



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal number: PA/10654/2019 (V)

THE IMMIGRATION ACTS

Heard Remotely at Manchester CJC  
On 20 November 2020

Decision & Reasons Promulgated  
On 9 December 2020

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

JK

(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS (V)

For the appellant: Ms C Johnrose, instructed by Broudie Jackson Canter Solicitors

For the Respondent: Mr C Bates, Senior Presenting Officer

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was video by Skype (V). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. At the conclusion of the hearing I reserved my decisions and reasons, which I now give. The order made is described at the end of these reasons.

1. The appellant, who is a national of the Democratic Republic of Congo (DRC) with date of birth given as 18.8.95, has appealed with permission to the Upper

Tribunal against the decision of the First-tier Tribunal (Judge Buckley) promulgated 23.3.20, dismissing on all grounds his appeal against the decision of the Secretary of State, dated 21.10.19, to refuse his claims for international protection and to remain in the UK on human rights grounds. The appellant relies on asylum grounds of political opinion, on the basis that he would be at risk on return of being killed by the DRC authorities, that risk arising out of his father's role in the political opposition group RCDN, his own involvement in the UDPS, and his escape from prison after being tortured.

2. The First-tier Tribunal found that at the highest the appellant was a low-level supporter of the UDPS who had been arrested and mistreated but escaped detention. The judge pointed out that political fortunes had reversed since the appellant left the DRC and President Tshisekedi is leader of the UDPS , so that the appellant would not be returning with a profile of opposition to the DRC authorities but in fact as a supporter of the President, who in March 2019, decreed a presidential pardon for 700 political prisoners and invited those in exile to return. The judge concluded that the appellant would not be of any adverse interest to the DRC authorities on his return.
3. In summary, the grounds of application for permission to appeal are as follows:
  - i. That the judge erred by failing to follow Country Guidance;
  - ii. That in departing from Country Guidance the judge failed to consider material evidence and that there was insufficient cogent evidence to justify doing so;
  - iii. That the judge failed to adequately assess and determine article 8 ECHR issues with particular regard to the appellant's physical and moral integrity.
4. Permission to appeal to the Upper Tribunal was refused by the First-tier Tribunal on 10.5.20. However, when the application was renewed to the Upper Tribunal, Upper Tribunal Judge Kamara granted permission on 3.8.20, considering it "at least arguable that the First-tier Tribunal erred in failing to follow the country guidance of R (on the application of MM (Lebanon) and Others) v Secretary of State for the Home Department [2017] UKSC 10 (UDPS) members -Risk on return) Democratic Republic of Congo Country Guidance [2007] UKAIT 00023 and in not considering material evidence when departing from that authority."
5. I have carefully considered the decision of the First-tier Tribunal in the light of the submissions made to me, the grounds of application for permission to appeal to the Upper Tribunal, and the documents now on the Tribunal's case file.
6. There has been no cross-appeal against the positive findings in the appellant's favour. The judge found the appellant credible in respect of his claimed past

persecution in the DRC. He found his role was to distribute leaflets and mobilise youth. The medical evidence was also accepted, to the effect that the appellant is suffering from PTSD, and that this corroborated the appellant's account of being mistreated in detention and the mechanism of his escape. As explained above, it was only because the judge found that the political climate in the DRC had changed that it was concluded that the appellant was not at risk.

7. The Country Guidance held at headnote [3] that as a general rule mere rank and file UDPS members are unlikely to fall within the category of those at risk. However, each case is fact sensitive. At [110] the Upper Tribunal referred to those with 'profile' as including those whose actual or perceived military or political activities or involvements are "likely to have brought them to the adverse attention of the Kabila regime." Mere membership of an opposition party will not demonstrate that a person has such a profile. At [250] the Upper Tribunal accepted that had that appellant been found credible, the Tribunal would have concluded that a person who had a role in the UDPS and who was known to the authorities and who had been detained and ill-treated by them for his political opinion and who had escaped from detention, would arguably be at risk on return to the DRC. It is on this basis that the appellant's circumstances falls within this profile that Ms Johnrose submitted that on the findings of the First-tier Tribunal, the appeal should have been allowed.
8. Whilst the respondent's case remains that the political circumstances on the ground have changed, Mr Bates conceded that if MM remains valid Country Guidance, on the facts as found, the asylum claim would have succeeded at the First-tier Tribunal. He accepted that there were difficulties with the decision in that in departing from the Country Guidance the judge referred to and relied only on the CPIN and appears to have taken no consideration of the key passages index provided by the appellant; there was no balancing assessment of the country background material. Mr Bates agreed that the treatment of the country information was unfair. Mr Bates also confessed to being confused by what the judge intended to convey at [51] of the decision where it was stated, "The onus is on the appellant to demonstrate a risk of persecution or serious harm, and on the basis of his facts of his claim and the change in political landscape - or even before the recent changes - the appellant has not demonstrated that he will (be) at risk on return..."
9. The fact is that MM remains on the Tribunal's list of Country Guidance Determinations and the default position is that it should be followed unless strong and cogent evidence justifies departure. I note, however, that a reassessment of the risk for UDPS members is pending before the Upper Tribunal in Country Guidance, but the case is in its very early stages and a conclusion may be several months away. In the premises, I concluded that it would not be appropriate to stay this case until the outcome of future Country Guidance.

10. Mr Bates accepted that strong and cogent evidence is necessary to depart from the Country Guidance, as stated, it was his case that there was such a change, relying on the CPIN. However, for the reasons set out below, I am not satisfied that there was sufficient cogent evidence to justify the judge in departing from extant Country Guidance.
11. In summary, the respondent relies on the fact that Felix Tshisekedi, the leader of the UDPS, is now president of the DRC. However, the evidence relied on by the appellant and contained in his bundle put before the First-tier Tribunal appeal hearing indicates that the President is sharing power with the Common Front for Congo (FCC), the Kabila coalition party. The President's partner in coalition, Vital Kamerhe of the UNC, and the CPIN at 5.2.3 indicates that they are in coalition with the FCC in which the UDPS and UNC are allocated 23 seats out of 65 in total. The Prime Minister is from the FCC. Effectively, it is arguable that the Kabila party or its proxies still control both Parliament and the government, retaining the majority in the Parliament, the Senate, and local and provincial governments, despite losing the election overall.
12. It is unnecessary to rehearse all of the considerable evidence relied on by the appellant, or to determine whether or not Tshisekedi or Mabila hold overall control. Even if there is evidence on this issue going both ways, I am not satisfied that the limited evidence that was before the First-tier Tribunal was sufficiently clear and cogent to justify departure from the Country Guidance. Even though there has been a change of President, it appears that Kabila factions or their proxies remain very much in control so that it cannot be said that it is safe for the appellant to return to the DRC.
13. Accordingly, for the reasons explained above, there was and is no justification for departing from extant Country Guidance authority, the effect of which is that on the unchallenged political profile of the appellant as found by the judge, in particular one who has been detained for UDPS political involvement, mistreated and escaped, the appellant has such a political profile that will be at risk on return on account of his prior active membership of the UDPS and hence his known adverse political profile as an opponent of a Kabila-led or Kabila-controlled government of the DRC.
14. In the circumstances and for the reasons set out above, I find material error of law in the decision of the First-tier Tribunal so that it must be set aside and remade by allowing the appeal.

## **Decision**

I set aside the decision of the First-tier Tribunal.

I remake the decision in the appellant by allowing it.

I make no order for costs.

Signed: *DMW Pickup*

Upper Tribunal Judge Pickup

Date: 23 November 2020

### **Anonymity Direction**

I am satisfied, having had regard to the guidance in the Presidential Guidance Note No 1 of 2013: Anonymity Orders, that it would be appropriate to make an order in accordance with Rules 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 in the following terms:

*“Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies to, amongst others, both the appellant and the respondent. Failure to comply with this direction could lead to contempt of court proceedings.”*

Signed: *DMW Pickup*

Upper Tribunal Judge Pickup

Date: 23 November 2020