Upper Tribunal
(Immigration and Asylum Chamber)

Lokombe (DRC: FNOs – Airport monitoring) [2015] UKUT 00627(IAC)

THE IMMIGRATION ACTS

Heard at Field House
On 5 August 2015

Decision & Reasons Promulgated

Before

UPPER TRIBUNAL JUDGE STOREY
UPPER TRIBUNAL JUDGE CANAVAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

LOKOLA LOKOMBE
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr T Melvin, Home Office Presenting Officer
For the Respondent: No appearance, by or on behalf of the respondent

The fact that there was an August 2013 report providing the answers given by 8 EU/Western countries documenting the return of a significant number of FNOs to the DRC without there having been any allegations of problems on return (except ones from Belgium, none substantiated) was a very significant piece of evidence that was not negated by the fact that in Kinshasa there is no airport monitoring carried out by outside governments or NGOs.

DECISION AND REASONS

1. The respondent (hereafter the claimant) is a national of Democratic Republic of Congo (DRC). His appeal against a decision refusing to revoke a deportation order against him as a foreign criminal was allowed by First-tier Tribunal Judge Miles on Article 3 grounds in a decision sent on 19 September 2014. The appellant (hereafter the Secretary of State or SSHD) was granted permission to appeal. Despite being notified of the hearing of this appeal the claimant did not attend. Over an hour after the time fixed for the hearing (14.00 hours) Customer Services received a call saying the claimant would arrive in 20 minutes. He failed to arrive either within that time or later (a subsequent check revealed he had made no further contact or effort to explain his failure to attend). In such circumstances we decided to exercise our discretion to proceed with the hearing. We took into account that the claimant's representatives had submitted a "Rule 24 Response" so we were apprised of both sides of the argument. There is no challenge in this case to the dismissal by the FtT judge of his case based on his particular history and political profile. These were resoundingly rejected by the judge at [31] and [55] – [56]. The only basis on which the judge allowed the appeal was that he considered the claimant to be at risk on return simply because he was a criminal deportee: see [31] and [54].

2. The reasons the judge gave for allowing the appeal on Article 3 ECHR grounds were essentially (1) that in R (on the application of P) v SSHD [2013] EWHC 3879 (Admin), Phillips J had concluded that criminal deportees would be at risk on return to the DRC and had done so after a comprehensive assessment of the evidence before him; (2) that Phillips J found that the evidence before him made clear that criminal deportees would be interrogated upon arrival and it would come to light that they had criminal convictions which would in turn lead on to ill treatment; (3) the SSHD had not appealed against Phillips J's judgment; (4) the further evidence available (which included the February 2014 Home Office DRC Policy Bulletin 1/2014), although not identifying that there had been any problems for returned deportees known to have criminal convictions outside the DRC, continued to show that there was a real risk to such persons in practice; (5) there was no evidence that the statements made by the Congolese Ambassador to the UK in his letter to Mary Glindon MP in August 2013 had been withdrawn and they disclosed there would be a real risk on return for Foreign National Offenders (FNOs).

3. In her written grounds of appeal the SSHD maintained that the judge had incorrectly interpreted the case of P and the February 2014 Bulletin. In relation to the judge's purported reliance on P, he failed to note that it was a judicial review decision about whether P's further representations could be accepted as a fresh claim, not a decision on the merits and that it should have been known to the judge that the Upper Tribunal had a pending country guidance case to seek to resolve the issues raised by P.

4. In relation to the February 2014 Bulletin, it was argued that the judge was wrong to place excessive or determinative weight on the fact that none of the countries that had replied to the questionnaire monitored returnees at the airport.

5. In the claimant's Rule 24 Response the point is made that even though P was not country guidance that did not prevent the judge from attaching weight to its findings and the judge had in any event evaluated the further evidence to hand. The fact that there was pending country guidance did not disqualify the judge from proceeding to decide the appeal on the evidence before him. As regards the judge's treatment of the February 2014 Bulletin, the quote at paragraph 4.13 which the SSHD herself set out in her grounds of appeal ("With regards to returnees with criminal records and/or outstanding warrants of arrest, if the authorities are aware that the person is returning they will be detained") demonstrated that the Bulletin was not at variance with the judge's assessment.

6. In written submissions produced for the hearing Mr Melvin relied on the original grounds and drew attention to the fact that the Upper Tribunal had now promulgated country guidance on this issue in BM and Others (Returnees – criminal and non-criminal) DRC CG [2015] UKUT 00293 (IAC).

Analysis

7. As we pointed out to Mr Melvin, our initial task is confined to deciding whether the First-tier Judge materially erred in law and in that context we cannot have regard to the post-decision findings of fact made by the UT in BM & Others.

8. As regards the SSHD's first ground, we consider it may have had force if the judge had simply sought to rely on the findings made by Phillips J or had treated those findings as authoritative in the same way as a country guidance case, especially since Phillips J himself emphasised that his judgment was not country guidance. However, the judge did not treat P in that way. The judge's reason for attaching significant weight to Phillips J's findings – namely that they were based on comprehensive evidence relating to the general issue of risk on return to FNO deportees – was an entirely rational one.

9. The SSHD avows that to have attached significant weight to P was to overlook that it was a decision on a further representations being examined on public law grounds only. There is of course a clear distinction between findings of fact in a statutory appeal on the merits and findings of fact in a judicial review case dealing with a challenge to the legality of a decision where all that has to be established is that there is a realistic prospect of success of a hypothetical tribunal judge, taking the new materials together with the old, finding in the applicant's favour. There is also higher court authority for the view that in addressing matters relating to risk factors or categories facing returnees to other countries a judge hearing a judicial review application should proceed with caution: In R (Madan) v Secretary of State for the Home Department [2007] EWCA Civ 770, [2007] 1 WLR 2891. Buxton LJ, giving the judgment of the Court, stated at paragraph 12:

> "The Administrative Court is really a wholly unsuitable tribunal for that purpose. Country guidance cases have a special status, failure to attend properly to them being recognised by this court as an error of law even though country guidance cases deal only with fact: see R (Iran) v Secretary of State for the Home Department [2005] Imm AR 535, para 27. They have that special status because they are produced by a

specialist court, after what at least should be a review of all of the available material. And that in particular involves a judicial input from a background of experience, not least experience in assessing evidence about country conditions, that is not available to such judges as sit in the Administrative Court and in this court. A judge hearing a judicial review application will therefore wish to tread carefully before finding that a country guidance case is unreliable just on the basis of one or two subsequent reports. The parties appearing before him will in particular wish to ensure that he is aware of any decisions in the AIT subsequent to the country guidance case in which that case has been considered."

10. Nevertheless, in P Phillips J expressly considered the guidance given in Madan ([30]-[31]) and took great care to emphasise that he understood his findings as being of an interim nature, until the Tribunal produced a new country guidance case ([55]). He took care to note (only as one factor) that the previous country guidance case was 6 years old ([31]) and that it did not address the issue of criminal deportees ([44]). He also attached particular importance to the fact that the respondent in her decision letter on the other case dealt with in the same proceedings (that of R) had stated that persons who were criminal deportees "may" be at risk on return ([44]-[45]). Further, notwithstanding his cautious approach, he took particular care to set out what his findings of fact were and the body of evidence on which they were based. These findings were not obiter, they were the central basis for his decision granting judicial review.

11. Viewed in this context we consider that it was entirely justified for the First tier Tribunal judge, albeit a judge in a specialist jurisdiction assessing a decision by a non-specialist judge dealing not with legality but with the merits, to attach significant weight to such findings. Whilst relatively rare, and always to be essayed with caution (see Mahad), judicial review cases which incorporate fact-finding on country conditions and risk factors or categories are not unknown. That is true not just of judicial review cases in the Upper Tribunal (Immigration and Asylum Chamber) which is a specialist court (see e.g. the recent case of Naziri & Ors, R (on the application of) v Secretary of State for the Home Department (JR – scope - evidence (IJR) [2015] UKUT 437 (IAC) (27 July 2015)), but also of those that arise in the Administrative Court, and occasionally in the Court of Appeal: see e.g. cases dealing with Dublin returns, such as EM (Eritrea) & Ors v Secretary of State for the Home Department [2012] EWCA Civ 1336; and Tabrizagh & Ors, R (On the Application Of) v Secretary of State for the Home Department [2014] EWHC 1914 (Admin). As a general rule, other courts or tribunals will value judicial fact-finding made on the basis of a careful and comprehensive examination of the relevant evidence, even if it is done in a different jurisdiction.

12. We also discern no error in the judge's treatment of the evidence of the Directeure, Centrale de la Chancellerie at the DGM in Kinshasa on 15 January 2014. In his statement the Directeur had contradicted the statement made by the DRC Ambassador in 2012. Whilst it is not entirely clear why the judge should give precedence to a 2012 statement of a government official to one made in January 2014, we take judicial notice of the fact that the Directeur is closely involved in law enforcement in the DRC and as such his evidence cannot be regarded as an objective and independent source as to what happens to returnees on his watch. We consider

the judge's dismissive approach to his evidence as being within the range of reasonable responses.

13. What was not reasonable, however, was the judge's approach to the February 2014 Bulletin and the evidence it appended entitled "Request for Information: Return of Rejected Asylum Seekers to DRC, August 2013". This documented replies from eight countries to nine questions which included 4, 5 and 6 which asked:

> "4. Have you received any allegations of returnees being subject to problems on return?
>
> 5. If so, what problems (in particular incidents of harassment, ill-treatment, harassment and detention)?
>
> 6. Have any of these allegations been substantiated?"

14. In reply to these questions none of the eight respondent States noted allegations except for Belgium and it noted that after investigation by an immigration liaison officer none was found to be substantiated.

15. In addition the Bulletin noted that from information supplied by Germany, that country alone returned 79 Foreign National Officers (FNOs) since the beginning of 2012, 69 of them enforced.

16. The Bulletin also referred to a DRC Fact Finding Mission of November 2012 which unearthed no substantive evidence of mistreatment of FNO returns.

17. Against this background the judge's dismissal of this evidence was extremely problematic. The only reason proffered was that "the responses do not identify bases upon which the knowledge used to provide these answers had been obtained because all accepted that they do not have a representative at the airport to oversee FNOs at the airport from Canada ..." [47]. That reason is in the first instance factually incorrect: we have already noted that the Belgians confirmed that an immigration liaison officer of theirs had investigated allegations and found them untrue. In the second instance it erroneously treats lack of monitoring at the airport as determinative of the state of the evidence as regards risk on return. Several of the respondent States, relying on their own embassy information and other sources, testified that they had no allegations of mistreatment at the airport. In our judgement, it is reasonable to assume that most if not all FNO offenders who are being returned to the DRC will notify friends, family or sources in the host country and in the DRC to inform them when they are being deported and when they will be arriving. It is further reasonable to assume that if there had been any problems, one or more of these contact points would have notified the host country authorities or the deportee's representatives or relevant NGOs expressing concern. Thus the fact that there was an August 2013 report providing the answers given by 8 EU / Western countries documenting the return of a significant number of FNOs to the DRC without there having been any allegations of problems on return (except ones from Belgium, none substantiated) was a very significant piece of evidence that was not

negated by the fact that in Kinshasa there is no airport monitoring carried out by outside governments or NGOs. We find the key importance attached by the judge to the lack of monitoring was a serious legal error on the part of the judge.

18. Although we cannot have regard to BM as evidence (because a significant amount of the evidence analysed by the Tribunal in BM post-dated the hearing before the FtT), we are fortified in our characterisation of the judge's error in respect of the February 2014 Bulletin evidence by the analysis set out at [80] – [81] of BM. The Upper Tribunal's reference in BM to the "consistency of experience" of the respondent states and the lack of allegations raised in the context of a country which produces an active diaspora, is very pertinent. At [80]-[82] the UT states:

> "80. We juxtapose this evidence, which we accept, with that of the eleven IGC states who participated in the survey and provided "*returns*" data in respect of the years 2012, 2013 and 2014 which we also consider persuasive. Making due allowance for the manner in which the data has been compiled and provided, it seems uncontroversial to find that in excess of 700 persons have been returned from the states in question to DRC during a period of just under three years, up to late 2014. We have no reason to find that the states in question were other than assiduous in providing the figures and, indeed, the contrary was not suggested. The significance of this discrete segment of evidence is that only one complaint was made out of this cohort of returning nationals. The recipient state was Belgium and, upon investigation, no substantiation was established. We consider it compelling that there is no substantiated evidence that any member of this large group has been persecuted or ill treated or arbitrarily detained. The consistency of experience of the eleven IGC states concerned is a matter of obvious moment and, further, entirely harmonious with the data and other information provided by the United Kingdom.
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> 81. In our evaluation of this body of evidence, we take into account also that the two states who returned the highest number of DRC nationals, Belgium and France, both contain a substantial DRC diaspora, for historical and other reasons. We find nothing in the evidence to counter the suggestion that the members of these groups in particular would be expected to communicate relevant complaints to the communities to which they belonged in the returning states and/or the Embassies of those states in Kinshasa. While we note that Dr Kennes disagrees with this assessment, it appears to us logical, realistic and consistent with the evidence of high levels of activity, much of it organised and concerted, among members of the DRC diaspora.
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> 82. In their critique of the evidence emanating from the IOM and the IGC states highlighted immediately above, the Appellants draw particular attention to the limited monitoring of returned nationals which is carried out and the intrinsic limitations thereof. This submission is well made. However, there is no counter punch. We consider that this submission neither mitigates the frailties in the Appellants' preferred evidence which we have identified nor undermines our assessment of the Respondent's body of evidence which we prefer. While we accept the evidence that the IOM is involved only in the cases of voluntarily returning DRC nationals, we find nothing in the evidence to support the submission that the DRC authorities pay attention to the distinction between those nationals who return voluntarily and those who do so under compulsion,

> subject to the limited exceptions of those who have an unexecuted prison sentence or an outstanding arrest warrant in DRC or who committed an offence such as document fraud when leaving DRC: see our finding in [74] above."

19. We find that the judge's dismissive and reductionist approach to the February 2014 Country Bulletin evidence was vitiated by legal error. This error was material because he made clear that if he had taken a different view of this evidence he would not have allowed the appeal. Accordingly we set aside his determination.

Our Decision

20. Apart from the Rule 24 Reply the claimant has not sought to adduce any further evidence. The SSHD, by contrast, relies heavily on BM. In the context of re-making of the decision, we can have direct recourse to BM, both to the further background country materials documented in that decision and its evaluation thereof. We find no reason to depart from BM. Since the claimant has not sought to challenge any aspect of the FtT's findings on his circumstances except in relation to the generic issues of whether he is at risk as an FNO returnee, we see no rational basis for distinguishing his situation on return from any other FNO returnees.

21. Accordingly we dismiss his appeal.

22. For the above reasons we conclude:

    The FtT judge materially erred in law and his decision is set aside.

    The decision we re-make is to dismiss the claimant's appeal.

Signed Date

Upper Tribunal Judge Storey