



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

Appeal Number: PA/08641/2016

THE IMMIGRATION ACTS

**Heard at Bradford
On 11 March 2019**

**Decision & Reasons Promulgated
On 20 March 2019**

Before

UPPER TRIBUNAL JUDGE LANE

Between

**KM
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Sills, instructed Judge D Spicer Zeb, solicitors
For the Respondent: Mr Diwnycz, Senior Home Office Presenting Officer

DECISION AND REASONS

1. By a decision promulgated on 6 February 2019, I found that the First-tier Tribunal had erred in law such that its decision fell to be set aside. My reasons were as follows:

“1. I shall refer to the appellant as the respondent and the respondent as the appellant (as they appeared respectively before the First-tier Tribunal). The appellant, KM, is a citizen of the Democratic Republic of Congo (“Congo”) born in 1972. He arrived in the United Kingdom in February 2012 and claimed asylum. By a decision dated 27 July 2016, the Secretary of State refused the appellant asylum. He appealed to the First-tier Tribunal (Judge Robson) which, in a decision

promulgated on 7 February 2018, allowed the appeal on asylum and human rights (Articles 2/3) grounds. At issue before the First-tier Tribunal was whether the appellant was excluded from asylum by the operation of Article 1(F) of the Refugee Convention. Judge Robson found that the appellant was not excluded from asylum protection and it is that decision which the Secretary of State challenges before the Upper Tribunal. In addition the Secretary of State argues that the judge erred in his treatment of the documentary evidence.

2. In support of his appeal, the appellant had produced several documents. The judge addresses the documents and how they came into possession of the appellant at [68]. There seemed to be no clear reason for the delay in the production of the documents (which the appellant claimed had been produced in 2012). The judge also noted that "it was not said [by the Secretary of State] that the documents themselves were forgeries". The Secretary of State argues that the judge did not have "the benefit of any expert evidence as to the provenance and credibility of the documents and he did not seem to question the fact that the authorities [in Congo] clearly knew of the appellant's whereabouts between 20 January 2012 and 4 February 2012." The respondent argues that the chronology revealed by the documents in the context of the appellant's account of what happened in Congo undermines the finding that the appellant had "deserted" his post as a senior police officer and was still wanted by the Congolese authorities.

3. In a Rule 24 response, the appellant submits that "in relation to [the second ground of appeal] no issue was raised in any point by the respondent or anyone else prior to or at the hearing about the dates on the documents referred to in the grounds". As such, the judge's failure to address that issue did not amount to an error of law. I agree. That there is no evidence that the points now raised in the second ground of appeal were put before Judge Robson at the First-tier Tribunal hearing. The judge's analysis at [68] appears to be factually accurate and the judge has reached findings in respect of the documents which were open to him on that evidence. He has, of course, not addressed the concerns of the respondent now articulated in the grounds to the Upper Tribunal since those concerns were never made known to him in the submissions of the Presenting Officer.

4. The first ground of appeal concerns exclusion under Article 1(F). The appellant claimed to have served with the Legion Nationale Police d'Intervention Rapide (PIR). He had risen to the rank of brigadier within the PIR. In January 2012, at a demonstration against the President of Congo, the appellant was given orders to fire mustard gas rather than tear gas at demonstrators. He refused to do so. He claims to have been detained and assaulted during his detention and escaped from hospital on 4 February 2012 and fled to the United Kingdom. The judge found [72] that the appellant was a middle ranking officer in the PIR and accepted also that he had been detained and had suffered severe physical abuse whilst in detention. The judge had the benefit of a medical report upon which he placed "considerable weight". In the light of the report, the judge accepted the appellant's claim that he had been detained and abused (the medical report details a number of scars on the appellant's body). At [66] the judge wrote:

"If, as appears to be the case, the respondent accepted that the appellant was in the PIR and did have some level of command, the only plausible reason I can find for his detention would be disobedience of orders."

5. Earlier in the decision at [23-24], the judge had discussed the UNHCR Guidance in respect of Article 1(F). At [24] he quotes from that guidance as follows:

"The specific role played by the person concerned within the organisation needs to be assessed to determine whether he or she carries individual responsibility for an act which reaches the level of seriousness required under Article 1F(b). It must be shown that the requirement of "serious reasons for considering" that the individual engaged in and intended to commit the excludable act or knowingly made substantial contribution to it, is fulfilled."

6. At [59] the judge found that it was not credible that a middle ranking officer in the PIR such as the appellant would not have known what would happen to people whom he arrested and handed over to other agencies within the Congolese state authorities. The judge found as a fact that "the appellant would have known the consequences of handing demonstrators for whom he was responsible for arrest to the Office."

7. At [69], the judge concluded:

"I have considered the evidence in its totality in the light of the UNHCR Guidance and in view of my findings above I do not consider that individual responsibility exists on the appellant (sic) for committing acts which would exclude him from the protection of the Refugee Convention and, therefore, I find that Article 1F(a) does not apply in his case."

8. Grounds of appeal challenge that conclusion:

"Nowhere does the FtT explain why the fact that the appellant (as accepted by the FtT) had deserted and been detained in 2012 by the authorities as a result made any difference to his behaviours and actions in the preceding thirteen years, including many promotions, such that he did not have individual responsibility for the acts committed when he arrested people and handed them over to the authorities. On the findings of fact, given the appellant's history, the FtT has materially erred in the finding on exclusion."

9. The Secretary of State notes that the judge had found that the appellant did arrest protestors and hand them over the authorities [58].

10. I agree that the judge's reasoning is far from clear. The decision is difficult to read because of the judge's habit of combining findings with his summary of the evidence. In particular, what the judge says at [59] (see above) represents something of a non sequitur. It is not at all clear why the judge should reach that conclusion having categorically rejected the appellant's claim that he did not know what would happen to detainees whom he handed over to the Office. I agree with the Secretary of State that it appears to be the judge's

finding that the appellant was detained and abused that has somehow led the judge to conclude that, because he disobeyed orders and was detained as a consequence, he should not be excluded under Article 1(F). As the grounds point out, the judge has wholly failed to address the appellant's conduct prior to his detention at a time when, as an officer of middling rank, he knowingly handed over those whom he had arrested for detention and physical abuse. In the circumstances, I set aside the judge's decision.

11. I see no reason to interfere with the judge's findings in respect of Article 3 ECHR. Only the question of possible exclusion under Article 1(F) need be considered by the Upper Tribunal which it will deal with at a resumed hearing at Bradford before me on a date to be fixed. The judge's findings in respect of the documents produced in evidence shall stand as shall his finding that the appellant was detained and abused in detention and that he escaped from detention. I also preserve the finding that the appellant did know what was likely to happen to individuals he handed over to the Office following arrest. On the basis of that factual matrix, the Upper Tribunal will remake the decision.

Notice of Decision

The decision of the First-tier Tribunal which was promulgated on 7 February 2018 is set aside. The findings of fact shall stand (as detailed in paragraph 11 above). The only issue which will be considered at the resumed hearing is whether the appellant should be excluded from refugee status on account of the operation of Article 1(F) of the Refugee Convention. The resumed hearing will take place at Bradford on the next available date before Upper Tribunal Judge Lane with a time estimate of 2 hours. An interpreter in the Lingala language will be available to assist the appellant. Both parties may produce additional evidence provided they send copies of any documents upon which they intend to rely to the other party and to the Tribunal no less than 10 days prior to the resumed hearing."

2. At the resumed hearing at Bradford I was again assisted by Mr Sills and Mr Diwnycz who appeared for the appellant and respondent respectively. Mr Sills very helpfully provided a note containing relevant jurisprudence.
3. I preserved the following finding from the First-tier Tribunal decision [59]:

"I do not find it credible that having attained a middle seniority rank in the PIR, the appellant would not have known what, in fact, would happen to people whom he arrested and heard was subsequently detained and I find that the appellant would have known the consequences of handing demonstrators, for whom he was responsible for arrest, to the Office."
4. The question is whether the appellant's conduct as described in that finding exclude him from protection as a refugee under the provisions of Article 1F of the 1951 Convention:

'Article 1F of the 1951 Convention states that the provisions of that Convention "shall not apply to any person with respect to whom there are serious reasons for considering" that:

- (a) he [or she] has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- (b) he [or she] has committed a serious non-political crime outside the country of refuge prior to his [or her] admission to that country as a refugee; or
- (c) he [or she] has been guilty of acts contrary to the purposes and principles of the United Nations.'

5. Article 25 of the Rome Statute of the International Criminal Court provides:

'3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

- (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
- (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
- (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
- (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
 - (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
 - (ii) Be made in the knowledge of the intention of the group to commit the crime;
- (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;
- (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.'
6. Mr Sills submitted that the appellant's conduct could only fall within the definition of subparagraph (d) above. The appellant had not committed the crime individually or jointly with others nor had he ordered, solicited or induced the commission of a crime nor aided abetted or otherwise assisted in its commission. I find that the appellant's conduct falls for consideration under (d) (ii): the appellant contributed to the commission of the mistreatment of detainees by intentionally passing those whom he had arrested into the custody of individuals who the appellant was aware would ill-treat the detainees. I accept that the appellant did not directly ill-treat those whom he had arrested nor did he, in the ordinary sense of the expression, actively join in their ill-treatment by aiding and abetting such treatment. In reaching that finding I acknowledge that Article 25 (3) (d) 'captures 'lesser' contributions to a crime than aiding and abetting' as the Court found in *Ezokola v Canada* [2013] 2 SCR 687 at [63].
7. The mental element is considered in the Statute at Article 30:
 'Article 30
 Mental element
 1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
 2. For the purposes of this article, a person has intent where:
 (a) In relation to conduct, that person means to engage in the conduct;
 (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
 3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.'
8. I find that the appellant did possess knowledge because he had full awareness that the consequence passing those whom he had arrested into the custody of the Office would, in the ordinary course of events, be likely to lead to their ill-treatment.
9. As regards the appellant's claim that he was carrying out orders, I note the decision of the Upper Tribunal in *CM (Article 1F(a) - superior orders) Zimbabwe* [2012] UKUT 00236(IAC):

“In the context of deciding whether a person is excluded from Refugee Convention protection by virtue of having committed acts contrary to Article 1F(a), the effect of Article 33(1) of the Statute of the International Criminal Court (“the Rome Statute”) is that whilst obedience to superior orders can be a defence if each of its three requirements – as set out at (a), (b) and (c) – are met, by virtue of Article 33(2) the Article 33(1)(c) requirement can never be met in cases where the order was to commit genocide or a crime against humanity. Such cases are always “manifestly unlawful”. For a person alleged to be criminally responsible for crimes against humanity the defence of obedience to superior orders is unavailable.”

10. Article 33 provides:

‘Article 33 Superior orders and prescription of law

The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:

- (a) The person was under a legal obligation to obey orders of the Government or the superior in question;
- (b) The person did not know that the order was unlawful; and
- (c) The order was not manifestly unlawful.

For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.’ [my emphasis]

11. If the appellant has committed a crime against humanity, then the defence of superior orders is not available to him. In respect of a lesser crime, the defence may be available. The document *Understanding the International Criminal Court* which is an official publication of the Court issued with the intent to ‘enhance understanding of the Court and its procedures’ states that ‘The mandate of the Court is to try individuals (rather than States), and to hold such persons accountable for the most serious crimes of concern to the international community as a whole, namely the crime of genocide, war crimes, crimes against humanity, and the crime of aggression, when the conditions for the exercise of the Court’s jurisdiction over the latter are fulfilled.’ Crimes against Humanity are defined as:

“Crimes against humanity” include any of the following acts committed as part of a **widespread or systematic attack directed against any civilian population, with knowledge of the attack:**

- murder;
- extermination;

- enslavement;
- deportation or forcible transfer of population;
- **imprisonment;**
- **torture;**
- rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- persecution against an identifiable group on political, racial, national, ethnic, cultural, religious or gender grounds;
- enforced disappearance of persons;
- the crime of apartheid;
- other inhumane acts of a similar character intentionally causing great suffering or serious bodily or mental injury' **[my emphasis]**

12. I find that the appellant falls within the provisions of the Statute because the consequences of delivering those whom he had arrested to the Office involved the commission of acts of imprisonment and torture which performed part of a systematic attack against a civilian population, in this instance the demonstrators who the appellant and his officers had arrested. Because the crimes involved fall within the definition of 'crimes against humanity' the appellant cannot rely upon the defence of superior orders.

13. Mr Sills submitted that the appellant did not know for certain that each and every individual whom he handed over to the Office would be tortured. The appellant could not, therefore, have had the knowledge required to render him liable to exclusion. I disagree. I have found that the appellant knew that *at least some* of the individuals whom he handed over would become victims of crimes against humanity. It did not matter that *all* should suffer in the same way. Indeed, the appellant had no control over what happened to any particular individual after he had handed him or her over to the Office. In my opinion, it was enough that the appellant knew that every individual *could* become a victim of torture, indeed that they were likely to become a victim even if he knew that, while some might not may not, others certainly would. The operation involving the appellant and his officers, the arrests of demonstrators and their transfer to the Office may not have been on a large-scale but it did, in my opinion, represent a systematic attack upon a civilian population. The threshold which must be reached for the conduct in which the appellant was involved to be properly characterised as a crime against humanity has been crossed, in my judgement, in this instance. Further, I find that the appellant was possessed of the required intent and knowledge. Accordingly, I have concluded that the appellant should be excluded from refugee protection by the operation of Article 1F. For the avoidance of doubt, I find that the appellant's conduct excludes him from refugee

protection notwithstanding his subsequent disobeying of orders, detention, ill-treatment and flight to obtain protection in the United Kingdom. That subsequent conduct cannot absolve him from participation in conduct in the Democratic Republic of Congo for which exclusion from protection is the appropriate response.

Notice of Decision

14. The appellant's appeal is allowed on human rights grounds (Article 3 ECHR). The appeal is dismissed on asylum grounds; the appellant is excluded from protection as a refugee by the operation of Article 1F of the 1951 Convention.

Signed

Date 12 March 2019

Upper Tribunal Judge Lane