Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/04480/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision Promulgated**
On 5 February 2015	**On 9 February 2015**

Before

THE HONOURABLE MRS JUSTICE PATTERSON DBE
DEPUTY UPPER TRIBUNAL JUDGE FROOM

Between

A Y
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr C Talacchi, Counsel
For the Respondent: Mr C Avery, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of the Democratic Republic of Congo ("DRC"). She has appealed with the permission of the First-tier Tribunal against a decision of Judge of the First-tier Tribunal Onoufriou, promulgated on 26 November 2014, dismissing her appeal against a decision of the respondent, made on 18 June 2014, to remove her to DRC, having refused her asylum application.

2. The core of the appellant's asylum claim is that she had been a member of a women's group known as "Les Abeilles" in DRC as a result of which she was

arrested and detained in March 2004 and accused of being anti-government. During her two-week detention she was interrogated, tortured and raped. She escaped and made her way to the UK. Since arriving in the UK she has been politically active as a member of APARECO and also the Congo Support Group ("CSG"). She believes her frequent attendance at meetings and demonstrations would be known to the authorities in DRC.

3. Judge Onoufriou rejected many parts of the appellant's account as lacking credibility. He did not believe her account of detention and ill-treatment in DRC. He also found her claimed membership of APARECO was not genuine. However, he found she had been a low-level member of CSG in the UK. He accepted that, were the appellant to be perceived as an active opponent of the government, she would be at risk on return. However, he reasoned that a low-level member of the CSG would not necessarily come to the attention of the authorities. He considered the background evidence and case law shown to him and then stated as follows (paragraph 38):

> "I have not been provided with any evidence that the DRC authorities have checked any particular websites and in particular that the appellant is shown on those websites as being an active political opponent to the DRC authorities. The photographs she provided appear to relate to two demonstrations at most and both of them in the last few months prior to this appeal and yet she claims to have attended numerous demonstrations over the years but there are no photographs from previous years. I am of the view that due to the recent date of the photographs they may have been contrived for the purpose of this appeal. I am, therefore, not satisfied that the appellant is at risk of persecution, either because of any political activities in the DRC or any future political opinion because of her *sur place* activities in the United Kingdom."

4. The Judge also dismissed the appeal on article 3 and article 8 grounds.

5. Counsel who prepared the grounds seeking permission to appeal, Mr Talacchi, made four points: (1) the Judge's reliance in making an adverse credibility finding against the appellant on the non-attendance at the hearing of the appellant's brother was perverse; (2) the Judge had made no finding regarding the background evidence that failed asylum seekers are identified and taken for interrogation on return to DRC, which detention may last up to one month; (3) the Judge failed to make any finding on the risk of gender-related violence; and (4) the use of the words "not necessarily" in paragraph 38 of the decision showed the Judge had applied too high a standard of proof.

6. The appellant was granted permission to appeal by Judge of the First-tier Tribunal Robertson. Although she thought the first and last grounds were not made out, she granted permission to appeal on all grounds.

7. The respondent has filed a response opposing the appeal. This argues the Judge had been entitled to find the non-attendance of the appellant's brother was in indicator that the appellant was not credible. The Judge had taken into account the background evidence in reaching his conclusion on risk on return.

8. We heard submissions on whether the Judge's decision contains a material error of law such that it should be set-aside and re-made.

9. Mr Talacchi did not challenge the Judge's adverse findings but said his starting-point was the positive finding that the appellant had participated in CSG activities in the UK since 2011. He said the important point was how the appellant would be perceived on return. In the country guidance decision of *BK (Failed asylum seekers) DRC CG* [2007] UKAIT 00098 it was held that returnees who were failed asylum seekers would be questioned[1]. He said there was a "lacuna" in the Judge's findings about this. The appellant would be questioned about her status and she could not reasonably be expected to lie about her political beliefs[2]. Mr Talacchi then referred to the Judge's assessment of the background evidence, particularly the Fact-Finding Mission to Kinshasa report of November 2012 ("FFM") and the assessment of that evidence found in the judgment of Philips J in *P (DRC), R (on the application of) v SSHD* [2013] EWHC 3879 (Admin) at paragraphs 47 to 49. He argued that the appellant could be distinguished from an ordinary failed asylum seeker because of her political activities, as found by the Judge. The Judge had not made findings about what the appellant would say if she was questioned on arrival in DRC.

10. Mr Talacchi argued that the Judge had failed to consider the additional risk to this appellant in the situation that she will be questioned on return arising from the fact she is a woman. He also argued the Judge had given weight to an irrelevant matter, namely, the non-attendance of the appellant's brother at the hearing. There was no basis for finding this undermined the appellant's claim.

11. Mr Avery said the Judge was clearly aware that, if the appellant were perceived to be an opponent of the regime, she would be at risk on arrival. In that context, having considered the background evidence about what happens on return, the Judge concluded he was not satisfied the appellant's case was made out. Being a low-profile member of the CSG was not enough. His decision was perfectly sound and well reasoned. There was insufficient evidence to show that the appellant's gender would have made a difference so the Judge's failure to address it was not material to the outcome. The point about the appellant's brother's non-attendance went to the issue of contact with family members in DRC and the Judge was entitled to take it into account.

12. We reserved our decision.

13. We have concluded the Judge did not make a material error of law such that his decision dismissing the appellant's appeal must be set aside. Our reasons are as follows.

[1] Although not provided by Mr Talacchi, we find reference to this point in paragraphs 188-189 of *BK*. The fact a failed asylum seeker has a *laissez passer* will arouse interest.

[2] Again we were not assisted by the citation of any authority on this point but we assume Mr Talacchi had in mind *RT (Zimbabwe) & Anr v SSHD* [2012] UKSC 38 in which the Supreme Court held that to expect an individual to profess political beliefs he did not hold in order to avoid persecution was just as much a breach of his Refugee Convention rights as to expect him to conceal his true beliefs.

14. As noted, Mr Talacchi did not challenge the Judge's adverse credibility findings. The only parts of the appellant's claim accepted by the Judge were that she had been a low-profile member of the CSG since 2011 and she may have attended some recent demonstrations. The Judge directed himself correctly in law as to the burden and standard of proof in paragraph 27. He made his findings in the context of the background evidence, some of which he set out in paragraphs 29 to 33. On the basis of his findings of fact, we find the Judge's overall conclusion on risk on return was one he was entitled to reach. We shall deal with the grounds of appeal in the order in which they are set out in the application for permission to appeal.

Ground 1

15. We find the Judge was entitled to draw an adverse inference from the non-attendance of the appellant's brother at the hearing. By way of background, we noted that the appellant stated in her witness statement dated 15 June 2010 that mere association with her brother would place her at risk on return. At the hearing before Judge Onoufriou the issue gained additional importance because the appellant said she had no contact with her family in DRC. The Judge asked the appellant about this because he found it "very strange" that she would not have remained in contact with them. The appellant had said she had not asked her brother whether he had had any contact with them either (see paragraph 16). It was appropriate for the Judge to try to clarify why there was no contact with the family given they would be a good source of information as to the current situation in DRC in terms of the authorities' interest in the family. On the basis of this evidence, the Judge was entitled to find the appellant had been trying to enhance her appeal (paragraph 34.3). In any event, this issue was one of a number of reasons given by the Judge for his overall assessment and it cannot be said that this matter carried undue weight in his deliberations.

Ground 2

16. On the face of paragraph 38, there is no assessment of the residual risk to the appellant as a failed asylum seeker returning from the UK. Mr Talacchi characterised this as a "lacuna" in the Judge's findings. However, we find no error of law in the Judge's approach.

17. As Mr Talacchi acknowledged, the starting-point for the Judge was the most recent country guidance of *BK*. The head note of that case states that failed asylum seekers do not per se face a real risk of persecution or serious harm or treatment contrary to article 3. It would have been an error of law for the Judge to depart from that finding unless there were sufficiently strong background evidence to justify such a course. The Judge set out much of the background evidence and expressly referred to the FFM report on which Mr Talacchi placed particular emphasis. However, we do not accept that this was evidence requiring a departure to be made from existing country guidance.

18. It is unhelpful to pick out one paragraph from the FFM report, such as the first subparagraph of paragraph 4.1, which seems to be the reference relied on in paragraph 9 of Mr Talacchi's written grounds. The report must be read as a

whole and chapter 4 contains a wide range of opinions from interested parties about the treatment of returnees. In its Country Policy Bulletin of November 2012 the respondent stated that the 'consensus' within the FFM report was that there was no risk to failed asylum seekers per se. This assessment was challenged in *P (DRC)* and rejected by Philips J, who found the respondent's reliance on the Bulletin and on *BK* as justified and rational (see paragraphs 40-42 of his judgment). We respectfully adopt his analysis and find that there is no change to the risk facing failed asylum seekers.

19. We note that Mr Talacchi relied on later paragraphs from the same judgment but they form part of the Judge's assessment of the risk to criminal deportees, not failed asylum seekers[3]. These paragraphs did not therefore assist us.

20. We conclude the position in terms of procedures for interviewing returnees has not changed materially since *BK*. It follows the Judge did not err by relying on the main holding from that case. A failed asylum seeker is not at risk on return by reason of being a failed asylum seeker from the UK. She will be interviewed to establish who she is ('*proces verbale'*) but that does not mean she faces a real risk of ill-treatment. The point about not being forced to lie does not arise.

21. If we understood him, Mr Talacchi also broadened the point in his oral submissions and argued that the First-tier Tribunal Judge had not considered the risk on return as a failed asylum seeker who had been active in the CSG. However, that is unarguable in our view. It is entirely clear that the Judge had this additional feature of the appellant's case firmly in mind when he arrived at his ultimate conclusion on risk. As said, we find this was a conclusion which it was open to the Judge to arrive at on the basis of the evidence and country guidance available to him.

Ground 3

22. We accept there is nothing in the decision to indicate the Judge gave separate consideration to the possibility that the appellant faced an enhanced risk on return as a woman and that there was background evidence of gender-based violence in DRC before the Judge. Although he has not recorded her submissions, counsel for the appellant relied on a skeleton argument which set out extracts from the background evidence on this point (see paragraphs 13 and 45 to 52).

23. However, if this amounted to an error on the part of the Judge, we would not find it material to the outcome of the appeal. We agree with Mr Avery that, properly understood, the evidence does not provide a sufficient evidential basis for finding an enhanced risk. The appellant in *BK* was female. The 'consensus' from the FFM report is not gender-specific. On our reading of the FFM report there is not a clear weight of evidence suggesting female gender adds materially to the risk to failed asylum seekers on return to DRC. The

[3] The position for deportees, not covered in *BK*, was significantly different: they would be held in custody in circumstances which could breach article 3 of the Human Rights Convention.

paragraphs cited in the skeleton argument we have referred to are not representative of the whole of the report or background evidence. We do not find that, had the Judge given this argument consideration, it would have led him to reach a different conclusion.

Ground 4

24. Finally, we can deal shortly with Mr Talacchi's last ground about the Judge's self-direction. The use of the sentence "she would not necessarily come to the attention of the DRC authorities" in paragraph 38 of his decision is unfortunate but we regard it as nothing more than loose wording. It is important to read it in context. The Judge directed himself clearly in paragraph 27 and the decision read as a whole satisfies us that he applied the low standard of proof when making his findings.

NOTICE OF DECISION

The Judge of the First-tier Tribunal did not make a material error of law and his decision dismissing the appeal shall stand.

Signed **Date 6 February 2015**

Judge Froom,
sitting as a Deputy Judge of the Upper Tribunal