



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

Appeal Number: PA/10559/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 15 July and 12 August 2019**

**Decision & Reasons Promulgated
On 21st August 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

**HM (DRC)
(ANONYMITY DIRECTION MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr James Collins, Counsel instructed by Sentinel Solicitors
For the Respondent: Mr Lawrence Tarlow, Senior Office Presenting Officer

DECISION AND REASONS

1. The appellant has been granted permission to appeal from the decision of the First-tier Tribunal (Judge Hussain sitting at Hatton Cross on 15 April 2019) dismissing his appeal against the refusal of his protection claim in which he maintained that he had a well-founded fear of persecution on return to the DRC on account of having an adverse political profile.

The Reasons for the Grant of Permission to Appeal

2. On 11 June 2019 First-tier Tribunal Judge Caroline Andrew granted permission to appeal for the following reasons: *“I am satisfied that there is an arguable error of law in that the Judge appears not to consider all the country information placed before him when considering the risk on return for the Appellant, taking into account that his findings as to the appellant’s nationality, that he was a high profile and active member of the UDPS, that he was arrested and detained on three separate occasions, and that as a result of recent elections in the DRC the appellant has joined APARECO.”*

Reasons for Findings an Error of Law

3. The Judge found against the appellant on the issue of future risk because of what was, in his view, *“a radical change in the country condition”*. As evidence of this, he cited an article from the appellant’s supplementary bundle dated 11 April 2019, which reported that President Kabila had stepped down as President, and had been replaced by the son of an opposition veteran who had been the supposed winner of the highly contested December elections. The article described the new President as having finally broken Mr Kabila’s strong hold on power.
4. However, the permission application cites a number of passages from other articles in the supplementary bundle which conveyed the message that Mr Kabila remained in power, although no longer the President. For example, the Reuters’ article dated 15 March 2019, entitled *“Congo Ex-Leader Kabila’s Coalition with his Decisive Majority”* stated as follows:

‘Former Democratic Republic of Congo President Joseph Kabila’s coalition won a clear majority in Senate elections on Friday, officials said, further undermining his successor Felix Tshisekedi’s ability to govern independently.

Kabila’s Common Front for Congo (FCC) coalition won about 70% of the seats in the Lower House of Parliament and an overwhelming majority of provincial assembly seats in elections also held on Dec.30.

The results of the Parliamentary and Provincial elections suggest Kabila will retain a significant influence in Congo, a vast, mineral rich, central African country of about 80 million people.’
5. Moreover, the Judge did not take into account the line of Country Guidance authorities which support the submission that active members of UDPS or those perceived as such will be at risk on return to DRC; and, hence the Judge failed to direct himself in accordance with **SG (Iraq) v SSHD [2012] EWCA Civ 940** where Stanley Burnton LJ said as follows: *“It is for these reasons, as well as the desirability of consistency, that the decision makers and tribunal judges are required to take Country Guidance determinations into account, and to follow them unless very strong grounds supported by cogent evidence, are adduced justifying their not doing so.”*
6. The Judge thus failed to ask himself whether the evidence that he cited constituted sufficiently cogent evidence to justify a departure from

Country Guidance authority to the effect that someone with the appellant's profile would be at risk of persecution on return to the DRC.

7. The Judge also does not appear to have been alive to the significance of the appellant joining APARECO. In **BM & Others (Returnees - criminal and non-criminal) DRC [2015] UKUT 00293 (IAC)**, the following is stated in paragraph 3 of the head note: *"A national of the DRC who has a significant and visible profile within Apareco (UK) is, in the event of returning to his country of origin, 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) 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 or spokespersons. As a general rule, mere rank and file members are unlikely to fall into this category. However, each case will be fact-sensitive, with particular attention directed to the likely knowledge and perceptions of DRC state agents."*
8. Having been presented with the evidence cited in the permission application, and after seeing Mr Collins' skeleton argument in which he cites the relevant Country Guidance authorities, Mr Tarlow readily conceded that an error of law was made out, and I so find for the reasons given above. The Judge did not adequately engage with the totality of the background evidence before him pertaining to the question whether there had, or had not, been a durable change in the country situation, and he failed to consider the relevant Country Guidance on the issue of future risk. So his decision is unsafe, and it must be set aside and remade.

Reasons for Retention of the Appeal in the Upper Tribunal

9. The representatives were in agreement at the error of law hearing on 15 July that this was an appropriate case to be retained by the Upper Tribunal. There was no challenge to the findings of fact that were made by the Judge in the appellant's favour. The only factual question which remained to be resolved with regard to the appellant's personal situation was whether he has a significant and visible profile within APARECO UK. The Judge simply found that he was active in APARECO, but did not make any finding as to whether he had a significant and visible profile within APARECO. As to whether there has been a change of circumstances in the DRC of such a significant and non-temporary nature that the appellant's fear of persecution can no longer be regarded as well-founded, if this was going to be a live issue on remaking, the resolution of the issue would turn on the background evidence in the supplementary bundle that was presented to the First-tier Tribunal, and any additional evidence, including country expert evidence, that the parties might wish to deploy. However, as I directed, it was not incumbent on the appellant to produce any additional evidence on this issue, as the relevant current Country Guidance authorities were in his favour.

The Resumed Hearing on 12 August 2019

10. In advance of the resumed hearing on 12 August 2019, the appellant's solicitors served a witness statement dated 9 August 2019 from Mr Livingston Mundele, Deputy Representative for the APARECO London branch, and a second supplementary bundle containing some additional newspaper articles about the political situation in the DRC that were published between January and June 2019.
11. At the resumed hearing, Mr Collins submitted that the evidence from Mr Mundele showed that the Appellant had a significant and visible profile within APARECO UK; and that the background evidence contained in (a) the first supplementary bundle that was before the First-tier Tribunal and (b) the second supplementary bundle served for the resumed hearing showed that Mr Kabila was still in power.

Discussion and Findings on Remaking

12. Apart from the finding on risk on return, all the other findings made by the First-tier Tribunal are preserved. Accordingly, it is common ground that the appellant was a member of the UDPS who encouraged people to join the party, and that on account of his UDPS activism he was arrested and detained on three occasions between 2011 and 2013. Although Judge Hussain made no specific finding on the details of the last detention, he did not reject the appellant's account that on the third occasion he was detained for nine months before escaping from detention on 23 November 2013 and fleeing to Angola.
13. Having reviewed the background evidence pertaining to the aftermath of Joseph Kabila stepping down as President, I find that the thrust of the article of 11 April 2019 referred to in [3] above does not reflect a consensus as to the consequences of Kabila taking this step. On the contrary, it appears to represent a minority and contrarian view, and it does not take into account the key consideration that, as noted by Voice of America on 21 January 2019 (Second supplementary bundle page 1) *"Tshisekedi won the top seat, but Kabila's party took the majority of parliament."*
14. Moreover, the case that Joseph Kabila remains in power is supported by Reuben Loffman, a Lecturer in African History at Queen Mary University in London, who in an article of 5 June 2019 (Second supplementary bundle pages 16-17) comments that the appointment by Tshisekedi of Sylvestre Ilunga Ilukamba as Prime Minister *"confirms fears that former president Joseph Kabila still wields a lot of power over the Congolese government"* because Ilunga is one of Kabila's close confidants. Mr Loffman also points out that Tshisekedi will not be able to pass laws without the approval of the Kabila-led Common Front for Congo.
15. Accordingly, there is no justification for departing from extant Country Guidance authority, including **MM (UDPS members - risk on return)**

DRC [2007] UKAIT 00023, which is to the effect that the appellant will be at risk of return on account of his prior active membership of the UDPS and hence his known political profile as an opponent of a Kabila-led or Kabila-controlled government of the DRC. Mr Tarlow did not seek to persuade me otherwise.

16. Mr Tarlow also did not present any argument as to why the appellant should not be treated as qualifying for asylum on the additional basis that he is now an active and visible member of APARECO. He only became a member on 1 December 2018, but the unchallenged evidence of Mr Mundele is that since then the appellant has been mobilising and spreading APARECO ideology on social media and within the Congolese community, attending prominent APARECO events, and that his details as a party member are published on the APARECO web site.
17. Accordingly, the appellant has discharged the burden of proving to the lower standard of proof that he qualifies for recognition as a refugee. By the same token, there are substantial grounds for believing that on return to the DRC the appellant would face a real risk of ill-treatment at the hands of agents of the State of such severity as to cross the threshold of Article 3 ECHR.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside and the following decision is substituted: the appellant's appeal is allowed on the ground that his removal would breach the Refugee Convention and on the ground that his removal would be unlawful under Section 6 of the Human Rights Act 1998.

Anonymity Direction

The appellant is granted anonymity throughout these proceedings, unless and until a Court or Tribunal directs otherwise. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date 14 August 2019

Deputy Upper Tribunal Judge Monson

TO THE RESPONDENT **FEE AWARD**

No fee was paid or is payable and therefore there can be no fee award.

Signed

Date 14 August 2019

Deputy Upper Tribunal Judge Monson