Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: AA/10097/2013**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3 April 2019	**On 8 May 2019**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

M J M
[ANONYMITY DIRECTION MADE]

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms N Braganza, Counsel instructed by Camden Community Law Centre
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
An anonymity order was not made by the First-tier Tribunal. However, as this appeal raises protection issues, it is appropriate to make an anonymity order. 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, amongst others, to both parties. Failure to comply with this direction could lead to contempt of court proceedings.

DECISION AND REASONS

BACKGROUND

1. The Appellant appeals against a decision of Designated First-Tier Tribunal Judge Shaerf promulgated on 29 January 2019 ("the Decision") allowing her appeal against the Respondent's decision dated 25 April 2013 on human rights grounds but dismissing it on asylum and humanitarian protection grounds. The Respondent has not appealed the allowing of the appeal on human rights grounds and I am therefore only concerned with the appeal on asylum and humanitarian protection grounds.

2. The Appellant's appeal was initially dismissed by First-tier Tribunal Judge Prior on 9 December 2013 on all grounds, but she was granted permission to appeal and by a decision promulgated on 27 March 2014, Deputy Upper Tribunal Judge Davey found that Judge Prior had erred. He remitted the appeal for reconsideration afresh. By a decision promulgated on 29 December 2014, First-tier Tribunal Judge Lobo allowed the appeal. However, the Respondent then appealed and, following a hearing before Mr Justice Edis and Deputy Upper Tribunal Judge Campbell, an error of law was once again found in particular in relation to the Appellant's nationality. The appeal was once again remitted for redetermination.

ERROR OF LAW

The Decision

3. The Respondent in his decision disputed the Appellant's nationality. He asserted that she is a citizen of the Republic of Congo (Brazzaville) whereas the Appellant claims that she is from the Democratic Republic of Congo ("DRC"). The Respondent confirmed that the sole destination for removal was the Republic of Congo. Judge Lobo found that the Appellant was from the Republic of Congo but, as noted above, his decision was found to contain an error of law. That issue was redetermined by Judge Shaerf in the Appellant's favour ([35] of the Decision). There is no challenge to that finding by the Respondent. The Judge therefore allowed the appeal on the basis that the Appellant is not a national or a legal resident of the Republic of Congo and there would be no reason for the authorities of that country to accept her ([37] of the Decision).

4. The Judge then went on to consider the substance of her appeal in the context of return to DRC. He concluded that, due to the Appellant's vulnerable state, she would be unable to care for herself, or to access medical or other support in order to trace family members in DRC. He found that she would be "destitute and likely to perish within a very short period of time". He therefore concluded that Article 3 ECHR would be breached on return. As I have already noted, the Respondent has not appealed that conclusion.

5. The Judge went on to consider whether the Appellant had a well-founded fear of persecution for a Refugee Convention reason. He made the following findings:

> "[39] I now turn to consider the Appellant's asylum claim. I have for the reasons already outlined found that on leaving the DRC she had a well-founded fear of persecution for actual and imputed political opinions, having regard to the reason why she was raped in Kinshasa and in Goma. There is no evidence that the DRC authorities have any continuing interest in the Appellant and indeed that has not been argued for her. Coupled with the medical evidence I find the Appellant is unlikely to be of interest to any of the authorities in the DRC who in the past persecuted her in the case of the Kinshasa incident or failed to provide a sufficiency of protection against attacks by members of M23. There was no claim made that the conditions in the DRC even for a person in a psychological state similar to that of the Appellant would be entitled to humanitarian protection under Article 15(c) of the Qualifying Directive.
> [40] It may be that when the Appellant left the DRC or even later when she arrived in the United Kingdom that psychological condition has not so deteriorated that she would be unable to care for herself in the DRC and so she might then still have been of interest to the DRC authorities and at risk of persecution. In the intervening period as already mentioned her psychological health has markedly deteriorated to such an extent that she is incapable of caring for herself or even accessing any care facilities which might be available. I have to consider the Appellant's asylum claim in this context. At paragraph 33 of the judgment of the Court of Justice of the European Union in *MP v SSHD (C-353/16)* the Court found that:
>
> > "..under Article 4(4) of Directive 2004/83, the fact that an applicant has in the past been subject to serious harm is a serious indication that he faces a real risk of suffering such harm again. However, that article also states that that does not apply where there are good reasons for believing that the serious harm previously suffered will not be repeated or continued."
>
> There was no evidence the Appellant might be discriminated against for any Refugee Convention reason such that she might qualify for asylum or subsidiary protection as the Court contemplated paragraphs 57 and 58 of its judgment. Consequently, while the Applicant might have qualified for asylum or subsidiary protection on arrival in the United Kingdom, the jurisprudence in *MP* means that at the present time, strictly speaking she does not qualify."

The Appellant's Grounds and the Grant of Permission

6. The Appellant's grounds continue to rely on a risk to the Appellant based on actual and imputed political opinion. It is said that there was no basis for the Judge to find as he did on this issue. However, the focus of the grounds is that the Judge ignored another prominent aspect of the asylum claim, namely that the Appellant is a member of a particular social group, being women or vulnerable women. It is said that "[t]he evidence as to the treatment of women as PSG in DRC is compelling". Reliance is placed on the expert reports of Dr Kodi both as to risk based on imputed political opinion and as a vulnerable woman. It is said that the Judge ignored those reports. The grounds are thereafter formulated as follows:

Ground one: The Judge erred in failing to engage with or consider the Appellant's claim that she was at risk on return to DRC as a member of a particular social group. This was raised in the skeleton argument, background material and the expert reports;
Ground two: The Judge erred in failing to find that the Appellant would be at risk on this account, having regard to his findings and the evidence relied upon. The appeal should therefore have been allowed on asylum grounds;
Ground three: The Judge erred in failing to find on the basis of his favourable credibility findings that the Appellant would be at risk by reason of her past persecution for imputed political reasons. This was addressed by Dr Kodi in his expert reports.

7. Permission to appeal was granted by Designated First-tier Tribunal Judge McCarthy on 27 February 2019 in the following terms:

> "1. Although I am reluctant to grant permission to appeal in this case given its protracted history and the mental health of the appellant, the grounds advanced by Ms Braganza identify an arguable legal error in the decision and reasons statement of Designated FtT Judge Shaerf that was issued on 9 January 2019.
> 2. There is no complaint regarding Judge Shaerf's finding that the appellant satisfies the high threshold in relation to article 3 ECHR and his decision to allow the appeal on that basis. As far as I can tell, there has been no application for permission by the respondent against that decision and Judge Shaerf's findings will stand irrespective of the outcome of any appeal to the Upper Tribunal.
> 3. The complaint is that Judge Shaerf failed to have regard to paragraph 15 of Ms Braganza's skeleton argument of 10 December 2018. Judge Shaerf had this before him as is clear by the fact he recorded it at paragraph 14(9) and commented on its contents at paragraph 29. Unfortunately, Judge Shaerf appears to have overlooked the contents of paragraph 15 in which Ms Braganza argued the appellant is a refugee because the developments in her case, particularly the extreme vulnerability arising from her mental health condition, brings her within the meaning of particular social group.
> 4. I can find no consideration of this argument in Judge Shaerf's findings. If the appellant is a member of a PSG, then when taken with his findings that the appellant meets the article 3 threshold, the likely conclusion would be that the appellant is a refugee. But in the absence of findings on this issue, it cannot simply be read across and the omission is an arguable legal error because it would affect the outcome in terms of the protection status granted to the appellant.
> 5. Although I think the above will be the central issue for the Upper Tribunal to consider, I note that the final ground of application argues that the appellant's past persecution for imputed political opinion would be a further refugee convention reason. Although I find this argument weaker, because it overlaps with the reasons why the appellant might face a real risk of serious harm as a member of a particular social group, I do not exclude it."

8. The matter comes before me to decide whether the Decision contains a material error of law and, if so, to re-make the decision or remit the appeal for rehearing to the First-Tier Tribunal.

Submissions and Conclusions in relation to Error of Law

9. Ms Braganza submitted that key to the Appellant's case is whether she is a member of a particular social group. The Judge did not consider this. The issue needs to be determined even though the Appellant is being granted status based on the Article 3 ECHR finding. The particular social group for which the Appellant contends is that of a woman, a lone woman or a woman with particular vulnerabilities. If it is accepted that the Appellant is a member of a particular social group then, on the basis of the Judge's other findings, her appeal should be allowed on that basis as she would remain at risk on return to DRC. Ms Braganza took me to various items of background evidence, some of which did not support her submissions. However, she also took me to the expert reports of Dr Kodi and the Home Office's Country Policy and Information Note entitled "Democratic Republic of Congo (DRC): Women fearing gender-based harm or violence" and dated June 2017 ("the 2017 CPIN"). I will deal with the substance of that evidence later in my decision.

10. Mr Avery accepted that the Judge did not deal with the appeal on this basis. The issue then becomes one whether the evidence is sufficient to justify a finding that the Appellant is at risk as a member of that particular social group. This would be a question of considering the Appellant's personal circumstances in light of the country evidence.

11. In light of Mr Avery's concession, I found an error of law in the Decision based on the Judge's failure to consider whether the Appellant is a member of a particular social group as the Refugee Convention reason engaged in this case. I also found that the Judge had failed to consider the expert reports of Dr Kodi.

12. Both parties agreed that I should redetermine the appeal rather than remitting it. Both agreed that I could do so on the papers. In light of that concession, it is appropriate to preserve a large part of the Decision which contains the Judge's report of the evidence he heard and considered and his findings. It is also obviously appropriate to preserve his conclusion that the appeal is to be allowed on Article 3 grounds and his finding as to the Appellant's nationality, which were not challenged.

13. For that reason, although I set aside the Decision consequent on my conclusion that there is an error of law disclosed, I preserve the whole of the Decision save for paragraphs [39] to [41] of the Decision. The latter paragraph concerns the possibility of the Respondent exercising discretion in relation to the asylum claim. Strictly, that does not fall to be set aside but, since I am redetermining the asylum claim, it is appropriate to do so.

RE-MAKING OF THE DECISION

14. I begin by adopting what is said at [13] of the Decision as to the relevant law concerning the burden and standard of proof in an asylum case. That does not need to be repeated. I apply the lower standard of proof. I recognise that, as

submitted, the issue here is whether a Refugee Convention reason applies in relation to the position which the Appellant will face on return to DRC. In that regard, although Ms Braganza did not develop submissions concerning her ground three concerning the continued risk on account of imputed political opinion, this was an issue on which permission was also granted and it is appropriate to consider continuing risk on both bases. I have of course set aside [39] of the Decision where Judge Shaerf made the finding that the DRC authorities would have no continuing interest in the Appellant.

15. I turn then to the Judge's finding as to the Appellant's core claim. At [36] and [37] of the Decision, he made the following findings:

> "[36] With this background as to her nationality, age and the medical evidence, I accept on the lower standard of proof that at least the core of the Appellant's account is credible: that she was born and lived in the DRC until she fled Goma; that she married into the military and had a number of children; that she was arrested and ill-treated at a demonstration in Kinshasa supporting the rights of women and subsequently witnessed the murder of her husband when she and two of her daughters were raped by soldiers of the rebel Mouvement du 23 Mars (M23).
> [37] … I am satisfied the Appellant left the DRC because of what happened to her and her family in Goma, including the death of her husband. I am also satisfied that by the time of the hearing before me, the Appellant is a broken woman and entirely reliant on her niece, [A], who may be occasionally assisted by her sister, [O].

16. It follows from the above citation that past persecution was accepted. As I have already noted above, "[t]he fact that an applicant has already been subject to persecution or serious harm or to direct threats of such persecution or such harm, is a serious indication of the applicant'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" (Article 4(4) of Directive 2004/83).

The Evidence

Country Expert Reports: Dr Muzong Kodi

17. Dr Kodi has provided two reports dated 28 June 2014 and 21 July 2017. He is a British citizen of Congolese origin. From 2005 to 2016, he was an Associate Fellow in the Africa Department of Chatham House. He is now an International Consultant. He has a lengthy CV showing working experience in international NGos focusing on human rights, governance and anti-corruption, in think tanks and research and teaching in African universities. He regularly visits DRC. Prior to his report dated 21 July 2017, he was in DRC from March to April 2017.

18. In his first report, Dr Kodi was asked whether the Appellant could return to DRC and live safely in Kinshasa notwithstanding her profile. He opined that it was unlikely that she would be able to do so as a failed asylum seeker returning from the UK diaspora which is viewed as an enemy of the DRC regime. He said that

there would be no protection for the Appellant anywhere in DRC, that there were no government agencies which could offer protection to civilians and that Congolese NGOs could not provide effective protection. There would not be any area in the country to which the Appellant could safely relocate. I pause there to note that Dr Kodi's opinion which was given in June 2014 is overtaken by the Tribunal's decision in BM and Others (returnees – criminal and non-criminal) DRC CG [2015] 293 (IAC) where the guidance given was that *"[a] national of the DRC whose attempts to acquire refugee status in the United Kingdom have been unsuccessful is not, without more, exposed to a real risk of persecution or serious harm or proscribed treatment contrary to Article 3 ECHR in the event of enforced return to DRC."*

19. In his second report, Dr Kodi was asked about the Appellant's situation as a lone woman in DRC if she were returned. He said the following:

> "[13] As a lone woman without family support and without recent experience of living in DRC, the Appellant would be confused and disoriented in a country that she left a few years ago and has changed for the worse since then. Without male protection, she would likely be at very high risk of being raped. As the Home Office rightly notes, "sexual and gender-based violence remain serious and widespread problems" in the DRC. Violence against women of any age, including rape and sexual slavery, has increased exponentially since the war began in the country in 1998. In the DRC, including in Kinshasa, women are routinely raped, as numerous reports by human rights organisations testify. Human Rights Watch, for instance, has reported several such cases, including that of women detained at the Kin-Maziere detention centre in Kinshasa who were repeatedly tortured with an electric baton. One of the women was reportedly gang-raped by five policemen. With guaranteed impunity, rapes of women and girls by state and non-state actors have continued unabated throughout the country."

20. After making reference to the worsening security situation throughout DRC, Dr Kodi goes on to say that:

> "[16] After so many years of conflict, with a large number of women and girls raped regularly by both the military, rebels and civilians, sexual violence has become tolerated or "normalized" in most regions of the DRC…Even at the societal level, where protection could be offered by the community to victims of rape by rebels, the impact of many years of conflict has been devastating…
> [17] This is confirmed by the Home Office who state that:
> *"Patriarchal attitudes and discrimination are prevalent and women and girls can be subject to rape and other forms of sexual violence."*
> …
> [19] Notwithstanding the fact that the DRC has adopted very progressive laws on sexual violence, they are not enforced because of the general tolerance of sexual violence, lack of political and a corrupt and ill-equipped justice sector. This has resulted in an enduring culture of impunity and total lack of protection for the victims of rape.
> [20] Congolese NGOs cannot provide effective protection to the Appellant either. They are weak, politicized and lack credibility. Congolese NGO activists are

> themselves in a rather precarious situation and are regularly harassed, arrested and even killed by the security forces…
> [21] The United Nations Mission for the Stabilisation of the Congo (…MONUSCO) does not do police work, as it is not part of its mandate. It may intervene – but does not always do so – in a case of mass repression of civilians but, from my own experience, it does not provide protection to an individual, such as a rape victim…"

Although much of this passage of the report is cross-referenced to a 2010 Oxfam report, the other, more recent background evidence does not suggest that this situation has changed for the better.

21. Asked whether the Appellant could safely internally relocate within DRC, Dr Kodi provides the following analysis:

> "[22] It is unlikely that it would be safe for the Appellant to be relocated. Because of her association with her husband who conducted activities on behalf of the MLC, a radical anti-Kabila political party, it is likely that the Appellant would be at risk of being arrested on arrival in Kinshasa or any other part of the DRC, if she were to be relocated. As explained above, the government of the DRC has for many years arrested members of opposition political parties, including members of the MLC, and those associated with them.
> [23] The Appellant would likely be identified as the wife of an MLC-supporting soldier during her interrogation by immigration officers on arrival in Kinshasa. She would likely be asked why she had fled from the Congo. It is unlikely, considering the information that I collected during my last visit to the DRC in June-July 2014, that the Appellant would be allowed to leave the airport as a free woman. She would instead run the risk of being detained on arrival. She would be tortured in detention and her human rights would be violated.
> [24] As explained above, the MLC, its members and those perceived to be associated to them, like the Appellant, are being targeted because the MLC is one of the main opposition parties to President Kabila's regime and one of the parties that are the most opposed to allowing Mr Kabila standing for a third term in 2016. The MLC and its supporters are still seen as a serious threat to the present regime."

Although the reference back to a previous section of the report which refers to arrests of political opponents relates to a period between 2007 and 2012, the other background evidence continues to refer to the DRC authorities targeting political opponents or those perceived as such, albeit there is scant mention of the MLC in more recent reports.

<u>The Home Office CPINs</u>

22. At [2.2] of the 2017 CPIN relied upon by the Appellant, guidance is given on women as a particular social group as follows:

> "2.2.1 Women in DRC form a PSG within the meaning of the Refugee Convention because they share an innate characteristic or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to their identity or

> conscience that they should not be forced to renounce it, and have a distinct identity which is perceived as being different by the surrounding society.
> 2.2.2 Although women in DRC form a PSG, this does not mean that establishing such membership will be sufficient to make out a case to be recognised as a refugee. The question to be addressed in each case will be whether the particular person will face a real risk of persecution on account of their gender."

23. Under the heading of "Assessment of Risk", the guidance considers discrimination, sexual harassment and rape, domestic violence (which does not apply in this case) and conflict related violence. In relation to discrimination, the following guidance is given:

> "2.3.2 Being female does not on its own establish a need for international protection. The general level of discrimination against women in DRC is not sufficiently serious by its nature and repetition as to amount to persecution or serious harm. However, decision makers must consider whether there are particular factors relevant to the person which might make the discrimination experienced so serious by its nature and repetition as to amount to serious harm or persecution. The onus is on the woman to demonstrate that she would be personally at risk of gender-based persecution, with each case considered on its merits."

Similarly, the section dealing with sexual harassment and rape makes the point that although this does occur, not all women will be at risk and it will be up to the individual to demonstrate that she will be personally at risk. Likewise, in relation to conflict related violence, the point is made that "single women without male support and protection may be able to demonstrate that within the conflict zone they would be at risk of serious harm".

24. In terms of protection, the 2017 CPIN accepts that "[a]lthough laws exist to protect women from sexual-based violence they are not always effectively enforced" and the same applies to deal with conflict related sexual violence. Although it is recorded that the government is working with international organisations to improve the protection offered and to implement a national strategy on sexual and gender-based violence, the report accepts that "progress is slow and although the state appears willing, it is unlikely to be able to provide effective protection to women living in conflict area who are at risk of gender-based violence".

25. Of course, the Appellant does not have to return to a conflict zone in DRC. The 2017 CPIN records at [2.5.3] that "[c]onflict related violence is predominantly in the eastern provinces so internal relocation to Kinshasa and other areas of the country not affected by civil conflict will generally be a reasonable option for a woman, provided it would not be unreasonable for her to do so."

26. Although I was told by the parties that the Home Office's guidance had not been updated since the 2017 CPIN, that is not the position. A cursory check of the published guidance reveals two CPINs, both dated September 2018, one relating to gender-based violence and the other to opposition to the government. As

reports published by the Respondent to which my attention should have been drawn by one or other of the parties, I consider it appropriate to have regard to what is the most up-to-date published guidance.

27. I deal first with the update to the 2017 CPIN. That is entitled "Gender-based Violence" and is dated September 2018 ("the First 2018 CPIN"). It repeats the guidance given in the 2017 CPIN concerning women as a particular social group. However, when dealing with the assessment of risk of discrimination, the passage cited above reads slightly differently as follows:

> "2.4.3 The general level of discrimination by state and non-state actors against women is not sufficiently serious by its nature and repetition as to amount to persecution or serious harm. However, widows and/or female-headed households may be at greater risk. Decision makers must consider whether there are particular factors relevant to the person which might make the discrimination experienced so serious by its nature and repetition as to amount to serious harm or persecution. The onus is on the woman to demonstrate that she would be personally at risk of gender-based persecution, with each case considered on its merits."

28. Similarly, when dealing with sexual harassment and violence, the passage has been slightly amended to the following:

> "2.4.6 Although sexual harassment and violence are prevalent, the likelihood of it occurring may be affected by factors such as location and socio-economic circumstances of the girl or woman, and not all women will be at risk. The onus is on the person to demonstrate that she will, on return, be personally at real risk of treatment that by its nature or repetition amounts to persecution or serious harm."

29. The sections dealing with effectiveness of protection and internal relocation are broadly the same as those in the 2017 CPIN.

30. Having regard to the Appellant's case that she is also at risk because of her imputed political opinion as an opponent of the regime, I also have regard to the CPIN entitled "Democratic Republic of Congo (DRC): Opposition to Government" also dated September 2018 ("the Second 2018 CPIN").

31. The Second 2018 CPIN continues to rely on decided country guidance cases which are broadly to the effect that it is only high-profile opponents who are at risk and that mere membership of an opposing political party or low-level activism is generally insufficient to excite the interest of the DRC authorities. However, the Second 2018 CPIN goes on to say this:

> "2.4.10 Given the political crisis since December 2016 and the uncertainty surrounding the build-up to the scheduled elections in December 2018, the country is in a state of heightened political tension, and political opponents are at increased risk of intimidation and arbitrary arrest. The state authorities are likely to be volatile and unpredictable in the uncertain political climate, and may react with harshness and brutality towards political opponents. Those with a known political profile or position in an opposition party are generally more at risk than ordinary members.

> 2.4.11 In general, opposition party leaders and/or high-profile activists who have come to the attention of the authorities and who are considered a threat may be at risk of persecution or serious harm, particularly at times of political tension and unrest. Rank and file party members and low-level activists are generally unlikely to be at risk of such treatment. However, whether a person is at risk of persecution depends on:
> • the prevailing political climate;
> • the nature and profile of their activities and the organisation they represent;
> • whether they have come to the attention of the authorities previously; and
> • if so, the nature of this interest."

Discussion and Conclusions

32. I begin with the Appellant's claim to be at risk on return as a member of a particular social group. I have referred at [4] above to Judge Shaerf's finding in relation to the Article 3 case that the Appellant is a highly vulnerable woman with mental health concerns and no contact with family members in DRC. She is a widow. Whether or not her fears of being targeted by the DRC authorities and/or rebel groups are objectively well-founded, she has subjective fears that she will be so targeted. She has lived previously in Kinshasa and Goma neither of which places are in a conflict zone and therefore internal relocation does not arise. However, having regard to the fact that the Appellant would be returning alone to a place where discrimination against women is accepted to exist, in her mentally vulnerable state, without family support and where she would be returning as a lone woman to a place where she has not lived for a number of years, I find that the seriousness of the discrimination she would face in her situation is sufficient to amount to persecution. I have in mind in particular Dr Kodi's opinion as cited at [19] above.

33. My finding to that effect takes into account also the high level of sexual violence against women in DRC. Whilst I accept that the Second 2018 CPIN points to a lower level of gender-based violence in Kinshasa in particular, I take into account the Appellant's highly vulnerable mental health, that she would be returning alone without support and unprotected by her husband. She is, according to her witness statement dated 6 December 2013, uneducated, she cannot read or write except for her name, was married young and had a number of children. Having regard to what is said about the relevance of a woman's socio-economic situation, and the Appellant's particular situation and vulnerabilities, I accept that she is at risk on return as a lone woman, even if returning to Kinshasa where the risk of the otherwise prevalent incidence of sexual violence is said to be lower.

34. For those reasons, I accept that the Appellant is at risk of discrimination amounting to persecution when coupled with the risk of sexual violence on account of her being a member of a particular social group namely a woman with particular vulnerabilities or a lone woman.

35. Strictly, it is not thereafter necessary for me to consider whether the Appellant is also at risk on return due to a political opinion which will be imputed to her

based on her previous arrest and detention. However, I do so for the sake of completeness and because I have set aside Judge Shaerf's findings in this regard.

36. I begin by noting that the incidents on which the Appellant relies in her claim occurred mainly in 2011 and 2012 which is not a very long time ago. Although her own political involvement was limited, her claim is founded mainly on the fact that she was arrested and detained in the past and will therefore be of interest now.

37. I do not accept Dr Kodi's opinion expressed in his first report that the Appellant will be at risk as a failed asylum seeker from the UK. His opinion runs contrary to later country guidance which considered all the material at that date. That country guidance has not been set aside.

38. I have some difficulty accepting that Dr Kodi's opinion concerning the risk to the Appellant on account of imputed political opinion in his second report assists the Appellant's case. He suggests that at least part if not most of that risk arises because the DRC authorities would view her as an opponent due to her relationship with her late husband who Dr Kodi says was a MLC supporter. This appears to rely on what is said at [6] of his second report as follows:

> "[6] It is plausible that the Appellant and her family lived in Goma in 2012. Her explanation of the reason why her husband, a soldier in the national army, was transferred to Goma is also plausible. In fact, she testified that her husband got into trouble for his political activities on behalf of the MLC…, one of the main opposition parties to President Joseph Kabila's regime…
> [7] I can hereby confirm that the Appellant's account is both consistent and plausible in the light of my knowledge and expertise of the circumstances of the DRC. Her testimony of the punishment of her husband, like other people who were considered by the government as close to opposition parties, and especially those, like her husband, who were perceived to be supporters of the MLC (which at the time represented the biggest threat to President Joseph Kabila's hold on power) is consistent with the accounts of human rights organisations, such as Amnesty International and Human Rights Watch…"

39. Dr Kodi appears to rely in this regard on what is said by the Appellant in her asylum interview (see list of documents referred to in his second report). However, I am unable to check that as there is no copy of the asylum interview in the bundles before me. The Appellant's witness statement makes no mention of this aspect of her claim. That statement is dated 6 December 2013. It pre-dates her referral for mental health assessment. There is no mention of the evidence in this regard in the earlier determinations nor any finding reached whether this part of her case is credible. I was not asked to hear evidence from the Appellant. Her mental state is such that she has not been able to give evidence at recent hearings. This element of her case is not referred to in her Counsel's skeleton argument before the First-tier Tribunal. Based on the insufficiency of evidence about this part of her case, I am unable to place any weight on this part of the Appellant's account.

40. That leaves only the risk based on the Appellant's previous arrest, detention and ill-treatment for taking part in a protest. That protest concerned the rights of women. Although I accept that the DRC authorities might perceive that also as opposition to the regime (since it is they who arrested, detained and ill-treated her at the time), based on the background evidence and the guidance given in the Second 2018 CPIN, I am unable to accept that this is a reason why the authorities would be interested her now. Indeed, Dr Kodi does not suggest that it would be. His analysis is based on acceptance of her case that the authorities would be interested in her due to her link with her late husband and his MLC support. I do not accept this part of the claim due to lack of evidence. I therefore reject the Appellant's claim that she would be at risk due to imputed political opinion.

41. However, as I have already found that the Appellant would be at risk due to her membership of a particular social group, it follows that I allow her appeal on asylum grounds.

DECISION

I am satisfied that the Decision contains a material error of law. The decision of Designated First-tier Tribunal Judge Shaerf promulgated on 9 January 2019 is set aside. However, I preserve paragraphs [1] to [38] of the Decision for the reasons given above.
I re-make the decision. I allow the Appellant's appeal on asylum grounds. The Appellant's appeal was also allowed by Judge Shaerf on human rights grounds (Article 3 ECHR) and that part of the Decision was not challenged.

The appeal is allowed on asylum grounds.
The appeal is allowed on human rights (Article 3) grounds

Signed

Dated: 2 May 2019

Upper Tribunal Judge Smith