

EM (Tutsi - Common Threshold of Risk) DRC [2004] UKIAT 00075

IMMIGRATION APPEAL TRIBUNAL

Date heard: 23 February 2004
Date notified: 18th March 2004

Before

**DR H H STOREY (CHAIRMAN)
MR G F SANDAL
MR C THURSBY**

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

Respondent

Tutsi ethnicity – risk on return

Appearances

Mr A Scarcliffe appeared for the Appellant.

Mr M. Khan, Counsel instructed by Drummond Miller Solicitors, appeared for the Respondent.

DETERMINATION OF APPEAL AND REASONS

1. The Appellant, the Secretary of State, has appealed with leave of the Tribunal against a determination of Adjudicator, Miss P Clough, allowing the appeal of the Respondent, a national of Democratic Republic of Congo (DRC), against the decision to refuse to grant leave to enter on asylum grounds. To avoid confusion the Respondent is hereafter referred to as the “Claimant”. This case is reported in order to provide Tribunal guidance on whether persons perceived as of Tutsi ethnicity are currently at risk in the DRC.
2. The Adjudicator did not find the Claimant’s account credible in a number of respects. In particular she did not accept his claim to have been arrested and detained in Kinshasa. However, she did accept that his mother was a Tutsi and

that although having a Bantu father the Claimant would be perceived as of Tutsi ethnicity.

3. The Adjudicator's conclusions were that the Claimant had not made out his asylum grounds of appeal, but had established a real risk of treatment contrary to Arts 2 and 3 of the ECHR, by virtue of the risk he would run as someone perceived to be of Tutsi ethnicity.
4. Remarkably, although she gave reasons for dismissing the asylum grounds of appeal, she gave none for allowing the Arts 2 and 3 grounds of appeal beyond saying he would be perceived as of Tutsi ethnicity. She did at paragraph 12 summarise the background evidence relating to Tutsis; but since it noted a significant decrease in human rights abuses committed against Tutsis during 2002 and referred to continuing discrimination - but not continuing persecution - against persons perceived as of Tutsi origin, it is difficult to treat that reference as the basis for her conclusion.
5. The grounds of appeal contended that the Adjudicator was not entitled to allow the Arts 2 and 3 grounds of appeal because there was no evidence that the abuse of the human rights of persons perceived as of Tutsi origin were the subject of "a consistent pattern of gross, flagrant or mass violations of human rights". They cited in support the Court of Appeal judgment in *Harari* [2003] EWCA Civ 807. They also cited other passages from the CIPU report for 2003 indicating that the government has continued since 2001 to protect Tutsis in government controlled territory who are at risk.
6. There was no Respondent's Notice nor any form of challenge to the Adjudicator's adverse credibility findings. Mr Khan confined himself to arguing that the background materials did demonstrate that persons perceived as of Tutsi origin still face a real risk of serious harm and that such persons are also perceived as Rwandan and therefore at risk because of the hostile approach of the authorities to persons of Rwandan nationality.
7. We consider that the Adjudicator's determination is seriously flawed.
8. In the first place it is impossible to reconcile her conclusions under the Refugee Convention and under the Human Rights Convention. On the one hand, she stated that she considered the Claimant had not left the DRC due to persecution because of his ethnicity. On the other hand she found that he would be at Art 3 risk because of his ethnicity. As the Tribunal and courts have repeatedly emphasised, under both the Refugee Convention and Arts 2 and 3 there is a *common threshold of risk*. If the Adjudicator believed that someone perceived as of Tutsi origin would be subjected to serious harm under Arts 2 and 3, she should have concluded he would face persecution under the Refugee Convention. Alternatively, if she considered that such a person would not face serious harm under the Refugee Convention, she should not have concluded such a person would face treatment contrary to Arts 2 and 3. She did not suggest in this case that the claimant only failed under the Refugee Convention because of lack of a Convention reason.

9. In the second place, her approach to the evidence relating to Arts 2 and 3 risks was flawed. On her own account of it, there had been a significant change in the situation of the Tutsis from 2002. As the grounds of appeal properly identify, when considering whether Tutsis or persons perceived as Tutsis per se would be at risk, the Adjudicator was not entitled to treat as decisive the mere fact that there remain some incidents of serious human rights abuses. She was required to consider whether such incidents amounted to a consistent pattern gross, flagrant or mass violations of human rights. That test was approved in *Harari* and more recently by the Court of Appeal in *Batayav* [2003] EWCA Civ 1489.
10. As already noted, Mr Khan did not contest that the Adjudicator's determination was free of error, but he considered nevertheless that her findings in relation to Tutsis or persons perceived as of Tutsi origin were sustainable. We cannot agree. The latest objective country materials indicate that the situation of Tutsis has significantly changed in the past few years. The April 2003 CIPU Report to which the Adjudicator made reference, stated:

“5.59. Since the start of the current conflict in 1998, Tutsis have been subjected to serious human rights abuses, both in Kinshasa and elsewhere, by government security forces and by some citizens for perceived disloyalty to the regime. By 2001, the Government no longer followed a policy of arresting and detaining members of the Tutsi ethnic group without charge and merely on the basis of their ethnicity. Approximately 300 Tutsis who voluntarily entered a government protection site at the national Security Institute in Kinshasa remained there at the end of 2001 awaiting resettlement or reintegration into the community. Human rights abuses committed against Tutsis significantly decreased during 2002 but human rights groups have complained that discrimination against persons perceived to be of Tutsi ethnicity [continues in] rebel-held areas ...”.

11. Mr Khan prayed in aid the Danish Immigration Report at paragraph 3.4.2 entitled the Tutsi in Kinshasa: the Current Situation. At page 12 this Report in a section dated 24 January 2002, it was stated:

“With regard to the position of ethnic groups in the DRC, Jean-Joseph Mukendi of Mulumba (IDH) explained that people belonging to or merely physically resembling the eastern Tutsi or Hutu communities, usually termed “Rwandans”, are in considerable danger of ill treatment and persecution at the hands of the civilian population in Kinshasa. The relatively few Tutsi still present in Kinshasa (the vast majority having previously been resettled abroad) are now living in one particular district known as La Colline, where they enjoy some measure of protection. However, the authorities cannot protect that

community against any abuses, although nobody in authority attempts to prevent those who wish from leaving the DRC. He emphasised that the authorities do not generally persecute the Tutsi community in Kinshasa”.

12. This report shows, he submitted, that the situation has deteriorated since the events in Kisangani in May 2002.
13. Mr Khan also relied on the Belgian Report, La Voix des Sans Voix, Interview in Kinshasa, 3 August 2002 which has a section on the Tutsi Community in Kinshasa which states as follows:

“3.4 THE TUTSI COMMUNITY IN KINSHASA

3.4.1 CONTEXT

When triumphantly entering Kinshasa on 17 May 1997, at the head of Alliance of Democratic Forces (AFDL) troops, Laurent-Desire Kabila brought a provisional end to a series of multiple developments. When it broke out in September 1996, the Banyamulenge revolt (i.e. of Tutsis who had lived in South Kivu for decades who claimed Congolese nationality) seemed to be of an internal ethno-political nature, and the Government of Rwanda did not delay in using it for its own purposes. This revolt was in fact an ideal opportunity to invade the former Zaire in order to pursue those loyal to the late President Habyarimana, a Hutu as well as the extremist Hutu militias to the Interahamwe.

In July 1998, Laurent-Desire Kabila cut all links with the Rwandan Government whose protégé he had been. This started the war with Rwanda which broke out on 2 August 1998. The first Tutsis were arrested the following day in Kinshasa. From the moment that the rebels (Rwandan and Congolese citizens of Tutsi origin) advanced on Kinshasa and where their presence was even reported in the capital's suburbs, Kinshasa experienced a real pursuit against the Tutsis. People of Tutsi origin or who were presumed to be of Tutsi origin were arrested and a number of them were burnt alive or shot.

In order to excuse themselves, the pogrom participants argued that the Congolese authorities played a significant role in stirring up anti-Tutsi hatred. During this period, a certain number of ministers in fact served as official spokesman to designate the enemy by popular condemnation by labelling them as vermin which should be exterminated at any price.

3.4.2 THE TUTSIS IN KINSHASA: THE CURRENT SITUATION

It emerges from numerous conversations with the Kinois that, in their eyes the Rwandans are the enemy, the occupier and the aggressor. Often the Kinois make no distinction between the Tutsis, the Hutus, the Rwandans and the others. During the August and September 1998 pogrom, an undetermined number of people were subjected to indiscriminate anger simply because of their appearance. The Tutsis are in fact recognised by their great height, their pointed noses and their oval faces.

In order to “protect” them from popular condemnation, the Tutsis in Kinshasa were regrouped in the Kokolo military camp as of November 1998 (July 1999 according to another source), the refugees were sheltered in an “accommodation site for the vulnerable” which was set up in the INSS (National Social Security Institute) Centre and located in the Maman Mobutu Development in Kinshasa/Mont-Ngafula. Thousands of Tutsis were then welcomed by third countries such as Canada, the United States, France and Belgium within the framework of a resettlement programme. The OIM resettled about 1,300 refugees. About 600 other refugees were resettled under the auspices of the International Red Cross Committee.

In spite of its resettlement programmes, about 300 refugees (mostly Tutsis, but also Hutus and individuals from mixed marriages) remained in the INSS Centre where humanitarian organisations such as the ICRC supplied their daily needs. The Centre was run by the Congolese Human Rights Ministry and Congolese police officers provided security.

Ever since the events in Kisangani on 4 May, a slight increase in the number of refugees in the INSS Centre has been observed. Currently, their number has risen to 342; furthermore, 185 Tutsis have been hiding in the Maman Mobutu Centre.

14. We do not consider that either of these sources justified the interpretation Mr Khan has sought to put on them.
15. Firstly, we note that both confirm that as a result of 1998 programs against Tutsis the authorities in conjunction with the ICRC took specific steps to protect the Tutsi community in Kinshasa. Secondly, even though the Belgian source does not describe the level of protection as complete, neither source identifies any significant level of civilian violence against Tutsis since specific protection steps were taken.

16. Secondly, both sources are dated 2002. They do not deal with the situation since August 2002. As already noted, the CIPU Report, which deals with developments since, identifies a significant improvement beginning in 2001.
17. Thirdly, we do not quite understand Mr Khan's contention that Tutsis fall into a separate risk category by virtue of being confused with Rwandans. It is clear that the authorities now protect Tutsis in Kinshasa. If there is a failure to make a distinction sometimes between Tutsis and Rwandans, it is made by civilian Kinois, not by the authorities. The latter, to repeat, are described as affording protection to Tutsis against civilian actions.
18. We also consider that the argument advanced by Mr Khan does not in any event easily fit the particular facts relating to this Claimant. On his own account, his mother was a Congolese, not a non-Congolese Tutsi. It appears from the background sources that suspicion and hostility against Tutsis is primarily directed against non-Congolese Tutsis.
19. Since returns from the UK to the DRC are to Kinshasa and there is no evidence to indicate that Tutsis who originate from other areas are prevented from remaining in that city, it is not necessary for us to address the evidence relating to the treatment of Tutsis in other areas, particularly those in rebel-held areas, although we note that the CIPU refers to continuing discrimination against them, not to any significant levels of violence or other forms of serious harm.
20. Accordingly we consider that not only did the Adjudicator fail to give reasons for decision to allow the Articles 2 and 3 grounds of appeal, but also that decision was not supported by the objective evidence.
21. For the above reasons this appeal is allowed.

DR H H STOREY
VICE PRESIDENT