IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2021-001286
First-tier Tribunal No: PA/00005/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

30th January 2024

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

FW
(ANONYMITY DIRECTION MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

REPRESENTATION
For the Appellant: Ms L King, instructed by Asylum Justice, Cardiff
For the Respondent: Miss S Rushforth, Senior Home Office Presenting Officer

Heard at Cardiff Civil Justice Centre on 27 July 2023

ORDER REGARDING ANONYMITY
Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant 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. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

BACKGROUND

1. The appellant is a national of the Democratic Republic of Congo ("DRC"). He arrived in the United Kingdom on 19th July 2019, at St Pancras Station via Eurostar using a passport belonging to a French national. He claimed asylum on 2 August 2019, claiming to be at risk upon return because of his political opinion and previous arrests in the DRC. The claim was refused by the respondent for reasons set out in a decision dated 5 November 2020. The respondent accepted the appellant is a national of the DRC but rejected his claim that he would be at risk upon return because he had previously come to the adverse attention of the authorities due to his political activities. The respondent also rejected the appellant's claim that he would be at risk upon return because of his activities in the UK.

2. The appellant's appeal against that decision was dismissed by First-tier Tribunal Judge Dorrington for reasons set out in a decision promulgated on 10 August 2021.

THE APPEAL TO THE UPPER TRIBUNAL

3. The appellant claims Judge Dorrington made unreasonable findings regarding the appellant's credibility and erred in finding the appellant not to be credible because he had not adduced evidence to support his claims. There is no requirement for corroboration and in any event, the appellant was not asked and given an opportunity to explain why he had not provided evidence to support his claims from his wife. The appellant had explained in interview that his wife fled the family home and was unable to retrieve any documentary evidence. The appellant claims Judge Dorrington rejected the appellant's claim as implausible contrary to the guidance set out in *HK v SSHD* [2006] EWCA Civ 1037.

4. Permission to appeal was granted by Upper Tribunal Judge Kamara on 15 February 2022. She said:

> "In view of the judge's many positive findings of fact, it is arguable that that the apparent requirement for corroboration as well as his reliance on the implausibility of one aspect of the appellant's account amount to arguable errors of law."

THE HEARING OF THE APPEAL BEFORE ME

5. Ms King provided a skeleton argument dated 26 July 2023. She refers to the positive findings made by the judge regarding the appellant's membership of the EPT and his role and profile within that organisation when he was in the DRC. She submits it appears from paragraph [37] of the decision that the judge accepted the appellant was arrested and detained on three occasions. She submits that even if the judge rejected the appellant's account that he was arrested and detained on a third occasion in August 2018, the judge on any view, accepted that the appellant was arrested and detained on two occasions. The appellant's account in his witness statement is that when detained on the two previous occasions he was beaten, taken to hospital for treatment and then left in Ndjili.

6. Ms King submits the judge does not refer to the appellant's claim that he was beaten during his second arrest, or make any finding in that regard, but having accepted the appellant had previously been arrested and detained, it is not clear why the judge rejected the appellant's account of his third arrest. The appellant's account of his beating during his third arrest is more extensive, but consistent with the escalating nature of mistreatment following his first and second arrests, which Ms King submits, the judge accepted. She submits it is inconsistent to the point of irrationality to accept the appellant was arrested three times, that he was beaten badly during the second detention, but to reject the evidence that he was beaten during the third detention. Ms King submits the judge makes assumptions about the extent of the appellant's injuries and whether he would have been physically capable in the aftermath of such injuries of leaving the hospital in the way claimed. She refers to counsel's note of the appellant's evidence given at the hearing, which was consistent with the appellant's account when interviewed, and what the appellant said in his witness statement. The evidence before the Tribunal was silent as to whether the appellant left the hospital by foot or by some other means of transport. Ms King submits the judge made unfounded assumptions as to the likely physical ability of the appellant to be escorted from the hospital by his wife.

7. Ms King submits the judge also failed to make any finding in respect of the appellant's claim that he was both sexually abused and threatened with rape.

8. Ms King submits the judge referred, at [38], to inconsistencies in the appellant's account of the number of days he was detained for following the third arrest. The appellant had provided an explanation, and it is impossible to discern from what is said in paragraph [38] whether the judge accepted or rejected that explanation.

9. As far as the appellant's claim that his wife was given a summons for the appellant is concerned, and the absence of that document, Ms Kings submits the judge failed to have regard to the appellant's claim when he was interviewed *(Q. 57)* that his wife fled the family home and was unable to retrieve any documentary evidence. Ms King again refers to counsel's note of the evidence before the Tribunal regarding the absence of evidence from the appellant's wife. Ms King submits the evidence is at odds with the findings set out by the judge at paragraphs [41] and [42] of the decision. She submits the judge states no explanation was provided when there clearly was an explanation that the judge did not consider.

10. Finally, Ms King submits that as far as the risk upon return is concerned, the appellant acknowledges the change in regime in 2019 that post-dates the appellant's departure from the DRC. However, she submits the judge failed to consider the significant number of reports within the appellant's objective evidence which post-date this event and which clearly set out that persons involved in activities such as the appellant (which activities the FTTJ accepted) are still at risk of persecution.

11. Ms Kings submits the issue at the heart of the appeal was the credibility of the appellant. On any view the judge accepted the appellant was a

member of a 'human rights organisation' in the DRC. The judge's findings of fact in that regard are clear. However the judge's findings as to the appellant's claim that he was arrested and detained on three occasions are unclear. Having accepted the appellant's account of his role in the organisations, if the judge concluded that the appellant's account of his third arrest and detention in particular, is not credible, it was incumbent on the judge to clearly and rationally explain why.

12. In reply, Ms Rushforth accepts it is difficult to discern from the decision, where the credibility findings start and end regarding the appellants claim that he was arrested and detained. Ms Rushforth submits that is immaterial because the judge went on to address whether the appellant is at risk upon return now, and it was open to the judge to conclude that the appellant will not be at risk upon return for the reasons set out in the decision.

DECISION

13. Judge Dorrington summarised the core of the appellant's claim at paragraph [9] of the decision. At paragraph [28] of the decision, the judge states that in coming to his findings he has carefully examined all of the evidence before the Tribunal. The judge's findings and conclusions are said to be set out at paragraphs [29] to [64] of the decision. It appears to be common ground between the parties that the judge made the following findings:

a. The appellant is a married DRC citizen. His wife is alive remains in the DRC. (paragraph 29)

b. The appellant has four children from his wife. They are all in the DRC. (paragraph 30)

c. The appellant last spoke to his wife on 06 July 2021; that is to say just 13 days before the appeal hearing. (paragraph 31)

d. The appellant was an educated man in the DRC and worked there as a technician. (paragraph 32)

e. The appellant was a member of the Egalite Pour Tours ("EPT") human rights organisation in the DRC. That organisation is not a political organisation, instead it was set up to further the human rights of citizens in the DRC. (paragraph 33)

f. Whilst in the DRC the appellant undertook an active role within the Ndjili commune of the EPT and was responsible for setting up meetings, marches and distributing leaflets and information on a one to one basis to encourage support for the EPT and to educate people in the DRC about the beliefs of the organisation. (paragraph 34)

g. The EDT was not, and is not, a banned organisation within the DRC.

h. The appellant was elected as the "co-ordinator" of the Ndjili commune of the EDT from 26 September 2015 on a five year term.

> The term "co-ordinator", I am told, means "president" (see Q105 of the asylum interview).

14. Thos findings address the appellant's circumstances in the DRC and his activities. The Judge then turned to address the core of the appellant's claim that due to his work with the EDT he was arrested on three occasions. The judge states at [37]

> "Due to the Appellant's work with the EDT he was arrested on three occasions. On the first two occasions he was released and on the third occasion he was arrested for organising an EDT march for about 600 people in August 2018."

15. At paragraphs [38] and [39] of the decision the judge addresses the appellant's account of his detention following his claimed arrest in August 2018. At paragraph [40], the judge then states:

> "After applying the lower standard of proof I do not accept this part of the Appellant's claim as being plausible for the following reasons. First there is an obvious discrepancy between claiming to be beaten to such a state that he was unconscious and left for dead by the prison guards, unguarded, at the Kinkole hospital but then recovered within hours to leave the prison on foot with his wife. That is not plausible especially when the Appellant accepted that there were no significant injuries suffered to him at that point in time. Second, there is no evidence from the Appellant (other than what he says) that he had received a 10 year prison sentence or that he had been in hospital per se. No plausible, or indeed any, explanation as to why such evidence has not been provided from his wife to confirm what the Appellant has said has been given. Yet the Appellant claimed he was in regular contact with his wife and had been for some time before the appeal hearing. I do not accept as plausible that he could not have got his wife to provide a statement (in any form, for example as an email) for this appeal to explain her version of events and what happened in her own words. I also do not accept as plausible that a 10 year prison sentence would be given to the Appellant but he would be left unguarded at the hospital and able to leave in the manner he said he did."

16. It is, as Ms King submits, difficult to discern from what is said at paragraphs [37] to [40] whether the judge accepted the appellant had been arrested on two previous occasions, but not on the third occasion, or whether the judge simply rejected the appellant's claim that he had been arrested and detained on all three occasions. The judge refers, at [40], to not accepting "this part of the Appellant's claim as being plausible", but it is entirely unclear 'what part' of the appellant's claim the judge is referring to. The appellant claimed that his first arrest was in February 2016 and his second arrest was in April 2017. However, the appellant remained in the DRC and the thrust of his claim was that he is unable to return because of events following the third arrest and detention.

17. A judge is not required to deal expressly with every point raised, but a judge must say enough to show that care has been taken and that the

evidence as a whole has been considered. Which points need to be dealt with and the way in which those points are addressed requires an exercise of evaluative judgment and it is not unusual that in this jurisdiction, a judge will focus upon the evidence which bears on upon the event(s) that caused the appellant to leave their country of nationality and the reasons why the appellant fears they are at risk upon return.

18. The judge carefully considered the appellant's account of his third arrest and detention and rejected the appellant's claims. I do not accept the submission made by Ms King that the judge failed to make a finding regarding the appellant's explanation for the inconsistencies in his account as to the number of days he had been detained and that the judge erred in his consideration of the appellant's account of the way in which he ended up in hospital and subsequently left hospital. The judge considered the appellant's account as a whole and it was open to him to reject the appellant's account of that third arrest and detention for the reasons he gave.

19. There is little merit in the general criticisms made in the appellant's grounds of appeal regarding the judge's assessment of the appellant's claim. The respondent had highlighted a number of matters that undermined the appellant's claims in the decision to refuse the appellant's claim for international protection. The judge made a number of valid criticisms about the appellant's account of events. In *TK (Burundi) v SSHD* [2009] EWCA Civ 40 the Court of Appeal noted there is a lower standard in asylum claims, but if there is no good reason why evidence that should be available is not produced, the judge is entitled to take that into account in the assessment of the credibility of the account. The appellant's wife remains in the DRC. She may have left what was previously the family home, but if as the appellant claims, he required hospital treatment, there are likely to be hospital records to support his account. The absence of relevant evidence to support the account that is easily obtainable, is a matter that the judge was undoubtedly entitled to take into account in reaching the decision. Furthermore, in In *Y –v- SSHD* [2006] EWCA Civ 1223, Keene LJ referred to the authorities and confirmed that a Judge should be cautious before finding an account to be inherently incredible, because there is a considerable risk that they will be over influenced by their own views on what is or is not plausible, and those views will have inevitably been influenced by their own background in this country and by the customs and ways of our own society. However, he went on to say, at [26];

> "None of this, however, means that an adjudicator is required to take at face value an account of facts proffered by an appellant, no matter how contrary to common sense and experience of human behaviour the account may be…"

20. Standing back and reading the decision as a whole, I am prepared to accept, as Ms King submits and Ms Rushforth accepts, that it is difficult to discern whether the judge rejected the appellant's claim that he had been arrested and detained on all three occasions as he claims, or whether the judge accepted that the appellant had been arrested and detained on two

occasions but rejected the appellants claim that he was arrested and detained August 2018. The lack of clarity is sufficient in my judgement to demonstrate that there is an error of law in the decision of the FtT. Taking the appellant's claim at its highest, and approaching my task on the basis that the judge accepted the appellant was arrested and detained on two previous occasions, as Ms King submits, but was not arrested and detained in August 2018 as he claims, I have considered whether the error identified is material to the outcome of the appeal. As Lord Justice Moses said in *AM (Pakistan) v SSHD* [2008] EWCA Civ 1064 (at paragraph 18)); "the real question, as always in these cases, is, notwithstanding that which had happened ... whether it would be safe for this Appellant to return".

21. Having considered and rejected the appellant's account of his arrest and detention in August 2018, the judge found that whilst in the UK, the appellant has had no active involvement with the EPT and has not taken part in any political demonstrations or movements here. The judge noted the inconsistencies in the appellant's evidence regarding the dates of his membership of the EPT and the information set out on his membership card. The judge also had regard to the letters of support from the EPT but attached little weight to that evidence. The judge made the following additional findings:

    a. The appellant is not an active member of the EPT and he has not been one for quite some time. The appellant accepted that. (paragraph 57)

    b. The appellant is not an office holder in the EPT whereas when he first arrived in the UK he was. The appellant accepted that. (paragraph 58)

    c. The appellant is not a person who has a significant and visible profile in a political group(s) outside of the DRC. (paragraph 59)

    d. There is no real risk of the appellant being wanted by the DRC government or government agencies/actors. (paragraph 60)

22. The judge referred to the fact that the current president of the DRC is Mr Felix Tshisekedi who took power on 24 January 2019 after democratic elections and referred to relevant background material and country guidance. He referred to the guidance set out in *BM & Others.* I reject the claim made that the judge failed to consider the significant number of reports within the appellant's objective evidence which post-date the change in regime in the DRC. In *SG (Iraq) v SSHD* [2012] EWCA Civ 940, at paragraph [47] the Court of Appeal confirmed that country guidance decisions should be followed unless very strong grounds supported by cogent evidence are adduced justifying a departure.

23. At paragraph [61] here, the judge confirmed that the very strong reasons for departure from the country guidance in *BM & Others* have not been established. At paragraphs [62] and [63] of his decision the judge said:

> "62. I note that were he to spend 24 hours or more in a DRC prison then following the BM and Others case there would be a breach of his Article 3 rights. However I am not satisfied that there is a real risk that he is wanted

> by the government or government agencies in the DRC and therefore there is no real risk of him spending 24 hours or more in a DRC prison if he returns to that country. The BM and Others case distinguished being held for questioning for up to 24 hours (not an Article 3 breach per se) and being held for 24 hours or more in a DRC prison which would be a breach.
>
> 63. There is therefore no well-founded fear of persecution if the Appellant is returned to the DRC because he is not at risk of persecution from anyone due to his political opinion. He is not entitled to asylum."

24. The judge was not satisfied on the evidence that the appellant is wanted by the government or government agencies in the DRC and therefore there is no real risk of him spending 24 hours or more in a DRC prison on return. In my judgement the conclusion reached by the judge that the appellant would not be at risk upon return was one that was open to him, even if the appellant had been arrested and detained on two previous occasions in February 2016 and April 2017. The judge rejected the appellant's account that he was arrested and detained in August 2018 and it was open to him to do so, for the reasons that I have already set out.

25. It follows that in my judgement the error of law identified was not material to the outcome of the appeal.

26. I therefore dismiss the appeal.

NOTICE OF DECISION

27. There is no material error of law in the decision of First-tier Tribunal Judge Dorrington capable of affecting the outcome of the appeal.

28. The appeal is dismissed.

V. Mandalia
Upper Tribunal Judge Mandalia

Judge of the Upper Tribunal
Immigration and Asylum Chamber

4 January 2024