



IAC-AH-DP/LEM-V1

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

Appeal Number: IA/25514/2009

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 14 March 2016**

**Decision & Reasons  
Promulgated  
On 13 April 2016**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MONSON**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**P K (DRC)  
(ANONYMITY DIRECTION MADE)**

Respondent/Claimant

**Representation:**

For the Appellant: Mr S Kotas, Specialist Appeals Team  
For the Respondent/Claimant: Mr Richard Bartram, Solicitor, Migrant Law Partnership

**DECISION AND REASONS**

1. The Secretary of State appeals to the Upper Tribunal from the decision of the First-tier Tribunal allowing on asylum grounds the claimant's appeal against the decision made on 21 August 2009 to refuse to revoke a

deportation order made against him as a foreign criminal on 3 May 2007 under Section 3(5)(a) of the Immigration Act 1971, with reference to Section 32(5) of the UK Borders Act 2007. The First-tier Tribunal made an anonymity direction, and I consider it is appropriate that the claimant continues to be accorded anonymity for these proceedings in the Upper Tribunal as the central issue remains whether he has a well-founded fear of persecution on return to the DRC on account of his political profile.

### **The Reasons for Granting Permission to Appeal to the Upper Tribunal**

2. On 14 October 2015 First-tier Tribunal Judge J M Holmes gave her reasons for granting the Secretary of State permission to appeal to the Upper Tribunal:
  1. In a Decision promulgated on 8 July 2015 a panel of Judge Whalan and Judge Scott Baker allowed on asylum grounds the Appellant's appeal against the Respondent's decision to deport him to the DRC. The application was made in time.
  2. It is arguable, as set out in the grounds, that the Tribunal has failed to adequately engage with the Respondent's case, and has failed to provide adequate reasons for the decision, and has failed to follow the relevant country guidance. On any view the assessment of the status and objectivity of the "expert witness" required great care given that she and the Appellant are, or were, in a relationship together, and arguably the weight that could be given to her evidence was not analysed with that properly in mind. The Tribunal also needed to make clear reasoned findings upon whether the Appellant's account of his *sur place* activities was credible, given his extensive record of dishonesty, and his inability to pursue the *sur place* activities relied upon whilst in detention. Having decided what was accepted, and what was not, the Tribunal then needed to analyse which of those activities (if any) would be likely to have come to the attention of the authorities in the DRC. The cynicism of the Appellant in undertaking any of those *sur place* activities also required specific findings, because that cynicism (if any) went to the HJ (Iran) argument he relied upon, and informed the decision of whether he was genuinely likely to pursue them further following deportation. Thus the decision required a careful examination of the chronology of the Appellant's immigration status and offending history, alongside the *sur place* activities the Tribunal accepted he had undertaken.

### **Relevant Background**

3. The claimant is a national of the Democratic Republic of Congo (DRC) who was born on [ ] 1967. He entered the United Kingdom on 5 March 1995 with his wife and two children. He applied for asylum the following day. He claimed refugee status on the basis of his political opinion as an active member of the UDPS.

*The Decision of the Tribunal in February 2004 - No future risk, but appeal allowed on Article 8 grounds*

4. His claim for asylum was refused on 28 November 2001. His appeal against refusal of asylum came before Adjudicator Powell sitting at Hatton Cross on 11 February 2004. In a subsequent determination, Adjudicator Powell dismissed the appeal on asylum and Article 3 grounds, but allowed his appeal under Article 8. He found that the claimant was detained in the DRC because he was an active member of the UDPS opposed to President Mobutu. He found his account of detention ill-treatment to be credible and if the present state of DRC society and its institutions were an indication of what took place in the past, it was quite credible that the appellant was able to bribe his way out of prison and out of the country.
5. However, he was not satisfied there was any evidence to suggest the appellant would be of interest to the authorities today. He had not been directly involved in DRC politics since 1995. Two regimes had passed away in DRC since he was politically active. The UDPS was now a legal party. Its refusal to register under the May 2001 law had resulted in harassment by the government but such harassment fell a long way short of persecution. He was not satisfied the appellant would be of interest to the authorities on account of his political activities nearly ten years ago for a party that was lawfully able to engage in politics in the DRC.
6. The judge rejected a submission by the claimant's representative that the claimant would be recorded as a political opponent of the current regime by implication, and as an individual who had escaped from prison in 1995. Part of the judge's reasoning on this issue was that the claimant was not a senior member of the UDPS in 1995. He was arrested with others who supported the organisation. He did not believe the claimant was regarded as anything other than a relatively low level member of the opposition by the authorities. His detention may well have been justified in the regime's mind in 1995, but did not find that his release, however accomplished, would have caused the authorities to take a further interest in him.
7. With respect to the appellant's Article 8 claim, the Adjudicator noted that the claimant had volunteered the fact that both he and his wife had been separately convicted of criminal offences committed in the UK. He did not consider this was determinative, as neither of them had been made the subjective of a recommendation for deportation by the trial judges or magistrates who heard their cases.

*The Claimant's Repeat Offending leading to Warning in February 2005*

8. By the beginning of 2005, the claimant had accrued twelve separate criminal convictions in a period spanning October 1996 to December 2004. This led to the Secretary of State issuing him with a warning letter in February 2005 of the need to comply with the laws of the United Kingdom, and the risk of his discretionary leave to remain (consequential upon his earlier appeal being allowed on Article 8 grounds) being withdrawn. No action would be taken to deport him unless he again came to the adverse notice of the courts.

*Further Offending triggering Decision to Deport*

9. As recorded in a subsequent decision of a panel sitting at Taylor House on 24 November 2006, the claimant did not heed the warning, and appeared before the criminal courts on a further three occasions prompting then Secretary of State to serve the claimant with a notice of intention to make a deportation order on 26 May 2006.

*The Decision of the Tribunal in November 2006 dismissing the Claimant's Appeal against Deportation on asylum and Article 8 grounds*

10. In their subsequent decision, the panel found that the claimant had appalling criminal antecedents with no less than fifteen criminal convictions, largely related to driving with excess alcohol and driving whilst disqualified. He also had convictions for matters of dishonesty in the form of deceptions, attempted deception and receiving stolen goods. There was no doubt in the panel's view that there was a real risk of the claimant reoffending if granted leave to remain in the United Kingdom. He posed a risk to the public. There was every risk that, whilst under the influence of alcohol and driving a motor vehicle, the claimant might cause injury to himself or another.
11. The claimant, who was legally represented, was appealing against the decision to deport him on Article 8 grounds only. His evidence before the panel was that he had no details of the other persons who were also associated to his political party in the DRC, and he had not kept an interest in the events occurring in the DRC.
12. At paragraph 25 of their determination, the panel found there was no evidence that the claimant would be targeted on his return or they would be placed in a position of fear or danger as a result of his past political associations. Having regard to the country guidance case of **MK (AB and DM confirmed) DRC CG [2006] UKAIT 001** and the latest Country of Origin Information Report, they concluded there was no evidence of risk of return to the claimant at the date of the appeal hearing. The evidence of the claimant was that he was no longer politically active and showed no interest in the events in the DRC. In the circumstances it was unlikely that the claimant would attract any adverse interest from those in authority.
13. The panel dismissed the claimant's appeal against deportation, and on 17 January 2007 Senior Immigration Judge Jordan, as he then was, dismissed his application for a reconsideration of his appeal as being utterly without merit. This decision was upheld by the Administrative Court on 12 April 2007.

*The Claimant's relationship with a human rights activist leading to him becoming an activist alongside her*

14. The claimant spent some sixteen months in detention following the completion of his prison sentence for his last criminal conviction. While in

detention he met Elizabeth Atherton, a human rights activist who came to offer her assistance in resisting his deportation to the DRC. As the claimant put it in a subsequent witness statement he made on 29 April 2008, she came to visit him to help him with his case. They fell in love and a serious relationship developed between them. He was released from detention on bail on 31 August 2007, and went to live with Elizabeth Atherton, who was both his partner and his surety.

15. In the same statement, he said that, following his release from immigration detention, he had become a political activist. He had attended several demonstrations against deportation to the DRC in September 2007 outside Field House at the time of the **BK** hearing. One of these demonstrations was filmed by Friction TV. They were criticising immigration policies by the British Government in keeping people in detention and deporting them to dangerous regimes like the DRC. On 12 January 2008 he attended a demonstration outside Hackney Empire, and afterwards he had gone to a meeting which he was filmed making a strong statement criticising the Kabila regime and the fact that Kabila was really Kanabam and was not from Congo. He said his DVD was circulated around the country and in other parts of Europe, through other Congolese organisations and also in Congolese shops. It was widely known in the Congolese community in the UK that some people had been offered money by the Congolese government in exchange for intelligence about opposition activists. That was why he was sure that information about him would have been sent to Kinshasa. He was a recognisable face and his family's name was already known to the authorities. The information he had from Congo was that his younger brother, who had recently returned from exile to Kinshasa, was arrested for driving people to and from UDPS meetings. He was currently in Makala Prison.

*The Secretary of State's Reasons for rejecting the Refugee Sur Place claim - limited and inconsequential sur place activities undertaken in bad faith and/or the Claimant would not be taken seriously by the DRC authorities as a genuine opponent of the regime*

16. On 21 August 2009 then Secretary of State gave his or her reasons for refusing to revoke the deportation order which had been made against the claimant on 3 May 2007. The reasons given were very extensive, running to 29 pages. One of the reasons that the decision letter is so long is that the caseworker, Philip Williams, gave detailed consideration to each element of the claimant's multifaceted *sur place* claim. It was multifaceted as it featured participation in a number of different demonstrations, and membership of a number of different organisations, and a number of different contexts in which the claimant said that his antigovernment views were likely to have entered the public domain and/or would have been likely to have been passed on to the authorities in the DRC by agents operating in the UK.
17. In broad terms, the caseworker accepted that the majority of the alleged *sur place* activity had taken place, but disputed its ramifications in terms

of its effects on the claimant's risk profile. For example, the claimant said he faced a real risk of persecution in the DRC because of his position as a leader of the Congo Support Project ("CSP"). The caseworker did not accept that his membership of the CSP gave rise to a risk of persecution on return. Firstly, this was because the CSP did not have the objective of the removal of the current DRC government. In **BK (failed asylum seekers) DRC CG [2007] UKAIT 0098**, in which Ms Atherton, the founder of CSP, appeared as an expert witness, she was recorded as stating that the aims of the CSP, which was officially founded by her in 2007, were to support asylum seekers and refugees from the DRC in the UK.

18. The caseworker accepted the CSP was critical of the human rights record of the current regime in the DRC and was also critical of the United Kingdom government. But the organisation did not appear to have a website and no information could be found on how to join it or where and when it held meetings. So there was no evidence to support the claim that the CSP had any substantial importance as either a political human rights organisation in the United Kingdom or elsewhere, and there was no evidence that its activities were of any significance, either in the UK or the DRC.
19. A common theme in the caseworker's deconstruction of the claimant's *sur place* activities was that they were low level, of limited reach in terms of the extent of publication and/or the content of what he said. Although "critical and insulting", what the claimant said was either manifestly unfounded and/or not revelatory. In short, he contended that the authorities in the DRC would not take the claimant seriously as a genuine political activist.
20. The caseworker expanded on this latter theme at paragraph 66. In interview he claimed to have been a political activist ever since he arrived in the United Kingdom, but this was inconsistent with what he had said in his deportation appeal. He had exaggerated the length of time he had been a member of the CRC and IRC, he had exaggerated his importance within these organisations and the prominence of his activities within the CRC. These exaggerations indicated that the claimant was seeking dishonestly to enhance his claim to asylum, and that his activities were not in pursuit of genuine political beliefs. He had taken part in his recent activities in full knowledge of the fact that he was due for deportation to the DRC. He had only commenced his activities in the United Kingdom after his deportation appeal had been dismissed in December 2006. He was a person whose name had hitherto attracted no particular attention either in the DRC or the United Kingdom, and the revelation of his identity in the course of attending demonstrations or giving interviews raised the possibility that the claimant was deliberately and repeatedly revealing his name in order to enhance his claim to asylum. In short, the claimant had not engaged in his activities in the United Kingdom to act upon his genuine political beliefs but had done so solely or mainly to provide a basis for seeking a revocation of his deportation order.

*Further criminal offending in 2009 and 2010*

21. Following his release from immigration detention, the claimant accrued two further criminal convictions. On 28 May 2009 he was convicted of a possession of a class A controlled drug and of being drunk and disorderly. For this he received a conditional discharge. But on 20 January 2010 he was convicted of ABH, and received a term of imprisonment of eighteen months. His victim was Ms Atherton.

**The Decision of the First-tier Tribunal in January 2011 dismissing the appeal on asylum grounds, but allowing the appeal on Article 8 grounds**

22. The claimant's appeal against refusal to revoke his deportation order came before Judge Head sitting with a non-legal member at Richmond's Magistrates' Court on 24 January 2011.
23. The claimant was legally represented. His Counsel, Mr Belaro, informed the panel that the claimant was relying on Article 3 and 8 only. The panel heard from Ms Atherton, who had been the victim of the assault by the claimant on 29 August 2009 which had led to his subsequent conviction. She had attended his trial at the Crown Court, but was treated as a hostile witness. In cross-examination, she confirmed she had given expert evidence in the case of **BK** although she had never visited the DRC. She said she was committed to halting removals to the DRC. The reason her evidence had not been accepted by the Tribunal in **BK** was not because it was incorrect but because there had been no evidence to substantiate what she had said. So it was incorrect to say the claimant had not kept an interest in persons in the DRC. He had been a member of the UDPS and the DRC and had joined the same organisation on his arrival in the United Kingdom. When he was in immigration detention between 2006 and 2007 he expressed an interest in working in her organisation and had become involved. She accepted she had stood surety for at least twenty other DRC nationals who had been facing removal or deportation.
24. In their subsequent decision, the panel considered the claim that the claimant was a refugee *sur place* on account of his present activities in the country with the Congolese Resistance Council (CRC), International Congolese Rights (ICR), the Combattants, and the Congo Support Project (CSP). They found that all these organisations, with the exception of the CSP, were UK based political organisations whose objective was the removal of the current regime in the DRC. His interests in these organisations commenced at the end of 2006 after his deportation hearing. He claimed that since then he had attended regular meetings and demonstrations, and had distributed leaflets. The panel accepted his involvement in these groups.
25. The panel continued in paragraph [35]:

It was the respondent's opinion, and we concur, that the organisations did not have a significant public profile either within the United Kingdom or

elsewhere and the [claimant's] involvement with these organisations would not bring him to the adverse attention of the authorities in the DRC.

26. At paragraph [36], the panel addressed the claim that there were a number of DVDs and videos and photographs which showed the claimant expressing views against the DRC government and that these would bring him to the adverse attention of the DRC authorities. The panel were satisfied that none of the DVDs, videos or photographs identified the claimant as a member or leader of any political party.
27. Finally at paragraph [37] the panel noted an argument that some people within the Congolese community in the United Kingdom had been offered money by the Congolese government in exchange for intelligence by opposition activists and that it was likely that the claimant's name could come to the adverse attention of the DRC government. However, neither the claimant nor his witnesses were able to substantiate that claim by any independent or objective material.
28. The panel concluded at paragraph [38] that the decision to return the claimant to the DRC would not be in breach of his rights under Article 3 ECHR.
29. The panel however went on to allow the appeal on Article 8 grounds, on account of the claimant's relationship with his four children in the UK and because it was not reasonable to expect his children or those of his partner, Ms Atherton, to accompany the claimant to the DRC to establish a life with him there.

### **The Decision of the Upper Tribunal setting aside the decision of the First-tier Tribunal**

30. The Secretary of State successfully applied for permission to appeal against the decision to allow the appeal on Article 8 grounds notwithstanding the claimant's repeated offending. In November 2011 Upper Tribunal Judge Eshun set aside the decision of the First-tier Tribunal, and ordered it to be remade.

#### *Further Criminal Offending by the Claimant in the period 2012 to 2014*

31. The Claimant was convicted of further offences on 7 January 2012, 11 January 2012, 6 March 2014 and 17 March 2014.

### **The Decision of the First-Tier Tribunal in 2015 pursuant to the remittal of the appeal by the Upper Tribunal in 2013 for a fresh hearing**

32. It appears to have been envisaged that the decision would be remade by the Upper Tribunal. Following a number of aborted hearings in 2012 and 2013, Judge Eshun decided to remit the appeal to the First-tier tribunal due to the inordinate delay since the case had been last been adjourned part-heard. Due to further procedural difficulties, appeal was not re-heard at Taylor House until 20 March 2015. The appeal then had to be



adjourned part-heard, for a further hearing on 12 June 2015. The claimant was represented by Mr Bartram, who appeared for him on a pro bono basis. The appeal was heard by a panel consisting of Judge Whalan and Judge Scott-Baker. Judge Whalan wrote the subsequent decision.

33. At paragraph [46] the panel found that the claimant had conducted himself with a truly contemptuous disregard and contempt for the criminal authorities, in circumstances where it seemed that nothing stopped or prevented his propensity to reoffend. The relentless, almost routine nature of his offending, was affirmed by the fact that he almost invariably pleaded guilty to the charges made against him, suggesting that he considered his behaviour to be somehow unavoidable. He also had a history of both refusing to provide his identity details to the criminal authorities and/or of proffering false identities, both in terms of his offending for dishonesty and the circumstances of his repeated arrest and detention.
34. The panel received evidence from the claimant as to continuing *sur place* activities in the period 2012 to 2015. He relied inter alia on an interview held on BEN TV in December 2014 and a meeting on 26 January 2015 she said was broadcast within the DRC.
35. The panel noted at paragraph [56] that the claimant had showed them DVD extracts and various television interviews he had given expressing (sometimes in combative terms) his opposition to the DRC regime. The interviews were broadcast on BEN TV, which were shown on Sky Channel 182, and these were conducted in slots given to (or bought by) opposition political groups.
36. At paragraph [58], the panel said that his evidence about his *sur place* activity would suggest a continuing active involvement, insofar as he had been in a march to the Congolese Embassy in London on Friday before the hearing on "1st June 2012" (sic). (I infer that the date given is a typographical error, and that the intention of the panel was to refer to a march which took place shortly before the resumed hearing on 12 June 2015). This march had been organised by an umbrella of antigovernment groups, including APARECO (UK). Footage of these demonstrations had been broadcast on YouTube and BEN TV.
37. The panel received evidence from Ms Atherton. She confirmed that he had helped found the CSP and had been an active supporter ever since. He was now a vice-coordinator of the organisation. She said as the DRC diaspora in the UK was comparatively small, the CSP would necessarily have contact and dealings with opposition groups, namely the CRC and APARECO.
38. At paragraph [65], the panel observed that the claimant had not only been a core member of the CSP from its inception, but also Ms Atherton's romantic partner. They had lived together between August 2007 and September 2014, when they separated. They remained on good terms.

They said that Ms Atherton could not be described as a truly independent witness as her motivation derived in part from the fact that she was the claimant's close friend and ex-partner. But one result of this established relationship was that the claimant was known throughout the DRC community in the UK as the partner of Ms Atherton:

Ms Atherton, who is an intelligent, committed and visible activist, has undoubtedly an established profile within the DRC opposition movement active in the UK.

39. The panel found at paragraph [66] that her evidence corroborated that of the claimant in respect of his attendance at meetings and demonstrations and, more particularly, the fact of his profile as a coordinator and spokesman, in circumstances where he had been filmmaking speeches or addresses at both demonstrations and on programmes broadcast on YouTube and via BEN TV.
40. At paragraph [69] onwards, the panel addressed the issues of law. At paragraph [73], they summarised the issue in the case as being whether he was at risk on return to the DRC arising from an established and visible position as an anti-government opposition activist, as demonstrated not by his experiences in the DRC prior to 1995, but rather by his *sur place* activity in the UK since about 2005 or 2006.
41. At paragraph [74], the panel said the relevant guidance was now outlined in **BM and Others (returnees - criminal and non-criminal) DRC CG [2015] UKUT 00293 (IAC)**.
42. At paragraph [76], the panel also made reference to **MM (EDS members - risk on return) Democratic Republic of Congo CG [2007] UKAIT 0023** and **AB and DM (risk categories reviewed - Tutsis added) DRC CG [2005] UKIAT 00118**.
43. The panel's findings of fact were set out at paragraph [77] onwards. They found that the claimant was an established and committed opponent and dissident of the existing political regime in the DRC. He had a genuine history of activism with the UDPS in the DRC. This could be termed low-level activism, but it had led nonetheless to lengthy detention and torture. They found the claimant, in respect of his evidence as to his political activities, to be a comparatively clear, consistent and credible witness. His evidence was corroborated by that of Ms Atherton, and it was supported by documentation such as internet reportage, photographs and DVD records of speeches and interviews given on satellite television.
44. The claimant was in summary a vice-coordinator of the CSP, a comparatively small yet active and visible opposition group in the UK, whose campaigning emphasis was opposing the repatriation or deportation of people to the DRC. The claimant was also an active member of other opposition groups, specifically Combattant and the CRC. For almost ten years he had attended pickets, demonstrations and protest meetings, often in high-profile or visible locations, particularly outside the

DRC Embassy in London. He had given – and had been filmed giving – addresses and speeches at some of those meetings. His profile was enhanced by interviews televised on the Voice of Congo programme broadcast on BEN TV. He was not a member of APARECO (UK) and had never held a position within that organisation. But it seemed to the panel that the organisation of the comparatively small DRC opposition groups in the UK was both fluid and collegiate. Many activists would be members of more than one such group and would not see non-membership as constituting a dilution of their own sincerity or commitment. The groups combined at pickets and demonstrations and it may sometimes be unclear to the casual onlooker which group, or which combination of groups, an individual spokesman represented. They were satisfied that the claimant’s activism was sincere and not a cynical manoeuvre to avoid removal or deportation. This did not mean that his evidence was free entirely from exaggeration, or that the aggressive content of some of his speeches represented necessarily an imminent or credible threat. Nonetheless his status within the dissident DRC diaspora in the UK was effectively that of a spokesperson, office bearer and leader.

45. Ms Atherton could not be described as an independent witness, given her determined activism and her long-standing romantic relationship with the claimant. The panel also found that her evidence sometimes inclined towards inaccurate exaggeration. But none of this undermined the credibility of her core evidence. Her assessment had undoubtedly some foundation in truth in respect of leading or visible activists in the UK.
46. The panel reached the following conclusions at paragraphs [85] to [87], which I repeat verbatim below.
  85. How should our findings of fact be applied in the light of the recent country guidance outlined in BM & Others (returnees – criminal and non-criminal) DRC CG [2015] UK UT00293 (IAC), following MM (UDPS Members – Risk on Return) Democratic Republic of Congo CG [2007] UK AIT00023? There are, in our view, three points of broad note and significance. First, insofar as the Appellant’s established, longstanding, anti-government activism is concerned, he has the visible status of a spokesman and organisational leader. This status is not exclusive and it is not the case that he adopts invariably a leadership role when attending anti-government marches or rallies. But he has done so on an identifiably regular basis, in circumstances where his interviews and speeches have been recorded and broadcast, on social media such as YouTube and satellite television channels like BEN TV. Second, he has, perhaps unusually, an additional, identifiable status as the partner (recently ex-partner) of Ms Atherton. It was noted that Ms Atherton is a very capable and visible political activist. The evidence of the parties, which we accept, is that the Appellant will be known and identified with the DRC diaspora as the partner of Ms Atherton, and vice versa. They are undoubtedly a visible partnership, partly by reference to their own political profiles, but also because Ms Atherton is white and the Appellant is not. Third, the Appellant’s *sur place* activism follows a foundation of oppositional activity undertaken between 1991 and 1995 in the DRC as a member of the UDPS. We note again that the Tribunal

concluded (as early as 2004) that the Appellant's evidence in this regard was credible and correct. He had been arrested, detained for many months and tortured in the DRC, before securing his release by bribery. This low-level membership and activism – notwithstanding the rather serious consequences for the Appellant himself – was not (and still would not be) sufficient to constitute a claim for protection. In combination with the other broad factors, however, it serves to enhance his overall profile. The Appellant, in summary has an anti-government profile that sets him apart from the active membership as a whole. He is not, of course, the only such spokesman in the UK, and indeed may have a profile that is towards the lower end of the leadership spectrum, but it is clear to us that his profile is comparatively significant and visible.

86. We find, in turn, that this profile places the Appellant within the category of persons at risk on return to the DRC. We acknowledge that he is not a member let alone a spokesman for APARECO but we do not see the guidance in BM as establishing APARECO as an exclusive body whose leaders or spokesman are at atypical risk when compared to persons with a comparative profile in other opposition groups. The CSP is without doubt a smaller and more defined organisation, with the core purpose that may be different to some opposition groups, but our findings, as outlined at paragraph 82 above, are that the other groups operate often effectively as a collegiate whole, so that the state agents of the DRC would not discriminate necessarily between spokesman for one over the other. Our conclusions, reached after a careful and considered assessment of the facts applicable in this case, is that the Appellant does fall within the category of persons at risk on return to the DRC, following the guidance in BM (ibid) and MM (ibid). There is really no question of safe internal re-location for him within the DRC on his deportation to that country. Insofar as this risk derives from the Appellant's actual political opinion, we consider his entitlement to be that of a refugee who should be granted asylum, rather than the recipient of humanitarian protection or protection under Article 3 of the ECHR.

### **Notice of Decision**

87. The Appellant is subject to conducive deportation as a foreign criminal under Section 3(5)(a) of the Immigration Act 1971. He is, however, entitled to asylum. We allow accordingly his appeal against the Respondent's refusal to revoke the Deportation Order signed and served on 3<sup>rd</sup> May 2007.

### **The Hearing in the Upper Tribunal**

47. At the hearing before me to determine whether an error of law was made out, Mr Kotas development the arguments raised in the application for permission to appeal to the Upper Tribunal. He submitted the panel had ignored the fundamental discrepancy between the claim that the claimant

had never stopped being an activist, and the complete absence of political activity prior to 2007. The panel had not adequately engaged with the case advanced in the refusal letter that the claimant was not a genuine activist, but was acting in bad faith. The panel had become fixated by the claimant's ramblings on DVDs etc. and had not engaged with the case advanced in the refusal letter that he would not be taken seriously by the DRC authorities as a genuine political activist.

48. Secondly, he submitted that the panel had misdirected themselves as the implications of the latest country guidance authority. It was not indicative of their being a general threat to all DRC nationals who express opposition to the government.
49. On behalf of the claimant, Mr Bartram submitted that the panel had made findings that were reasonably open to them on the evidence and the country guidance case law, and that the challenge of the Secretary of State amounted to no more than expression of disagreement with sustainable findings and conclusions.

## **Discussion**

50. Ground 1 is that the Tribunal failed to give reasons or adequate reasons for finding the asylum claim to be credible. It is argued that the decision letter raised various issues regarding the credibility of the asylum claim from paragraphs 30 to 70 in great detail, and yet none of this has been considered by the Tribunal when assessing the claimant's credibility. The Tribunal should have placed little weight on the evidence of Ms Atherton given that she was not an independent witness, and that her views as an expert witness were not supported by recent country guidance. If the claimant was particularly motivated, he would not have refrained from any activism for ten years until faced with deportation. In short, it is argued that the Tribunal has failed to give adequate reasons as to why the claimant's asylum claim was credible.
51. Ground 1 is undermined by the fact that the pleader cites various paragraphs in the Tribunal's decision by way of support for the proposition that the Tribunal has not taken a particular consideration into account. In short, the pleaded case is self-contradictory.
52. The Tribunal clearly took into account the fact that Ms Atherton was not to be treated as an independent witness, both because of her relationship with the claimant and also because her evidence as to the situation faced by returnees to the DRC was not supported by recent country guidance. It was open to the Tribunal to find that, nonetheless, her evidence as to the nature and extent of the claimant's *sur place* activities in the UK was credible and consistent with the documentary evidence.
53. The panel did not specifically address the adverse credibility implications of the claimant becoming actively engaged in political activity from 2006, having previously been completely inactive since he had fled the DRC in

1995. But the fact that the claimant's renewed activism was highly advantageous to him in resisting deportation as a foreign criminal did not mean that his renewed activism was a complete charade. It was open to the Tribunal to find that the claimant was a genuine political activist, for the reasons which they gave. Firstly, he had been an opposition activist in the DRC. Secondly, there was abundant evidence, much of it in documentary form and hence not reasonably controvertible, as to the claimant's political activism in the UK from 2006 to date.

54. There is no merit in the criticism that the panel did not engage adequately with the caseworker's critique of the *sur place* activities which the claimant was relying on in 2009. Firstly, the Tribunal were assessing the matter in 2015, some six years later, and the claimant was relying on up-to-date evidence of his *sur place* activities. So the focus of the Tribunal was necessarily on the up-to-date evidence, rather than on the evidence that had been made available to the Secretary of State in 2009. Secondly, at paragraphs [52] to [58] the Tribunal addressed the two main themes of the caseworker's critique, which was whether the claimant's activities would have come to the attention of the DRC authorities in the first place; and, if so, whether he would be thereby taken seriously as an opponent of the regime.
55. At paragraph [57] the Tribunal discussed a DVD extract of an interview given at a demonstration outside the DRC Embassy in London in which, dressed in a form of army camouflaged uniform, he made a passionate speech anticipating the overthrow of the regime in the DRC. It was evident to the Tribunal from the footage that the claimant was not alone, but he appeared to be the (or at least a) spokesman for this group of protestors:

Such interviews may be subject to some critique - the respondent cites the almost comic unlikelihood of the [claimant] leading any form of armed paramilitary insurrection - but it did seem clear to us that the [claimant] was exhibiting the status of a leader or spokesman for an active (although possibly quite small) opposition group.

56. Ground 2 is the panel failed to give reasons or adequate reasons for finding that the claimant had a well-founded fear of persecution on return to the DRC. The panel found that the country guidance case of **BM and Others** related to other people with comparative profiles and other political groups other than APARECO. But the panel was wrong to do so (it is argued), as the country guidance in **BM and Others** relates to members of APARECO only, and no findings about membership of other political parties were made. The earlier country guidance, such as **MM (UDPS members - risk on return) DRC CG [2007] UKAIT 0023** did not assist the claimant, because even if his political activity was genuine, it could not be said to be activity in which he would be perceived to be a leader, office bearer or spokesperson. Given his extensive criminal history, the panel failed to factor into their assessment how he was able to perform a leadership role, when he had been in constant trouble with the

law and had spent numerous periods in custody. There was no evidence the authorities in the DRC would even be aware of the organisations which he was a member, given that these organisations did not operate outside the UK. Even if the claim was genuine, the claimant was nothing more than a low level political activist and the authorities in the DRC would have no interest in him and therefore he would not be at risk if returned.

57. In his oral submissions, Mr Kotas principally focused on the argument that the Tribunal had misapplied **BM**. I consider that this is by far the strongest argument raised by way of appeal to the Upper Tribunal. The panel's observations at the beginning of paragraph [86] are controversial in that prime facie the message of **BM** is precisely the opposite of what was stated by the panel. The implication of **BM** is that APARECO is an exclusive body regarded with particular concern by the DRC regime, with the consequence that its leaders and spokesmen are at a much higher risk of persecution than the generality of DRC activists in the UK.
58. In his introduction, the President reviewed the DRC's recent history, and observed that the period 2011 to 2015 had been characterised by relative cessation of military and other hostilities, social unrest and political instability. Taking into account both history and context, he said it might not be inaccurate to describe the present overall situation of the DRC as one of relative peace and stability. He went on to observe that there were several reported decisions of the Upper Tribunal which considered conditions in the DRC and the legality of returning its nationals from the United Kingdom. All of these decisions belonged to the period 2004 to 2007.
59. Part of the evidence considered by the Tribunal in **BM** was the OGN of May 2012 which observed that no evidence could be found to support the allegations that the DRC authorities had either capacity or the capability in the UK to monitor low level political opponents, including those participating in anti-government rallies in the UK. The same OGN noted the Tribunal's decision in **MM** that the level of risk those having, or perceived to have, political profile in opposition to the DRC was one which fluctuated in accordance with the political situation and low level members and or sympathisers were not at real risk upon return (paragraph 35).
60. Another source of evidence considered by the Tribunal in **BM** was evidence emanating from the British Embassy in Kinshasa in November-December 2014 which was addressed at some length by the President at paragraph [43]. The most striking feature of this evidence in his view was its vintage. Having been generated in November/December 2014, it constituted the most recent evidence available for the Tribunal.
61. The Swiss Premier Colaborateur is quoted as saying that the DRC authorities had an interest in those who pose a political risk, or who are a high level activist.

62. The executive director of a Kinshasa based human rights organisation said that the DGM maintained a blacklist of persons who were subjected to further questioning by the ANR. The blacklisted categories are persons in respect of whom there are arrest warrants in DRC and “opposition political activists, for example those who had plotted a coup against the government or who were believed to be involved in attacks against Congolese authorities whilst visiting overseas.” The executive director was not aware of any returning failed asylum seeker or foreign national offender having serious problems upon arrival. While there had been some reports of subsequent arrests or harassment of returning nationals, none of these persons emanated from the United Kingdom. The interviewer believed that the interest of the DRC authorities was focused on “those linked to radical opposition political parties”.
63. The Tribunal received expert evidence from Dr Kennes who said that APARECO was perceived as a serious threat to the president as it was very influential in shaping the political opinion of the diaspora and public opinion abroad. The movement was founded in 2005 by a former security advisor to depose the president. At DRC ports of entry there were lists of APARECO activists in Europe. He opined that APARECO members and militants who returned to DRC as failed asylum seekers: “... ranked among the category of people who run the highest level of risk for detention, arrest and cruel, inhuman and degrading treatment during interrogations”.
64. The ANR and DGM officials interviewed in 2009 described APARECO as “the most dangerous opposition movement abroad”.
65. The conclusions of the Tribunal are set out at paragraphs [59] onwards. At paragraph [64], the President said the Tribunal had no hesitation 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.
66. At paragraph [87] the President turned to 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. He continued:

In addressing and determining this question, we make the following specific findings:

- (i) APARECO is the cohesive, structured organisation which has its main base in France and strong bases in other certain European countries, including the United Kingdom. It also operates in Canada and the United States.
- (ii) APARECO is implacably opposed to the regime of President Kabila which has governed DRC during the past decade. Its overarching aims are the defeat of this regime the re-establishment of the State on a different basis ...



- (iii) APARECO has no overt presence in DRC, where it operates underground.
- (iv) The external opposition of APARECO to the governing regime of DRC is overt and visible. Its highest profile activities unfold in public places, accessible to all. Activities of this nature are accompanied by advanced publicity.
- (v) In common with many comparable regimes throughout the world, both present and past, the DRC government has a strong interest in opposition organisations, including APARECO. Such organisations are monitored and data is recorded. This includes information about the identities of most prominent members of such organisations, that is to say their leaders, office holders and spokespersons...
- (vii) It is likely that the leaders, office bearers and spokespersons of APARECO (UK) are known to the DRC UK Embassy and the DRC government, in particular ANR and DGM.

67. At paragraph [88], the President went on to give the following general guidance in respect of DRC nationals returning from the United Kingdom to their country of origin:

- (iii) 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 prescribed 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 0023**. 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.

68. The individual facts of AA's case were considered at paragraphs [112] to [117]. One of the reasons for allowing AA's appeal was that she had taken part in an APARECO protest outside the Savoy Hotel London on 20 and 21 October 2014. It was a meticulously organised and well publicised event in a public space. The occurrence of the event, as the photographic evidence demonstrated, included large, striking posters broadcasting clearly legible slogans which identified APARECO (UK) as the organiser and President Kabila as a main target of the protest. AA was prominent in many of the photographs. She was one of the most visible protestors and clearly had a leading role. The Tribunal considered it highly likely the event was monitored by agents of the DRC government. Such monitoring probably resulted in AA being identified or confirmed as a leading APARECO (UK) activist. The Tribunal was satisfied the DRC government did not make fine and subtle distinctions relating to roles, designations and portfolios within the organisation. Its main interest was in members and associates who appeared to and/or were perceived to threaten the DRC regime and who occupied positions of prominence. Substance, rather

than form, was what mattered in this context. There was a printout of the first page of Google search results in respect of AA which linked her to a high profile petition accusing President Kabila of crimes against humanity and demanding appropriate international action against him. Furthermore there was evidence of the APARECO website, accessible to all, contained photographs and videos of AA attending demonstrations and meetings of the organisation's leadership. So the appeal of AA succeeded, based on the significant and visible profile which she held in APARECO (UK).

69. Although the First-tier Tribunal in this appeal found that the claimant had attended demonstrations in which APARECO were also involved, there is no equivalent finding to that made in respect of AA of the claimant appearing to act as a spokesman at a demonstration which was visibly organised and promoted by APARECO. Moreover, in contrast to this case, in the case of AA there was material available on the internet which would have enabled agents of the DRC government in the UK to check and confirm that she was an APARECO activist.
70. However, the Tribunal in **BM** did not purport to set aside the earlier country guidance of **MM**, in particular the risk category of those having or perceived to have a military or political profile in opposition to the government.
71. While the Tribunal clearly considered that an association with APARECO gave rise to an enhanced risk of persecution on the grounds of actual or imputed political opinion, I do not consider that the Tribunal in **BM** is to be taken as excluding from risk political dissidents who operate under the banner of smaller and less threatening groups which have no presence in the DRC, whether overt or underground.
72. So although a differently constituted Tribunal might well have reached a different conclusion on the same facts, there was no error of law in this panel finding that the claimant had a political profile that was towards the lower end of the leadership spectrum, but which was nonetheless sufficiently significant and visible such as to engender a real risk of persecution on return, following the country guidance given in **MM**, which is not displaced by the country guidance given in **BM**.

### **Notice of Decision**

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

### **Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

Unless and until a Tribunal or court directs otherwise, the claimant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the claimant

and to the SSHD. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date

Deputy Upper Tribunal Judge Monson