Neutral Citation Number: [2008] EWCA Civ 1322

Case No: C5/2008/0424

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM & IMMIGRATION APPEAL TRIBUNAL
THE IMMIGRATION APPEAL TRIBUNAL
AA049582006

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/12/2008

Before :

THE RIGHT HONOURABLE LORD JUSTICE LAWS
THE RIGHT HONOURABLE LORD JUSTICE LONGMORE
and
THE RIGHT HONOURABLE LORD JUSTICE STANLEY BURNTON

- -

Between :

BK (DEMOCRATIC REPUBLIC OF CONGO)	**Appellant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Mr Christopher Jacobs & Ms Jessica Franses (instructed by **Biscoes**) for the **Appellant**
Ms Lisa Giovannetti & Mr Rory Dunlop (instructed by **Treasury Solicitors**) for the **Respondent**

Hearing dates : 19th November 2008

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Judgment

Lord Justice Longmore:

1. On 31st October 2008 the Asylum and Immigration Tribunal ("AIT") promulgated their amended determination in this country guidance case in relation to the Democratic Republic of Congo ("DRC"). Removals to DRC have been put on hold pending that determination and this appeal. The reason why a further country guidance was required in respect of DRC was to resolve the issue whether failed asylum-seekers, involuntarily returned to DRC, were likely, merely because of their return, to suffer a well-founded fear of persecution for a Convention reason or mistreatment such as to engage Article 3 of the ECHR. In AB and DM [2005] UKAIT 00118 the AIT had confirmed that categories of asylum-seekers, such as (1) those with a political or military profile in opposition to the government and (2) Tutsis or those suspected by being Tutsis, were at risk and were to be treated as refugees. That tribunal also pointed out that the assessment of risk in any individual case would depend on a careful analysis of that individual's origin background and profile but there was no suggestion that failed asylum-seekers, who had no opposition profile, were at risk merely because they were failed asylum-seekers.

2. The appellant, BK, had no opposition profile beyond that of being a low-level member of the UDPS (Union pour la Democratic et le Progres Social) when she was in DRC. Nor, on the findings of the Tribunal, did she acquire any higher profile while she was in the United Kingdom. On that basis the Secretary of State considered that she would be of no interest to the DRC authorities on return and her claim to asylum was refused. The appeal to the AIT raised the issue whether those findings were correct and also the broader issue whether failed asylum-seekers returned to DRC against their will were at real risk of persecution, serious harm or ill-treatment. That depended on what was likely to happen to failed asylum-seekers on arrival at N'Djili airport in Kinshasa and thereafter. The AIT correctly described that as a purely factual issue.

3. Those issues necessitated a hearing of 12 days before the AIT who received a mass of oral and written evidence on that question between 3rd July and 25th September 2007. Their unamended decision was notified to the parties on 18th December 2007 and contained 547 paragraphs. After an exhaustive analysis of the evidence they concluded in para 385:-

> "Despite concerted efforts by a significant number of people – lawyers, NGOs and others – and despite there having been a long lead-in period to the hearing and conclusion of this case during which members of the UK's DRC diaspora have been encouraged by leaflets and public meetings in over six cities to come forward with cases, we have found no evidence to substantiate the claim that returned failed asylum seekers to the DRC as such face a real risk of persecution or serious harm or ill-treatment."

4. On the way to that conclusion they made these findings among many others:-

> (a) Persons involuntarily returned to DRC will not be seen as normal returnees and will arouse the interest of the authorities so as to be questioned on arrival. [paras 188-189]

> (b) They will accordingly be interrogated on arrival at the airport and, if the interrogation revealed anything of interest to the authorities they would be likely to be detained at or near the airport; otherwise they would be released. [para 324]
>
> (c) Failed asylum seekers would not be seen as traitors because there are voluntary repatriations and DRC is a full party to the Refugee Convention. [para 191]
>
> (d) DRC officials would usually assume that the accounts of failed asylum seekers had been disbelieved. [para 192]
>
> (e) If the DRC authorities believed that the act of claiming asylum was traitorous there would be no need to interrogate them to find out what they had said about the DRC government. [para 193]
>
> (f) The DRC authorities are well aware that claiming asylum abroad can sometimes be for purely economic reasons. [para 194]
>
> (g) There have been no official government statements portraying asylum seekers as traitors. [para 195]
>
> (h) DRC authorities would be able to differentiate between those who are anti-regime and those who are either loyal or apolitical. [para 197]

In making these findings, the AIT made various assessments about the witnesses and evidence advanced on the appellant's behalf. Some of these witnesses were reluctant to allow their names into the public domain. The tribunal did not find the evidence of W1, W2 or W3 to be credible.

5. In considering the particular circumstances and evidence of the appellant, the AIT made the following findings between paragraphs 524 to 544 of the determination:

   i) The appellant's activity with the UDPS in the DRC and the United Kingdom was at the 'lowest possible level';

   ii) The appellant was generally an unreliable and evasive witness;

   iii) The appellant and her mother concocted their accounts and this reflected adversely on the mother's credibility as well;

   iv) The evidence which the appellant's mother gave was not credible;

   v) The claim that the appellant was arrested, ill treated and raped was rejected;

   vi) The account of her claimed escape and travels was not believed.

6. Accordingly, the appellant did not discharge the onus of proof on her to show that she had a well founded fear of persecution or that there were substantial grounds for

believing that she faced a real risk of serious harm or treatment contrary to Article 3 of the ECHR. Her appeal was therefore dismissed.

7. It might be thought that the conclusions of the AIT were conclusions based on findings of primary fact and thus not amenable to being reversed by a court whose function is confined to identifying and coverting errors of law. Amazingly, however, there are 23 separate grounds of appeal. Unsurprisingly each of these grounds, on analysis, turned out to be little more than disagreement on the part of the appellant with the conclusions reached by the AIT after hearing an abundance of evidence.

8. The main grounds developed in oral argument were that

   i) the AIT had failed to give credence to witnesses who had been disbelieved in the course of their asylum applications; it was said that the mere failure of an asylum claim on the grounds of credibility did not mean that evidence given about the fate in general of those involuntarily removed to DRC was necessarily false. This ground, as I understood it, related both to the witnesses, such as W2 and W3, who gave oral evidence to the Tribunal but also to hearsay accounts from those who were (or had been) in DRC and gave those accounts to expert and factual witnesses who then repeated them in their evidence to the Tribunal;

   ii) the AIT had failed to consider what questions would be asked of those involuntarily returning and to remind themselves, as said in IK [2004] UKAIT 00312, that they could not be expected to lie in the answers they gave;

   iii) the AIT should not have rejected the evidence of witness W1 whose asylum claim had been accepted by a differently constituted AIT on the basis that he was a credible witness;

   iv) the evidence of the first expert witness (E1) should have been accepted especially as he had given evidence and been believed in AB and DM.

Credibility of Failed Asylum-seekers

9. As far as live witnesses were concerned, W2 and W3 had been found to have lacked credibility and their asylum claims had been refused. It is impossible to say that that was an irrelevant consideration for the AIT to have taken into account. No doubt if the AIT had treated that matter as decisive in rejecting their evidence that might have formed the basis for an attack on their conclusion. But far from doing that the AIT gave detailed reasons for rejecting the evidence of witness W2 and W3 in paras 213-236 of the determination. There is no error of law in that approach.

10. As far as the hearsay evidence of other witnesses, relayed to the Tribunal by live witnesses or contained in documents, the supposed error of law is even more difficult to understand. The point most clearly emerges in relation to accounts collected by the second expert witness as set out in paragraph 274 of AIT's decision:-

> "We underline our concern that E2's reports nowhere address the question of to what extent the deportees her organisation interviewed or heard about could be considered credible given

> their history as failed asylum seekers. Of course, someone who is a failed asylum seeker may not necessarily have been disbelieved about everything or anything, but, in general terms, if a person is a failed asylum seeker there is absolutely no reason (absent evidence to the contrary) to assume that they have been found credible in the course of their asylum claim. Hence any approach to evidence from a failed asylum seeker which treats it as truthful simply on trust is extremely problematic. E2 was asked about this in cross-examination and said that she and/or her organisation brought their considerable experience to bear when assessing what she/they were doing. We are bound to say we see very little evidence of any real scrutiny. On her own account the main priority of her and her organisation when contracting such people is to win their trust. That is entirely understandable, but, in the absence of an indication in E2's reports of the issue of an individual's past credibility or lack of it being addressed, even with those individuals she and her organisation were able to interview thoroughly, this is a serious flaw in her methodology. This is not to say that she had not shown real diligence in some respects, for example in writing down telephone interviews and in video-recording some interviews. In appendix B of her first report she refers to being able in February 2006 to interview a number of people in a "special setting" in which statements were taken in their presence of two persons and a local group attempting to "provide help to people forced to return from Europe and unable to survive". But unfortunately she does not match these measures with other basic empirical steps and, as a result, we are left with a body of evidence with very little substance."

The critical phrase is "extremely problematic". The AIT make it clear that they do not proceed on the basis that a failed asylum seeker is to be disbelieved about all that he or she has said in the past or was saying to the expert witness. But there can be no doubt that evidence from such a source is, indeed, extremely problematic. The AIT considered the evidence on a whole and came to its conclusion upon it. This is particularly clear with findings about the February 2007 charter flight in para 359. It is impossible to see any error of law. An assertion that a tribunal has approached evidence too sceptically is not an assertion of error of law, only an assertion that more than one factual decision is possible. The fact that the decision-maker has come to a particular factual conclusion does not mean that any error of law has been made.

11. It is worth adding that the issue whether the authorities in DRC would regard all failed asylum seekers as traitors merely because they had claimed asylum abroad was expressly addressed by the AIT who concluded (paras 190-197 and elsewhere) that the evidence did not support any such contention.

The IK Point

12. It is true that the AIT did not consider whether all failed asylum-seekers would have to tell untruths if they were to avoid persecution. That is because it was irrelevant.

As the AIT made clear interrogation would take place at the airport to see if the person concerned fell into any category which was of interest to the authorities. Those of no interest to the authorities because of their low profile would, usually after a small sum of money had changed hands, be released. That only requires the returning person to tell the truth. If such a person were to be asked to identify the basis of his application for asylum in the UK, he or she (if it were the truth) might well have to say that they claimed falsely to be a political activist but add that they were disbelieved. The AIT made no findings (because there was no evidence) about the likely reaction to such answer but to say that such a person would have to lie in order to avoid the risk of persecution or mistreatment is insupportable.

13. There was, in any event, evidence about past treatment of failed asylum-seekers but there was no evidence that questioning on arrival led to Article 3 mistreatment or to persecution (see para 385).

Witness W1

14. The complaint under this head is that the AIT wrongly failed to give credence to W1 when he had been believed in the course of his asylum application and actually granted asylum. It is true that after giving 5 (or perhaps 6) separate reasons for considering his evidence unreliable in paras 202-208, the AIT did say (in para 211) that they doubted whether the original adjudicator in respect of W1's claim would have taken the same view of his credibility.

> "if W1 had voiced then the much wider claim he now has."

This paragraph is not, however, given as the reason for rejecting W1's evidence. There were separate reasons given for that earlier. Even in this paragraph the AIT accepted that part of W1's evidence was considered true namely that he had been principal assistant to the chief prosecutor and may well have had occasion to visit N'Djili airport and the prison at Kin Maziere. This shows the AIT's balanced approach to the evidence.

15. It was said that the previous authorities of Ocampo v SSHD [2006] EWCA Civ 1276 and AA Somalia v SSHD [2007] EWCA Civ 1276 dictated the conclusion that, once an applicant or witness had been essentially believed with respect to what had happened in the country from which he had escaped, then a second tribunal should not to go behind that conclusion. That is, of course, correct if the applicant or witness is giving evidence about the same matter unless there is additional evidence not before the first tribunal or some particular matter of that kind. But that is chiefly applicable to cases where an applicant (or some relative) is appealing or having his case reconsidered after an order requiring reconsideration. If, in a country guidance case, there is adduced evidence from a witness who, having given evidence in his own case on a previous application or appeal, gives much wider evidence for the purpose of that country guidance case, that evidence (given for the first not a second time) has to be evaluated in accordance with ordinary principles. That is just what the AIT did in relation to W1 and there is no error of law.

Expert E1

16. Here the complaint seems to be that the Tribunal should have accepted this expert's evidence especially on the issue of bribery. There was no doubt that money changing hands produced a smooth transition through the airport but the AIT found in para 320 that E1 himself

> "does not indicate that the amounts requested/demanded normally present any particular problem for the returned asylum seekers except where there are special risk factors."

They later said

> "even loose change will do"

17. It is said that their conclusions are at variance with E1's evidence accepted in the earlier case of AB and DM where the amounts of bribes required were said to be between $500 and $1000. But it was the appellant who chose to adduce further evidence on the question of bribes. On a fair reading of para 320 (which is too long to quote in its entirety) the AIT looked at all the evidence adduced before it and came to conclusions upon it. Once again there is no error of law.

18. Counsel concentrated his oral argument on these 4 matters. The remaining 19 grounds set out in his skeleton argument have been carefully considered by the court but they no more raise any question of law than the grounds developed in oral argument. To the extent that the appellant's skeleton argument suggested that a lone woman would be at particular risk on return (not put forward as one of the 23 grounds of appeal), the suggestion has no foundation on the facts found by the Tribunal, since it held that no low profile asylum-seeker was at risk of persecution and it rejected the evidence of W1, W2, and W3.

19. It is necessary to reiterate the guidance given by Baroness Hale of Richmond in para 30 of her speech in AH (Sudan) v SSHD [2008] 1 AC 678, 691:-

> "… This is an expert tribunal charged with administering a complex area of law in challenging circumstances. To paraphrase a view I have expressed about such expert tribunals in another context, the ordinary courts should approach appeals from them with an appropriate degree of caution; it is probable that in understanding and applying the law in their specialised field the tribunal will have got it right: see Cooke v Secretary of State for Social Security [2002] 2 All ER 279, para 16. They and they alone are the judges of the facts. It is not enough that their decision on those facts may seem harsh to people who have not heard and read the evidence and arguments which they have heard and read. Their decision should be respected unless it is quite clear that they have misdirected themselves in law. Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently. I cannot believe that this eminent tribunal had indeed confused the three tests or neglected to apply the correct relocation test. The structure of their determination can be explained by the fact

> that this was a "country guidance" case: but that makes it all the more important that the proper approach … is followed in future."

20. It is, of course, distressing for those, who have managed to escape a 'failed or failing' state, to be told that they have no right of asylum because there is no well-founded fear of persecution on return but that does not justify an attack on a lengthy cogent and clear determination on grounds which amount to no more than a complaint that the facts should have been decided differently. I would uphold the AIT's determination and dismiss this appeal.

Lord Justice Stanley Burton:

21. I agree.

Lord Justice Laws:

22. I also agree. It will be clear from the judgment delivered by my Lord Longmore LJ that from first to last this appeal has involved nothing more than an attempt to persuade the court to re-visit various aspects of the merits of the case. My lord has cited para 30 of Lady Hale's speech in AH (Sudan) v SSHD [2008] 1 AC 678. I would respectfully underline its importance in a context such as this. While I acknowledge that Sir Henry Brooke was persuaded to grant permission to appeal, I have to say that in my view appeals in this field which do nothing but complain of the tribunal's factual conclusion do real disservice to the statutory appeal.