

Neutral Citation Number: [2008] EWHC 2249 (Admin)

CO/696/2007

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Tuesday, 17 June 2008

B e f o r e:

MR JUSTICE CRANSTON

Between:

THE QUEEN ON THE APPLICATION OF KALOMBO
Claimant

v

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Defendant

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(Official Shorthand Writers to the Court)

Mr Chirico (instructed by Wilson and Company) appeared on behalf of the **Claimant**
Mr C Zwart (instructed by the Treasury Solicitors) appeared on behalf of the **Defendant**

J U D G M E N T
(As approved)

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1. MR JUSTICE CRANSTON: This is a renewed application for judicial review. The issue is whether the Secretary of State was correct in treating representations made by the claimant as not constituting a fresh claim.
2. In brief, the claimant came to this country in 2002 and claimed asylum. The matter went before a Tribunal and the claimant's claim was dismissed. The claimant then made a number of further representations and I think that these were made, on my calculation, on at least four different occasions. The issue that arises today is relating to the background of the claimant. I shall come to that in a moment.
3. Judicial review proceedings were begun and were refused on paper by Ouseley J. In essence, the claimant has a father who is, or was, a Hutu from Kivu. His mother, however, was born in Kinshasa. He said at the Tribunal stage that he took his mother's tribe and considered himself to be Congolese although he is half Rwandan. He said that in 1998, when civil strife broke out, he went to live in Kisangani. That claim was disbelieved by the immigration judge.
4. Importantly, however, he said that he had had no problems in the DRC prior to his marriage. He even said that he did not feel that his problems had arisen specifically because he married a Rwandan. In his account his wife was killed by Congolese citizens in revenge for the killing of certain Congolese citizens by Rwandan soldiers. He, as I say, was disbelieved in relation to certain aspects of his account.
5. The issue before me today is a very specific issue. It rests on the fact that he is half Rwandan. It is said that that is not disputed now, and I accept that. In particular, the fresh claim application arises in that it is said that the Secretary of State misdirected herself in the application of the Country Guidance case: AB and DM (Risk Categories Reviewed, Tutsis added) DRC CG [2005] UKIAT 00118. The decision in that case says in the headnote that the Tribunal broadly confirms the list of risk categories identified in previous cases, but finds that in view of the increase in anti-Rwandan feelings that Tutsis, or those suspected of being Tutsis, are at risk by reason of being associated with Rwandans. The headnote continues:

"Essentially, the risk categories are those with an ethnic, political or military profile in opposition to the government. The assessment of risk in an individual case will depend upon a careful analysis of that individual's origins, background and profile."

The relevant substantive part of the judgment is paragraph 51, where the Tribunal sets out the risk categories. The key risk categories are (i) and (ii):

- (i) We confirm as continuing to be a risk category those with a nationality or perceived nationality of a state regarded as hostile to the DRC and in particular those who have or presumed to have Rwandan connections or are of Rwandan origins.

(ii) We consider that in light of recent developments there is now a risk category consisting of those who are Tutsi (or Banyamulenge) or are perceived to be Tutsi (or Banyamulenge). The only possible exception to it arises in relation to high-level officials of RCD/Goma. We accept that in practice there is considerable overlap with (i) since, as a result of the events of 2004 "Rwandan" and "Tutsi" are more often regarded as the same by the DRC authorities and civilian population and as a result Tutsis and those perceived as such face higher risks than before. However, they are distinct categories, one nationality-based, the other ethnicity-based."

6. It is important to read these particular risk categories in context, not only of the remaining subparagraphs of paragraph 51, but in relation, for example, to paragraph 54 where it is said that as with the military or political category much depends on the perception of the authorities as to whether they perceive of someone adversely:

"It is not sufficient for an appellant simply to state that he is Rwandan or Tutsi or would be perceived as such. Evidence as to ethnicity will need to be scrutinised carefully."

7. In addition my attention was drawn to paragraph 49 of the Tribunal judgment where, in particular, the question of returnees is addressed. It is said by the Tribunal that the relevance of the fact that returnees are closely scrutinised goes to the likelihood of their background coming to light.

8. In the cogent submissions made on behalf of the claimant, it is said that the Secretary of State simply got those provisions in that judgment wrong. The submission was that, in particular, the Secretary of State was wrong to say that the Tribunal had found that Rwandan connections alone do not create a risk. The submission is that the Tribunal's decision cannot sustain that interpretation. Nothing, it is said, in the Tribunal decision suggests that perceived Rwandan ethnicity is merely one factor which can act cumulatively with other factors to create risk. In this submission Rwandan connections are a freestanding risk category. In the light of that it is said that the Secretary of State in her letter should have been focusing on the ethnicity of the claimant, that he is half Rwandan.

9. The letter itself, dated 25 January 2007, refers to and quotes paragraph 51 of the Tribunal decision, which I have referred to. It also quotes paragraph 53 and it sets out in full paragraph 54, which I have also quoted. The Secretary of State's letter says, after quoting those paragraphs, that the claimant had given the account, which I have referred to earlier, of the death of his wife, and said that he feared that the Congolese population would turn against him for having a Rwandan wife and so he fled to a nearby village.

10. The Secretary of State then says:

"The judgment does not imply that all individual claimants with Rwandan connections will automatically be at risk of persecution simply on the basis of their ethnicity, rather that ethnicity, in addition to other factors, such as political activity, are likely to bring such individuals to the adverse attention of the authorities resulting in mistreatment, which may amount to persecution."

It then goes on to say that the claimant had no political or military past. As well, the Secretary of State says:

"We therefore do not believe that your client will come to the adverse attention of the authorities purely as a result of his Rwandan connections."

It is therefore considered, says the Secretary of State, that the Tribunal decision does not apply in his case.

11. In my judgment, the Secretary of State, applying anxious scrutiny, was entitled to take that view of the Tribunal decision. As with any judgment, the decision of the Tribunal cannot be read as a statute. The particular statement of the Tribunal in paragraph 51(i) has to be read in context and, in particular, it has to be read in context of the extract I read from paragraph 54, but in context of other paragraphs as well. The Secretary of State was entitled to read the Tribunal decision as saying that Rwandan connections alone are not determinative.
12. It is said that the Secretary of State, and I, must take into account that the claimant could be subject to interrogation, or examination, on return, and that his Rwandan connections will be revealed. That would lead him to be subject to risk. That, in my view, is not a matter which I need to consider. The Secretary of State was not, on my reading of the letter, asked to address it. It is a matter which, as I understand it, is being dealt with separately in relation to the return of failed asylum seekers to the DRC. In any event, given that I do not think the Secretary of State's approach to the main issue is flawed, I cannot see how this aspect takes the matter further.
13. In my view, therefore, in terms of the fresh submissions which were made to the Secretary of State, I cannot say, applying anxious scrutiny as I am required to by WM, that the Secretary of State in any way acted wrongly, in a public law sense, in saying that the fresh submission as to the interpretation of the Tribunal decision, taken together with the other material, did not create a realistic prospect of the claimant succeeding before a Tribunal. Therefore I refuse permission.
14. MR CHIRICO: I am grateful. Can I make an application for a detailed assessment of the claimant's publicly funded costs?
15. MR JUSTICE CRANSTON: Yes.
16. MR ZWART: May we have the costs of the acknowledgment of service?
17. MR JUSTICE CRANSTON: You can. What is the figure?

18. MR ZWART: I do not have a figure unfortunately.
19. MR CHIRICO: There is on the acknowledgment service an application for no order as to costs, which we would support.
20. MR JUSTICE CRANSTON: I take your word for it.
21. MR CHIRICO: I better check myself. I am not sure I take my own word for it. I think that is true.
22. MR JUSTICE CRANSTON: Let us have a look.
23. MR CHIRICO: Yes, the application be dismissed with no order as to costs.
24. MR JUSTICE CRANSTON: There we are.
25. MR ZWART: I am obliged.
26. MR JUSTICE CRANSTON: Thank you very much.