Case No: C5/2007/1128

Neutral Citation Number: [2009] EWCA Civ 744
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
[AIT No: HX/00528/2005]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24th March 2009

Before:

LORD JUSTICE MOSES
LORD JUSTICE LAWRENCE COLLINS
and
MR JUSTICE HOLMAN

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Between:

MS (DRC) **Appellant**

- and -

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT **Respondent**

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Ms A Weston (instructed by Brighton Housing Trust) appeared on behalf of the **Appellant**.

Ms K Olley (instructed by the Treasury Solicitor) appeared on behalf of the **Treasury Solicitor**

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Judgment

Lord Justice Moses:

1. This is an appeal, with permission of the single judge, which focuses on the factual conclusions drawn by the Immigration Judge on a reconsideration. It is submitted, in short, by Miss Weston, who appears on behalf of this applicant -- one who was claiming refugee status -- that the factual conclusions are unfair and unsupported by uncontroversial evidence laid before her. In order to analyse those criticisms it is necessary I believe to start with a few facts which formed the basis of the claim by the appellant for refugee status.

2. He was born in Kinshasa in the Democratic Republic of Congo on 5 April 1984. That is relevant, because the account he gave, which led him to flee that country was an account of events which happened to him when he was a young teenager.

3. The central event, on which the whole of his claim is based, took place on 12 September 2000, when he was only 16. The account he gave of those events after he had claimed asylum was given some five years later in a determination of the Asylum and Immigration Tribunal dated 23 May 2005. There was an application for reconsideration of that determination, which was successful and led to a further hearing, which forms the basis of the appeal in this case. It was heard by Immigration Judge Turquet on 18 December 2006. In essence she disbelieved the account given by the appellant.

4. The appellant said that on 12 September 2000 his brother was holding a meeting of the party known as the "MLC party" when the government forces raided their house where the meeting was taking place and arrested him and detained him. He did not know what had happened to his brother, who was also arrested, and never saw him again. He was, so he says, taken from there to a camp, trained for fighting in the military and then forced to go to fight against rebels. Whilst he was detained, he says he was tortured and interrogated and, importantly for the purposes of this appeal and indeed for the findings of the Immigration Judge, subsequent medical evidence from Dr Frank showed a number of injuries and consequences of those injuries which were consistent with his account. Moreover this was not the only occasion on which he says he was detained and tortured. Having been forced to go to the front, he then says he refused to fight and in consequence was imprisoned as a result. It was during his detention that he also said he had been raped, and he gave a most distressing and graphic account of that rape. But, so his account ran, he managed to escape from prison with the aid of a soldier who had a connection with his uncle. From prison he managed to flee over land to Zambia and then arrived as a young man of only by that time 17 on 17 December 2001 where he immediately claimed asylum on arrival.

5. The account given by the applicant was set out by the Immigration Judge at the second-stage remittal, which was a *de novo* hearing. It is important for the purpose of this appeal to recall that the judge noted the grounds upon which reconsideration had been ordered, at paragraph 5: in essence that the original judge had reached conclusions on the appellant's credibility without considering properly the medical evidence and had thus, as the

Immigration Judge put it, put the cart before the horse. I mention that at this stage because that is exactly the same criticism as is made of the decision in the instant appeal.

6. The Immigration Judge went on to consider the credibility of the account which the appellant gave of how his first arrest occurred in consequence of the raid on the family home during the course of the elder brother's meeting with members of the MLC. She said that she did not find it plausible that the appellant did not know what the meeting was about. The finding of lack of plausibility, which was a finding which was in terms with which this Immigration Judge expressed herself on a number of occasions, does not appear to me a finding to be based upon what has been described in other cases as a lack of inherent plausibility with all the attendant dangers upon such a finding. It does not require me to reiterate what has been said in so many cases, that such findings have a danger since they tend to suggest that the fact-finder is deploying his experience in this country as a means or test of casting doubt upon events and circumstances of which that fact-finder can have little or no experience. But in the instant case it is clear to me that the original doubts or inconsistencies which the fact-finding Immigration Judge expressed related to the ignorance of this appellant as to what was going on in the family house. That was particularly striking since, as the Immigration Judge mentions at paragraph 38 of her decision, apparently this appellant had learnt that his elder brother had been a member of the MLC since 1999. In my judgment she was entitled to find that it was implausible that the brother, but a few years younger, was unaware of what the meeting in his house with others attending was about.

7. The judge went on, in a full paragraph at 39, to set out the examination by the doctor, to which I shall turn later, and he went on then to consider the circumstances in which the original raid took place. In order to appreciate why it was that the Immigration Judge found the account implausible, it is necessary, I believe, to refer to the original account given by the applicant when he gave a witness statement about the raid. The original statement stated that:

> "… on 12.09.2000, while my brother and his friends were in their party meeting at home, we were raided by the security forces, who arrested everybody living to that place, including myself and my aunt, who was suspected of being connected with rebels."

The applicant then went on in a later written statement that:

> "The sentence is misleading and I would like to confirm that my brother, myself and those in his meeting who had not managed to escape who were arrested. My mother and younger siblings were not arrested."

He goes on to say that he saw his aunt being questioned.

8. By the time of his oral evidence he gave an account that he and his mother were outside the house but within the compound when the raid took place. The men had come past them. Some of the people at the meeting had run out, but his mother went to see what was going on. He said that "his mother could not leave because it was their house". The judge then gives her conclusion as to that account saying:

> "I find this not to be plausible. I do not find that his mother would have entered into a room where security forces had burst in or that the Appellant would have stayed behind. For the above reasons I do not find that the raid took place as claimed. Having made the above finding relating to the alleged raid, I find that the Appellant was not detained and tortured as claimed in September 2000."

9. I have considerable reservations about this passage. It was clearly important because it was the account of the raid which had led to the appellant, according to him, being detained and tortured. The judge, having rejected the account of the raid, then rejected the detention and torture. She gives no reason as to why the account, that he and his mother did not leave and that his mother entered a room where her elder son had been holding the meeting was implausible. Indeed, although I am not the fact-finder, I cannot see any basis for saying that that was unlikely or implausible. In those circumstances it is difficult to find, from the reasoning she sets out in paragraph 41, any basis for rejecting the account he gave of the raid.

10. But there were other bases for reaching a conclusion as to inconsistency or incredibility and she has given them. Firstly, although he expressed ignorance of what the meeting was about, bearing in mind he also revealed that he had learnt that his elder brother had been a member of the MLC since 1999, notwithstanding that after the raid he never saw him again. Secondly, there was a discrepancy between the account he had originally given of everyone in the meeting being arrested who had not managed to escape and the subsequent account of him being outside the compound. I should stress that I might well had I been the fact finder not have reached the same conclusion, but this court must be very wary of not colouring an error of disagreement as to fact under the guise of an error of law. It requires no further words from me to stress that the decision must be looked at as a whole and in those circumstances it is necessary to move on to look at other criticisms made of the conclusions and reasoning of the judge.

11. The judge then turns to consider the account the applicant gave of being forced to fight against the rebels. She had noted that, although he was detained as being involved with the MLC, that he had been trained and sent to fight against the rebels. She goes on:

> "I find it would be even more unlikely that he would be sent to fight against the rebels, if his acceptance to fight was only made as a result of torture. The authorities would know that he was not only, if his account is true, suspected of being involved with rebels but was only going to fight under extreme duress. Dr Kennes states that forcible conscriptions were practiced and that supposed sympathy for the MLC may have been an [excuse]. He does not give a reason, why someone, who is suspected of having connections with rebels would be sent to fight against the rebels."

12. There is in that passage a danger, to which Miss Weston draws attention, that the Immigration Judge did use her own beliefs as to what was plausible and implausible in reaching a conclusion about whether someone suspected of involvement with a rebel party would be sent to fight against the rebels. But it is of note, and the Immigration Judge was entitled in my view to draw attention to the fact, that no explanation was given by Dr Kennes in his report as to objective circumstances within the Democratic Republic of the Congo as to why it was that such a person would be forced to fight against such an opposition. Dr Kennes did deal in general terms with circumstances in the Democratic Republic, but also, whilst making a report that was no doubt of use in many different cases, did condescend to comment upon this applicant's own account. He said as to conscription:

> "Moreover, during this period, forced conscription was practise[d]. The government was lacking many ordinary soldier[s], and youngsters were put into the army for any reason. I witnessed this during my visit to the DRC in December 1999. In this particular case, a conscription is plausible; the supposed sympathy of [Mr MS] with the MLC may have procured a convenient excuse."

13. The judge said that Dr Kennes had given no reason. True it is he did not grapple specifically with the question of whether someone suspected of sympathy with the MLC would be used to fight against the rebels. But reading his paragraph that I have quoted as a whole, it is plain that he was giving a reason why this might occur. It was not, therefore, correct to say that the expert, Dr Kennes, whose evidence is not otherwise criticised or joined issue with by the judge, gave no reason.

14. But the disbelief expressed by the Immigration Judge does not stop there. The judge goes on to criticise the applicant for inconsistency as to his account of his training and being forced to fight. She sets out his witness statement, which suggested that he had been trained for six months and then sent to the front. In his account given to the doctor who examined him, Dr Frank, it is plain to me that he was suggesting that he had only been detained and trained for a very few days before being sent to the front. As the Immigration Judge

said in her paragraph 45, "There was a plain difference in the account he was given". In my view that difference was a matter she was entitled to rely upon in considering the credibility of the applicant's account.

15. She then turned to the circumstances in which he came, as he had said throughout, to desert. In his original SEF statement he had said that he decided to run away and decided to desert. In amplifying that account, in both his witness statement and in his account to the doctor, he did not assert that he had run away but rather that he had merely refused to fight and lay down his weapon. He then gave an account of being detained and arrested once the gunfight had finished and he said:

> "… it was when the Commander was questioning him that he came to realise that he had links with the MLC and he was considered as a rebel."

The judge commented:

> "Given the Appellant's own account of how he came to be fighting, the army would have known of his alleged background."

16. Again, in my view, whilst the discrepancy between how he came to desert seems to me to be trivial, the account of the commander only discovering after his desertion that he had links with the MLC does seem to me to be a matter that the Immigration Judge was entitled to use as a basis for finding inconsistency and therefore incredibility.

17. To my mind the most important feature, however, of the conclusions reached by the Immigration Judge as to credibility is based upon what happened thereafter. The applicant says he was imprisoned, but managed to escape because a soldier who had a connection with his uncle had enabled him to do so and, according to the appellant's account, accompanied him for a walk of two-and-a-half hours and then returned to prison. In my view the judge was entitled to regard that account as implausible, not on the basis of any misapprehension as to different circumstances in relation to a prison in a far-off country but rather as to the unlikelihood of a soldier drawing attention to the assistance he had given to a detained deserter, which would inevitably follow as a result of him helping him over the space of two-and-a-half hours. Different views might be taken of that, but I resist the submission, and disagree with it, that the Immigration Judge was not entitled to found her conclusions in part on the basis of that account. If that account was not to believed, then in my view the judge was entitled to regard that as fundamentally undermining the account given of detention, torture, interrogation and then escape via Zambia to this country. But the Immigration Judge was not entitled to do that without, as part of the process of considering credibility, taking into account Dr Frank's description of the injuries which the applicant had suffered. These, as I have said, were carefully set out within the determination. Particularly, there were scars on the right and left arm, on the shoulder, left and right leg. Dr Frank, on two occasions,

both in a full report and in a subsequent comment on the original Tribunal's determination, had pointed out that those scars were consistent with injuries caused by beatings and, in particular, having regard to what the scars revealed about the breaking down of those injuries and subsequent slow recovery, totally consistent.

18. The judge commented that, apart from the mention of sports, Dr Frank gave no other possible causes for the injuries and reached the conclusion that the injuries could equally have been caused due to something else which Dr Frank did not reveal. The judge's short dismissal of Dr Frank's report is the subject of primary challenge by Miss Weston on behalf of the appellant. She points out that the report is not itself dismissed, there was no basis for doing so and that report fully complies with what is to be expected of such a report, as identified by the President of the Family Division at paragraph 28 of SA (Somalia) v SSHD [2006] EWCA Civ 1302. That is true but, as the doctor points out twice in the conclusions of his report, he is unable to do other than to say that the injuries and the account given as to how they were caused are consistent. In those circumstances the judge was entitled to place greater weight upon the issue as to whether she believed the account of the appellant as to how they were caused or not. As to the rape, in my view she dismisses the circumstances of that far too readily. The graphic account of that terrible incident was set out by the doctor, surrounded by an account of the manner and circumstances and shame. It did not merit so short a dismissal. But the fact remains that, unless the appellant was believed as to the circumstances in which the rape took place, it was a matter which invited, although perhaps in more tactful and fuller terms, the comment that it did not necessarily occur whilst in detention at the behest of the authorities in the Congo.

19. In those circumstances, the comment that the rape could have taken place in a number of circumstances unrelated to detention, whilst I criticise its terms, cannot be categorised as an error of law. It did turn upon the essential credibility of this appellant.

20. It was as a result of the discrepancies which I have identified that the judge concluded that the appellant had not been detained, tortured and interrogated, still less detained as a deserter. Those facts were essential as the basis for consideration of the all important question of whether the appellant would be at risk on return. Absent belief as to his detention and arrest there was no basis for saying that he would be at risk on return merely as the result of being a failed asylum seeker. Neither the previous decision of AB and DM CG [2005] UKAIT 00118 nor the more recent decision which led to the adjournment of this appeal, BK (DRC) v SSHD [2008] EWCA Civ 1322, suggest to the contrary. Miss Weston correctly drew to our attention the Home Office's own guidance note which does establish that, were the appellant to be believed as being a deserter who had been detained in prison, and were he at real risk of imprisonment on return to the DRC, then the correct conclusion would be that he was at risk of a breach of Article 3; see paragraph 3.11.7 of the Home Office Operational Guidance Note. But absent findings as to those facts on which the appellant relied, there was no basis for concluding such a risk.

21. There have been many cases upon which this court has set out the correct view as to challenges to findings and conclusions of fact by those charged with that onerous responsibility. We have been reminded of some of them: E and R [2004] EWCA Civ 49, Gheisari v SSHD [2004] EWCA Civ 1854, and R (Iran) and others [2005] EWCA Civ 982. This is not the case for yet further disquisition on the correct approach of this court to challenges to findings of fact. Perhaps underlying the approach of this court is the concern that there may be cases where the findings of fact show an underlying wish of the fact-finder to find inconsistencies and implausibilities which reveal a consistent and established unfairness in a particular case in the approach to the factual account given by a claimant for refugee status. Such cases do, fortunately rarely, come before this court. But it is so easy in a case such as this, where there are justified criticisms as to the way conclusions were expressed and the reasoning, to say that those criticisms infect the findings as a whole. But, as I have endeavoured to emphasise, there was a respectable basis, properly expressed, for finding that the account was not to be believed, despite some of the reasoning which I have criticised. In those circumstances, in my judgment, read as a whole, the determination does not reveal any error of law and I would dismiss this appeal.

Lord Justice Lawrence Collins:

22. I agree

Mister Justice Holman:

23. I also agree, and I agree with all the reasoning of my Lord, Moses LJ. However, this case has caused me considerable anxiety and for that reason I would like very briefly to summarise my own reasoning.

24. The appellant's account involves a continuous chain of events. The chain began with the raid upon the family home while his brother was holding a political meeting there, and passed through the account of his own detention, conscription, desertion, further detention and final escape. At paragraph 41 of her determination and reasons, the Immigration Judge found it "not to be plausible" that during the raid his mother went to see what was going on, and "not to be plausible" that he and his mother could not leave because it was their house. The Immigration Judge thus concluded that the raid did not take place, and so in a single sentence at the end of paragraph 41 she effectively rejected the whole of the subsequent story. I, for my part, do not consider the appellant's account of the raid not to be plausible. There are at least two other aspects of the reasoning of the Immigration Judge where she found implausible that which I personally consider to be plausible. In paragraph 43 she said it was implausible that if the appellant had some connection with the MLC he would still have been trained and sent to fight against the rebels. That is not implausible to me, for it is so often the fate of boys (he was only 15 at the time) that they are forced to fight in that way. In paragraph 46 the Immigration Judge found implausible the appellant's account that at the front he refused to fight and laid down his weapon. That, too, does not seem

implausible to me. A young man refusing to fight may not necessarily feel able to flee.

25. The question for this court, however, is not whether we do or do not find plausible that which the Immigration Judge found implausible; rather, it is whether, in finding aspects of the appellant's account implausible, the Immigration Judge fell altogether outside permissible reasoning. It was the Immigration Judge who heard the oral evidence of the appellant, and it is she who is the specialist tribunal with daily experience of considering cases of this kind. There were, in any event, clear discrepancies or inconsistencies in parts of the different accounts given by the appellant, to which the Immigration Judge referred and which she was entitled to take into account. In particular, as the Immigration Judge said in paragraph 44, the appellant's witness statement clearly referred at paragraph 13 to six months of military training before being sent to the front. His account as given to Dr Frank, however, if accurately recorded by Dr Frank at page 3 of his report, suggests a period of training measured more in days than in months. Viewing the case in the round, I accept the submission of Miss Olley on behalf of the Secretary of State that the picture is of an Immigration Judge who, having heard his evidence, did not feel comfortable with the appellant's story, found certain discrepancies within it, and then tried to rationalise her overall impression. I am unable to identify defects in the reasoning, whether individually or cumulatively, that amount to errors of law. Ultimately, in my view, and as my Lord has put it, there was within this determination a respectable basis properly expressed for the final conclusion reached by the Immigration Judge.

26. For those reasons, together with those of my Lord, in my view this appeal must be dismissed.

Order: Appeal dismissed