Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/09466/2013

THE IMMIGRATION ACTS

Heard at Taylor House	**Decision & Reasons Promulgated**
On 12th October 2015	**On 25th November 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

C K
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms S Iqbal, Counsel instructed by Duncan Lewis Solicitors
For the Respondent: Mr K Norton, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of the DRC born on 13th December 1990 and he appealed against the decision of the respondent taken on 21st May 2013 to refuse his application for further leave to remain and to give directions for his removal pursuant to Section 10 of the Immigration and Asylum Act 1999.

2. The background to the appeal was that the appellant arrived in the UK on 25th April 2006 and claimed asylum immediately. He was refused asylum on 24th June 2006 but

granted discretionary leave until his 18th birthday. He made his application for leave on 12th December 2008 and his application was refused on 5th November 2011.

3. The appellant was convicted on 27th April 2010 at Croydon Magistrates' Court for assaulting a bus driver. He was convicted on 22nd June 2010 for failing to comply with the community requirements. He was again convicted on 15th June 2011 for obstructing a police officer and indecent behaviour and was fined. On 5th August 2012 he was together with an accomplice convicted of possession of a class B drug and robbery and was sentenced to three months' imprisonment suspended for 24 months together with a 24 month community programme.

4. The appellant had been living with a British partner, S J S, and they had two children. He claimed that not only was he in fear of his life should he be returned to the DRC but also that his removal would breach his rights to a family and private life.

5. The refusal decision from the respondent set out that the appellant has an unacceptable character and that the decision to refuse to grant his leave to remain in the United Kingdom was such that it was not conducive to the public good. The refusal stated:

> "We are satisfied that the decision to refuse your client's claim and seek your removal from the United Kingdom is necessary to protect the public safety and the economic wellbeing of the country and to prevent crime and disorder and provide effective immigration control. For the reasons set out above your case falls for refusal under the suitability grounds as outlined in the new Immigration Rules (specifically S-LTR.1.6)."

6. The respondent also rejected the claim in respect of the appellant's family life in the UK.

7. First-tier Tribunal Judge Mayall considered the matter and dismissed the appellant's appeal on 30th June 2014.

8. He recorded that the respondent had considered that the appellant was relying on the same reasons as the claim made in 2006 but which had been refused and had submitted no further evidence to challenge the findings of that refusal. In the refusal letter the Secretary of State also considered whether there would be a risk upon his return to Kinshasa Airport from the DRC authorities and the respondent referred to the Country of Origin Information Report for 2009 and 2011. It was noted by the judge at paragraph 14 that at paragraph 32 the Secretary of State noted that contradictory claims which continued to be made about the issue of treatment of failed asylum seekers. She referred to the country guidance case of **BK (DRC) CG [2007] UKAIT 00098** and noted that he had not claimed that his offences in the UK had attracted any significant level of publicity. It was not accepted that the crimes of which he had been convicted would attract any adverse interest from the DRC government and there was no evidence that any of his offences had attracted any media attention in the UK or the DRC, and the Secretary of State did not therefore accept that he would be of interest to the DRC government and did not accept that he had a well-founded fear of persecution if returned to the DRC.

9. The judge recorded from paragraphs 24 to 42 the history of the appellant's convictions and made reference to the appellant's family life in the UK. Submissions on behalf of the respondent were recorded at paragraph 67 which stated that the appellant had committed seventeen offences in four and a half years and was currently in the prison or immigration detention since his last offence. It was submitted by the respondent that **BK** was still valid country guidance and had not been overtaken by recent events.

10. The judge also recorded that the appellant's representative at the First-tier Tribunal confirmed there was no dispute as to the appellant's credibility and he also accepted that **BK** was still the current guidance.

11. The judge found that there was no evidence to suggest that the children of journalists, such as the appellant, had an objective fear of ill-treatment in the DRC and the judge concluded at paragraph 82 that the appellant would not be at risk of persecution should he be returned to the DRC on account of his father's activities. The judge recorded that both representatives accepted that the country guidance of **BK** was binding country guidance and in that case the Tribunal held 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 ECHR.

12. An application for permission to appeal was made by the appellant's representatives on the basis that **R (On the Application Of P (DRC)) v Secretary of State for the Home Department [2013] EWHC 3879 (Admin)** held at paragraph 44:

> "It is clear … that the position with regard to criminal deportees is significantly different from that of failed asylum seekers. … The position of criminal deportees was not considered in **BK (Failed asylum seekers) DRC (Rev 1) CG [2007] UKAIT 00098**. … Further, the following two propositions are not seriously in dispute:
>
> i) First, that criminal deportees to the DRC, if identified as such, will be detained on arrival for an indeterminate period. The DRC Ambassador's official statement makes the unequivocal statement that
>
> > 'people who are being deported for having committed crimes in the UK are held in custody for a period of time to allow the Congolese justice system to clarify their situation'."

And:

> "…
>
> ii) Second, such detention is likely to be in conditions which contravene Article 3 of the ECHR. … prison conditions in the DRC are severe and likely to reach the Article 3 threshold."

13. Permission to appeal was granted by Upper Tribunal Judge Reeds on the basis that the position of those convicted of criminal offences if identified as such will be detained on arrival for an indeterminate period. And it was stated: "Whilst this was not a point, it appears that was taken before the First-tier Tribunal, it is arguable that

that is a matter relevant to the risk on return." Upper Tribunal Judge Reeds did not allow permission for the remainder of the grounds.

14. **P** referred to the case of someone who was a criminal deportee and there was a factual difference between that and this case. The appellant in this claimed that he was not a criminal and therefore he was not at risk even in the new country guidance.

15. The appellant had accepted that he was guilty of criminal convictions and indeed that is quite clear from his witness statements at paragraph 9.

16. **BK** stated 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 ECHR. In so finding this decision updates and reaffirms existing country guidance."

The First-tier Tribunal Judge identified that broadly the list of risk categories identified in the earlier country guidance included those perceived as being in opposition to the government. **AB and DM (Risk categories reviewed – Tutsis added) DRC CG [2005] UKIAT 00118** reiterated that there continued to be a real risk for those with an ethnic, political or military profile in opposition to the government and that each case was to be judged on its own facts. There is reference to the effect that persons involuntarily returned or expelled from the UK to the DRC will not be seen as normal returnees, paragraph 188 **BK**, and that they will be questioned with a view to establishing what type of expellee they are, "and in particular whether they are either a failed asylum seeker or a deportee" and further "in certain contexts, as we have already had cause to see, it can be of importance to distinguish between different categories of involuntary returnees/expellees)." **BK** did not specifically address the issue though of criminal returnees and for example at paragraph 374, although it states:

> "To summarise, we consider that viewed as a whole the allegations regarding the ill-treatment of failed asylum seekers on return to N'Djili Airport on 27th February 2007 either have not withstood closer scrutiny or remain unsubstantiated. **(It has not been our purpose in this determination to analyse what will happen on return to persons who are not mere failed asylum seekers but have a particular military or criminal history that is known, or is likely to become known, to the DRC authorities on return** – e.g. persons who are deserters or persons who have a criminal record or who for other specific reasons may be on the 'wanted' list held at the airport. However, we see no reason to take a different view regarding such persons than that taken by previous Tribunal country guidance, which is essentially that the claims of such persons would need to be looked at on a case by case basis.)"

17. An error of law was found because the judge appeared to accept that **BK** applied without further consideration and he did not consider the evidence that suggested from the Ambassador de la République Démocratique du Congo près le Royaume-Uni dated 16th August 2012 whereby the ambassador states:

> "Nevertheless people who are being deported for having committed crimes in the UK are held in custody for a period of time to allow the Congolese justice system to clarify their situation."

18. The background material including the U.S. State Department Report dated 19th April 2013 recorded that conditions in most prisons remained severe and life-threatening. The matter was set aside only in respect of the risk of detention should he be returned.

Conclusions

19. I have set out some of the background of the Error of Law decision to contextualise the developments and to spell out the limits of this decision. The one issue on which permission was granted and which the matter was set aside was in relation to the risk on return of the appellant bearing in mind the criminal profile of the appellant, and the issue of his response should he be interrogated on return to the airport. At the substantive hearing before me counsel agreed that there was one issue only, the issue of risk on return.

20. At [82] the First-tier Tribunal Judge recorded he was not satisfied and there no attempt was made to persuade him that the situation had changed since **BK** and there would be a real risk of persecution or serious harm or ill treatment on the appellant's return. This is the overall conclusion bar the consideration of the impact of the appellant's criminality on his return which I address below. The judge at [81] concluded that the appellant would not be at risk on account of his father's activities and there was no challenge to this. There was no objective evidence to suggest that children of journalists had an objective fear of ill-treatment. That was central to the appellant's claim. The judge in the decision recorded a 'deeply disturbing' picture of the appellant's criminality and the appellant was unable to dispute that criminal behaviour [84].

21. Mr Norton drew my attention to paragraphs 46 and 47 of the recently promulgated country guidance **BM and Others (returnees – criminal and non-criminal) DRC CG** [2015] UKUT 00293 (IAC). This recorded

> '46 Dr Kennes opines that, as regards returning nationals, the attention of the DRC authorities is focused on those who are "currently perceived as a threat". This will fluctuate, according to changing circumstances. If a person is "specifically targeted for judicial or for political reasons, or both", detention upon return is likely. If not, liberty will be guaranteed by the payment of a bribe. DGM officials receive, identify and verify the travel tickets, identity papers and resident's permits of those arriving. They work in tandem with the ANR. Bribery is to the forefront of the officials' minds. There is no evidence of ill treatment connected with questioning at the airport. Officials ascertain whether the name of the interviewee is on "a list of persons wanted by the Country's Justice or Security Services". This will include those who were prohibited from leaving the country. There is a further discrete group of those who used false documents when either leaving or entering the country, thereby committing an offence which can result in detention and prosecution. The authorities will also have an

interest in identifying any returning national who had escaped from prison. Persons who commit the offence of false testimony are also at risk of prosecution.

47 Dr Kennes also provides the example of a national who publicised state secrets and then fled abroad. A further discrete group which he identifies is that of "trouble makers in Europe". He gives the further example of a participant in a demonstration abroad who "….. uses violence, destroys property or harms other persons": such persons are at risk of prosecution upon returning to DRC. Another discrete group of persons at risk upon return are those who have engaged in attempted or actual attacks against visiting Congolese Government officials, or others perceived as supporters of the Government, abroad. In this context, the author describes the Congolese community in the United Kingdom as "very active and aggressive", without particulars. Based on this unparticularised premise, he asserts that such persons are "very thoroughly interrogated" upon returning to DRC, without any supporting evidence. He also discloses an article in a pro-Congolese Government newspaper suggesting that in February 2011 armed assailants originating from the Congolese diaspora attempted to kill the Head of State. Strikingly, Dr Kennes acknowledges that this is the only example of its kind'.

22. Indeed all the appellants in that **BM and Others (returnees)** relied on Dr Kennes' evidence. The Tribunal placed limited weight on some of Dr Kennes evidence but had this to say about his evidence at paragraph 64

> 'Furthermore, the Tribunal has no hesitation in accepting one of the central themes of Dr Kennes' evidence, namely that the focus of the DRC authorities will be on persons who are, at the relevant moment in time, perceived to be a **significant threat** to the regime. However, one of the main weaknesses of the report is the absence of any evidence supporting the thesis that all, or certain, foreign national offenders and all, or certain, failed asylum seekers belong to this broad category'.

23. There was no evidence that the crimes of which the appellant had been convicted in the United Kingdom would attract any adverse interest from the DRC government and there was no evidence that any of his offences had attracted any media attention in the UK or the DRC.

24. **BM and Others (returnees)** states as follows

> 'A national of the Democratic Republic of Congo ("DRC") who has acquired the status of foreign national offender in the United Kingdom is not, simply by virtue of such status, exposed to a real risk of persecution or serious harm or treatment proscribed by Article 3 ECHR in the event of enforced return to the DRC.
>
> 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.
>
> A national of the DRC who has a significant and visible profile within APARECO (UK) is, in the event of returning to his country of origin, at real risk of persecution for a Convention reason or serious harm or treatment proscribed by Article 3 ECHR by virtue of falling within one of the risk categories identified by the Upper Tribunal in MM (UDPS Members – Risk on Return) Democratic Republic of Congo CG [2007] UKAIT 00023. Those belonging to this category include persons who are, or are

> perceived to be, leaders, office bearers or spokespersons. As a general rule, mere rank and file members are unlikely to fall within this category. However, each case will be fact sensitive, with particular attention directed to the likely knowledge and perceptions of DRC state agents.
>
> The DRC authorities have an interest in certain types of convicted or suspected offenders, namely those who have unexecuted prison sentences in the DRC or in respect of whom there are unexecuted arrest warrants in the DRC or who allegedly committed an offence, such as document fraud, when departing the DRC. Such persons are at real risk of imprisonment for lengthy periods and, hence, of treatment proscribed by Article 3 ECHR'.

25. This makes it clear that despite the appellant's status as an offender in the United Kingdom this does not automatically expose him to a risk of serious harm on return to the DRC. Nor does his failed attempt to obtain asylum status. There was no evidence that he had any profile within APARECO (UK) (which is considered by the DRC government to be a serious threat), let alone a significant and visible one. There is no evidence of an outstanding arrest warrant or an unexecuted prison sentence and indeed he came to the United Kingdom as a child without claiming a history of offending in the DRC.

26. Miss Iqbal referred me to the expert report prepared by Mr A Ntung and drew my attention to **BM (false passport) DRC [2015] UKUT 00467 (IAC)**. At the head note **BM (false passport) DRC** confirms

> 'The mere fact that an asylum claimant utilised a false passport or kindred document in departing the DRC will not without more engage the risk category specified in [119(iv)] of BM and Others (Returnees: Criminal and Non-Criminal) DRC CG [2015] 293 (IAC). The application of this guidance will be dependent upon the fact sensitive context of the individual case. The Tribunal will consider, inter alia, the likely state of knowledge of the DRC authorities pertaining to the person in question. A person claiming to belong to any of the risk categories will not be at risk of persecution unless likely to come to the attention of the DRC authorities. Thus in every case there will be an intense focus on matters such as publicity, individual prominence, possession of a passport, the standard emergency travel document arrangements (where these apply) and how these matters impact on the individual claimant.

27. The question regarding document fraud was also highlighted and Ms Iqbal submitted that it was completely credible that the appellant had entered the United Kingdom on a false document as a child. The matter was adjourned twice following the finding on an error of law in the decision of Judge Mayall in order to allow for both cases in **BM** to be promulgated. She submitted the risk was enhanced because the appellant had applied for a travel document, he had been absent from the DRC for 9 years and there would be an awareness of his ethnic background. These matters would be looked on suspiciously.

28. She also referred me to the expert report of Mr Alex M Ntung dated 28th September 2015. Mr Ntung also expressed concerns about the ethnic background of the appellant. What he did say was this 'I was so concerned about his total lack of awareness of his family and ethnic background' and 'one of the surest ways of

knowing whether an individual is a member of specific (sic) tribe or community is by examining his or her genealogy'.

29. In that report at [36] was this comment

> 'When I asked him whether about his ancestral origin, he stated that he was not aware of this but he think that he might be from the Bakongo ethnic group'.

and at [43] it was reported

> 'Mr Kisungu has demonstrated no awareness of his tribe link beyond DRC borders or social and linguistic background of Bakongo petiole in DRC. He has demonstrated any (sic) understanding of realities surrounding conflict in DRC. He has provided no knowledge about his mother's family genealogy and her cultural identity'.

30. If the appellant does not know what his ethnic background is and cannot give details, I do not accept that Mr Ntung can ascribe one to him based on 'their ancestry, namely the name of their father, grandfather, great-grandfather up to the tenth or more generation'. That said, the report identifies that there are 70 million people in the DRC and over 400 ethnic groups. I do not accept that it has been shown that the appellant is at risk because of his ethnicity.

31. The skeleton argument of Ms Iqbal introduced the assertion of the vulnerability of the appellant to interrogation because as Mr Ntung stated [79], the appellant had 'no awareness of the social, geographical, cultural linguistic and political background'. The report consists of large sections of general background history, surmise and unsubstantiated assertions and the value of this report is limited in this regard and as an example, Mr Ntung's report identified [60] that the appellant

> '... is culturally British, his history of offences and criminal behaviour would be considered in DRC as 'western behaviour' and 'would make him discriminated and unwanted as local people in DRC … perceive the western young adults as lacking moral values'.. 'His history of offences and criminality would reinforce these beliefs and excluded (sic) him socially, which influence his economic survival'.

32. The appellant, however, lived in the DRC for 16 years until his entry to the United Kingdom in 2006. I find therefore that he would have grounding in the cultural, social, linguistic and geographical character of the DRC. He is not interested in politics and bearing in mind his extensive experience with the police authorities in the United Kingdom, I do not accept that he is rendered particularly vulnerable. He is also an adult healthy male. I repeat the issue in this case is his liability to be detained by the authorities on his return not a rehearsal of all the issues. I do not find that he is unable to return to the DRC and this appellant is at any real risk of persecution or other serious harm if now returned to the DRC. He has also confirmed to the expert that he had no media attention. The expert asserted that he would not be returning with identity documents but he has in fact applied for a Travel document.

33. I also note that the expert stated at [46] of his report that

> 'having exited the country illegally isn't a serious issue in DRC as bribery and corruption is endemic and informal system is part of everyday life'.

This contradicted his assertion at [49] that the appellant

> 'having exited the country illegally could only trigger other investigation and questioning'.

34. I do not therefore find that the mere fact that the appellant has applied for a Travel document will attract the adverse attention of the authorities. It is clear from his own evidence and no doubt the evidence he has put forward when making the application for his Travel document that he left the DRC 9 years ago and when he was a child and would not have had control over his own papers. In relation to travel documents **BM and others (returnees)** found at paragraph 68 *'AI accepts these are 'for **administrative purposes'**, in other words, for the legitimate purpose of checking information without thereby implying a sinister motive that might lead to an individual being placed at risk'.*

35. I repeat the finding above that he was not considered to be at risk because of his family and his ethnic background would not, either alone or cumulatively with the other information produced, expose him to a risk from the authorities. This observation is reinforced by the lack of any political activity by the appellant within the United Kingdom. The factor of having a criminal record in the United Kingdom for assault, disorderly behaviour, obstructing a police officer, robbery and possession of drugs may be 'disturbing' as described by First-tier Tribunal Judge Mayall but does not have a political flavour. His argument for asylum was the same as the reasons given in 2006 (connection with his father) and this was dismissed. His lifestyle revolved around petty offending, drug possession and robbery but he was not a political member of APARECO or any other anti-government organisation in the time he has been in the United Kingdom. As pointed out in a previous hearing this is not a criminal deportation but an administrative removal and on the basis of the case law and the fact sensitive analysis I do not find the appellant would be at risk on return.

36. The fact is that Judge Mayall found no evidence that the appellant would be at risk because his father was a journalist and this finding has not been disturbed. Although the expert report of Mr Ntung attempted to expand the consideration to the return of the appellant overall because of his vulnerability, I do not accept that the case extends to revisiting the risk to the appellant overall but only to the risk to him because of his criminal record. Even if that were not the case I do not find he would be at risk for the reasons given above.

Order

The appeal is dismissed on Asylum, Humanitarian Protection and Human Rights Grounds.

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.

Signed Date 19th November 2015

Deputy Upper Tribunal Judge Rimington