Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/02107/2014

THE IMMIGRATION ACTS

Heard at North Shields	**Determination Promulgated**
On 11 February 2015	**On 18 February 2015**
Prepared on 13 February 2015	

Before

DEPUTY UPPER TRIBUNAL JUDGE JM HOLMES

Between

J. B.
(ANONYMITY DIRECTION)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: in person
For the Respondent: Mr Dewison, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of the DRC who entered the United Kingdom as a child on 19 December 2005, in the company of two of her siblings. Her elder brother immediately claimed asylum, naming his sisters as his dependents. The names which the Appellant and her siblings used in that asylum application, were not consistent with the names that had been used in September 2005 in the visa applications

(supported by apparently genuine DRC passports) that they had made, or the name in which an ETD was obtained by the Respondent for the removal of her elder brother to the DRC on 26 May 2009.

2. The asylum claim made by her elder brother was rejected, and his appeal to the Tribunal was dismissed by Immigration Judge Timson in a Determination promulgated on 26 April 2006. Her elder brother's account of events was rejected as untrue, and that decision was made before the Tribunal was made aware of the inconsistency between the names in which he had made his visa application, and the name in which he had made his asylum application, and the inconsistency between the family details given in that visa application, and those given in his asylum application. The Appellant and her sister do not appear to have given evidence at that appeal. Further submissions were made on her elder brother's behalf, and they were rejected as advancing no fresh claim to asylum. An application for judicial review of that decision was rejected as without merit on 18 May 2009. Her elder brother was in consequence removed to the DRC on 26 May 2009 using an ETD that had been obtained by the Respondent for him from the DRC authorities. That ETD was issued to him in the same identity as that which he had used in the September 2005 visa application.

3. The Appellant made her own claim to asylum on 10 May 2009. That application was refused on 25 February 2014, but discretionary leave to remain was granted to her until 25 August 2016. The Appellant pursued an "upgrade" appeal to the Tribunal against that decision, which was dismissed by Determination of Judge Fisher promulgated on 3 July 2014.

4. The Appellant's application to the First Tier Tribunal for permission to appeal, as drafted, raised three complaints; that the Judge had made findings that were perverse; that he had not adequately considered the "*sur place*" claim; that he had failed to follow current country guidance in his assessment of the risk upon return. That application was refused by Judge Gibb on 23 July 2014 on the basis that the complaints, as drafted, were not arguable and amounted in reality merely to an attempt to reargue the appeal.

5. Undaunted the Appellant renewed her application for permission to appeal to the Upper Tribunal, which was granted on 2 October 2014 by Upper Tribunal Judge King in the following terms;

> *The Judge has dealt adequately with a number of issues affecting return as a woman and as a failed asylum seeker.*
>
> *It was accepted that the applicant had a minor role in APARECO although that role was not defined. The quote from BK did not reflect paragraphs 192, 193, and 197. In the light of such matters it is arguable the Judge should have given clearer reasons why there was no risk to the Appellant on return.*

The burden is upon the Appellant to produce to the Tribunal all relevant material on this issue well in advance of the hearing.

6. The reference to BK is to the country guidance decision of BK (Failed asylum seekers) DRC CG [2007] UKAIT 98, quoted by the Judge in the course of his Determination – a country guidance decision that was upheld by the Court of Appeal in BK (DRC) [2008] EWCA Civ 1322.

7. The Respondent filed a Rule 24 Notice on 13 October 2014. She argued that the Judge had directed himself appropriately, and had given adequate reasons for the decision that the Appellant would not be at risk upon return to the DRC.

8. Neither party has formally applied for permission to rely upon further evidence pursuant to Rule 15(2A) of the Upper Tribunal Procedure Rules 2008.

9. Thus the matter comes before me.

Adjournment

10. By letter type dated Monday 9 February 2015, but only faxed to the Upper Tribunal at 0935 hours on Tuesday 10 February 2015, the Appellant's representatives applied for an adjournment of the hearing of the appeal. The basis for the application was that Counsel who had accepted instructions *pro bono* on behalf of the Appellant "*has informed that she is no longer available to attend the forthcoming hearing"* [sic]. That application was refused by the Duty Judge the same day, and in consequence a notice of that decision was sent by fax to the Appellant's representative at 1152 hours on 10 February 2015. The Tribunal file shows that attempts by Upper Tribunal staff to phone the Appellant's representatives in relation to the matter were unsuccessful.

11. When the hearing was called on before me, the Appellant and her foster mother Ms Lovell confirmed that they wished to renew the application for an adjournment. In the course of doing so, they accepted that a Notice of the Hearing had been sent by the Upper Tribunal by first class post to the parties, and to the Appellant's representative, on 19 January 2015. The Appellant and her foster mother accepted that they had duly received a copy, although they could not now recall precisely when that was.

12. I was told that they had decided that they could not afford to pay privately for representation at the appeal hearing, and so they had sought to find professional representation for the Appellant *pro bono*. They accepted that they were aware that an adjournment application had been made by the Appellant's representatives, but they denied knowledge of any decision made upon that application.

13. Contrary to the clear inference in the letter dated 9 February 2015, they agreed that Counsel had never accepted instructions for the hearing, because she had never been in a position to do so. Counsel was never available to conduct a hearing on 12 February, because

when she was first contacted in relation to the matter "last week", she had explained to them that she had a pre-booked holiday, and thus could not accept their instructions. Attempts to find another member of the Bar willing to act on the Appellant's behalf without charge had come to nothing.

14. The application was renewed therefore on the basis that it was unfair and unrealistic to expect the Appellant, even with the assistance of her foster mother, to argue the appeal without legal assistance. Thus, it was argued, the appeal should be adjourned until the only representative identified as being able and willing to accept instructions on a *pro bono* basis, was available to attend.

15. I refused the renewed application. It was plain that the original application for an adjournment was advanced on a false premise; Counsel had never accepted instructions to appear on behalf of the Appellant at the hearing. Thus the Appellant had not been left, unexpectedly and at the last moment, without representation at the hearing. The Appellant was professionally represented at the hearing before the First Tier Tribunal, and her applications for permission to appeal had been prepared with the benefit of professional assistance. She continued to be represented by MLP even now, although no member of that firm had attended the hearing. The Appellant was not taken by surprise by that; it was plain that this was something that had been discussed and agreed some time earlier.

16. The Appellant and her foster mother had known since early October 2014 that she had secured permission to appeal, and there had therefore been ample time for both her, her foster mother, and MLP, to explore the Appellant's ability to secure legal assistance at any forthcoming hearing, even if the date upon which that hearing would actually be held was unknown until the Notice of Hearing was received in mid January 2015.

17. Finally, and as I sought to explain to both the Appellant and her foster mother, it was quite common for claimants to be without representation in the First Tier Tribunal and the Upper Tribunal. The issue raised by the grant of permission in this appeal was a narrow one, and not one that could only be advanced with the benefit of legal assistance. The Appellant had the assistance of her foster mother, to make any points she wished to make, and I would assist where I could properly do so. The current economic reality, in which the Upper Tribunal must operate, is that adjournment in such circumstances is not consistent with the overriding objective, or the public interest in the efficient timeous and fair disposal of such an appeal.

<u>The scope of the appeal</u>

18. The Appellant and her foster mother confirmed that they had been advised, and understood, that there was no general right of review of Judge Fisher's decision and that the scope of the appeal was set out by Judge King as follows;

It was accepted that the applicant had a minor role in APARECO although that role was not defined. The quote from BK did not reflect paragraphs 192, 193, and 197. In the light of such matters it is arguable the Judge should have given clearer reasons why there was no risk to the Appellant on return.

19. The starting point for any analysis of Judge Fisher's Determination must be the adverse findings of fact he made in relation to the Appellant, which went to the core of her claim, and which it is not open to her to challenge on the limited ground of appeal for which permission was granted.

20. First. The Appellant is not who she has claimed to be since she arrived in the UK in December 2005. In consequence, and since an ETD had been issued in relation to her brother's return under the original Congolese identity in relation to which a passport had been issued to him, and in which a visa application had been made by him, there was no evidential basis upon which the Judge could, or should, have assumed that an ETD would not be issued in relation to the Appellant under the original Congolese identity in relation to which a passport had been issued to her, and in which a visa application had been made by her.

21. Second. The Appellant did not tell the truth to the Respondent or the Tribunal about the presence of members of her family in the DRC. In consequence she would not be returned to the DRC as a single woman without family support and protection.

22. Third. The Appellant's brother advanced an asylum claim, which was rejected as untrue by the Tribunal even before it became obvious that he had made that claim under a false identity. He was returned to the DRC in May 2009 using an ETD issued by the Congolese authorities to him in the name upon which he had made a visa application in September 2005, and in which a passport had been issued to him in March 2005, and not the name under which he had claimed asylum.

23. The grant of permission does not permit the Appellant to challenge those findings.

24. Nor does the grant of permission permit the Appellant to argue that she faced any risk upon return to the DRC on account of any family connection to anyone considered by the authorities in the DRC to be of interest to them. The Appellant had claimed that her brother was detained at the airport upon return to the DRC, and then injured and ill treated in detention, and this claim was supported by both her foster mother and Ms Catherine Ramos. The Appellant's brother was said to be one of the individuals referred to anonymously in Ms Ramos' "Unsafe Return I", and "Unsafe Return II" reports. The content and conclusions of those reports were discussed, and the subject of serious criticism, in P (DRC) [2013] EWHC 3879, and in PBN (DR Congo) [2013] IEHC 435. Both of those decisions concluded in the light of the UKBA's Fact Finding Mission report of November 2012, and contrary to Ms Ramos' opinion evidence, that failed asylum seekers

were not *per se* at risk of ill treatment upon return to DRC. The Judge noted that the Appellant's brother had in June 2009 been able both to write to, and to conduct a number of telephone conversations with Ms Ramos since his return to the DRC. In my judgement, when the Determination is read as a whole, it is plain (despite the language used in paragraph 55) that the Judge did not accept as true the assertion that the Appellant's brother had been detained at the airport upon return to the DRC. The Judge approached the matter however on the basis that even if that claim were true, he did not accept that the Appellant faced any risk of harm upon return to the DRC, in the event of being perceived in the DRC as her brother's sibling. No challenge is open to the Appellant to that finding.

25. The grant of permission is limited to the Judge's approach to the Appellant's "*sur place*" claim which rested in turn upon the evidence that she had become involved with the activities of APARECO, and had joined that organisation, and might thereby have acquired a profile with the DRC authorities as an opposition activist. The Appellant made a number of individual claims in this respect in the course of her evidence, which are set out in the Determination, as follows;

> She claimed to have attended a march organised by APARECO in 2011, but she accepted that there was no record of her name as one who had done so, and that there were no photographs that recorded her as having done so.
>
> She claimed to have attended some APARECO activities in 2013, but under cross-examination she clarified that she was referring to meetings she attended by telephone and Skype. She claimed that her role at this time was an advisor to young people, nationally, speaking at meetings, and building awareness of the actions of the regime in the DRC. The independent evidence of what that role had been in practice was scant. She did not assert that there were any photographs of her having done any of these things, or that she was named as having done so, published upon the internet.
>
> APARECO has not had a branch office in the north east of England at any material time. Its presence in the area in which the Appellant has lived since at least 2008 was limited to one representative, who was not the Appellant.
>
> She accepted that the representations made on her behalf to the Respondent in late 2013 made no mention of her having attended any march or demonstration, or, to having become involved in any of the activities of APARECO. She had no explanation for that – but asserted that she had told her representatives of these matters at the time. Her foster mother claimed to have been fully aware throughout of the Appellant's involvement in the activities of APARECO.

> She claimed to have formally joined APARECO as a full member only on 22 February 2014, using the name that she has adopted by deed poll in the UK.
>
> She claimed to have given a speech at a meeting in London on 5 June 2014, which had been written for her by Mr Likiyo. Again she did not assert that there were any photographs of her having done so, or that she was named as having done so, upon the internet.
>
> What were produced in evidence were some photographs from 2014 showing the Appellant holding a placard, and at some meetings. It was not suggested that these had been published upon the internet.

26. The Judge's findings were that the Appellant had not done anything in the UK that would give rise to a reasonable likelihood that the DRC authorities would perceive her as an "opposition activist". His finding was that what she claimed to have done, was not sufficient to be reasonably likely to lead the DRC authorities to perceive her as an "activist", as opposed to someone with a "lower profile", even if they knew of it, and even if they could link those actions to her.

27. In any event, in my judgement, the Judge was perfectly entitled to draw the distinction between the two categories of persons ("activist" as opposed to someone with a "lower profile") in the context that he did. That context was his reference to the way in which those terms were used in the decision in P (DRC) [54].

28. The evidence before the Tribunal about APARECO which the Judge did accept, was that APARECO had no presence in the DRC, no activists in the DRC, and conducted no activities in the DRC. It was an entirely UK based organisation conducting its internal affairs largely by telephone and Skype video calls. The Appellant would not therefore be able to do anything in support of that organisation in the event of her return to the DRC. There is no challenge to these findings, and the Judge was perfectly entitled to make them on the evidence that was before him, for the reasons that he gave.

29. Part of the evidence relied upon in relation to APARECO was a report said to have been prepared by an organisation known as AHRO – which the Judge declined to attach any real weight to. Again he was entitled to do so for the reasons that he gave.

30. Although the Judge did not perhaps spell this out in the course of the Determination in the way that he might have done, it is quite clear to me, that it is a necessary consequence of his findings in relation to the Appellant's true identity, that the identity used when taking membership of APARECO or whilst undertaking any of the *sur place* activities relied upon, is neither the identity by which the Appellant is known to the DRC authorities, nor, the identity under which she would be returned to the DRC. It was not the name under which either the original visa application, or, the original asylum claim, was made.

31. There is no obvious reason therefore why the identity used in taking membership of APARECO should be linked to her true identity by the DRC authorities. Moreover, there was no reliable evidence to suggest that APARECO had been infiltrated, and that its membership details were known to the DRC authorities, and the Judge made no finding to that effect. Thus the evidence was that such membership details were confidential to the organisation and the individual members.

32. As to the Appellant's account of her own involvement in the activities of APARECO, whether before or after she formally became a member of that organisation; she did not assert that either of the identities she has used in the UK could be found upon the internet associating her with that organisation.

33. Accordingly there was nothing in the evidence to give rise to the inference that there was a reasonable likelihood that the identity under which the Respondent would return her to the DRC would be linked by the DRC authorities either to APARECO itself, or to any activities undertaken by the Appellant in the UK upon which she now relies as founding a *sur place* claim.

34. In those circumstances there was in my judgement no error of law in the Judge's finding that the Appellant was not reasonably likely to be perceived as an opposition activist by the DRC authorities upon return. She had not used at any stage within the UK the identity in which she had been issued with a passport by the DRC, and thus the identity under which she would be returned to the DRC. There was no basis in the evidence upon which the Judge could, or should, have inferred that she would upon return be perceived as the individual who had undertaken the activities that she relied upon as creating a risk of harm – even if he were to have accepted her account of them in full.

DECISION

The Determination of the First Tier Tribunal which was promulgated on 3 July 2014 contains no error of law in the dismissal of the Appellant's appeal which requires that decision to be set aside and remade, and it is accordingly confirmed.

Signed

Deputy Upper Tribunal Judge JM Holmes
Dated 13 February 2015

Direction regarding anonymity – Rule 14 Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until the Tribunal directs otherwise the Appellant is granted anonymity throughout these proceedings. No report of these proceedings shall directly or indirectly identify her. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to proceedings being brought for contempt of court.

Signed

Deputy Upper Tribunal Judge JM Holmes
Dated 13 February 2015