



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: AA/02897/2015

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 11 January 2016**

**Decision & Reasons Promulgated  
On 4<sup>th</sup> May 2016**

**Before**

**UPPER TRIBUNAL JUDGE PERKINS**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**D- L-**

(ANONYMITY DIRECTION MADE)

Respondent

**Representation:**

For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer

For the Respondent: Ms M Knorr, Counsel, instructed by Southwark Law Centre

**DECISION AND REASONS**

1. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellant, that is the present respondent. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. I make this order because the First-tier Tribunal has made a similar order and because I am satisfied that publicity concerning the respondent's identity could increase the risks he might face in the event of his return.
2. This is an appeal by the Secretary of State against the decision of two judge panel of the First-tier Tribunal allowing the appeal of the respondent,

hereinafter “the claimant”, against the decision of the Secretary of State on 6 February 2015 to refuse him asylum and make him the subject of a deportation order. My primary task is not decide if he his a refugee or if he should be deported but if the Secretary of State has shown that the First-tier Tribunal erred in law in reaching the decision that it did.

3. The claimant is a citizen of the Democratic Republic of Congo. He was born on [ ] 1993 and so is now 22 years old. He has lived in the United Kingdom since January 2006. He arrived with his sister and they claimed asylum the day after they arrived. His claim for asylum was refused but he was given discretionary leave to remain as a minor. That leave lapsed on 1 February 2009. On 30 January 2009 he applied for further leave to remain.
4. His situation is complicated because in September 2009 he was convicted before the Crown Court of attempted rape, aiding and abetting rape and false imprisonment of a female under the age of 16 years. He was sentenced to five years in custody but this was reduced to four years on appeal.
5. He was released from custody at the end of October 2010. About six months later the Secretary of State refused him further leave to remain and decided to deport him. That decision and a subsequent decision were withdrawn but, as set out above, on 6 February 2015 the Secretary of State decided that the claimant was not a refugee and should be deported. It was an appeal against that subsequent decision that was allowed by the First-tier Tribunal.
6. The appeal was allowed on asylum grounds and on human rights grounds with reference to Article 3 and Article 8 of the European Convention on Human Rights. The appeal on humanitarian protection grounds was dismissed. The Tribunal did not uphold the decision of the Secretary of State under Section 72 of the Nationality, Immigration and Asylum Act 2002 that the claimant was a danger to the community and consequently not entitled to protection as a refugee.
7. Permission to appeal was refused by the First-tier Tribunal but granted by Upper Tribunal Judge McGeachy. The respondent’s grounds are apt and helpful and I have considered them with Mr Tufan’s submissions and Ms Knorr’s response.
8. I begin by deciding if the First-tier Tribunal’s decision that there is a real risk to the applicant’s safety in the event of his return to the DRC is sound in law. My findings on this point materially affect the approach to the rest of the case.
9. The asylum claim is summarised in the Decision beginning at paragraph 50. It is a feature of the case that the claimant’s sister has been recognised as a refugee. In some ways her case is similar to the claimant’s case but, as the grounds rightly point out, there are additional and compelling features in her case which do not apply to the claimant.
10. Nevertheless the First-tier Tribunal directed itself, I find correctly, that the findings of fact made by the First-tier Tribunal in the claimant’s sister’s

case are a necessary starting point when they relate to the case of this claimant.

11. The First-tier Tribunal deciding the claimant's sister's case found her evidence "compelling" and the Tribunal accepted her account of what had happened to her in the DRC. The claimant's experiences in the DRC were shared with his sister. The First-tier Tribunal therefore accepted that the claimant's mother is now dead and that while he was child in the DRC soldiers came to their home, assaulted him and raped his sister.
12. The Tribunal recognised that the incident was some ten years or so before it made its decision. It was Ms Knorr's case that the claimant was still at risk. His mother had been arrested and detained on account of her political activities. It was reasonable to believe that her subsequent death was a result of those activities. The claimant and his sister, although still children, had been targeted by the authorities after their mother's disappearance. The claimant would probably be identified as his mother's son on arrival. He would be returning to the DRC at a time of increasing tensions in anticipation of an election in 2016.
13. Although mentioning that the claimant was a failed asylum seeker and a person with criminal convictions Ms Knorr made it clear that that was not the "crux" of her case that he was at risk on return for those reasons. They were incidental to her main argument.
14. The First-tier Tribunal followed the decision of the Tribunal in the sister's case and accepted that this claimant had been persecuted because of her association with his mother.
15. The Tribunal noted background evidence and an expert report that there had recently been "crackdowns" in the DRC and accepted evidence that the claimant would be interrogated on return. The Tribunal was entirely satisfied that people returned to the DRC are interviewed so that their identity can be established. Establishing this claimant's identity could reasonably be expected to identify him as the son of his persecuted mother and thus lead to the claimant himself being at risk.
16. The Tribunal was expressly aware that the decision in **BM and Others (returnees - criminal and non-criminal) DRC CG [2015] 00293 (IAC)** discounted there being a risk of persecution or other serious ill-treatment simply by reason of being a returned offender or failed asylum seeker.
17. The Tribunal's concern was clearly that the claimant would be identified as someone whose mother was worthy of persecuting and therefore at risk himself.
18. The finding that the claimant is a refugee was clearly challenged.
19. The grounds point out that the Tribunal began by saying that the respondent did not appear to be disputing the claimant's credibility. The grounds say that this is wrong.
20. In particular paragraph 66 of the notice of decision letter disputed the claimant's evidence that he had seen the photograph of his mother's funeral. The photograph appeared to be of a funeral but there was nothing

in the photograph that identified it as the funeral of the claimant's mother. The decision that it was the mother's funeral was described as "pure speculation". Further the claimant had identified himself to the authorities of the DRC in the United Kingdom because he had applied for a passport and that was considered to be not credible if he feared persecution from the authorities in his country of nationality.

21. The grounds also assert that the claimant's sister's appeal was allowed for reasons that do not apply to the claimant including her being a lone female stigmatised by rape and being a member of a particular social group. The First-tier Tribunal clearly acknowledged this distinction but, according to the grounds, had not appreciated its significance.
22. Mr Tufan submitted that the UDPS is a legitimate political party in the DRC and is the main opposition party. There was, he said, insufficient background evidence to support the conclusion that the claimant would be at risk now. Mr Tufan recognised that at paragraph 23 of its Decision the Tribunal had relied heavily on paragraph 6.7 of the report of Dr Seddon (page 432 in bundle) which is set out and refers to the "ample objective evidence to suggest that those suspected of political associations ... will be at risk in the DRC today."
23. Mr Tufan submitted that the Tribunal could not conclude from that that this claimant was someone who would be suspected of political associations or affiliations.
24. Ms Knorr objected to this line of argument pointing out that the grounds of appeal did not challenge the Tribunal's acceptance of Dr Seddon's evidence.
25. It is appropriate to look at the decision of the First-tier Tribunal allowing the appeal of the claimant's sister. Having accepted the claimant's sister's evidence as credible and referring to her witnessing attacks on her family the First-tier Tribunal said unequivocally at paragraph 34 that he found the claimant's sister to be a refugee "on the grounds of a political opinion imputed to her by reason of her family connections".
26. At paragraph 35 he then began an alternative analysis with the words "in the alternative" and here the First-tier Tribunal Judge claimed that he accepted that the claimant's sister was a refugee by reason of her membership of a particular social group and by being a lone woman stigmatised by rape.
27. It really is quite plain that the First-tier Tribunal considering the case of the claimant's sister accepted that she was at risk because she was her mother's daughter. There were other important reasons for allowing the appeal but the decision to allow the appeal did not depend on them.
28. In her reply dated 15 October 2015 Ms Knorr pointed out that the contention that the evidence does not substantiate the claimant's mother's death and that the claimant had obtained a passport should not be understood as challenges to his credibility as a whole.

29. The point about the evidence about the mother's death is that documents were provided from the Red Cross to Lewisham Social Services. It was a permissible inference that they did indeed show the claimant's mother. His sister accepted the evidence was imperfect but thought she recognised someone in the photograph. The point is that neither the claimant nor his sister was relying deceitfully on evidence which, on scrutiny, was shown to be dishonest. Rather the evidence was recognised to be of limited value but produced from an independent source because it was the best that could be done.
30. It was not challenged that the passports had been obtained at the assistance of Social Services for the purposes of getting a bank account. The fact that a person has sufficient confidence in his government to seek a passport from the embassy in the United Kingdom on the advice of Social Services is hardly compelling evidence that he feels safe in the event of his return.
31. Whilst it is right to say that the refusal letter made it plain that the claimant's account was not accepted in its entirety it is going too far to say that credibility was so much in issue that the Tribunal erred in the approach that it took. Basically the lead points had been resolved in the claimant's favour in his sister's appeal and the Tribunal believed the thrust of the claimant's evidence. There is no error of law there.
32. Neither was it suggested that the Tribunal was not entitled to rely on Dr George's evidence.
33. The evidence that this claimant would be at risk now might be thought less compelling than the evidence that he been ill-treated in the past but Dr George was clearly of the opinion that the past history of persecution taken with the present circumstances and the likelihood of discovery when interrogated on return was sufficient to create a risk.
34. This is clearly the evidence that the Tribunal has accepted and the grounds fail to show any error of law in accepting those findings. Although it was some time ago it is at least reasonably likely that this claimant's mother has been killed because of her political activities. It may well be, as claimed, that this is a family that has seen the sharp end of persecution and the conclusion that the claimant would be at risk now was permissible.
35. Once this is established then the Secretary of State's case starts to fall away. Clearly the need for "Article 3 protection" is made out.
36. Further the conclusion that the claimant is entitled to refugee protection remains. There is no argument that he has committed a serious crime but that was some time ago. He was a young man when he went into custody. There was abundant evidence to support the conclusion that he had addressed his offending behaviour and was not a risk to anyone. Some might find it repugnant to offer international protection to a person who has behaved so badly. People are entitled to such views but that does not alter the terms of the Refugee Convention or the European Convention on Human Rights. To be disqualified from refugee protection there needs to

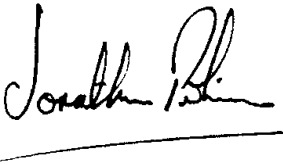
be both a serious crime and an existing danger and the finding that there was no present existing danger was wholly justified by the evidence.

37. The finding that removal would be contrary to the claimant's rights under Article 8 of the European Convention on Human Rights might be a little under explained. There is a clear statutory obligation on judges not to allow an appeal on Article 8 grounds when certain conditions exist unless there are further circumstances. Section 117C(6) refers to "very compelling circumstances, over and above those described in Exceptions 1 and 2."
38. There are manifestly such circumstances here. They are the fact that the claimant needs international protection because there is a real risk of his being seriously ill-treated in the event of his return. Maybe that these are the paradigm examples of the "very compelling circumstances over and above those described in Exceptions 1 and 2" needed to prevent deportation. It may well be that the First-tier Tribunal did not get this point quite right. If it is necessary I remake the decision on this point only and I make it in the claimant' favour.
39. Although I have considered carefully the arguments raised by Mr Tufan which he did clearly and economically, for the reasons given I am satisfied the decision that the claimant is still a refugee was permissible and with that the rest of the case follows.

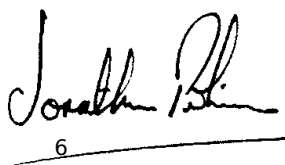
**Notice of Decision**

40. I dismiss the appeal of the Secretary of State. I uphold the finding that the claimant is in need of international protection under Article 3 and is still a refugee. If necessary I remake the finding that removal would be contrary to his rights under Article 8. The reasons given are not impressive. The proper reason is that it is contrary to a person's Article 8 rights to risk Article 3 ill-treatment.
41. In all the circumstances I dismiss the Secretary of State's appeal.

Signed  
Jonathan Perkins  
Judge of the Upper Tribunal



Dated 28 April 2016



6