Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/10155/2012

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination Promulgated**
On 8th August 2013	**On 19th November 2013**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

DEPUTY UPPER TRIBUNAL JUDGE FARRELLY

Between

SUAMO SIMON

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S.Bryce, Counsel, instructed by Drummond Miller, Solicitors
For the Respondent: Mr Mullen, Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction.

1. The appellant made a claim to asylum on 19 May 2006, having arrived by air two days earlier from the Democratic Republic of Congo (DRC). He claims that he is a national of that country, born on 1 September 1980.

2. The appellant claims that he was a supporter of the UDPS and that, whilst taking part in a demonstration, he was hit over the head by a policeman and taken into custody. After being detained almost a year, he had managed to leave a hospital where he had been transferred. He was helped by a pastor who had befriended him. They then travelled to the United Kingdom, the same pastor enabling him to pass through immigration control with a false passport. He claimed that he is fearful of being returned to the DRC because of his involvement with the UDPS and because he has claimed asylum in the United Kingdom.

3. Asylum was refused on 5 July 2006. His appeal was dismissed on 26 October 2006. The judge did not find him to be a credible witness. On the 4 December 2006, the appellant made an Article 8 ECHR claim which was refused. Further representations were submitted on 3 January 2008 and 23 April 2012 but were rejected as fresh claims by the respondent. A decision to remove the appellant to the DRC was made on the 31st October 2012. The appellant appealed.

The First –tier Tribunal

4. His appeal was heard on the 10th December 2012 at Glasgow before Immigration Judge Debra Clapham. The appeal was dismissed.

5. The appellant had provided a report on enforced returns to the DRC entitled `Unsafe to return' written by Catherine Ramos along with email correspondence from the author. Her report related to a survey of 15 enforced returnees from the United Kingdom who claimed they had been abused by the Congolese authorities. The appellant's representative had submitted that this report was up to date; indicated that people had been tortured when returned; and therefore it would be unsafe to return him. It was argued that the country guidance case of BK (Failed asylum seekers: DRC) CG [2007] 00098 should not be followed in light of the report from Ms Ramos as it was out of date. *Inter alia*, **BK** held that, on return to the DRC ,failed asylum seekers *per se* do not face a real risk of persecution or treatment contrary to Article 3 ECHR.

6. At paragraph 47 of her determination Judge Clapham states :

> 47. In relation to whether he can be returned to the DRC I have before me the report from Catherine Ramos. That obviously is considerably more up-to-date than the country guidance case of BK and I am being asked to depart from the country guidance case here. As I understand it I am in a position to depart from the country guidance if there is fresh and compelling evidence to do so. The country guidance case of BK states that on return to the DRC failed asylum seekers do not per se face a real risk of persecution or serious harm or treatment contrary to article 3 of the EC HR. The Court of Appeal decision is dated 2008.

7. Judge Clapham went on to say :

> 49. I am not persuaded that in this particular case I am in a position to depart from the country guidance case. In the first place, as I stated the report is based on 15 returnees only. On the other side of the coin the United Nations High Commissioner for refugees noted in 2011 "In January 2011 there were 107,900 returnee refugees … in the country of which UNHCR assisted 10,900… In short, Ms Ramos' study is based on a very small number of returnees. Further, although Ms Ramos claims a special interest in the DRC she is not a country expert conceding that she is a language teacher and interpreter. She claims that her meetings with high-profile cabinet members shows that her report has been taken seriously but the fact of the matter is that no comments have yet been made on that report. Further, the UKBA claim that the report fails to address any mythology re credibility of interviewees and no list of questions and no survey design. In her email Ms Ramos states that she has explained her mythology in 2 sections of the report which span 3 pages. In these sections she claims to identify interviewees and how she addressed credibility. In relation to the survey design she says she is unclear what is meant by that and therein I think lies one of the faults of the report. Ms Ramos is not an expert in this type of research. Qualitative Research design is a highly specialised field. However, most of what she writes has been gleaned through third-party evidence and she dismisses as not relevant the fact that some of the asylum seekers who have been returned have been returned because of credibility issues stating that she has obtained information about these individuals from people in the community and she is prepared to therefore put weight on the statements from the failed asylum seekers on that basis. I think there are severe design and mythological problems with the report, and until these have been addressed or I am persuaded otherwise I am not prepared to depart from previous findings.

The Grounds of Application

8. A number of grounds were advanced relating to how the immigration judge dealt with the evidence. Central to the application was the manner in which the judge dealt with the evidence of the risk on return. This consisted of more than the report from Ms Ramos. It was also suggested that the judge did not take into account a telephone statement from Ms Ramos about her report. It is also argued that Judge Clapham erred in law by suggesting she could only depart from a country guidance case where there was fresh and compelling evidence. Her reference to large numbers of people returning to the DRC in other reports did not factor in that these were people who had fled to neighbouring countries rather than being returned to the airport. It was suggested she failed to take into account the risk simply as a failed asylum seeker being returned and the operational guidance note from the UK BA that it was still considering the Ramos report.

9. The Grounds also assert that Judge Clapham failed to comment on evidence about negative comments about asylum seekers made by the DRC Ambassador on a visit to the United Kingdom. Judge Clapham referred to the President of Vox des Sans Vox, a Congolese human rights NGO, who had claimed that, whilst returnees to the airport had been monitored, no ill treatment had been observed. The Grounds states that there was evidence before Judge Clapham that that organisation no longer operates. The judge's treatment of Article 8 ECHR was criticised as cursory.

Permission to appeal

10. Permission was refused in the First-tier Tribunal. The view taken was that the judge had conducted a careful analysis of the background and objective evidence, including the expert evidence relied on, and give sufficient reasons for adhering to the country guidance decision of BK(Failed asylum seekers :DRC)CG [2007] 00098.

11. Similar grounds were advanced in seeking permission from the Upper Tribunal. In addition, it was suggested that Judge Clapham's conclusion that the appellant lacked credibility had tainted her view of the appellant's risk on return simply as a failed asylum seeker. It was submitted that the judge had not mentioned the fact that removals from the United Kingdom to DRC had been halted following the comments made by the DRC Ambassador.

12. Permission to appeal was granted by Upper Tribunal Judge Chalkley on 23 February 2013 on the basis the Grounds raised arguable issues.

The adjournment application in respect of the Upper Tribunal hearing.

13. By a letter dated 2 August 2013, received at Field House on 5 August 2013, the appellant's representatives sought an adjournment of these proceedings. This was because the Administrative Court had granted permission to bring a judicial review in respect of two cases involving returns to the DRC. Return was challenged on the basis of the comments made by the DRC Ambassador and the content of the report from Ms Ramos. A substantive hearing has apparently been fixed for 19 February 2014. The application was refused on the basis it had not been established in the present appeal that there had been an error of law.

14. At the hearing, Mr Bryce renewed the application. He referred to a generic letter dated 17 May 2013 from the Treasury Solicitor's Department to representatives involved in judicial review applications challenging removal to the DRC. The letter asked applicants to agree to stay proceedings pending the outcome of the lead cases fixed for 19 February 2014. He said that the respondent had, in the meantime, put removals on hold.

15. We pointed out to the representative that Field House had not put appeal hearings on hold. We were mindful of the comments of the Court of Appeal in AB (Sudan) – v- SSHD [2013] EWCA Civ 921 which dealt with an appeal against an order of the Administrative Court refusing to stay judicial review proceedings pending an appeal to the Supreme Court in a related action regarding removals to Italy under the Dublin Convention. Jackson LJ had referred to the rapid developments which can occur in immigration law and in many of the countries with which immigration proceedings are often concerned. At paragraph 32 he stated:

> 32. In my view the power to stay immigration cases pending a future appellate decision in other litigation is a power which must be exercise cautiously and only when, in the interests of justice, it is necessary to do so. It may be necessary to grant a stay if the impending appellate decisions are likely to have a critical impact on the current litigation. If courts or tribunals exercise their power to stay cases too freely, the immigration system (which is already overloaded with work) will become even more clogged up.

This view was echoed by Davis LJ:

> 54. It seems to me that, generally speaking, tribunal's and courts should be very wary in this field in acceding to requests for a stay of proceedings on the ground that a relevant, or allegedly relevant, point of law or practice is due - it is often said "shortly", although that more often proves to be a statement of aspiration rather than of fact - to be decided in some other case. Sometimes such a course may be necessary and appropriate, depending on the circumstances. But it should not be taken as some kind of norm.

16. With these dicta in mind, we refused the adjournment application on the basis an error of law had yet to be established and we saw no prejudice by proceeding to determine the error of law question.

The point argued.

17. In line with Directions issued by the Upper Tribunal, the appellant's representative had filed a skeleton argument. It states that the sole basis on which the appeal was to be argued related to the risk on return to the appellant as a failed asylum seeker, specifically one who exited illegally. It was acknowledged that Judge Clapham had been right to take the previous credibility findings as a starting point. The only issue was the point arising in Senga CO-573-94, namely, the risk created by virtue of the act of claiming asylum, irrespective of the truth of the underlying claim.

18. Although the country guidance case of BK (Failed asylum seekers: DRC) CG [2007] 00098 dealt with risk on return, the appellant's representative argued that the issue should be revisited. This was on the basis that the Administrative Court would be doing so in the pending judicial review applications. An additional dimension to the appellant's claim was that he left the DRC illegally. The consequence of this was not covered by **BK.** The Ramos report indicates that the penalty for doing so would be imprisonment and that the country guidance case established that prison conditions in the DRC violated Article 3 ECHR. The principal argument however centred on whether immigration Judge Clapham had properly dealt with the Ramos report.

19. At hearing, Mr Bryce referred us to paragraph 47 of immigration Judge Clapham's determination. He said that when considering whether she should depart from the country guidance of BK (Failed asylum seekers: DRC) CG [2007] 00098, the judge had wrongly applied a test requiring `fresh and compelling evidence'. He also

referred to paragraph 49 of the determination where Judge Clapham had noted that Ms Ramos was not a country expert and was critical of her methodology. He suggested that the judge had misunderstood the nature of the report and she had approached it on the basis it was an expert report which it was not. Rather, as outlined in his skeleton argument it was more akin to diplomatic or consular material used in relation to advice on situations in a country. By using the phrase 'compelling' he argued the immigration judge was introducing a specific and inappropriate criterion.

20. Mr Mullen submitted that the use of the word `compelling' in itself did not demonstrate a material error of law. He said the immigration judge had dealt with all the evidence in detail and had preferred one part of the evidence over another. He submitted that the judge had properly referred to the smallness of the sample used by Ms Ramos and, at paragraph 49, she questioned the methodology used and the credibility of the interviewees. He submitted that country guidance were only promulgated following a rigorous examination of all the evidence in relation to a country; by contrast, Ms Ramo's report was impressionistic and based on a small sample from people not found to be credible.

Our conclusions

21. The skeleton argument on the behalf of the appellant refers to the decision of DSG & Others (Afghan Sikhs: departure from CG Afghanistan [2013] UKUT 00148 (IAC). There, the Upper Tribunal upheld the judge in the First-tier Tribunal departing from a country guidance decision. The country guidance decision was from 2005 and found that Afghan Sikhs were not at risk if returned. Against this, the First-tier judge had a more recent High Court decision and an expert report indicating there had been a drastic reduction in the number of Sikhs in Afghanistan. The Upper Tribunal referred to the Practice Direction in relation to country guidance cases (reproduced in the skeleton argument) and concluded the First-tier judge had directed himself properly, albeit by way of paraphrase. The Upper Tribunal found that a First-tier Tribunal judge was entitled to depart from country guidance where evidence indicated that it should not be followed. At paragraph 26, the Upper Tribunal stated:

> 26… A country guidance case retains its status until either overturned by a higher court or replaced by subsequent country guidance. However, as this case shows, country guidance cases are not set in stone … and a judge may depart from existing country guidance in the circumstances described in the Practice Direction and the Chamber Guidance Note. This does not amount to carte blanche for judges to depart from country guidance as it is necessary, in the wording of the practice direction to show why it does not apply to the case in question. In SG (Iraq) [2012]EWCA Civ 940, the Court of Appeal made it clear, at paragraph 47, the decision-makers and tribunal judges are required to take country guidance determinations into account, and to follow them unless very strong grounds supported by cogent evidence, are adduced, justifying their not doing so. To do so otherwise would amount to an error of law.

22. Before deciding to depart from country guidance, the First-tier Tribunal must have before it "credible fresh evidence". The test is not that the evidence is `compelling'. A judge is required to carry out a proper evaluation of any fresh evidence presented to cast doubt upon an existing country guidance decision. It is our conclusion that immigration Judge Clapham did properly evaluate the evidence presented. Paragraph 49 clearly demonstrates her evaluation of the report from Ms Ramos and the weight she attached to it in the light of the existing country guidance. The judge gave her reasons for finding shortcomings in the methodology used by Ms Ramos and her evaluation of the risk on return is a balanced one; for example, she noted that returnees are likely to be interviewed by the DRC authorities. We do not find that the judge erred in law in refusing to depart from the existing country guidance. We do not find that her use of the word "compelling" introduced a new and improper test into her analysis; we find that the use of the word did no more than indicate that the judge was aware that she should not depart from country guidance simply because new evidence, whatever its probative value, had been put before her. We find her analysis of the new evidence and of the evidence as a whole to have been fair. Consequently, we find no error of law in her decision to follow the existing country guidance in the particular circumstances of this appeal.

23. Mr Bryce did not pursue any of the other grounds upon which leave was granted.

Decision

This appeal is dismissed.

Signed Date

Immigration Judge F J Farrelly Sitting as a Deputy Judge of the Upper Tribunal.