EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

Lord Reed
Lord Carloway
Lord Hardie

[2009] CSIH 57
XA30/08

OPINION OF THE COURT

delivered by LORD HARDIE

in the Application for Leave to Appeal under section 103B of the Nationality, Immigration and Asylum Act 2002

by

JBM

Applicant;

against

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent:

_____

Act: Bryce; Drummond Miller

Alt: Lindsay; Solicitor to the Advocate General for Scotland

19 June 2009

Introduction

[1] The applicant maintains that he is a national of the Democratic Republic of Congo ("DRC"). On 9 April 2006 along with his wife and son he arrived in the United Kingdom by air at Heathrow Airport and sought asylum. By letter dated 8 January

2007 and notice dated 11 January 2007 the respondent refused the claim. A Notice of Appeal was lodged in respect of each of the applicant, his wife and son. On 22 February 2007 the three appeals came before Immigration Judge Bradshaw ("IJ"), when the applicant's representative indicated that the appeal on behalf of his wife and son depended upon the applicant's case. By decision promulgated on 12 March 2007 the IJ dismissed the applicant's appeal. The applicant applied for reconsideration of the decision of the IJ and, by order dated 29 March 2007 and intimated to the applicant on 10 April 2007, Senior Immigration Judge Perkins ordered reconsideration of the applicant's case because he considered it arguable that the IJ had been unduly impressed with evidence provided by the respondent that tended to damage the applicant's credibility, and that arguably the IJ had given the evidence a meaning it did not support and had dismissed the appeal without deciding if the adverse credibility finding necessarily destroyed the applicant's case. On 22 November 2007 there was a further hearing of the applicant's case before two designated Immigration Judges who concluded that the IJ had made no error of law and confirmed the decision of the IJ dismissing the applicant's appeal. Thereafter the applicant sought leave to appeal to this court but leave was refused by a Senior Immigration Judge by decision dated 9 January 2008 and intimated to the applicant on 23 January 2008. Thereafter the applicant lodged the present application to this court seeking leave to appeal against that decision.

The background circumstances

[2] In support of his application for asylum on behalf of himself and his two dependants the applicant gave the IJ an account which can be summarised as follows. His name was JBM, his wife's name was ISN and his son's name was PM. They were born respectively on 25 December 1960, 9 August 1970 and 2 December 2002. They

are citizens of DRC. The family lived in Kinshasa. The applicant was on a business trip in Bas-Congo when his landlord died of natural causes on 31 December 2005. Rumours spread that the applicant had caused the death through witchcraft to increase the applicant's own business success. A mob attacked the family home where the applicant's wife was present along with their older son M (born 1 March 1998) and with P. The police dispersed the crowd but said they would not return if further accusations were made. On 4 February 2006 the 15 year old son of the deceased landlord died suddenly and rumours spread blaming the applicant's sorcery. On this occasion the mob outside his house was so large and violent that two people were trampled to death. The mob captured the applicant's step daughter and burnt her to death. The applicant saw television reports of the riots when he was in Bas-Congo. He tried to return to his home but was attacked in the street. He was stabbed and left for dead. He recovered and escaped to the local church. The applicant's wife was forced to leave their home. She became separated from their older child and had not been able to locate him since. The applicant, his wife and son, P, remained inside the church for two days but they managed to leave the church one evening and the pastor drove them to the border with Angola where he put them in contact with the pastor of a church in Luanda. The second pastor contacted a colonel who, in exchange for payment, collected them from the church, took them to the airport and put them on board their flight.

[3] The documentation submitted by the applicant in support of his claim included general materials relating to the DRC and Angola, the Lingala language and witchcraft. He also submitted a magazine article said to refer to his case and two medical reports relating to the injury sustained by him. The first medical report dated 18 December 2006 was from a general petitioner with particular experience caring for

asylum seekers and refugees. She described physical and psychological symptoms and concluded:

> "The [applicant] has scars on his upper back, abdomen and legs...highly consistent with his description of injuries...His description is entirely plausible. He describes symptoms of post traumatic stress...I...have no reason to doubt his account."

The second medical report dated 20 February 2007 followed three medical examinations in January and February 2007 by a general practitioner, who had received annual training from the Medical Foundation for Victims of Torture since 2003. In his opinion the applicant's "...numerous scars over his torso, abdomen and limbs...[are] strongly consistent with being beaten with various weapons whilst lying on the ground in different positions." Some of the scars are "almost certainly the product of blows of significant force from human-made objects." His symptoms are "consistent with a diagnosis of post traumatic stress disorder."

The decision of the Immigration Judge

[4] The IJ disbelieved several aspects of the applicant's account. First he disbelieved that the applicant and his dependents were nationals of the DRC but concluded that they were all Angolan nationals whose true identities were respectively MM, AF (the applicant's wife) and PM (the applicant's son). In support of that conclusion the IJ relied upon the report from the Heathrow Intelligence Unit to an investigator within the Home Office. That report disclosed that the airline tickets for the applicant and his family were purchased in London and collected in Luanda by the family prior to travel. The family travelled together on a flight from Luanda to Johannesburg in South Africa and then directly to the United Kingdom using the names MM, date of birth 12 December 1962 (the applicant), AF, date of birth 2 November 1974 (his wife)

and PM, date of birth 6 September 2002 (the applicant's son). Passports containing visas issued by the British Embassy in Luanda relating to each of these names and containing photographs respectively of the applicant, his wife and son were found in an unclaimed piece of luggage matching that held by the family, to which was attached a baggage tag in the named of AF (the applicant's wife). Second, the IJ disbelieved the evidence of the applicant and his wife that their knowledge of the DRC was derived from their then living there. The applicant was a businessman who, on his own admission, travelled away from home in connection with his business. The DRC is bounded on the south by Angola and Kinshasa, the capital of the DRC, is not far from the Angolan border. The information provided about Kinshasa was basic information which could be obtained by virtue of living near the border or by reason of the applicant having business in the DRC. Third, the IJ also rejected the authenticity of the magazine article lodged by the applicant and the IJ concluded that it had been fabricated on behalf of the applicant to improve his chances of success in his asylum claim. In reaching that conclusion the IJ took into account the country report, which supported such a conclusion. Although the IJ accepted the medical reports he rejected the applicant's assertion that he and his family were nationals of the DRC and that he had sustained the injuries in the circumstances outlined by him.

Reconsideration of the IJ's decision

[5] The grounds for reconsideration alleged that the IJ had failed to explain his decision that the family were Angolan. The facts were equally consistent with the family being Congolese and travelling under false Angolan identities. It was also alleged that the IJ, having heard evidence regarding nationality, failed to look at all the evidence in the round and used the finding in respect of nationality to reject the other evidence supporting the applicant's case. The Senior Immigration Judges who

reconsidered the case concluded that the IJ's finding on nationality was supported by the evidence and that looking at the other evidence in the round the IJ was entitled to find nothing significantly positive to outweigh the nationality finding. In all the circumstances they concluded that the IJ had made no error of law and affirmed his decision dismissing the appeal.

The present application

[6] In the present application the applicant seeks leave to appeal on the ground that the Tribunal erred in law in failing to give sufficient weight to the medical evidence. Counsel for the applicant referred to the case law concerning the compartmentalization of evidence and submitted that an immigration judge must consider medical evidence in the round with the other evidence where that evidence is advanced in support of the credibility of the appellant's claims (*Mibanga* [2005] INRL 377). The IJ stated in his decision that he had done that and counsel acknowledged that there was no proper basis on which to dispute that assertion. In *SA (Somalia)* [2006] IMM AR 236, the court set out guidance to those involved in the asylum determination process as to what the court might expect to see in medical reports proffered as evidence of the veracity of an appellant's account. Paragraphs 28 to 30 of that decision incorporated the "Istanbul Protocol" and are in the following terms:

> "28. In any case where the medical report relied on by an asylum seeker is not contemporaneous, or nearly, with the injuries said to have been suffered, and thus potentially corroborative for that very reason, but is a report made long after the events relied on as evidence of persecution, then, if such report is to have any corroborative weight at all, it should contain a clear statement of the doctors opinion as to consistency, directed to the particular injury said to have occurred as a result of the torture or other ill treatment relied on as evidence of

persecution. It is also desirable that, in the case of marks of injury which are inherently susceptible of a number of alternative or 'everyday' explanations, reference should be made to such fact, together with any physical features or 'pointers' found which may make the particular explanation for the injury advanced by the complainant more or less likely.

29. In cases where the account of torture is, or is likely to be, the subject of challenge, Chapter Five of the United Nations Document, known as the Istanbul Protocol, submitted to the United Nations High Commissioner for Human Rights on 9 August 1999 (Manual on the Effective Investigation Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment) is particularly instructive. At paras 186-7, under the heading 'D. Examination and Evaluation following specific forms of Torture' it sates:

> '186...for each lesion and for the overall pattern of lesions the physician should indicate the degree of consistency between it and the attribution.
>
> (a) Not consistent: the lesion could not have been caused by the trauma described;
>
> (b) Consistent with: the lesion could have been caused by the trauma described, but it is non-specific and there are many other possible causes;
>
> (c) Highly consistent: the lesion could have been caused by the trauma described, and there are few other possible causes;
>
> (d) Typical of: this is an appearance that is usually found with this type of trauma, but there are other possible causes;

(e) Diagnostic of: this appearance could not have been caused in any way other than that described.

187. Ultimately, it is the overall evaluation of all lesions and not the consistency of each lesion with a particular form of torture that is important in assessing the torture story (see Chapter IV.G for a list of torture methods).'

30. Those requested to supply medical reports supporting allegations of torture by asylum claimants would be well advised to bear those passages in mind, as well as to pay close attention to the guidance concerning objectivity and impartiality set out at paragraph 161 of the Istanbul Protocol."

In this case counsel for the applicant reminded us that the medical reports referred to the injuries being highly consistent with the applicant's account. Moreover the applicant had been consistent in his own story throughout since his arrival in Heathrow and his account was consistent with that of his wife. The Tribunal had erred in law in failing to regard the overall consistency of the applicant's evidence as well as the medical evidence.

[7] Counsel further submitted that the evidence in relation to the passports was equally consistent with the applicant's explanation, as it was with the applicant and his family being nationals of Angola. It was submitted that the Immigration Judges had failed to take into account matters that ought to have been taken into account, namely the consistency of the applicant's evidence for which no credit had been given to him (*Chinder Singh* 1997 GWD 34-1738). Although counsel raised before us issues relating to the passport and the internal consistency of the applicant's account and its consistency with his wife's account, counsel acknowledged that he would not have

supported an application to this court had it not been for the strength of the medical evidence.

Discussion

[8] The application for leave to appeal and the grounds in support of it amount to no more than a disagreement about the weight to be attached to the medical evidence in this case. Counsel for the applicant accepted that the IJ is obliged to consider such evidence in the round with the other evidence in the case (*Mibanga*). Counsel recognised that the IJ said that he did this and he acknowledged in his submissions that there is no proper basis upon which to dispute the IJ's assertion (paragraphs 2.19 and 3.3 of the written submission for the applicant). Even if such a concession had not been made we note that the classification of injuries in *SA (Somalia)* describes the term "highly consistent" as meaning that they could have been caused by the trauma described and that there are few other possible causes. This classifications falls in the middle of the scale specified in *SA (Somalia).* At one end of the scale is the term "not consistent" which is self-explanatory and at the other end is the term "diagnostic," meaning that the appearance of the injuries could not have been caused in any way other than described by the patient. Furthermore although the medical evidence supported the applicant's account of the mechanism of how the applicant received his injuries, it could not assist in relation to the circumstances in which he received them. Thus in this case the IJ was entitled to consider whether he believed the applicant's account of how he received his injuries. He clearly rejected the applicant's evidence on that matter. Having rejected that account it is not for the IJ to speculate as to how the injuries may have been sustained. It is for the applicant to prove his case, albeit to a relatively low standard.

[9] The IJ considered the applicant's evidence to be incredible and there was clearly a basis for disbelieving the applicant. First, the IJ did not believe the applicant about the magazine article that allegedly reported the incident in which the applicant claimed that he was attacked because he was alleged to be involved in witchcraft, resulting in the sudden death of his landlord and subsequently of his landlord's son. The IJ concluded that the article was forged and counsel for the applicant in his written submissions to us confirmed that "it will not be contended that such a finding was not open to him as a matter of law". In light of that finding it appears that the applicant has been involved in an attempt to deceive the Tribunal by submitting a forged article to bolster his claim about the nature and circumstances of the attack upon him. It is not surprising that the IJ disbelieved his version of events, which was given to the doctors preparing the medical reports as well as to the Tribunal.

[10] The IJ also disbelieved the applicant about the passports and visas which suggested that the applicant and his family are Angolan citizens, not Congolese as claimed by him. There was ample evidence for the IJ to do so, not least the report from the Intelligence Unit at Heathrow Airport. Bookings, departure details and the flight manifest clearly show that the family travelled together from Luanda to Johannesburg in South Africa and then directly to the United Kingdom using the names MM (the applicant), AF (his partner) and PM (their son). An unclaimed bag with a luggage tag linked to AF was found to contain Angolan passports in each of these names and bearing each of their photographs. The passports each contained a visitors' visa issued in Angola at the British Embassy at Luanda. The submission before us was to the effect that there was an insufficient basis for the IJ to conclude that the applicant and his family were Angolan and that even if the documents did

belong to them, it was not unusual for asylum seekers to use false documents. We reject that submission. As the judges noted when they reconsidered the case;

> "The [applicant's] evidence demands that he flew without being aware of these documents existence and they were fabricated without his knowledge to facilitate travel. However if the [applicant] flew on apparently genuine Angolan passports and visas, there was no need for subterfuge or corruption of personnel at the airports and no need to be concealed from him. If he never had them there is no reason for them to be in the family luggage."

We agree with these observations. We also agree that the IJ's conclusion about nationality was supported by the evidence and we have concluded that there is no legal basis for interfering with the decision complained of.

Decision

[11] For the foregoing reasons we shall refuse the application for leave to appeal.