Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/03673/2018

THE IMMIGRATION ACTS

Heard at North Shields	**Decision & Reasons Promulgated**
On 9th August 2019	**On 22nd August 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE ZUCKER

Between

MISS MIMY MUPANGILA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms L Brakaj of Iris Law Firm, Gateshead
For the Respondent: Mr P Stainthorpe, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of the Democratic Republic of the Congo. There is something of a history to her appeal, she first having arrived in the United Kingdom on or around 31st March 2013. There have been a number of appearances before the Tribunal in which the Appellant's contention that she was entitled to refugee status have been rejected.

2. On 18th October 2017 the Appellant made a further application to be recognised as a refugee on the basis of her involvement with the organisation, APARECO, in Newcastle and that on her case, her involvement with it would be perceived by the

authorities in the Democratic Republic of Congo in such a way that on return she would be at risk of persecution within the meaning of the Refugee Convention.

3. On 28th February 2018 the Respondent rejected the application and the Appellant appealed. On 19th April 2018 the appeal was heard by Judge of the First-tier Tribunal Buchanan sitting at North Shields. The appeal was dismissed by him on two bases. Firstly, he did not accept that by reason of the activities with APARECO UK the Appellant would be at risk were she to be returned to the DRC. Particular reference should be made to paragraph 36 of his Decision and Reasons. Secondly because the Appellant had at one time permanent residence in the Republic of South Africa, he was not satisfied that she had established that she could not be returned there.

4. Not content with that Decision by Notice dated 28th June 2018, application was made for permission to appeal to the First-tier Tribunal. At first instance, on 26th July 2018, permission was refused but on 21st August 2018 a renewed application was made both in respect of the finding of Judge Buchanan that the Appellant would not be at risk by virtue of her political activities or perceived political activities and also in relation to the finding that the Appellant had not established that she could not be returned to South Africa.

5. On 7th November 2018 Upper Tribunal Judge Dr Storey granted permission in these terms:

> *"It is arguable that the judge erred in concluding that the Appellant would not be perceived by the DRC authorities on return as either a leader, office bearer or spokesperson connected with APARECO, notwithstanding she had taken on national responsibilities in 2017 in the UK. The grounds disclose an arguable error of law".*

6. At the commencement of the proceedings before me I was concerned by the lack of any mention by Dr Storey in his grant of permission of the second ground; being whether or not the Appellant was returnable to South Africa. Mr Stainthorpe contended that the terms of the grant were such that no permission had been granted on that point. Not surprisingly Ms Brakaj argued to the contrary. In my judgment noting that Dr Storey in no part of his grant stated that the permission was limited; noting that he speaks in terms of the "grounds" (pleural); and finally noting that granting permission only in respect of the first aspect of the appeal would be meaningless because it would lead to the appeal being dismissed in any event, I find that permission was granted on both grounds. If I am wrong about that I grant permission at this stage for the matter to be argued.

7. On the substantive matters, I am grateful to the parties for enabling me to focus on that which was in dispute and not having to consider areas which were not. At the outset, Mr Stainthorpe, quite properly and realistically accepted that there was an error of law in the determination of Judge Buchanan, in that he ought to have assessed the risk to this Appellant on the basis of how she might be *perceived* on return, rather than through the prism of her activities in the United Kingdom and the extent of them, though he accepted that the latter informed the former.

8. Earlier I made reference to paragraph 36 of Judge Buchanan's Decision and Reasons. That reads as follows:

> *"I have taken an overall view of all the evidence before me and the above-mentioned matters in reaching my decision. I have given as much credit as I can to the Appellant for the documentary evidence which the Appellant has produced. I cannot disregard the previous findings in respect of the Appellant's credibility or the timescale of the matters which fall for assessment, the case in respect of the Appellant's credibility or the timescale of the matters which fall for assessment. The case in respect of the arrest of the Appellant's father and cousin and their questioning is not established. I have considered the country guidance authority in* ***BM and Others*** *[2015] UKUT 293 and the BI (sic). I conclude that the Appellant has established that she is a member of APARECO and has been appointed to various roles within that organisation but she has failed to establish that she holds a significant and visible role in APARECO or that she would be perceived as a leader, office bearer or spokesperson of APARECO by the authorities in the DRC".*

9. As I say Mr Stainthorpe rightly conceded that the judge had fallen into error insofar as he failed adequately to consider whether the appellant would be at risk of being perceived as a leader, office bearer or spokesperson on return to the DRC. There is simply no sufficient explanation as to how the finding was arrived at and so I make it clear that although Mr Stainthorpe made the concession he did, I agree with him entirely.

10. There was then some discussion concerning the remaking of the decision. I heard submissions in the first instance in relation to the ability of the Appellant to return to South Africa. Though at paragraph 38 of his Decision and Reasons, Judge Buchanan had referred to the burden of proof resting on the Appellant to the lower standard, it was common ground that in fact the correct standard for this issue was a balance of probabilities. Since I am remaking the case, I would fall into error myself if I were now to apply the wrong standard.

11. There is no dispute about whether or not the Appellant once held permanent residence in South Africa; she has produced a document to that effect. The issue was whether it was open to Judge Buchanan to find that there was insufficient evidence for him to be satisfied that the burden had been discharged.

12. It is trite law to say that matters of foreign law are matters of fact and not of law. The importance of that is that there will be times when a domestic Court or Tribunal needs help with how foreign law is to be interpreted and how that law is applied in practice.

13. The starting point is paragraph 28 of the South African, Immigration Act 13 of 2002. It provides under the heading:

> **"Withdrawal of permanent residence permit"** (which I note came about by an amendment of 2004) "that the director general may *withdraw a permanent residence permit if its holder …*
>
> (c) has been absent from the Republic for more than three years, provided that:

(i) upon showing good cause and upon her prior application the director general may extend this period in specific cases;

(ii) the time when such holder

(aa) was residing abroad while in the service of the state;

(bb) was residing abroad while the representative or employee of a person or association of persons resident or established in the republic;

(cc) was residing abroad while in the service of an international organisation of which the state is a member;

(dd) in the case of the spouse or dependent child of a person referred to in subitem (aa), (bb) or (cc), such spouse or child was residing with such a person; or

(ee) in the case of the spouse or dependent child of a person who is a South African citizen, such spouse or child was residing with such person,

shall not be computed within such period;

(iii) the minister may grant an exemption from the requirement of residence in respect of certain residence or class of residence;

(iv) the period of absence may only be interrupted by an admission and sojourn in the republic; and

(v) the requirement of residence in the republic shall not affect any foreigner to whom exemption has been granted under Section 31(2)(b) as a member of a category of persons, unless such foreigner previously entered the republic or sojourned therein for the purpose of permanent residence under the authority of such exemption; or

(d) has taken up residence in the republic within one year of the issuance of such permit".

14. I do not have Section 31(2)(b) before me, nor was it available to Judge Buchanan. Ms Brakaj relied heavily also before me and before Judge Buchanan on a document from the South African High Commission in Canada, in which, under the heading "Application for proof of permanent residence", it states:

> "*Please note: a person loses his/her permanent residence permit when he/she is out of the country for continuous (three) years according to the Immigration Act and according to the repealed alien controller, continuous three years results in automatic lapse of the permit.*"

15. One possibility for the interpretation of what there appears is that, "…. according to the Immigration Act" means within the clauses and the manner in which the Act is to be interpreted. I know not. Neither did Judge Buchanan. Ms Brakaj asserts that taken together with correspondence with the VF Services (UK) Limited demonstrating that application had been made for a visa by the Appellant, the totality of the evidence was sufficient to demonstrate that the judge ought to have accepted that the Appellant had discharged the burden which was upon her.

16. I remind myself that I am concerned only with whether it was open to Judge Buchanan to make the findings that he did. It is not for me simply to replace my own view for his. As it happens, I take the same view as Judge Buchanan. The evidence is and was lacking. I simply do not know how the Act of 2002 is applied. I also note that the withdrawal of permanent residence is discretionary. The word "*may*" appears not "*must*". The provision provides the circumstances in which the Director General on the face of the Act may exercise that discretion. If the circumstances are not present, then the discretion, it seems, cannot be applied. Whether there are any other circumstances which relate to this Appellant, for example in relation to Section 31(2)(b) was not, and Ms Brakaj accepts, evidence that was before the First-tier Tribunal. As I have said this is a question of fact, not of law.

17. There followed some discussion as to whether or not this matter should be adjourned in order for additional evidence to be obtained to go to the point. I reserved my view on that until after consideration of the first ground of appeal. If the Appellant would necessarily fail, then there was little point in any adjournment, though I shall explain why I have come to the view that the matter should not be adjourned in due course.

18. I turn then to the issue as to whether or not the Appellant would be perceived as a person to whom the authority would have an adverse interest. With the consent of both parties I simply typed into "Google" the Appellant's name and then clicked on "images". I used only the Appellant's first and last name. It was common ground that the first set of images which emerged were those of the Appellant. Included in those images was a photograph of the Appellant in front of an APARECO poster.

19. Having seen those photographs Mr Stainthorpe rightly conceded that on the first ground i.e. how the Appellant would be perceived on return to the DRC, she was entitled to succeed given the guidance in the case of **BM.** I find therefore that on that point there was not only the material error of law but that were the Appellant to be returned to the DRC she would be at real risk (lower standard applied) of persecution by reason, at the very least, of her perceived political activities in the United Kingdom.

20. If that were the only issue in this matter, the Appellant would be entitled to refugee status, but it is not.

21. An appeal to the First-tier Tribunal is not a dress rehearsal for an onward appeal to the Upper Tribunal. Cases are to be determined on the basis of the evidence that is provided. Judge Buchanan explained, and sufficiently so, why he did not accept that the Appellant had discharged the burden of proof. At paragraph 40 of his Decision and Reasons he said amongst other observations:

> *"I have no evidence before me as to which statute governs the Appellant's position. I have no evidence from a South African lawyer as to whether the Appellant will have lost her permanent resident rights. Does the fact that the Appellant has been absent from South Africa, and for most of the time has been making an application for asylum in another country have any bearing on the situation? Is the Immigration Act 2002 Act still in force? Has it been amended*? [I pause to note that clearly it has by the 2004 legislation]. *Has the Director General in fact withdrawn the Appellant's rights?*

[Again, I pause to note that it appears on the face of the legislation to be discretionary]. Judge Buchanan made the same observation. He went on to say these are just some of the questions which might need to be addressed before it can be said that the Appellant has established even to the "lower level" (which is not the correct standard) that she has lost her right of permanent residence in South Africa.

22. Ms Brakaj suggested to me that the difficulty was one of funding. That may be so. I know not. But I cannot make findings of fact on the basis of a lack of evidence simply because there is not the funding to produce the evidence. That is a matter which needs to be taken up elsewhere if indeed it is an obstacle. Certain it is that the Tribunal cannot be expected to embark upon some means testing exercise to determine whether there should be an adjournment. The issue for me is whether the finding that the Appellant had not proven her case on that point was one open to Judge Buchanan. It was.

23. Where does this leave the Appellant? It means this, that she now has a positive finding that she cannot be returned to the Democratic Republic of Congo. I am not granting permission for further evidence to be adduced at some other time. The test for whether an adjournment should be granted is "fairness": **Terluk v Berezovsky [2010] EWCA Civ 1345.** There has been plenty of time to obtain additional evidence. Further the First-tier Tribunal Judge pointed to the evidence that was lacking. To adjourn the case at this stage would impact on the administration of justice and delay some other appeal.

24. The Appellant is not left without remedy. What she needs to do, if she can, is to satisfy the Secretary of State that she cannot be removed to South Africa. Whether the Secretary of State is prepared to entertain the application as one amounting to a fresh claim, is one for the Secretary of State. But it is if established and accepted by the Secretary of State that such is the case then that is, as matters stand all that lies in the way of her being entitled to be recognised as a refugee.

Decision

It follows that the appeal to the Upper Tribunal is allowed insofar as there was a material error of law. In the remaking however the appeal in the First-tier Tribunal is affirmed and the appeal is dismissed.

Signed **Date: 20 August 2019**

Deputy Upper Tribunal Judge Zucker