Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/00963/2013**

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 19 May 2014	**On 20th May 2014**

Before

Upper Tribunal Judge Kekić

Between

H N

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Ms A Walker, Counsel
For the Respondent: Mr P Duffy, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

Background

1. This appeal comes before me following the grant of permission to appeal to the Secretary of State by First-tier Tribunal Judge Heynes on

26 March 2014. For continuity, however, I shall refer to H N as the appellant and to the Secretary of State as the respondent.

2. The appellant claims to be a citizen of Burundi born on 7 July 1981. He initially entered the UK illegally in February 2003, claimed asylum thereafter but, due to non compliance, his application was refused on 1 July 2003. The claim was subsequently resurrected on the basis that the appellant had not been aware of the scheduled asylum interview but was refused again on 15 January 2004 and his appeal was dismissed on 12 May 2004. The appellant then voluntarily returned to Burundi.

3. On 17 December 2006, he then came back to the UK, using a false passport and having travelled from Norway where he had claimed asylum. Another claim was made in the UK. Prior to its determination, the appellant was convicted of possession of a false identity document and received a 15 month prison sentence. On 2 August 2007 he was served with a notice of intention to make a deportation order and on 4 March 2008 his asylum claim was refused. His appeal against that decision was dismissed on 26 June 2008 and on 12 August 2008 a deportation order was signed. Removal directions were set and the appellant was deported with escorts on 8 September 2008. On 5 October 2008 the appellant was returned to the UK. The Secretary of State was informed this was because he had claimed to be from the DRC and subsequently claimed to be from Mali. Various attempts were then made to document the appellant but he remained uncooperative. He initially claimed at an interview that he had been released from detention in Burundi after a few days but then later changed his mind and maintained he did not remember anything. A language analysis concluded that his Swahili was spoken in Tanzania and not Burundi. On 25 February 2010 he claimed he was not from Burundi but refused to provide any further information. He was re-interviewed in respect of his asylum claim on 15 September 2011 following a fresh application made on 30 March 2010. Further evidence was sought by the Secretary of State in respect of the appellant's claimed mental health issues. On 7 May 2013 the respondent refused to revoke the deportation order.

4. The appeal against the refusal to revoke the deportation order came before First-tier Tribunal Judge Dineen and Mr P Bompas on 25 October 2013 but, regrettably, the determination was not prepared until 6 March 2014 and was promulgated on 14 March 2014. The Tribunal allowed the appeal on asylum and human rights grounds. It took the previous two determinations as the starting point, accepted the appellant was Burundian and had had involvement with the FNL, considered the medical evidence submitted and concluded that the appellant had been persecuted in 2006. *"Against that background"*, it then considered the warrants submitted by the appellant (actually translated as "wanted notices") were genuine but concluded that that even if they were not, that was immaterial given the findings on the

other evidence. That decision was challenged by the respondent and permission to appeal was granted.

Appeal hearing

5. I heard submissions from Mr Duffy and Ms Walker. Mr Duffy was hindered by the absence of a complete file but was able to make submissions from the documents he had. He sought to amend the grounds to argue that there had been a lack of reasons from departing from the two earlier determinations particularly as a medical report had been before the Tribunal at one of those hearings. He submitted this was a Robinson obvious point. He accepted that the panel had probably meant to allow the appeal only on Article 3 grounds (and asylum) given the observations at paragraph 73 on Article 8 but argued that the conclusion should have been put in a clearer way. He submitted that the main issue was whether there was a risk to FNL supporters at the present time and that had not been engaged with. The determination should be set aside and remitted to the First-tier Tribunal for a fresh hearing.

6. Ms Walker opposed the application to amend the grounds. With regard to the main issue, she argued that it was not necessary for the panel to consider the background evidence in this case due to the appellant's circumstances. The assessment of risk had been adequate if the starting point was that the appellant was at risk because of what had happened when he was returned in 2008. Additionally, there were outstanding warrants which would place him at risk. The appellant was vulnerable because of his mental health problems; he suffered from PTSD and was on anti depressants.

7. In a brief response Mr Duffy submitted there had been no consideration of the background evidence, the findings were not adequately reasoned and the determination was therefore unsafe.

8. At the conclusion of the hearing I indicated that I would be setting aside the determination of the First-tier Tribunal. I now give full reasons for that decision.

Conclusions

9. I have considered the determination, the submissions and the skeleton argument to which I was referred.

10. There is no merit in the second of the two arguments advanced in the grounds for the respondent and in fairness, Mr Duffy did not seek to pursue it. It was argued by the respondent that the panel's findings on Article 8 were flawed and that no reasons were given for allowing the

appeal on that basis. In fact, as may be clearly seen at paragraph 73 of the determination, the panel found that the appellant would not be entitled to protection under Article 8 for the reasons set out therein. The decision to allow the appeal on human rights grounds (which I agree could have been more clearly put in the decision paragraph) was under Article 3 only and that decision flowed from the decision on the asylum claim, both being based on the same claimed facts.

11. There is, however, merit in the first ground. The premise on which the analysis of risk was based (see paragraph 54) takes no account of the changes in Burundi since the appellant's detention in 2006 when he was found to have conducted a business transaction with an FNL rebel (he had to pay them to allow safe passage of his goods which were being imported from Rwanda) and was suspected of association with them. As such, it is flawed. The respondent is right to complain that the panel failed to undertake any consideration of the current country evidence on Burundi.

12. Extracts from relevant reports and relevant events are set out at length in the refusal letter. These refer to changes over the last several years and certainly since the appellant's claimed arrest for contact with the FNL in 2006. The evidence shows that the FNL and other rebel groups integrated into the government, that a peace pact was signed, that the FNL disarmed and registered as a political party in 2009, that 3,500 FNL combatants integrated into the government and the police force, that thousands had received assistance and that 24 of the group's leaders had been assigned to senior civil service positions. It may be seen that the panel allowed the appeal on the basis of the appellant's claim to have been arrested and tortured in 2006 because of his FNL links. There was no consideration at all of how the changes summarised above may have impacted upon the risk to the appellant were he to be returned at the current time. In the context of these changes it cannot be said, as the panel found, that if the appellant was persecuted in 2006, he would *"again be subject to such persecutory treatment on account of his past history, upon his identity being ascertained"* (at paragraph 54). That is plainly a material error as consideration of the evidence could well have led to a different outcome. I cannot speculate on whether the delayed preparation of this determination had anything to do with the failure to consider all the evidence but the bundles are on file and therefore should have been taken into account in the assessment of risk.

13. The panel also found that the appellant would be at risk of similar treatment on return to that which he was subjected to upon removal in 2008. That alleged persecution consisted of being ill treated by UKBA enforcement officers who escorted him to Burundi and allegedly mistreated him there and his subsequent detention, interrogation and beatings. The findings in respect of this risk are at paragraphs 69 and 70. However, the panel fails to address the respondent's rejection of

the alleged ill treatment by the UKBA (for reasons set out at paragraphs 56-57 of the refusal letter). It also fails to take account of the appellant's inconsistent accounts of what transpired on his return with regard to detention (at paragraphs 13, 53 and 58) and appears to assume, without any factual basis, that he would have been held in order to be returned to the UK. The panel does not consider the option of the appellant being asked to report back for removal, such as often occurs in the UK or his evidence at interview that he had been released after a few days in detention (paragraph 13). The panel found that if returned, his identity would be ascertained and he would be at risk because of the 2006 incident but, as already explained, that is a flawed finding as that risk was assessed without consideration for the changed situation in Burundi. Further, if, as is argued by Ms Walker in her skeleton argument, it must be accepted that the appellant cannot be expected to conceal his identity on return, then it cannot also be argued that he would the same treatment he did when last returned when he lied about his nationality and claimed both to be Congolese and from Mali. And, it cannot automatically be assumed that he would be at risk because of the 2006 incident because of the reasons I have already set out - the failure to engage with the background evidence. Ms Walker also argued that the appellant would be at risk nonetheless because of the warrants but the panel did not engage with that evidence adequately and made no clear finding as to their reliability one way or another. Further, even if the warrants were genuine, the panel should still have engaged with whether they would be enforced given the changes that had occurred in Burundi and with the FNL since the appellant's departure.

14. For all these reasons, I find that the panel erred in law when making its decision on asylum and Article 3.

15. I have considered whether there are any findings that should be preserved. The main positive findings were that the appellant was from Burundi, that he had been detained in 2006 and again on return in 2008. Despite the contradictory evidence from the appellant as to his nationality and the language report suggesting his dialect was from Tanzania, the respondent has not directly disputed the claimed nationality and indeed sought to remove him to Burundi after he lost his asylum and deportation appeals. There was thus no need to specifically make a finding on nationality as the panel did given that it had not been challenged in the refusal letter and it follows that there is no need to preserve that finding.

16. The panel found that the appellant's account of the 2006 detention was credible because of the medical evidence which showed he suffered from episodes of depression, had scarring and that he could clasp his hands behind his back and bring them forward which supported his claim of being handcuffed. However, the panel did not give adequate reasons for departing from the decisions of the two

previous judges who had found his claim to be lacking in credibility. As Mr Duffy pointed out, there had also been medical evidence before at least one of them. For that reason, I do not preserve that finding.

17. The determination of the First-tier Tribunal is therefore set aside in its entirety. It is not suggested that the appellant has any Article 8 claim and it is unlikely that he can develop any compelling claim in the period that has passed since the determination of his appeal in March, but the determination has been set aside and so it follows that all matters are to be decided afresh.

Decision

18. The First-tier Tribunal made errors of law and the decision is set aside in its entirety. The decision shall be re-made at a future hearing before another judge or panel of the First-tier Tribunal.

Anonymity

19. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. That order is continued (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

Signed:

Dr R Kekić
Upper Tribunal Judge

Date: 19 May 2014