JR-2022-LON-001810

In the Upper Tribunal (Immigration and Asylum Chamber) Judicial Review

In the matter of an application for Judicial Review

The King on the application of
'BK' (DEMOCRATIC REPUBLIC OF CONGO)
(Anonymity direction continued)

Applicant

versus

Secretary of State for the Home Department

Respondent

Anonymity direction - Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the Applicant is granted anonymity, to the extent set out this direction, as the subject matter of this application relates to a claimed fear of persecution. No-one shall publish or reveal any information, including the name or address of the Applicant, likely to lead members of the public to identify him. Failure to comply with this order could amount to a contempt of court.

ORDER

BEFORE Upper Tribunal Judge Keith

HAVING considered all documents lodged and having heard Mr J Gajjar of Counsel, assisted by Ms S Alvarez, of Counsel, instructed by Axis Solicitors, for the applicant and Mr M Smith of Counsel, instructed by GLD, for the respondent at a hearing on 4th July 2023

IT IS ORDERED THAT:

(1) The application for judicial review is refused for the reasons in the attached judgment.

Costs

(2) The applicant shall pay the respondent's reasonable costs of the application, to be assessed if not agreed.

Permission to appeal to the Court of Appeal

(3) Neither party has sought permission to appeal to the Court of Appeal. In any event, I refuse permission to appeal to the Court of Appeal for the same reasons that I have made these orders, on the basis that there is no arguable error of law in my reasons.

Signed: J Keith

Upper Tribunal Judge Keith

Dated: **21st July 2023**

The date on which this order was sent is given <u>below</u>

For completion by the Upper Tribunal Immigration and Asylum Chamber

Sent / Handed to the applicant, respondent and any interested party / the applicant's, respondent's and any interested party's solicitors on (date): *27 July 2023*

Solicitors:
Ref No.
Home Office Ref:

Notification of appeal rights

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a point of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was sent (Civil Procedure Rules Practice Direction 52D 3.3).

Case No: JR-2022-LON-001810

IN THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Field House,
Breams Buildings
London, EC4A 1WR

Heard on: 4th July 2023

Before:

UPPER TRIBUNAL JUDGE KEITH

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Between:

THE KING
on the application of
'BK' (DEMOCRATIC REPUBLIC OF CONGO)

Applicant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

- -

Anonymity direction - Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the Applicant is granted anonymity. No-one shall publish or reveal any information, including the name or address of the Applicant, likely to lead members of the public to identify him. Failure to comply with this order could amount to a contempt of court. The reason is that the subject of this application is the rejection of further submissions in relation to a claimed fear of persecution.

Mr J Gajjar, Counsel
Ms S Alvarez, Counsel
(instructed by Axis Solicitors), for the applicant

Mr M Smith, Counsel
(instructed by the Government Legal Department) for the respondent

Hearing date: 4th July 2023

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J U D G M E N T

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Judge Keith:

1. These written reasons reflect the full oral reasons given at the end of the hearing on 4th July 2023. My decision, of the same date, was to refuse the application for judicial review; to refuse the applicant permission to appeal to the Court of Appeal; and to order the

applicant to pay the respondent’s reasonable costs of the application, to be assessed if not agreed.

The application

2. The applicant, a citizen of the Democratic Republic of Congo (‘DRC’) applied on 16th November 2022 for judicial review of the respondent’s decision of 14th November 2022 to refuse to treat his further submissions, in relation to his claimed fear of persecution, as a fresh claim for the purposes of paragraph 353 of the Immigration Rules. The context includes the applicant’s repeated criminal offending, with the most recent, index offence of wounding with intent, resulting in a prison sentence of 12 years. He has also been the subject of at least one hospital order on mental health grounds. The combination of imprisonment for a series of offences and hospital detention has meant that the applicant has been in continuous detention, of some sort, since 2010. In light of the index offence and the applicant’s offending history, the respondent considered his protection claim as excluded by virtue of section 72 of the Nationality, Immigration and Asylum Act 2002. Section 72 would not exclude a claim that the applicant’s return would risk breaching his rights under Articles 2 and 3 ECHR.

3. The applicant’s previous asylum claims, in respect of both of which the applicant had been granted rights of appeal, but Judges of the Fist-tier Tribunal had rejected his appeals, were on the basis of his ‘sur place’ political activities in the UK, in support of an organisation which opposed a previous DRC government and, the applicant argues, now criticises the recent successor government. The organisation is referred to as ‘APARECO.’ The respondent had previously accepted that the applicant was and remains the youth leader of the London branch of ‘APARECO UK,’ although she disputes what substantive activity, if any, the role involves, particularly given the applicant’s detention since 2010.

4. The respondent, and previous Judges in decisions of 2007 and 2016, had accepted the applicant’s APARECO membership and title, but did not accept that a DVD recording of the APARECO UK organisation’s inaugural meeting in 2005, which the applicant claimed to have attended, had been broadcast in the DRC. In the 2016 decision, at §19 of his judgment, Designated Judge Keane had taken the 2007 findings on the issue as his starting point, and had concluded that there was not a “shred” of evidence that the applicant had carried out further substantive activities for APARECO since the 2007 judgment, despite his retention of the title of youth leader.

5. The applicant then made further submissions on 6th September 2016, which the respondent refused to treat as a fresh claim in her decision of 3rd August 2022 which in itself is not the subject of the application, although it was discussed in further detail in the decision under challenge.

The applicant's further submissions

6. On 10th November 2022, the applicant made further submissions, referring to his long-standing association with APARECO and relying on two crucial new pieces of evidence.

7. First, he relied on a letter from the UK territorial representative of APARECO, whom it is unnecessary to name, dated 25th October 2022, which referred to the applicant remaining the head of the youth London branch, since joining the organisation on 25th June 2007. The same letter referred to the applicant's appearance in "many" pieces of footage, which could be found on the APARECO UK website, although for the avoidance of doubt, Mr Gajjar himself acknowledged that reliance was placed only on a single piece of footage.

8. Second, the applicant relied on footage of the applicant, apparently recorded from a place of detention in the UK, for which there was a link said to be the APARECO website, together with what was said to be a translation of that footage, which referred not to the APARECO website address, but a 'YouTube' address. The translator recorded that the footage lasted less than a minute. No details were provided of the number of views on the YouTube site. The translation was said to be of a speech by the applicant, criticising the successor DRC government and referring to events in 31st July 2022, which meant that the footage, the date of which was not specified, had to have been recorded after that date.

The decision under challenge

9. The respondent accepts, for the purposes of the test under paragraph 353 of the Immigration Rules, that there were submissions which had not already been considered (para 353(i)). These were the letter and the footage. The question was whether the respondent had erred, on public law grounds, in concluding that the submissions, when taken together with the previously considered material, did not create a realistic prospect of success, notwithstanding rejection of the earlier material (para 353(ii)). The respondent concluded that neither new pieces of evidence demonstrated that the applicant had come to the adverse attention of the authorities in the DRC or that there would be a relevant risk of such. The letter did not describe the applicant's involvement in APARECO, since the first Tribunal decision in 2007,

or indeed any ongoing activities since the applicant's detention since 2010. Put another way, the UK head, despite describing the applicant as having the title of "head of youth London Branch", discussed no details of the substance of what that entailed such that it would result in any perceived, let alone actual, profile. The footage had been linked to a YouTube channel, without any evidence of how many people, if any, had viewed the footage.

The applicant's challenge

10. The applicant's original application for permission was rejected on the papers by Upper Tribunal Judge Blundell, in a decision on 17th January 2023. It is unnecessary to recite those original grounds or the basis of the refusal, except to say that the application was renewed and permission was granted by Upper Tribunal Judge Sheridan, in his decision dated 24th February 2023.

11. The renewed grounds referred to the previous findings that the applicant was a member of APARECO; that there was new evidence from the two sources already referred to; that the applicable country guidance at the time was BM and Others (returnees – criminal and non-criminal) DRC CG [2015] 293 (IAC); and the respondent herself had issued a Country Policy and Information Note or 'CPIN' of November 2019, §2.4.25 of which the applicant relied on in particular, for evidence that there was at least more than a fanciful chance that the applicant might be perceived as being an office bearer with significant profile within the meaning of §88(iii) of BM. Whilst the respondent had rejected the claim on the basis that a YouTube video did not demonstrate continuing involvement with APARECO, his current status had not been disputed, nor was it disputed that he had apparently made a speech from his prison cell which appeared on APARECO's website.

12. In his decision granting permission Judge Sheridan noted:

> "It is arguable that if a judge were to accept the evidence of [and I redact the name of the UK head], that the applicant is the head of the youth APARECO London branch, it would follow that the judge would arguably find that the applicant falls within one of the risk categories identified in paragraph 88(iii) that of being an 'office bearer'. It is arguable that the guidance in *BM* is that an APARECO 'office bearer' faces a real risk of persecution even if he is inactive and lacks a significant public profile. Accordingly, I consider that it was arguably irrational for the respondent to take the view that the applicant does not have an arguably realistic prospect of success before a First-tier Tribunal Judge".

He granted permission and did so without any limitation on the grounds.

13. Both parties accept that the relevant case law in relation to whether to treat further submissions as a fresh claim is WM (DRC) v SSHD [2006] EWCA Civ 1495, as supplemented by further guidance, in R (AK (Sri Lanka)) v SSHD [2009] EWCA Civ 447. The question is whether the respondent was entitled to reach the decision she did, noting that the test to satisfy the requirement entitling an applicant to a statutory right of appeal is a modest one, and also bearing in mind the need for anxious scrutiny.

14. The applicant says the respondent's decision was irrational. The content of the translation could only sensibly be interpreted as the applicant, who named himself, incited activism against the DRC government and spoke out against the current DRC government leader, doing so on behalf of APARECO. The decision under challenge had only referred to the footage being on a YouTube site, whereas it was also on APARECO's website. The error in discounting publication on the APARECO website infected the respondent's assessment of the risk, bearing in mind that both BM and Others and the more recent case of PO (DRC - Post 2018 elections) DRC CG [2023] UKUT 00117 (IAC) referred to the APARECO website being monitored, (see §55 of the former decision).

15. The respondent says that her decision was not irrational based on the country guidance, at the time by reference to BM and Others and also on the basis of PO. Further, or in the alternative, the respondent says that I should not grant relief as it was highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred, (see Section 15(5A) of the Tribunals, Courts and Enforcement Act 2007), in particular because the guidance in PO had made material changes since BM and Others in three respects, on which Mr Smith elaborated in his submissions to me. While PO had not been promulgated until shortly after the decision under challenge, it was heard and related the circumstances as they existed in June 2022, before the respondent's decision.

16. The respondent argued that the new evidence was limited. The footage only showed the applicant giving a very brief speech, making broad complaints about the current DRC government. There was no context for the speech, no details of the circumstances in which it was given, nor any details as to how many times the footage was viewed (or if anyone viewed the footage), let alone whether it was viewed by state agents of the DRC. The applicant had not described his role in the footage and

the speech itself, a single incident of activity since 2007, did not support the applicant's contention of having a substantive ongoing role as a youth leader. In his speech, the applicant did not describe his role, responsibilities, or any activities in that role. The letter from the leader of the APARECO organisation in the UK was also of limited evidential value. It was not in the form of a witness statement. It did not set out the nature of the applicant's role or provide details of the applicant's current activities. Even on the applicant's case, the author's reference to "multiple videos" contrasted with the applicant's reliance upon only a single piece of footage, albeit one posted on two sites. The author did not explain why the applicant would be in danger on return by reference to his particular activities. The respondent pointed out that the that the applicant has had a history of making vague and unsupported assertions about his involvement in APARECO which had resulted in the past rejection of his claims. Specifically, Designated Judge Keane had noted the 2007 Judge's acceptance of the applicant's membership and role in 2007, but nothing beyond that. It was unarguably open to the respondent to conclude, notwithstanding the need for anxious scrutiny and based on a fact-specific assessment, that the applicant's new evidence did not have a realistic prospect of demonstrating a significant or visible profile, sufficient for him to be at risk in the DRC.

17. Moreover, as already referred to, the respondent says that the current country guidance in PO materially differs from BM and Others. Whereas in BM and Others, the external opposition to the DRC government was overt and visible (§87(iv), PO indicates that there is currently a lack of clear evidence as to what, if any, opposition APARECO is currently engaged in (§148). People who had a significant and visible role may be at risk (headnote 3(v)), which contrasted with the reference in BM and Others which stated that there was a risk (headnote 3). PO referred to those with an active or perceived profile of "significant and active opposition" to the president of the DRC (§§133 and 136) as opposed to BM and Others, which placed less emphasis on the need for active opposition. The decision of PO set out factors to be considered in assessing a person's profile. Applying those factors to the applicant, the fresh evidence did not support that he was a sufficiently high-profile opponent of the DRC government, having not been involved in any activity likely to have brought him to the adverse attention of the DRC regime. APARECO's current activities were unclear and the applicant's single recorded speech in relation to the DRC regime only amounted to a broad criticism, without credible evidence that the DRC was capable, let alone interested in monitoring the diaspora community in the UK.

The applicant's submissions

18. Mr Gajjar reiterated that the new evidence, either separately, or considered together, could only sensibly be interpreted as evidence of active leadership as a youth leader of the London Branch. Even if this were not correct, then as per §88(iii) of BM and Others, perceived activity was sufficient to show a realistic, changed prospect of success. In his speech, the applicant named himself, criticised the DRC government for killing innocent people, including women and children; criticised the current DRC president; used the phrase 'we' on a number of occasions, when referring to standing up to the DRC government and encouraging people to complain to the International Criminal Court.

19. In relation to the letter, the respondent had not suggested, in the decision under challenge, that the letter was not genuine. The fact that the applicant was in prison did not resolve the issue of a risk due to the DRC government's perception of his role and status. Moreover, the respondent had based her assessment of risk on the basis of the single publication channel, YouTube, and not the AREPCO website.

20. Finally, even if one were to consider Section 15(5A) of the 2007 Act, on the basis of the updated Country Guidance case of PO, that did not render the applicant's case merely a fanciful one. Consideration of a significant profile required consideration, on a case-by-case basis. The footage appeared to show APARECO's approach to the regime and its content suggested that the applicant was speaking on APARECO's behalf.

The respondent's submissions

21. Mr Smith submitted that the judicial review application should be dismissed if, on one view, a decision maker could have reached a decision that there was no relevant risk. The application was essentially a perversity challenge. BM and Others had referred to those with significant profile as being at risk. The respondent was unarguably entitled to conclude that the applicant did not have, nor would be perceived to have, such a profile. Mr Smith echoed Mr Gajjar, when referred to the fact-specific nature of such an assessment. In 2016, Judge Keane had found that the applicant had not, in reality, been actively involved APARECO since 2007 and that he had been in custody or detention since 2010. The only new evidence was a link to some footage of the applicant giving a speech, and the letter from the APARECO head in the UK. The applicant's speech was brief; undated; without any descriptive context; without any evidence of how many times it had been viewed; and without any expression in it that the applicant was making the speech on behalf of APARECO or in his capacity as youth leader of the London branch of APARECO. There was no

evidence that the speech would be perceived as having been made in the capacity as an office-holder.

22. In terms of the letter, the respondent did not criticise that it was from the person claimed, but it did not set out the nature of the applicant's role as a youth leader or provide any description of his current activities. While the author referred to the applicant having appeared in many videos it was of note that the applicant himself only referred to one. The applicant had a history of making vague and unsupported assertions and the new evidence did not set out any detail of the sur place activities in the period from 2007 until 2022.

23. In the alternative, but relevant to Section 15 (5A) of TCEA 2007, the new Country Guidance (PO) materially differed from the previous guidance (BM and Others) as there was now a clear lack of information or cogent evidence of what opposition, if any, APARECO was currently engaged in. The current guidance was that those with significant, visible and active roles may be at risk, in contrast to the previous guidance of a definite risk based on mere perceived activities. By reference to the factors set out in PO, the fresh evidence did not demonstrate that the applicant had a relevant profile. In reality, he had not been involved in any substantive activity. There was no evidence of any activity in which he claimed to be involved in his role as office holder, or any detail about it.

Discussion and conclusion

24. In relation to the applicant's challenge that the impugned decision was based on a mistake of fact, namely that the footage was published only on YouTube and not on the APARECO website, at §17 of her decision, the respondent had referred to the link to the APARECO website. Mr Gajjar argued that in the alternative, the respondent's analysis of risk had only been on the basis of the YouTube link. That alternative challenge is not sustained, as the impugned decision has to be read in the context of the applicant's letter of 10th November 2022, making further submissions, which itself enclosed the translation referring to the YouTube website, while referring, in the letter itself, to a link to the APARECO website. The respondent had done no more at §78 of the decision than to use a composite phrase of the "APARECO YouTube video", rather than failing go consider publication on two sites. The thrust of the respondent's decision was that there was no evidence as to what, if any, interest the material had attracted. That was not a mistake of fact, on which the respondent based her decision.

25. I turn to the main thrust of the applicant's challenge which is of perversity. Mr Gajjar accepted Mr Smith's proposition that to succeed in this case, no reasonable decision maker would have concluded that the prospects of the applicant's new material, when considered in context with his previous claims, had a mere fanciful prospect of succeeding, bearing in mind the real risk of serious harm for the purposes of an Article 3 ECHR claim.

26. Mr Gajjar's submission that the new material can only sensibly be read as being on behalf of APARECO, and that the applicant's detention does not mitigate the risk because of his perceived activities, is answered bv Mr Smith's submission that the risk is fact sensitive. The First-tier Tribunal's 2007 assessment of the applicant's membership and youth leadership was tempered by the Tribunal's rejection of his claim that footage of the APARECO meeting was broadcast within the DRC. In 2016, Judge Keane concluded that there was no evidence of any ongoing activities between 2007 and 2016. Those findings were the starting point of the respondent's assessment in 2022. While the role of the author of the 2022 letter was unchallenged, the letter, while reiterating the applicant's title, provided no details of the substance of his role and whether, by virtue of the substance of any activities, he would have any visibility or any perceived activities. For example, it did not discuss any activities in the 15-year period between 2007 and 2022. Even on the applicant's case, it refers to multiple videos whereas on the applicant's case he instead relies upon a single piece of footage, broadcast on two websites.

27. While the brevity of the footage is not relevant to the question of risk, the respondent was unarguably entitled to consider the absence of context. Even where, as here, the material was uploaded onto the APARECO website in addition to a YouTube website, the respondent was also entitled to consider the absence of any interest in it, or analysis of what is sometimes referred to internet 'traffic.' I do not accept Mr Gajjar's submission that the only, or indeed the natural inference, on reading what the applicant is recorded as having said, is that he is speaking in the capacity of an office holder, even if it is accepted that it is uploaded onto the APARECO website. Other than naming himself, he does not describe his role, status, activities, or reveal any further information about himself. What was relevant here, which the respondent unarguably considered, was the perception of the applicant as an office holder by reference to what is sometimes referred to as a social graph, profile or visits to that site. None of that has been provided to the decision maker. That gap in evidence is particularly relevant where, as the respondent considered, the applicant had previously made generalised, vague assertions of activities in his role as youth leader in a London

branch. The fact of a publication of critical footage, even including highly critical material and in which the applicant names himself, without any evidence of context, or, bluntly, any evidence of interest in the footage, did not mean that no reasonable decision maker could conclude that that the new material, when considered with the previously considered material, had no realistic prospect of success. Even on the basis of the previous Country Guidance case of BM and Others, I accept the respondent's submission that the fact of being an office holder alone was something that the respondent was entitled to conclude would not necessarily result in a relevant risk, based on a fact-specific analysis. The question was of the substance of a person's perceived activities, just as Judge Keane had considered when rejecting the applicant's claim, in 2016, after BM and Others was published, despite the applicant's ongoing office-holder title, because there was not a "shred" of evidence about his activities.

28. Whilst it is not strictly necessary for me to consider Section 15(5A) of the TCEA 2007, I do so for completeness. Had I concluded that the respondent had erred on public law grounds by failing to appreciate that the footage was uploaded to two websites, I accept Mr Smith's argument that by virtue of PO, and without substituting my view for what I would have decided, and also bearing in mind the high threshold, the respondent has established that it is highly unlikely that the outcome would have been substantially different. This is for the reasons outlined by Mr Smith. I accept Mr Gajjar's point that PO does not resile from BM and Others, but there are important developments. First, as headnote (5) in PO makes clear, there is no credible evidence that the current authorities in the DRC are interested in monitoring the diaspora community in the UK or that the DRC has the intelligence capability to do so, even if there were the appetite. Second, I also accept that the focus, since PO, is on significant, active opposition (whether perceived or actual) as opposed to merely perceived visible opposition, and that is particularly important in the applicant's circumstances, given the lack of any evidence of activity between 2007 and 2022. I accept that a single broadcast may potentially be sufficient, but in the context of the applicant's case, if it were correct that the respondent had failed to consider that the footage was uploaded on to the APARECO website, I accept that the respondent has met the test under Section 15(5A) of TCEA 2007. That is because of the lengthy gap in any activity (2007 to 2022), the lack of any evidence as to the substance of the applicant's role of youth leader of London branch; and the lack of evidence of the 'traffic' or interest that the footage attracted, all factors which the respondent had expressly considered.

29. For the above reasons, I refuse the application for judicial review.

Costs

30. I have ordered that the applicant shall pay the respondent's reasonable costs, to be assessed, if not agreed and I gave very brief reasons for doing so. Mr Gajjar relies on R (Shote) v SSHD [2018] EWHC 87 (Admin) Shote [2018] EWHC and R (Ademiluyi) v SSHD [2017] EWHC 935 (Admin) for his submission that there should be no order as to costs because of the respondent's delay in filing a skeleton argument (it was filed 6 days before this hearing, rather than 7 days before, as directed), for which Mr Smith accepts there is no explanation (let alone a good one). However, while I do not condone the breaching of directions, as Mr Smith points out, the nature of the breach is very different from substantial non-compliance and Mr Gajjar has not identified any prejudice to the applicant as a result. In the circumstances, the order that the applicant should pay the respondent's costs remains appropriate.

Permission to appeal to the Court of Appeal

31. Neither party has made any application for permission to appeal to the Court of Appeal but nevertheless I have to consider it. I refuse permission because there is no arguable error of law in my decision.

32. It only remains to thank the representatives for their clear and helpful submissions, which assisted me in deciding this case.

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