



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

Appeal Number: PA/00092/2017

THE IMMIGRATION ACTS

Heard at Birmingham CJC

Decision & Reasons

On 5 October 2018

Promulgated

On 23 October 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**GAUTHIER [L]
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Ms K Aboni, Home Office Presenting Officer

For the Respondent: Ms H Masih of Counsel, instructed by Coventry Law Centre

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Hussain promulgated on 9 October 2017 in which he allowed the appeal of Mr [L] on protection grounds against a decision of the Respondent dated 21 December 2016 refusing asylum in the UK.
2. Although before me the Secretary of State for the Home Department is the appellant and Mr [L] is the respondent, for the sake of consistency with the proceedings before the First-tier Tribunal I shall hereafter refer to the Secretary of State as the Respondent and Mr [L] as the Appellant.

3. The Appellant is a citizen of the Democratic Republic of Congo born on 17 October 1961. On 4 February 2016 an application was made for a business visit visa which was granted effective from 19 February 2016 until 19 August 2016. On 3 March 2016 the Appellant arrived in the UK and entered pursuant to his visa. On 24 June 2016 the Appellant claimed asylum. A screening interview was conducted on 1 July 2016 and a substantive asylum interview was conducted on 5 December 2016. The Respondent refused the Appellant's application for asylum for reasons set out in a 'reasons for refusal' letter ('RFRL') dated 21 December 2016.
4. The Appellant appealed to the IAC.
5. First-tier Tribunal Judge Hussain allowed the Appellant's appeal on asylum and Article 3 grounds for reasons set out in his Decision and Reasons promulgated on 9 October 2017.
6. The Respondent applied for permission to appeal to the Upper Tribunal which, in the first instance, was refused by First-tier Tribunal Judge Saffer on 6 November 2017. However, permission to appeal was granted by Upper Tribunal Judge Kekić on 18 December 2017. So far as is material the grant of permission is in these terms:-

"It is arguable for the reasons set out in the grounds that the Judge failed to consider all the evidence, failed to make findings on all material matters and did not give any or adequate reasons for accepting the expert report given that it was based on an opinion and conflicted with country guidance".
7. The nature of the Appellant's claim for asylum changed over the course of time. Indeed, the First-tier Tribunal Judge identified what he characterised as the "*Initial fear of persecution*" - which he then addressed and rejected at paragraphs 6-15 of the Decision.
8. The 'initial fear' was rooted in the Appellant's claim to have been involved in events on 30 December 2013 culminating in his arrest during a protest march against President Kabila and in support of an opposition leader, Joseph Mukungbila. The Appellant claimed to have been detained and tortured, and to have suffered injuries in consequence of the torture. Although these events occurred some considerable time before his departure for the UK with no intervening adverse events, the Appellant made his claim for asylum following a further incident in the UK. He claimed to have stumbled across an anti-Kabila demonstration outside the

DRC Embassy in London on 18 March 2016, and although not a participant (see interview at question 73) was concerned that he had been perceived to be a participant by reason of his inadvertent presence; he claimed that this had led to a reawakening of suspicion rooted in the earlier events of December 2013. The Appellant claimed that in consequence arrest summonses, or warrants, had been issued and attempts made to execute them; he also claimed that in the course of an attempt to execute a warrant his wife had been raped and later died of injuries sustained.

9. As noted above, the First-tier Tribunal Judge rejected the entirety of this account over the course of paragraphs 6-15. He referred to a lack of plausibility and mentioned "*a few matters to give a flavour of the implausibility of the account*" (paragraph 8).
10. The Appellant's case, however, was reformulated during the proceedings to include a claim that he was at risk because of a failure to return home as a member of a mission or delegation that had visited the UK in an official capacity - he would thereby be perceived as a traitor to the regime.
11. It was the Appellant's claim that he had come to the United Kingdom as a member of a mission. He produced a document in this regard which appears in the Respondent's bundle at Annex C - and accordingly was before the Respondent's decision maker (albeit in an untranslated version). A copy of this document and a translation was before the First-tier Tribunal in the Appellant's bundle (pages 45- 48). The document is described as a 'Mission Order' and names four individuals - one of whom is the Appellant - who were said to be "*designated to carry out an official mission in London*". The purpose of the visit was stated in the Mission Order to be to take part in a media and entertainment forum in London running for ten days from 22 February to 8 March 2016, with a departure planned for 22 February 2016 and a return date of 8 March 2016.
12. It is to be recalled that it was in fact not until 3 March 2016 that the Appellant arrived in the UK.
13. The Mission Order appears on the letterhead of the People's Party for Reconstruction and Democracy which is the ruling party of President Kabila. The Appellant's function is described as "*Official, Provincial Communicator*".
14. The Appellant necessarily says that he did not return with the other members of the mission but remained in the United Kingdom: he claims

that this was in effect, or would be perceived as, an act of disloyalty or treachery, such that he might be accused of treason.

- 15 The Appellant's representatives put this issue to an expert witness for consideration. Mr Alex M Ntung was instructed to prepare a report, and, *inter alia*, the following question was raised for comment:

"If it is accepted that Mr [L] came to the United Kingdom as a representative of his government department and subsequently failed to return to the DRC on the appointed date, does that fact in itself put him at risk on return?" (report at paragraph 19).

16. The expert offered an opinion on this issue in these terms:

"41. Firstly it is important to note that being at risk of persecution does not necessarily require a potential victim to be a. issued a Summons b. of a high 'political profile' c. affiliated directly to a political party, or d. associated with a previous anti-government group. On the contrary, a perceived political activist with a non-political background can be persecuted for other reasons.

42. If it is accepted that Mr [L] was a government employee and a representative to a conference in London, he could be accused of treason or anti-patriotic behaviour with intentions to betray government services: a former government employee who had left the country and return in the country as failed asylum seekers could be also viewed as traitor or it may be assumed that they have 'damaged' the organisation's reputation during the process of an asylum claim.

43. A former government employee who has had access to government information or involved in secret operations, he is likely to be questioned and persecuted on return. Depending on previous role with government departments, some former employees can be kidnapped and assassinated or arrested in secret cells. Treatment of returnees' asylum seekers is still unknown since UN troops or human rights organisations have not access to most of ANR secret detentions.

44. The question is not whether it is believed that Mr [L] is likely to be persecuted as former government employee, but whether a. he was indeed a civil servant b. he is returned as failed asylum seeker. If this is the case he would be viewed as a traitor on return to DRC.

45. DRC views the mere application for asylum in another state as an act of treason: those who have left the country are forced to

admit they have committed treason by falsely claiming persecution in asylum applications or are accused of betraying their country through an 'act of terrorism'. Failed asylum seekers are reported and handed over to the security services in Ndjili International Airport in Kinshasa".

17. The First-tier Tribunal Judge gave consideration to the expert evidence of Mr Ntung. The Judge noted the credentials set out in the expert report and that such credentials were not challenged (paragraph 16). The Judge concluded that he was satisfied that Mr Ntung was indeed an expert witness on the DRC. At paragraph 17 the Judge sets out something of the considerations within the report, both to summonses and arrest warrants produced by the Appellant, and also the significance of the Appellant's role as a government employee.
18. The Judge also directed his mind to the case of **BM and others (returnees - criminal and non-criminal) DRC CG [2015] 00293 (IAC)**. The Judge observed that it was held therein:-

"that a national of the DRC whose attempts to acquire refugee status in the United Kingdom have 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" (paragraph 18).

19. However, the Judge went on to consider, with reference to the words "*without more*", whether there was something more to the Appellant's case. In this regard the Judge was very clearly persuaded by the opinion expressed by Mr Ntung:

"20. Mr Ntung opines that failed asylum seekers will be reported and handed over to the security services at the airport suggesting that they will be subject to article 3 ECHR mistreatment.

21. I regard being accused and tried for treason to be a disproportionate response to a failure to return as a member of a government department or having claimed asylum such as to amount to persecution on the basis of political opinion. For this to be the case, the key question to answer is whether the Appellant was a government employee?"

20. The Judge then considered the Appellant's employment situation and concluded that the Appellant was indeed a government employee who had come to the UK "*as part of a delegation to attend a conference led by a Chef de Mission*" (paragraphs 22- 26).

21. I am grateful to both representatives for the helpful discussion it was possible to have in respect of the issues raised by the Respondent's grounds of challenge. In light of the discussion and consideration of aspects of the expert report, it seems to me that the First-tier Tribunal Judge fell into error in accepting uncritically the opinion evidence of Mr Ntung on the key point as regards the risk on return to the Appellant as a failed asylum seeker who had been part of a mission and as a government employee.
22. In particular, in my judgement there is a difficulty in reconciling aspects of Mr Ntung's opinion with the country guidance in **BM & others**.
23. Whilst I entirely accept that it is open to a First-tier Tribunal Judge to depart from country guidance, in order to do so there must be cogent evidence justifying the departure. I also note and acknowledge that ultimately the Judge was focused on matters that were said to distinguish the Appellant from a mere failed asylum seeker. However, it seems to me that material error arises in the following circumstances for the following reasons.
24. Irrespective of the supposed distinction on the facts of the Appellant's case, Mr Ntung expressed an opinion at paragraph 45 of his report as to the generality of the situation facing returning failed asylum seekers. It is stated that the DRC "*views the mere application for asylum in another state as an act of treason*", and it is also said that "*Failed asylum seekers are reported and handed over to the security services*". These assertions are contrary to the findings and conclusions in **BM & others**: see paragraph 2 of the headnote, and more particularly the exploration of the supporting evidence leading to the conclusion at paragraph 77 - especially paragraphs 37, 43, and 76.
25. The essence of the findings in **BM & others** is that the making of asylum claims abroad does not in and of itself lead to difficulties upon return. Whilst there may be some stopping at the airport in relation to immigration concerns by the DGN (see for example paragraph 42 of **BM**), the Upper Tribunal rejected the notion that there was a risk of any further issues - far less that people were handed over to the security services. As such, paragraph 45 of the expert report is not reconcilable with the country guidance case.
26. That does not mean to say that paragraph 45 is in error: but in order to justify departure from country guidance it would be incumbent upon the

expert to fully explain the basis upon which the observations at paragraph 45 are founded, and to provide source materials and examples and so on to support the opinions expressed – or for such evidence to be otherwise available to the Judge. It would only be in such circumstances that departure from country guidance would be warranted. Necessarily the Judge would then need to set out in the Decision such evidence, the findings made, the reasons for the findings, and the reasons why such findings justified departure from country guidance.

27. However, the First-tier Tribunal Judge at paragraph 20 records what the expert has said in this regard entirely uncritically, and in repeating that “*failed asylum seekers will be reported and handed over to the security services at the airport*” fails to identify the significant departure from the country guidance.
28. This should have alerted the First-tier Tribunal Judge to a potential flaw in the opinion of Mr Ntung, or at least the existence of an opinion that was at variance with country guidance without there having been anything advanced in the report to justify the departure from the general country guidance. This in turn should have led the First-tier Tribunal Judge to view more critically other opinions in the report – including the opinion that was ultimately relied upon in allowing the appeal.
29. Indeed, in my judgement, the opinion with regard to the risk to a government employee appears to be expressed on the basis of theoretical conjecture rather than by reference to any source materials such as examples or events where there have been difficulties for such individuals.
30. Accordingly, in all of the circumstances I conclude that the First-tier Tribunal Judge was in error simply to accept the expert’s opinion without further reasoning and explanation. This error is key to the outcome and as such sufficiently material to justify setting aside the Decision.
31. Moreover, even if there was some justification for accepting aspects of the opinion evidence, it is to be noted that paragraph 43 of the expert report incorporates a contingent condition upon which there might be risk. It is suggested that the employee would need to be a person who “*had access to government information or involved in secret operations*”, and it is said that the risk is dependent on the “*previous role with government departments*”.
32. This in itself is perhaps at variance with the conclusion at paragraph 44 which seems to depart from the contingent approach at paragraph 43, to

express matters in more general terms - it seems to indicate that it is simply enough to be a government employee such as a civil servant. This variance should also have been the subject of some further consideration by the First-tier Tribunal Judge.

33. More particularly though, given that there was a qualification, or contingency, identified at paragraph 43, the Judge seems to have essayed nothing by way of analysing the nature of the Appellant's claimed employment by the government as claimed as to whether - role, access to information and secrets.
34. In my judgement this reveals a further issue of concern. It is to be recalled that the First-tier Tribunal Judge rejected significant aspects of the Appellant's narrative, and in particular essentially concluded that a substantial aspect of the claim as originally advanced was nothing more than a fabrication. In the circumstances it seems to me that the Judge should have been more critical in his consideration of the evidence relating to the Appellant's past employment. Even in this context it is to be noted that the Judge observed that there were some concerns about the Appellant's evidence as to his employment history (e.g. paragraphs 11 and 22), and the nature and conduct of the 'mission' (paragraph 24), but ultimately reached the conclusion that he was satisfied with regard to employment because of a visa fee waiver. At paragraph 25 the Judge notes that the Visa Application Form (which was produced before the First-tier Tribunal) indicated that there had indeed been a fee waiver, and that according to the form such fee waivers were only applicable where applicants held a diplomatic, special service, or official passport. The Judge in essence takes the fact of entry clearance having been granted in circumstances of a fee waiver to reinforce the notion that the Appellant was indeed a member of an official mission, which in turn reinforced the notion that his employment was as stated on the mission document.
35. The concern that I have in this regard is that it is apparent from the Visa Application Form that the Entry Clearance Officer was never at any point able adequately to verify the nature of the application. That may be seen from the notes that appear in the various entries of the chronology of the application. It follows that although the application may appear to have come from an official source, there was no verification that the Appellant was genuinely a member of a mission, or indeed it seems to me any verification that the mission itself was a genuine enterprise. In this regard it is to be recalled - as the Judge indeed observed - that the mission arrived almost at the end of conference it was to attend. It is again also to be recalled that the Appellant has given an inconsistent account of the nature and history of his employment.

36. Against this background I accept that the other focus of the Respondent's challenge - that the Judge failed to make a finding in respect of the warrants produced by the Appellant - is germane.
37. I entirely understand the Appellant's position that it was not vital to make such a finding if there was a risk to the Appellant by reason of his treachery. It is the Appellant's argument that irrespective of whether those documents are genuine, if there is a risk by reason of perceived treachery, then there is a risk, and that is enough to establish an entitlement to protection. On that basis, at worst, the documents might be an embellishment on an otherwise genuine claim.
38. Whilst I understand the logic of that approach, a finding on the documentation would be relevant to a consideration of other aspects of the claim - including whether the basis of the entry clearance application was genuine, i.e. based on the Appellant's actual employment as a government employee and his attachment to a mission in consequence. The Judge's failure to make findings on the arrest warrant, it seems to me, impacts upon his evaluation of the nature of the visa application. In this regard it is to be noted that the validity of the 'mission' was raised in the RFRL at paragraphs 33 and 34.
39. Accordingly I find a further material error of law. Moreover I do not consider that any of the First-tier Tribunal's favourable findings may be safely preserved. In consequence I consider that remaking of the decision in the appeal is appropriately to be done before the First-tier Tribunal.
40. In this regard, if it is not already clear from what I have said, the Appellant is now on notice that there is likely to be an issue in respect of his employment insofar as he wishes to continue to rely upon the notion that being a government employee who fails to return to the DRC, and/or being a government employee who travels abroad as part of a mission but fails to return to the DRC, are significant risk factors. Further bearing in mind the observations above about the cogency of the expert report, the Appellant may wish to consider filing further expert evidence.
41. However, I make no specific directions in respect of evidence. It is incumbent upon the Appellant to obtain and file any other evidence he thinks appropriate and in that regard standard directions will suffice. I do note however that Ms Masih indicated that if expert evidence was going to be filed there may be some delay in obtaining it, and in those circumstances I will direct that this appeal not be relisted before the First-tier Tribunal prior to 21 January 2019. It is also necessary that there be an

interpreter in Lingala available for the hearing. Otherwise, standard directions will suffice.

Notice of Decision

42. The decision of the First-tier Tribunal contained material errors of law and is set aside.
43. The decision in the appeal is to be remade before the First-tier Tribunal by any judge other than First-tier Tribunal Judge Hussain with all issues at large.
44. No anonymity direction is sought or made.

Signed:

Date: **17 October 2018**

Deputy Upper Tribunal Judge I A Lewis