



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-000547
First-tier Tribunal No:
PA/52614/2020
IA/01925/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 26 March 2023

Before

UPPER TRIBUNAL JUDGE SMITH

Between

C KK
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Muzenda, Solicitor, Longfellow & Co Solicitors
For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

Heard at Field House on 26 January 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the Appellant and/or any member of his family, and/or other person the Tribunal considers should not be identified is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the Appellant, likely to lead members of the public to

identify the Appellant and/or other person. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

BACKGROUND

1. By a decision promulgated on 24 May 2022, Upper Tribunal Judge Lindsley found an error of law in the decision of the First-tier Tribunal (Judges Cartin and Khurram) dated 7 February 2022 by which the Appellant's appeal on protection and human rights grounds was dismissed. Judge Lindsley's decision is appended to this decision for ease of reference.
2. In short summary, Judge Lindsley found there to be an error of law in the First-tier Tribunal's decision that the Appellant would not be at risk on return to DRC based on his sur place activities. It was conceded by the Respondent at that time that her Country Policy and Information Note ("CPIN") did not of itself provide evidence of a significant and durable change in DRC following the regime change so as to enable the Tribunal to depart from the country guidance in BM and Others (returnees - criminal and non-criminal) DRC CG [2015] 00293 (IAC) ("BM and Others") or at least not without a detailed consideration of the other background evidence.
3. The Appellant's immigration history is set out at [1] of the error of law decision and I do not need to repeat what is there said. Again, in short summary, the Appellant's (second) protection claim is founded on his sur place activities in the UK in support of Alliance des Patriotes pour la Refondation du Congo (APARECO) which is an organisation which opposes the DRC regime (although that may not now be the entire picture as I come to below). As Judge Lindsley summarised at [8] of her decision, the Appellant claims to be an activist and the Urban Secretary of APARECO for London UK. I will come to the detail of that claim below.
4. The appeal first came before me for re-making on 9 August 2022. As set out in my adjournment decision of that date, it was necessary to adjourn in order to permit both parties to file, serve and consider new evidence which was provided shortly before that hearing by both parties. I gave directions for further evidence to be provided and for the appeal to be listed for a case management review. That review came before me on 28 October 2022. I gave further directions for filing and serving further evidence and for an agreed bundle of documents to be served prior to the resumed hearing.
5. An agreed bundle of documents was filed by the Appellant on 14 December 2022. I refer to documents in that bundle as [ABS/xx]. I was also taken to some of the documents in the Appellant's original bundle in the First-tier Tribunal to which I refer as [AB/xx]. I also had the

Respondent's bundle as before the First-tier Tribunal, but I do not need to refer to documents in that bundle.

6. I was also told at the hearing on 28 October 2022, that both a French and Lingala interpreter would be required for the resumed hearing for the Appellant and his witnesses. Both were booked but at the start of the hearing I was informed that only the Lingala interpreter was in fact required. As a result, the Appellant's solicitors wasted the valuable resources of the Tribunal in booking an interpreter who was not in fact required and who was put to considerable personal inconvenience in attending. The Appellant's solicitors should have checked the position prior to the hearing and advised the Tribunal accordingly. In the future, the Appellant's solicitors should be aware that such failures to check and notify the Tribunal of changes will not be dealt with so leniently.
7. Having heard evidence from the Appellant, his partner ([ALM]) and a further witness ([GM]), and submissions from Mr Muzenda and Ms Cunha, I indicated that I would reserve my decision and provide that in writing which I now turn to do.

LEGAL FRAMEWORK

8. The main focus of the Appellant's case is his protection claim. That is a claim that removal to DRC would breach the UK's obligations under the Refugee Convention on account, in this case, of his activities in support of an organisation which is said to oppose the regime in DRC. The burden of proving his case is on the Appellant. The standard of proof is to the lower standard as to risk on return, that is to say that the Appellant must show that there is a real risk that what he says will happen will in fact do so. Otherwise, the Appellant must establish facts to the ordinary civil standard of balance of probabilities.
9. I have regard to what is said in Karanakaran v Secretary of State for the Home Department [2000] Imm AR 271 about the inherent difficulty of establishing facts in protection cases. As I will come to, however, there was little challenge to the facts of the Appellant's case.
10. The protection claim in relation to future risk turns mainly on country guidance and background evidence dealing with risk to supporters of APARECO. The relevant country guidance is BM and Others. The guidance in BM and Others reads as follows so far as relevant:

"1. ...

2. A national of the DRC whose attempts to acquire refugee status in the United Kingdom have been unsuccessful is not, without more, exposed to a real risk of persecution or serious harm or proscribed treatment contrary to Article 3 ECHR in the event of enforced return to DRC.

3. 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 00023. 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 within this category. However, each case will be fact sensitive, with particular attention directed to the likely knowledge and perceptions of DRC state agents.

4. ...”

11. As Judge Lindsley pointed out at [9] of her decision, by reference to the guidance given in Roba (AAR) v Secretary of State for the Home Department (Rev 1) (OLF members and sympathisers) Ethiopia CG [2022] UKUT 00001 the issue to be considered in relation to the continued applicability of BM and Others is whether there has been a sufficiently significant and durable change to the position for supporters of APARECO disclosed by evidence post-dating BM and Others. The Respondent relies upon such a change and it is therefore for her to point to evidence in support of her submission.
12. The Appellant has not abandoned his human rights claims. I do not need to consider Article 3 ECHR as that claim stands or falls with the Refugee Convention claim. The Appellant also claims that removal will breach his Article 8 ECHR rights based on his relationship with his partner. The focus of that claim is that their family life could not be continued in DRC as [ALM] is herself a recognised refugee from DRC. Due to the Appellant’s (lack of) status, the Respondent asserts that paragraph EX.1. of Appendix FM to the Immigration Rules (“Paragraph EX.1.”) applies. That reads as follows so far as relevant:

“EX.1. This paragraph applies if

(a)

(i) ...; or

(b) the applicant has a genuine and subsisting relationship with a partner who is in the UK ... or in the UK with refugee leave ..., and there are insurmountable obstacles to family life with that partner continuing outside the UK.

EX.2. For the purposes of paragraph EX.1.(b) ‘insurmountable obstacles’ means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner.”

13. Outside the Immigration Rules (“the Rules”), some reliance was also placed on the case of Chikwamba v Secretary of State for the Home Department [2005] EWCA Civ 1779. I do not find it necessary to deal with that case following the Court of Appeal’s recent judgment in Alam and Rahman v Secretary of State for the Home Department [2023] EWCA Civ 30. This is not a case where the Secretary of State asserts that, but for his unlawful immigration status, the Appellant would succeed in his human rights claim and nor is it asserted that he is only required to return to DRC to seek entry clearance as a partner and that such an application would be certain to succeed.
14. When considering the Appellant’s Article 8 claim outside the Rules, I need to carry out a balance sheet assessment between the interference with the Appellant’s private and family life against the public interest which applies in order to determine whether removal would be proportionate. In so doing, I must have regard to the factors set out in section 117B Nationality, Immigration and Asylum Act 2002 (“Section 117B”).

EVIDENCE, ASSESSMENT OF EVIDENCE AND FINDINGS

Witness Evidence

15. The Appellant has provided two witness statements dated 26 July 2021 ([AB/5-8]) and 15 November 2022 ([ABS/1-7]) which he adopted as his oral evidence.
16. The Appellant says that he is a member of APARECO. He joined the organisation on 9 April 2018. He says that he has attended “numerous meetings, rallies and demonstrations around the country” and that, before the Covid-19 pandemic, he and others gathered outside the Congolese embassy in London. During the lockdowns, he and others were active online. At demonstrations, the Appellant describes his role as someone who speaks to the public by loudspeaker, and holds banners and placards. He wears “APARECO regalia which is highly visible”. He and others “protest in solidarity with events in Congo” and “target regime officials when they travel to the UK”.
17. The Appellant says that soon after he joined APARECO, he was appointed “Mobilisation Officer of APARECO London branch”. His responsibility in this post was to mobilise members and ensure that protests were peaceful and there was no disruption. In oral evidence, the Appellant clarified his position in this regard. He said that all those who joined APARECO as members were in effect Mobilisation Officers.
18. The Appellant says that he was later appointed as “Urban Secretary of APARECO London branch”. Along with his responsibilities as previously mentioned, he became responsible for taking minutes of meetings, communicating with other branches and members, liaising with the national APARECO organisation, organising community events and meeting other Congolese people who might be interested in the organisation.

19. It is the Appellant's case that the DRC authorities have informers operating in the UK and elsewhere. He says that some of these informers even contact those in detention under pretence of helping with their case whereas they are in reality collecting intelligence.
20. The Appellant says that his positions within APARECO make him "very visible" within the Congolese community in the UK and around the world. If he were returned to DRC, he says that he would be a "real target" for the government and that he would be detained, tortured and even killed. The Appellant says that his activities are displayed on the official website of APARECO and also their social media and You Tube channels. He says that his name is given and his pictures are shown. He would also come to the attention of the authorities if he attended the embassy in the UK in order to obtain travel documents.
21. In support of his case, the Appellant provided an "attestation" from Mrs Candide Okeke dated 1 September 2022 ([ABS/104-105]). She says that she was the National Vice President of APARECO below Mr Honoré Ngbanda who was formerly the President. She says that after Mr Ngbanda's death, she was appointed President. In that capacity, she confirms the Appellant's case that he is a very active member of APARECO and Urban Secretary in London. She also refers to the Appellant being one of a number of persons who have taken legal action against Mr Ebama who had named himself as President of APARECO following Mr Ngbanda's death.
22. This brings me on to the documentation which led to the earlier adjournments of the appeal before me.
23. By email dated 3 August 2022 ([ABS/101-102]), Mr Stefan Kotas of the Home Office emailed APARECO via its website to ask for confirmation of the Appellant's status within the organisation. In a reply dated 8 August 2022, Mr [AL] replied. He said that although the Appellant used to be a member of APARECO, he had left after 2021 and was no longer active. A membership card which the Appellant had produced ([AB/24-25]) was a forgery. [AL] said that validity of membership cards was for three years and not renewable annually and that APARECO had not issued membership cards since 2021. [AL] also said that [LM] who had produced a supporting statement for the Appellant (which is at [AB/11-15]) was not the deputy president of APARECO London as he had described himself in the statement. [AL] said that only he could provide official confirmation of membership in the UK and that before this, a man named [PL] was the only person who could do so. The Appellant was unable to provide any satisfactory explanation as to why [AL] would say that the Appellant was not active within APARECO as he claimed to be. The explanation perhaps lies in the documents from the French courts to which I now turn.
24. The statement from Mrs Okeke was provided by the Appellant in response to the exchange of emails between Mr Kotas and [AL]. Mr Kotas therefore provided that statement to [AL] and asked for his response to

Mrs Okeke's statement. This led to the disclosure of court documents from France ([ABS/65-84]) showing that APARECO had taken action against Mrs Okeke for misuse of the name, official website and social media belonging to APARECO (in effect an intellectual property dispute). That action concluded in October 2022 with an order declaring Mrs Okeke's registration of the name APARECO to be void and ordering her to pay damages to APARECO.

25. The Appellant also relies on proceedings which have been ongoing in France to which the Appellant is party. The documents in that regard are at [ABS/15-38]. They show that the Appellant and many others have brought an action against Mr Ebama (Djoko) and APARECO who they claim have wrongfully declared Mr Ebama to be the new President of APARECO following Mr Ngbanda's death. Although the French court accepted that Mr Ebama was entitled to act to convene an extraordinary meeting to appoint a successor and to act as interim president in the meanwhile, it concluded that the organisation had failed to comply with its articles of association when convening the extraordinary meeting. The Court therefore suspended the deliberations of the extraordinary meeting until the statutory requirements were met. The Court's decision is dated 17 November 2022. I do not have any final judgment in that regard. The Appellant says that it is now for APARECO to convene an extraordinary meeting in accordance with its articles of association in order legally to appoint a successor to Mr Ngbanda.
26. As the Appellant and his witness [GM] agreed, the totality of the French Court documents show that there is a rift between two factions of APARECO. However, the original purpose of the documents has perhaps become lost. The initial disclosure of the French documents arose from the Respondent's endeavours to ascertain whether the Appellant is an active member of APARECO as he claimed to be and whether he held the role he claimed. The issue regarding Mrs Okeke is relevant as she purports to confirm the Appellant's case. The documents beyond that purpose show only that there remains a dispute as to who is in charge of APARECO at the present time.
27. For those reasons, I did not find of great assistance Ms Cunha's focus on these documents during cross-examination. She asked the Appellant about his roles in APARECO but his answers were consistent with his written evidence. Although the Respondent in her decision under appeal took issue with the credibility of the Appellant's claim to have the roles he said he had within APARECO and Mr Kotas sought to strengthen that case by asking the questions he did in the email exchange to which I have referred, Ms Cunha in her submissions did not suggest that the Appellant was not credible in that regard.
28. As noted above, the Appellant said that every member of APARECO is appointed as Mobilisation Officer on joining which suggests that this is not a high-profile role. However, he said that there was only one person who is appointed as Urban Secretary. The hierarchy of the organisation in the

UK is UK representative, vice representative and then Urban Secretary. He agreed with Ms Cunha that it was a very senior and high-profile position. She did not challenge his evidence in that regard.

29. The Appellant's evidence about the profile of his role as Urban Secretary was supported by [GM] whose statement is at [ABS/13]. That is not supported by a statement of truth but [GM] was called to give evidence and confirmed that what he said was true. He describes himself as "Territorial secretary of APARECO UK". He is a supporter of Mrs Okeke. He is also one of the named participants in the legal action against Mr Ebama.
30. [GM]'s evidence is that the Appellant replaced him as Urban Secretary for London in 2019 when he became "territorial secretary". [GM] said that he is the only person in that position. Above him there is only the "leader of UK territory", [LS]. I do not place any weight on the minor discrepancy between the description of "territorial secretary"/"leader" and "representative" as the Appellant referred to these gentlemen. That is likely to be a vagary of translation. Most importantly, [GM] indicated that he was recognised by the Respondent as a refugee in June 2022 as a result of his involvement with APARECO. Although I did not receive any documentation in that regard, Ms Cunha did not take issue with the credibility of this assertion.
31. Returning then to the internal wrangling within APARECO, I accept that the Appellant and [GM] currently appear to support the faction which is not recognised as being official. Whilst the Appellant accepted in his oral evidence that he and those supporting Mrs Okeke in the UK have their own website because the previous one was closed, he also said that there is still only one APARECO. The President of that organisation will in due course have to be chosen by a further meeting to appoint that person. However, I accept the submission that the DRC authorities will not be concerned with internal wranglings but will only be concerned (if they still are) with APARECO as an organisation and with those who purport to associate themselves with that organisation.
32. This brings me on to the other document on which weight was placed by Ms Cunha. At [ABS/40-41] is a website page showing that a new mining company has been created in South Ubangi, in north-east of DRC. The governor of that area made the announcement describing it as a company belonging to that province. That same governor appointed himself as chairman of the mining company and Mr Ebama as "Director-General Manager" by a document dated 14 May 2021 ([ABS/42-43]).
33. Both the Appellant and [GM] accepted that the DRC authorities would know of Mr Ebama's involvement with APARECO but did not accept that this showed that the authorities are no longer interested in those associated with APARECO. They both said that Mr Ebama was following his own interest and that there were political reasons why the DRC authorities might wish to suggest that they no longer had a problem with those associated with APARECO in order to silence their opposition. In and of

itself, I accept that this appointment does not show that the DRC authorities are no longer interested in those with a profile in APARECO. Indeed, the Respondent also apparently accepts that the position has not changed since she has very recently recognised [GM] as a refugee.

34. Dealing more generally with the position of APARECO as a whole, the Appellant confirmed that it remains banned in DRC, that it does not fund opposition parties in DRC nor does it provide supporters to those opposition parties. It has no connections with those parties. Its role is to provide vocal opposition to the DRC authorities from outside DRC and to mobilise support by rallies and demonstrations. Within DRC, the Appellant described the organisation's role as "resistance" and said that in common with all resistance movements, those supporting APARECO within DRC operate covertly.
35. The Appellant has also provided further witness statements from [AM] dated 16 November 2022 ([ABS/9-11]). He describes himself as having held a number of positions within APARECO and provides similar testimony to that of the Appellant about the Appellant's role within APARECO and the proceedings in France. In terms of his own status, [AM] says that he was granted indefinite leave to remain in 2010 and was naturalised in 2011. It appears likely from the timescale that he obtained status as a "legacy" case. He does not claim to have been recognised as a refugee. The statement is not supported by a statement of truth. [AM] was not called to give evidence as he was apparently unable to get time off work. I can give little weight to this evidence as a result.
36. The Appellant also provided a statement from [LM] dated 7 January 2021 ([AB/11-15]). He is the "Deputy Representative for APARECO London". He supports the Appellant's evidence as to the Appellant's role within APARECO and his duties in that regard. This statement is supported by a statement of truth. Having heard evidence from [GM] Ms Cunha indicated that she did not feel it necessary to cross-examine [LM] as his evidence was likely to cover the same matters as [GM]. I give some weight to this evidence even though I did not hear oral testimony from him.
37. Finally, I heard from the Appellant's partner [ALM]. She has provided two statements, dated 20 July 2021 ([AB/9]) and 15 November 2022 ([ABS/8]).
38. [ALM] is also a member of APARECO. She therefore confirmed the Appellant's evidence about his role in the organisation. Although [ALM] was recognised as a refugee in February 2020 following a successful appeal, she accepted that this was not because of membership of APARECO. She had become a member after this. Her claim was based on association with UDPS.
39. [ALM] has been in a relationship with the Appellant since 2018. They met in November 2017. They do not live together at the moment as the Appellant lives in NSASS accommodation from which he is not permitted to be absent for more than seven days. She confirmed that if the Appellant

were given status in the UK, he would come to live with her. [ALM] confirmed that she was aware of the Appellant's lack of status when she entered into a relationship with him.

40. [ALM] is working and earns £700-750 per month. [ALM] has two children still living in DRC the youngest of whom is now aged seventeen. She sends money to support them. An aunt looks after them. She would be unable to provide the Appellant with financial support if he returned to DRC. She has not returned to DRC since she came to the UK and could not do so due to her status.

Documentary Evidence

41. Although the focus of the Respondent's decision under appeal is the credibility of the Appellant's case to be a high profile activist with APARECO, the thrust of Ms Cunha's submissions was that the risk to those in the Appellant's position had changed since BM and Others and he would no longer be at risk on return to DRC.
42. I accept that the majority of the evidence directed at the Appellant's activities in the UK at [AB/34-54] stems from the period prior to the regime change in 2019 when Felix Tshisekedi came to power. Many of the YouTube stills for example show the Appellant protesting against former President Kabila. There is some evidence that the Appellant has protested against the current President (see for example [AB/54]) but the evidence in that regard is limited. The more recent evidence at [ABS/113-128] continues to show that the Appellant has links to APARECO London (or at least purports to speak in its name) but in terms of demonstrations his activities are apparently targeted against the UK Government policy of deporting asylum seekers to Rwanda and opposing the Rwandan army rather than directly criticising the regime in DRC.
43. The issue which then arises is whether there has been a sufficiently significant and durable change to the position for those who oppose the authorities in DRC.
44. Neither party included in evidence updated background evidence in relation to the treatment of political opponents in DRC. The material in the Appellant's bundle at [AB/59-99] dates back only to March 2021. There is no express mention of APARECO and only limited mention of targeting of political opponents. Indeed, the general thrust of some of the reporting is that President Tshisekedi has encouraged those in exile back to DRC (which might explain the return of Mr Ebama).
45. Neither party took me to the detail of the CPIN (Country Policy and Information Note: Democratic Republic of Congo: Opposition to government dated November 2019), extracts of which appear at [AB/107-121]. However, I have regard in particular to what is said at [2.4.21-

2.4.26] regarding risk to those associated with APARECO and the current position (as at November 2019) in relation to BM and Others as follows:

“2.4.21 In the country guidance case of BM and Others (returnees – criminal and non-criminal) DRC CG [2015] 293 (IAC) (2 June 2015), (hearing date 28 April 2015) the Upper Tribunal made findings on the treatment of members of the political group, Alliance de Patriotes pour la Refondation du Congo (Alliance of Patriots for the Re-establishment of the Congo) (APARECO) – one of a number of diaspora political groups that operate in the UK and other countries outside of the DRC.

2.4.22 The UT considered, on the facts before it, that:

‘(i) APARECO is a cohesive, structured organisation which has its main base in France and strong basis in certain other European countries, including the United Kingdom. It also operates in Canada and the United States. ‘

(ii) APARECO is implacably opposed to the regime of President Kabila which has governed DRC during the past decade. Its overarching aims are the defeat of this regime and the re-establishment of the state on a different basis. ‘

(iii) APARECO has no overt presence in DRC, where it operates underground. ‘

(iv) The external opposition of APARECO to the governing regime of DRC is overt and visible. Its highest profile activities unfold in public places, accessible to all. Activities of this nature are accompanied by advance publicity. ‘

(v) In common with many comparable regimes throughout the world, both present and past, the DRC Government has a strong interest in opposition organisations, including APARECO. Such organisations are monitored, and data is recorded. This includes information about the identities of the most prominent members of such organisations, that is to say their leaders, office holders and spokespersons. ‘

(vi) The monitoring of APARECO (UK) is likely to be undertaken by and on behalf of the DRC Embassy in London. This is the agency with the most obvious motivation to carry out and co-ordinate such scrutiny. Such scrutiny is likely to generate periodic reports to the DRC Government, in particular its ANR and DGM agencies. ‘

(vii) It is likely that the leaders, office bearers and spokespersons of APARECO (UK) are known to the DRC UK Embassy and the DRC Government, in particular ANR and DGM.’ [para 87]

2.4.23 APARECO, on the available evidence has no overt presence in DRC (see Opposition groups outside the DRC). The Upper Tribunal in

BM went on to find that: 'Persons who have a significant and visible profile within APARECO (UK) are 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. Those belonging to this category include persons who are, or are perceived to be, leaders, office bearers and spokespersons. As a general rule, mere rank and file members are unlikely to fall within this category. However, each case will be fact sensitive, with particular attention directed to the likely knowledge and perceptions of DRC state agents.' (Paragraph 88 (iii)).

2.4.24 Since BM and Others was promulgated former President Kabila has been replaced by Felix Tshisekedi, leader of the main opposition party, the UDPS. President Tshisekedi has committed to improve human rights, opened up political space and encouraged political exiles to return to the country. However, it is not clear, yet, whether there has been a significant and durable change in the government's stance and actions towards its critics, including those in diaspora (see Tshisekedi government - 2019).

2.4.25 Therefore there are not very strong grounds supported by cogent evidence to depart from the UT's findings in BM. Decision makers must consider each case on its facts to determine if there is a risk of persecution or serious harm. Factors to take into account include:

- The profile, size, and organisation of the group / organisation the person belongs
- its aims and activities and stance towards the new government;
- whether it has a presence in the DRC as well as outside of the country and any evidence that it is monitored by the government
- The person's profile and political activities (including those online) and relevant documentary or other evidence
- The profile and activities of family members
- Past treatment - harassment, discrimination, arrest and ill treatment, release, and reason for release

2.4.26 The onus will be on the person to demonstrate that they are of interest to the government because of profile and activities and are at risk of serious harm or persecution."

46. Ms Cunha suggested that I could depart from the CPIN but in the absence of any further CPIN or strong evidence suggesting the necessary improvements since the regime change, that is a difficult submission to sustain. Although the background evidence in the Appellant's bundle before the First-tier Tribunal does suggest some improvements for the

position of political opponents in DRC (many of whom according to that evidence and the CPIN have been pardoned), the thrust of the evidence is that former President Kabila still wields considerable power due to the majority which his party holds in Parliament.

DISCUSSION

47. As I have already noted, Ms Cunha did not suggest that I should find the Appellant not to be credible in relation to his sur place activities or the positions he holds in APARECO. The Appellant's own evidence is supported by his witnesses [GM] and [LM] and by the attestation of Mrs Okeke. I accept that there is contrary evidence from [AL] provided by the email exchange with the Home Office. I consider that is likely to result from the internal disputes within APARECO. In other words, [AL] does not recognise the Appellant's position or role because he himself supports the opposing faction of APARECO.
48. I accept that the overall picture painted by the documents from the French courts is that the official faction of APARECO at the present time is that led by Mr Ebama. Although he has been found to have acted unlawfully in the way in which he convened the extraordinary meeting of APARECO in order to elect a new president, the Court did not accept that he was not entitled to convene that meeting or act as interim president. Mrs Okeke on the other hand has been found to have acted unlawfully in using the APARECO name.
49. However, the internal disputes within APARECO (which is mainly located in France) do not impact on the Appellant's case. If the authorities in DRC continue to be interested in and target those who have a high profile in APARECO, I doubt that they would be concerned whether it is the official arm of that organisation or the other faction acting in the same way and with the same motivation. In the end, the concern of the authorities will be that the organisation is critical of them.
50. The guidance in BM and Others is that those with "a significant and visible profile" within the organisation will be at risk on return. The CPIN accepts that there is not yet (or was not in November 2019) sufficient evidence to suggest a significant and durable change. The background evidence I have suggests that although there may have been improvements as regards the treatment of political opponents since the election of President Tshisekedi in 2019, it also shows that the former President Kabila continues to wield power. He was the main target of the Appellant's opposition in 2018. That opposition was vocal and well publicised.
51. The Appellant also holds a position of some profile as Urban Secretary. His evidence that he is in effect third in command within the UK was not disputed by Ms Cunha.
52. I also have regard to the evidence of [GM] that he has been recognised as a refugee as recently as June 2022 based on his role within APARECO. I

accept that his position is above that of the Appellant. Nonetheless, I find that the Appellant still has a “significant and visible profile”.

53. For those reasons, I accept that the Appellant will be at risk on return. He therefore succeeds on protection grounds.
54. Strictly I do not need to go on to consider Article 8 ECHR. On my findings, the Appellant cannot be expected to return to DRC. There cannot therefore be any removal. It could not sensibly be suggested in light of my findings that the Appellant and [ALM] could continue their family life in DRC. Whilst the position in relation to [ALM] may be slightly changed due to the election to power of a president who is from the party that she supported, her status as a refugee has been recognised and the Respondent has not suggested that it ought to be revoked in light of any changed circumstances. In any event, based on my findings the Appellant himself is a refugee. It follows that he could not be expected to return to DRC. The Appellant therefore succeeds also on human rights grounds. It would be disproportionate for him to be returned to DRC.

Notice of Decision

The Appellant’s appeal is allowed on protection and human rights grounds.

L K Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

7 February 2023

APPENDIX: ERROR OF LAW DECISION



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

Appeal Number: UI-2022-000547
PA/52614/2020

THE IMMIGRATION ACTS

**Heard at Field House
On 17th May 2022**

**Determination Promulgated
.....24 May 2022.....**

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

**CKK
(ANONYMITY ORDER MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Muzenda from Longfellow & Co Solicitors

For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a citizen of DRC born in 1959. He arrived in the UK in January 2017 and claimed asylum. His claim was refused, and his appeal dismissed by Judge of the First-tier Tribunal Courts. He made a fresh asylum claim based on his sur place activities in the UK in November

2018, which was refused on 17th July 2020. His appeal against this decision was dismissed all grounds by a panel of First-tier Tribunal Judge Cartin and First-tier Tribunal Judge Khurram in a determination promulgated on the 7th February 2022.

2. Permission to appeal was granted by Judge of the First-tier Tribunal Andrew on the 11th March 2022 on the basis that it was arguable that the First-tier judge had erred in law in failing to follow relevant country guidance and to have regard to the CPIN on the DRC, but the grounds relating to the failure to make an Article 8 ECHR decision were not arguable as this was explicitly not pursued at the appeal by those representing the appellant. Judge Andrew also extended time to admit the application.
3. The matter came before me to determine whether the First-tier Tribunal had erred in law, and if so whether the error was material and the decision and whether any findings should be set aside.

Submissions - Error of Law

4. In the grounds of appeal and in oral submissions from Mr Muzenda for the appellant it is argued that the First-tier Tribunal erred in law as it was not disputed that the appellant had the claimed sur place activities, and if the country guidance had been followed he was entitled to succeed in his appeal as he would be at real risk of serious harm. Country guidance was not followed due to the election of a new government, but the CPIN report stated that it was too soon to be sure that there was lasting and durable change under the new president Mr F Tshisekedi, particularly as he has partnered with the old leader. It is also argued that there was a failure to consider the Article 8 ECHR claim in relation to the appellant's partner, as she is a recognised refugee from the DRC.
5. In the Rule 24 notice from the respondent it is argued that the First-tier Tribunal provides adequate reasons for departing from the country guidance in BM & Others as parts of the CPIN are cited at paragraphs 39 and 41 of the decision. Mr Walker submitted however that the Rule 24 notice could not be relied upon as the CPIN explicitly states at paragraph 2.4.25 that there is insufficient evidence to conclude that there has been lasting and durable change and that therefore the country guidance should be followed. He conceded the appeal as he agreed that the approach of the Panel of the First-tier Tribunal erred in law in failing to identify evidence of lasting and durable change when finding that BM & Others should be followed.
6. At the end of the hearing I indicated to the parties that I found the First-tier Tribunal had erred in law with respect to the determination of the asylum appeal. I would therefore set aside the decision and all of the findings. It was agreed that the decision would be remade in the Upper Tribunal at the first available date, with a listing time of three hours and

a Lingala interpreter. Any new evidence from either party to be submitted ten days prior to the remaking hearing date.

Conclusions – Error of Law

7. At paragraph 8 of the decision it is recorded that it was agreed by the appellant's representative at the hearing that the Article 8 ECHR ground of appeal was not pursued. This is repeated again at paragraph 45 of the decision. There is no evidence that this is an inaccurate representation of what was agreed, and so I find there is no error of law by the First-tier Tribunal panel not making a decision on Article 8 ECHR.
8. The appellant claims to be an activist and urban secretary for the London branch of APARECO. The First-tier Tribunal records at paragraph 21 of the decision that the relevant country guidance is BM & Others (returnees – criminal and non-criminal) DRC CG [2015] UKUT 293 IAC, and cites the conclusion in that case that anyone with a significant or visible profile with APARECO has a well founded fear of persecution/ is at Article 3 ECHR risk if returned to the DRC. The First-tier Tribunal concludes at paragraph 43 of the decision that it did not need to decide if the appellant has such an APARECO profile because they found that BM & Others no longer should be applied due to regime change in the DRC.
9. The key question is whether there was sufficient evidence and reasoning relating to that evidence for the First-tier Tribunal to depart from the country guidance in BM & Others. To lawfully decide the appeal contrary to the country guidance the First-tier Tribunal must have provided careful reasoning to show that there was credible fresh evidence compelling a different view, as per paragraph 21 of SI (reported cases as evidence) Ethiopia [2007] UKAIT 00012, and as reformulated in the more recent reported case of the Vice Presidential Panel, Roba (OLF – BM confirmed) (CG) [2022] UKUT 00001 whether material circumstances have changed and whether there such changes are well established evidentially and durable.
10. At paragraph 23 of the decision the First-tier Tribunal sets out the CPIN evidence from November 2019 on the new government in the DRC which states that it was unclear whether there had been significant and durable change to the attitude to opposition members and so BM & Others should be followed. It is noted that the CPIN was more than two years old at the time of hearings and so a review of the history of DRC guidance cases since 2003 is conducted, and it is concluded, at paragraph 35 of the decision, that the guidance given was very much based on the risk from the former President Kabila and his government, and that the appellant opposition position was to the Kabila regime. At paragraph 37 it is accepted that there is little objective material in the bundles since President Tshisekedi took power in January 2019, but there is no evidence that he is under the influence of former President Kabila. It is therefore based on a lack of evidence of on-going

persecution of oppositionist from the DRC, including APARECO, that the First-tier Tribunal concludes that the appellant cannot succeed in his appeal. I find that this was not a lawful approach. For the First-tier Tribunal to lawfully not follow the country guidance in BM & Others they needed to provide careful reasoning demonstrating that the changes in the DRC were material to the risk on return of those in APARECO, demonstrating that these changes were evidentially supported and durable. An absence of evidence of on-going risk in a situation where government has changed does not suffice to refuse follow country guidance. A failure to follow country guidance is an error of law as it results in a failure to consider a material matter and a failure to give adequate reasons for the decision.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.
2. I set aside the decision and the findings of the First-tier Tribunal.
3. I adjourn the re-making of the appeal.

Directions:

1. Any new evidence must be filed with the Upper Tribunal and served on the other party ten days prior to the date for the remaking hearing.

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. 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 original appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. I do so in order to avoid a likelihood of serious harm arising to the appellant from the contents of his protection claim.

Signed: Fiona Lindsley
Upper Tribunal Judge Lindsley

Date: 17th May 2022