**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: RP/00182/2018

**THE IMMIGRATION ACTS**

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| **Heard at Birmingham** | **Decision & Reasons Promulgated** |
| **On 20 January 2020** | **On 3 February 2020** |

**Before**

**UPPER TRIBUNAL JUDGE KEITH**
**UPPER TRIBUNAL JUDGE MANDALIA**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**YRN**
**(ANONYMITY DIRECTIONS MADE)**

Respondent

**Representation:**

For the Appellant: Mr D Mills, Senior Home Office Presenting Officer
For the Respondent: Mr M Jones of Counsel

**DECISION AND REASONS**

**Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

*Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.*

**Introduction**

This is an appeal by the appellant, who was the respondent before the First-tier Tribunal, and who I will refer to as the Secretary of State. The respondent was the appellant before the First-tier Tribunal, and to avoid confusion, I will refer to

him as the claimant. The Secretary of State appeals against the decision of First-tier Tribunal Judge Gurung-Thapa (the "FtT"), promulgated on 9 September 2019, by which she allowed the Claimant's appeal on the basis that the Secretary of State's decision to revoke the Claimant's status as a refugee under the Refugee Convention breached the UK's obligations under the same convention.

## Background

The Claimant was convicted on 2 June 2008 of robbery, for which he was sentenced to 60 months' detention in a Young Offenders Institution. He successfully appealed against an earlier deportation order and his appeal was allowed on 29 September 2011. He was subsequently granted leave to remain as a refugee on 5 September 2012. Following this, on 26 July 2013, at Blackfriars Crown Court, he was convicted of conspiracy to cause grievous bodily harm with intent and he was also convicted of applying corrosive fluid with intent. He was sentenced to fourteen years' imprisonment for each offence, to run concurrently.

The first issue before the FtT in the case before her, noting the very serious offences of which the Claimant had been convicted, was whether the Claimant had rebutted the presumption under section 72(2) of the Nationality, Immigration and Asylum Act 2002. The presumption that the Claimant became a 'refoulable' refugee applied as he had been convicted in the UK and sentenced to a period of imprisonment of at least 2 years, so it was presumed that he had been convicted of a particularly serious crime and remained a danger to the community of the UK.

The FtT upheld the Secretary of State's certification of the Claimant's case under section 72. In doing so she concluded that he remained a danger to the community of the UK ([19]). That aspect of her decision is not the subject of an appeal to the Upper Tribunal.

The FtT noted that the section 72 certification was not an end of the matter and she still had to consider the cessation of Claimant's status as a refugee under the Refugee Convention, as it had been considered by the Secretary of State in her decision. She considered whether the circumstances in which the Claimant had been granted refugee status had changed, specifically by reference to the Claimant's country of origin, the Democratic Republic of Congo ('DRC'), and whether the Claimant would be at risk on return to Kinshasa, as someone of mixed ethnicity, including Tutsi heritage, with his family's perceived political links.

The FtT considered country evidence, in particular a report by the Canadian Immigration and Refugee Board dated March 2013, relating to Tutsis living in Kinshasa, which referred to a 'deep hatred' amongst Congolese people for those of Tutsi origin. However, the FtT noted that the report stated that corroborating information on the treatment of Tutsis living in Kinshasa could not be found. The FtT went on to consider correspondence from the UNHCR from September 2018 relating to the proposed cessation of the Claimant's

refugee status and their assertion that the situation in the DRC had not fundamentally and durably changed to justify the application of Article 1C(5) of the Refugee Convention.

The Claimant relied on the country guidance case of AB and DM (Risk categories reviewed - Tutsis added) DRC CG [2005] UKIAT 00118, which continued to be applicable country guidance. The FtT concluded that she could not be satisfied that there were clear and cogent reasons for departing from the country guidance. She went on to consider at paragraphs [27] and [28] the past adverse treatment of the family (including the Claimant's sister's abduction and disappearance and presumed death of the Claimant's father by virtue of their ethnicity and perceived political loyalty to the RCD, a rebel opposition group); and the fact that an earlier Tribunal had previously concluded, in a determination of March 2011, that the Claimant had discharged the burden of proof of having a well-founded fear of persecution for a Convention reason.

Having assessed the evidence in the round, the FtT concluded that there was insufficient evidence before her to suggest that there had been a change of circumstances as relied upon by the Secretary of State which was significant and of a non-temporary nature. She went on to indicate that she was not persuaded that the circumstances by which the Claimant was recognised as a refugee had ceased to exist. She found therefore that the decision breached the UK's obligations under Article 1C(5) of the Refugee Convention and that in light of this finding, Articles 2 and 3 of the ECHR were also engaged.

In the Notice of Decision at the end of the determination, the FtT noted as follows:

> *"The appeal is allowed on the basis that the respondent's decision to revoke the appellant's refugee status breaches the UK's obligations under the Refugee Convention."*

## The Grounds of Appeal and Grant of Permission

The Secretary of State appealed against the decision in grounds of appeal submitted on 22 September 2019. Ground (1) started on the basis that Article 1C(5) of the Refugee Convention applied; that a change of circumstances in the DRC meant that the Claimant was no longer a refugee and the serious criminality of the Claimant meant that the public interest required his deportation. Whilst the FtT had upheld the section 72 certification, the consequence of that was that the appellant was excluded from the protection of the Refugee Convention and therefore the decision that the respondent's decision had breached the UK's obligations under the Refugee Convention was materially flawed.

Ground (2) asserted that the FtT had not provided adequate reasons, in particular in relation to the lack of durable change in the DRC, noting that there was no recent evidence of ethnic violence aimed at Tutsis or those of mixed ethnicity in Kinshasa. The Country Guidance case of AB and DM was now

fourteen years old and given the lack of any recent evidence of persecution it was submitted that the FtT had not explained adequately why there had not been a durable change of circumstances in the DRC.

Judge L S Bulpitt granted permission for this matter to proceed to a full hearing on 11 October 2019. He noted that it was arguable that ground (1), namely that the Secretary of State's decision breached the UK's obligations under the Refugee Convention, disclosed an error of law, as the provisions of Article 33(2) on permitting refoulment were unambiguous and did not require consideration of cessation of Refugee Convention status. He referred to the authority of RY (Sri Lanka) v SSHD [2016] EWCA Civ 81. It was also arguable that the FtT's reasoning, in particular when finding that Articles 2 and 3 were engaged, was inadequate, especially in the light of RY (Sri Lanka) and the need to consider the ECHR, as distinct from the Refugee Convention.

## The hearing before us

The representatives' submissions substantially changed from the beginning of the hearing, in light of our discussions with them about the authority of Essa (Revocation of protection status appeals) [2018] UKUT 00244. Mr Jones, on behalf of the Claimant, initially conceded that the FtT had erred in considering the Claimant's refugee status, suggesting that once she had upheld the section 72 certification, the FtT had erred in going on to consider cessation, at [20]. The focus should instead be on Article 3 ECHR. It was unarguably open to the FtT to have concluded that Articles 2 and 3 would be breached and there was no evidence to disturb the Country Guidance on the risk to the Claimant by reference to Article 3.

Mr Mills, on behalf of the Secretary of State, concurred with that concession and said that once the section 72 certification was upheld, then the FtT should cease to consider refugee status and instead focus solely on Articles 2 and 3 in light of RY. RY suggested that there was not a need to go on to consider Article 1C(5) and the FtT had impermissibly gone on to do so. Where we ended up with was a consideration of Article 3 on the same facts. The burden of proof rested with the Claimant on an Article 3 case, and instead all that was available was the fourteen year old Country Guidance case and the absence of any new evidence which one would expect to see, the Claimant had failed to show the risk of adverse treatment of Tutsis. In particular, ongoing discrimination was not sufficient to show a risk of Article 3. Reports had referred to people of Tutsi ethnic origin in Kinshasa, in positions of power.

## Our discussion with the representatives on the impact of 'Essa'

We discussed with the representatives whether Mr Jones' concession could properly be made in light of Essa. While RY indicates that the Secretary of State is not obliged to consider whether cessation applied in a certification case, in the Claimant's case, the Secretary of State had considered both certification and cessation. Was it suggested that despite the Secretary of State having considered both, the FtT, when considering the appeal, had erred in doing so? It appeared to us that if the section 72 certification applied, then

absent any further issue, the Claimant became a 'refoulable' refugee. If cessation were considered and there were durable changes, then the Claimant would cease being a refugee at all. On the basis of Essa, even where section 72 certification was upheld, and where, as a result, the FtT was obliged to dismiss the appeal under section 72(10), it could go on to consider whether someone nevertheless had status as a refugee, albeit a refoulable one, as this could have important practical implications for the Claimant.

Having considered the implications of Essa over the lunch break, both representatives accepted that the FtT should have considered cessation as well as certification and Mr Jones withdrew his earlier concession. The FtT was right to consider whether Article 1C(5) applied. We permitted him to withdraw the concession and Mr Mills did not object to us doing so.

For the Secretary of State, Mr Mills accepted that the burden of proof remained upon the Secretary of State to show that Article 1C(5) applied, and while he was not making any formal concession, there was very limited evidence to indicate that matters had changed since the Claimant's asylum status was recognised in 2011. However: (1) the FtT had failed to apply Essa and formally dismiss the Claimant's appeal under section 72(10) of the 2002 Act; (2) even if the Secretary of State had not discharged the burden of proof of showing a durable change within the meaning of Article 1C(5) of the Refugee Convention, nevertheless, the burden of proof and question under Article 3 was very different. It was a forward consideration and the burden of proof was on the Claimant. It depended on the risk to the Claimant at the date of the FtT hearing, 9 September 2019. The lack of evidence since the Country Guidance case some fourteen years earlier, of AB and DM, meant that the Claimant had failed to discharge the burden. The FtT had conflated her view in reasoning in paragraph [28] that because the decision breached the UK's obligations under Article 1C(5) of the Refugee Convention, therefore, Articles 2 and 3 of the ECHR were also engaged. Mr Mills accepted that a judge might, for similar reasons, uphold both appeals, but nevertheless they needed to explain why.

Mr Jones reiterated that for the cessation test, the burden of proof was on the Secretary of State. The Secretary of State had not come to the hearing before the FtT with any evidence to demonstrate such a durable change in the DRC. The Secretary of State had provided the Claimant only excerpts from the Canadian Immigration and Refugee Board Report and the Claimant's solicitors had to research and find the remainder of the report, which suggested ongoing discrimination. He also referred to the letter from the UNHCR in relation to the risks to the Claimant. Moreover, there had been a specific FtT determination in the Claimant's case far more recently than the Country Guidance case, namely in 2011, which had considered the specific risks to the Claimant in light of the adverse treatment of his sister and family.

## Discussion on error of aw

We gave an oral decision and full reasons to the parties in relation to the error of law, which these written reasons record. There was one specific error in the FtT's decision, namely that she failed to formally dismiss the Claimant's appeal

under section 72(10) of the 2002 Act. Nevertheless, that was an omission which, in the absence of any evidence or submission to the contrary, could be easily rectified on remaking, by us formally dismissing the Claimant's appeal.

We conclude that there was no error of law in FtT going on to consider Article 1C(5). While there was no concession, Mr Mills' submissions about the absence of evidence since the 2004 Country Guidance case, and the limited (ableit still relevant) 2013 Canadian Immigration and Refugee Board report, undermined any assertion that the Secretary of State had discharged the burden of showing a fundamental and durable change. In the circumstances, we preserve the FtT's findings that it has not been shown that there has been a fundamental and durable change in the DRC since recognition of the Claimant's refugee status in 2011. Article 1C(5) is not satisfied and the Claimant remains a refugee, despite section 72 applying.

However, we did regard the FtT as erring in law in simply applying the same conclusion on Article 1C(5) to Articles 2 and 3 of the ECHR, without further explanation. We accept Mr Mills' submissions that the test and burden is different – the burden being on the Claimant, and the risk being forward-looking.

## Decision on error of law

**We allow the Secretary of State's appeal to the limited extent that the FtT failed to dismiss the Claimant's appeal. We do so now and dismiss his appeal under section 72(10) of the 2002 Act.**

**In doing so, we nevertheless confirm that there was no error of law in the FtT's decision that the Secretary of State has not shown that Article 1C(5) applies. The Claimant continues to be a refugee for the purposes of the Refugee Convention. We preserve that finding.**

**We set aside the FtT's decision that the Secretary of State's decision breached the Claimant's rights under Articles 2 and 3 of the ECHR, which needs to be considered afresh in remaking the decision.**

We regard it as appropriate that we remake that decision, in light of the narrowness of the issues.

## Remaking the Decision

Mr Mills applied to adjourn the remaking hearing, on the basis that the Secretary of State may wish to adduce evidence in relation to the risk, on ethnic grounds, to Tutsi returnees to the DRC. There had been a considerable period of time since the Country Guidance case of AB and DM and an expert report would shed some light on this.

When asked for an explanation for why such evidence had not been adduced before the FtT and why he did not have such evidence ready for the remaking hearing today; without any criticism of Mr Mills, he confirmed that he had no explanation. Further, we specifically asked him whether he had any firm

instructions on whether the Secretary of State would actually proceed to instruct an expert, were we to adjourn the hearing, and he confirmed that he did not.

On the Claimant's behalf, Mr Jones opposed the adjournment and instead submitted that we should consider the remaking of the appeal on the evidence before us.

We considered the overriding objective, which required us to deal with the case justly and fairly. In that regard, we considered not only whether the Secretary of State demonstrated a good reason for adjourning the hearing, but also whether the Secretary of State was deprived of a fair hearing and we were conscious of the cases of SH (Afghanistan) v SSHD [2011] EWCA Civ 1284 and Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC).

We concluded that it would not be in accordance with the overriding objective to adjourn the hearing and we concluded that the Secretary of State had not been deprived of a fair hearing. Considering the two-stage approach under SH (Afghanistan) and Nwaigwe, without any personal criticism of Mr Mills, the Secretary of State had not given any explanation whatsoever for why there had been no instruction of an expert. Moreover, Mr Mills could give us no reassurance that there would actually be any definite decision to instruct such an expert, and in the circumstances, the possibility that an expert might be instructed could be no more than speculative. In the circumstances, where the Secretary of State had the opportunity on two separate occasions to instruct an expert but had not done so and in the absence of any firm instructions to Mr Mills that an expert would be instructed, we concluded that it would not be in the interests of the overriding objective to adjourn the matter and we refused the adjournment application.

**The Claimant's submissions on remaking**

We proceeded with the hearing. Mr Jones relied upon the Canadian report; the Country Guidance case of AB and DM; and crucially, the 2011 decision of the First-tier Tribunal, in accordance with the principle of Devaseelan, with further guidance recently given by the Court of Appeal in SSHD v BK (Afghanistan) [2019] EWCA Civ 1358. Judge Cooper had allowed the Claimant's appeal in a decision promulgated on 29 September 2011, on both asylum grounds and also by reference to Articles 2 and 3 ECHR. Paragraph [10.15] notes:

> *"While we accept that he lived without problems for three years after the abduction which led to the dreadful experiences of his sister, we nevertheless accept that the abduction took place, and that it took place because of the family's perceived ethnic origin and political allegiances. Consequently this is not a case where the appellant has merely asserted his claim to be Tutsi or Rwandan. We therefore find that it is reasonably likely that the appellant would be at risk of persecution or treatment in breach of his Article 2 or 3 rights as a person falling within this category described in AB and DM."*

> There is a recitation of his conclusion at [10.17], where Judge Cooper repeated that in light of the finding, that there were substantial grounds for believing that the Claimant would, on return to his country, now face a real risk of death or ill-treatment which reached the minimum level of severity required to constitute a breach of Articles 2 and 3.

Mr Jones emphasised that this was not a case of risk merely assessed by general conditions in the DRC, but also because of particular adverse treatment of the Claimant's sister (her abduction) and abduction of the Claimant's father, and in circumstances where the authority of Devaseelan applied, that that should be the starting point. While the burden may be on the Claimant in the context of Articles 2 and 3, there was no reason to depart from that starting point.

In relation to the Canadian report, it stated explicitly that it was not intended to be definitive; that available information was scarce owing to time constraints in which the report had been produced; and that many of those of Tutsi ethnicity had already fled Kinshasa owing to prior conflict and persecution. That report further indicated at pages [16] to [18] of the Claimant's supplementary bundle that the report did not purport to be conclusive as to the merit of any particular claim for Refugee Convention protection and it described the situation in the DRC as still relatively tense.

## The Secretary of State's submissions on remaking

Mr Mills reiterated the age of the Country Guidance. Whilst there was evidence of potential discrimination and anti-Rwandan/Tutsi feeling, there was an emphasis that each case would need to be considered on its own merits. Even the Canadian report had referred to Tutsis in positions of some prominence within Kinshasa, which was not consistent with risks to those of Tutsi origin only by virtue of their ethnicity in Kinshasa. The evidence was simply stale. Whilst the evidence was specific and Mr Mills accepted that the risks identified in 2011 had been not only general, the risks to the Claimant could have changed with the passage of time.

## Conclusions

We take the FtT's decision in 2011, to which we have already referred by way of an excerpt, as our starting point. We are not 'bound' by it, in the sense that we are unable to consider wider evidence (see BK (Afghanistan)) but equally, Mr Mills does not seek to criticise the decision in any way. We accept the submission that Judge Cooper evaluated risks not just by general background factors, but also relating to the family's perceived political connections, as a result of which the Claimant's sister was abducted (she too has been granted asylum) and their father abducted, never to be seen again. This was an evaluation which was not simply based on the Country Guidance case of AB and DM, but an evaluation of personal risks far more recently, namely in 2011. While we accept the submission that for Articles 2 and 3, the burden is on the Claimant, we accept that the 2011 determination should be our starting point.

The Secretary of State's case to the contrary is simple: the passage of time and the absence of clear evidence either way on the risk to the Claimant since 2011 means that he has not discharged the burden on him in relation to Articles 2 and 3 ECHR. We do not agree. The burden is to the lower evidential standard. We take the 2011 decision as our starting point, which expressly found that the Claimant's appeal succeeded on Article 2 and 3 grounds. Judge Cooper did so not only by reference to AB and DM, but also the personal risks to the Claimant, as a result of his family's adverse treatment, because of the family's perceived political loyalties. That is consistent with [39] of AB and DM which confirms that the resentment against anybody Rwandan or perceived to be Rwandan is very high; and that a mere assertion of risk on the basis of being a Tutsi would not engage Articles 2 and 3; but it might do, by reference to particular individual risks, which need to be assessed. In the Claimant's case, the general hostility towards those perceived as Rwandans recorded in AB and DM is echoed in the more recent Canadian report, noting its limitations; more importantly, there remains the individualised risk, as exemplified in the Claimant's sister's abduction and disappearance of his father. The passage of time does not negate or minimise those individual risks, and there is no reason to depart from Judge Cooper's 2011 decision that the Claimant's removal would breach his rights under Articles 2 and 3 of the ECHR.

**Notice of Remaking decision**

**The Claimant's appeal to the FtT is remade and allowed on human rights grounds. His removal would breach his rights under Articles 2 and 3 ECHR.**

Signed J Keith Date 29 January 2020

Upper Tribunal Judge Keith

**TO THE RESPONDENT**
**FEE AWARD**

No fee is paid or payable and therefore there can be no fee award.

Signed J Keith Date 29 January 2020

Upper Tribunal Judge Keith