IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-003316

First-tier Tribunal Nos: PA/55304/2021
LP/00438/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

25th October 2023

Before

UPPER TRIBUNAL JUDGE OWENS
DEPUTY UPPER TRIBUNAL JUDGE B KEITH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

CSM
(ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr D Clarke, Senior Home Office Presenting Officer
For the Respondent: Mr G Lee, Counsel, instructed by Duncan Lewis Solicitors

Heard at Field House on 27 September 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the respondent is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the respondent, likely to lead members of the public to identify the respondent. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The appeal is against the decision of First-tier Tribunal Judge Loke ("the Judge") dated 22 March 2023 in which she allowed CSM's appeal on asylum and human rights grounds.

2. CSM is a national of the Democratic Republic of Congo ("DRC").

Chronology

3. The case has a long and complex chronology as set out in detail in the immigration history of the refusal letter from the Home Office. CSM originally entered the UK as a child in 1996. He was granted refugee status in line with his father on 28 November 2002. His refugee status was revoked on 10 June 2008 as a result of the revocation of his father's refugee status. However, his indefinite leave to remain in the UK was maintained.

4. On 15 August 2012 the Respondent was convicted of attempted robbery, two counts of possession of a firearm with intent to endanger life or enable another to do so, possession of ammunition without certificate and possession of class A drugs (cocaine) and possession of class B drugs. He was sentenced on 7 January 2013 to a total of seven years and two months' imprisonment (65 months, 86 months, 86 months, 43 months, two months and two months to be served concurrently). On 4 December 2014 he was served with a deportation order and then appealed that decision.

5. He became appeal rights exhausted as of 25 November 2016 and was served an IS15F on 29 December 2016. On 17 October 2017 he was deported from the UK. He then returned illegally to the UK in breach of his deportation order somewhere between 18 and 20 October 2018. It is unknown by the Home Office on what documents he travelled. He was not discovered for some time, and on 8 August 2019 he was served with an ILL ENT 101 that he was in breach of the deportation order. After being detained, his applied for asylum on 8 August 2019. This was treated as an application to revoke his deportation order. He applied for permission to apply for judicial review on 28 August 2019 which was granted on 17 February 2020.

6. On 21 October 2021 the Secretary of State refused to revoke the deportation order and refused CMS's asylum and human rights claim. The Secretary of State decided that s72(2) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") applied to CSM because he had been convicted of an offence and sentenced to a period of imprisonment for two years which is a particularly serious crime, and he is presumed to constitute a danger to the community.

Grounds of Appeal

7. The Home Office advance five grounds of appeal in which they say the Judge was wrong in her decision.

8. Ground 1 is that the Judge made a material error of law/lack of adequate reasoning under Section 72 of the 2002 Act, namely that the Judge was wrong to find that the Respondent is not a danger to the community.

9. Ground 2, is that the Judge made a mistake as to material fact or material misdirection in relation to imputed political opinion. In particular, the Home Office relies on paragraph 30 of the decision in which the judge took as her starting point that the Respondent's father was politically involved as claimed and that this issue was not disputed by the Secretary of State.

10. Ground 3 is that the First-tier Tribunal Judge made a material misdirection or lack of adequate reasoning in relation to the treatment of the expert reports, in particular that she placed inappropriate weight on the report of Ms Ramos given that there had been previous adverse findings against Ms Ramos as an expert on DRC. In addition, the judge erred in her approach to the two medical experts, Dr Nuwan Galappathie and Dr Tim Green.

11. Ground 4 is that the judge made a material misdirection or lack of adequate reasonings in relation to the Respondent's account of how he left the DRC and provided inadequate reasonings in relation to that crucial aspect of the claim.

12. Ground 5 is that the First-tier Tribunal Judge made a mistake as to material fact or material misdirection in relation to Section 8 of the 2004 Act, namely that the judge made a mistake in relation to the date the Respondent entered the UK.

13. We are grateful to the advocates for their detailed and complex written and oral submissions which have assisted greatly.

14. In relation to ground 1 and the Section 72 certificate the judge's findings are outlined at [22] to [28] of her decision. The judge took into account the sentencing judge's remarks, and that the National Referral Mechanism concluded that the Respondent is a victim of trafficking. At [28] the judge says:

> "28. On balance, I find the Appellant has rebutted the presumption. While the offences are extremely serious, I make this finding on the basis of the sentencing judge taking the view that the Appellant was not likely to be a danger to the public, that the Oasys assessment before the Tribunal in 2016 indicated a risk of reoffending was low, and the fact that both judges' views seem to have been borne out by the fact that the Appellant has not offended since 2013. Looking at the evidence in its totality, I find that the Appellant has just rebutted the presumption that he constitutes a danger to the community".

15. The Secretary of State's first ground is little more than a disagreement with the findings of fact and law of the Judge. We find no error of law here. The judge examines the risk of reoffending and the seriousness of the offence and weighs those factors in the balance correctly. Mr Clarke's submitted that the additional factors to take into account were the fact that the Respondent had entered the UK in breach of a deportation order. He did not strenuously pursue this ground. However, we do not consider that this factor is such that it would change the judge's assessment of the Section 72 issue. The judge's reasoning was tolerably clear and open to her on the evidence before her. We therefore find no error of law in relation to ground 1.

16. Ground 2 is essentially pleaded as a material error of fact which has infected the remainder of the judge's reasoning. At [30] of the decision the Judge says the following:

> "30. There was no challenge from the Respondent that the Appellant's father was politically involved as claimed. He obtained refugee status on a political basis and it was not disputed that he was the bodyguard of Mr Mobutu. The issue is whether the Appellant himself is at risk due to his father's activities, and therefore on account of his imputed political opinion".

17. For the Secretary of State, Mr Clarke submits that [30] is an error of fact and that no such concession was accepted by the Secretary of State. In fact there was clear evidence before the

judge that the Respondent's father had his refugee status revoked in 2008 and that there was a serious and substantial challenge to the veracity of his claims about his political opinion. Mr Clarke submitted that that error infected much of the reasoning of the remainder of the judgment and that this fundamental misstatement of the facts led to a judgment which is wholly flawed. For the respondent, Mr Lee in part accepts that [30] is incorrect because the respondent's father obviously had his refugee status removed as a matter of record but he submits that there is a nuance to what the political claim is and that the judge tried to reflect this nuance in [30]. Mr Lee says even if he is wrong, then the judge managed to reason the other aspects of the claim such that any error in [30] was not material to the overall outcome of the case. He submitted that there was sufficient evidence before her to allow the Respondent's appeal, in particular when examining the expert evidence and the evidence of the Respondent in the round. He submits that if there is an error it is not material to the overall outcome.

18. There was substantial evidence before the Judge that the assertion made at [30] of her judgment was incorrect, and that the Secretary of State did challenge the political activities of the Respondent's father. Firstly, the judge had before her the decision of First-tier Tribunal Judge Seelhoff dated 18 May 2016 in relation to CSM. In that judgment in 2016 there is reference to the Respondent's father having his refugee status revoked. The cessation of his father's refugee status is also mentioned in the refusal letter.

19. At [29] of the refusal letter, it is explicitly stated the Respondent's father's political activities are not accepted, nor is the Respondent's own attendance at an APERCO meeting. The judge sets out these reasons for refusal at [15(b)] and [15(c)] of her decision.

20. There is a potential second error at [30] regarding the basis upon which the father originally claimed political asylum. The Judge found that the Respondent's father was found to be at risk as a former bodyguard of Mr Mobutu. However, the Respondent claimed political asylum on the basis of his father's political activities for APARECO which was a very different basis of claim. This claim is dealt with and rejected in the refusal letter at paragraph 33 to 44. The Secretary of State does not accept that the Respondent's father was involved in APARECO and does not accept that the Respondent attended an APARECO meeting. Paragraph 45 to 73 of the refusal letter deal with the Respondent's claimed arrest and detention on his return to the Democratic Republic of Congo. The Secretary of State maintains her position on review.

21. We are satisfied that the Judge should have been aware that the Respondent's father's refugee status was ceased in 2008 after he was convicted of rape. Manifestly in 2008 the Secretary of State had formed the view that there was no longer any risk to the Respondent's father as the previous bodyguard to Mobuto. The judge was aware that the Respondent's father did not successfully appeal this decision because he was ultimately deported from the UK in 2017 after he exhausted all avenues of appeal. The situation in DRC has manifestly changed since the Respondent's father was found to have a genuine fear of persecution in 2002 as Mobutu's bodyguard. The sentence that "there was no challenge from the Respondent that the Appellant's father was politically involved as claimed" is factually inaccurate. In our judgment the error impacts upon the reasoning throughout the judgment. At [32] the Judge says:

> "32. The Respondent states that the Appellant's account of his father's activities was vague and lacked detail. The Appellant has always stated that he knew nothing about DRC politics, very little about his father's activities, his last contact with his father was

> in 2017 and he has no involvement with politics in the DRC. The fact that the Appellant was unable to give details about his father's involvement in politics is not particularly surprising in the circumstances. Given the Appellant's father's political involvement is not in itself disputed and the Appellant's case is on the basis of imputed political involvement, the lack of knowledge of his father's activities is not a particularly relevant consideration in this claim".

22. In our view [32] carries over the error from [30] of the decision and the judge uses it as a reason to disagree with the Secretary of States rejection of the factual basis of the claim in relation to the father's claimed activities for APARECO and the Respondent's attendance at APARECO meetings.

23. The Judge uses the acceptance of the father's political involvement as the starting block in her consideration of the Respondent's credibility and his claim to have been detained and tortured. At [33] and [34] the Judge finds that the Respondent's detention and torture were as a result of his father's involvement in APARECO and that it was reasonably likely that the authorities would have discovered who the Respondent's father was. These findings were infected by her earlier finding the father's political involvement as claimed is not disputed.

24. The judge at [49] concludes as follows:

> "49. In conclusion, I find that the Appellant has proved the factual aspects of his case. I make this decision on the basis that the Appellant's father had political asylum in the United Kingdom, the Appellant's own account of being tortured and detained is credible and supported by medical evidence. There is evidence that the authorities were looking for the Appellant's father around the time of the Appellant's detention, and the documents provided also lend some support to the appeal in the circumstances. The Appellant's account of exiting the DRC is somewhat less coherent, however in the context of the evidence as a whole I am prepared to accept this account on the lower standard. In any event, it is a lesser concern in the context of my positive findings regarding his imputed political opinion and his detention and torture".

25. We are satisfied that the findings at [49] are based partially upon a fundamental misunderstanding of the factual position and as a result the findings as a whole cannot stand. In our judgment the decision is infected by a material error of law.

26. Paragraph 49 also serves to demonstrate how the error of law and fact in [30] has infected the evidence in the case and the reasoning of the judge. By way of example, the judge says in [49] that there is evidence that the authorities were looking for the Respondent's father, however that evidence is the hearsay evidence of Ms Ramos who spoke to an individual claiming to be the Respondent's father in 2018 who told her those facts. We agree with Mr Clarke that had the Judge not erroneously found that the Respondent's father's political profile was accepted, she would have treated the evidence that he gave to Ms Ramos that he was in hiding given to Ms Ramos with more caution. The judge does not assess whether or not that evidence is credible or coherent precisely because she takes it is as an accepted fact that he was politically involved. This feeds into her analysis of the risk to the Respondent. At the end of [46] the Judge says that the father's purported evidence given through Ms Ramos from many years ago "supports the contention that the authorities would have been interested in the Appellant".

27. Although this forms part of ground 3 of the grounds of appeal it flows from the error in Ground 2.

28. We are satisfied that Ground 2 is made out and that the Judge did make a material error of law because she found that there was a concession which was never made by the Secretary of State. That error has infected all of the reasoning in the remainder of the judgment.

29. Ground 3 is that the Judge mistreated the expert evidence in this case, in particular that of Ms Ramos but also the two medical experts, Dr Galappathie and Dr Green. The Home Office refusal letter is quite clear on its position in relation to Ms Ramos. It sets out the concerns the Home Office have about her previous report called Unsafe Returns III in relation to the assessment of risk on return in 2011 and 2013. It says she has no specific academic qualifications or training in undertaking objective qualitative or quantitative country of origin reports. She does not provide records of interviews, conversations, email correspondence or any other background material. Most importantly the Home Office say that Ms Ramos presents the accounts of returnees at face value, there is no indication that she has critically assessed the information provided to her on the credibility of the individuals including any past lack of credibility. The judge seems to in part accept the criticism of Ms Ramos' evidence. At paragraph 46 she states:

> "46. The value of Ms Ramos' evidence in my view is less to do with her general expert opinion on risk of return, and more to do with her personal involvement in the Appellant's case. Pertinently, there are two key features of Ms Ramos' evidence which were not subject to challenge in the decision letter or under cross examination. Firstly, Ms Ramos in her supplementary report 27 February 2023 from [26-31] indicates that she had prepared the report for the Appellant's father's appeal. Upon the Appellant's father's release, he had called her in July 2018 and was living in hiding. The Appellant's father had provided details about his family which proved to be correct. This evidence indicates that the authorities were looking for the Appellant's father around the time of the Appellant's own detention, which supports the contention that the authorities would have been interested in the Appellant".

30. In our judgment the judge was wrong to find that just because Ms Ramos' had not been cross-examined that the evidence given to her by the Respondent's father should be accepted. Indeed, the Home Office refusal letter spent much time and energy refuting that Ms Ramos' evidence was either relevant or admissible at all. The decision by the Judge to treat it not as expert evidence but as evidence of fact of the progress of the case is problematic. Although Ms Ramos states that she was involved in the father's appeal hearing in 2013, there is no disclosure of the ultimate outcome of this appeal. To be fair to Ms Ramos she has probably not been told this, but the Judge must have inferred from the fact that the Respondent's father had been deported that his Article 3 ECHR claim did not ultimately succeed. The Judge erred by accepting at face value the information provided in 2018 to Ms Ramos by the father who is now deceased, that evidence having never been tested or cross-referenced or checked by anybody including Ms Ramos.

31. The judge continues in respect of Ms Ramos evidence at [47]:

> "47. The second key feature of Ms Ramos's evidence is that in her original report dated 24 July 2019, she states she had contacted the lawyer from the NGO which had assisted in the Appellant's return to the United Kingdom. He had confirmed that he had visited the Appellant in detention, had gone to court with the Appellant and that

> the Appellant had left the DRC on a false passport. The lawyer had also informed Ms Ramos that there were more than thirteen other returnees from the United Kingdom. Since they had assisted in the Appellant's return the NGO had been suspended. As indicated, Ms Ramos' account was not subject to any challenge in the decision letter. Furthermore, it was never put to Ms Ramos by the Respondent that this conversation did not happen, or that this person might not have been the lawyer that she believed him to be. In my view, it is this conversation that Ms Ramos had is the salient feature of her evidence and which lends some support to the Appellant's rather strange account of how he was returned from the DRC".

32. In our judgment the Judge has used Ms Ramos' evidence to support a conclusion which is based on the incorrect factual finding at [30], namely the father's political involvement as claimed. The fact that some matters were not put to her in cross-examination or in the refusal letter does not mean that her evidence was accepted in light of the Home Office's very clear and consistent position in the decision and on review that Ms Ramos is not a credible or admissible expert. In any event the judge makes no proper assessment of the veracity of the hearsay evidence which she then admits and accepts in whole that Ms Ramos puts forward in relation to the father's position and also in relation to the Respondent's position. The evidence of the conversation with the lawyer is to be found at page 101 of the stitched bundle. There is very little information contained within that evidence. Given that there is no proper reasoning about the weight to be given to that evidence and that the evidence is infected by the error in relation to the father's political activities, the Judge's approach to Ms Ramos evidence is flawed and this is a material error of law.

33. The Judge deals briefly with Dr Green's evidence at [40] of her judgment and Dr Galappathie's evidence at [41] of her judgment. The problem with this is that the judge does not assess the veracity of Dr Green or Dr Galappathie's evidence other than to say that their evidence supports the conclusion that the appellant is credible. In fact, she even states at [40(c)] that Dr Green states "the appellant's account has been internally consistent and proffers the view that his credibility is sound". It is for the Judge to assess the credibility of an appellant. We can see no evidence of a malingering assessment having taken place by either medical practitioner, nor the application of the Istanbul Protocol in relation to instances of torture.

34. At paragraph 42 the judge draws the following conclusions:

> "42. The medical reports as a whole in my view overwhelmingly indicate that the Appellant suffered a traumatic incident. The symptoms described are sufficiently significant to be consistent with the experiences he relates. I also consider that the account given to Dr Galappathie by the Appellant is generally consistent with the account he gave to Dr Green. That, together with the Appellant's own thorough account of his detention and torture persuades me that it is reasonably likely that the Appellant was detained and tortured as claimed".

35. This in our judgment is effectively a compounding of the issues explained earlier in the judgment including the error at [30], and therefore the conclusion about the Respondent's credibility means that the judge has not properly assessed whether or not the medical experts were able to assist her in a determination of whether or not the Respondent was in fact tortured and most importantly whether the Respondent was in fact detained in the DRC on his return. We therefore find that the treatment of the expert evidence as a whole is flawed and that Ground 3 is made out.

36. Ground 4 is that the judge made a material error of law or material error in fact in relation to the respondent's exit from the Democratic Republic of Congo. This ground is essentially a subset of grounds 2 and 3. The reason that ground 4 is a subset of grounds 2 and 3 is that essentially the Secretary of State's submissions are that the Judge failed to adequately reason why she accepted the Respondent's account of how he was returned to DRC and how he was detained. That credibility finding in our judgment is based in a significant part upon the misapprehension that there was no challenge to the father's political involvement. Therefore, Ground 4 is also made out. The Judge has failed to adequately reason why she accepted the account in relation to DRC and in any event any reasoning is infected by the error in ground 2.

37. Ground 5 can be taken shortly and relates to whether or not the Judge correctly applied the test under Section 8 of the 2004 Act at [48] of her judgment. The Judge found at paragraph 48 that the fact that the Respondent has given an adequate explanation for his failure to present himself to the Home Office until almost a year after he had arrived. She said:

> "I find that this is a reasonable explanation. I therefore find that there are reasons which justify not making adverse findings of credibility in the circumstances".

38. In our judgment the issue with that finding is that it is again infected by the same error that is present in [30] and throughout the judgment in relation to the father's political asylum which is the cornerstone of all of the judge's reasoning. Essentially having accepted that the father was politically involved as claimed and that that was not in issue she then went on to find that essentially everything the Respondent said was credible as a result of his father's previous political asylum status. That assumption is so fundamental to the assessment of credibility and the assessment of the case overall that it means that the case was not properly decided and that there was an error of law made by the First-tier Tribunal Judge. Consequently, in our judgment ground 5 is also made out in relation to the Respondent's credibility and whether or not the judge was correct to find that Section 8 of the 2004 Act applied in the Respondent's case.

39. Therefore, in our judgment there are several material errors of law in this case and we find that grounds 2, 3, 4 and 5 are made out. We allow the appeal to the extent that it is remitted to the First-tier Tribunal. We preserve the judge's finding that s72 does not apply to the Respondent because the grounds of challenge in respect of this were not made out.

Disposal

40. In relation to disposal of the case the parties have submitted that the case should be transferred back to the First-tier Tribunal if we were to find an error of law. Having considered both the interests of justice and the Presidential Guidance on the matter and the facts of the case, it is our judgment that a new judge needs to examine the case and make a substantial number of findings. For those reasons we consider that the appropriate method of disposal is to send this case back to the First-tier Tribunal for a re-examination of the case before a differently constituted First-tier Tribunal.

Notice of Decision

41. The decision of the First-tier Tribunal involved the making of an error of law.

42. The decision is set aside in its entirety apart from the finding at paragraph 28 that the Respondent rebutted the presumption that he is a danger to the community and that the

certificate pursuant to s72 of the Nationality, Immigration and Asylum Act 2002 does not apply to him.

43. The appeal is remitted to be heard de novo apart from the finding above before a judge other than First-tier Tribunal Judge Loke.

Ben Keith

Judge of the Upper Tribunal
Immigration and Asylum Chamber