

AJB
Heard at Field House
On 13 March 2002

APPEAL NO HX17016-2001
BM RM TW (KMDJ) Kenya CG
[2002] UKIAT 01841

IMMIGRATION APPEAL TRIBUNAL

Date Determination notified:
07.06.2002
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Before:

**A R Mackey (Chairman)
Mr R Hamilton
Mrs M L Roe**

Between

**BONNIFACE WAIHARO MWAURA
RICHARD WAIHARO MWAURA (SON)
MRS TABITHA WANJIKU (WIFE)**

APPELLANTS

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

Representation:

For the appellants: Ms S Naik of Counsel representing Wilson & Co.
Solicitors

For the respondent: Mr D Ekagha, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellants are citizens of Kenya who appeal, with leave, against the determination of an Adjudicator Mr M E Curzon Lewis, promulgated 9 November 2001, wherein he dismissed an appeal against the decision of the respondent who had refused to vary leave to enter, an asylum and human rights claim by the first appellant and a human rights claim by his wife, the third appellant above named.
2. The first five paragraphs of the grounds upon which leave was requested were a challenge based upon the delay in the promulgation

of the decision from the time of hearing before the Adjudicator on 17 July 2001.

3. As stated in the application granting leave, these grounds did not appear to have substance. We indicated that our views have not changed. Ms Naik agreed and stated that she would not be pressing those grounds but concentrating on the other grounds set out in paragraphs 8 to 27 of her application for leave.

The Adjudicator's decision:

4. The Adjudicator heard evidence both husband and wife appellants. There was no Home Office Presenting Officer available so no cross-examination took place.
5. Mr Mwaura entered the United Kingdom, as a student, in December 1995 and claimed asylum on 3 December 1996 during the currency of his leave to enter as a student. His application was determined on 31 January 2001 and from that he appealed to the Adjudicator.
6. Mrs Wanjiku, arrived in the United Kingdom on 3 March 1996 and claimed asylum on arrival. Her application was refused on 3 June 1997 and, after an appeal to an Adjudicator, that application was refused on 17 March 1999. She was refused leave to appeal to this Tribunal. The third appellant is a child of this couple born in United Kingdom on 8 October 1998. They evidently also have a further child. The couple were married on 10 July 1999 in the United Kingdom. Their respective appeals were heard together before the Adjudicator and likewise before us. Substantial bundles were presented to the Adjudicator and are set out in detail at paragraphs 12 to 15 of the determination. Those documents were also before us. In addition we were provided with the latest CIPU Assessment Report of October 2001.
7. Mr Mwaura is an only child, he is now aged 25, he is Kikuyu and his home district is Kiambu, a suburb of Nairobi. His father died in a car accident when he was 11 years old. He came to the United Kingdom in late 1995 after completing secondary education in the Muranga and studied at a London management school. His studies were funded by his mother.
8. He claimed that during 1994 he became aware that his mother, was a very active Safina supporter (an opposition party in Kenya). She was stated to be a local representative in Kiambu and was involved in writing papers and undertaking secretarial tasks for the party as well as attending various meetings and rallies. In addition to this family political history it was claimed that his late father and two paternal uncles had been politically involved (one of them being a member of Kanu (the ruling party)). They had both fled Kenya in 1992 and were believed to be in the United States.

9. While Mr Mwaura stated that he had observed political activities at his home prior to leaving Kenya, including police visits to his home and an accusation and harassment for illegal behaviour by his mother, he had not personally been involved in any politics prior to leaving.
10. He claimed that in December 1994 his mother went to Mombasa for safety reasons and because the Safina Party had its foundations there. She remained there until August 1995 campaigning for Safina. The appellant remained in Kiambu at that time. However his mother returned to Kiambu to ensure she would not lose her post as local representative and to assist in the planning for the appellant to come to Britain as a student. There were then additional political problems in Kiambu for his mother (and two maternal uncles) over the period September and October 1995 including the arrest of the two uncles for a short period.
11. During January 1996, while the appellant was in London, he contacted his mother through a neighbour and was told that their house had been broken into and because of a failure to the police to react to a complaint she suspected the thieves were more likely to be Kanu supporters looking for Safina documentation. It was then claimed that the appellant had difficulty in communication with his mother from then on. In May 1996 the appellant was told by a friend in England that his mother had been arrested in about April 1996. Despite trying to contact his mother he was unable to do so. He eventually tried to contact her through the Red Cross and claims he heard from them that she was still in prison. However the Red Cross since that date had been unable to obtain further news for him. The Red Cross inquiries included, we were advised by Counsel, specific requests made by the solicitors acting for him. The appellant then considered returning to Kenya to find his mother but realised that may cause him danger. He also tried to get in contact with his maternal uncles through a church friend. Nothing was successful.
12. In December 1996 faced with this dilemma he lodged his application for leave to remain and asylum.
13. Mrs Wanjiku's background, also set out in the Adjudicator's determination, is that she had been involved with the Safina Party herself from May 1995 after leaving school. She was the Secretary of a Kiambaa divisional branch in the district of Kiambu. At the hearing before us the appellant briefly explained that the districts where his mother and wife had been involved were about 20 miles apart from each other.
14. Mrs Wanjiku stated that she was arrested in September 1995 for participating in a Safina demonstration against President Moi and had been detained at the Kiambu police station for 32 days during which time she had been beaten and interrogated about her political activities. She was released on the condition that she reported weekly.

In January 1996 a friend in the CID told her the police were planning to charge her when she next reported. She accordingly ran away and stayed with a friend of her mother until she departed for the United Kingdom, escorted by the CID officer who had told her of the charges. She lodged her application for asylum on arrival in the United Kingdom. The couple claimed they had not known each other in Kenya prior to coming to United Kingdom.

15. Both husband and wife have become involved in the Kenya Movement for Democracy and Justice (KMDJ) since they have been in United Kingdom. A letter from the Chairman, dated 13 July 2001, sets out the objectives of this organisation and in respect of Mr Mwaura states that he is an active member, who has participated in meetings, activities and demonstrations demanding change in Kenya. The Chairman opined that Mr Mwaura may be identified if he returned to Kenya as he has been "at the forefront of our activities due to his commitment in their activities and that there is undoubted interest in him". Also he states that as the Kenyan police and judiciary are not independent from political interference the Kenyan legal system would not protect him and he faces the prospect of being assaulted and imprisoned on trumped up charges.
16. The Adjudicator found that the earliest reference to KMDJ by the appellant Mr Mwaura was 24 November 2000. However in respect of his wife Mrs Wanjiku, it was claimed that she had been associated with KMDJ from 1998 and became a member in 2000. She was stated to have taken part in a demonstration in Downing Street in September 2000 in which a petition was presented to the Prime Minister. If she were to return to Kenya she would carry on her activities in opposition politics.
17. The fear of both the husband and wife is that when they returned to Kenya, because of their political associations in the past, their family backgrounds and their KMDJ activities in London, they would be at risk of persecution by the Kenyan authorities and the Kanu ruling party. They also made some reference to their ethnic tribal background as an additional area of risk.
18. Mr Mwaura's claim was thus presented as a "sur place" one and the human rights claim made by Mrs Wanjiku was submitted not only under Article 3 but also under Article 8 and made in respect of both her and her children.
19. Expert evidence was presented to the Adjudicator in the form of a report from Mr Oliver Furley of the African Studies Centre, Coventry University, dated 9 July 2001. As well considerable country information and a decision of this Tribunal in Njenja [00/HX/01066], a decision by Mr Freeman dated 20 November 2000, were submitted.

20. The Adjudicator sets out his credibility findings between paragraphs 110 and 117 of the determination. The essential points arising from this assessment were that the Adjudicator found the evidence of Mr Mwaura gave him concerns and he was inconsistent as to who was responsible for the home visits when he was in Kenya. He also noted there was a discrepancy over the motive of his mother in returning from Mombasa to Kiambu in August 1995. He did not believe that the appellant's mother and her brothers were high profile members of the Safina, as claimed. For these reasons he made an adverse finding on credibility in respect of the appellant's "Nairobi evidence". With regard to the evidence since his arrival in the United Kingdom he concluded that, as the Nairobi evidence had been rejected, the failure to claim at an earlier date was implausible and not satisfactorily explained. In respect of KMDJ involvement, he found it was not credible that the appellant had joined the organisation with a genuine political motive. In his judgement "he and his wife joined in order to enhance their prospects in this asylum appeal. I make an adverse finding of credibility in respect of the UK evidence."
21. The Adjudicator then took into account the country of origin information, including the report of Mr Furley, the Tribunal decision in Njenja and also noted the decision of the Court of Appeal in Danian [1999] INLR 533. That decision relates to claims based on post arrival activities carried out in bad faith. The Adjudicator did not believe that the appellant joined KMDJ in good faith but did not find that a material issue, rather in his judgement, the appellant had not reached the level of risk on return that was required for him to qualify under the Refugee Convention.
22. Under the human rights claim he found that Article 3 and Article 8 were not engaged. In respect of the human rights claim of Mrs Wanjiku the Adjudicator stated that the claim under Article 3 had not been specifically argued (although before us Ms Naik submitted that she had presented such an argument). In this regard it is noted that her asylum appeal had been dismissed and that she had taken no steps to seek judicial review in 1999. More significantly the Adjudicator found that although she arrived in the United Kingdom in 1996 she did not take steps to join the KMDJ until November 2000 at the same time as her husband. He then applied to her, in the human rights context, the same arguments that had been put in respect of her husband in respect of his KMDJ membership and found that, even if she did suffer ill treatment during her detention in 1995, that ill treatment was some five years ago (i.e. was now remote). Beyond that her maiden name would have been changed after her marriage thereby disguising any link with her past. He was thus not satisfied that there would be a breach of Article 3, on her return.
23. He dismissed Article 8 claims of all three appellants and also did not accept that it would be unreasonably harsh for the first appellant and his dependants to return to Nairobi.

The appellant's submissions:

24. Ms Naik did not press the delay argument set forth in paragraphs 1 to 7 of the grounds of appeal submitted. However she relied on the remainder of her grounds.
25. She disputes the credibility assessment of the Adjudicator in several respects. Firstly in relation to the finding by the Adjudicator that the appellant's mother was not a high profile member of Safina as claimed (paragraph 115 of the determination). It was submitted that there is in fact not a discrepancy at paragraph 114, as claimed, and that the reasons for the return to Mombasa, by the appellant's mother, were both to preserve her position as a local representative of Safina and to organise the appellant's departure to United Kingdom. Beyond this the finding in paragraph 113.3 was also not inconsistent given that the Kanu are the governing party in Kenya and also control the police force. Therefore it was logical for the appellant as a young man (school boy) to view the visits to the home as being from both parties and there was nothing inconsistent in this. The submission therefore by Ms Naik was that this part of the credibility assessment is built on a flawed assessment of the facts.
26. It was submitted in relation to the negative credibility findings relating to the time at which the appellant lodged his refugee claim in the United Kingdom that this was not significant, as for his first year the appellant had been a student and it was only during 1996 he had heard of his mother's arrest. The claim was therefore always a "sur place" claim and it was improper to read a lack of credibility into this point.
27. In relation to the approach to the Red Cross made in November 2000, it was submitted that this should not be seen as a negative credibility point but a reasonable inquiry made by the appellant. More significantly it was submitted that there had been no further result from that investigation which heightened the appellant's fears. It was also submitted this regard that the lack of any corroborative material should not be used to undermine the appellant's account. As to the adverse credibility findings on the United Kingdom evidence of the appellant it was submitted that the delay in the appellant joining the KMDJ (which was formed in 1996) should not be counted against him or seen as an act of bad faith or opportunism as at the time the appellant left Kenya, he was very young and had not grown up and formed his own political views. It was thus logical, particularly given his wife's involvement, that he would become interested some years after his arrival in the UK. It was submitted further that even if joining the KMDJ was seen as opportunistic the Kenyan authorities would know of this. His risk therefore on returning to Kenya over the next nine months would also be heightened because of the proposed election due to take place and the wish by the existing Moi government to suppress all opposition.

28. In respect of the findings on the human rights appeal of Ms Wanjiku we were reminded that her risk must be assessed at this point in time against the relevant country background and an assessment of both her Article 3 and Article 8 rights considered. Before the Adjudicator the Article 3 rights were pursued and in the submission of Ms Naik Article 8 was presented as a possibility.
29. The findings of the Adjudicator at paragraph 131 that attach significance to the failure by Ms Wanjiku to seek judicial review of the decline of her asylum appeal, was submitted as an irrelevant point and that the right question should have been whether there was a real risk of return under Article 3. On the point that Ms Wanjiku had married and would return under a different name, it was submitted by Ms Naik that the totality of the evidence should be looked at and that given her past arrest in 1995 and that she was a known Safina activist, there would be risk on return, particularly coupled with her involvement in KMDJ in the UK and also Kikuyu tribal background.
30. Ms Naik submitted that the treatment of the expert evidence from Mr Oliver Furley, had been wrongly assessed by the Adjudicator and it should not have been dismissed simply on the basis of the adverse credibility findings in relation to the first appellant's Nairobi evidence.
31. Finally it was submitted that if it was concluded that the risks to the appellant's were not at the level of Article 3 ECHR risk, then we must go on to consider the risk under Article 8 particularly with reference to the decision of the Tribunal in Nhundu and Chewera.

The respondent's submissions:

32. Mr Ekagha submitted that the credibility findings were valid and correct on the evidence before the Adjudicator. This was an appellant who had no political background at all before he left and his mother's involvement was not one of a high profile. He submitted that the Adjudicator appears to have taken all the factors available into account including, noting that the appellant's wife Ms Wanjiku and his mother had come from the same district and apparently been involved in the same Safina branch. Thus claiming that he did not know his wife before he came to the UK did not appear logical.
33. He referred us to paragraph 5.50 of the latest CIPU Report on Kenya and submitted the last sentence was particularly relevant as it indicated, in his submission, that there was no Article 3 risk in this case.
34. Turning to the KMDJ membership in United Kingdom and its impact on these appellants, it was submitted that their membership would not bring them to the adverse attention of the Kenyan authorities. Their position could be clearly distinguished from that in the Njendu determination of the Tribunal. Mr Njenja was one of the co-founders of

KMDJ, there was video recordings taken of him involved in KMDJ activities and he was clearly a leading member. In the case of these appellants however, they were just members, indeed there was not even a specific date available as to when they had joined. Also noting the comments from the Furley report (paragraph 4), we should observe the comments made in the Njendu decision in regard to this and not place too much weight on this report.

35. We should thus conclude, in his submission, that the appellants would not suffer persecution on return or be at risk of human rights breaches and thus, decision of the Adjudicator should be upheld.
36. In reply Ms Naik submitted that the findings in Njenja should not just be seen as applicable for leading members of the KMDJ. The specific situation of each applicant had to be referred to and noting the comments in the Furley report and also that at the present time a further 18 months had passed. Also, as stated, in nine months time there will be elections in Kenya and accordingly, given the attitudes of the Moi Administration there is a risk to KMDJ members returning at this time. We were referred to paragraphs 3.17, 3.18, 4.20 to 4.29 of the CIPU Report as a background to the human rights situation in Kenya and activities of the Kanu Party.
37. It was submitted that it was, on the evidence available, particularly noting the witness' statement relating to KMDJ, correct to conclude the Kenyan authorities in the United Kingdom were aware of the opposition activities of the appellants.
38. Ms Naik submitted there was no significance in the claim that the first appellant's mother and his wife came from the same area. She submitted they had been involved in unconnected past events and these should not count against them and it was illogical to undermine the credibility of the first appellant based on this issue. There was simply no proof of past association and indeed, it appeared on the first appellant's evidence that the districts they came from were some 20 miles apart.
39. Finally in response to our questions relating to concerns as to the failure of the Red Cross or the Safina network in Kenya to trace the appellant's mother, we were informed that the appellant's solicitors had asked the Red Cross to make inquiries and sent off the appropriate forms in 2000, however, despite continuing requests there had been no result.

The issues:

40. We found the issues before us to be:
 - (a) Was the decision of the Adjudicator, sustainable, particularly in relation to findings on credibility and the lack of a well founded risk to both appellants on return under both the Refugee Convention and the ECHR?

- (b) Even if there are some flaws in credibility assessment, on the totality of the evidence that is acceptable, do either or both of the appellants have a well founded fear of persecution, or a real risk of Article 3 or Article 8 breaches on return to Kenya?

Assessment:

41. We found the Adjudicator's assessment of the credibility of the appellant somewhat flawed in the reasons given at paragraphs 113.3 and 114. The submissions of Ms Naik in this regard have merit. At the young age when the appellant left Kenya distinguishing between the police and members of the Kanu should not be seen as a point of major inconsistency. In addition we do not consider that it would be discrepant for the appellant's mother to return from Mombasa for a number of reasons. The impact of this finding however is not substantive in our conclusion, in that, from the evidence, it would mean, at most, that the appellant's mother had a higher profile within the Safina Party. However as it is now some six years since it is claimed she was detained and because her current situation can only be seen, from the evidence (or lack thereof) to be highly speculative, we find her impact on the risks to either appellant can be of little, or no significance at this time. While it is correct that a lack of corroborative evidence should not be the basis of rejecting a claim in the refugee or human rights context, in a situation such as this, where the resources of the Red Cross and a significant opposition party in Kenya are available and have been for many years, it is seen as significant that neither of these parties could not give corroborative evidence to the first appellant, that his mother was still detained or, that anything otherwise untoward had happened to her.
42. We have considered carefully the appellant's involvement with KMDJ and the decision in Njenja and the expert evidence of Mr Oliver Furley. We find that the profile and situation of these two appellants can be clearly distinguished from that of Njenja. These appellants, at most, are ordinary members who have not had significant involvement in the KMDJ. The appellant in Njenja is clearly a significant figure within that organisation and thus someone who could be perceived by the Kenyan authorities as of some interest. The letter from the KMDJ, we consider, is particularly self-serving and does not indicate a high profile membership of either appellant.
43. Viewed in its totality we consider that there may be a remote risk to these appellants on return to Kenya but the risks are certainly not at the level of a real or substantive likelihood that they will suffer persecution or that a breach of the provisions of Article 3 would occur on their return to Kenya.
44. Finally we have given consideration to the situation relating to the appellants and their family. They apparently have two young children born in the United Kingdom. After consideration of the guidelines set out in Nhundu and Chewera we find that Article 8 is not invoked. These

are two very young children who are clearly better off with their own parents and who would be returning to their own cultural and ethnic background. We do not consider that proportionally assessed as against the immigration objectives of the United Kingdom that there would be a breach of Article 8 if the family were to be sent to Kenya.

Decision:

45. The appeals of all appellants are dismissed.

**A R Mackey
Vice President**