Neutral Citation Number: [2007] EWCA Civ 18

Case No: C5/2006/1531

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
AIT No. HX/04050/2003

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/01/2007

Before :

LORD JUSTICE WALLER
LORD JUSTICE SEDLEY
and
LORD JUSTICE RIX

- -

Between :

GM (BURUNDI)	**Appellant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

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Ms S Naik (instructed by Dare Emmanuel Solicitors) for the **Appellant**
Mr M Chamberlain (instructed by The Treasury Solicitor) for the **Respondent**

Hearing date: 20 December 2006

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Judgment
As Approved by the Court

Lord Justice Sedley :

1. The appellant, who it is now accepted is a Burundian of Hutu ethnicity, reached the United Kingdom from Malawi in January 2002 and claimed asylum. The Home Office took the view that he was not a Burundian and that his documents were forged, and on this ground alone refused him asylum. An adjudicator, Mr Timson, allowed his appeal in May 2003, finding that he was in truth a national of Burundi but neglecting to make other essential findings about risk and protection. The IAT on the Home Secretary's appeal accordingly remitted the case to the same adjudicator, directing that his existing findings of fact should stand. In July 2004 the same adjudicator allowed the appeal on both refugee and human rights grounds. The Home Secretary again appealed, this time by way of seeking reconsideration by the AIT. The AIT held that Mr Timson had again erred in law, and upon substantive reconsideration of the claims dismissed them both.

2. Ms Naik's contention on the appellant's behalf is that the adjudicator (as he still was in 2004) had made no error of law in deciding that it was as a Hutu located in his particular home area of Bujumbura that the appellant faced a real risk of persecution; but that if, contrary to her contention, the AIT were entitled to intervene, they went on to err in law themselves by misapprehending what the appellant's case was and treating him simply as a Hutu in Burundi. The AIT having refused permission to appeal, the appellant comes before this court by permission of Scott Baker LJ.

3. The adjudicator records at the start of his second determination (§5) that it was agreed that the single issue now outstanding was the risk to the appellant if he were now to be returned to Burundi. The appellant had no political affiliations, although that had not prevented the Tutsi soldiers who had raided his home from threatening to kill him if he did not disclose information about the Frodebu Party. But the adjudicator concluded that he would be at risk of persecution on return. He held:

> 30. It is clear from the material before me that despite the political changes in Burundi the Human Rights situation remains poor. At 6.2 of the April 2004 CIPU report it is noted that the UN Secretary General reported in March 2004 there had been little improvement in the human rights situation in Burundi.
> 31. At 6.10 of the CIPU report it is noted that the US State Department reported that the security services continued to torture people and at 6.14 of the CIPU report it is noted that a Human Rights Watch (HRW) Report referred to extra judicial killings by government soldiers.
> 32. It is also reported that in the material from Amnesty covering January to December 2002 submitted by Mr Adewoye that indiscriminate killings of Hutus took place in reprisal against rebel operations. A report from CNN dated 18 March 2004 set out that fighting between Hutu rebels and the Burundian army had left 13 killed and hundreds homeless. A rebel leader said most of the dead were civilians.
> 33. At 6.78 of the CIPU report it is noted that since Mr Ndayizeye assumed the Presidency his party has operated increasingly closely with the Tutsi dominated Uprona party.
> 34. It appears clear from all the material before me that discrimination persist against Hutus despite the change in government. It also appears clear that some Hutu rebels have not accepted the peace agreement and the Burundian army have engaged in indiscriminate attacks against civilians.
> 35. The issue before me is whether the appellant will face persecution or breaches

of his article 3 rights. The party the appellant was accused of supporting is now in power. I do not accept the appellant faces any risk because of his support or alleged support for the Frodebu party. It is a party of government and its leader is President of Burundi. There is no evidence to suggest that mere support or alleged support for that party will give rise to a risk of persecution or breaches of ECHR.
36. As a Hutu it is clear that the appellant faces a real risk of state discrimination. At 6.7 of the CIPU report it set out that state discrimination against Hutus affected every facet of society. It is equally clear from 6.79 of the CIPU report UN Secretary General believes the transfer of power in Burundi has created a new hope for a democratic and peaceful Burundi.
37. Whilst it maybe that at a time in the future that hope may be realised it is clear that at present the ethnic tensions still exist. I am mindful that making a finding on risk of persecution is not an academic exercise. It involves a decision about someone's life. I am also mindful that the standard in these appeals is a low one. Having looked at the area material placed before me it is clear that Hutus are marginalized in Burundian society and continue to face a risk of being attacked. It is equally clear that Hutus have been subject to indiscriminate attacks. Asking the question is there a serious possibility that the appellant would face a breach of his article 3 rights as a Hutu or persecution because of his ethnicity I find he would. It may be he might return to Burundi and nothing would happen to him. That however is not the standard to be applied. The question is whether there is a serious possibility he will suffer treatment amounting to persecution or breaches of his article 3 rights on return. At present I find that there would be such a risk.
38. I find that the appellant has a well founded fear of persecution for a convention reason and that there are substantial grounds for believing there is a real risk he would face breaches of his article 3 rights.

4. It is to be noted, first of all, that no issue of internal relocation was canvassed or considered either at the original or at this remitted hearing; nor had it been raised on the first appeal to the IAT. Secondly, however, it can be seen that the adjudicator found in the appellant's favour on the single ground that he would face a risk of being persecuted in Burundi because he was a Hutu. The earlier suggestion of risk arising from imputed political opinion had gone with the election of Frodebu into power.

5. The AIT concluded that this second determination was vitiated by the errors of law set out in the Home Office's grounds of appeal, summarised by the AIT as follows:

> 10. ……
>
> By concluding that the situation in Burundi posed a threat to every Hutu (ground 2);
> Whilst concluding that there was discrimination in Burundi against Hutus, in failing to identify that there was any evidence that Hutus as a ethnic group were persecuted per se (ground 3);
> In failing to indicate why the appellant would be in any different situation from the rest of the Hutu population in Burundi, having conclude that the appellant would not be at risk of persecution for any political reason (ground 4);
> Having concluded that Hutus had been subjected to indiscriminate attacks, in failing to indicate why such would bring the appellant within the protection of the Refugee Convention (ground 5);

In failing to follow relevant case law (*Mapesa* [2002] UKIAT 01035 and *N (Burundi)* [2003] UKIAT 00065), which indicated that Hutus were not per se persecuted (ground 6).

6. The AIT upheld these grounds. They said:

> 15. The reported determination in *Mapesa*, with particular reference to paragraphs 18 and 19 thereof, gives clear indication that the Tribunal concluded that Hutus per se were not at risk of serious harm by which we mean persecution or treatment contrary to Articles 2 and 3, in Burundi. The Adjudicator, despite that determination having been lodged with him by the respondent, failed to refer to it within his determination and, as a result, we conclude that the Adjudicator failed to take into account evidence which was material to the conclusions which were made by him. Had the Adjudicator give regard to the content of the reported decision in *Mapesa*, his conclusion might have been very different from then conclusion actually reached by him.
> 16. Further, with reference to the objective material referred to by the Adjudicator in paragraphs 30 to 36 of his determination, the essential elements of which we have set out in some detail above, we conclude that no elements of the material to which the Adjudicator referred indicated that the appellant, as a Hutu per se, would be at risk of serious harm in the event of his removal to Burundi. We are satisfied that the material referred to does no more than indicate that the appellant might be at risk of serious harm; it does not support the Adjudicator's conclusion that the appellant would be at real risk of such harm. Thus, we find that the Adjudicator's decision, in respect of both asylum and human rights, is one which is wholly unsupported by the evidence to which he referred.
> 17. With reference to ground 4 of the grounds of appeal, the Adjudicator had already concluded that the appellant would not be at risk due to any political element and, consequently, failed to indicate why this appellant would be at specific risk of persecution other that due to the fact that he was a Hutu. This issue is circulatory, as it returns us to our original indication that the material before the Adjudicator did not entitle him to conclude that this appellant would be at real risk of persecution or of a breach of his protected human rights.

7. Although no argument has been directed to it, I am bound to say, with respect, that the second of these paragraphs seems to me unsatisfactory as reasoning and unfair as criticism. The AIT's formulation "might be at risk of serious harm" is tautologous: it purports to make contingent ("might") something (risk) which is already contingent. To recast in this form a conclusion which the adjudicator had put properly in his findings ("would be at real risk of harm") is to substitute a nebulous formulation for a precise one.

8. The other two criticisms hang together. The fact (see §2/17) that the adjudicator had failed to indicate why the appellant would be at any specific risk of persecution save as a Hutu is a criticism only if the adjudicator was wrong in finding Hutus generally to be at risk. It is therefore on §2/15 that the AIT's oversetting of the adjudicator has to depend.

9. As to this, the AIT's critique is that the adjudicator's failure to have regard to the decision in *Mapesa* [2002] UKIAT 01035, which had been among the materials placed

before him, though not apparently the subject of direct argument, was an omission to take material evidence into account. The IAT's decision in *Mapesa* in March 2002 was that, on the material before them, Hutus as an ethnic group were not at risk of persecution in Burundi. Ms Naik, in a candid and helpful skeleton argument, has shown that more recent decisions, including the country guidance case of *SS (Burundi) CG* [2004] UKIAT 0029, have confirmed the conclusion reached in *Mapesa*, but have qualified it by stressing that there may be special risks to Hutus living in the Bujumbura area.

10. Whether it is classified as evidence or as what Laws LJ has called a "factual precedent", I agree that *Mapesa* should have been considered by the adjudicator and that, if it had been, he would have been unable without more to find a generic risk to Burundian Hutus. In that sense it was a material omission, and one which has been confirmed by subsequent decisions. The AIT were accordingly, in my judgment, entitled to find an error of law and to proceed to re-evaluate the claims themselves.

11. The AIT reached the following conclusions:

> 17. The conclusions we draw from our review of the objective evidence (part only of which has been quoted above) are as follows:
> (a) That a Hutu in Burundi does not face a real risk of persecution by reason of his race or ethnicity.
> (b) That a Hutu in Burundi does not face a real risk of being subjected to inhuman and/or degrading treatment.
> (c) That the risks of falling victim to widespread criminal activities are not disproportionately borne by any particular racial or ethnic group.
>
> The foregoing conclusions apply subject to the saving for those who may still be involved in insurgency or fighting that may be perceived as continuing a form of rebel struggle or being anti-government. We are entirely satisfied that a Hutu with no particular profile (as in the case of the present appellant) does not face the real risks referred to above. In arriving at those conclusions we have had regard to this Tribunal's determination in *AM (Risks in Bujumbura area) Burundi* [2005] UKIAT 00123 and the extent to which the objective evidence shows that the then expressed reasons for optimism in respect of Burundi have materialised. This determination up dates the position so far as Burundi is concerned.
>
> 18. It follows that upon reconsideration of the appellant's claim we are satisfied that his appeals based upon both asylum and human rights grounds must fail.

12. It is because the in-country material now confirms that a generic risk of persecution of Hutus in Burundi cannot be sustained that Ms Naik has shifted her focus to the specific risk facing Hutus in Bujumbura. Scott Baker LJ's grant of permission to appeal on this ground places it on our agenda, but Ms Naik faces some difficulty in showing that it was ever an explicit issue below – except in relation to the AIT's fallback finding on internal relocation, to which I will come.

13. The somewhat slender peg on which her submission is hung is that, as the adjudicator records at §11, the Home Office Presenting Officer had submitted that "any action against the appellant only took place because of where he lived and was not specifically

directed against him". Hence, Ms Naik submits, the IJ was entitled to find that the appellant was at risk "as a Hutu in his particular home area". This may be putting more weight on the particular submission than it will bear; but in this sensitive and difficult area of decision-making, I accept that, even without reference to it in argument, it was open to the adjudicator, and arguably incumbent on him, to consider risk locally as well as nationally. But it is not something the adjudicator chose to address directly, although he did say (§37) that he had "looked at the area material" which was before him. For the Home Secretary, however, Mr Chamberlain does not argue that the issue was not on the agenda. On the contrary, he argues that it was substantively addressed, at least by the AIT – not, admittedly, in their conclusions, which I have set out above, but at several points of their recital of the facts. Thus, although at §9 they pose only the question of risk to the appellant as a Hutu in Burundi, they go on in §§11, 13 and 14 to cite evidence from the UNHCR, the US State Department and Human Rights Watch which touches expressly on the situation in Bujumbura province.

14. I agree with Ms Naik that in the factual and procedural circumstances of this case the AIT were called upon to consider not only national but local risks of persecution facing this appellant. The recent Burundi case to which they themselves refer more than once, *AM (Risks in Bujumbura area) (Burundi)* [2005] UKAIT 00123, points out that "individuals who come from particular areas may still establish a well-founded fear of return". Indeed, the tribunal took the possible presence of localised risk directly into account when dealing with relocation. But did they do so when dealing with risk of persecution?

15. While they made reference in more than one place to in-country material about local conditions in rural Bujumbura, Ms Naik is right to say that it forms no visible part of their conclusion on risk. Mr Chamberlain says it does not need to, since it self-evidently had been taken into account. I am not convinced by this answer. A proper process of reasoning needs to indicate, however briefly, why evidence which might have produced a different conclusion has not done so. But it is not difficult to see what the reason was here: nothing in the material cited by the AIT, and nothing in the further evidential material which Ms Naik has been allowed to refer to in argument before us, demonstrates that a Hutu now faces persecution, even in rural Bujumbura, because of his ethnicity. The problems people still face there are problems of insecurity caused by residual rebel activity and government counter-activity in the area. This by itself can rank neither as persecution under the refugee convention nor as inhuman treatment under the human rights convention.

16. While therefore I accept that this aspect of the AIT's reasoning is not satisfactory, the flaw may not be fatal. But I do not need to reach a final conclusion on the point because of the AIT's contingent finding that the option of internal relocation was sufficient to provide protection. As I said earlier, this was not raised as an issue on either hearing before the adjudicator, and the Home Office's grounds of appeal to the AIT make no mention of it. But the point was raised by the AIT itself as an issue at the conclusion of the first-stage reconsideration (see AIT §4) and was argued on the second-stage reconsideration:

> 19. This case was also argued on the basis that even if the appellant could show that he was at real risk of persecution and/or inhuman and/or degrading treatment, that would be limited to the Bujumbura Rural area and that he would have available

the option of internal relocation. Mr Ouseley put the case on the basis that internal location either to Bujumbura City or one of the provinces where ongoing tensions do not exist, would be open to the appellant. We can take this aspect of the case shortly. Our conclusions rely upon the same objective evidence as we have considered in conjunction with the asylum and human rights aspect of this case. If the appellant is to be returned to Burundi it will be to Bujumbura. In our judgment, a man who is young, fit and equipped with skills could reasonably be expected to relocate. We are mindful of the approach to be taken in considering whether or not internal relocation is a reasonable option, as set out by the House of Lords in *Januzi v Secretary of State for the Home Department* [2006] UKHL 5 and the need to consider the various factors identified in Lord Bingham's speech.

20. It was the appellant's case that he had worked as a builder for many years although in his evidence before us explained that this was as an assistant to his father (who died in the early 1990's). It is clear that as a result of the civil war in Burundi much will now have to be done to rebuild not only an infrastructure but also homes, communities and other facilities. The appellant has available the prospect of engaging in economic activity by using his skills in the building field subject, we accept, to such work being available. Whilst we accept that there might be a period of adjustment through which the appellant would have to travel, by way of finding accommodation and work to support himself, we take the view that somebody who has shown himself to be as resourceful as this appellant has done, would soon be able to make that adjustment without suffering undue hardship. The appellant would not be returning to circumstances of abject poverty where the basics of support and provision would be absent and thus we are far from satisfied that it would be unduly harsh to expect a fit young man, unburdened by family responsibilities, to relocate within Burundi (if necessary).

17. Ms Naik, however, contends that there was no evidence at all that the appellant could be safe in either reaching or settling in Bujumbura city, which is where he would have to go if his building skills were to be of use to him. She points to the risks identified in *AM* of land mines and banditry, and to the UNHCR report of April 2005 advising that returns to Burundi were unsafe. She challenges the AIT's marginalising of UNHCR's advice.

18. Mr Chamberlain submits that the AIT were entitled to rely on the Home Office guidance note which suggested that Bujumbura City was safe, and that access was not an issue since any return would be to the airport which is only a few kilometres from the city.

19. In my view the AIT's decision on internal relocation is properly reasoned and evidence-based. It does not, as sometimes happens, simply throw in relocation as a makeweight. It addresses the two key questions of safety and reasonableness and arrives at tenable conclusions in relation to both, related in each case to the appellant as a young single man with building skills, and assuming, contrary to the tribunal's view, that as a Hutu he would not be safe in rural Bujumbura. On this ground alone, in my judgment, this appeal has to fail, and I would accordingly dismiss it.

Lord Justice Rix:

20. I agree.

Lord Justice Waller:

21. I also agree.