



**Upper Tribunal  
(Immigration and Asylum Chamber)      Appeal Number: AA/11200/2014**

**THE IMMIGRATION ACTS**

**Heard at Field House, London**

**Decision and Reasons  
Promulgated**

**On 7 October 2015**

**On 11 November 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE GRIMES**

**Between**

**MM  
(ANONYMITY DIRECTION CONTINUED)**

Appellant

**and**

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

Respondent

**Representation:**

For the appellant: Mr A Mills, instructed by Duncan Lewis & Co Solicitors

For the respondent: Ms A Fijiwala, Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant, a national of the Democratic Republic of Congo (DRC), appealed to the First-tier Tribunal against a decision by the respondent of 5 November 2014 to refuse his application to revoke a Deportation Order. Judge of the First-tier Tribunal Afako dismissed the appeal. The appellant now appeals with permission to this Tribunal.

2. In summary the background to this appeal is that the appellant arrived in the UK on 24 April 1991 on a false passport and claimed asylum on arrival.

That application was refused on 14 October 1996. In October 1997 the appellant was arrested by the French authorities en route to Belgium for possession of a false Belgian passport. He was returned to the UK and made a further application for asylum which was refused. The appellant accrued a number of convictions in 1998, 2002 and 2006 for which he was sentenced to periods of imprisonment. On 25 April 2005 a decision was taken to make a Deportation Order against him and his appeal against that decision was dismissed on 9 September 2005. Upon conviction of possession of a false or improperly obtained identity document in 2006 the court recommended that he should be deported. A Deportation Order was made on 11 February 2008 and his appeal against that decision was dismissed on 4 December 2008 and on 30 November 2009 the appellant was listed as an absconder. On 30 May 2012 the appellant's legal representatives lodged an application for asylum which was treated as an application to revoke the Deportation Order. The Secretary of State refused that application on 8 August 2012 and following the appellant's application for Judicial Review of that decision the High Court gave the appellant permission to submit further submissions in relation to the refusal to revoke the Deportation Order. Those submissions were rejected in the Secretary of State decision dated 5 November 2014, the decision subject to the current appeal.

3. The First-tier Tribunal Judge found that the appellant had not demonstrated a genuine political commitment to opposition activities in the UK and that accordingly his activities in the UK would not therefore be mistaken by the DRC authorities for genuine political commitment and would be viewed as opportunistic. He found that the current organisation with which the appellant is affiliated (the High Council of Congolese Resistance (HCCR)) appears to be little known and there is no evidence that it is perceived to be a threat to the Congolese authorities [29]. The First-tier Tribunal Judge noted that the respondent accepts that the appellant left the DRC with forged documents and considered the findings of the Upper Tribunal in the country guidance case of BM and Others (returnees - criminal and non-criminal) DRC CG [2015] 00293 (IAC) (hereinafter BM1) in relation to the risk to those who committed document fraud when leaving the DRC. The Judge concluded that the findings of the Upper Tribunal in that case are limited to the more recent political dispensation of the DRC and does not apply to those, like the appellant, who left during the Mobutu era [32]. The First-tier Tribunal Judge dismissed the appeal on asylum grounds and under Article 8 of the European Convention on Human Rights.

4. In his grounds of appeal the appellant contends that the First-tier Tribunal Judge erred in two ways. It is firstly contended that, in light of the respondent's acceptance that the appellant left the DRC using a forged passport, the Judge erred in failing to properly apply the guidance in BM1 in assessing the risk of return. The second ground is that the Judge erred in his assessment of the evidence of the appellant's *sur place* activities. It is contended that the Judge wrongly stated that the General Secretary of the HCCR was not called to give oral evidence and could not therefore be cross-examined on the standing of the organisation [24] whereas he had in fact been called and had been cross-examined. It is further contended that the Judge erred in failing to have proper

regard to the expert report of Dr Seddon which assessed the appellant's claimed activities with the HCCR.

5. The first ground relates to the application of the country guidance case of BM1. Mr Mills also relied on the supplementary decision in BM (false passport) DRC [2015] UKUT 00467 (IAC) (hereinafter BM2). The Upper Tribunal in BM1 concluded (as summarised in head note 4);

“4. The DRC authorities have an interest in certain types of convicted or suspected offenders, namely those who have unexecuted prison sentences in the DRC or in respect of whom there are unexecuted arrest warrants in the DRC or who allegedly committed an offence, such as document fraud, when departing the DRC. Such persons are at real risk of imprisonment for lengthy periods and, hence, of treatment proscribed by Article 3 ECHR.”

6. The First-tier Tribunal Judge said at paragraph 32;

“Whilst one can more readily recognise the DRC authorities’ need to target those who escaped from the country or left the country irregularly under their watch, it is difficult to see why the DRC authorities would want to target those who left Zaire unlawfully during the Mobutu era. It is clear that the findings of the Upper Tribunal are limited to the more recent political dispensation of the DRC and does not apply to those who might have fled Mobutu’s regime, among whom would be supporters of this government. In the appellant's case, given what is said on his behalf about the authorities’ knowledge of individuals in exile, it will be clear to them that he had left the country well before the existence of the DRC. There is no evidence to show that a Mobutu-era escapee would be targeted for leaving on a forged Zairean travel document and I do not accept that the Upper Tribunal intended to suggest that this was the case.”

7. Mr Mills accepted that the Tribunal decision in BM2 was issued after the First-tier Tribunal Judge signed the determination in this case, albeit it was before the First-tier Tribunal determination was promulgated. In any event he submitted that and in BM2 did not make any distinction in terms of risk to those who departed the DRC before or after the Mobutu regime.

8. Ms Fijiwala submitted that the Judge did consider the relevant paragraphs of BM1 at paragraph 30 of his determination and that he considered the evidence before the Upper Tribunal from Dr Kennes at paragraph 46 of the decision in BM1. She submitted that the Judge was entitled to conclude that this evidence relates to those ‘currently’ perceived as a threat to the DRC authorities.

9. However the Tribunal in BM1 made no such distinction. At paragraph 78 the Tribunal found;

78. ..., based on all the evidence, that the DRC authorities have an interest in returning nationals in respect of whom there are uncompleted prison sentences, unexecuted arrest warrants or the suspected commission of criminal offences, such as document fraud, when leaving the country. ...”

10. I accept that the evidence before the Upper Tribunal concerned current circumstances in the DRC. However there is nothing in the decision to qualify the guidance in relation to the risks to returning nationals who have committed document fraud. The Judge has failed to set out the evidence on which he

based his finding that the guidance given by the Upper Tribunal does not apply where document fraud was committed in 1991. He failed to set out the evidence on which he decided not to follow the country guidance set out in BM1.

11. In BM2 the Tribunal considered this part of the guidance in more detail. The Tribunal in BM2 proceeded on the basis that leaving the DRC using a false passport ‘constitutes the offence of document fraud, or something kindred, under the domestic laws of DRC’ [3]. The Tribunal went on to find that the appellant in that case had not established that he had left the DRC on a false passport. The Tribunal set out the procedure for the grant of an Emergency Travel Document (ETD) to DRC nationals who are the subject of enforced return to their country of origin. This procedure includes the provision of information to the DRC authorities as to when and how the person left the DRC and about their passport.

12. The Tribunal provided further guidance in BM2 as summarised in the head note as follows;

“The mere fact that an asylum claimant utilised a false passport or kindred document in departing the DRC will not without more engage the risk category specified in [119(iv)] of BM and Others (Returnees: Criminal and Non-Criminal) DRC CG [2015] 00293 (IAC). The application of this guidance will be dependent upon the fact sensitive context of the individual case. The Tribunal will consider, inter alia, the likely state of knowledge of the DRC authorities pertaining to the person in question. A person claiming to belong to any of the risk categories will not be at risk of persecution unless likely to come to the attention of the DRC authorities. Thus in every case there will be an intense focus on matters such as publicity, individual prominence, possession of a passport, the standard emergency travel document arrangements (where these apply) and how these matters impact on the individual claimant.”

13. Both Mr Mills and Ms Fijiwala submitted that BM2 makes it clear that the mere use of a false document is not enough to show a risk of persecution but that consideration must also be given to whether the appellant would come to the attention of the DRC authorities. Mr Mills submitted that the First-tier Tribunal Judge did in fact find that the appellant would come to the attention of the authorities as he found at paragraph 28 that it is reasonable to conclude that the DRC authorities will have a proper appraisal of the HCCR and of the appellant. He went on to find; *“Without evidence of a genuine political commitment on his part, the apparent activities and public denouncements of the government would not be mistaken by the authorities for genuine political commitment and would be viewed as opportunistic”*. Ms Fijiwala submitted that the Judge found that the appellant would not come to the attention of the authorities.

14. In my view the Judge found that the appellant would be considered by the DRC authorities to pose no threat. The difficulty is that this may require the authorities to carry out an assessment of the appellant during which his previous use of a false passport may come to light. This issue then is whether this would be sufficient to mean that the appellant would be at risk of persecution upon return to the DRC. I do not accept Mr Mills’ submission that

the findings of the Judge on this issue are sufficiently clear to enable me to remake the decision based on those findings.

15. The Tribunal in BM2 made clear that the assessment of risk requires an 'intense focus' on matters relating to the individual case. The Tribunal said;

"16. ... The country guidance on this discrete issue is, of necessity, broad and general in nature, having regard particularly to the evidence upon which it is based. Its application to a given asylum claimant will be dependent upon the fact sensitive context of their individual case. Predictably, one of the enquiries for the primary decision maker and, on appeal, the FtT, in every case, will be the likely state of knowledge of the DRC authorities pertaining to the person in question. All necessary findings of fact and/or evaluative assessments and/or predictions relating to this issue will be made on the basis of primary evidence and sustainable inferences from primary evidence or concessions. Fundamentally, a person claiming to belong to any of the risk categories will not be at risk of persecution unless he or she is likely to come to the attention of the DRC authorities upon return. Thus in every case there will be an intense focus on matters such as publicity, individual prominence, possession of a passport, the standard ETD arrangements where they apply and how these matters impact upon the individual claimant. We emphasise that this is not intended to operate as an exhaustive list."

16. The application of this guidance is linked with the second ground of appeal. Mr Mills produced counsel's notes of the hearing and the record of proceedings indicates that the General Secretary of the HCCR gave oral evidence. Ms Fijiwala accepted that the General Secretary did give oral evidence at the First-tier Tribunal hearing, however she submitted that the Judge's error in relation to this matter is not material given that the Judge considered other evidence and that there was no independent evidence about the HCCR. However the First-tier Tribunal Judge identified the profile of the HCCR as providing the context for the appellant's own profile [23] and went on to rely on the lack of profile of the HCCR in finding that the appellant himself has no genuine opposition profile. Whilst the Judge did briefly consider the expert's report at paragraph 25, I cannot be sure that the Judge would have reached the same conclusion on the basis of this evidence had he properly considered the evidence of the General Secretary. This is because a main basis for this finding was the fact that the General Secretary of the HCCR was not called to give evidence and be cross-examined as to the standing of the organisation [24].

17. In these circumstances I find that the Judge's mistake as to the lack of oral evidence from the HCCR General Secretary undermines his findings as to the organisation and the appellant's profile. Sustainable findings on these matters are crucial to the likelihood of the appellant coming to the attention of the authorities of the DRC and the assessment of risk on return as set out in BM2. I therefore set aside all of the findings of the First-tier Tribunal Judge.

18. The decision in this appeal should be remade by consideration of all of the evidence with reference to the guidance given by the Upper Tribunal in BM1 and BM2.

19. In light of the issues with the Judge's findings I am satisfied that none of the findings can stand. I am satisfied that the appellant has not therefore had his case properly considered by the First-tier Tribunal. The parties were in agreement with my view that the nature and extent of the judicial fact finding which is necessary in order for the decision to be remade is such that (having regard to the overriding objective in Rule 2 of the Upper Tribunal Procedure Rules 2008) it is appropriate to remit the case to the First-tier Tribunal.

### **Decision**

The Judge made an error on a point of law and the determination of the First-tier Tribunal is set aside.

The appeal is remitted to the First-tier Tribunal to be remade.

Signed

Date: 10 November 2015

A Grimes

**Deputy Upper Tribunal Judge**

### **Anonymity**

The First-tier Tribunal made an order pursuant to rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. I continue that order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

Signed

Date: 10 November 2015

A Grimes

**Deputy Upper Tribunal Judge**