Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: UI-2022-000676
PA/52833/2021; IA/08183/2021

THE IMMIGRATION ACTS

Heard at Field House, London	**Decision & Reasons Promulgated**
On Monday 1 August 2022	**On Wednesday 14 September 2022**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

PM
[ANONYMITY DIRECTION MADE]

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
An anonymity order was made by the First-tier Tribunal. This is an appeal on protection grounds. It is therefore appropriate to continue that order. Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies, amongst others, to both parties. Failure to comply with this direction could lead to contempt of court proceedings.

Representation:
For the Appellant: Ms J Bond, Counsel instructed by Fadiga and Co solicitors
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer.

DECISION AND REASONS

BACKGROUND

1. The Appellant appeals against the decision of First-tier Tribunal Judge Head dated 7 December 2021 ("the Decision"). By the Decision, the Judge dismissed the Appellant's appeal against the Respondent's decision dated 25 May 2021 refusing her protection and human rights claims. The Appellant's challenge is to the Judge's dismissal of her appeal on protection grounds.

2. The Appellant is a national of the Democratic Republic of Congo (DRC). However, she left that country aged seven years. Prior to her arrival in the UK, the Appellant lived in South Africa with her family, renewing status documents every six months. She claims to be at risk on return to South Africa as a result of events occurring in 2015 and 2019. Between those two dates, the Appellant also went to Germany in 2017. She claims that she was subjected to attempted trafficking in Germany and assisted by a pastor to return to South Africa.

3. The Judge disbelieved the entirety of the Appellant's claim, also finding that she could return to DRC where she did not claim to be at risk on return.

4. The Appellant appeals on five grounds which can be summarised as follows:

   Ground 1: The Judge has made findings not supported by evidence and/or inadequately reasoned.

   Ground 2: The Judge has applied a standard of proof higher than reasonable likelihood.

   Ground 3: The Judge has misapplied the Court of Appeal's judgment in TK (Burundi) v Secretary of State for the Home Department [2009] EWCA Civ 40 ("TK (Burundi)") to the evidence.

   Ground 4: The Judge has failed to determine the case on the basis of the facts before her.

   Ground 5: The Judge has erred in her findings in relation to return to DRC.

5. Permission to appeal was refused by First-tier Tribunal Judge Dainty on 10 February 2022 in the following terms so far as relevant:

   > "… 3. The Judge has made an arguable error in failing to consider that the evidence from the hospital in South Africa is not evidence readily available 'within this jurisdiction'. It is arguable this affected her whole assessment of credibility of the Appellant. It is however in my view not a material error because the Judge goes on to find in the alternative that the Appellant can avail herself of protection in the DRC. There is no arguable error of law

> in the Judge's consideration of this point. She has confirmed at [21] that she is applying the lower standard of proof and at [25] that she has considered Professor Aguilar's report in detail. It is not arguable that she has overlooked the conclusion of the expert at paragraph 49 of the report (as asserted in the grounds) rather she has rejected it for the reasons given at [48] – [50] of the decision."

6. Following renewal of the application for permission to appeal to this Tribunal, permission was granted by Upper Tribunal Judge Macleman in the following terms so far as relevant:

> "... 2. FtT Judge Head dismissed [the Appellant's] appeal. FtT Judge Dainty refused permission to appeal to the UT, on the view that although ground 3 disclosed an arguable error affecting the credibility assessment, it was immaterial in light of the finding on return to DRC.
>
> 3. Ground 3 looks for a perhaps doubtful distinction on whether the appellant might have provided evidence from South Africa. The correct question may be whether evidence is readily available to an appellant who is in the UK, not whether a witness or a documentary source is physically in the UK.
>
> 4. However, if there was an error in terms of ground 3, and if it affected credibility, that arguably feeds into ground 5, on whether the appellant established that she had no family contacts in DRC, and on the extent of risk to any woman returning there.
>
> 5. Grounds 1, 2 and 4 may not turn out to be more than selective disagreement on the facts, partially disguised in terms such as 'a much higher standard of proof'; but the grant of permission is not restricted."

7. The Respondent filed a Rule 24 reply dated 31 May 2022, seeking to uphold the Decision on the basis that the Judge "directed himself [sic] appropriately" and making the following submission:

> "... 3. The grounds are a disagreement with the findings of the judge. The Secretary of State does not accept that the judge was in error in expecting the appellant to support her claim with evidence from the hospital. The appellant was aware that this was an issue but had made no attempt to obtain this potentially corroborative evidence and could offer no explanation as to why. It is considered that that argument that as this evidence was not 'in the jurisdiction' is an artificial distinction. The determination shows that the judge carefully considered the appellant's evidence and gave sound reasons for finding her account not credible."

8. The matter comes before me to decide whether there is an error of law in the Decision and, if I conclude that there is, whether to set aside the Decision for re-making. If the Decision is set aside, I may either retain the

appeal in this Tribunal for redetermination or remit it to the First-tier Tribunal to re-hear the appeal. Both representatives agreed that if I were to find an error, the appeal should be remitted as the challenge is to the Judge's findings in relation to credibility. If those findings were in error, the appeal would require to be redetermined afresh.

9. I had before me a bundle of the core documents in the appeal, as well as the Appellant's and Respondent's bundles as before the First-tier Tribunal. I refer to documents in the Respondent's bundle as [RB/xx] and the Appellant's bundle as [AB/xx].

10. Having heard submissions from Ms Bond and Mr Tufan, I indicated that I would reserve my error of law decision and issue that in writing. I therefore turn to that consideration.

DISCUSSION AND CONCLUSIONS

11. I take the grounds in the order they were dealt with in submissions as there is some overlap between some of the grounds as pleaded. I begin by observing that the challenge to the Judge's findings relates only to events which the Appellant claimed occurred in 2015. As Mr Tufan pointed out, the Appellant claimed to be at risk predominantly due to events which she says occurred in 2019. None of the findings dealing with those events (at [33] to [40] of the Decision) are challenged.

Ground 1

12. The first ground relates to what the Judge says at [27] of the Decision as follows:

> "The appellant claims that her and her family were subject to a violent xenophobic attack in their home in January 2015, at the hands of the gang of King Goodwill, a Zulu Chief. The appellant claims that during the attack her back was broken and she was required to spend six months in hospital recovering. I note that a similar attack was reported in the media to have taken place in April 2015, I find it surprising, given the level of violence the appellant claims took place in the attack, that no such attack has been reported in the media. I note that after the claimed attack, apart from some anonymous phone calls, the appellant claims that her and her family were able to remain in their home without further incident."

13. As the Appellant points out in her grounds, what is there said has to be seen also in context of the Judge's first observation that xenophobic attacks do take place in South Africa and that the Appellant's account was broadly consistent with the background evidence in this regard ([24] of the Decision). As such, the expert report on which the Appellant relies of Professor Mario Aguilar ([AB/13-29]) which sets out general crime statistics for 2013-15 and provides details of some reports of violence, particularly against women and some relating to violence against foreign women (in

the period, it appears, from 2016 onwards although some references are not clearly dated), is not inconsistent with the Judge's appraisal of that evidence.

14. The Judge refers specifically at [27] to a media report which is cited in the Respondent's refusal letter ([45] at [RB/12]). The point is made by the Appellant that this media report, taken also in the context of Professor Aguilar's report about generalised violence, shows that violence against foreigners comes in "waves" and therefore the Judge was not entitled to disbelieve the Appellant merely because the attack against her was not the subject of any media report.

15. This ground is without any evidential foundation. The pleaded ground, as also Ms Bond's submission, pre-supposes that there is evidence that the BBC article to which the Judge makes reference shows that the "latest wave of violence" began before April 2015 and was therefore capable of encompassing also the attack which the Appellant claims occurred in January 2015. The difficulty is that the article as cited does not say when the wave in April 2015 began.

16. Nor does the report of Professor Aguilar point to any evidence of a "wave" of violence which began in early 2015. The Appellant does not produce any evidence which would support the submission at [8] of the grounds that "there is a significant amount of background evidence to support A's claim". The Appellant herself provided no such background evidence apart from that referred to in Professor Aguilar's report. As I have already pointed out, his evidence about specific attacks on non-South Africans and particularly violence against females stems from 2016. There are some general statistics on crime in the period 2013-15 but Professor Aguilar does not provide evidence that the "wave of violence" in Durban, reported by the BBC in April 2015 began any earlier than that month.

17. The Judge could only deal with the evidence which she had before her. That did not show that violent attacks were taking place in Durban at the time when the Appellant says she was attacked.

18. In any event, as Mr Tufan pointed out, the remark made by the Judge that the lack of media coverage was surprising was not the Judge's only reason for finding the Appellant not to be credible as to this attack.

19. I asked Ms Bond whether the Appellant challenged in particular the final sentence of [27] which casts doubt on the Appellant's account because she and her family were able to stay in the same area and house for a number of years after she says that the attack took place. Ms Bond's response that she had "forgotten" to challenge that finding did not however explain how she could have challenged it. She said that the Appellant had been in hospital for some time after the attack but the Judge notes this also at [27] of the Decision. That does not explain how or why the Appellant and her family would remain in the same area and the same

house in which they claimed to have been attacked for the following eighteen months to two years.

Ground 4

20. That brings me on to the fourth ground which challenges what is said at [28] of the Decision as follows:

> "The appellant claims that she went to Germany with her church in 2017, I find that the appellant has failed to give a credible explanation as to why she did not seek to claim asylum in Germany, if, as she claims, she had been subject to such a violent xenophobic attack in South Africa, I find her account of actively seeking to return to South Africa lacks credibility."

21. It is said in the pleaded grounds that the Appellant did not say that she feared persecution when she left South Africa in 2017 and it is for that reason that she did not claim asylum at that time (two years after the attack in 2015). It is said that the Judge therefore erred in finding that the Appellant's claim of what happened in 2015 was not credible due to her failure to claim asylum in Germany at that time. Ms Bond said that this was simply a visit to Germany and that the 2015 events were relied upon not as reason of themselves for claiming asylum but were merely background to the 2019 events which were the Appellant's reason for leaving South Africa.

22. I begin by noting that the Appellant's account is inconsistent with the pleaded grounds and Ms Bond's submission. The Appellant says at [7] of her statement dated 21 December 2020 ([RB/96]) that she and her family "were living in fear and were unable to go out because we were scared of what might happen to us". That statement makes no mention of the trip to Germany. That is dealt with in the asylum interview at [Q124] to [Q140] ([RB/80-83]). The Appellant said that she travelled to Germany with a Church group in January 2017. She stayed for six months. What she recounts in answer to [Q131] appears to be an attempt at trafficking but the Appellant refused to go with the "Abbott" who took her to Germany and instead sought refuge in a catholic church. Although she says in her subsequent statement dated 13 September 2021 at [37 ([AB/8]) that she did not know how to claim asylum, that is inconsistent with being assisted by a church in Germany to seek refuge and return to her home country and, more importantly, inconsistent with what is said in the grounds challenging the Decision and the way in which Ms Bond put the case.

23. Even leaving aside the inconsistencies between the way in which the Appellant's case was put before the Judge and is now put, in any event, the Judge was entitled not to accept the Appellant's explanation for not claiming asylum. This was not simply a failure to claim asylum in another country, for example, where an asylum seeker travels through that country en route to the UK. This was a case where the Appellant not only did not seek asylum but when assisted by an organisation within that country, actively sought to return to South Africa, a country where, on her case as

before the Judge, she feared ill-treatment. The Judge was entitled to take into account that course of events when judging the credibility of the account of what had happened to the Appellant up to that point in time and to disbelieve the account of the events in 2015 as a result.

Grounds 2 and 3

24. The second ground can be split into three parts. The first ([10] and [11] of the grounds) raises again the issue raised in the first ground. It is said that the Judge's reliance on the absence of media reporting of the incident in January 2015 amounts to an adoption of a higher standard of proof. For the reasons I have already given, the Judge was entitled to rely on the lack of media reporting in the context of the background evidence. The Judge properly self-directed herself as to the applicable standard of proof at [21] and [26] of the Decision. There is nothing to suggest that she adopted any higher standard of proof when assessing the claim against the background evidence.

25. In fact, the main complaint made by the Appellant in this regard appears at [12] of the grounds read with the third ground. The Appellant submits that the Judge adopted too high a standard of proof and/or impermissibly required independent corroboration of the claim. This relates specifically to the Appellant's claim to have been hospitalised in South Africa for six months following the 2015 incident.

26. The Judge deals with this at [29] to [32] of the Decision as follows:

> "29. The appellant was asked in her evidence if she had approached the hospital where she was admitted for six months for evidence of her treatment and the injury sustained, the appellant confirmed that she had not.
>
> 30. The appellant has been in the UK for over 2 years and has failed to seek assistance and/or clarification from the hospital in South Africa. I find that if the appellant truly had been admitted into hospital for such a significant period of time with such a significant injury, then she would have contacted the hospital to obtain confirmation of this. The fact that she has not, is in my view, indicative of the fact she has not been honest in relation to this aspect of her account.
>
> 31. I appreciate that there is no strict need for any documentary or indeed, any corroborative evidence in a claim for international protection in an appeal such as this. That being said, the appellant could have easily contacted the hospital for confirmation and she has not.
>
> 32. I have considered the absence of evidence line with TK (Burundi) v SSHD (2009) EWCA Civ 40 and note, that where there are circumstances in which evidence corroborating the appellant's evidence was easily obtainable, the lack of such evidence must affect the assessment of the appellant's

> credibility. I find that the appellant, was in a position to obtain clarification from the hospital, her failure to do so, is in my view, indicative of the lack of credibility in relation to her claim."

27. It is necessary to spend some time dealing with the third ground which focusses on what is said in TK (Burundi). This is the ground which First-tier Tribunal Judge Dainty found to be arguable, albeit not materially so, based on the way in which the ground was pleaded by the Appellant. Upper Tribunal Judge Macleman however, found the distinction which the ground sought to draw to be "perhaps doubtful". I agree with Judge Macleman's view for the reasons which follow.

28. In TK (Burundi), the Court of Appeal was grappling, as it said at [1] of the judgment with "the importance which can attach to the provision of independent supporting evidence where it is readily available and the part its absence can play in determining overall credibility where no credible explanation is provided for its absence". By the time that the case reached the Court of Appeal, the context in which the issue arose was an Article 8 claim and not a protection claim. I accept that the "independent supporting evidence" in that particular case was evidence from and about the appellant's partner and former partner both of whom were living in the UK.

29. In relation to the issue which the Court identified as the relevant issue of law at the outset, it held as follows:

> "16. Where evidence to support an account given by a party is or should readily be available, a Judge is, in my view, plainly entitled to take into account the failure to provide that evidence and any explanations for that failure. This may be a factor of considerable weight in relation to credibility where there are doubts about the credibility of a party for other reasons. I accept, as did the Judge, that Miss Mutoni, his first partner, might well have been reluctant to help, but there was no evidence that any attempt had been made to seek her help in circumstances where her failure to help would result in serious financial disadvantage to the support to her child, and no evidence as to the payments alleged to have been made. Nor in my view can Immigration Judge Scobie in any way be criticised for his rejection of the appellant's account of why he had not sought evidence from his current partner, Miss Ndagire. In my view the approach of the Judge on the evidence before him was an approach he was entitled to take in assessing the appellant's credibility; there was no error of law. On that evidence, he was entitled to reach the view that the family life was not as strong as the appellant claimed or in other words not strong at all. He was therefore entitled to come to the conclusion he demonstrably arrived at with great care, that the balance under Article 8 came down in favour of the appellant being returned to Burundi. In my

> judgment, there was no error of law and this ground of appeal fails."

30. Paragraph [16] of the judgment therefore sets out the ratio of the judgment (contrary to Ms Bond's submission). Ms Bond relies in her grounds on [21] of the judgment. The Court was there dealing with further evidence which had been produced by the appellant in that case. As I say, this appeal concerned at that time only Article 8 ECHR and specifically the appellant's family life with his children and their mothers. It stands to reason that the evidence was therefore from within the UK. For ease of reference below, I set out what was said at [21] (cited in part at [17] of the Appellant's grounds in this case):

> "The circumstances of this case in my view demonstrate that independent supporting evidence which is available from persons subject to this jurisdiction be provided wherever possible and the need for an Immigration Judge to adopt a cautious approach to the evidence of an appellant where independent supporting evidence, as it was in this case, is readily available within this jurisdiction, but not provided. It follows that where a Judge in assessing credibility relies on the fact that there is no independent supporting evidence where there should be supporting evidence and there is no credible account for its absence commits no error of law when he relies on that fact for rejecting the account of an appellant."
>
> [my emphasis]

The citation at [17] of the grounds omits the final sentence of that paragraph which reiterates what is said at [16] of the judgment.

31. Before turning to my understanding of what is said in TK (Burundi) and the allegation that the Judge has misunderstood it, I refer to the other cases to which the parties referred me in oral submissions.

32. I do not need to refer in any great detail to the Court of Appeal's judgment in AG and others v Secretary of State for the Home Department [2006] EWCA Civ 1342 which Mr Tufan produced. That case pre-dates TK (Burundi) and cannot therefore provide any useful analysis of what is there said. However, what is said at [106] of the judgment about the distinction between the "absence of corroboration" and the requiring of it appears to me to be consistent with the distinction drawn in TK (Burundi). Further, this was in the context of a protection claim and moreover in the context of evidence from a person outside the UK.

33. Ms Bond took me to two cases post-dating TK (Burundi). Both concern protection claims. The first is MH (review; slip rule; church witnesses) Iran [2020] UKUT 125 (IAC). As Ms Bond accepted, what it has to say about TK (Burundi) is not part of the guidance for which the case is reported. Nonetheless, it is helpful to see what the Presidential panel made of TK (Burundi) as that appears at [20] and [21] of the decision following a

summary of the competing submissions at [16] and [19] of the decision as follows:

> "16. For the Secretary of State, Ms Cunha submitted that the judge's findings had been properly open to him for the reasons he had given. Insofar as the judge was criticised for noting the absence of evidence which should have been readily available to the appellant, it was permissible for him to do so: TK (Burundi) v SSHD [2009] EWCA Civ 40; [2009] Imm AR 488….
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> …
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> 19. Ms Jones made three points in response. Firstly, even if this was a case such as TK (Burundi), in which the absence of readily available evidence could be held against the appellant, it was not clear what evidence of marital disharmony was actually expected by the judge …
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> …
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> 20. In all but one respect, we do not consider Ms Jones to have established that the judge erred in law in the extensive reasons he gave for rejecting the appellant's account.
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> 21. As to the first of her submissions (which we heard *de bene esse* in the absence of a clear reference in the grounds), we do not accept the submission that the judge *required* the appellant to corroborate her account. The judge stated at [37](iii) that he would have "expected some written communication" and not that he was unable to accept the appellant's account without the same. As Ms Cunha submitted, the former approach accords with decision of the Court of Appeal in TK (Burundi), in which Thomas LJ (as he then was) stated at [16] that a judge was 'plainly entitled' to take into account the absence of supporting evidence which is or should be readily available (Moore-Bick and Waller LJJ agreed)."

34. The context of the Tribunal's findings in this regard related not to the evidence of the Church witnesses as Ms Bond appeared to suggest but to the absence of evidence from the appellant's husband ([11] of the decision). I accept however that he was within the UK. The protection claim was concerned with sur place activities and so that is unsurprising. It is worthy of note that the Tribunal referred to [16] of the judgment in TK (Burundi) as setting out the Court's decision on the principle there raised.

35. The second case is SR (Sri Lanka) v Secretary of State for the Home Department [2022] EWCA Civ 828 ("SR (Sri Lanka)"). The Court of Appeal referred to TK (Burundi) at [95] of the judgment as follows:

> "I reject Mr Mahmood's submission that the FtT erred in law in paragraph 23 of the 2020 determination because that paragraph shows that the FtT did not consider the evidence as a whole before reaching its overall conclusion. In assessing A's explanation for not calling witnesses the FtT was, as is clear from

> the structure of the 2020 determination, considering an issue which was distinct from its evaluation of A's claim as a whole. The FtT was entitled to express its surprise that A had not called available supporting evidence. The FtT was also entitled, as it did, to take into account its view that A's explanation for that failure was not credible in the distinct exercise of evaluating his claim (paragraph 47): see paragraph 16 of the judgment of Thomas LJ (as he then was) in *TK (Burundi) v Secretary of State for the Home Department* [2009] EWCA Civ 40, to which Mr Keith referred in his skeleton argument."

36. I accept that the evidence to which the Court of Appeal was referring in that appeal was evidence from witnesses within the UK. I also note that the Court of Appeal referred at [49] of the judgment to the First-tier Tribunal Judge's finding that the appellant could not be expected to obtain evidence of his name being on a "stop list" in Sri Lanka. That is unsurprising given that the appellant's claim was that he would be at risk from the authorities in Sri Lanka. The Judge did not therefore hold that absence of evidence against the appellant in terms of credibility. It is evident from what is said at [49] of the Court of Appeal's judgment that it considered that the Judge was right to make that finding. I observe that the Court of Appeal again referred to [16] of the judgment in TK (Burundi) as the relevant paragraph setting out the Court's decision on the principle.

37. The Appellant submits that the Judge in this appeal has misunderstood what was said in TK (Burundi). As I have already noted, reliance is placed on [21] of the judgment whereas the ratio of the judgment appears at [16] of the judgment. That is why both the Tribunal in MH (Iran) and the Court of Appeal in SR (Sri Lanka) drew attention to that paragraph. I have also already mentioned that the last sentence of [21] of the judgment has been omitted from the pleaded grounds. That reiterates the principle that "[w]here evidence to support an account given by a party is or should readily be available, a Judge is … plainly entitled to take into account the failure to provide that evidence and any explanations for that failure" (to quote from TK (Burundi)).

38. As the Court goes on to say in TK (Burundi), "[t]his may be a factor of considerable weight in relation to credibility where there are doubts about the credibility of a party for other reasons". Judge Head did not err when setting out the principle (save perhaps for the reference at [32] of the Decision to "must" rather than "may" since issues of credibility are very much a matter of discretion; that is not however a point taken by the Appellant and nor do I consider it to impact on the Judge's credibility analysis read as a whole).

39. I turn then to what Ms Bond seeks to draw from the part of [21] of TK (Burundi) which she does cite at [17] of her grounds. First, she says that the Judge failed to take into account that evidence said to be absent in TK (Burundi) and the other cases referring to TK (Burundi) was all from those "subject to the jurisdiction" (and therefore that the principle cannot apply

to evidence available from outside the UK). Second, she says that the Judge must adopt a "cautious approach".

40. In relation to the first point, Ms Bond's submission is based on a misreading of what is said at [21] of the judgment in TK (Burundi). I have highlighted two passages from what is there said. The reference to evidence "subject to the jurisdiction" is not to the evidence per se but that which "is available from persons subject to this jurisdiction" (my emphasis). That must be right. An example may assist. A witness outside the jurisdiction of the courts in this country cannot, in most cases, give oral testimony in our courts without permission from the authorities in that person's home country.

41. Even in those circumstances, however, as was the case in AG and others to which I have referred at [32] above, a letter might be produced from a person outside the UK as independent corroborative evidence. That is the point being made by the Court of Appeal in the second part of [21] which I have emphasised above. The issue in relation to the evidence is whether it "is readily available within this jurisdiction". The Court does not refer to evidence being readily available "from within" this jurisdiction. The question is whether the evidence can be readily obtained and produced in an appeal. As in this case, a document might be produced in the form of a medical record to corroborate the evidence being given by the Appellant. That evidence would be provided from a person outside the UK but not a person who would be required to give any oral evidence. The document itself would be the medical record of the Appellant or a letter confirming that medical record. The Appellant is herself "subject to this jurisdiction". The issue is therefore whether the evidence is "readily available" to her. That is the issue which the Judge considered at [32] of the Decision.

42. What is said at [21] of the judgment in TK (Burundi) therefore does not restrict the principle there stated in the way which the Appellant contends. The Judge was therefore entitled to rely on the absence of medical evidence from South Africa when reaching her credibility findings.

43. In relation to the second point, it stands to reason that in a protection claim, an appellant may not be in a position to obtain evidence (documentary or otherwise) from his or her home country. That is particularly the case as in SR (Sri Lanka) where an appellant claims to fear the authorities in his or her home country (see [49] of the judgment in that case). Even in those cases, however, much depends on the nature of the evidence. There may be evidence related to a protection claim which is however readily obtainable without recourse to the authorities of the State. That is not in any event this case. The Appellant claims to fear non-State agents. The evidence which was said to be lacking related only to her medical condition and hospitalisation. None of that could relate to her claimed fear (nor did she say that it did). As the Judge said, the principle applies only if the evidence is "easily obtainable". The Judge was entitled to find that it was obtainable in this case for the reasons she gave at [30] and [31] of the Decision.

44. At [19] of the grounds, the Appellant makes the point that she said in interview that the discharge documents were in her family house and that she did not have contact with her family. She was not believed about that lack of contact ([52] of the Decision). However, leaving that aside and even if she did not have copies of the documents which she was given at the time of discharge, that does not mean that she could not obtain copies from the hospital. More importantly, that was not the explanation which the Appellant gave in cross-examination (see [21] of the grounds and [29] of the Decision). It was open to her to give that explanation and it would then have been a matter for the Judge to consider it. The Judge can only consider a case based on the evidence given.

45. For the foregoing reasons, ground 3 does not disclose an error of law.

46. I return then to the third part of the second ground raised at [13] and [14] of the grounds. This relates to [43] of the Decision. That paragraph has however to be read in the context of [41] to [44] of the Decision as follows:

> "41. I do not accept that the appellant's account of events in South Africa is a reliable one. I have considered the risk, if any, to the appellant on return to South Africa.
>
> 42. I do not find the background material relied upon by the expert supports the conclusions at paragraph 29 that; 'It is very likely that the appellant will face physical attacks by gangs on return to South Africa on account of being a young foreign woman'
>
> 43. I note the background material in the CPIN at 18.1.2 states 'there are an estimated 3.6 million migrants in the country'. It has not been submitted on the appellant's behalf that all foreign women are at real risk of serious harm in South Africa, I conclude that such a suggestion would be absurd.
>
> 44. Although it is clear that xenophobic attacks take place in South Africa, I do not accept that the appellant has given a credible account and I conclude that she has not been a victim of such attacks. I do not find that she would be at real risk of serious harm on return to South Africa."

47. I accept of course that the issue for the Judge was whether this Appellant is at risk and not whether all non-South African women in South Africa are at risk. However, what is said at [43] of the Decision is in the context both of the Judge's consideration of the background evidence and a response to the views of the expert as set out at [42] of the Decision. The Judge had indicated at the outset of her consideration that there was background evidence of xenophobic attacks in South Africa ([24] of the Decision). Having considered the Appellant's claim of what had happened to her personally at [27] to [40] of the Decision, the Judge rejected that account at [41] of the Decision. As an aside and as Mr Tufan pointed out, the reasons given for finding the Appellant not to be credible in relation to the 2019 events are not challenged at all.

48. Having not accepted the Appellant's account, the Judge had to consider the claim against the other evidence, being the expert report and the background evidence. That is the task which she was undertaking at [42] to [44] of the Decision. The expert had provided a view that the Appellant would be at risk simply on account of being "a young foreign woman". The Judge did not accept that view based on the background evidence as set out at [43] of the Decision. Having considered that evidence and whilst accepting that the background evidence did show that xenophobic attacks take place in South Africa, the Judge therefore rejected the Appellant's claim to be at risk in South Africa. There is no error disclosed in relation to [43] of the Decision.

49. For the foregoing reasons, the second and third grounds do not disclose any error of law.

Ground 5

50. The fifth ground deals with risk to the Appellant in DRC. As both representatives accepted, the Respondent had not dealt with the Appellant's claim in relation to her country of nationality. That is probably because she did not claim to be at risk there. Although she is a national of that country, she left it when she was a child.

51. Ms Bond made the point that the Respondent may not be able to return the Appellant to South Africa as she had only a renewable residence permit to live there. As she accepted, however, that was not a matter for the Judge in this appeal. It would arise only if the Respondent seeks to return the Appellant to South Africa and is unable to do so. If the Respondent thereafter sought to return the Appellant to DRC and if the Appellant then claims to fear return to that country, she would have to make another protection claim.

52. I accept however that this does not render what is said by the Judge about return to DRC to be immaterial. Various credibility findings have been made upon which the Respondent might well seek to rely in the event that return were subsequently sought to DRC (see also [4] of the terms of the permission grant albeit I have found no error in relation to ground 3).

53. The Judge deals with return to DRC at [46] to [54] of the Decision as follows:

> "46. I note that Article 1A(2) of the Refugee Convention makes clear in cases in which a claimant has more than one nationality, she will not qualify as a refugee if, she can avail herself of the protection of another country of which she is a national. In this instance, the appellant is a national of the DRC and accepted to be a resident of South Africa. Therefore, I find, that if the appellant does not want to return to South Africa, she can return to the DRC, the country of her birth and her nationality.

> 47. The only reason given by the appellant as to why she cannot return to the DRC, is that she left when she was a child. The appellant makes no mention of herself or her family suffering any problems in the DRC and confirms that she continues to be a citizen of the DRC.
>
> 48. I have considered in detail the expert report of Professor Mario Aguilar. I note that at paragraphs 49, the expert states; 'If return to the DRC and with a very violent state, particularly violence towards women, including rape and human trafficking, the appellant will be at risk of destitution, violence, rape and human trafficking because of no family protection.'
>
> 49. I have considered what the expert says, however, I note that the references made within his report are to attacks against women and babies in the DRC between 1993 and 2003, in the region of Bakavu. I do not find that references to mistreatment of women 18 to 23 years ago, can assist me in determining what risk the appellant may face on return to the DRC today.
>
> 50. No background material was cited or relied upon to support the claim that the appellant, returning now as an adult woman to Kinshasa, would be a real risk of serious harm solely on account of being a female without a male relative to support her.
>
> 51. It is the appellant's case that both her parents are from the DRC and that her immediate family moved to South Africa when the appellant was 7 years of age. In her oral evidence she stated that she does not know where her family members are located in the DRC and that she has never seen any of her father's relatives.
>
> 52. I do not accept as credible, that the appellant has lost all ties with her family in South Africa or her wider family in the DRC.
>
> 53. I find that the appellant can if she so wishes, return to the DRC. Although she has not lived there since she was 7 years of age, she is entitled to live there and I do not find there is a real risk to her for any reason, if she chooses to return there now.
>
> 54. I conclude that the appellant has failed to establish even to the lower standard, that she would be at risk on return to either South Africa or the DRC."

54. The first point made in the grounds is that the Judge has ignored Professor Aguilar's report or made findings which are inconsistent with it. Professor Aguilar says at [49] of the report ([AB/27]) that "[i]f returned to the DRC, and within a very violent state, particularly violence towards women, including rape and human trafficking, the appellant will be at risk of destitution, violence, rape, and human trafficking because of no family protection." The Appellant emphasises the last five words in her grounds. I fail to see how that assists her since the Judge did not accept that the Appellant had lost her family ties. The same can be said of the Professor's

reference to the Appellant returning as a lone woman at [41] of the report and that she "has no family to help her in the DRC" ([42] of the report).

55. The conclusion at [49] of Professor Aguilar's report also has to be read in the context of his analysis of the background evidence at [43] to [46] of the report. As the Judge points out, [46] of the report ([AB/26]) refers to violence between 1993 and 2003 which is historic.

56. The high point of Ms Bond's submission is that the Judge has overlooked the reference to the US State Department report (footnote [10] of the report – [AB/25]). That report is not within the Appellant's bundle, and I was not taken to it. I have however read it in full. The first point to make is that it is concerned with trafficking, largely of children and non-DRC nationals. Second, I can find nothing to substantiate a generalised risk of trafficking and forced prostitution to any lone woman as Professor Aguilar suggests is the case. Third, I hunted in vain for any reference to DRC being "the world capital of rape" as Professor Aguilar describes it at [43] of the report. In fact, reading on to [44] of the report, that appears to come from an article written by the expert himself in 2015 (see footnote [11]). It is not entirely clear when the events to which reference is made at [44] and [45] took place. However, since they refer to a Dr Mukwege who was awarded the Nobel Peace Prize in 2018, they must pre-date that year. What is said at [45] of the report suggests that the events took place about fifteen years ago. As with the US State Department report, none of the underlying background evidence is in the Appellant's bundle.

57. Whilst I accept that the Judge has not made reference to the US State Department report expressly and that this is from 2019, for the reasons explained above, it is not clear how it relates to this Appellant's case. More importantly, read as a whole, it does not provide support to the generalised conclusion reached by Professor Aguilar that any lone woman returning to DRC "will be at risk of destitution, violence, rape and human trafficking" with or without family protection. As the Judge found at [50] of the Decision, therefore, there is no material which supports Professor Aguilar's generalised conclusion that an adult woman returning to Kinshasa would be at risk solely on account of being a lone female.

58. The point made at [27] and [28] of the grounds cannot possibly avail the Appellant. As is there accepted, the Judge was not taken to the Home Office Country Information and Policy Note ("the CPIN"). For completeness, I have read the paragraphs cited in context. As is pointed out at [2.2.2] of the CPIN, merely because women are a particular social group due to their innate characteristic as such, does not mean that any woman in DRC who is a member of that group has a well-founded fear of persecution. As the section of the report at [2.4] makes clear, although sexual harassment and violence (including rape) and domestic violence are prevalent, incidents are regional and/or depend on individual characteristics. Not all women are at risk.

59. It is also worthy of note that the Appellant does not herself claim to be at risk in DRC. As is pointed out at [47] of the Decision, the only reason that the Appellant gives for not being able to return to DRC is that she left when she was only a child.

60. For those reasons, the Judge was entitled to make the findings she did in relation to risk in DRC.

CONCLUSION

61. For the foregoing reasons, I conclude that the grounds do not disclose any error of law in the decision of First-tier Tribunal Judge Head. I therefore uphold the Decision with the consequence that the Appellant's appeal is dismissed.

DECISION

I am satisfied that the Decision does not involve the making of a material error on a point of law. I therefore uphold the Decision of First-tier Tribunal Judge Head dated 7 December 2021 with the consequence that the Appellant's appeal remains dismissed.

Signed L K Smith` Dated: 3 August 2022

Upper Tribunal Judge Smith