



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/00725/2014

THE IMMIGRATION ACTS

Heard at Field House
On 11 July 2015

Determination Promulgated
On 20 July 2016

Before

UPPER TRIBUNAL JUDGE JORDAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

STEVEN KADIMA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Secretary of State: Mr P. Duffy, Home Office Presenting Officer

For the respondent: Mr G. Denholm, Counsel, instructed by Luqmani Thompson & Partners Solicitors

DECISION AND REASONS

Introduction and the decision in the First-tier Tribunal

1. For the reasons upon which I intend to expand later, this is an entirely unnecessary appeal and is a waste of legal and judicial resources in a jurisdiction which has sufficient workload without being required to conduct hypothetical appeals which serve no useful purpose. Nevertheless, for the reasons that I will subsequently provide, I am required to make a decision in relation to a deportation decision where there is no foreseeable prospect of deportation being effected given the fact that Mr Kadima has been sentenced to a period of 17 years imprisonment and that it will be many years before he is eligible for release at which point anything I may say in 2016 as to the risk on return will only be of historic interest. As a serving prisoner the benefits that would normally arise as a result of a finding that an individual is a Convention refugee have no impact on

this appellant. Similarly, the dismissal of his appeal will have no tangible consequences. The sequelae of my decision, if I commit a legal error in its preparation, may result in an appeal which is likely to be conducted at further significant cost to the public purse for no obvious advantage to anyone.

2. Both sides, however, insist I am bound to make a decision; Mr Kadima blames the Secretary of State for her failure to withdraw the deportation decision and order, the Secretary of State blames the appellant for pursuing his appeal to the Tribunal.
3. The Secretary of State appealed against the determination of First-tier Tribunal Judge Paul promulgated on 31 December 2014 allowing the appeal on asylum and human rights grounds. For the sake of continuity, I shall refer to Mr Kadima as 'the appellant' as he was before the First-tier Tribunal.
4. On 9 July 2013, the Secretary of State refused to revoke a deportation order made on 9 March 2009 following the appellant's conviction on 10 August 2006 for offences of robbery and handling an offensive weapon. In my decision of 4 December 2015, I found that First-tier Tribunal Judge Paul's determination contained an error on a point of law.
5. Although the determination in *BM and others (returnees – criminal and non-criminal)* DRC CG [2015] UKUT 00293 (IAC) (McCloskey J, President and Upper Tribunal Judge Jordan) post-dated the Judge's determination, the First-tier Tribunal Judge failed to consider the additional material referred to by the Secretary of State in the decision letter and on which the Upper Tribunal based its reasons for departing from Phillips J's decision in *R (P and R – DRC) – v – Secretary of State for the Home Department*. The background material considered by the Upper Tribunal in March 2015 was, for the most part, the same material in December when the determination in the instant appeal was promulgated. The Judge's approach was flawed and amounted to an error on a point of law.
6. In the course of the hearing on 4 December 2015, Mr Denholm informed me that, on 27 November 2015, the appellant had been convicted of an offence of attempted murder. Sentencing was deferred until a date not before 18 December 2015. In the error on a point of law decision, I suggested that this would impact upon the re-making of the decision. Indeed, depending upon the final outcome of the criminal proceedings, I suggested it might well be that the Secretary of State would withdraw the deportation decision until such time as the appellant has served any further custodial sentence (or period of confinement). For this reason, I directed that the appeal be adjourned until 18 February 2016 by which time the respondent was to have decided whether to withdraw the deportation decision that is the subject of this appeal.
7. On 18 December 2015 the appellant was sentenced to a term of 17 years imprisonment.

8. At the For Mention Only hearing on 18 February 2016, I was informed the Secretary of State had decided to make a fresh decision which covered the latest conviction. I was disinclined to conduct a hearing at considerable public expense which was confined to the issue of whether the Secretary of State's refusal on 9 July 2013 to revoke a deportation order made on 9 March 2009 (following the appellant's conviction on 10 August 2006 for offences of robbery and handling an offensive weapon) violated the appellant's human rights. Given the latest conviction, the result of the appeal would be of academic interest only. I also stated that the respondent must consider the utility of such a decision, even if the hearing encompassed the 18 December 2015 conviction, if it was the intention of the Secretary of State to require the appellant to serve his sentence in the United Kingdom thereby rendering it likely that the appellant would not be eligible for release for many years.
9. The Secretary of State made a fresh decision on 18 March 2016. (It was agreed at the hearing that this was the relevant decision, although I was shown other decisions made at around the same date but only in draft form.)

The certification of the asylum claim under s. 72

10. The asylum appeal was certified pursuant to s. 72 of the Nationality, Immigration and Asylum Act, 2002 excluding the applicant refugee protection. Mr Denholm did not seek to challenge the certification or to introduce evidence to rebut the presumption. Hence there is no asylum appeal before me. However, there remains an in-country appeal on the basis of a human rights claim which is co-extensive with the asylum claim. The human rights claim is directed towards whether the hypothetical removal of the appellant would violate the appellant's Article 2 and 3 rights, that is, whether the appellant is at real risk of serious harm, a risk equivalent to persecution in the asylum claim.

The remaining claim under Articles 2 and 3 ECHR

11. For the sake of completeness, a human rights claim is normally assessed by reference to whether there is an imminent risk of removal. If no imminent removal then there is no risk. Were I to be required to assess the risk to the appellant on the basis that he will be removed in 8 or 9 years time, his human rights claim would (it is accepted) fail because it is inevitably far too speculative to decide what might happen in so distant a future. We therefore come back to making a decision on a deportation decision that the Secretary of State has decided not to withdraw but in circumstances where there is no foreseeable prospect of its being effected for the present. This is the reason for my opening remarks that this appeal is entirely unnecessary and a waste of legal and judicial resources.

12. The focus moves to the decision of 18 March 2016.

The Immigration History

13. The appellant entered the United Kingdom on 12 June 2000, aged 13, accompanying his father, Hoy Kadima. On 14 November 2001, the appellant's father was granted asylum along with the appellant as a dependent. Somewhat less than six years later, on 10 August 2006, when the appellant was aged 19, he was convicted at St Albans Crown Court of robbery and sentenced to 33 months imprisonment and of handling an offensive weapon for which he was sentenced to 6 months imprisonment concurrent. In due course, on 3 August 2007, the appellant was served with the notification of his liability for deportation which resulted, on 4 November 2007, with the revocation of his asylum status as a result of his criminal conviction. That revocation is not now challenged. On 4 February 2008, the Secretary of State decided to make a deportation order which resulted in the appellant's appeal being heard in the Tribunal. By a determination promulgated on 16 May 2008, the appellant's appeal was dismissed and a deportation order made by the Secretary of State on 9 March 2009 was served on the appellant on 26 March 2009.
14. After several more efforts to prevent removal, the Secretary of State treated the various submissions as an application to revoke the deportation order, which had not by then been put into effect. The applicant sought judicial review of the Secretary of State's refusal. This then led to the appeal being allowed on human rights grounds which, as I have said above, was legally flawed and which I have since set aside. In the meantime, the appellant has, of course been convicted of the offence of attempted murder.
15. The basis of the appellant's present claim is that the appellant will suffer serious harm or death on account of his father's connections with Rwandans. In this context, it is noted that the appellant's family comes from the Kasai Oriental Province, a region associated with opposition to Kabila but not close to the border with Rwanda. This claim was raised by Mr Denholm before the First-tier Tribunal (see, for example, paragraph 39 of Judge Paul's determination) but left unresolved by the First-tier Tribunal Judge.

The case law

16. In *AB and DM (Risk categories reviewed – Tutsis added)* DRC CG [2005] UKIAT 00118, the Tribunal considered the appeal of AB whom the Adjudicator had found was a credible witness. One key element of his claim was his part-Rwandan ethnicity. The Adjudicator was satisfied that those of Rwandan descent had in the past been the subject of adverse attention by the DRC authorities. It was argued that AB would fall into a risk category as someone having Rwandan connections or being of Rwandan origin.
17. Mr Kennes had given his expert opinion that if AB were suspected of being Rwandan by association, he would fall into a risk category. If there was no evidence of this, he would not be at risk. The transfer of information between authorities in the DRC was not systematic. It might happen in some cases but not in others. The immigration services had instructions to arrest all those

thought to be Rwandan or Tutsi. If he was considered to be of Rwandan origin, he would be at risk from the authorities. The assessment had to be viewed in the context of the complexity of the previous conflict, involving (amongst others) the government army and the rebel group controlled by Rwanda. The position was exacerbated by continuing concerns that the Rwandan government was interfering in the Kivu region resulting in mass demonstrations across the DRC in June 2004 protesting against the activities of the Rwandans and a reinforcement of the anti-Rwandan and anti-Tutsi sentiment: the Rwandans were seen as the cause of the evil that had come over the country. Mr Kennes thought that resentment against anything Rwandan was very high. This led to the Tribunal summarising the risk in paragraph 51 (i) of its determination in these terms:

We confirm as continuing to be a risk category those with a nationality or perceived nationality of a state regarded as hostile to the DRC and in particular those who have or presumed to have Rwandan connections or are of Rwandan origins.

18. *MK (DRC) CG [2006] UKIAT 00001 confirmed AB and DM (Risk categories reviewed – Tutsis added)*. More recently, *BM and Others (returnees – criminal and non-criminal) DRC CG [2015] UKUT 00293 (IAC)* referred to *AB and DM* without attempting to alter its conclusions and spoke of the events that have transpired since. Hostilities between government sources and the FDLR (Forces démocratiques de liberation du Rwanda) continued. This escalated in 2009 during a joint DRC/UN military operation. The UN peace keeping force ultimately withdrew from the DRC in 2011. The country continued to suffer from the activities of militias, bandits and its official army. Widespread violence continued. By 2011, the UN General Assembly reported that the “*overall human rights situation*” in the DRC continued to be “*of serious concern*”. There were grave human rights violations by armed groups and members of the national security forces. These included acts of arbitrary execution, rape, arbitrary arrest and detention, torture, looting and cruel, inhuman and degrading treatment. This was especially prevalent in the eastern provinces of the country. State security forces were acting with impunity.
19. The Tribunal suggested, taking into account both history and context, it might not be inaccurate to describe the present overall situation in the DRC as one of relative peace and stability. Yet there remain the undisputed factors of enduring human rights violations, which include in particular the repression of political opposition, deplorable prison conditions, the lack of accountability of state agents and a weak judiciary:

In short, the DRC is a state in which the rule of law is both fragile and fickle.

The appellant’s claim

20. It is at this stage that I turn to look at the father’s claim to have been at risk in 2000, some 16 years ago. In his SEF, the appellant's father, Mr Kadima claimed political asylum. The claim is set out at pages 75 and 76 of the appellant’s bundle filed with the Upper Tribunal following the directions of 14 March 2016. The

father claimed that he was a risk from Kabila soldiers and the government as he was a businessman who had a farm and abattoir in the area of [Mbuji-Mayi] and was also selling and negotiating in the diamond business. He had business partners who were from Rwanda. He said in a style which I have not attempted to amend because of the immediacy that the original version carries:

Th will ey used to come and do business with me, selling cows since 1995. All Rwandese businessmen coming with their cows were accommodated in my apartment. When the war broke out in August 1998 between Rwanda and Congo I had three Rwandans in my flat. [Three names provided.] On 12 November 1998 I was surprised to see a dozen of the military at my home. They came and arrest everybody including my three Rwandese partners. The same night I was arrested, they killed the three Rwandese. I was tortured and showed Rwandese clothes cover in blood. I was beaten with a long stick and asked several questions about Rwandese rebels who were approaching the town...around 280 km near Kabinda. My first son who was also arrested with me was found three days later dead, killed by military with a bullet on his back. My brother was also arrested and never been seen up to now. I was in...prison for over nine months, beaten and tortured by military who wanted information on Rwandese rebels. As my family were putting pressure on them, I was transferred...

The fact that I have accommodated Rwandese businessmen in my flats and living with them, I was considered as someone who supported rebels. The fact that I am from Luba tribe...I was a victim of what I consider as a conspiracy against me just because I have given shelter to people I do business with and I know from long time.

My family receive the same treatment. My wife and children were also arrested. My son was killed...

I was arrested without apparent reasons. I was put in jail for more than nine months. I was abused and tortured. My son was killed by military as a result of me accommodating business partners from Rwanda. I...suffered a lot in both prisons. I was considered by military as an informer, a traitor and someone who provide information to rebels. I was also ill treated because I was Luba. Following all the events I was threatened to be killed if I failed to provide names of other rebels. I decided to leave my country because I risked my life since I was a victim of something I did not know.

21. The appellant provided a long statement at pages 4 to 18 of the bundle which, inevitably, only touches in part upon his father's claim. However, the appellant's father also provided a statement found at pages 19 to 31 of the bundle in which he repeated his claim but in greater detail. He described how he had a long history of trading with Rwandans. The family farm was located at Mbuji-Mayi, the capital of Kasai Oriental, a long way to the east of Kinshasa. The area was associated with opposition to the Kabila regime. Farmers from Rwanda to the east brought cattle to the farm because of its abattoir. The area was also a diamond producing area and provided a good market in which to sell meat. They obtained much better prices than in Rwanda. The appellant's father also said that he travelled a lot to Rwanda to do business there. Because on these business connections, Rwandans often stayed at the farm. The Congolese soldiers knew

that Rwandans often visited. Commenting upon the contents of his SEF the appellant's father repeated his claim to have been detained but thought his detention was much longer than the nine months or so that he had described earlier. However, members of his family managed to bribe guards and he was able to leave the prison and finally reach the Zambian border where he was reunited with members of his family.

22. The appellant's father also spoke of the disappearance of one of the appellant's brothers (page 24). He was sent back to the DRC in 2009 (page 118 refers to the appellant's brother having been previously removed from the UK) and his whereabouts are not known.
23. The account provided by the appellant in answer to questions asked in his interview which took place at HMP Dartmoor (see pages 111-113) is largely consistent. Mr Duffy, accepted that the appellant was granted refugee status as a result of the claim brought by his father. He did not require the appellant's father, who was present at the hearing, to give evidence.

The analysis

24. What strikes me so forcibly about the father's account is how the soldiers acted in accordance with the sense of prevailing violence associated with this period: the summary execution of the three Rwandans (in contrast with his father's treatment); the absence of any legal process or trial, no charges, no sentencing; the release on payment of a bribe. This has all the hall-marks of the rough justice that was meted out at a time when the raw violence was at its height.
25. In *AB*, which either coined or repeated the expression 'Rwandan connection', the Tribunal was considering a person who was of part Rwandan ethnicity. The classification of the risk was also expressed as being of Rwandan descent or Rwandan origin. It was in this context that the risk category was said to include those with Rwandan *connections*. Mr Kennes' evidence expanded the category by suggesting persons suspected of being Rwandan *by association*. Whilst that categorisation is not altogether clear (and this is no criticism), it seems to cover the case of a person who is *perceived* to be Rwandan. This is consistent with his evidence that the Rwandan immigration services had instructions to arrest all those *thought* to be Rwandan. Hence, whilst the Tribunal in *AB* did not set out to define precisely what is meant by Rwandan connections, the Tribunal was principally concerned with ethnicity or those perceived to have Rwandan ethnicity, perhaps by being related (by marriage, for example) to those who were Rwandan.
26. One can readily understand that if the general feeling within the DRC is a sense of hatred for Rwandans, this may spill over to those who are *not* Rwandan but, perhaps, *look* Rwandan (if such a thing were possible) or speak with an identifiable accent or are known to have fraternised with Rwandans or have a name that appears to have a Rwandan. It is not so far removed from anti-German

feelings that were unleashed in the two World Wars of the last century. Prejudice against Rwandans, so it appears, is not limited to action against ethnic Rwandans but those perceived to have Rwandan connections.

27. As this appellant is not Rwandan, or part Rwandan or of Rwandan descent or Rwandan ethnicity or connected by marriage to those that are, his case is not of direct links with Rwanda or Rwandans. Nor is his case based on a mistaken *perception* that he has such direct links. Instead, his case is firmly based upon that wider categorisation of a person with Rwandan *connections*.
28. Applying this test to the facts of a given case than in the is bound to be an inexact science. Not all persons with some form of link with Rwanda or Rwandans are likely to be at risk. Hence, for example, whilst those from a border region are more likely to be at risk than others who are located in more distant parts of the country, there is no evidence of widespread harm being suffered by *all* those from areas which border the DRC or *all* those who trade with Rwandans or offer services, including accommodation to the general public including Rwandans. Hence, there is a qualitative element that must be introduced when examining the relevant connections. Some connections will place an individual at risk and some will not. The decision maker is required to differentiate between the two and decide in a scale of events which goes from 'definitely at risk' to 'definitely not at risk' whether the particular claimant before him falls in that part of the scale that represents a real risk of harm.
29. Furthermore, the appellant himself entered the United Kingdom with his father on 12 June 2000, aged 13. Hence, he makes no claim to have generated by his own actions or associations the animus that underlies the antipathy felt in the DRC to those with Rwandan connections. His claim is a generation removed from that and based on a vicarious antipathy directed as a result of his father's activities.
30. The 'connections' relied upon by the appellant was that of a son of a trader and provider of accommodation. It is a connection that is generated in a particular area, a farm located somewhere near Mbuji-Mayi, the capital of Kasai Oriental, 280 km to the east of Kinshasa. It is a connection generated by events that took place in 1998, nearly two decades ago in a climate of violence that is removed from the present, notwithstanding the poor human rights record of the existing government and the long memory of antipathy towards Rwandans. Hence, the links that exist between these events in time and space is a tenuous one.
31. The strength of the connections will be immeasurably strengthened if there is evidence sufficient to create an inference that the events in 1998 were recorded in such a way that an official at the airport will have a record accessible to him which details or summarises the events. (There is no direct evidence of such record-keeping but I would not necessarily expect there to be so. It is for this reason the Tribunal must look, where possible, to draw inferences.) Inevitably, this assessment will require an examination of the past events, including the

history of the father's detention in order to assess the likelihood of an accessible record being available.

32. There was consistent evidence before us in the Country Guidance appeal of *BM and Others (returnees – criminal and non-criminal)* that returning nationals are interviewed by the DRC migration agency, the DGM, at Kinshasa airport. It described how nationals being returned who are in possession of an emergency travel document are interviewed at the airport by the DGM and how the ANR (the DRC national intelligence agency) may then become involved. Not all involvement results in persecution or Article 3 ill-treatment such that all those interviewed by the DGM or the ANR are at real risk.
33. The events described by the father as to his arrest and detention, which I accept, were the actions of soldiers who summarily executed Rwandans for no other reason than that they were Rwandans. It is to be noted that the appellant's father was not summarily executed, suggesting the obvious distinction made between him and the Rwandans. Nor can we assume that the appellant's brothers were summarily executed. No-one is able to say. Although in the course of his detention the appellant's father was held in regular prisons, he was released on payment of a bribe or by local influence which operated outside the legal system. There is no evidence of a formal process of prosecution or trial. Nor would I expect one in a period of significant turmoil. A bribe, inferentially, suggests the detention is not recorded in such a way as to result in an investigation when the prisoner's absence is noted on a roll-call. The soldiers who executed the three Rwandans are unlikely to have compiled a notebook of what took place.
34. It seems to me almost inconceivable that what took place is recorded anywhere. Nor can we infer that the arrival of this appellant in Mbuji-Mayi, his home area, in 2016 will recall memories of the Rwandan connections that his father had as a trader when this appellant was a 13-year-old boy such that the level of ill-feeling will place him at risk.
35. That, however, is largely academic because the appellant may be very unlikely to return to Mbuji-Mayi if his family is no longer there and the farm and abattoir has, presumably, long since gone. He will certainly not return there if, notwithstanding my objective view of the risk there, he has a subjective fear of returning. If in this hypothetical exercise he is to return anywhere, it is to Kinshasa, some 280 km from Mbuji-Mayi. Absent a record of events in 1998, he will return as a convicted criminal and, as identified, in *BM and Others (returnees – criminal and non-criminal)* will not be at risk for that reason alone. Even if I am wrong on the existence of local records kept from 1998 in Mbuji-Mayi, we cannot reasonably infer that those records will be copied and filed in Kinshasa or that an extract is made accessible to the officials who question the appellant at the airport on return. The appellant may not be expected to lie but he is unlikely to volunteer information that will put him at risk.

36. It was not argued that it was unreasonable for this 33 year-old-male, to settle in Kinshasa or some other urban conurbation of his choosing.
37. Stepping back a pace, I am quite satisfied that the appellant is not at risk. At the commencement of my analysis I spoke of the events in 1998 in historical terms as at a time of prevailing violence, summary executions, the absence of the rule of law, rough justice and raw violence. Whilst the claims of those with Rwandan connections must be critically examined, the connections that the appellant is now able to establish are so tenuous as to be insignificant as a source of risk.
38. I dismiss his appeal under Articles 2 and 3 of the Convention. Inevitably, there is no claim advanced under Article 8.

DECISION

I have allowed the appeal of the Secretary of State.

I re-make the decision and dismiss the appeal of Mr Kadima under all the grounds advanced.

ANDREW JORDAN
JUDGE OF THE UPPER TRIBUNAL
14 July 2016