



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/02220/2019

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre
On 12 March 2020

Decision & Reasons Promulgated
On 15 April 2020

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

S B B
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Joseph, instructed by NLS Solicitors
For the Respondent: Mr C Howells, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Unless and until a Tribunal or court orders otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify the appellant or any member of their family. This order applies both to the appellant and to the respondent. Failure to comply with this order could lead to contempt of court proceedings.

Introduction

2. The appellant is a citizen of the Democratic Republic of Congo (“DRC”) who was born on 18 June 1980. He arrived in the United Kingdom on 14 October 2018 and claimed asylum. The basis of his claim was that he is a supporter of the opposition leader, Moise Katumbi and a member of the Platform Assembly Together for Change Party in the DRC. He claimed that as a result of his political activities he was detained on two or, on another version of his account, three occasions and ill-treated by the DRC authorities because of his politics.
3. On 22 February 2019, the Secretary of State refused the appellant’s claims for asylum, humanitarian protection and under the European Convention on Human Rights.

The Appeal

4. The appellant appealed to the First-tier Tribunal. In a determination sent on 14 October 2019, Judge Davidge dismissed the appellant’s claim on all grounds. The judge made an adverse credibility finding and rejected the appellant’s account that he had been detained and was a political activist at risk on return to the DRC.
5. The appellant sought permission to appeal to the Upper Tribunal and on 12 December 2019, the First-tier Tribunal (Judge Scott-Baker) granted the appellant a permission to appeal. The respondent did not file a Rule 24 response.

The Submissions

6. On behalf of the appellant, Mr Joseph made two principal submissions.
7. First, he submitted that the judge had failed to apply, and determine an issue raised by, the country guidance decision in BM and Others (returnees – criminal and non-criminal) DRC CG [2015] UKUT 00293 (IAC). He submitted that the judge had found that the appellant had left the DRC on his own passport but with a forged visit visa vignette for the UK contained within it. Relying on [119(iv)] of BM and Others, Mr Joseph submitted that the judge had failed to determine whether the appellant was at risk on return of treatment proscribed by Art 3 of the ECHR (and entitled to humanitarian protection by virtue of Art 15(b) of the Qualification Directive) as he would be suspected of having “committed an offence, such as document fraud, when departing [the] DRC”. Mr Joseph submitted that the appellant’s passport with a tampered UK vignette in it potentially fell within this risk category.
8. Secondly, Mr Joseph submitted that the judge had erred in law in reaching the adverse credibility finding. First, he submitted there was an inconsistency between the judge’s findings at para 33 and para 48. At para 33, Mr Joseph submitted the judge had found on the basis of the background evidence that the use of cable ties as handcuffs was widespread in the DRC. She accepted the medical evidence that the injuries to the appellant’s right wrist was “highly consistent” with an injury caused by a cable tie. In those circumstances, at para 33 she had found that “on this evidence the appellant establishes to a real likelihood that he has been arrested.” Nevertheless, at para 48 the judge, Mr Joseph submitted, reached a contrary finding.

There she said that the country evidence undermines the appellant's account that he had been arrested because there was no real likelihood that if he had been he would have been given back his passport, as he claims, so as to allow him to leave the country. That, Mr Joseph submitted, was an inconsistency and a material error of law. Secondly, he submitted that the judge had failed to engage with the appellant's evidence that he had been, in fact, arrested on three occasions. Thirdly, Mr Joseph submitted that the judge had fallen into error in para 46 of her determination when she had doubted the appellant's claim to have joined the Platform Assembly Together for Change in Congo Party in March 2018 when, she said, that was undermined by the country information which showed that it did not come into existence in the DRC until June 2018. Mr Joseph submitted that the only source for this was a BBC News Report on the internet referred to, and relied upon, by the Secretary of State in para 31 of the decision letter. Having accessed that document, he submitted that the point relied upon, namely that the party did not come into existence until June 2018 in the DRC, was not to be found in the article. Finally, Mr Joseph drew my attention to para 37 of the judge's determination in which she dealt with the expert report concerning the genuineness of the documents relied upon by the appellant. Although the ground challenged the judge's reasoning, he accepted that, unlike the assertion in the grounds, the expert had not said that the documents were authentic but simply that they appeared to be authentic. In the result, he placed little weight on this ground.

9. In response, Mr Howells submitted that on the BM and Others point, the issue of whether the appellant would be at risk as a result of the use of a "false document" on exit within [119(iv)] of BM and Others had to be read in the light of the further decision in that appeal, BM (false passport) DRC [2015] UKUT 467 (IAC) that the issue was fact-sensitive. He submitted that the appellant had exited with a valid passport in his name but with a false vignette and that this did not fall within the risk category in BM and Others at [119(iv)].
10. In relation to the judge's adverse credibility finding, first Mr Howells submitted that there was nothing inconsistent in the judge's finding in paras 33 and 48. He drew my attention to para 34 where the judge had concluded that it was plausible "subject to his credibility" that the appellant may have been arrested in the context of opposition to the Kabila government and suffered ill-treatment for a Refugee Convention reason. Mr Howells submitted that what the judge had found in paras 33 and 34 was that there was a real likelihood that he had been arrested but whether he had been arrested and ill-treated because of his political activity depended upon whether his account was credible. At paras 35-50, Mr Howells submitted that the judge gave detailed reasons why she did not accept his account. That included at para 48 where, in effect, the judge rejected his account that he had been arrested for the reasons that he had claimed.
11. Secondly, in relation to the judge's reasoning in para 46 concerning when the party to which the appellant claimed to be a member had come into existence in the DRC, Mr Howells accepted, on seeing the BBC Report produced electronically by Mr Joseph, that it did not refer to the party as having come into existence in the DRC in June

2018. He accepted that the judge may well, therefore, have made a mistake but, he submitted, that mistake was not material to her adverse credibility finding given the overall reasons she had given for not accepting his claim.

12. Finally, in relation to the point raised in the grounds in respect of para 37 and the expert's report in respect of the documents, Mr Howells pointed out that this had not been raised in the original grounds and, in the light of Mr Joseph's position, he was content to leave the matter to me.
13. In reply, Mr Joseph submitted that the second BM decision did not vary the country guidance in [119(iv)] of the first BM decision because the Tribunal found that the appellant in that case had in fact not used a false passport.

Discussion

14. For convenience, I will consider first the issues arising out of the judge's adverse credibility finding.
15. The first point relied upon is that the judge made inconsistent findings in para 33 (and 34) and in para 48. At para 33-34 the judge said this:
 - "33. I am satisfied that the use of cable ties as handcuffs is widespread and so there is a real likelihood that, were someone to be arrested in the DRC, cable ties might be used. I am satisfied that on this evidence the appellant establishes to a real likelihood that he has been arrested.
 34. In the context of the country information about the extent of the opposition to the Kabila government and the volumes of demonstrators, it is plausible, subject to his credibility, that the appellant may have been arrested in that context and suffered ill-treatment for a refugee convention reason."
16. Then at para 48 the judge, towards the end of her reasons leading to her adverse credibility finding, said this:
 - "48. The country information undermines the appellant's account that had he been arrested there is any real likelihood that he would have been given back his passport as he claims, so as to be able to leave the country in the manner he describes. The explanation that the authorities did so because they had removed the vignette does not bear scrutiny."
17. In my judgment, Mr Howells' submission is correct. Based upon the medical evidence concerning the "highly consistent" nature of the appellant's injuries to his right wrist, taken with the background evidence of the widespread use of cable ties as handcuffs, the judge found in paras 33 and 34 there was a "real likelihood that [the appellant] has been arrested."
18. However, as the judge made clear in para 34 the reason why he had been arrested although plausibly, on the basis of the country information, could arise from political opposition whether in fact it did and he had suffered ill-treatment for a Refugee Convention was "subject to his credibility". Thereafter, at paras 35-50, the judge dealt with the appellant's credibility. Her finding in para 48 was simply that his arrest *for political reasons* followed by release and return of his passport so that he was

able to leave the country was undermined by the country information. That reasoning was not challenged in the grounds and was not challenged by Mr Joseph before me. Likewise, the judge gave detailed reasons at paras 37-47 and 49 why she rejected the appellant's evidence and account and found it not to be credible. Consequently, true to her observation in para 34, the claimed underlying reason for his arrests (which she accepted at paras 33 and 34) was dependent on the credibility of his account and she found him not to be credible. Consequently, I reject Mr Joseph's submission that there is any inconsistency in the judge's finding and reasoning in paras 33 and 34 on the one hand and para 48 on the other.

19. Secondly, Mr Joseph submitted that the judge had not engaged with the evidence concerning the number of arrests by the appellant. The judge was clearly aware of the appellant's account that he had been arrested and detained on more than one occasion. At para 3 she refers to his release "from his most recent detention in 2018". The focus of the case was, however, on his most recent release from detention and his departure from the DRC on his own passport which included a vignette which had been tampered with. It is difficult to see what material error the judge could have fallen into by not explicitly dealing in more detail with the evidence concerning his claim to have been arrested on a number of occasions. That evidence was, in itself, inconsistent in that he had said he had been arrested on both two and three occasions (see paras 13-16 of the refusal letter). The judge, of course, as I have already noted, accepted that he had been arrested and, in truth, the credibility issues flowed from his claim based upon his most recent arrest, release and journey to the UK. There is, with respect to Mr Joseph, nothing in this point.
20. Thirdly, but without any vigorous pursuit, Mr Joseph drew my attention to the ground which submitted that the judge had failed properly to take into account the expert evidence dealing with the genuineness and authenticity of a number of documents, namely summonses, an arrest warrant, a search warrant and two death certificates in relation to his mother and sister, which were relied upon. The judge dealt with the expert report and the documents at paras 37-39 as follows:

"37. I have looked at the DRC documents provided by the appellant as guided by the case of Tanveer Ahmed [2002] UKIAT 00439. The expert report does not provide me with significant assistance. The expert does not confirm that the documents are genuine or authentic. The expert refers on many occasions to the documents being similar to or following the format and content of other documents that he had been able to verify in the DRC by "checking and double checking with various sources" elsewhere described as "including policemen, civil servants and human rights activists". However, even though it would therefore appear to be the case that verification is a viable option, he has not actually verified any of the documents provided by the appellant. The expert does not deal directly with the criticisms of the respondent. For example, the made no comment on the similarity of handwriting over extended periods of time in the summons and warrants; there is no consideration of whether or not summons, arrest and search warrants might originate from the same personnel; nor any consideration of different coloured inks, or the inconsistent completion of the death certificates. The expert makes no

comment on matters such as corruption or forgery, and whether or not in verified documents there are any features determinative of the authenticity. Although the expert refers to the warrants having been served, he does not set out the relevant processes, including to whom they would be served and, in the event that the appellant has the original, how the documents might remain available to others to act upon.

38. Mr Joseph acknowledged there was no evidence of provenance to support the authenticity of the documents and that it was unclear as to why the documents had not been verified.

39. I find that the points made by the respondent in the reasons for refusal in respect of the documents are well made and raise doubts about the reliability of the documentation albeit none of the matters is determinative."

21. In my judgment, Mr Joseph was right not to pursue this point with any vigour. The judge clearly had regard to the expert's view that the documents appeared to be genuine or authentic. She also, in para 37, noted that the expert had failed to deal with a number of criticisms raised by the respondent in relation to the documents including the "similarity of handwriting over extended periods of time in the summons and warrant"; whether the summons, arrest and search warrants originated from the same personnel; the use of different coloured ink; and the inconsistent completion of the death certificates. She also noted that the expert made no comment on matters such as corruption or forgery in relation to documents. The judge, applying Tanveer Ahmed, considered the documents and their reliability in the context of all the evidence. She was entitled to reach a finding, entirely within the range of reasonable conclusions, that the documents were not reliable for the reasons she gives in paras 37-39.

22. Finally, there is the issue concerning the judge's reasoning in para 46 which was as follows:

"46. In respect of the criticism of the appellant's account of having become a member of a political party in March 2018 called "the Platform Assembly Together for Change in Congo" being undermined by the country information which showed that the party did not come into existence in the Congo until June 2018. The appellant says that this was an umbrella organisation or coalition party and that he was a member of a party that united under the umbrella. The difficulty with this explanation is that he did not offer it at the time."

23. Mr Howells accepted that there was no background evidence to support this finding which appeared to be based upon the respondent's conclusion in para 31 of the refusal decision. The only background evidence relied upon, namely the BBC News Report, did not state that the party to which the appellant claimed to have joined in March 2018 only came into existence in June 2018 in the DRC. However, I accept Mr Howells' submission that that mistake was not material to the judge's adverse credibility finding. First, she had documents which she reasonably concluded were unreliable. Secondly, she rejected the appellant's claim that the doctored vignette

had been inserted by the DRC authorities and instead found that it had been the appellant who had doctored his passport. Her reasons are at paras 40-44 as follows:

- “40. I turn to the evidence about the appellant’s passport. I am satisfied that the respondent has established that the appellant has perpetrated a fraud in respect of the vignette in his passport.
41. The respondent has shown me the record of the multiple entry visit visa issued to the appellant on 24 January 2018. The appellant provided a copy of the same vignette endorsed with his arrival in the United Kingdom on 4 April 2018. However, in the passport presented on arrival in October 2018, the 2018 vignette is entirely missing. The 4 April 2018 entry endorsement appears on an entirely different vignette. This vignette appears to be, but is not, a previously issued vignette dated 4 September 2017 on which the appellant entered the UK in November 2017. It is quite clear that it is not that 2017 vignette: the validity of the vignette being extended to 4 September 2019 when in fact it expired in 2018, and because it has the 4 April 2018 entry endorsement which properly belongs on the vignette issued in January 2018. The appellant accepted he has been issued two entry clearances and can offer no credible explanation for the obvious fraud. In his interview, he explained that the 2018 vignette was removed by the authorities in the DRC, as a way of preventing him from being able to leave the country and enter the UK following his arrest and detention in 2018. The appellant’s explanation is plainly not true for all the reasons above. As well as all of those difficulties, the passport he presented had an entry clearance valid until 2020 because of the fraudulent alteration of the 2017 vignette to extend its validity. That is something that, even on his own chronology, only he can be responsible for.
42. I do not accept that his 2018 vignette was removed by the authorities in the DRC, as he said, in an effort to prevent him from leaving.
43. The appellant told me that he did not know that his 2018 entry clearance had been cancelled because of issues of fraud discovered in his wife’s application at the same time. Although the respondent produced a copy of a letter said to have been sent to him in June year? he says he never received it. I am satisfied that in fact he removed the 2018 vignette and replaced it with the fraudulent 2017 vignette.
44. I am satisfied that he made that forgery to circumvent the cancellation of the 2018 entry clearance. That the appellant has not told me the truth about this course of fraud fatally undermines his credibility and establishes his willingness and ability to obtain and use false documents and to lie.”

24. No challenge is made to the judge’s reasoning or finding on this issue. On that basis, the appellant had been found to have used a false document and to lie as the judge stated in para 44. That was a relevant matter, indeed the judge was entitled to regard it as a significant matter, in assessing the appellant’s credibility and veracity as a witness. At para 45 the judge correctly reminded herself that: “the core of an appellant’s account may be true even if he is found to have lied or acted fraudulently in respect of matters outside or peripheral to that claim.” That is a proper self-direction on the relevance of a ‘lie’ or ‘dishonesty’ to the overall issue of credibility (see the recent decision in Uddin v SSHD [2020] EWCA Civ 338 at [11]). The judge’s

finding in relation to the doctoring of the vignette was, in my judgment, a significant matter that could properly be taken into account in assessing whether credit should be given to his account and in assessing his truthfulness.

25. In addition in para 49, the judge took into account under s.8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 that the appellant had delayed in claiming asylum without reasonable explanation. That finding is also not challenged by the appellant.
26. Finally, as I noted earlier, in para 48 the judge found that the country information undermined the appellant's account that if he had been arrested for political reasons there was no real likelihood that he would have been given back his passport in order to leave the country.
27. Overall, I am persuaded that the mistake which the judge made, in that there was no supporting evidence to show that the party had only come into existence in the DRC in June 2018, was not material to her adverse credibility finding. Her other reasons would, in my judgment, have inevitably led her to the same conclusion and to have rejected the appellant's account and therefore the basis of his asylum claim, namely that he was an opposition political activist in the DRC who had been detained and would be at risk on return.
28. Consequently, the judge did not materially err in law in rejecting the appellant's asylum claim based upon his political activism.
29. I turn now to deal with Mr Joseph's alternative ground that the judge failed to engage with the point in [119(iv)] of BM and Others, namely that the appellant was at risk of arrest and detention, in circumstances which would breach Art 3 of the ECHR, as a result of committing an offence of document fraud on leaving the DRC.
30. Reduced to its relevant parts, [119(iv)] of BM and Others as relied upon by the appellant is as follows:

"the DRC authorities have an interest in certain types of ... suspected offenders, namely those ... who supposedly committed an offence, such as document fraud, when departing DRC."
31. In that case, the issue arose in relation to the appellant BM and his claim that he had left the DRC on a false passport. That issue was addressed in the second case BM [2015] UKUT 00487 (IAC). In fact, in that case the Upper Tribunal did not accept that BM had left the DRC on a false passport. That was, therefore, the end of his claim based upon [119(iv)] of BM and Others. In the second decision, the Upper Tribunal, nevertheless, dealt with what it described as the "out workings" of that in [16] of its decision as follows:

"At the hearing we suggested to both parties that in cases where it is established - whether by proof to the requisite standard or by concession - that the asylum claimant utilised a false passport or kindred document in departing DRC this will not, without more, trigger [119(iv)] of the Country Guidance Decision. This analysis, we suggested, is clear from the words "suspected offenders" and "who supposedly committed an offence, such as document fraud, when departing DRC".

Neither representative dissented from this analysis. 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 fact-sensitive context of their individual case. Predictably, one of the inquiries 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 that sustainable inference is 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 where 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.”

32. There are, in my judgment, two significant difficulties in Mr Joseph establishing an error of law in this appeal.
33. First, it does not appear to have been any part of the appellant’s case before the First-tier Tribunal that the country guidance in BM and Others at [119(iv)] applied to him. His claim was that he had not doctored the vignette in his passport. Not surprisingly, therefore, his case was not put in the alternative that he had been guilty of producing a false vignette within his valid passport which would become apparent to the DRC authorities and would lead him to being suspected of committing an offence of document fraud in the DRC.
34. I would, however, not rest my decision on that point. It may well be that, given the judge’s findings, of her own motion she should have considered, if it were relevant, the country guidance issue raised by her findings (but not it would appear by the appellant or his representatives at the hearing) based on [119(iv)].
35. Secondly, however, had the judge considered this issue I am left in no doubt that she would have rejected any claim by the appellant based upon it. There was some discussion before me, based upon Mr Howells’ submission that the judge’s error was not material, as to what information the judge had that could have led her to conclude that the valid passport containing a false vignette fell within [119(iv)] of BM and Others. Both representatives accepted that there was no evidence on that issue either before the judge or, indeed, before me. Mr Joseph relied upon that as indicating that, whatever might be the outcome based upon evidence at a hearing to remake the decision on this issue, it could not now be said that any error by the judge in not considering this issue was immaterial.
36. At first blush, I was attracted to that submission. However, on reflection the submission is not well-founded. Accepting that the judge erred in law by not considering the issue raised by her findings and [119(iv)], any error could only be material if there was evidence before her that the appellant’s circumstances potentially fell within [119(iv)]. There was no such evidence. There was no evidence

whether the use of a valid passport with a false UK entry clearance vignette in it constituted the offence of document fraud under the domestic laws of the DRC. Without that evidence, the appellant's case relying on [119(iv)] could not get off the ground. The Upper Tribunal (McCloskey and UTJ Jordan) made a similar point in the second BM case at [3] where that appellant had claimed to use a false passport. The UT said this:

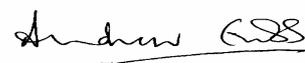
“it is this appellant's case that he travelled from DRC to the United Kingdom using a false passport. There is no evidence that conduct of this kind constitutes the offence of a document fraud, or something kindred, under the domestic laws of DRC.”

37. In fact, the only reason why the UT did not dismiss the appeal in the absence of that evidence, but conducted it “on an assumption” that it was an offence, was that, on the evidence, it made an adverse factual finding determinative of the appeal that in any event BM had not used a false passport.
38. The point, however, that an appellant must establish by evidence that his use of a “false” document on exit put him at risk of prosecution of an offence under the DRC's domestic laws, nevertheless, is well made and I accept it. Here, there was no such evidence and so, even if Judge Davidge, had considered the application of [119(iv)] she would inevitably have rejected the appellant's claim on this basis since he had led no evidence, and there was no other evidence in the case, to show that by leaving the DRC on a valid passport in his name but with a false UK visit visa vignette he was at risk of prosecution for a criminal offence in the DRC and, as a consequence, at risk of conviction and imprisonment in circumstances which breached Art 3 of the ECHR.
39. Consequently, any error by Judge Davidge in not considering the application of [119(iv)] of BM and Others was not material to her decision which would inevitably have been to dismiss his appeal also on this basis.

Decision

40. For these reasons, the First-tier Tribunal's decision to dismiss the appellant's appeal did not involve the making of a material error of law such that the decision should be set aside. The judge's decision to dismiss the appellant's appeal on all grounds stands.
41. Accordingly, the appellant's appeal to the Upper Tribunal is dismissed.

Signed



A Grubb
Judge of the Upper Tribunal

18 March 2020