



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

Appeal Number: AA/01340/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 23 October 2015**

**Decision & Reasons Promulgated
On 28 October 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

**BB
(ANONYMITY ORDER MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr T. Hodson, Counsel instructed by Elder Rahimi
Solicitors (London)

For the Respondent: Mr S. Staunton, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

2. The appellant is a citizen of the Democratic Republic of the Congo (“the DRC”) born on 12 February 1984. He first visited the UK on 11 July 2013, with a valid visa, and stayed for approximately a month. He came again to the UK on 9 December 2013 and claimed asylum on 14 February 2014.
3. The appellant is appealing the decision of First tier Tribunal (FtT) Judge Verity, promulgated on 19 June 2015, in which his appeal against the decision of the respondent to refuse his asylum/human rights claim was dismissed.
4. From 2006 until coming to the UK in 2013, the appellant lived in South Africa, only returning to the DRC on two occasions: in June 2012 and in February 2013.
5. The essence of the appellant’s claim is that, whilst living in South Africa, from 2010 onwards, he became active in the Union pour le democracie et le progres social (UDPS). His role in the UDPS included being in charge of publicity and he actively recruited new members. On his return to the DRC in February 2013 he was arrested and detained, having attended a UDPS march, and whilst detained was subject to beatings. He was released after three days detention. He has continued his activities for the UDPS and there is a warrant out for his arrest. He fears that he will be killed if returned to the DRC. He also fears return to South Africa because he has recently been subject to serious threats.
6. In a letter dated 9 January 2015 refusing the appellant’s asylum claim (“the Refusal Letter”), the respondent stated the following:
 - a. It was accepted that the appellant was a supporter of the UDPS but not that he was involved with the party to the extent claimed.
 - b. It was accepted that he was arrested and detained as he claimed.
 - c. It was not accepted that the appellant was subject to threats in South Africa, or brought to the attention of the authorities in South Africa or the DRC, from a man named Fabric “king zombie” Shungu.
 - d. It was not accepted he was of continuing interest to the police authorities in the DRC or in South Africa.

Decision of the FtT

7. The judge did not consider the appellant’s account of having been detained and subject to abuse as credible. At paragraph [37(1)] she states.

“I have grave doubts as to the appellant’s involvement with the UDPS but I have accepted as a starting point the Home Office position. However, even though I have accepted the Home Office position I am not prepared to accept the appellant’s account as credible”.

8. The judge found that the appellant would not be at risk on return to the DRC as an active member of the UDPS for a number of reasons. These included:
 - a. that the letter submitted on the appellant's behalf from the UDPS in the UK stated that he was appointed an officer at a UDPS branch in the DRC at a time when, according to the appellant's own evidence, he was living in South Africa and had been doing so for approximately four years.
 - b. that the claim to have suffered sexual abuse was not mentioned to the respondent or otherwise raised by the appellant before it was put to him at the hearing and was being used to embellish his claim.
 - c. that the appellant did not apply for asylum when he first came to the UK in July 2013, which was after he had been imprisoned in the DRC.
 - d. that, at most, the appellant has been involved in only one demonstration outside the DRC embassy since coming to the UK and there is no evidence the embassy staff noted his details or photographed him.

9. The FtT referred to *R(DRC) v Secretary of State for the Home Department* [2013] EWHC 3879 (Admin) and *MM (UDPS members - risk on return) Democratic Republic of Congo* CG [2007] UKAIT 00023 and the finding in the latter case that there is not a real risk of return if the appellant is no more than a mere member of the UDPS.

Grounds of appeal

10. There are several grounds of appeal:
 - a. Ground 1: Failing to properly consider the appellant's evidence in relation to the timing of his asylum claim. The FTT made adverse credibility findings arising from the failure of the appellant to apply for asylum when he first came to the UK in July 2013 without taking into account evidence that explains the delay, namely, that
 - i. In July 2013 the appellant did not consider his life to be in danger in South Africa (the country in which he was residing and to which he would be returning), as it was only after returning to South Africa (in August 2013) that he began to receive threats and feel unsafe; and
 - ii. It was only in December 2013 he was informed by his uncle about the issue of an arrest warrant. He then telephoned the respondent but was told he had to wait until after January for an appointment.
 - b. Ground 2: Making findings incompatible with the respondent's concession that the appellant was arrested and detained as claimed in the DRC. The respondent stated at paragraph 20 of the

reasons for refusal letter that *“your account of your arrest and detention has been largely internally consistent, and therefore it is accepted that you were arrested and detained in the way that you claim.”* This is an unqualified concession and the reference to *“in the way that you claim”* includes the abuse suffered. However, even though the FtT has said it accepts the respondent’s concession, it is apparent that the appellant’s account of the detention has been brought back into question and rejected.

- c. Ground 3: Failing to note the appellant’s evidence in interview as to the sexual abuse suffered in detention. Contrary to the assertion by the FtT judge that sexual abuse was never previously mentioned, statements in the interview with the respondent are strongly suggestive of sexual abuse.
- d. Ground 4: failing to make findings as to risk on return arising from the appellant having his finger prints and photograph taken whilst in detention and having acquired a “political profile” such that he falls within the risk categories identified in the country guidance. There was a failure by the FtT to assess the appellant’s profile and attendant risk including evidence of activity in South Africa.
- e. Ground 5: Making a finding that the appellant would not be at risk on return as he would not identify himself as a failed asylum seeker. This is contrary to the principle enunciated in *RT (Zimbabwe) v SSHD* [2013] 1 AC 152 that it is not permissible for those at risk of persecution to be expected to dissemble or lie in order to protect themselves.
- f. Ground 6: Failing to make findings in relation to documents supporting the appellant’s claim as to active UDPS membership in the DRC, South Africa and UK. The FtT was not entitled to exclude from consideration documents submitted by the appellant in support of his contention to be active on behalf of the UDPS on the basis that the presenting officer considered them “highly suspect.”

Submissions

11. Mr Hodson focussed his submissions on the second ground of appeal. He argued that the judge improperly went behind – and effectively reversed – a clear concession by the respondent that the appellant had been arrested and detained in the way he claimed.
12. Mr Wilding argued that the only concession made by the appellant was that the appellant was arrested and detained – the concession did not extend to how the appellant was treated when detained. The concession should also be considered in light of paragraph 17 of the Refusal Letter, where it was not accepted that the appellant was involved with the UDPS to the extent claimed. Moreover, the judge did not reject outright the appellant’s account of being detained and the findings with respect to credibility of the appellant’s account of his

detention need to be considered as a whole, taking into account the other findings about the appellant's credibility.

Findings

13. Failure to follow a concession can amount to legal error (see *SS v Secretary of State for the Home Department* [2010] CSIH 72F) and for the reasons set out below I find that the FtT made a material error of law in going behind an express concession of the respondent without giving the parties notice that it was intending to do so.
14. In the section of the Refusal Letter concerning the substantive consideration of the claim there is a sub-heading "Arrests and detention: DRC" under which there are the following three paragraphs (paragraphs 18-20):
 18. Your claim that you were arrested and detained by police authorities in the DRC in March 2013 is material to your asylum claim because you fear persecution from the regime due to your activities as a member of the UDPS
 19. When asked how many UDPS activists were present at the demonstration, you initially claimed that "there were many people"....When asked if there were more policemen than people attending you stated that people attending the march were many and policemen were also many.
 20. Despite this vagueness in your account, your account of your arrest and detention has been largely internally consistent, and therefore it is accepted that you were arrested and detained in the way that you claim. However, when asked if all the demonstrators had been treated in the same way you stated we were subjected to the same fate; it is therefore considered that you were not specifically targeted, and only arrested as part of a mass arrest.
15. It is apparent from paragraphs 18 to 20 of the Refusal Letter that the respondent conceded that the appellant was arrested and detained in the way he claimed with the only qualification being that he was not specifically targeted and was arrested as part of a mass arrest. In using the phrase "*in the way that you claim*" the respondent has made it clear that the appellant's account of his detention and what happened to him whilst detained is not disputed and falls within the concession.
16. Mr Stauton, in his submissions, referred to paragraph 17 of the Refusal Letter. However, this is in the section of the letter concerning UDPS Membership and does not pertain to the arrest and detention of the appellant.
17. The FtT judge recognised that the respondent had made a concession with respect to the appellant's detention. At paragraph [37] she noted "that the Home Office have accepted the appellant...was detained for

three days in March of 2013.” She also, in the same paragraph, stated that she accepted the respondent’s position.

18. However, despite the judge’s comment at the start of paragraph [37] that she “accepted” the respondent’s position in relation to the appellant’s detention, it is clear from her decision that she did not. There can be no doubt, in reading the decision, that the judge’s view was that the appellant was not detained or abused and that his evidence in respect of this lacked credibility. The judge’s findings in this regard are set out in paragraph [37(6)], where she states (emphasis added):

“When the appellant comes to the UK in July of that year again he makes no mention of the arrest, detention and assault to the UK immigration authorities. **If the appellant seriously had experienced this assault and detention then I am at a total loss as to why he made no application for asylum immediately [sic] he arrived in the UK ...** When asked in cross examination why he had not claimed asylum during this visit the appellant stated that he had not seen the need and he hoped to return to South Africa. This explanation clearly **indicates to me that nothing much happened in the DRC during his visit and despite the Home Office’s Statement that they accept the detention occurred I find it implausible that if the detention did result that the appellant would state that he saw no need to claim asylum three months later upon arriving in the UK (after as he claims being beaten and sexually abused). This evidence lacks credibility.**”

19. The judge’s findings in relation to the appellant’s detention, as set out in paragraph [37(6)] of the decision, are incompatible with the concession made by the respondent and which she purports to accept. Having formed a view as to the detention of the appellant that was contrary to the concession made by the respondent, it was incumbent on the judge to advise the parties and give them an opportunity to make submissions accordingly and to not do so amounts to an error of law.
20. Having regard to Section 12(2) of the Tribunals Courts and Enforcement Act 2007 and the President’s Practice Statement 7.2(b), as extensive findings of fact will be required in a reconsideration of the appellant’s credibility, the matter should be remitted to the First-tier Tribunal for re-making.

Decision

21. The decision of the First-tier Tribunal contains a material error of law such that it should be set aside in its entirety and the appeal heard afresh.
22. The appeal is remitted to the First-tier Tribunal for hearing afresh before a judge other than First tier Tribunal Judge Verity.
23. An anonymity order is made.

Signed

A handwritten signature in black ink, appearing to be 'S. Sheridan', with a long horizontal stroke extending to the right.

Deputy Upper Tribunal Judge Sheridan

Dated: 26 October 2015