



IAC-AH-DN-V1

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

Appeal Number: PA/02180/2016

**THE IMMIGRATION ACTS**

**Heard Remotely Manchester CJC  
On 25 January 2021**

**Decision & Reasons Promulgated  
On 09 February 2021**

**Before**

**UPPER TRIBUNAL JUDGE PICKUP**

**Between**

**AK  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr C Holmes instructed by Citizens Advice Bureau (Bolton)  
For the Respondent: Mr ZZ, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. *Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269), I make an anonymity direction. Unless the Upper Tribunal or a court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellant.*

2. This is the appellant's appeal against the decision of First-tier Tribunal Judge Foudy promulgated on 13 September 2019 dismissing on all grounds his appeal against the decision of the respondent dated 21 February 2016 refusing his protection claim.
3. This is a matter with some history. The decision of Deputy Upper Tribunal Judge O'Ryan, promulgated 1 August 2018, set aside the appeal dismissal decision of First-tier Tribunal Judge Tobin promulgated on 6 September 2017, remitting the appeal to be remade in the First-tier Tribunal. Hence the hearing before Judge Foudy.
4. Permission to appeal was initially refused by First-tier Tribunal Judge Bulpitt on 23 October 2019. However, when the application was remitted to the Upper Tribunal, Upper Tribunal Judge Smith granted permission on 28 November 2019. Thus, the matter came before me in an error of law hearing on 21.1.20.
5. In my decision promulgated 30.1.20, I was not satisfied that Judge Foudy had erred in relation to the treatment of the medical evidence and in addressing the article 8 ECHR claim. However, I accepted the submission that despite the difficulties caused by the appellant's mental health, the First-tier Tribunal failed to make an adequately reasoned assessment of the evidence relating to the appellant's factual claim. I directed that the appeal be remade afresh in the Upper Tribunal with no findings of fact preserved.

*Remaking of the Decision in the Appeal*

6. In compliance with the directions issued on 30.1.20, the Tribunal has now received the respondent's further evidence served on 17.11.20, and the appellant's consolidated bundle and skeleton argument provided under cover of letter dated 20.11.20.
7. The respondent's further evidence comprises the CPIN DRC: Opposition to Government V3.0 November 2019 (two copies of) and the CPIN DRC: Unsuccessful Asylum Seekers v 4.0 January 2020. By reason of their date, neither of these documents could have been put before First-tier Tribunal Judge Foudy in September 1999. The appellant's bundle is largely a consolidation of materials that were before First-tier Tribunal Judge Foudy, together with the January 2020 CPIN relied on by the respondent.
8. I confirm that I have considered the appellant's case in the context of the evidence as a whole, applying the lower standard of proof. I have also taken full account of his inability to give oral evidence and the effect his declining mental health may have played on his ability to give a coherent and credible account, or to explain apparent inconsistencies in his account. Although matters may be addressed below in a particular order, that is merely for the convenience of organising the drafting and is not a compartmentalisation of the decision. My findings have only been made after considering the evidence in the round, together with the submissions of both representatives. It is not necessary to address every factual issue of dispute, but I have provided my primary reasons which support the findings and conclusions made.

9. As formulated by Mr Holmes, and agreed by Mr McVeety the issues before the Tribunal are:
- i. Is the appellant's account reasonably likely to be true? Effectively, a credibility assessment.
  - ii. Is he at real risk on return to the DRC?
  - iii. Alternatively, can he succeed under articles 3 and/or 8 ECHR?

*Relevant Background & Factual Account*

10. The appellant's claim for international protection was that he feared return to the DRC, believing that his life was in danger because of his membership of FILIMBI, described by him as a movement to encourage youth to choose a political party and in turn elect a president to lead the country well. He claimed that he first became aware of this party on 1.9.15 when he happened by chance to hear a crowd being addressed by someone with a microphone, urging youth to wake up and stand up for their rights. Up to that point, he had no political involvement but immediately registered his interest with FILIMBI, providing his ID and personal details for later contact. He has given differing accounts as to whether the police attended and dispersed this meeting, but he has stated that he hid in the compound of a Catholic Church and, although others were detained, including Alfred Mboma and Yves Makwambala, he was able to run away.
11. Thereafter, as a "simple member" or supporter, he helped distribute leaflets. He has claimed that when doing so on 10.9.15, he was arrested, detained and tortured. He has alternatively stated he was arrested as soon as he received the leaflets and that he was arrested after being followed whilst distributing the leaflets. Alternatively, he was arrested at a later date, on 30.9.15.
12. He claimed to have been detained for some 10 days during which time he was tortured by beating but not interrogated. He was then taken to hospital vomiting blood and bleeding. He claims that a cousin whom he had never before met heard rumours that a young man was in hospital and going to die as a result of his injuries. After a search, his cousin found the appellant and with the assistance of a friend who was a policeman was able to remove him from the hospital via the back door, avoiding the police guarding the entrance who were unaware of this exit route. This same man later helped him leave the country. He travelled via Brazzaville and Kenya, from where he flew to London with the assistance of an agent, arriving on 4.11.15. He claimed asylum two days later on 6.11.15, asserting that if returned to the DRC he will be killed.

*The Respondent's Case*

13. In the refusal decision (RFR) of 21.2.16, the respondent entirely rejected the appellant's factual claim of affiliation with FILIMBI. Other than it encouraged youth to engage in politics, he was unable to identify any other goals of the party, as set out in the country background information cited in the RFR. His interview account of

police presence at the meeting on 1.9.15 was considered inconsistent in several respects, as was his account of being detained for distributing leaflets, as he had given significantly different dates for the date and circumstances of his arrest. More serious inconsistencies were identified between his factual account and objective country information. The persons he purported to identify as having been arrested on 1.9.15 were in fact already in detention, having been arrested on 15.3.15 and have been held by the Congolese authorities ever since. It follows that they could neither have been present at the meeting nor arrested on 1.9.15. Given this and the internal inconsistencies in his account of events on 1.9.15, 10.9.15, or alternatively 30.9.15, his account of being involved with FILIMBI was rejected. In reaching my own findings, I have necessarily taken these factors into account, along with any explanations for such stark inconsistencies, in the context of the evidence as a whole.

### *The Medical Evidence*

14. In considering the medical evidence, I apply the guidance in JL (Medical reports – credibility) China [2013] UKUT 00145 (IAC), and remind myself *“that ultimately whether an appellant’s account of the underlying events is or is not credible and plausible is a question of legal appraisal and a matter for the Tribunal judge, not the expert doctors.”* I need also to bear in mind the extent to which the medical assessment relies on an assumption that the account given by the appellant is to be believed.
15. In support of the claimed torture, the appellant relies on the medico legal report of 4.7.17. He also relies on the reports of Dr Kovvuri dated 12.4.19 and 14.6.19 reassessing his mental health, previously diagnosed as PTSD. Evidently his mental state deteriorated between 2017 and 2019, so that it is now suggested that the appellant does not have capacity to engage with the appeal process.
16. The April 2019 report of Dr Kovvuri opined that the appellant was suffering from a likely traumatic brain injury leading to bizarre behaviours, including eating faeces, drinking from the toilet, loss of consciousness, labile mood, problems remembering and concentrating, and confabulation. The doctor also considered that the appellant was suffering from PTSD, depression and anxiety, requiring EMDR therapy, which Mr McVeety accepts may not be available in the DRC, although other forms of psychiatric therapy are available.
17. Judge Foudy considered that *“Because of the overlay of the appellant’s mental illness on his ability to recount events in DRC it is impossible to assess what did and did not occur to him the past. There is ample evidence of him erroneously believing that events occurred in the UK when they had not. I therefore cannot be satisfied even to the lower standard of proof that the appellant’s claims regarding his fears in DRC are credible.”* The judge also went on to state that it was not possible to conclude that scars from burning must have been inflicted in the course of torture by a third party and because the appellant was such an unreliable historian his flawed recollection could not be relied on.
18. As stated above, I found that the First-tier Tribunal had erred by not tackling these difficulties in order to reach a conclusion on the appellant’s factual claim of events in the past. Whilst the points made by Judge Foudy summarised above make the task

difficult, it was nevertheless necessary to make clear findings on the evidence, one way or another.

19. Obviously, the appellant's mental state is a relevant factor in considering the credibility of his claim. I also agree with Mr Holmes submission that the narrative of his account "*must be viewed through the prism of the appellant's mental health,*" and confirm that I have done so.
20. However, I regard it as significant that to the doctor, the appellant described events that could not have happened in reality, such as the theft of a fire alarm and assault by staff members. He was unable to recall events in chronological order and had considerable difficulty expressing himself. At [8.4] of the April report, it was found that the appellant was "*likely to misrepresent and give an inadequate account of his mental health symptoms*". He was deemed not fit to give instructions to his legal representatives. I find that these very symptoms significantly undermine the reliability of the appellant's account of events in the DRC to his medical examiners and thereby, to some extent, their assessment of compatibility of symptoms with his attribution.
21. Having considered the evidence as a whole, for the reasons set out below, I find it impossible to discern from these reports that the appellant was or might have been so adversely affected by his mental health conditions that his interview account cannot be relied on, so as to explain the significant inconsistencies in his account.
22. Mr Holmes' skeleton argument helpfully summarises the medical evidence. In 2017 the appellant was described as suffering from PTSD symptoms that were pronounced and disabling, and of a level of severity not expected from someone who had not experienced the level of trauma he claimed. I have already summarised above the April 2019 assessment that he lacked the capacity to understand the legal proceedings and give instructions. In medical interview, he did not accurately represent his mental health problems and would likely give an inaccurate account of symptoms. The conclusion was that the appellant has suffered a traumatic brain injury as a result of which he may have experienced psychotic symptoms which required further investigation, including problems remembering, concentrating, or making decisions. There was also evidence of slowness in thinking and speaking. The June 2019 report reached similar conclusions, the author stating "*I am of the opinion that he does not possess a full understanding of why he continues to be detained in spite of serving his sentence... In my opinion he is not fit to provide his solicitor with instructions. In my clinical opinion, I do not think that he has the capacity to attend his court proceedings and give evidence.*"
23. In addition to the mental health issues, Mr Holmes submits that the medical evidence set out in the reports is indicative of physical mistreatment, which is relevant to the credibility assessment and "*strongly supportive*" of the veracity of his account. The Freedom from Torture report of July 2017 concludes that the appellant has:
  - i. Burns 'highly consistent' with the appellant's attributions.
  - ii. Cuts 'typical' of the appellant's attribution.

- iii. Other lesions which 'chime' with the appellant's general account of detention and mistreatment.
  - iv. Reported symptoms and identified a lesion was 'in keeping with' a blow to the head.
  - v. Identified a 'clinically probable' sequelae of his injuries, given the mistreatment to which he claims to have been subjected.
24. Whilst none of these findings lie at the top of the Istanbul Protocol scale, I take all of this into account and find no reason to disagree with the clinical diagnoses or assessment of both mental health issues and physical injuries, as set out or summarised above.
25. Mr McVeety did not seek to challenge that the appellant's mental health is such that he is unable to provide further instructions or for his case to be tested in oral evidence. I also accept that the appellant is not in a position to assist further by giving evidence or providing further instructions to his legal representatives.
26. However, I have to consider the medical evidence in the context of the evidence as a whole, including the appellant's factual accounts to the respondent and in his witness statement of 18.7.17. Whilst he accepted that the medical evidence was relevant to the assessment of credibility, Mr McVeety submitted that one cannot simply ignore the considerable credibility issues identified between [14] and [41] of the refusal decision. I agree.
27. Other than inviting me to view the factual claim through the prism of the appellant mental health issues, Mr Holmes did not directly address the significant internal and external inconsistencies in the appellant's factual account, except by submitting that any inconsistencies may be attributable to mental health issues arising from mistreatment in detention and should not be held against the appellant in the credibility assessment. It was argued that both physical and mental health matters are entirely consistent with the appellant's claim of mistreatment in detention and are, therefore, supportive of his factual account. To a limited extent and in general terms I accept this as an obvious point, which I have taken into account. However, the submission ignores the significant inconsistencies and impossibilities of his account.
28. Mr Holmes further submitted (1) that the appellant's evidence was broadly consistent with the attitude of the DRC authorities to political opposition in 2016; (2) that the activities of the appellant and others was also broadly consistent; and (3) that the nature of the alleged mistreatment in detention was consistent with the history of such behaviour by the DRC authorities as shown in the country background information. Again, in general terms these are valid points and I have fully taken these submissions into account in assessing the evidence as a whole.
29. In respect of the appellant's mental health, I also note Mr Holmes' submissions that the account given in the Medico-legal report from 2017 provides something of an explanation for becoming involved in activity which he must have known was

dangerous, for which reason his family worried about his safety, namely that although sympathetic to their aims, he had “joined mainly for the money,” which his family desperately needed. However, I do not find this explanation plausible or credible, given his previous completely absent interest in politics and the obvious significant danger of becoming involved in opposition to the DCR regime, of which it appears he was fully aware. In my view, the account makes no sense and I discount financial gain as his motivation.

30. Mr Holmes also pointed to the appellant’s demeanour when giving his account to his medical examiner, as noted at [19] and [20] of the report, as well as details which Mr Holmes suggested lent credibility to the account as pointed to by Mr Holmes such as those at [24] and [27] of the report that after being beaten the bubbles of drinking coca cola hurt his mouth and that he had pain when urinating. These are rather minor points, and it is possible, for example, that such experiences did happen during his life entirely outside of his claim to have been beaten and tortured by the DRC authorities. Nevertheless, to the extent I can I have weighed these factors in the overall balance of credibility assessment.
31. I accept as a point well-made that the appellant’s apparent limited knowledge of FILIMBI, as highlighted in the refusal decision, may be consistent with reasonable expectations of a person with no previous political involvement and a mere 10 days of involvement before detention. I agree it would not be reasonable to expect such a person to be able to recite the other goals of that organisation and have taken this point in the appellant’s favour.
32. Having carefully read the asylum interview, I find that the appellant was able to give a relatively detailed account of his factual claim, as well as considerable significant detail in the medico-legal report, although his memories were there described as fragmented and he was restless and tearful at times in recounting his story. I note there was absolutely no indication at the time of the asylum interview that he may have been suffering from mental health issues such as an inability to recall detail, or being confused, or that he complained of any similar issues, or was distressed in the way described in the later medico-legal report. Whilst I accept the theoretical possibility that his mental health issues could have played some limited part at that early stage of his claim, there is no reliable support for that proposition.
33. Reading the asylum interview as a whole does not suggest any such mental health difficulties. For example, he confirmed that he felt fit and well to be interviewed and positively wanted to continue with the interview and answer the questions. Whilst he referred to physical health issues, these did not appear to adversely affect his ability to answer questions. It appears to me that his mental state as assessed in 2019 rather suggests that there had been a post-interview deterioration in mental health rather than that his mental health was a significant factor in his asylum interview. For example, the content of that interview did not disclose obvious internal impossibilities in the account, in the same way as appears from the medical assessment, or that he was having any difficulty recalling events. I find that the difficulties that arise from the interview is much more suggestive of an ongoing

fabrication of an account with consequent difficulties of consistency because of the lies told.

34. In the premises, whilst I have been willing to view the factual account through the prism of what we now know about his mental health, I am unable to find that this played any significant role at the time of the asylum interview.
35. As already noted, it is clear from a reading of his interview, the appellant was unable to provide an internally or externally consistent account, as set out in the refusal decision, summarised above and which need not be repeated in full at this stage. I accept that an entirely consistent account would be itself suspicious and is unlikely from any person genuinely recounting such events. However, there was not just the odd discrepancy but serious inconsistencies which I find no sensible explanation can reconcile or otherwise explain. For example, the appellant was very clear in asserting that the two prominent FILIMBI figures he mentioned were arrested at the time of his attendance at the meeting. This cannot be accurate, as they were arrested months earlier and have remained in detention. Similarly, during interview the appellant gave accounts that were chronologically inconsistent and impossible to reconcile, such as whether the police attended and if so when; and the circumstances and date of his own arrest and detention.
36. I bear in mind that the sorts of mistreatment the appellant claims he was subjected to are consistent in general terms with country background information, and that to a limited extent the nature of the injuries are potentially consistent with such mistreatment. However, it remains far from clear that the injuries he complains of were necessarily or even reasonably likely to have been sustained at the time and in the circumstances claimed and did not have some other causation. Only the burns were said to be 'highly consistent' with such treatment.
37. In assessing credibility, I also take Mr McVeety's point that it is not credible that the appellant could claim to have absolutely no contact or support in the DRC but yet produce a supposed newspaper report, sent to him from the DRC. The report itself is frankly incredible, suggesting that the appellant was a person "highly visible within the ranks of 'Filimbi'", and who was taking part in a demonstration to call for the release of Ive Makwambala and Alfred Bauma both of whom were said to be incarcerated in the Kinshasa penitentiary. As written, the report implied knowledge of not only the appellant and his detention but his method of escape travelling through Brazzaville. It is incredible that the author of the article could know such details without being in contact with the appellant. The article is also inconsistent with the appellant's claim that the two persons mentioned were arrested at the meeting he attended and as to his role as a simple member or supporter. I am driven to conclude that, despite his assertions to the contrary, the appellant has contacts with persons in the DRC, who have attempted to assist him by producing this frankly incredible and unreliable report. Rather than supporting the appellant's credibility, this report actually undermines it further.



38. Taking all the evidence into account together, in the round, and applying the lower standard of proof, I am unable to find that either or both the appellant's mental health issues and his physical injuries provides any adequate satisfactory explanation for serious inconsistencies in his account. Nor do they sufficiently support that account to persuade me that it is reasonably likely to be true. Whilst I take into account the degree to which the fact of the mental health symptoms and diagnosis and the assessment of physical injuries supports his account, in the light of the evidence as a whole I find that the appellant has failed to demonstrate that any of the events he described might reasonably have happened. Put another way, I find that his account is not reasonably likely to be true. I am driven to the clear conclusion that the appellant fabricated his account in interview and has subsequently been caught out in his lies by the inconsistencies in the false account he has woven.
39. It follows that I do not accept that the appellant is at risk on return for any Convention or humanitarian protection reason. Applying the fact-sensitive approach of Country Guidance of BM and Others (returnees – criminal and non-criminal) DRC Country Guidance [2015] UKUT 00293 (IAC), there is no reason whatsoever to support that the DRC authorities have any adverse interest in the appellant.

#### *Article 3 ECHR*

40. In relation to article 3 ECHR, Mr Holmes relies on the unchallenged poor state of the appellant's mental health and limited cognitive abilities to submit that his rights may be breached on return to the DRC.
41. In his skeleton and in his further helpful oral submissions, Mr Holmes pointed to the Supreme Court's recent decision in *AM (Zimbabwe)* [2020] UKSC 17, requiring the appellant to demonstrate that there are substantial grounds for believing his is a very exceptional case because of a real risk of subjection to inhuman treatment. It was submitted that once a prima facie case of a potential article 3 breach has been demonstrated, the burden shifts to the respondent to demonstrate that necessary care or treatment is available to prevent a breach of article 3.
42. I need not repeat the summary of the appellant's mental health difficulties set out above, which are unchallenged and which I accept. I also accept, as did Mr McVeety, that mental health provision in the DRC is limited. There is only one mental health hospital in the DRC and only one outpatient mental health facility. Further, mental health is widely stigmatised in the DRC, and drugs commonly available in the Western World are no to be found or not affordable in the DRC.
43. Against that background, Mr Holmes submitted that given the poor state of the appellant's mental health and the lack of any effective or accessible care in the DRC, the appellant has discharged the burden to show a prima facie case. He pointed out that the reports recommended EMDR therapy, which Mr McVeety accepted is not available in the DRC. However, the fact is that other therapy is available and there is no evidence before me that EMDR is the only therapy that could assist the appellant. Neither do I accept Mr Holmes' submission that there no effective or accessible care.

It may be limited and not as comprehensive as that available in the UK, but there is provision for both outpatient and inpatient mental health treatment within the DRC.

44. More importantly, I accept Mr McVeety's submission that it is significant that there has been no further medical evidence and no update on the appellant's mental health. We know nothing about his condition beyond the 2019 assessments, now approaching some two years of age. Although the reports recommend treatment, no evidence has been put before the Tribunal that the appellant is currently receiving treatment or, in fact, that he has ever received any actual treatment, or the therapy suggested. Neither is there any evidence that he presently requires and is currently receiving any form of medication; there has not even been a letter from his GP. Effectively, Mr Holmes asks the Tribunal to determine the important article 3 issue on outdated and incomplete evidence. As Mr McVeety put it, how do we know that he still requires treatment, or has not recovered, or that whatever his needs may presently be would not be available to be met in the DRC? No practical reason has been advanced as to why no further evidence has been commissioned, particularly that it was a year ago that I made the error of law decision, indicating then that I was not satisfied that Judge Foudy had erred in respect of the article 3 issue. The appellant was put on notice as to this issue but has provided no further information. In the premises, I cannot accept that any prima facie case has been made out.
45. In any event, even taking the mental health evidence at its highest, I am not satisfied that his condition can meet the high threshold required under article 3 ECHR, even as redefined in *AM (Zimbabwe)*. The Supreme Court held that there was no question of it refusing to follow *Paposhvili v Belgium* [2017] ECHR 41738/10, concerning applications under article 3, departing from the decision in *N v SSHD*. However, the appellant still has to demonstrate substantial grounds for believing that it is a "very exceptional case" because of a real risk of subjection to inhuman treatment. In essence, article 3 now extends to a situation other than those in which there was an imminent risk of death in the returning state, but the requirement of a "significant" reduction in life expectancy, in the context of the new criterion, had to mean "substantial". Were a reduction in life expectancy to be less than "substantial", it would not attain the minimum level of severity which Article 3 requires (*see paras 27-31*). As to the procedural requirements, the threshold is for the applicant to adduce evidence to demonstrate "substantial" grounds for believing that it was a "very exceptional" case because of a "real" risk of subjection to "inhuman" treatment. Considering the evidence as a whole, I am satisfied that nothing in the evidence even begins to come close to meeting the high threshold of a "very exceptional case" required under article 3 ECHR, even after consideration of *AM (Zimbabwe)*.
46. Mr Holmes did not pursue article 8 ECHR grounds. It was previously argued that the appellant's mental health was inadequately dealt with by the judge at paragraphs [10] and [11] of the decision and that the difficulties of his condition and the need for treatment were relevant factors to the Article 8 consideration outside the Rules. However, as I pointed out in my error of law decision, there was no family life claim. The only claim could be under private life, on the basis that the appellant had been in the UK since 2015. However, as this was a deportation case, the appellant would

have had to meet the requirements of paragraphs 399A and all three limbs, not only simply that there were very significant obstacles to integration in the DRC. It does not appear that the appellant could possibly have met those requirement and, therefore, there would have to be very compelling circumstances over and above the factors set out in paragraph 339A. I am satisfied that there are no such very compelling circumstances.

*Decision*

I remake the decision in the appeal by dismissing it on all grounds.

Signed: *DMW Pickup*

Upper Tribunal Judge Pickup

Date: 25 January 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: 25 January 2021