IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/04540/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5 January 2016	**On 27 January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

A D
~~**(ANONYMITY DIRECTION NOT MADE)**~~

Respondent

Representation:
For the Appellant: Mr. N. Bramble, Home Office Presenting Officer
For the Respondent: Mr. R. Bartram, Migrant Law Partnership

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the decision of First-tier Tribunal Judge Herbert OBE promulgated on 9 September 2015 in which he allowed AD's appeal against the Respondent's decision to refuse to grant asylum.

2. For the purposes of this decision I refer to the Secretary of State as the Respondent and to AD as the Appellant, reflecting their positions as they were before the First-tier Tribunal.

3. Permission to appeal was granted as follows:

> "In summary, the grounds on which the respondent seeks permission to appeal complain as to: (1) the judge not having given reasons for refusing to admit additional evidence [primarily relating to the "Congolese Support Group"] at the hearing on 18 August 2015 (reference is made to the presenting officer's minute which bears a date of 28 August 2015 but might actually be from 18 August); (2) mis-application of the country guidance given in **BM and Others (returnees - criminal and non-criminal) DRC CG [2015] 00293 (IAC), circulated on 2 June 2015**; (3) the judge apparently counting in the appellant's favour her physical appearance before him - in the absence of medical evidence regarding the appellant's physical health problems; and (4) a failure to apply the correct principles before indicating that the appellant would probably also succeed by reference to article 8 of the European Convention on Human Rights.
>
> The grounds are arguable. Amongst other things, it seems to me arguable that the judge adopted a flawed approach when assessing the appellant's case for international protection. For example, in the absence of medical evidence regarding the appellant's physical health problems, the judge seems to have counted in the (68 year old) appellant's favour her physical appearance before him - see his paragraph 6. And it was also the judge's view that "Inconsistency is the hallmark of a refugee who has experienced traumatic events" (paragraph 7 of the decision under consideration)."

4. At the hearing I heard submissions from both representatives, following which I reserved my decision which I set out below with reasons.

Submissions

5. Mr. Bramble relied on the grounds of appeal.

6. Mr. Bartram submitted in relation to the first ground that there was no record of this request in the decision and that his note of the hearing recorded none of these submissions. Notwithstanding the possibility that this evidence had been rejected, the Respondent's representative could have made submissions that it was for the Appellant to prove her case. Mr. Bartram stated that he had some documents on his file which he had been given by the Respondent's representative at the hearing.

7. In relation to the second ground he submitted that BM and Others was not limited to members of APARECO. The risk category included those who were opponents of the regime and BM and Others did not limit this to APARECO. To do so would be to overrule the case of MM (UDPS members - risk on return) DRC CG [2007] UKAIT 00023.

8. In relation to grounds three and four, Mr. Bartram submitted that there was an interplay between the medical evidence and findings of credibility. I was referred to paragraph [6] of the decision. In assessing credibility the judge had taken account of the letter from Barbara Gehrels, but this was not the sole reason that he had made his credibility findings. I was referred to the cross-examination in paragraph [11] and the analysis of the medical evidence in paragraph [12]. The consistency of the evidence went in favour of the Appellant. I was referred to paragraph [17] where the judge found that the Appellant's evidence was consistent both

internally and with the country evidence. At paragraph [19] the judge referred to there being some issues with the case before him. The judge was right to place some weight on the symptoms identified by the counsellor and on what he saw and heard at the hearing.

9. In relation to the fourth ground and Article 8, it was not incumbent upon the judge to allow the appeal on every ground, and he had already allowed it on asylum grounds.

10. Mr. Bramble in his submissions stated that the first and second grounds of appeal were related. The judge had to make a proper assessment of the group to which the Appellant claimed to belong, the Congolese Support Group ("CSG"). The presenting officer provided various documents which related to the witnesses who attended the hearing, and some documents which related to CSG. In paragraph [11], page 5, the judge states that the credibility of the CSG was challenged by the Respondent's representative in submissions. This was relevant to the second ground. I was referred to paragraphs [87] and [88] of BM and Others which are the basis for the headnote. At paragraph [87] of the Upper Tribunal set out steps to be followed to ascertain the status of APARECO. It was submitted that the judge needed to go through the same exercise for the CSG but that he had not taken that task in hand. This needed to be done to ascertain what weight could be given to the letters of support. The reference in paragraph [20] to the video on the opposition website was not a sufficient basis for the analysis.

11. In relation to the third ground, limited weight should be given to the letter from Barbara Gehrels. She did not have the level of expertise necessary to make a diagnosis. The judge was entitled to take the circumstances and demeanour of the Appellant into account but there was no medical evidence before the judge regarding the physical aspects of her claimed medical problems. The statement at paragraph [7] that "inconsistency is a hallmark of a refugee who has experienced traumatic events" was a preconceived notion in showed that the judge had "put the cart before the horse".

12. In relation to the fourth ground although the judge did not allow the appeal under Article 8, in paragraph [23] he all but allowed it under Article 8 outside the rules. There was not a sufficient assessment in paragraph [23] to reach that conclusion.

13. Mr. Bartram responded that the statement referred to in paragraph [7] was not a conclusion, and the judge was only setting out the test which he would apply. In relation to the evidence of physical problems referred to in paragraph [18], the judge found that there may well be little by way of medical evidence of such an experience but that the psychological consequences were what remained.

14. In relation to the legitimacy of the CSG, the grounds referred to APARECO. It was clear that APARECO mattered to the DRC authorities. In paragraph

[20] of the decision the judge found there was a possibility that the video would have been seen. The question was whether the CSG opposed the government, which they did, and on that basis there was a serious possibility that the government would take it out against the Appellant. The structure of the CSG as set out was sufficient.

Error of law

Grounds 1 and 2

15. In relation to the first ground, there is no reference in the decision to any attempt by the Respondent's representative to submit further documents in relation to the witnesses or to the CSG. There is no record of any application in the Record of Proceedings. Mr. Bartram stated that he had no record of any submissions being made, although he was in possession of some documents which had been given to him by the Respondent's representative at the hearing. There were no such documents on the Tribunal file, but given the claim of the presenting officer that they had not been admitted, I would not expect to have found them.

16. It is troubling that the evidence of what occurred at the hearing is so different, with the Respondent's representative in the First-tier Tribunal stating that she attempted to submit further documents but there being no record of this in the decision or the Record of Proceedings. There is a reference in the decision to submissions being made by the Respondent's representative challenging the credibility of the CSG [11], but there is no reference to the basis on which it was challenged, nor any reference to supporting evidence.

17. The judge states in paragraph [11] that the CSG letter "simply details the current family structure with the appellant living with her son and two grandchildren, setting out that the group organised a public march from the DRC Embassy in the UK up to 10 Downing Street on 30 June 2015." He then continues to set out further details of what is in the letter. At first the decision implies that it is a letter which simply sets out the Appellant's family structure, but as the judge goes on to detail its contents, it is clear that the letter goes beyond a simple description of the Appellant's family circumstances. Although referred to, there are no details of the Respondent's representative's challenge to the CSG's credibility in the decision or the Record of Proceedings, and there is no further analysis of the CSG in the decision.

18. As submitted by Mr. Bramble, the issue of the credibility of the CSG is relevant to the second ground of appeal. This relates to the judge's failure to give reasons for his findings as to why the authorities would have viewed the CSG website, and why therefore the Appellant's sur place activities would be known to the DRC authorities. It relates directly to the judge's failure to make findings to support the proposition that the DRC authorities had any adverse interest in the CSG.

19. The Respondent refers to the case of BM and Others in the grounds of appeal. Paragraph [87] starts "We address the discrete question of risk to those who are considered to be opponents of the Kabila regime by reason of their *sur place* activities in the United Kingdom." The decision then turns to an analysis of APARECO, which was the relevant opposition group in the case of BM and Others. This leads to the finding as set out in paragraph (iii) of the headnote that:

> "Persons who have a significant and visible profile within APARECO (UK) are 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) DRC CG [2007] UKAIT 00023. Those belonging to this category include persons who are, or are perceived to be, leaders, office bearers and 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."

20. BM and Others finds that those with a visible profile within APARECO are at real risk of persecution because they fall within one of the risk categories identified in MM as opponents of the Kabila regime. However, there is no analysis here of the CSG and no findings that it is perceived in a similar way to APARECO. I find that, in order to ascertain whether the Appellant fell within one of the risk categories identified in MM, it was incumbent on the judge to carry out an assessment of the CSG along similar lines to the assessment of APARECO in BM and Others. It is clear from the decision that the Respondent had concerns about the credibility of the CSG, but these are not addressed, and the status of the CSG is not given any consideration. This goes to establishing whether the Appellant had a political profile, actual or perceived, which was likely to have brought her to the adverse attention of the DRC authorities.

21. In paragraph [11], when setting out the evidence provided by the Appellant, the judge quotes from the CSG letter:

> "The letter finally confirmed the fact that the appellant had joined the strategic team of the Congo Support Group in White Chapel and, because of her high profile views and presence on the website recording a video, would be at serious risk in the DR Congo if she were returned."

22. In paragraph [20] the judge finds that there is a real risk that the Appellant's video which was on the CSG website would have been seen by the authorities. However, he gives no reasons for why the DRC authorities would be interested in, or aware of, the CSG website. He makes general statements about the "resourcefulness of forces of repression in Africa and elsewhere", without making any specific findings relating to the CSG. He makes no reference to the CSG letter.

23. BM and Others held in relation to APARECO that, as a general rule, mere rank and file members are unlikely to fall within this risk category. It held that "those belonging to this category include persons who are, or are

perceived to be, leaders, office bearers and spokespersons." It also acknowledges that each case will be fact sensitive with particular attention directed to the likely knowledge and perceptions of the DRC state agents.

24. There is no finding in the decision that the Appellant is anything more than a rank and file member of the CSG. Although when setting out the evidence the judge quotes from the CSG letter which states that the Appellant is a member of the strategic team of the CSG in Whitechapel, there is no analysis of what this means. Neither is there any attention directed to the "likely knowledge and perceptions of the DRC state agents". As set out above [21] there is no assessment of the CSG so as to lead to any findings that the DRC state agents would be interested in it.

25. I find that the judged erred in failing to give reasons for why the authorities would have viewed the CSG website. There are no reasons given for why the DRC authorities have any interest in the CSG. Further, there is no finding that the Appellant is anything more than a supporter of the CSG.

26. I find that the judge has not established that the CSG is on a par with APARECO such that involvement with the CSG would be regarded in a similar way to involvement with APARECO. Clearly central to this issue is the Respondent's challenge to the credibility of the CSG, and any evidence which the Respondent may have to support her submissions. It is unsatisfactory that this extra evidence was in the possession of the Appellant's representative, and that there was such a discrepancy between the recollection of the presenting officer and the record of proceedings.

27. This failure to give reasons is material as, whether or not the Appellant falls within the risk category identified in BM and Others with reference to MM, is determinative of whether or not her asylum claim succeeds.

Ground 3

28. In relation to the other grounds, the judge was aware that Barbara Gehrels was not a recognised qualified professional capable of making a diagnosis of PTSD. As accepted by Mr. Bramble, the judge was entitled to take the circumstances and demeanour of the Appellant into account, and also to take into account the evidence of Barbara Gehrels. In paragraphs [8] and [12] the judge accepts that there are limitations on the degree of weight that can be given to the report.

29. In paragraph [18] the judge states that as it happened in 2009 "there may well be little by way of certain medical physical evidence". He is aware that the timelapse will have affected the possibility of there being corroborative medical evidence relating to her physical condition. I find, as accepted by Mr. Bramble, that he was entitled to take the Appellant's physical appearance and demeanour before him into account.

30. It was submitted that in paragraph [7] when the judge states "inconsistency is a hallmark of a refugee who has experienced traumatic events", this was not a finding but rather the judge setting out the test that would apply. However I find that this has affected his approach towards the evidence which was before him, and towards any inconsistencies in the evidence. Rather than assessing all of the evidence and then coming to a conclusion as to the inconsistencies, he has approached the evidence from the standpoint that any inconsistencies will lend towards a positive credibility finding.

Ground 4

31. Although the judge did not expressly allow the Appellant's appeal under Article 8, he did make findings in paragraph [23] that her removal would be "highly likely to be disproportionate to the need to maintain immigration control". However he made this finding without carrying out a proper assessment of her Article 8 claim. There is no assessment of paragraph 117B which is necessary when making a finding as to proportionality. Although the appeal was not allowed under Article 8, to make such a statement without having made any findings is not the correct approach.

Decision

The decision involves the making of an error on a point of law and I set it aside. No findings are preserved.

The appeal is remitted to the First-tier Tribunal.

Signed Date 26 January 2016

Deputy Upper Tribunal Judge Chamberlain