



EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

**Lord Osborne
Lord Carloway
Lord Clarke**

**[2009] CSIH 20
XA103/07**

OPINION OF THE COURT

delivered by LORD CARLOWAY

in the application for leave to appeal by

LK

Appellant

against

THE SECRETARY OF STATE FOR
THE HOME DEPARTMENT

Respondent

Act : O'Brien; McGill & Co, Solicitors

Alt: Webster; Solicitor to the Advocate General

13 March 2009

1. The Decision of the Asylum and Immigration Tribunal

[1] The appellant is a citizen of the Democratic Republic of Congo (DRC). She is now 41 years of age. She claimed asylum on 18 October 2004, stating that she, and her dependent daughter, had arrived in the United Kingdom on that day using a false

passport. Her claim was refused by the respondent on 28 November 2004. She appealed unsuccessfully to an Adjudicator, but a Senior Immigration Judge, and the Asylum and Immigration Tribunal upon review, ordered a reconsideration. This was partly because it was held that the Adjudicator had failed to set out the requisite standard of proof, partly because of his failure to deal with the background material on risk on return generally and partly because of a paucity of reasoning for rejecting certain documentary proof produced by the appellant. Accordingly the appellant's claim was considered anew by two judges of the AIT on 30 January 2007.

[2] The AIT reminded themselves that the burden of proof was on the appellant and that the standard was whether there was a "reasonable degree of likelihood", otherwise described as a "reasonable chance or serious possibility", of the appellant being subjected to persecution or to human rights abuses in terms of the Conventions. Whether that standard was met depended, the AIT stated, upon a consideration of the evidence "in the round". That evidence consisted of the appellant's oral testimony and an up to date written statement, together with her screening questionnaire, statement of evidence and asylum interview record, all dated late 2004. In addition, the appellant produced two documents in support of her claim. The first was a copy of an article from "La Reference" newspaper dated 15 April 2004. The second was headed "Attestation de Confirmation".

[3] The essence of the appellant's case was that, since 1998, she has been an ordinary member of the "Union pour La Democratie et le Progres Social" (UDPS), a political party opposed to the DRC government under President Joseph Kabila. It is not disputed that being a known activist with the UDPS would subject a person to a real risk of persecution and abuse at the hands of the government. The appellant maintained that she was such an activist. She was involved in marches in February

and August 2003. At each she was arrested, detained and mistreated. In particular, she was raped on at least three occasions. On 29 March 2004, there was political violence in Kinshasa. The appellant's house was searched and a bag was found containing a military uniform and a bayonet. These were said to belong to the appellant's brother, who was suspected of anti government military activity. The appellant was imprisoned for three months in one prison before being transferred to another in July 2004. The appellant said that she was again assaulted and raped on several occasions. However, she had managed to escape by feigning an epileptic fit. She was sent to a hospital and, on an unescorted visit to the toilet, simply walked out of the clinic, having secured a change of clothing from someone in the hospital. She had also met a woman outside the hospital, who had helpfully provided her with money for a taxi. Ultimately, she left Kinshasa by aeroplane, travelling to the United Kingdom via Nairobi.

[4] The article produced from la Reference (in translation) was in the following terms:

"" Sports &

Following the failed coup d'état attempt of 27-28 March 2004

Arrests continue in Kinshasa

Some weeks ago members of ... [the UDPS] attempted to organise a march in Kinshasa to alert the Congolese authorities and international opinion that their party would not accept a prolongation of the transition in any form. The demonstrators were broken up and the police and the security services proceeded to arrest more than ten demonstrators who were then taken to an unknown destination ...

The case of one of the victims particularly worrying for the ONG of human rights is that of Mme [LK], residing at [address given] ...

This lady was arrested, according to the ONG, in the presence of her friend [G] on 29 March 2004, the day following the resounding gun fire heard through the night of 27-28 March. She is accused of complicity with her brother...

Human rights organisations had in fact protested against the fact that the home of [L] had been subject to a search on that day, the 29 March 2004.

... "

The AIT were not impressed with this document (para [16]). They considered that there were some *prima facie* unusual features about it. Those were that: (a) the appellant should be singled out at all in such an article; (b) the treatment of her case should be so sympathetic; and (c) Human Rights organisations should have been involved, in the absence of any reference to mistreatment. The concerns of the AIT were confirmed when they came to consider a genuine copy of the newspaper obtained by the respondent from the British Embassy in Kinshasa. In the genuine copy, the page in question, which had as its heading the description "Sport", there was, in place of the piece about the appellant, an article relating to the technical staff of the DRC football team. Not surprisingly, the AIT concluded that the appellant had produced a "clever forgery, the purpose of which could only have been to deceive the appellate authorities" (Determination para 20). This is what the Adjudicator had found also, upon the basis of the same evidence, yet the appellant had not attempted to contradict his conclusion of fact before the AIT, such failure being commented on by the AIT as being "truly deafening".

[5] The AIT's finding that the newspaper article was a forgery was, they said:

"[21] ... sufficient to undermine the appellant's claim to be a witness of truth. Furthermore, the fact that she has seen fit to produce a false document, knowing it to be false, is not a peripheral matter but goes to the core of her claim to have been a victim of state persecution in the DRC, the subject matter of the deception. It also goes to the weight to be attached to the attestation de confirmation ... "

[6] The Attestation purports to be a certificate of the appellant's membership of the UDPS signed by an acting general secretary of the party. The document, however, not only confirms membership, it continues (in translation):

" Mme [LK], an active member within our party, was the victim of harassment by the security services following the events of 28 and 29 April 2004.

We have learned that the above named person, victim of deep psychological trauma and fearing for her life, left the country in search of a place of security.

In view of this and in consideration of the genuine fear for her security and her physical and moral integrity, the UDPS would ask that Mme [LK] be granted refugee status in compliance with the Geneva Convention of 28 July 1953 and its additional Protocol of 31 January 1965".

The AIT observed that there was a conflict in the dates of the troubles as described by the appellant and those on the document, which was also described as "poorly printed" and containing psychological information which the writer was not qualified to proffer.

[7] The AIT reminded itself of the principles to be applied in assessing the genuineness of such documents as set out in *Tanveer Ahmed v Secretary of State for the Home Department* [2002] Imm AR 318. Having approached the document with caution, the AIT proceeded (para 22 *et seq*) to provide further reasons for considering that the appellant was lying. These included the implausibility of the finding of military gear in the appellant's house relating to her brother and the facility of her escape from custody. They concluded that the appellant's account of imprisonment and ill-treatment in 2004 was false. They explained that, in doing so, they had taken into account the general background information, which they narrated in some detail. They did accept that the information rendered the appellant's account more plausible than it might otherwise have been.

[8] The AIT concluded:

"42. We reject the appellant's claim of events from March 2004 onwards. We have considered whether there is any residual part of her claim that is able to withstand this undermining of her credibility. It is, of course, possible for parts, even significant parts, of a claim to be rejected whilst others remain credible. ... however, the appellant's account has been found so seriously flawed, that nothing within those parts that we have rejected has been established to have even a small basis in truth. ... we see no basis on which we can be satisfied that another element of her claim is established even to the

lower standard of proof. In support of her claim to be a member of the UDPS and to have been arrested, ill-treated and raped, we have only the appellant's evidence to support it, save for the attestation which suffers from being adduced alongside the newspaper article which we are satisfied is a forgery. We place no weight on the attestation de confirmation because we do not accept that the appellant can be relied upon to adduce reliable documentary evidence. The graphic accounts of ill treatment are not substantially dissimilar from the 2004 account that we have rejected. It is for the appellant to establish her claim by credible evidence and her failure to come before us as a credible witness, leads us to conclude that we cannot safely rely upon any part of her evidence as being truthful".

The appeal was refused.

Submissions

[9] The appellant invited the Court, in accordance with current practice, to treat the hearing as if it were one on the substantive merits of the appeal, even although this was technically only an application for leave to appeal. That having been accepted by the respondent under reference to *Hoseini, Applicant*, 8 December 2004, unreported, (Lord President (Cullen) at para [5]), the appellant advanced four succinct grounds of appeal, all related to the Attestation de Confirmation. The first was that the AIT had erred (in para 42, *supra*) in failing to attach weight to the Attestation. They had referred to the Attestation containing "graphic accounts of ill treatment". But the document did not contain such accounts. This misreading of the document raised the question of whether the AIT had given proper consideration to the document at all. The second was that the AIT had erred in failing to give adequate reasons for giving the Attestation little weight, applying the test on such adequacy in *Esen v Secretary of State for Scotland* 2006 SC 555 (at para [21]). Under reference to *Tanveer Ahmed* (*supra*, paras 33-36), it was said that the AIT had failed to note that the document was "ex facie" valid, consistent with the background material and not directly contradicted by the respondent. Thirdly, the appellant maintained that the AIT had pre-judged the

weight to be given to the Attestation by approaching it on the basis that the appellant's account was false and that therefore the coincident material in the confirmation was also false. Reference was made to the English Court of Appeal decision in *Mungu v Secretary of State for the Home Department*, unreported, [2003] EWCA Civ 360 (at paras 18-19). The AIT had failed to consider the possibility that the coincidences supported the core elements of the appellant's claim. Finally, on the basis that the AIT had failed to assess properly the weight of the Attestation, the overall assessment of the credibility of the appellant had been flawed.

[10] The respondent reminded the Court that leave to appeal was being sought in circumstances where an appeal lay only on a point of law (Nationality, Immigration and Asylum Act 2002 (c 41) s 103B). The test for leave was whether there was a real prospect of success on appeal or there was some other substantial reason for leave to be given. There was no discernible error of law in the AIT's Determination. The appellant was trying to "compartmentalise" the evidence in a manner rejected by the Immigration Appeal Tribunal in what was the starred decision of *Tanveer Ahmed* (*supra*). The AIT had carefully considered the newspaper article and had held that it was a forgery, that having been put in issue. In relation to the Attestation, the issue was not whether it too was a forgery but whether, looking at all the evidence, any reliance could be placed upon it. The AIT explained that the effect of their finding on the newspaper article was sufficient to undermine the appellant's credibility on its own. They had then gone on to detail several other reasons why it had to be concluded that the appellant was lying. The conclusion reached (in para 42) was one which they were entitled to arrive at, even if the meaning of the sentence referring to "graphic accounts" was not clear. At least two interpretations of that sentence were possible. The AIT had looked at the evidence "in the round" and decided not to place weight

upon the Attestation because it came from the hands of the appellant, who was not to be regarded as generally truthful. The central issue had been whether she was to be believed. She had required to satisfy the AIT in that regard and had failed to do so.

Decision

[11] The onus was on the appellant to demonstrate that her return to the DRC carried with it a reasonable chance, or a serious possibility, of persecution or human rights abuse in terms of the Conventions. For that low standard of proof to be met, it was essential that at least a material part of the appellant's account be regarded as credible. In the context of this appeal, the focus was entirely on whether the Attestation de Confirmation might be a genuine document. But it was only one piece of evidence, among others, to which the AIT could have regard in determining the credibility of the appellant's account.

[12] The issue of the credibility of the appellant was the central feature in this case, since it was from the appellant, and her alone, that the Attestation came. It was spoken to in evidence only by the appellant. There could be no presumption, in these circumstances, that it was, as the appellant submitted, "*ex facie valid*". As was said in *Esen v Secretary of State for the Home Department* (*supra*, Lord Abernethy delivering the Opinion of the Extra Division at para [21]):

"Credibility is an issue to be handled with great care and with sensitivity to cultural differences and the very difficult position in which applicants for asylum escaping from persecution often find themselves. But our system of immigration control presupposes that the credibility of an applicant's account has to be judged ... Credibility is a question of fact which has been entrusted by Parliament to the [Immigration Judges]".

Matters of the weight to be attached to a particular piece of evidence are primarily for the Immigration Judges to assess, since they normally have the benefit of seeing and hearing the appellants giving evidence. They also have the advantage, as specialists,

of being experienced in the assessment of the credibility of asylum claimants and the reliability of accompanying documentation (*vide Tanveer Ahmed v Secretary of State for the Home Department (supra)* at para 30). It will seldom be possible to dress up what is essentially a challenge to the assessment of weight as an error of law, although, of course, adequate reasons require to be given for rejecting an appellant's account as incredible.

[13] The determination of whether a claimant is credible, and whether reliance might be placed on a particular document, has to be made by analysing the evidence as a whole. This has been expressed in the asylum context as looking at the evidence "in the round" (*Tanveer Ahmed v Secretary of State for the Home Department (supra)* at para 37, following the English Court of Appeal in *R v Immigration Appeal Tribunal ex parte Davila-Puga*, unreported, [2001] EWCA Civ 931, Laws LJ at para 11, followed in *Mungu v Secretary of State for the Home Department (supra)*, Lathan LJ at para 17).

[14] It is not possible to fault the AIT's Determination. It is clear from that Determination that they looked at the evidence as a whole before rejecting the appellant's account as incredible. They have given adequate reasons for that rejection and, in particular, for deciding not to attach any weight at all to the Attestation. There was no evidence produced by the appellant to establish that it was a valid, genuine document. The AIT were entitled to assess the weight, if any, to be attached to it in all the circumstances. Their finding that the newspaper article was a forgery considerably damaged the appellant's credibility and undermined the weight which might be attached to any other document produced by the appellant. The extent of that damage was increased by the AIT's view that the appellant's accounts of the search of her house and her escape from custody were inherently implausible. When it came to the

Attestation, the Judges were not prepared to accept it as reliable because: (a) when the evidence was looked at "in the round", it was a document emanating from a person who had been proved to have presented false documents to the AIT; and (b) the document itself lacked plausibility by reason of its quality and internal content. In reaching its assessment, the AIT did have regard to the background material, upon which they made findings and which, they accepted, rendered the appellant's story more plausible than it might have been in the absence of such material. Nevertheless, that material was not sufficient to persuade the AIT of the lack of such plausibility overall. There is no indication that, in reaching their determination, there was any element of pre-judging, as distinct from simply judging, the relevant issues by the AIT.

[15] It is fair to comment that the meaning to be attached to the sentence, which reads: "The graphic accounts of ill-treatment are not substantially dissimilar from the 2004 account that we have rejected" (para 42), is not immediately clear. In particular, it is not apparent what graphic accounts are being referred to. They do not seem to be contained in the Attestation. Be that as it may, the lack of clarity in one sentence does not lead to a conclusion that the reasoning of the whole paragraph (para 42) is unclear. It is not. Taken with the earlier findings of forgery and lack of plausibility, the "Conclusion" reached by the AIT in that paragraph is both clear and adequately reasoned. Having determined that the appellant lacked credibility in respect of all material parts of her claim, her appeal from the respondent to the AIT was bound to fail. There is no error of law apparent in the application for leave to appeal to this Court, nor is there any other substantial reason for that leave to be given. Accordingly, leave to appeal must be refused.

