



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

Appeal Number: PA/04487/2016

THE IMMIGRATION ACTS

Heard at Centre City Tower, Birmingham

On 16th April 2018

**Decision & Reasons
Promulgated
On 23rd April 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

**RKK
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Fraczyk of Counsel instructed by Braitch Solicitors

For the Respondent: Mrs H Aboni, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellant appealed against a decision of Judge Swinnerton of the First-tier Tribunal (the FTT) promulgated on 4th July 2017. The Appellant is a female citizen of the DRC born 23rd August 1993. She has a son born in the UK on 24th June 2015 who is a dependant in her appeal.
2. In brief the Appellant's immigration history is that she left the DRC on 24th April 2015 and travelled to the UK using a French passport provided by an

agent. She entered the UK on 24th April 2015 posing as a French national and claimed asylum on 27th April 2015.

3. The Appellant claimed international protection on the basis of her imputed political opinion, claiming that the DRC authorities would regard her as a political opponent. The asylum and human rights claim was refused on 20th April 2016. The appeal was heard on 26th April 2017 and dismissed on all grounds.
4. The FTT found that the Appellant had given a credible account, and accepted that she feared that she would suffer persecution if returned to the DRC, but found that her fear was not well-founded and she had not proved she would be unable to seek protection from the DRC authorities.
5. The Appellant applied for permission to appeal to the Upper Tribunal. The Appellant's claim is summarised in the grounds seeking permission to appeal. It was contended that the Appellant and her husband were politically active against the DRC government with her husband being a member of the ACAJ Party and they distributed leaflets and attended a demonstration. The Appellant's husband was arrested and detained and a few days later the Appellant was also arrested and detained for three months. While in detention she suffered repeated sexual abuse. She escaped by payment of a bribe and fled the DRC. Her husband's whereabouts remain unknown and the Appellant has been unable to contact any family in the DRC.
6. Included in the grounds seeking permission to appeal are the findings made by the FTT to the effect that the FTT found credible the Appellant's account of distribution of anti-government literature, attendance at an anti-government demonstration, the fact that her husband had been arrested and detained as had the Appellant, the Appellant was detained for three months and physically and sexually abused as evidenced by scarring and a diagnosis of PTSD, and the Appellant was released after payment of a bribe.
7. It was contended that the FTT had erred in law, having accepted the credibility of the Appellant's account, and objective evidence of how the authorities in the DRC deal with political opposition, by not applying the lower standard of proof and finding that the Appellant had not demonstrated to the required standard that she has a well-founded fear of persecution. It was further contended that the FTT erred by accepting that the Appellant was subjected to persecution by the DRC authorities, but finding that the Appellant had not demonstrated that she was unable or, owing to such fear, unwilling to avail herself of the protection of the authorities. It was further contended that the FTT had erred by having found the Appellant to have been politically involved, by making an inconsistent finding at paragraph 44 to the effect that the Appellant had not been active in politics either in the DRC or UK. It was further contended that the FTT erred at paragraph 44 by finding that the Appellant travelled to the airport in the DRC without difficulty, but failed to

have regard to the fact that she was travelling on a false passport provided by an agent.

8. Permission to appeal was granted by Deputy Upper Tribunal Judge Chapman who found in particular, that the FTT had arguably erred in law by having expressly accepted the credibility of the Appellant's claim to have suffered past persecution, by failing to apply the judgment in Demirkaya [1999] EWCA Civ 1654 at [20] - [22].

Error of Law

9. On 13th December 2017 I heard submissions from both parties in relation to error of law. The Respondent contended that there was no material error. The Appellant relied upon the grounds contained within the application for permission to appeal.
10. I found that there was a material error of law in the FTT decision and set that decision aside but preserved some findings which had not been the subject of challenge. Full details of the application for permission, the grant of permission, the submissions made by both parties, and my conclusions are contained in my error of law decision and directions promulgated on 22nd December 2017. I set out below paragraphs 17 - 22 which contain my conclusions and reasons for setting aside the FTT decision:

"17. In my view the FTT erred in law by failing to adequately consider the principles in Demirkaya which are now set out in paragraph 339K of the Immigration Rules which for ease of reference I set out below;

'The fact that a person has already been subject to persecution or serious harm, or to direct threats of such persecution or such harm, will be regarded as a serious indication of the person's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated.'

18. The FTT does not adequately explain what good reasons exist to indicate that persecution or serious harm will not be repeated.

19. At paragraph 33 the FTT makes the following findings;

'In this case the issue was credibility. If what the Appellant claims is established to the lower standard of proof then she will be at risk of serious harm in DRC and the question is then, whether she can safely relocate within that country and whether it would be unreasonably harsh to expect her to do so.'

20. The FTT found the Appellant to be credible. At paragraph 34 the FTT found that the Appellant had distributed anti-government leaflets, attended at a demonstration on 19th January 2005, and had subsequently been imprisoned and subjected to physical and sexual abuse. At paragraph 36 the FTT found that she was released after payment of a bribe, as an army officer was

sympathetic to her because they were from the same tribe. Having stated in paragraph 33 that if the Appellant is credible she would be at serious risk of harm, the FTT does not adequately explain, having found the Appellant to be credible, why she would not be at risk of serious harm.

21. At paragraph 42 the FTT finds that the Appellant has a subjective fear of state persecution and finds she has not proved that she would be unable or owing to such fear unwilling to avail herself of state protection. I find that inadequate reasons have been given for finding that there would be state protection available to the Appellant, given the FTT findings she was arrested by the authorities, detained for three months and physically and sexually abused throughout the detention. For the above reasons, I conclude that the decision of the FTT does contain a material error of law and must be set aside. The Respondent did not challenge the credibility findings made by the FTT and therefore those findings are preserved. Preserved findings are to be found at paragraphs 34-41.
22. There will be a further hearing before the Upper Tribunal to consider, taking into account the preserved findings, whether the Appellant would be at risk if returned to the DRC."

Re-making the Decision

11. At the commencement of the hearing Mr Fraczyk confirmed that no further evidence would be called and I therefore proceeded to hear submissions from both representatives.
12. On behalf of the Respondent Mrs Aboni relied upon the refusal decision dated 20th April 2016 although it was accepted that there were preserved findings made by the FTT. It was submitted that the Appellant had not established that she would be of adverse interest to the authorities in the DRC, and the Appellant had not proved that she fell within the risk categories set out in BM and Others (returnees-criminal and non-criminal) DRC CG [2015] UKUT 00293 (IAC).
13. Mrs Aboni submitted that the Appellant was not subject to an arrest warrant in the DRC or any court proceedings. There was no reason to believe she would be at risk because of her husband. I was asked to dismiss the appeal.
14. Mr Fraczyk relied upon his skeleton argument dated 15th April 2018. In brief summary it was submitted that the principle in Demirkaya applies in the Appellant's favour. Reliance was also placed upon the Respondent's latest CPIN on political opposition in the DRC which although stating that being a rank and file opponent of the DRC government would not generally put an individual at risk, a fact-sensitive approach is required and consideration must be given to a person's profile and activities. It was submitted that taking into account the Appellant's previous detention and rape while in detention, and the fact that she had only been released after payment of a bribe, meant that she would at risk if returned. The

Appellant is a vulnerable individual suffering from PTSD. She has had no contact with her husband since 2015.

15. Reliance was also placed upon BM and Others in particular paragraph 88(iv) which confirms that individuals who have unexecuted prison sentences in the DRC, or are alleged to have committed document fraud offences when departing the DRC, would be at risk of imprisonment for lengthy periods and hence treatment proscribed by Article 3 of the 1950 European Convention on Human Rights (the 1950 Convention).
16. At the conclusion of oral submissions I reserved my decision.

My Conclusions and Reasons

17. The Appellant would be entitled to asylum if she proves she has a well-founded fear of persecution by reason of her imputed or political opinion, and she is unable or owing to a well-founded fear of persecution unwilling to avail herself of the protection of the authorities in the DRC.
18. The Appellant also relies upon Article 3 of the 1950 Convention and must therefore prove that there are substantial grounds for believing that returning her to the DRC would create a real risk that she would be subjected to torture or inhuman or degrading treatment or punishment.
19. In relation to risk on return the burden of proof is on the Appellant and can be described as a reasonable degree of likelihood which is a lower standard than the normal civil standard of the balance of probabilities.
20. It is appropriate at this point to set out the preserved findings of the FTT at paragraphs 34-41;

“34. The Appellant is a national of DRC. This is accepted by the Respondent. She is alone in the UK with her child and has no family in this country. Taking her evidence in the round, and also taking account of the Country Information I decided her account of events in DRC including about her distribution of anti-government leaflets, attendance at a demonstration on 19th January 2015 and her subsequent imprisonment and physical and sexual abuse is credible. I considered that her evidence including in the asylum interview, in her written statement and at the Tribunal has remained consistent overall. I also decided that her detailed account of events in DRC and the sexual and physical abuse she was subjected to whilst in captivity is consistent with the medical evidence about her mental health condition as included in her GP records. Also, the history of claimed events that she gave to the doctor who examined her, Dr Kiernan is consistent with her evidence including in the asylum interview.

35. I am aware that the report from the medical practitioner, Dr Kiernan, which relates to both the Appellant's physical and mental health contains the doctor's clinical findings and opinion. That opinion being that some of the scarring on the Appellant's body is consistent with her account of being pushed against a door whilst

detained. I also noted the doctor's opinion about the Appellant's mental health condition, its effect on her currently, and its being caused by her being sexually abused and raped by her captors. I am aware that the doctor is expressing an opinion, based on her medical examination of the Appellant and assessment. I am fully aware that it is for me, not the doctor to make any findings in this case. I was persuaded by the doctor's opinion. Her report is thorough and detailed. Her conclusions are consistent with the Appellant's own evidence, her medical history in the UK and treatment including, the evidence in the Appellant's GP records and the fact that she has been referred for further treatment for PTSD which, is awaited.

36. I also found the Appellant's claims that she was released from captivity after a bribe was paid to Captain Cherry by her uncle to be plausible taking into account the country information about DRC. Also plausible was her claim that Captain Cherry became sympathetic towards her when he realised that they were from the same tribe.
37. Although not a member of a political group herself, at the request of her husband, a member of the AJAC she gave out anti-government leaflets in January 2015 because she felt strongly about the proposed changes to the country's constitution. It is for that reason that she also attended the public demonstration on 19th January 2015 in Kinshasa. Her explanation that she did so because she was aggrieved because of the implications of this one particular issue is plausible.
38. Her evidence that both the Appellant and her husband were arrested after the demonstration is also consistent with the country information. This includes the report from Human Rights Watch, World Report 2017: Democratic Republic of Congo, 12th January 2017. This indicates that in DRC there is political violence and government repression (which became more intense in 2016 after President Kabila clung to power). The latter occurring after the Appellant had left DRC.
39. The report indicates that in DRC the security services seek to prevent demonstrations and that there are unlawful detentions by the Congolese army including of children. During the week of December 19th, 2015, heavy fighting broke out in various parts of DRC. This is consistent with the Appellant's account of events.
40. I decided that the Appellant's claims that she was detained by government forces for approximately three months and physically abused (i.e. she was scarred after being injured when pushed against some metal door whilst in detention) and also sexually abused to be consistent with the country information.
41. I took the view that the Appellant's failure to claim asylum when she arrived at Heathrow Airport with the intention of coming to the UK to do so does affect her credibility under section 8 but not so as to materially undermine her evidence about events in DRC when the evidence is taken in the round."

21. In considering this appeal, I do take into account the principle in Demirkaya and paragraph 339K of the Immigration Rules. I also take into account the lower standard of proof.
22. I find that the Appellant would be at risk if returned. I do not find that there are good reasons to consider that the persecution and serious harm previously encountered by the Appellant would not be repeated. It is not the case that the Appellant has been politically active in the UK. She would in my view be questioned when she returned to the DRC. She would not be at risk simply because she is a failed asylum seeker. I find that she would be at risk if she disclosed when questioned, and she cannot be expected to lie, that she had previously been detained and released following payment of a bribe. Paragraph 88(iv) of BM and Others DRC CG sets out the following as country guidance;
 - (iv) The DRC authorities have an interest in certain types of convicted or suspected offenders; namely those who have unexecuted prison sentences in DRC or in respect of whom there are unexecuted arrested warrants or who supposedly committed an offence, such as document fraud when departing DRC. Such persons are at risk of imprisonment for lengthy periods and, hence, treatment proscribed by Article 3 ECHR.
23. The Appellant left DRC using a false passport, which amounts to document fraud. There is a risk that she would be regarded as having an unexecuted prison sentence in that she was released after payment of a bribe. The Appellant is not a leader or a spokesperson of an opposition party to the authorities in DRC. It is however made clear in BM and Others that each case is fact-sensitive, and I must therefore take into account the previous detention of the Appellant and the rape and ill-treatment she suffered while in detention. Taken together with the fact that she was released after payment of a bribe, and left the DRC using false documents, I find that she would be at risk of detention if she returned to the DRC, and she would be at risk of treatment proscribed by Article 3, taking into account that she previously suffered such treatment.
24. I therefore conclude that the Appellant has proved that she has a well-founded fear of persecution on the basis of her imputed political opinion. She would not be able to seek protection from the authorities as her fear is of the authorities. I do not find that there is any reasonable internal relocation option within the DRC, as the Appellant's fear is of the authorities.
25. I therefore conclude that the Appellant is entitled to a grant of asylum, and her appeal also falls to be allowed pursuant to Article 3 of the 1950 Convention.
26. In addition I find that the appeal falls to be allowed with reference to Article 8. I find that the Appellant satisfies the requirements of paragraph 276ADE(1)(vi) in that there are very significant obstacles to her integration into the DRC. I also take into account that she has a diagnosis of PTSD. I

have considered section 117B of the Nationality, Immigration and Asylum Act 2002. The maintenance of effective immigration control is in the public interest. The Appellant has not demonstrated that she can speak English and she is not financially independent. Little weight should be given to a private life formed by a person who is in the UK unlawfully or with a precarious immigration status.

27. The above considerations do not assist the Appellant but notwithstanding those considerations, the fact that she would be at risk if returned to the DRC, and the fact that there are very significant obstacles to her reintegration, mean that I conclude that to expect her to establish a private and family life in the DRC would be disproportionate, and therefore removal from the UK would breach Article 8. The best interests of the Appellant's infant son are considered as a primary consideration. Because of his age his best interests are to remain with his mother, and given the risk to his mother, it would not be in his best interest to be removed to the DRC.

Notice of Decision

The decision of the FTT involved the making of an error on a point of law and was set aside. I substitute a fresh decision as follows.

The appeal is allowed on asylum and human rights grounds with reference to Articles 3 and 8. Because the Appellant is entitled to asylum she is not entitled to humanitarian protection.

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 her or any member of her 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 17th April 2018

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT FEE AWARD

No fee has been paid or is payable. There is no fee award.

Signed

Date 17th April 2018

Deputy Upper Tribunal Judge M A Hall