



**Upper Tribunal
(Immigration and Asylum Chamber)**

BM (false passport) DRC [2015] UKUT 00467 (IAC)

THE IMMIGRATION ACTS

**Heard at Field House, London
on 23 July 2015**

**Determination
promulgated**

.....

Before

**The Hon. Mr Justice McCloskey, President of the Upper Tribunal
Upper Tribunal Judge Jordan**

Between

BM

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

Appellant: Ms S Naik, of Counsel, instructed by McGarvey Immigration
and Asylum Practitioners

Respondent: Mr D Blundell, of Counsel, instructed by the Government
Legal Department

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. Thus in every case there will be an intense focus on matters such as publicity, individual prominence, possession of a passport, the standard emergency travel document arrangements (where these apply) and how these matters impact on the individual claimant.

ANONYMITY

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI2008/269) an Anonymity Order is made. Unless the Upper Tribunal or Court orders otherwise, no report of any proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant. This prohibition applies to, amongst others, all parties.

DECISION AND REASONS

Introduction

1. The consideration of this Appellant's appeal in BM and Others (Returnees: Criminal and Non-Criminal) DRC CG [2015] 293 (IAC) (hereinafter "*the Country Guidance decision*") was incomplete for the reason specified in [111] thereof. This foreshadowed a further hearing in order to complete the determination of this Appellant's appeal.
2. Such hearing has now been conducted. It entailed oral evidence from the Appellant, the reception of a new witness statement and the consideration of Counsel's submissions, both written and oral. The framework within which this supplementary decision is provided is shaped by [119(iv)] of the Country Guidance decision:

"The DRC authorities have an interest in certain types of convicted or suspected offenders, namely those who have unexecuted prison sentences in DRC or in respect of whom there are unexecuted arrest warrants or who supposedly committed an offence, such as document fraud, when departing DRC. Such persons are at risk of imprisonment for lengthy periods and, hence, treatment proscribed by Article 3 ECHR."

This passage, with appropriate editing, is to be applied to this Appellant in the following way:

“The DRC authorities have an interest in certain types of suspected offenders, namely those who supposedly committed an offence, such as document fraud, when departing DRC.”

3. It is this Appellant’s case that he travelled from DRC to the United Kingdom using a false passport. There is no evidence that conduct of this kind constitutes the offence of document fraud, or something kindred, under the domestic laws of DRC. However, the appeal was conducted on an assumption to this effect. Having no basis for rejecting this assumption, we shall proceed accordingly. We consider that two basic questions fall to be addressed:
 - (i) Did this Appellant, as he claims, employ a false passport in departing DRC and travelling to the United Kingdom?
 - (ii) If “yes”, does [119(iv)] of the Country Guidance decision apply to him?

As this formulation makes clear, the second question does not arise if the first is answered in the negative.

The Appellant’s Case

4. Our overview of the relevant parts of the evidence is as follows. We begin with the asylum screening interview, conducted on 26 July 2013, the transcript whereof records the Appellant’s assertion that he travelled to the United Kingdom by air from DRC, arriving on 12 July 2013, in possession of *“a borrowed passport that the agent gave me to travel here in the name of [XY]. The DOB 1977. It was a French passport.”* He repeated this in response to a later question.
5. The Appellant’s substantive asylum interview followed soon thereafter, on 05 August 2013. He claimed that he departed DRC from N’djili (which we construe from other evidence as Kinshasa) Airport, accompanied and assisted by an agent. He described in some detail his receipt of a passport from the agent and the instructions given to him in relation thereto. He asserted that following arrival in the United Kingdom the agent escorted him to the *“Home Office Building”*, explaining that the Appellant should go there to claim protection.

6. In the context of pursuing his asylum appeal, the Appellant made a statement dated 21 October 2013. This contains the following material passage:

“My brother in law brought a man to the house who took me to the airport and we arrived on a plane to the United Kingdom, arriving on 12 July 2013. The man provided me with a passport and told me to follow him through immigration control. He took the passport from me outside the airport. The same day he took me to Croydon and pointed out the building to claim asylum”

For the purposes of this appeal hearing, the Appellant made a second written statement, wherein he recounts:

“When I got to the airport, I was given the French passport by [the agent]. He told me to memorise the name on the passport and not to be afraid. [He] gave me the plane ticket which I used to travel

When we arrived at the airport in the United Kingdom I showed the passport to the Immigration Officer

Once I was through immigration control [the agent] took the passport from me

I used the false document because even if I had obtained a valid passport from the DRC I did not think I would have been able to get a visa to the UK. A French passport allowed me to travel to the UK. Because I am French speaking I thought I could convince people that I am a French national. I think I was given a French passport and not a Belgium one because there are many people in the DRC with Belgium passports and the immigration authorities might be able to more easily detect a false Belgium passport because they are relatively common

When I arrived in the UK I did not claim asylum at the airport. I was afraid that because I had a false document that I would get into trouble. If I am returned to the DRC the authorities will be aware that I have never had a passport of my own. If I am questioned upon return about how I left the DRC they will be able to ascertain that no one of my name left Kinshasa Airport on the day I left. I will have to tell the truth about how I left the country and how I used a false passport to do this.”

We interpose at this juncture an observation. This statement is dated 17 June 2015 and was generated approximately two weeks following promulgation of the Country Guidance decision. It remained in abeyance, however, until the morning of the reconvened hearing on 23 July 2015 when an application was made to admit it in evidence. Taking into

account the public law overlay of immigration appeals, we did not find the explanation proffered for the timing of this application satisfactory. Based on the explanation given, this witness statement would have been suppressed but for the pre-hearing intimation on behalf of the Secretary of State that the Appellant's claims relating to the use of a false passport were disputed. This was not entirely unexpected, since it was accepted on behalf of the Appellant that there had been no finding or concession in his favour on this issue in the Secretary of State's decision or otherwise.

7. The next piece of the evidential jigsaw is the determination of the First-tier Tribunal (the "FtT"). It is apparent from the text that the passport issue did not feature at this stage. However, the determination contains findings relating to the gravamen of the Appellant's asylum claim, which is that he was tortured and ill treated by agents of the DRC State because of his politically active support of an anti-government party, the UDPS. The Secretary of State found the essence of the Appellant's claim to be a fabrication and the FtT did likewise. In thus concluding, the Tribunal stated:

"The sole issue to be determined with regard to the Appellant's asylum account is credibility

We find after considering all the evidence that we can safely discount any possibility of the Appellant's asylum story being true."

The uncompromising terms of this rejection are striking. It is followed by the FtT's reasons for thus concluding. One of the core reasons was that a document which formed the centrepiece of the Appellant's case was a fabrication. Other reasons related to identified discrepancies in the Appellant's accounts. We need not elaborate on them at this juncture.

8. The Appellant gave evidence to this Tribunal. His examination in chief was confined to the formal adoption of his witness statements. Cross examination focused on a single issue. He confirmed that in evidence to the FtT he claimed to have been ill treated by the DRC authorities. Next, he acknowledged his awareness that the FtT had disbelieved his claims. He further confirmed that he was maintaining these claims unabated.
9. Having regard to what was ventilated at the hearing, we consider that there are two main issues, both factual, to be addressed. The first is the Appellant's claim that he made use of a false travel document to facilitate his departure from the DRC and his ensuing travel and entry to the United Kingdom. The second concerns the procedures and arrangements in force for the provision of emergency travel documents ("ETDs") to DRC nationals being repatriated by compulsion to their country of origin.

Consideration and Conclusions

10. The primary submission of Mr Blundell on behalf of the Secretary of State is encapsulated in the following passage in his skeleton argument:

“BM has been found wholly incredible. The entirety of his account of arrest, detention and ill treatment has been disbelieved. There is accordingly no reason why he would have needed to use a false passport to leave the DRC. Using a false passport to gain entry to the United Kingdom, on the other hand, remains consistent with the presentation of a false account of persecution since it perpetuates the (false) suggestion that BM needed to use such documentation to escape persecution.”

The riposte of Ms Naik on behalf of the Appellant had two main elements. First, it was submitted that the Appellant’s claims relating to the use of a false passport did not form a core part of his asylum application but, rather, constituted a “separate” issue. It was suggested that the impugned decision of the Secretary of State supports this construction. Second, it was submitted that, from the outset, the Appellant has been consistent in his false passport claim.

11. We take our cue from the findings of the FtT. By those findings the core of the Appellant’s assertions underpinning his asylum claim has been rejected – and in swingeing terms. Having regard to the Appellant’s screening and substantive asylum interviews (rehearsed above), about which there is no issue, we consider that his claims relating to all aspects of his interaction with an agent and his departure from and travel to the United Kingdom formed integral parts of his asylum application. They are elements of a whole. The suggestion that they should be in some way detached from the allegations of ill treatment is, in our judgment, as unsustainable as it is unrealistic. True it is that the Appellant has been consistent in his false passport claims and assertions. However, we consider that this does not avail him. We acknowledge the possibility that whereas there is an uncompromising judicial finding that the Appellant has fabricated elements of his asylum claim going to its very foundation, he might be telling the truth about the false passport. However, the mendacity of which he has been found guilty is so profound that we consider that it taints the entirety of his story.
12. Furthermore, in his recent statement the Appellant acknowledges the possibility that he could have obtained a valid passport to travel from the DRC. This undermines still further his ill treatment claims, and, simultaneously, weakens his false passport claim. Finally, in his evidence to this Tribunal, the Appellant has persisted in advancing a case which the FtT found to be wholly mendacious. If he had acknowledged these fabrications, his prospects of persuading this Tribunal of the truth of his false passport claim would have improved. However, he chose to

perpetuate a fabrication. In doing so, he sought to mislead and deceive this Tribunal. The conclusion that this deception infects the entirety of his story follows readily. For this combination of reasons, we find that his claim that he departed the DRC and travelled to the United Kingdom using a false passport to be fabricated.

13. The second issue, also a factual one, to which we now turn relates to the procedure for the grant of an ETD to DRC nationals who are the subject of enforced return to their country of origin. We directed an agreed statement of facts pertaining to this issue and this was duly produced. It is appended to this decision. Clearly, if our finding in relation to the Appellant's false passport claim had been favourable to him, this further evidence would have had a bearing on the question of whether he belongs to the risk category identified in [119(iv)] of the Country Guidance Decision.

14. In brief compass, the "ETD" process has the following main elements and features:

(i) The Home Office does not provide information to the DRC authorities about when or how any of its nationals departed the DRC.

(ii) A returning DRC national must apply for an ETD. This entails the completion of a *laissez-passer* form, which contains a question asking when the person arrived in the United Kingdom. The application is made to the DRC in London.

(iii) The ETD application is accompanied by a Home Office submission letter; passport size photographs; the aforementioned application form; the applicant's personal details; any supporting evidence; and supplementary evidence, such as an expired passport or driving licence.

(iv) ETD applicants are interviewed by a DRC official who questions the person concerned about when and how they left the DRC and about their passport.

The joint response of the parties' representatives also drew attention to the most recent Country Information and Guidance Report (July 2015) and, specifically, paragraphs 5.1.1 and 5.1.2, together with Annexes Q to T thereof. We note that in Annex N there is an instance of a repatriated DRC national being questioned by a DGM official at Kinshasa Airport about, *inter alia*, "..... how he had originally travelled to the UK"

15. In cases where there is a finding by a Tribunal that the appellant used a false passport or travel document when departing the DRC, it will be necessary to give effect to the above evidence (or any further or updated

relevant evidence) in applying [119](iv) of the Country Guidance decision. This exercise does not fall to be conducted in the present case in light of our finding that this Appellant's claim that he deployed a false passport in leaving the DRC is a fabrication. Building upon this finding, we further find that, as a matter of probability, there was nothing irregular about this Appellant's departure from the DRC and, in particular, it was effected by the use of a valid passport. In his second witness statement the Appellant claims that if questioned upon return he will have to inform DRC officials of *"the truth about how I left the country and how I used a false passport to do this"*. Giving effect to our principal finding above, we consider that this scenario is highly unlikely to materialise. Predictively, the most likely scenario is that the Appellant will not be questioned thus. We consider the second most likely scenario to be that in the event of being questioned he will tell the truth, as we have found this to be, there will be no self-incrimination and he will not be at risk of detention and, consequent thereon, treatment proscribed by Article 3 ECHR.

16. Finally, we address briefly the outworkings of [119(iv)] of the Country Guidance decision. At the hearing we suggested to both parties that in cases where it is established – whether by proof to the requisite standard or by concession – that the asylum claimant utilised a false passport or kindred document in departing DRC this will not, without more, trigger [119(iv)] of the Country Guidance decision. This analysis, we suggested, is clear from the words *"suspected offenders"* and *"who supposedly committed an offence, such as document fraud, when departing DRC"*. Neither representative dissented from this analysis. The country guidance on this discrete issue is, of necessity, broad and general in nature, having regard particularly to the evidence upon which it is based. Its application to a given asylum claimant will be dependent upon the fact sensitive context of their individual case. Predictably, one of the enquiries for the primary decision maker and, on appeal, the FtT, in every case, will be the likely state of knowledge of the DRC authorities pertaining to the person in question. All necessary findings of fact and/or evaluative assessments and/or predictions relating to this issue will be made on the basis of primary evidence and sustainable inferences from primary evidence or concessions. Fundamentally, a person claiming to belong to any of the risk categories will not be at risk of persecution unless he or she is likely to come to the attention of the DRC authorities upon return. Thus in every case there will be an intense focus on matters such as publicity, individual prominence, possession of a passport, the standard ETD arrangements where they apply and how these matters impact upon the individual claimant. We emphasise that this is not intended to operate as an exhaustive list.

Decision

17. We dismiss this Appellant's appeal and affirm the decision of the FtT.

Seamus McCloskey.

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE

UPPER TRIBUNAL

IMMIGRATION AND ASYLUM CHAMBER

30 July 2015