



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-003012

First-tier Tribunal No: PA/00338/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 12th of June 2024

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

NM
(Anonymity Order made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Holt, instructed by Duncan Lewis & Co. Solicitors
For the Respondent: Mr C Bates, Senior Home Office Presenting Officer

Heard at Manchester Civil Justice Centre on 3 June 2024

DECISION AND REASONS

1. This is the re-making of the decision in the appellant's appeal, following the setting aside, in part, of the decision of First-tier Tribunal Judge Austin which had allowed the appellant's appeal against the respondent's decision to refuse her asylum and human rights claim.

2. The appellant is a national of the Democratic Republic of the Congo (DRC), born on 14 October 1982. She arrived in the UK on 17 November 2007 and claimed asylum on 20 November 2007. Her claim was refused on 18 January 2011 and her appeal against that decision was dismissed on 11 March 2011 by the First-tier Tribunal. The First-tier Tribunal concluded at that time that the appellant was not credible as to her claim to be at real risk of persecution consequent to her father's political engagement in domestic politics. The appellant lodged further submissions with the Secretary of State on several occasions, on each of which the submissions were refused without a right of appeal. Submissions lodged on 23 April 2020 were, however, treated as a fresh claim,

although the claim was refused on 28 June 2022. The appellant appealed against that decision.

First-tier Tribunal

3. The appellant's appeal came before First-tier Tribunal Judge Austin on 5 April 2023. In line with medical evidence filed with the First-tier Tribunal, the appellant was not called to give evidence, although she was in attendance at the hearing. Her husband, GN, a naturalised British citizen from the DRC, gave evidence and was cross-examined. The appellant's claim was based upon her own political profile as a result her past experiences in the DRC and her association with her father who was politically active in the DRC, her *sur place* activities in the UK and her perceived association with the UDP through her husband, as well as a result of her poor mental health and the risk of suicide.

4. Judge Austin noted that the appellant's political profile, based on her affiliation to a UK political organisation opposed to the DRC government, was at a low level and considered that she was not at risk on return to the DRC on that basis. However the judge considered that the appellant was at risk on the basis of a perceived association with the UDP, which she could not hide, due to her association with her husband. He also found, on the basis of the medical evidence, that the appellant was in a very poor state of mental health and a suicide risk and that she met the high threshold to show a risk of a breach of Article 3 on return. He accordingly allowed the appeal on asylum grounds/ humanitarian protection grounds and human rights grounds.

5. Subsequent to the judge hearing the appeal, the Upper Tribunal, on 18 April 2023, promulgated PO (DRC – Post 2018 elections) CG [2023] 00117 (IAC). The country guidance decision was placed on the Upper Tribunal website on 22 May 2023, after the judge signed his decision on 11 May 2023, but prior to the decision being promulgated and sent to the parties on 1 June 2023.

6. The respondent sought permission to appeal against Judge Austin's decision on two grounds: (1) the judge's decision to accept that there was a risk to the appellant consequent to political activity was materially flawed as it failed to take account of the country guidance in PO (DRC) which had been promulgated by the date the decision was sent to the parties; and (2) the judge had adopted an uncritical reliance upon a medical report which was based upon information provided to her by the appellant and which failed to consider the previous negative credibility findings regarding her account of what happened to her in the DRC.

Upper Tribunal: Error of Law

7. Following the grant of permission, the matter came before Upper Tribunal Judge (UTJ) O'Callaghan on 21 March 2024. The basis upon which Judge Austin had allowed the appeal on Article 3 grounds was clarified and agreed between the parties as (1) a real risk of serious harm at the hands of the Congolese authorities on return to the DRC because of the appellant's low-level political activity in the United Kingdom and her close association with her husband, and (2) a real risk of serious harm flowing from suicide ideation. It was accepted that no humanitarian protection case had been advanced before the judge and that the judge had not addressed Article 8, a matter upon which it was accepted that the appellant not cross-appealed.

8. It was conceded on behalf of the appellant that the first ground of appeal was made out and the UTJ accordingly set aside Judge Austin's decision in that regard.

However UTJ O’Callaghan found no error of law with respect to the second ground and he upheld Judge Austin’s decision in that respect. The relevant part of UTJ O’Callaghan’s decision is set out as follows:

“Discussion

Ground 1 – failure to follow country guidance

20. Mr Hussain properly accepted that NM could offer no defence to ground 1.

21. Relevant to this appeal, a tribunal remains seized of a case until its decision is promulgated. The decision is not made at the time a judge signs it: *RK (Algeria) v Secretary of State for the Home Department* [2007] EWCA Civ 868.

22. The Upper Tribunal and its predecessor have made country guidance determinations for over 20 years. In *R (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982, [2005] Imm. A.R. 535 the Court of Appeal held that a failure to identify and apply a relevant country guidance decision without good reason might amount to an error of law in that a relevant consideration had been ignored, and legally inadequate reasons had been given for the decision.

23. The Court of Appeal confirmed in *NA (Libya)* that although country guidance cases do not amount to binding precedent, they are authoritative in any subsequent appeal so far as that appeal relates to the country guidance issue in question and depends on the same or similar evidence. It is not the case that a country guidance decision could only be authoritative regarding appeals which were "subsequent" in the sense of "yet to be heard". The Court held that it would not be impractical or conducive to uncertainty to treat a country guidance case promulgated after the hearing but before promulgation of a tribunal decision as binding on the tribunal. The need to avoid uncertainty was outweighed by the principle that like cases should be treated alike and so applicable country guidance cases should be followed.

24. A failure by a tribunal to apply a country guidance decision unless there is good reason, explicitly stated, for not doing so might constitute an error of law in that a material consideration has been ignored or legally inadequate reasons for the decision have been given: *Roba (OLF - MB confirmed) Ethiopia CG* [2022] UKUT 00001 (IAC).

25. I find that the failure to consider extant country guidance in this matter was a material error of law in respect of NM’s asylum appeal, and the attendant article 3 appeal based upon a fear of the Congolese authorities, because at the very least headnote 5 to the decision in *PO (DRC – Post 2018 elections)* is relevant to the consideration of NM’s appeal.

26. Mr Hussain acted properly in conceding this ground of appeal.

27. I take this opportunity to observe an additional concern. At [50] the Judge noted a paragraph of an expert report from Karen O’Reilly dated 18 December 2019, which references two NGO reports that at the time of his decision were between twelve and thirteen years of age. That these NGO reports refer to a time when Joseph Kabila was President of the DRC, he stepped down from this position in 2019, appears not to have concerned the Judge. At [51] the Judge detailed: "I accept that the expert report was written from [sic] a position of expertise." No further reasoning is given as to why Ms O’Reilly is considered an expert in this matter.

28. The Judge failed to consider the guidance of the Supreme Court in *Kennedy v. Cordia (Services) LLP (Scotland)* [2016] UKSC 6; [2016] 1 WLR 597, at [43]-[44].

Noting that in Scots law a “skilled person” is an expert witness, Lord Reed and Lord Hodge confirmed in their joint judgment:

“43. Counsel agreed that the South Australian case of *R v Bonython* (1984) 38 SASR 45 gave relevant guidance on admissibility of expert opinion evidence. We agree. In that case King CJ at pp 46–47 stated:

“Before admitting the opinion of a witness into evidence as expert testimony, the judge must consider and decide two questions. The first is whether the subject matter of the opinion falls within the class of subjects upon which expert testimony is permissible. This first question may be divided into two parts: (a) whether the subject matter of the opinion is such that a person without instruction or experience in the area of knowledge or human experience would be able to form a sound judgment on the matter without the assistance of witnesses possessing special knowledge or experience in the area, and (b) whether the subject matter of the opinion forms part of a body of knowledge or experience which is sufficiently organized or recognized to be accepted as a reliable body of knowledge or experience, a special acquaintance with which by the witness would render his opinion of assistance to the court. The second question is whether the witness has acquired by study or experience sufficient knowledge of the subject to render his opinion of value in resolving the issues before the court.”

44. In *Bonython* the court was addressing opinion evidence. As we have said, a skilled person can give expert factual evidence either by itself or in combination with opinion evidence. There are in our view four considerations which govern the admissibility of skilled evidence:

- (i) whether the proposed skilled evidence will assist the court in its task;
- (ii) whether the witness has the necessary knowledge and experience;
- (iii) whether the witness is impartial in his or her presentation and assessment of the evidence; and
- (iv) whether there is a reliable body of knowledge or experience to underpin the expert's evidence. All four considerations apply to opinion evidence, although, as we state below, when the first consideration is applied to opinion evidence the threshold is the necessity of such evidence. The four considerations also apply to skilled evidence of fact, where the skilled witness draws on the knowledge and experience of others rather than or in addition to personal observation or its equivalent. We examine each consideration in turn.

29. Often a helpful preliminary question to ask when considering the weight to place on an expert report is whether the author is an expert on some or all the questions they have been asked to opine upon, or are they not an expert on those issues but a witness providing their own observations on issues of personal interest? In this matter, a further question to be asked is whether a three-and-half-years old report was of sufficient aid to help the Judge understand the political situation in the DRC as it existed in June 2023.

30. I note that Ms O'Reilly is a Protection Officer for the UNHCR with long experience of working in Africa. She has personal experience of assessing the asylum claims of DRC nationals on behalf of the UNHCR whilst she was based in various African countries and was clearly adjudged to be qualified to do so. I observe that her opinion featured in *GW (FGM and FGMPOs) Sierra Leone CG* [2021] UKUT 108 (IAC).

31. However, Ms Reilly's opinion is advanced upon consideration of information that is of some age. Much of her report relies upon elderly NGO reports, several of them over a decade old at the date of the hearing before the Judge. There is little if any consideration of the limited engagement of the UCP in Congolese politics, nor the post-January 2019 situation in the DRC subsequently addressed with care in *PO (DRC - Post 2018 elections)*.

32. The Judge appears to have failed to engage with the four key considerations which govern the admissibility of expert evidence identified by the Supreme Court in *Kennedy v. Cordia (Services) LLP (Scotland)*. The first consideration permits a judge to consider the age of the report and the material relied upon by an expert.

Ground 2 - approach to medical evidence

33. Though advanced with skill by Ms Ahmed, I consider that that the second ground is bound to fail because it is advanced on a misconceived basis. The Secretary of State's focus before the Judge, and again before the Upper Tribunal, is the acceptance by Dr Kiely and Dr Issacs that NM was truthful as to events said to have occurred to her in the DRC. It appears that neither practitioner was aware of previous adverse credibility findings made in respect of such history.

34. However, before the First-tier Tribunal the Secretary of State did not challenge the medical evidence as to NM being unfit to give evidence. Additionally, as Ms Ahmed accepted, the Presenting Officer appearing before the Judge did not challenge the medical evidence as to NM being significantly, and adversely, affected by her detention on three occasions in the United Kingdom.

35. The Judge detailed his awareness of the previous adverse findings of fact at [48] and made no positive finding as to NM's assertion of events in the DRC.

36. Dr Kiely is a GP with Specialist Interest in Asylum Seeker Mental Health. By a letter dated 14 January 2020, she confirmed that NM's mental health had deteriorated over the previous twelve months "directly in response" to the repeated periods of detention that she had been exposed to by the Secretary of State. In the weeks before the letter was written, NM's symptoms required the urgent input of the Early Intervention Team, a specialist mental health team who offer input and assessment for patients who are suffering with acute delusional or psychotic episodes. Dr Kiely recorded an escalation in NM's anxiety, flashbacks and hypervigilant state. There was concern that she was presenting as early psychosis. She was suffering ongoing severe complex PTSD. Her suicidal thoughts were recorded as "persistent and daily".

37. I note that at [54] of his decision the Judge expressly relies upon a paragraph from Dr Kiely's fitness to attend email, dated 17 March 2023. Dr Kiely opined that NM's mental health difficulties began in relation to her past experiences - which is not correct insofar as they pertain to persecutory events in the DRC - but there has been an escalation (which can properly be read as 'deterioration') in mental health following three detentions by the Secretary of State in a five-year period. These events have left NM with PTSD and suffering dissociative episodes, panic episodes, hyperarousal and at risk of suicide. I am satisfied that in referencing this paragraph of Dr Kiely's email, the Judge was clearly observing NM's present mental health, including suicide ideation, as resulting from adverse treatment in the United Kingdom, not the discredited assertion as to events in the DRC. The Judge was satisfied that the high threshold of article 3 was met in respect of the risk of suicide.

38. In the circumstances, the focus of the Secretary of State upon Dr Kiely, and by implication Dr Issacs, uncritically relying upon NM's assertion as to events in the DRC is not made out. There was no challenge by the Presenting Officer at the hearing as to NM having suicidal ideation. This ground is dismissed.

Resumed Hearing

39. I observe the guidance in *Begum (Remaking or remittal) Bangladesh* [2023] UKUT 00046 (IAC). The sole remaining issues to be addressed are the asylum appeal and the human rights (article 3) appeal relating to a fear of the Congolese authorities. These can properly be considered by the Upper Tribunal.

Decision

40. The decision of the First-tier Tribunal sent to the parties on 1 June 2023 is not subject to material error of law in respect of the human rights (article 3 ECHR) appeal concerned with the risk of suicide. Consequently [52] to [55] and the related conclusion in the Notice of Decision is preserved.

41. The decision of the First-tier Tribunal in respect of NM's asylum and human rights (article 3 ECHR) appeal concerned with a well-founded fear of/ serious harm from the DRC authorities is subject to material error of law and is set aside.

42. As NM did not advance an appeal on humanitarian protection grounds, I set aside the Judge's decision to allow the humanitarian protection appeal.

43. There was no counter appeal in respect of the Judge's failure to consider article 8. In the circumstances, this element of NM's human rights appeal has concluded.

44. The remaking of this appeal will be undertaken by the Upper Tribunal sitting in Manchester."

9. The case was listed for a resumed hearing for the decision to be re-made in accordance with Upper Tribunal Judge O'Callaghan's decision, in relation to the appellant's asylum and human rights (Article 3 ECHR) appeal concerned with a well-founded fear of/ serious harm from the DRC authorities.

Upper Tribunal: Resumed Hearing

10. The matter came before me on 3 June 2024. Neither the appellant nor her husband attended the hearing and no further evidence was produced for the hearing.

11. Both parties made submissions.

12. Mr Holt accepted that, in the absence of further country evidence or further evidence from the appellant/ her husband, the only relevant issue was whether the appellant's claim was made out on the factual matrix before the First-tier Tribunal. He relied upon the evidence of the appellant's partner (GN), as recorded at [24] of Judge Austin's decision, that his (GN's) brother had been attacked in the DRC on the day before the hearing because of his association with him (GN). Mr Holt also relied upon the judge's finding at [58] that the appellant's husband was a credible witness and submitted that the judge had, thereby, accepted that GN's brother was attacked the day before the hearing, which was after the change in regime in the DRC. He submitted that the gap in the categories of those at risk, as set out at [2] of the headnote to PO (DRC), was such that GN's brother could be found to fall within a risk category and to be at risk, despite the change in regime in the DRC, and that the appellant herself would therefore also be at risk on return on the same basis.

13. Mr Bates submitted that the appellant's difficulty was that the burden of proof lay upon her and she had failed to provide any evidence to support her claim that the risk

remained despite the change of regime. The findings which the judge had made did not take account of the material change in circumstances owing to the regime change in the DRC. It was not apparent, from his acceptance that GN's brother had been attacked in the DRC, how that related to the changed country circumstances. Neither did the judge provide details of the evidence about the attack. The absence of GN at the hearing meant that he could not be questioned about the attack or whether his brother had sought protection from the authorities, and he could not be questioned about his own view of the current regime. Mr Bates submitted further that the evidence of the limited number of DRC Embassy staff in the UK suggested that it was unlikely that the appellant's husband's organisation's activities would be monitored or even that the authorities in the DRC would be aware of them. In addition, there was no country evidence to show where the UPC stood in terms of Congolese politics, considering the large number of parties which had obtained seats in the elections, and it appeared that they were not even politically active any more.

Analysis

14. It is relevant to have regard to the headnote to PO (DRC), as follows:

"1. The change in Presidency, following the elections held on 30 December 2018 and the announcement on 10 January 2019 that Felix Tshisekedi was the winner of the elections, has led to a durable change to the risk of persecution to actual and perceived opponents of former President Kabila and current President Tshisekedi, such that the following general guidance applies:

- (i) Actual or perceived opponents of former President Kabila are not at real risk of persecution upon return to the Democratic Republic of Congo ("DRC").*
- (ii) Generally speaking, rank-and-file members of opposition political parties or political opponents of President Tshisekedi and/or the Sacred Union are not reasonably likely to be at real risk. That must be distinguished from high-profile opponents who may be at risk in some circumstances.*

2. The assessment of those at real risk of persecution for reasons relating to [1(ii)] requires a fact-sensitive analysis of the individual's profile, wherein the following (non-exhaustive) factors will be relevant:

- a. Whether an individual is a sufficiently high-profile opponent of President Tshisekedi having regard to their role and profile, including involvement in activity that is likely to have brought them to the adverse attention of the Tshisekedi regime.*
- b. The political party of which the individual is an officer or member, or to which the views of the individual are aligned.*
- c. The position of the political party or the views of the individual towards President Tshisekedi and the Sacred Union.*
- d. The nature and frequency of the individual's activities in opposition to Tshisekedi's Sacred Union and to what extent the authorities know about him/her.*
- e. It is unlikely that a rank-and-file member of any opposition party or group will have a sufficient profile such that they will be at real risk upon return without more.*

3. In particular:

- (i) *Members of the MLC and Ensemble pour le Changement are no longer at risk of being targeted.*
- (ii) *Members or supporters and activists of the UDPS are no longer at risk upon return to the DRC. The country guidance set out in AB and DM Democratic Republic of Congo CG [2005] UKAIT 00118, endorsed in MK DRC CG [2006] UKAIT 00001 and re-affirmed in MM (UDPS members - Risk on return) Democratic Republic of Congo CG [2007] UKAIT 00023, as far as it relates to the risk of persecution of UDPS members and activists, should no longer be followed.*
- (iii) *Leaders, members and activists associated with the Congolese Support Group (“CSG”) are not at risk upon return to the DRC on account of their actual or perceived political opinion or sur place activities in the UK.*
- (iv) *Simply being a journalist, media worker or blogger is not likely to lead to a person facing treatment that amounts to persecution or serious harm unless they are considered to be a sufficiently high-profile opponent of President Tshisekedi.*
- (v) *Persons who have a significant and visible profile within APARECO (leaders, office bearers and spokespersons) may be at risk upon return to the DRC. Rank-and-file members are unlikely to fall within this category.*

4. *Failed asylum seekers are not at risk on return simply because they are failed asylum seekers and there is no basis in the evidence before us to depart from the guidance set out in BM and Others (returnees - criminal and non-criminal) DRC CG [2015] UKUT 293.*

5. *There is no credible evidence that the current authorities in the DRC are interested in monitoring the diaspora community in the UK; nor is there any credible evidence that the intelligence capability exists, even if there were the appetite.”*

15. The guidance in PO (DRC) makes it clear that the political situation in the DRC has substantially changed since the events relied upon by the appellant in relation to her own, limited, political involvement and the activities of her husband, and that the categories of those at risk on return to DRC on account of their political activities has significantly changed. It was because of Judge Austin’s reliance on outdated country information and his findings made without sight of PO (DRC) that his decision was set aside, and the intention for the resumed hearing was that the appellant would produce current evidence to support her claim to remain at risk despite the change in the country situation. However, as Mr Holt accepted, no further evidence has been produced.

16. Judge Austin maintained the previous adverse credibility findings about the appellant’s experiences in the DRC in terms of political involvement and associations, and found that her political profile in the UK was at a low level. Although he found that she would be at risk on the basis of her association with her husband, he did not make any findings to the effect that her husband was a high profile political activist, but simply relied upon his position as deputy secretary to the Manchester branch of the UDP opposition party. On the basis of those findings, the country guidance in PO (DRC) clearly did not support a claim that the appellant’s husband would currently be of any interest to the current regime, either arising from opposition activities in relation to the previous president, President Kabila (headnote 1(i)), or from any low-level

opposition to President Tshisekedi (headnote 1(ii) and 2). Further, as UTJ O’Callaghan observed at [25] of his decision, headnote [5] made it clear that there was a lack of credible evidence that the current authorities in the DRC were interested in, or capable of, monitoring the diaspora community in the UK. That was indeed consistent with the evidence in the recent CPIN of November 2023, as relied upon by Mr Bates, in relation to the limited size of the DRC Embassy in the UK. Accordingly, in the absence of any expert evidence or other country evidence to suggest otherwise, the effect of the guidance in PO (DRC) was that there remained no risk to the appellant or her husband in light of the changed country situation.

17. Mr Holt, however, relied upon the one aspect of the evidence before Judge Austin which he submitted suggested that there remained an adverse interest in the appellant’s husband, and which was not precluded by the general guidance in PO (DRC), namely the fact his brother was attacked in April 2023 because of his association with him, after the regime change. However I agree with Mr Bates that that cannot be a proper basis to find that, despite the recent country guidance, there was sufficient to make out a case for an ongoing risk on return to the DRC. As Mr Bates submitted, Judge Austin provided no details of the attack in terms of who was the aggressor and what was the motivation behind the attack, and neither did he assess the account in the light of the current country situation. There was nothing to suggest that the attack was carried out by a member or supporter of the current regime as opposed to a disgruntled member of the former regime, and neither was there any evidence to suggest that the incident had been reported to the authorities and that, if it had, the authorities would have endorsed the attack and would not have pursued the attacker and provided adequate protection to GN’s brother. As Mr Bates properly submitted, those were all matters which could have been put to GN and clarified by him had he been available for cross-examination at the hearing, but he did not attend. Likewise, as Mr Bates submitted, the absence of any further evidence from GN meant that his current position vis-à-vis the DRC government was not entirely clear, since the evidence in his most recent statement of 19 January 2023 was that his opposition party was awaiting the outcome of the June 2023 election and that it was a waiting game for the party in exile. There was no evidence as to the position of the party, and GN himself, following the election. Had GN attended the hearing, the matter could have been clarified, but in his absence it was simply not clear where he stood.

18. In the circumstances, in the absence of any further background country evidence or expert evidence addressing the appellant’s particular circumstances and those of her husband, and addressing any proper basis for fearing return to the DRC, at the current time, the country guidance in PO (DRC) is effectively determinative of her claim. In the light of that guidance the appellant cannot demonstrate any basis for her claim to be of adverse interest to the current regime in the DRC, either on account of her own activities or by way of association with her husband and his political activities. I do not accept that she has shown that she would be at risk on return to the DRC on such a basis and her appeal accordingly fails on protection grounds.

19. As accepted by Mr Bates, and as determined by UTJ O’Callaghan, Judge Austin’s decision on the appellant’s Article 3 claim based on her mental health and suicide risk is, however, maintained, and her appeal is allowed on those grounds.

DECISION

20. The making of the decision of the First-tier Tribunal having been set aside, the decision is re-made by the appellant’s appeal being dismissed on asylum and Article 3 human rights grounds in relation to a fear of/ serious harm from the DRC authorities.

Judge Austin's decision allowing the appellant's appeal on Article 3 health grounds is, however, maintained and the appeal is accordingly allowed on that basis.

Signed: S Kebede
Upper Tribunal Judge Kebede

Judge of the Upper Tribunal
Immigration and Asylum Chamber

3 June 2024