



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

Appeal Number: PA/02588/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 25 August 2017**

**Decision & Reasons Promulgated
On 6 September 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

**LM (DRC)
(ANONYMITY DIRECTION MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Neale, Counsel instructed by
BHT Immigration Legal Service

For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals to the Upper Tribunal from the decision of the First-tier Tribunal (Judge NJ Bennett sitting at Hatton Cross on 17 December 2016) dismissing her appeal against the decision of the Secretary of State to refuse her protection claim. The First-tier Tribunal made an anonymity direction in the appellant's favour, and I consider that it is appropriate that this direction is maintained for these proceedings in the Upper Tribunal.

2. The background to this appeal is that the appellant is a national of The Democratic Republic of Congo (DRC) and was born on [] 1998. She arrived in the United Kingdom by air on 1 August 2013. She claimed asylum on 6 September 2013. Her asylum claim was refused on 5 March 2015, but she was granted discretionary leave to remain until 18 July 2015 as an unaccompanied asylum-seeking minor. The appellant applied for further leave to remain on 16 July 2015, and her application was refused on 26 October 2015.
3. The appellant's claim was that she came from Kiwanja in Northern Kivu. She lived there with her two parents, two sisters and a brother until her father was killed. Her father owned a mine and had some business partners, whom she had never met. Her father was in charge of about 50 men who worked in the mine.
4. In 2012 she was raped by two soldiers on her way home from church one evening. Her parents treated her with antibiotics. About a year later, in July 2013, armed soldiers came to the family home at night and forced their way into the house. They hit her father, raped her mother and were about to rape her when her father tried to stop them. Her father was shot dead at this point. The soldiers then tied up the rest of the family and took them away. Her mother and her sisters were made to get into one car, and she and her brother were made to get into another car. She and her brother were driven to a building where the car stopped. They were taken inside the building. She was put in one room with four other girls. Her brother was put in another room with boys. There was a guard outside the room. There was a large stone lying against some planks of wood leaning against one wall of the room. After a while the girls managed to remove the stone and the wood revealing a small hole in the wall through which she and the other girls escaped.
5. They ended up at a camp. A man came up to her and started talking to her. It emerged that the man knew her father. After she told him her story, he said that it would not be safe for her to stay in the camp and he took her to a house. He left her at the house with an older woman for a few days and then returned with a passport for her. He then took her to the airport and flew with her to England. After they arrived in England, he took her by taxi to Brighton and left her there.
6. The appellant asserted that she had a well-founded fear of persecution on return to DRC, on the account of being of Nande ethnicity and on account of being a member of a particular social group, namely a member of a mining family.
7. In the reasons for refusal letter of October 2015, the respondent said that she had not given any evidence that she faced persecution on return to DRC on the basis of her ethnicity. Her account of the events which she said had led to her leaving DRC had previously been considered in the refusal letter of 5 March 2015, and the account had been rejected due to her inability to provide details to substantiate her claim. In particular, she

had given a vague account of the attack on her family. When asked if she had had problems prior to the incident, she replied that she did not know. With regard to the assessment of future fear, the respondent acknowledged that the conflict in the Eastern part of the country had intensified significantly in 2012. The conflict led to the displacement of large numbers of people and significant human rights and violations and abuses, including recruitment and use of children by the M23 Armed Group. Rebel Militia Groups (RMGs), some of which were supported by foreign governments, had committed violent abuses against civilians, particularly in North Kivu, South Kivu, Katanga and Orientale provinces.

8. The respondent acknowledged that the background information indicated that women in the region could suffer harsh treatment. Between December 2010 and November 2011, the United Nations reported a total of 625 cases of sexual violence perpetrated by the parties to the conflict in North Kivu, South Kivu and Orientale provinces. Of these, 602 were against women and girls, and 23 against men and boys.
9. The respondent said it was clear from the background evidence that women (in particular women who did not have the support of a male relative) faced hardship in DRC. But she had a father and brothers who resided in the DRC and they would assist her upon her return.

The Hearing Before, and the Decision of, the First-tier Tribunal

10. The appellant's appeal came before Judge Bennett for a *de novo hearing*, as the decision of the previous First-tier Tribunal Judge had been set aside by the Upper Tribunal. Both parties were legally represented. Mr Neale of Counsel appeared on behalf of the appellant. In his extensive skeleton argument prepared for the appeal, he acknowledged that the appellant did not come within the risk categories identified in **BM & Others (Returnees - criminal and non-criminal) DRC CG [2015] UKUT 00293 (IAC)** or in **MM (UDPS members - risk on return) Democratic Republic of Congo CG [2007] UKAIT 0023**. He acknowledged that the former case established that failed asylum-seekers were not at risk on return to DRC for that reason alone. He submitted that neither case specifically addressed the risk to lone women or to the civilian population in North Kivu. He submitted that the appellant would be returned to her former home area as a woman whose father had been murdered, and who was not in contact with her remaining family and who did not know their whereabouts. Accordingly, she would face a real risk of persecution in North Kivu on account of her membership of a particular social group, namely the Nande tribe and/or women in North Kivu; or she faced a real risk of serious harm under Article 15B of the Qualification Directive; or she faced a serious and individual threat to her life from indiscriminate violence under Article 15C of the Qualification Directive, as a lone young woman.
11. He cited the expert report of Dr Harry Verhoeven dated 16 March 2015, in which Dr Verhoeven stated that, whether Nande, Hutu or Tutsi, an

adolescent on her own in North Kivu, or even an adult woman surrounded by her family, had to live on a daily basis with “a severe risk” of sexual violence occurring and suffering instances of harassment, extortion and beating, if not worse. People who had been victims of rape, and who had survived and/or escaped, were often targeted again when the penetrators got a chance to do so. If the armed men who attacked her in 2012 were still around, they might even consider her return to be a provocation.

12. In his subsequent decision, the Judge set out his findings at paragraphs [42] onwards. At paragraphs [42]-[45], the Judge addressed the appellant’s vulnerability and the report of the Clinical Psychologist, Dr Lissa Morrish, dated 13 July 2015. From paragraph [47], the Judge addressed the expert evidence of Dr Verhoeven, observing that there were a number of key aspects of the claim about which the country expert did not comment, or about which his comments did not assist the appellant and which raised, in his view, serious credibility questions. The Judge expanded on this at paragraphs [48] to [54].
13. At paragraph [55], the Judge said that he could not ignore the appellant’s failure to contact the Red Cross for help in contacting her family. He said that this might be explained by the desire to avoid thoughts about her family, but it was also consistent with her knowing that her family was at home and that the truth would not help her.
14. At paragraph [56], he concluded that that it was not reasonably likely that the appellant’s father owned a mine which employed 50 people, or that her family was attacked in July 2013 as alleged or at all, or that she had escaped from captivity or that she was brought to the UK by one of her father’s friends.
15. At paragraph [57], he nonetheless accepted that it was reasonably likely that the appellant came from North Kivu, in view of the knowledge which she displayed about the province. At paragraph [58], the Judge said that it was reasonably likely that the appellant was raped about a year before she left the DRC, when she was going home from church on her own in July 2012. At paragraphs [59] and [60], the Judge gave extensive reasons for rejecting Dr Verhoeven’s opinion that there was a real risk of the appellant being raped on return to DRC as a consequence of the various risk factors which he had identified, including her membership of the Nande ethnic group.
16. At paragraphs [61]-[67], the Judge gave extensive reasons for rejecting statements to the effect that sexual violence was rampant in North Kivu, or that female residents in North Kivu had to live with a severe risk of sexual violence, or that the available statistics demonstrated that the threshold set by Article 15C of the Qualification Directive was met.
17. At paragraph [68], he said that, having reached the above conclusions, he was not satisfied that the appellant would face very significant obstacles to reintegration into society in the DRC. She was born there and was

familiar with the way of life there. She would return to her family. She would have to contend with the continuing conflict and the risks associated with the conflict, but the evidence showed that she and her family were able to live there safely. She had said, in her SEF statement, that they had had a comfortable life. She had explained, at the very end of her interview, that she went to local shops on her own and she had said that she was raped on the only occasion when she went further away from home, and that this happened as it was getting dark. She would obviously have to live a considerably more restricted life in the DRC than she needed to live in the UK, but he did not accept that this amounted to very significant obstacles to her reintegration because she was familiar with such a lifestyle.

The Grounds of Appeal to the Upper Tribunal

18. Mr Neale pleaded the grounds of appeal to the Upper Tribunal. Ground 1 was that the Judge had failed to take into account material evidence. The Judge had not considered the possibility that the appellant was being truthful about what she had been told about her father's work, but that the information about her father's work which was given to her was incomplete, inaccurate or misunderstood by her. Accordingly, the Judge was wrong to make an adverse credibility finding based on Dr Verhoeven's suggestion that it was more likely that her father was a mid-level operative rather than being "*the boss*".
19. Ground 2 was that the Judge had adopted an inappropriate approach to the psychological report.
20. Ground 3 was that the Judge erred in making findings about the plausibility of the actions of the friend of the appellant's father.
21. Ground 4 was that the Judge had not given sufficient reasons for his findings on Article 15C of the Qualification Directive.
22. Ground 5 was that the Judge had been guilty of procedural unfairness in not accepting the appellant's claim to come from the Nande tribe.

The Reasons for the Grant of Permission to Appeal

23. The First-tier Tribunal gave detailed reasons for refusing to grant permission to appeal. Following a renewed application for permission to appeal to the Upper Tribunal, Upper Tribunal Judge Bruce granted permission to appeal on 4 July 2017, but did not give any reasons for doing so beyond stating that all the grounds were "*arguable*".

The Rule 24 Response

24. A member of the Specialist Appeals Team settled a Rule 24 response opposing the appeal. In summary, the Judge of the First-tier Tribunal had directed himself appropriately. Credibility was a matter for the Tribunal and not the expert, and it was open to the Judge to find that while the

appellant may well have a mental health issue, it was caused by reasons other than the basis of the appellant's claim: **S -v- Secretary of State for the Home Department [2006] EWCA Civ 1153**. The Judge had given adequate reasons for his findings, supported by reference to the background and expert evidence submitted on behalf of the appellant. The Judge had had regard to the expert evidence and background material in assessing the appellant's claim, and had made findings which were open to him on the evidence.

The Hearing in the Upper Tribunal

25. At the hearing before me to determine whether an error of law was made out, Mr Neale applied to admit further evidence in support of Ground 4. The Judge had drawn adverse inferences at paragraph [66] of his decision because although he had been provided with a news article detailing the outcome of a study of sexual violence in the DRC (which had been published in the American Journal of Public Health), he had not been provided with a copy of the published paper itself. The fact that this paper was not provided to Judge Bennett was "*simply an oversight*". A copy of the paper had now been obtained and the Tribunal was invited to exercise its discretion to admit the paper as further evidence under Rule 15(2A) of the 2008 Procedure Rules.
26. Mr Tufan queried whether the new evidence was material. I queried whether the new evidence fell within the scope of **MM (Unfairness: E&R) Sudan [2014] UKUT 00105 (IAC)**, in which the Tribunal held that an error of law may be found to have occurred in circumstances where some material evidence, through no fault of the Tribunal, was not considered, resulting in unfairness. However, in the light of the stance taken by Mr Tufan, I reserved my ruling on the question, and I gave Mr Neale permission to develop his case under Ground 4 by reference to the new evidence.

Discussion

Ground 1

27. At the outset of his findings, the Judge reminded himself about the Presidential Guidelines relating to children and vulnerable people. He took into account that the appellant was about 14 1/2 years old when she said she was raped, and that she was about 15 1/2 years old when she said that the incidents had occurred which led to her departure from the DRC. He said that allowance had to be made for this because a person of that age could not fairly be expected to have the same knowledge and understanding of events as an adult would have. He also acknowledged that the two key events asserted by her would have been highly traumatic events, and this may have made it difficult for the appellant to give details of what happened, such as how long the armed men were in the house before they took her away, how long the journey from the house took, how long it took the girls to open the hole in the wall, and how long it took to

reach the camp. He also accepted that she had undergone an extensive cross-examination and that no major inconsistencies had emerged in her evidence.

28. The Judge found that the first serious credibility question raised by Dr Verhoeven's evidence was her claim that her father owned a significant mining operation, but at the same time her family did not employ any security guards or even any domestic workers. The Judge found, at paragraph [49], that this was the difficulty for the appellant because Dr Verhoeven had said that, given the dangerous security environment, almost everybody who could afford it in Kiwanja tried to enlist men with guns for protection and that a person playing an important professional role in the mines would almost certainly be able and compelled to do so.
29. At paragraph [50], the Judge held that the case now advanced re-wrote the appellant's case in an area where she had been specific and had given details. She may not have visited the mine, but she had given details which should be within the knowledge and understanding of even a 15-year-old girl. She also knew to say that she did not know an answer. The Judge observed that the expert's evidence gave rise to another difficulty, which was the more that her father's social standing was reduced, the more difficult it was to accept that her father would have known a person who had the knowledge, ability and willingness to arrange to bring the appellant to the United Kingdom.
30. At paragraph [51], the Judge said that much the same can be said of Mr Neale's submission that the appellant may have been referring to a small-scale mining operation in the Kivu region. He could not accept that a mine which employed 50 people, and which belonged to the operator, could be so classified.
31. The Judge's approach to this aspect of the appellant's claim does not disclose any error of law. The evidence of the country expert undermined the credibility of the appellant's account. The fact that the appellant was a teenager at the time of the alleged incident did not change the fact that her account ran counter to country expert information as to the availability of armed protection for someone in the appellant's father's claimed position. It was open to the Judge to attach significant weight to the fact that the appellant had given specific information that her father was the boss of the mine; that he was in charge of about 50 men, and that the mine was on his land; and that the mine belonged to him. The Judge was not required to proceed on the premise that the appellant had grossly exaggerated or misrepresented her father's role in the mine, as a result of a misunderstanding on her part or as the result of being misinformed of the true position by members of her family.

Ground 2

32. The guidance given by the Tribunal in **JL (Medical reports - credibility) China [2013] UKUT 00145 (IAC)** includes the following:

The more a diagnosis is dependent on assuming that the account given by the appellant was to be believed, the less likely it is that significant weight will be attached to it (HH (Ethiopia) [2007] EWCA Civ 306 at [23]).

Even where medical experts rely heavily on the account given by the person concerned, that does not mean that their reports lack or lose their status as independent evidence, although it may reduce very considerably the weight that can be attached to them.

33. The Judge addressed Dr Morrish's report at paragraph [43] of his decision. He noted her finding that the appellant did not suffer from PTSD, depression or an anxiety disorder, but that the appellant reported suffering from many of these symptoms after the events that she described.
34. She said that in her clinical judgment the appellant had given a true account and that the appellant was unlikely to have been able to fabricate her account "*with such clinical accuracy*". She went on to say that it was vital to take account of the grief that the appellant continued to experience. She observed that the appellant in interview was noticeably and significantly distressed when talking about the murder of her father and the loss of the rest of her family upon her departure from the DRC. It was her opinion that the appellant had been profoundly and chronically emotionally affected by the attack on her family, which not only resulted in the murder of her father, but also the loss of her entire family as she had had not contact with any of them since that night. This would account for the extreme sadness she displayed in the session, and which the appellant said she was experiencing at regular intervals currently. The lack of PTSD, depression and anxiety could not distract from the clinically significant "*grief-related, psychological reaction*" that the appellant was currently experiencing.
35. The Judge held that there were serious limitations to Dr Morrish's assessment because her report was not, and did no claim to be, a holistic assessment of the claim. She had taken any steps to test the overall credibility of the claim when she interviewed the appellant, nor had she made any critical analysis of the claim before she reached her conclusion that the appellant's account was reliable. She did not appear to have considered whether only part of the claim was truthful; and, if so, whether this would account for the appellant's presentation and symptoms. This was important because, on the appellant's account, there were two separate incidents, both of which would have been highly traumatic. Dr Morrish did not say whether separation on its own would be sufficient to explain the appellant's "*extreme bereavement reaction*". The Judge also found that Dr Morrish had given insufficient detail of the subject matter of the appellant's primary symptoms, such as the content of the flashbacks or the intrusive memories and so forth, or precisely what questions had led to displays of emotion during the interview to show that these related to all the aspects of the claim.
36. I consider that the Judge has given adequate reasons for holding that Dr

Morrish's report had serious limitations, and that it was of limited probative value in supporting the appellant's account of the circumstances in which she came to leave the DRC.

37. With regard to the reported past symptoms of PTSD, these were just as attributable to the rape incident in 2012, which the Judge accepted had taken place, as they were to the subsequent alleged "*stressor*" event in 2013. Thus Dr Morrish's finding that the symptoms reported by the appellant were "*clinically accurate*" did not in itself make it any more or less likely that the second stressor event had occurred. As is apparent from Dr Morrish's conclusion at paragraph 5.1, in her opinion the appellant was no less traumatised by being raped in 2012 than she was by the alleged attack on her family in 2013. So, the fact that she was a reliable historian from a clinical perspective as to the PTSD symptoms which she reported after her rape in 2012 was reasonably treated by the Judge as not fortifying the credibility of her claim to have experienced similar PTSD symptoms following the alleged second stressor event in 2013.

Ground 3

38. The second difficulty which the Judge found with the appellant's claim was her ability to escape without being detected. There is no error of law challenge to this adverse credibility finding.
39. In paragraph [53], the Judge said that the third difficulty with the claim was that it was very difficult to accept the remarkable coincidence of the appellant arriving at a camp (probably a camp for internally displaced people - according to Dr Verhoeven) and encountering her father's friend. It was also a remarkable coincidence that her father's friend happened to be in the same tent as her, and an even more remarkable coincidence that her father's friend was willing and able to bring her to the United Kingdom. This would have involved significant expense for him. The Judge observed that there were other ways in which he could have helped her at significantly less risk and expense. Accordingly, the Judge held (at paragraph [54]) that it was very difficult to accept that, having invested a considerable amount of time, effort and money in bringing the appellant to the UK, the man would have left her with no means of communicating with her, whether to find out how she was coping or to tell her any news which might reach him about her family.
40. Mr Neale submits that the Judge's reasoning is erroneous in law as it is procedurally unfair. He submits that the friend of the appellant's father might have had any number of reasons for his actions which simply lie outside the child's knowledge, and so it must be an error of law to make adverse credibility findings of this kind on the basis of bare implausibility.
41. I consider that there is no merit in this submission. It was open to the Judge to find this aspect of the appellant's account incredible for the reasons which he gave. The fact that the appellant was a child when she first presented her asylum claim called for a more liberal application of the

benefit of the doubt. But her status did not require the Judge to suspend disbelief.

Ground 4

42. It is pleaded that the Judge's reasoning on Article 15(c) of the Qualification Directorate was inadequate; that he failed properly to apply paragraph 339K of the Rules; and that he placed an undue and excessive emphasis on the piecemeal statistical evidence available, rather than considering the question of risk in the round; and he gave inadequate reasons for rejecting the view of the UNHRC (expressed in September 2014) that, despite the military defeat of 23 in November 2013 and the signing of the peace agreement between the government and M23 in December 2013, the situation in the Kivus remained volatile, and so States were urged not to forcibly return to DRC persons originating from *inter alia* the Kivus.
43. At paragraph [61], the Judge held that UNHCR's recommendation against enforced returns to the Kivus was not binding on him. His self-direction was in accordance with the guidance given by the Upper Tribunal in **NM & Others (Lone women, Ashraf) Somalia CG [2005] UKIAT 00076** at paragraphs [108] following.
44. At paragraph [63], the Judge referred to Dr Verhoeven's opinion that, even as an adult woman surrounded by her family, the appellant would live on a daily basis in North Kivu with a severe risk of sexual violence occurring. The Judge said that he did not find the expert's "*unsourced evidence*" compelling, as it was not backed by any factual analysis. It was open to the Judge to reject the evidence of Dr Verhoeven on this topic for the reasons which he gave.
45. The Judge went on to address the background evidence on the prevalence of sexual violence in the DRC. He held, at paragraph [65], that the available statistics should be viewed with considerable caution because they would include statistics of marital rape, and of sexual violence which could not be attributed to a situation of internal armed conflict, and which therefore could not be taken into account for the determination of whether The Appellant qualified for protection under Article 15(c). This is not disputed by Mr Neale.
46. The Judge went on to address, at paragraph [66], the review of the study published in the American Journal of Public Health. He observed that the weight to be attached to it was considerably reduced because the study had not been provided to him, with the result that the methodology used by its author and actual conclusions were not available to him. The review indicated that the study was based on a sample of about 3,400, which in his view was a very small sample when compared to the population of the DRC. As the review did not distinguish between rape attributable to the conflict and other types of rape, it was impossible to determine how far the headline figure of four rapes every five minutes was accurate, and how far it was applied to rape attributable to the conflict. He did not therefore

accept that the figure is reasonably likely to be definitive of the prevalence of rape attributable to the conflict or that the study showed much more that there might be very significant under-reporting.

47. Mr Neale relied on the new evidence to advance an argument that the Judge misdirected himself in paragraph 66. Firstly, he relies on a sample-sized calculator exercise conducted on 24 August 2017, to show that the Judge was wrong to find that the study was based on a very small sample when compared to the population of the DRC, and was thereby unreliable. Moreover, the explanation which accompanies the calculation states that the larger the sample size, the more sure you can be that their answers truly reflect the population. It is further stated that the confidence interval calculations assume you have a genuine random sample of the relevant population. If your sample is not truly random, you cannot rely on the intervals. Mr Neale acknowledged in oral argument that the study was not based on a genuine random sample of the relevant population. So, I am not persuaded that the Judge materially erred in his analysis.
48. Secondly, Mr Neale relies on the actual contents of the published policy to show that the Judge was mistaken about the nature and scope of the study, and about its probative value.
49. Aside from the observation about sample size, Mr Neale does not dispute that the Judge's other observations in paragraph [66] were entirely valid *on the evidence that was before him*. I consider that the Judge did not make a mistake, even with the benefit of hindsight. The Judge did not make mistaken assertions about what the published study contained. The Judge simply, and correctly, observed that he did not have the published study before him.
50. Moreover, I do not consider that the failure to produce the published paper for the hearing was an oversight. As competent Counsel, Mr Neale was well aware that choosing to rely on a review of the study, rather than the published study itself, was inherently less satisfactory from a forensic perspective, and that the review was going to be of much less probative value than the published paper. So there was no procedural unfairness as envisaged by the Tribunal in **MM**.
51. Moreover, the published paper relates to statistics gathered in 2007, which is not apparent from the review. So the published paper would not have materially advanced the appellant's case with regard to the risk of sexual violence in North Kivu at the date of the hearing before the First-tier Tribunal.
52. Although the Judge accepted that the appellant had been raped in 2012, it was open to the Judge to find that there was not a real risk of such persecutory ill-treatment being repeated on the appellant's return to North Kivu, for the reasons which he gave.

Ground 5

53. Ground 5 relates to the Judge's finding, at paragraph [60], that it was reasonably likely that the appellant came from the Nande tribe; but if he was wrong about that, he was not satisfied that membership of this clan put her at real risk of ill-treatment, because there was no evidence that it had done so in the past.
54. Mr Neale submits that it was unfair for the Judge to find against the appellant on the issue of her membership of the Nande tribe when this had not specifically been put in issue by the respondent, albeit he accepts that the respondent did not concede that she was a member of the Nande ethnic group.
55. I consider that it was open to the Judge not to accept this aspect of the appellant's claim, for the reasons which he gave. The burden was on the appellant to prove all relevant aspects of her claim, to the lower standard of proof. In evaluating this aspect of her claim, the Judge took into account the expert evidence of Dr Verhoeven and he gave adequate reasons for concluding that the claim was not made out.

Notice of Decision

I dismiss this appeal.

Direction Regarding Anonymity - rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date 5 September 2017

Judge Monson

Deputy Upper Tribunal Judge