



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004392

First-tier Tribunal No: PA/00135/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 28 December 2023

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

KT
(ANONYMITY ORDER MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Mrs C Johnrose, instructed by Brodie Jackson & Canter Solicitors
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

Heard remotely at Field House on 20 December 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, [the appellant] (and/or any member of his family, expert, witness or other person the Tribunal considers should not be identified) is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant (and/or other person). Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. To avoid confusion, the parties are referred to herein as they were before the First-tier Tribunal.

2. By the decision of the First-tier Tribunal (Judge Hamilton) dated 11.9.23, the respondent has been granted permission to appeal to the Upper Tribunal against the decision of the First-tier Tribunal (Judge Dainty) dated 22.8.23 allowing the appellant's appeal against the respondent's decision of 12.1.23 to refuse his Further Submissions (FS) in support of a claim for international protection first made in 2017, and to deport him from the UK following his conviction and sentence in May 2022 of making indecent images or pseudo images of children and sentence to 12 months' imprisonment.
3. The appellant had claimed to be at risk from the Kabila government having been accused of being in conspiracy with Chief Kamina Nsampa (KN), who had been asked by President Kabila to relocate the local population to enable overseas companies to mine for minerals within that province. He claimed to have spoken in 2016 at a public meeting in opposition to the policy, as a result of which KN refused to direct the villagers to relocate. The government brought in soldiers who killed KN. The appellant was identified by those in favour of relocation, so that he was arrested, detained and tortured by DEMIAP. They found a picture of Etienne Tshiskendi on the wall of his home, at which time his wife was stabbed and shot dead. After being detained for about a year before he escaped. He feared return to the DRC as in his view the current government is "merely a puppet for the former regime."
4. The protection claim was previously dismissed by the First-tier Tribunal in the decision of Judge Durance promulgated 10.8.18. The account was found to be inconsistent with his screening interview in which he denied having been detained and made no reference to a land dispute. Various other discrepancies and inconsistencies in his account were identified by Judge Durance, who also found the account inconsistent with the country of origin reports, including that the death of KN was not related to a land dispute but that KN related to the title of a chief and became the name of a movement and a militia, of which the appellant was unaware. Other inconsistencies related to the extent of injuries, where he was stabbed, and how he managed to escape. The entirety of the account was rejected.
5. The FS included news items, medical evidence, and article 8 grounds in relation to family life with his partner and daughter from a different relationship. Some of the medical evidence was relied on to explain discrepancies in the appellant's account.
6. The Upper Tribunal has received and considered the appellant's Rule 24 response, dated 10.12.23.
7. Following the helpful submissions of the legal representatives, I reserved my decision and reasons to be provided in writing, which I now do.
8. In summary, the grounds argue that the First-tier Tribunal made a material misdirection in law in failing to apply relevant country guidance as to risk on return to the DRC: PO (DRC- Post 2018 elections) DRC CG [2023] UKUT 00117, promulgated 18.4.23. In effect, as a result of the December 2018 election of Felix Tshisekedi, announced in January 2019, there has been a "durable change" to the risk of persecution for actual and perceived opponents of the former President Kabila and current president Tshisekedi, so that there is no real risk of persecution of actual or perceived rank-and-file opponents on return. High-profile opponents, which the appellant was not, may be at risk in some circumstances and the Country Guidance sets out a non-exhaustive list of relevant factors to be considered in a fact-sensitive analysis.

9. In addition to the basis of his previously made protection claim, before Judge Dainty the appellant claimed a family relationship with his partner, a refugee with ILR. He also claimed to have a child born in the UK from a different relationship. He also claimed a risk arising from his mental health. However, these claims were not addressed by the First-tier Tribunal.
10. At [14] of the decision, Judge Dainty cited the appellant's view that the present government was but a puppet for the former regime but made no findings as to this claim. Relying primarily on newspaper articles from April 2022, at [57] the judge found that the articles to be genuine and consequently at [64] that the events the appellant claimed as occurring in the DRC did occur, in that he was named by a person in detention, pursued, arrested, detained, and tortured by the authorities. The articles stated that elements of the Namwina Nsapu (KN) militia detained in Kinshasa continued to be tortured in detention. This includes one SK (named in the reports) who was said to have been arrested in September 2021 and under torture named others, including this appellant. The judge also relied on the medical evidence as some explanation for discrepancies in the appellant's accounts.
11. Having made the finding referred to above, the First-tier Tribunal Judge did not go on to consider the additional or alternative grounds of appeal.
12. However, the judge did not address the current Country Guidance of PO and failed to determine whether despite the finding that events took place as claimed there was any ongoing risk, given the change of regime. It is submitted that the judge failed to adequately address the appellant's risk on return in line with PO, which undermines the appellant's claim that he remains at risk from the current government as it is 'merely a puppet for the former regime'.
13. Mrs Johnrose relied on her Rule 24 response and submitted that PO did not address and is to be distinguished from the appellant's case in that he claims a risk on return as being connected with and accused of collaborating with KN, not as a political opponent of the regime in power at the time he fled the DRC. She submitted that the findings in relation to the April 2022 newspaper articles post-date the change in presidency, demonstrating that those associated with KN remain at risk even in the new government. She submits that even had the judge considered PO, it would have made no difference to the outcome of the appeal.
14. Unarguably, the political landscape in the DRC has changed significantly. There can be no doubt that as originally framed the appellant's case was to the effect that he was at risk from the then in power regime of President Kabila because of his association with KN over the land clearance and exploitation of mineral rights. He specifically mentioned that an image of President Tshiekedi was found in his home by soldiers sent by President Kabila. He has now redefined his claim to suggest that he remains at risk because he had been named by SK and that KN militia elements remain in detention and subject to torture.
15. Although a different judge may have reached a different conclusion, Judge Dainty was entitled to find on the evidence that the news articles were genuine, providing adequate reasoning for that conclusion. That is not the challenge of the respondent to the impugned decision. However, given the change in presidency and the new Country Guidance, I am satisfied that the findings cannot be made in isolation to PO and that it was essential for the First-tier Tribunal to consider whether the appellant remained at real risk on return under the guidance of PO. I recognise that what was argued by Mrs Johnrose was a new or rather different threat to the appellant than original claim, one that does not directly relate to opposition to President Kabila. However, even if the articles are genuine, the

appellant has never claimed to be part of the KN militia but always framed his case as a perceived opponent of former President Kabila. In essence, that remains his case and consequently PO stands in stark contrast to that case in stating that actual or perceived opponents of former President Kabila are not at real risk of persecution on return to the DRC. I am satisfied that at the very least the First-tier Tribunal ought to have addressed the Country Guidance and reasoned why, if that is the case, it can be distinguished from the appellant's case. In summary, I am not satisfied that there was an adequate assessment of the risk on return based on perceived political opinion. Given that the First-tier Tribunal did not go on to consider the other grounds of appeal, it cannot be said that the outcome of the appeal would have been the same.

16. In all the circumstances, I am persuaded that there is a material error of law in the decision of the First-tier Tribunal which requires it to be set aside and remade. I canvassed with the two legal representatives whether this is a case which could be properly decided in a continuation hearing in the Upper Tribunal. However, Mrs Johnrose pointed out that a redetermination of the appeal may well need to address the other grounds of appeal, including the article 8 and mental health claims, in respect of which there has been no primary findings of fact. It follows that this is a case which falls squarely within paragraph 7 of the Practice Statement and should be remitted to the First-tier Tribunal to be remade.
17. Mrs Johnrose asked that the positive findings of the First-tier Tribunal should be preserved. However, that would be to tie the hands of the First-tier Tribunal and make the task of remaking the decision in the appeal very difficult. In the circumstances, I do not preserve any findings and the appeal decision should be remade *de novo*.

Notice of Decision

The respondent's appeal to the Upper Tribunal is allowed.

The decision of the First-tier Tribunal is set aside in its entirety with no findings preserved.

The remaking of the decision in the appeal is remitted to the First-tier Tribunal.

I make no order as to costs.

DMW Pickup

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Judge of the Upper Tribunal
Immigration and Asylum Chamber

20 December 2023