellwood for the claimant we find as follows.

Late Issue

12. Mr Lindsay relied on the details grounds of application for permission to appeal, which he accepted may not have been as clear as they could have been. He also sought to rely and to make submissions on an additional issue not addressed in the grounds but which appears to have been relied on by the First-tier Tribunal Judge at [144] of the decision, namely the apparent delay between the index offence committed in 2009 and the deportation decision of 6.2.18. At [36] the judge recorded the submission on behalf of the Secretary of State that there was no evidence to suggest that either the public interest had lessened or that the claimant's private and family life had strengthened during the intervening period. Mr Lindsay argued that that submission had not been addressed by the judge and thus there was an error of law in the reliance on delay made at [144] of the decision.

13. Mr Sellwood objected to the late introduction of the delay issue when it had not featured in the details grounds of application for permission to appeal. Whilst he accepted that he would be able to address the issue in his oral submissions, he made the fair point that he had not been able to prepare a detailed response, or to research any relevant authorities on the point. After hearing both parties on the matter, we considered that in a detailed consideration as to whether a person was to be deported to the DRC, with potentially serious implications, we should enable all relevant issues to be addressed rather than enforce a strict procedural adherence to the pleaded grounds but would ensure that the claimant was not unfairly prejudiced by the late introduction of the issue. For that reason, as indicated above, at the end of the hearing we granted Mr Sellwood the opportunity to identify to the tribunal panel any relevant authorities before the making of the decision on the appeal.

Delay

14. Mr Lindsay raised the new ground of the judge's reliance at [144] on delay as a material consideration in reducing the weight to be given to the public interest in deportation and in allowing the appeal. The judge noted that 9 years had elapsed since the commission of the index offence justifying deportation and that consideration of revocation of refugee status began in 2012. The judge continued, "At that point no action was

taken against him. It must be inferred that having conducted a review at the time the Secretary of State did not consider the public interest necessitated the appellant's deportation."

15. We accept the submission that the judge was in error of law to draw such an inference, particularly given the wide ranging changes to the relevant provisions governing deportation considerations that have taken place since 2012. To reduce the weight of the public interest in this way because of the delay and the drawing of such an inference is an error of law, particularly as the public interest has not diminished over time and it cannot properly be inferred that at the time the Secretary of State did not consider the public interest to necessitate the claimant's deportation.

16. In granting leave to make further submissions on the issue, we accepted that Mr Sellwood had not prepared the claimant's case to address this new issue. However, we find nothing in the further submissions strengthens his argument or undermines the complaint of the Secretary of State that reliance on delay was not justified. Reliance is made on RLP (Bah revisited – expeditious justice) Jamaica [2017] UKUT 00330 (IAC), where it was held that in cases where the public interest favouring deportation is potent and pressing, even egregious and unjustified delay on the part of the Secretary of State in making the underlying decision is unlikely to tip the balance in the individual's favour in the article 8 proportionality balancing exercise. However, we accept that delay is a potentially relevant factor in the proportionality exercise. In EB (Kosovo) v SSHD [2008] UKHL 41, the House of Lords held that delay may reduce the weight otherwise to be accorded to firm and fair immigration control if the delay is a result of a dysfunctional system which creates unpredictable, inconsistent and unfair outcomes. We also accept that, obviously, during a period of delay an applicant may develop closer personal and social ties, thereby strengthening a family and private life claim to remain in the UK. In MN-T (Colombia) v SSHD [2013] EWCA Civ 893, the Court of Appeal held that delay may lessen the weight of public interest considerations of deterrence and societal revulsion. Further, during lengthy delay a foreign criminal may be able to demonstrate he has rehabilitated. These are all relevant considerations but the difficulty for Mr Sellwood's argument is that these were not adequately addressed in the decision of the First-tier Tribunal, where the judge proceeds on the assumption that it must be inferred from the delay that the Secretary of State did not consider the public interest necessitated deportation. That assessment was flawed and unsustainable. It follows that on this additional ground of reliance on delay, we also find the decision of the First-tier Tribunal in error of law.

Article 3

17. Following a lengthy and careful digest of the evidence and the findings and conclusions which are not at issue in this appeal, the article 3 considerations are set out relatively briefly between [126] and [128] of the decision. In essence, the tribunal found that whilst there would be no Article 15(c) risk on return and no reason to depart from the Country

Guidance of BM and others (returnees – criminal and noncriminal) DRC CG [2015] 293 (IAC), which is to the effect that those who have been convicted of offences in the UK are not at real risk of being persecuted or suffering serious harm or treatment proscribed by Article 3 ECHR on return to the DRC, the judge concluded that there was a risk of destitution infringing Article 3 for the following specified reasons set out at [128] of the decision:

(a) In light of the appellant's age when he left the DRC;

(b) The likelihood of there being no family support available to him on return;

(c) His lack of fluency in the main languages; and

(d) Obstacles in securing accommodation and employment, although his partner confirmed that she would be willing to financially assist him in the short but not the longer term.

18. In his oral submissions, Mr Lindsay relied primarily on two decisions from the Court of Appeal, copies of which were provided to the panel:

(a) Binbuga [2019] EWCA Civ 551;

(b) Said [2016] EWCA Civ 442.

19. Mr Lindsay's attack on the destitution reasons can be summarised briefly as follows:

(a) The age when the claimant left the DRC is not determinative of the issue of destitution;

(b) The absence of family support was contradicted by the finding that the claimant's partner would assist him in the short term;

(c) As is clear from [76] the claimant spoke Lingala with his mother, save for certain words he cannot understand. He would therefore be able to communicate in the DRC and would have little difficulty gaining fluency;

(d) Difficulties in securing accommodation and/or employment did not amount to evidence of destitution.

20. Whilst we are satisfied that the judge did not make any mistake of fact or reach inconsistent findings in respect of these issues, we have carefully considered whether any of these (or other) factors individually or taken together could justify a conclusion of a real risk of destitution sufficient to infringe Article 3 ECHR bearing in mind the high threshold required. In Said, the Court of Appeal held that to succeed in resisting removal on Article 3 grounds on the basis of suggested poverty or deprivation on return which are not the responsibility of the receiving country or others,

the person liable to deportation must show circumstances which bring him within the approach of the Strasbourg Court in the D and N cases.

21. Mr Sellwood sought to draw a distinction relying on [29] to [30] of Said, and submitted that the risk of destitution arises because of the state's indifference to circumstances which would amount to an infringement of Article 3, effectively an acquiescence in harm, and thus submitted that the N threshold did not apply. However, we did not find any such distinction was made by the First-tier Tribunal or applies on the facts of this case. It is clear that the judge's reasoning for finding a risk of destitution did not rely on indiscriminate violence in IDP camps or because of the conditions of the country, or similar such considerations, but specifically because of the claimant's personal circumstances on return.

22. We find that the judge did not consider the very high threshold applicable and did not have regard to Said. Further, it is clear to us that even taking the evidence at its highest, the circumstances on return cannot justify such a conclusion even in the challenging environment that would face anyone returning to the DRC. In particular, as has already been noted, the appellant has a good understanding of the language and the judge found that he will have some temporary financial assistance from his partner on return. In the circumstances we are driven to conclude this part of the decision is flawed for inadequate reasoning, insufficient to justify the conclusion of an infringement of Article 3 on the basis of a risk of destitution and, therefore, in error of law.

23. Mr Sellwood and the Rule 24 response points out that the prospect of destitution was not the only basis upon which the judge concluded Article 3 would be infringed. We agree. As part and parcel of the Article 3 conclusion, at [128] the judge also found a "risk of (the claimant) returning to drug use and reasonable risk of further incarceration in DRC." We also find this conclusion problematic even though it is based on the unchallenged expert evidence, in part of Dr Kofi but to a greater extent of Dr Lackenby, summarised at [127] of the decision. Dr Lackenby considered that the appellant would be vulnerable to return to drug use, antisocial behaviour and/or criminal activity if deported to the DRC. The judge found or accepted, "This gives rise to a very real prospect of further detention in abject conditions."

24. We accept that the claimant has an appalling criminal history, having amassed some 19 separate convictions for 34 criminal offences between 2004 and 2014. In January 2009 he was convicted of possession with intent to supply Class A (cocaine) and Class B (cannabis) controlled drugs, for which he was sentenced to a total term of four years in a Young Offender Institute. During and even after his release from that sentence, he continued to offend, albeit to a lesser degree. He was also a member of a known criminal gang, though the First-tier Tribunal accepted that he was not particularly high in the hierarchy. He had also been given an Osman warning in 2017. The deportation order was made on the basis of the four

year sentence, on the basis that his deportation was conducive to the public good.

25. In essence, the argument is that because the claimant has previously been convicted of drugs offences, despite all the suggestions in the evidence adduced on his behalf that he is now a reformed character and would remain drug-free, he should not be removed from the UK because he would go on to commit criminal offences in the DRC, leading to his prosecution and imprisonment in what are accepted would be conditions infringing Article 3.

26. The argument is further advanced in Mr Sellwood's post-hearing written submissions. It is not necessary to rehearse the well-established legal principles elaborated upon by Mr Sellwood, which are not in contention, but we readily accept that if there is a real risk of a person being subjected to degrading or inhuman treatment in a particular country so as to amount to an infringement of article 3, that would constitute an absolute prohibition on expulsion, even if the risk arises from the subject's conduct or activity, and even if such activity is conducted in bad faith. In SSHD v Iftikhar Ahmed [1999] EWCA Civ 3003, the Court of Appeal concluded that if an asylum seeker would in fact do things after return which would put them at real risk of persecution for a Convention reason, there is an entitlement to protection, however unreasonable the conduct. In HJ (Iran) [2010] UKSC 31, the Supreme Court held that attention must be focused on what the claimant would actually do if returned to his country of nationality. The fact that he could take action to avoid persecution does not disentitled him from asylum if in fact he will not act in such a way as to avoid it, even if to fail to do so would be unreasonable.

27. We accept that article 3 is a non-derogable right prohibiting in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the conduct of the person seeking to rely on such protection. However, we find Mr Sellwood's submissions and the supporting legal authorities he cites fall short of supporting the basis upon which Judge Bart-Stewart allowed the appeal under article 3, namely that the claimant would be vulnerable to further drug use and criminal behaviour so as to give rise to the prospect of detention in conditions infringing article 3. We accept as well-made the Secretary of State's argument that the protection of article 3 cannot properly be construed so as to protect those who freely choose criminal conduct that if pursued would give rise to a real risk of treatment infringing article 3. We accept that a distinction must sensibly be drawn between on the one hand those who cannot help but, or who are alternatively entitled to, conduct themselves in a way that gives rise to a risk of treatment infringing article 3, and on the other those who choose to commit crime or engage in other anti-social and illegal activity through personal choice and/or for financial gain. Whilst even the most serious public policy considerations cannot override the absolute prohibition on treatment infringing article 3, there is an important and significant public policy consideration that to construe the protection of article 3 in the way the First-tier Tribunal Judge did and

for which Mr Sellwood contends would incentivise criminal conduct in the UK by claimants seeking to avoid deportation.

28. We readily understand and accept that the claimant would not have the same stable support structure available to him as he has in the UK and on any view the risk of recidivism must be greater in the DRC than in the UK. We also acknowledge that to an extent both parties are trying to have their cake and eat it. For example, the Secretary of State relies on the risk the claimant presents for the protection of the public by reason of his drug dealing convictions as being sufficient to deport him but at the same time, in reliance on the suggestion that he would not face a risk of return to offending on return, points out that there was no evidence that he is a drug addict or took anything other than cannabis whilst dealing in the harder drug of cocaine. We note the claimant's own evidence, summarised at [119-120] of the decision, is that he had relocated away from his gang or peer associations and had not reoffended since 2014.

29. We find the core argument untenable, unsupported as it is by any legal authority or precedent. This is not an argument of double jeopardy where the claimant would face further punishment in the DRC for the crimes he committed and for which he was sentenced in the UK. Neither is this a situation akin to HJ (Iran) principles where a returnee is entitled to pursue his political opinion, faith or sexual orientation; we cannot accept that the claimant has the right to protection because he is inherently criminal or might in the future behave like a criminal. It is one thing to accept that if imprisoned because of his past behaviour he would face a real risk of incarceration in conditions infringing Article 3, but it is entirely another to suggest that because he is of criminal inclination or outlook the tribunal must proceed on the expectation that he would commit further criminal offences in the DRC and in due course find himself detained in inhuman conditions. If this argument were to be adopted in principle, it would prove almost impossible to return to a wide range of countries around the world any person being deported on the basis of having committed serious criminal offences in the UK. We find no authority for the proposition that one must look to see whether a returnee is likely to or might commit further offences so as face the risk of incarceration in unacceptable conditions infringing Article 3. In any event, we find such a risk is speculative and far too remote.

30. It will be the claimant's free choice whether to continue to commit criminal offences on return. In the circumstances, we do not accept that any propensity to reoffend can be equated to an imputed or innate characteristic, such as mental ill-health, or a genuinely held belief, such as political opinion or religious faith. Committing crime is not central to the claimant's identity such as to entitle him to international protection from the consequences of a deliberate choice to offend. In our view, he cannot sensibly be entitled to international protection against the consequences of any future criminal conduct. As stated in SE (Zimbabwe) v SSHD [2014] EWCA Civ 256, an offender cannot rely upon his own partially unreformed

criminality as a factor relevant (in that case) to either his family or private life. Article 3 was not argued in that case.

31. In the circumstances and for the reasons set out above, we find each aspect of the First-tier Tribunal Article 3 considerations flawed and as the judge combined them at [128] to reach the conclusion that the high threshold had been reached, the decision on Article 3 was made in material error of law.

Article 8 Consideration – Very Compelling Circumstances

32. We also heard Mr Lindsay's detailed arguments as to the Article 8 very compelling circumstances considerations set out in the decision from [129] onwards. We accept that on the facts of this case there is a considerable degree of overlap between Articles 3 and 8. At [134] the judge relied on: the claimant's young age when he left the DRC and formative upbringing in the UK; a finding that there would be very significant obstacles to his integration in the DRC (based on Dr Kodi's opinion); that he has no family in the DRC; that he "does not speak the language;" and has no accommodation or means of support. The judge went on to note that the claimant poses a moderate to low risk of reoffending, which will remain the case if he continues on the path of rehabilitation and lifestyle change.

33. Mr Lindsay highlighted concern at [134] where the judge stated "The offending history in itself does not prevent him being socially and culturally integrated in the UK," which does not seem to acknowledge that the claimant's long criminal record, including offences before and after the index offence as well as offences of violence whilst in prison, and the serious nature of his offending, runs counter to a claim of social and cultural integration in the UK. In Binbuga the Court of Appeal specifically held that gang membership tells against social integration and that integration connotes integration as a law-abiding citizen, referring to a 'discontinuity in integration,' by the commission of criminal offences. Further, Binbuga held that rehabilitation carries little or no weight in the proportionality balancing exercise. The tribunal did not take these considerations into account.

34. In his submissions that the First-tier Tribunal failed to carry out a 'broad evaluative judgement,' Mr Lindsay also drew a comparison with the facts in Bossade (ss117A-D interrelationship with Rules) [2015] UKUT 00415 (IAC), where the Upper Tribunal found no very significant obstacles to integration in circumstances where the DRC citizen came to the UK age 4 and lived in the UK for the following 25 years, did not speak Lingala and had no family in the DRC. It was submitted that the claimant is in a stronger position on return than Mr Bossade.

35. Mr Sellwood's submitted that the Article 8 conclusion of very compelling circumstances could survive a finding that the Article 3 assessment was flawed. His submissions largely sought to rely on the evidence before the First-tier Tribunal, particularly the reports of Dr Kofi and Dr Lackenby. We

accept that a holistic approach must be taken to the decision as a whole rather than the piecemeal criticism in some of Mr Lindsay's submissions. However, the issue before us is not whether the available evidence was sufficient to justify the findings made but whether the findings made were sufficient to justify allowing the appeal on either or both Article 3 or Article 8, applying the correct legal principles, or whether the way in which reliance on those findings was approached was flawed so as to amount to a material error of law.

36. Having heard from and taken into account the submissions of both counsel, we accept that the Article 8 assessment and the factors relied on by the judge did in general terms amount to a broad evaluative judgement of the evidence but find that the analysis failed to accord adequate weight to the public interest, whilst giving undue weight to factors in the claimant's favour, at least some of which were either neutral factors or not objectively capable of being accorded significant weight, such as rehabilitation or the fact that the claimant can speak but is not fully fluent in Lingala.

37. Further, it is clear from the wording of paragraph [141] of the decision that in reaching her conclusions on article 8 the judge had regard to the circumstances the claimant would face on return, including that he was not fluent in the local language, before stating, "taken together I consider that these are compelling circumstances." Not only did the judge fail to apply the relevant threshold of "very compelling circumstances," but it is clear that the flawed Article 3 findings were so entwined with the Article 8 considerations that it is impossible to separate out a decision which we could find would have justified a judge allowing the appeal on Article 8 grounds independently of the flawed Article 3 findings. Mr Sellwood accepted that given the terms of paragraph [141], it would be difficult to sustain his argument that the Article 8 findings could survive independently. It is clear that the entire considerations in relation to both Article 3 and Article 8 will need to be remade.

38. In the circumstances, the decision of the First-tier Tribunal cannot stand and must be set aside to be remade.

Remittal

39. When a decision of the First-tier Tribunal has been set aside, section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions, or it must be remade by the Upper Tribunal. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal. The errors infecting the First-tier Tribunal decision vitiates all other findings of fact and the conclusions from those facts so that there has not been a valid determination of the issues in the appeal.
40. In all the circumstances, at the invitation and request of both parties to relist this appeal for a fresh hearing in the First-tier Tribunal, we do so on the basis that this is a case which falls squarely within the Senior President's Practice Statement at paragraph 7.2.

Decision

41. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

We set aside the decision.

We remit the appeal to be decided afresh in the First-tier Tribunal in accordance with the attached directions.

Signed DMW Pickup

Upper Tribunal Judge Pickup

Dated **29 May 2019**

Consequential Directions

1) The appeal is remitted to the First-tier Tribunal sitting at Birmingham;
2) The appeal is to be decided afresh with no findings of fact preserved;
3) The appeal may be listed before any First-tier Tribunal Judge, with the exception of Judges Bart-Stewart and Woodcraft;

Signed DMW Pickup

Upper Tribunal Judge Pickup
Dated 29 May 2019