Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/08329/2012

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
on 14 March 2016	**on 8 July 2016**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

N D
(Anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Kirk instructed by Asylum Aid
For the Respondent: Ms N Willocks-Briscoe

DECISION AND REASONS

1. On the 29 December 2014 the Court of Appeal sealed an order leading to this matter being remitted to the Upper Tribunal for further hearing. There are preserved findings set out in paragraph 59 of the determination of Upper Tribunal Judge Pitt and Deputy Upper Tribunal Judge M Hall in the following terms:

> "The findings of the Panel, which are preserved, are that the Appellant would be returned to the DRC with no political profile as a

person opposed to the regime there. He would therefore be returned as an individual who has been resident in the United Kingdom since 1997, and whose asylum claim has not been believed, and who has been forced to leave the United Kingdom."

2. The scope of this hearing has been previously defined as being (a) to consider evidence not previously considered in relation to the appellant's sur place activities in the United Kingdom and (b) to make findings upon the risk on return to the DRC in light of the decision in the case of BM and Others (returnees – criminal and non-criminal) DRC CG [2015] 00293 (IAC) in which it was held that a national of the DRC who has acquired the status of foreign national offender in the United Kingdom is not, simply by virtue of such status, exposed to a real risk of persecution or serious harm or treatment proscribed by Article 3 ECHR in the event of enforced return to the DRC.

Background

3. The appellant is national of the DRC born in the 1960's. He entered the United Kingdom from Calais on 1 March 1997 and claimed asylum. His application was refused on 29 November 2000 against which he appealed. Before the appeal process was completed the appellant made a fresh claim for asylum, on 11 February 2002. The appeal was dismissed on 8 October 2002 and the fresh claim for asylum refused on 3 April and 29 May 2003. A subsequent appeal was dismissed in a determination dated 8 December 2003.

4. On 13 January 2004 the appellant applied for leave to remain outside the Rules which was refused on 8 March 2004 with no right of appeal. A further application made on the 6 April 2006 was refused on 25 May 2006.

5. On 29 November 2007 the appellant was convicted of possessing a false identity with intent to commit fraud and sentenced to ten months imprisonment and recommended for deportation. A number of further submissions followed which were treated as applications to revoke the deportation order which were refused. The decision dated 28 March 2012 conferred a right of appeal which was dismissed on the 3 August 2012 by a panel of the First-tier Tribunal.

6. The appellant initially claimed to be a member of the Union for Democracy and Social Progress (UDPS) having joined that organisation in 1980. He claimed to have led a strike of sugar workers between 12 and 14 October 1996 in the DRC and to have been arrested as a result and accused of organising an illegal strike. He claimed to have been detained and ill-treated but to have been able to escape from prison and travel to Kinshasa and from there to France from where he travelled to the United Kingdom. The appellant further claimed that his wife and children had been murdered as a result of adverse interest in him by the authorities in the DRC.

7. In 2007 the appellant joined the Patriots Alliance for the Re-foundation of the Congo (APARECO) and claimed he will face persecution on return to the DRC as a result of his membership of both UDPS and APARECO.

8. The First-tier Panel hearing the appeal in 2012 noted that the appellant had not been believed in his three previous appeals, and that none of these decisions had been successfully challenged. Having considered the evidence the Panel made the preserved findings set-out above in relation to the lack of credibility in the claim.

9. The appellant claims to be at risk on return in this appeal on the basis of his continued membership of APARECO with whom he claims to have a role within the party as the person in charge of protocol for the Nottingham branch. The appellant claims to assist in the organisation and mobilisation of people for events the party organises and assisting with seating persons who attend the meetings. He also claims to 'vet' people attending to ensure they are members.

10. The appellant has attended a number of meetings and events which he claims have included a sit down protest outside the embassy of the DRC in the UK in summer 2014, a further protest at the same site in September 2015, and demonstrations listed on the APARECO website. In June 2015 the appellant states he attended the national conference in Newcastle of which he has provided a number of copy photographs and a conference in London on 2 November 2015 where he assisted in setting up the meeting and attendees with their seating.

11. In his witness statement the appellant claimed the last meeting he attended was on the 14 November 2015 at Nottingham.

12. The appellant sums up his profile in the following terms:

> "I consider myself an activist. I expose myself at ever meeting as someone who helps in organising and so I am well known within the party. I am also well aware that when we have held demonstrations the Embassy has come out and taken photographs of us. Finally I am on the APARECO website, there is photos of me attending the meetings. It is for these reasons I believe that the DRC government will know that I am an activist against the regime."

13. The appellant seeks to rely upon the evidence of a witness who describes himself as the new President of the organisation in the UK and who claims to have known the appellant since 2013. The witness was appointed to his current post in 2015. An issue arose in relation to a written document the witness was consulting when providing replies to questions put in cross-examination but this was resolved without issue in the early stages of his evidence.

14. The witness stated he had seen the appellant at demonstrations in London, Nottingham and Manchester.

15. The witness was asked about the lack of any reference in his witness statement to the appellant attending meetings, which contradicted his claim now made that he had seen the appellant there, to which the reply was “I am not a lawyer I just answer your questions”. This was the same answer given when a similar issue arose later in the evidence and did not satisfactorily address the questions put and is considered evasive.

16. The witness confirmed that the structure of the Nottingham branch was that of a President, Vice President and the members.

17. The witness was asked about a contradiction in his evidence when he was claiming that he could not recall if the appellant was present at a particular event but also claiming that he could recall the attendance.

18. In his oral evidence the appellant was asked what he meant when he stated that he mobilised people. His response was to claim he mobilised people to join their group to fight together.

19. The appellant was unable to recall dates he attended demonstrations, claiming his inability to recollect was due to his depression but that every time there was a demonstration he attended. The appellant claims to have joined the group in London in 2007 and transferred to Nottingham in 2012. He claims to have been a member initially but an active member since 2015. He relied upon this fact as an explanation for the lack of evidence of his attending demonstrations since 2010 before the First-tier Tribunal.

20. In relation to the Nottingham branch the appellant claimed there are a number of ‘executive’ posts such as treasurer and vice treasurer although not all were available. Such posts were not advertised but could be created when a person joined the branch. Appointment was by nomination of the President.

21. The appellant claimed to have started working in his role in 2015. He was required to attend an interview and training for the role.

22. The appellant was asked about what was put to him as a contradiction in his evidence, where he had stated he was well known within the party in his witness statement but in his oral evidence that he has known in passing by those in London. The appellant maintained he was well known but his explanation was not convincing.

23. The appellant accepted that the pictures on the web site that had been provided did not identify him or show he had any significant role in the party and that the pictures were of the appellant attending meetings not demonstrations.

The law

24. Although there are a number of adverse credibility findings and numerous attempts by the appellant to secure a right to remain in the United Kingdom his claim to be at risk as a result of events since the rejection of his previous claims cannot be dismissed on that basis alone although reliance on a claim, the core of which has been found not to be credible, is relevant.

25. Paragraph 339P states:

> "A person may have a well-founded fear of being persecuted or a real risk of suffering serious harm based on events which have taken place since the person left the country of origin or country of return and/or activates which have been engaged in by a person since he left the country of origin or country of return, in particular where it is established that the activities relied upon constitute the expression and continuation of convictions or orientations held in the country of origin or country of return."

26. In Danian v SSHD (2002) IMM AR 96 the Court of Appeal said that there is no express limitation in the Convention in relation to persons acting in bad faith, despite Counsel's attempt in Danian to have one implied. In the court's opinion the answer to the 'riddle' lay in the judgement of Millet J in Mbanza (1996) Imm AR 136. Millet J said "The solution does not lie in propounding some broad principle of abuse of the system….but in bearing in mind the cardinal principle that it is for the applicant to satisfy the SSHD that he has a well-founded fear of persecution for a Convention reason. Whether he can do so will largely turn on credibility and an applicant who has put forward a fraudulent and baseless claim for asylum is unlikely to have much credibility left." The court referred to a letter from the UNHCR which stated that regard should be had to whether the person's actions had actually come to the notice of the authorities in his home country and how they would view such actions. It does not matter whether an appellant has cynically sought to enhance his asylum prospects by creating the very risk he then seeks to rely on, although bad faith is relevant when evaluating the merits/credibility of the claim, as explained in Danian. However, as Bingham J also said in Danian - the actual fear has to be shown to be genuine and not one that was manufactured by conduct designed to give plausibility.

27. In YB (Eritrea) v SSHD [2008] EWCA Civ 360 the Court of Appeal sounded a note of caution in relation to the argument that, if an appellant was found to have been opportunistic in his sur place activities, his credibility was in consequence low. Credibility about what, said the Court of Appeal? If he had already been believed ex hypothesi about his sur place activity, his motives might be disbelieved, but the consequent risk on return from his activity sur place was essentially an objective question.

28. SS (Iran) v SSHD [2008] EWCA Civ 310 the Iranian Kurdish applicant had become more involved in Komala since coming to the UK and attended a demonstration. He claimed that this would have come to the attention of the Iranian authorities through a photograph posted on the internet and a film of the demonstration broadcast on Swedish television. The Senior Immigration Judge did not accept that his activities would have come to the attention of the Iranian authorities. Although allowing the appeal on other grounds, the Court of Appeal said that the Senior Judge was entitled to reach this particular conclusion as the claimant had failed to prove that his presence and activities in London would be known to the authorities in Iran. There had to be a limit as to how far an applicant for asylum was entitled to rely on publicity about his activities in the UK against the government of the country to which he was to be returned. It was not enough for the applicant simply to establish that he was involved in activities which were relatively limited in duration and importance without producing any evidence that the authorities would be concerned about them or even that they were or would be aware of them.

29. In EM (Zimbabwe) v SSHD (2009) EWCA Civ 1294 the Court of Appeal held that, when an asylum seeker claims that her activities in this country will have brought her to the adverse attention of the authorities in her own country, the judge will have to gauge, having regard to all the relevant material, whether those activities are likely to have been monitored and, if so, whether they will actually get her into trouble. ….In most cases the issue of disclosure would be a matter of inference and degree. There would rarely, if ever, be case specific evidence that the Appellant's activities were known to the CIO and it would therefore normally be unrealistic to divorce the issue of whether those activities had become known to the regime from the question of whether they would be of real concern to it. The more significant the political activity, the more likely it was that it would become apparent. The Court of Appeal upheld the Immigration Judge's decision dismissing the appeal of an applicant who joined the Wolverhampton branch of the MDC and attended the vigil outside the Zimbabwean embassy.

30. In BA (Demonstrators in Britain – risk on return) Iran CG [2011] UKUT 36 (IAC) the Tribunal held that, given the large numbers of those who demonstrate here and the publicity which demonstrators receive, for example on Facebook, combined with the inability of the Iranian Government to monitor all returnees who have been involved in demonstrations here, regard must be had to the level of involvement of the individual here as well as any political activity which the individual might have been involved in Iran before seeking asylum in Britain. It is important to consider the level of political involvement before considering the likelihood of the individual coming to the attention of the authorities and the priority that the Iranian regime would give to tracing him. It is only after considering those factors that the issue of whether or not there is a real risk of his facing persecution on return can be assessed. The following are relevant factors to be considered when

assessing risk on return having regard to sur place activities (a) Nature of sur place activity. Theme of demonstrations – what do the demonstrators want (e.g. reform of the regime through to its violent overthrow); how will they be characterised by the regime? Role in demonstrations and political profile – can the person be described as a leader; mobiliser (e.g. addressing the crowd), organiser (e.g. leading the chanting); or simply a member of the crowd; if the latter is he active or passive (e.g. does he carry a banner); what is his motive, and is this relevant to the profile he will have in the eyes of the regime. Extent of participation – has the person attended one or two demonstrations or is he a regular participant? Publicity attracted – has a demonstration attracted media coverage in the United Kingdom or the home country; nature of that publicity (quality of images; outlets where stories appear etc)? (b) Identification risk. Surveillance of demonstrators – assuming the regime aims to identify demonstrators against it how does it do so, through, filming them, having agents who mingle in the crowd, reviewing images/recordings of demonstrations etc? Regime's capacity to identify individuals – does the regime have advanced technology (e.g. for facial recognition); does it allocate human resources to fit names to faces in the crowd? (c) Factors triggering inquiry/action on return. Profile – is the person known as a committed opponent or someone with a significant political profile; does he fall within a category which the regime regards as especially objectionable? Immigration history – how did the person leave the country (illegally; type of visa); where has the person been when abroad; is the timing and method of return more likely to lead to inquiry and/or being detained for more than a short period and ill-treated (overstayer; forced return)? (d) Consequences of identification. Is there differentiation between demonstrators depending on the level of their political profile adverse to the regime? (e) Identification risk on return. Matching identification to person – if a person is identified is that information systematically stored and used; are border posts geared to the task?

Discussion

31. The previous determinations are relevant as a starting point as per the Devaseelan principles. In Devaseelan (2002) UKIAT 00702, the Tribunal was concerned with a human rights appeal which followed an asylum appeal on the same issues. The Tribunal said that, in such circumstances, the first Tribunal's determination stands as an assessment of the claim the Appellant was making at the time of that first determination. It is not binding on the second Tribunal but, there again, the second Tribunal is not hearing an appeal against it. The Tribunal set out various principles: the first decision is always the starting point; facts since then can always be considered; facts before then but not relevant to the first decision can always be considered; the second Tribunal should treat with circumspection relevant facts that had not been brought to the first Tribunal's attention; if issues and evidence on the first and second appeals are materially the same, the second Tribunal should treat the issues as settled by the first decision rather

than allowing the matter to be re-litigated. The Tribunal also gave a caveat and said that there will be occasional cases where the circumstances surrounding the first appeal were such that it would be right for the second Tribunal to look at the matter as if the first determination had never been made.

32. In the determination of the First-tier panel, dated 15 August 2012, the following findings were made:

> "18. The letter [dated 22 July 2008 purportedly written by a senior representative of the UDPS] makes no reference to the appellant having led a 2 day strike in 1996. The letter does not state when the appellant is supposed to have begun his UK-based UDPS activities. If the appellant had been actively involved with the London branch of the UDPS we find he would have mentioned it when he appeared before the Adjudicator Mr F E P Meadows on14 November 2003. If he was not yet a member in 2003 we find that he would have mentioned his activates to the panel in April 2008, as part of his asylum claim and/or as part of his claim to enjoy private life in the UK. It is clear from the determination of the panel that he did not make any mention at all of any UK based political activities. We note that the Tribunal found no merit in the appeal before them. We place no weight on this letter.
>
> 19. The appellant also sought to rely upon a letter purportedly written by the president of APARECO UK which is dated 16 November 2010 and which stated that he has attended all the events and meetings organised by their political organisations since his enrolment on 2 March 2007 as a member and that we was involved in the mobilisation within the Congolese community in the UK. The writer concluded that the leader of their organisations who lives in France has faced attempts on his life and that their meetings and activities are monitored by spies of which the Kabila regime has many in London. As a result members are at serious risk if they are returned. The appellant also submitted his membership card.
>
> 20. We find that the appellant failed to inform the panel in April 2008 about his membership of APARECO UK even though the significance of his membership of this organisation must have been clear to both him and those advising and representing him. We note that there are photographs depicting him at demonstrations. He us looking directly at the person taking he photograph. If he was an active member we find he would have given full details in his evidence before the panel and again as part of his asylum claim and/or as part of his claim to enjoy private life in the UK. Even if the Kabila regime has planted spies in London who attend demonstrations we find that the participation of someone who has no political profile in the DRC, who left the country in March 1997, and who has done nothing more on the basis of the evidence before us than to join a party in the hope of creating a political profile for himself, the attend the occasional meetings, and to attend demonstrations where he poses with a placard for his photograph to be taken and placed in his bundle will not ignite interest in him where none existed before."

33. This finding is to the effect that the appellant may have involved himself in activities with the groups he claims, not as a result of a genuinely held political belief but as a result of an attempt to secure status in the United Kingdom.

34. Following guidance provided in BA (Iran) the following matters must be considered:

Nature of sur place activity: - it is not disputed the appellant has attended meetings. He claims to have attended demonstrations. The photographs provided show him in attendance at the former. The theme of the meetings, it is presumed, is to discuss the business of APARECO UK which is a political opposition organisation. In relation to the role played by the appellant he claims to have a position of responsibility and profile that puts him at risk, as a result, but I find this not to be made out. The evidence in relation to the appellant's role was not convincing as noted above. The appellant's claims to have been a member of the party and to only have assumed an active role from 2015, after the dismissal of his previous claim for asylum suggests the real motive for the same is an attempt to enhance what was found to be a weak claim. Even if the appellant does assist in seating on the day and checking that those attending are members this has not been shown to be the role of a person with a profile that creates a real risk on return, per se. I do not find that the appellant has established to the lower standard applicable that he has a significant and visible profile within APARECO (UK). There is insufficient evidence to support a finding that the appellant's conduct and activities at meetings and/or demonstrations are those of a person who is, or will be perceived as, a leader, mobiliser or organiser. The appellant has established he is an attendee who helps out at a low level and no more.

In relation to the identification risk, - Surveillance of demonstrators – assuming the regime aims to identify demonstrators against it how does it do so, through, filming them, having agents who mingle in the crowd, reviewing images/recordings of demonstrations etc? Regime's capacity to identify individuals – does the regime have advanced technology (e.g. for facial recognition); does it allocate human resources to fit names to faces in the crowd?

It was not disputed before the Tribunal that the staff at the Embassy of the DRC in the UK photograph those demonstrating outside it and it is suggested by the appellant that agents of the regime mingle with the crowds and attend meetings and demonstrations to spy on members of opposition groups. If this is so it has not been shown that in the DRC itself there is a sophisticated facial recognition system available that will allow those photographed in the UK to be identified on return, automated or manual. Even if this was the case, mere attendance at an event is not sufficient. In BM and Others (returnees – criminal and non-criminal) DRC CG [2015] UKUT 00293 (IAC) it was held that a national of the DRC who has a significant and visible profile within APARECO (UK) is, in the event of returning to his country of origin, at real risk of

persecution for a Convention reason or serious harm or treatment proscribed by Article 3 ECHR by virtue of falling within one of the risk categories identified by the Upper Tribunal in MM (UDPS Members – Risk on Return) Democratic Republic of Congo CG [2007] UKAIT 00023. Those belonging to this category include persons who are, or are perceived to be, leaders, office bearers or spokespersons. As a general rule, mere rank and file members are unlikely to fall within this category. However, each case will be fact sensitive, with particular attention directed to the likely knowledge and perceptions of DRC state agents.

The appellant has not established that he fits within the risk profile above and so even if he has been seen at meetings it will not have been as a person with a significant profile. The appellant is a rank and file member who states he has additional responsibilities of seating attendees and checking membership, not of leadership or as an office holder or spokesperson of sufficient influence of perceived importance to create a real risk.

In relation to the meetings and demonstrations the appellant claims to have attended, I find he has not established a credible claim to have undertaken a role or projected a profile that may be perceived by the authorities in the DRC as an organiser even if what he claims is true. I accept the photographic evidence shows the appellant as a member of the crowd at a meeting in Newcastle. It has not been made out that the appellant will be perceived as an activist. The appellant has not made out that this motive is credible or that his activities represent genuinely held political beliefs. I find, even when applying the lower standard of proof, that they are a further attempt to secure a right to remain in the UK. The appellant's participation in events is limited as demonstrated by the chronology above.

Factors triggering inquiry/action on return. As stated above I do not find the appellant has established a credible profile that will place him at risk on return. The appellant has not established that he is known as a committed opponent or someone with a significant adverse political profile. The appellant has not established that he falls within a category which the regime regards as especially objectionable.

Immigration history – The appellant has been in the UK for a number of years. If not removed by the anniversary of his entry to the UK in 2017 he may have the required 20 years in the UK to enable him to succeed under paragraph 276ADE of the Immigration Rules.

The lack of credibility in the appellant's earlier claims is noted above. The appellant has not established that his method of leaving the country, place of residence in the UK, or timing and method of return is more likely to lead to inquiry and/or being detained for more than a short period and his being ill-treated.

Consequences of identification. The appellant has failed to make out that a person with his profile will face a real risk even if identified on return. See BM above.

35. In relation to APARECO the Tribunal in BM found:

> "87. We address the discrete question of risk to those who are considered to be opponents of the Kabila regime by reason of their *sur place* activities in the United Kingdom. In addressing and determining this question, we make the following specific findings:
>
> (i) APARECO is a cohesive, structured organisation which has its main base in France and strong basis in certain other European countries, including the United Kingdom. It also operates in Canada and the United States.
>
> (ii) APARECO is implacably opposed to the regime of President Kabila which has governed DRC during the past decade. Its overarching aims are the defeat of this regime and the re-establishment of the state on a different basis.
>
> (iii) APARECO has no overt presence in DRC, where it operates underground.
>
> (iv) The external opposition of APARECO to the governing regime of DRC is overt and visible. Its highest profile activities unfold in public places, accessible to all. Activities of this nature are accompanied by advance publicity.
>
> (v) In common with many comparable regimes throughout the world, both present and past, the DRC Government has a strong interest in opposition organisations, including APARECO. Such organisations are monitored and data is recorded. This includes information about the identities of the most prominent members of such organisations, that is to say their leaders, office holders and spokespersons.
>
> (vi) The monitoring of APARECO (UK) is likely to be undertaken by and on behalf of the DRC Embassy in London. This is the agency with the most obvious motivation to carry out and co-ordinate such scrutiny. Such scrutiny is likely to generate periodic reports to the DRC Government, in particular its ANR and DGM agencies.
>
> (vii) It is likely that the leaders, office bearers and spokespersons of APARECO (UK) are known to the DRC UK Embassy and the DRC Government, in particular ANR and DGM.

36. In relation to risk on return as a failed asylum seeker, it has not been found that a failed asylum seeker per se it at risk on return for that reason alone. In BM it was held that a national of the DRC whose attempts to acquire refugee status in the United Kingdom and who has been unsuccessful is not, without more, exposed to a real risk of persecution or serious harm or proscribed treatment contrary to Article 3 ECHR in the event of enforced return to DRC.

37. The appellant has failed to discharge the burden of proof upon him to the required standard in relation to Ground 1 to show a credible real risk on return, actual or imputed.

38. In relation to Ground 2, no real risk is made out. The appellant is a failed asylum seeker who is also a foreign criminal. The finding in BM is that a national of the DRC who has acquired the status of foreign national

offender in the United Kingdom is not, simply by virtue of such status, exposed to a real risk of persecution or serious harm or treatment proscribed by Article 3 ECHR in the event of enforced return to the DRC. The appellant has not established a fact sensitive element to his case that warrants this Tribunal departing from this finding of no real risk.

39. Having conducted a careful fact specific analysis of the evidence, including that produced and relied upon by the appellant, I find he has failed to prove his case. I dismiss the appeal.

Decision

40. **There is no material error of law in the First-tier Tribunal Judge's decision. The determination shall stand.**

Anonymity.

41. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

    I make such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

Signed…….
Upper Tribunal Judge Hanson

Dated the 7 July 2016