Case No: C5/2007/2344

Neutral Citation Number: [2008] EWCA Civ 457
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
[AIT No AA/12670/05]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday, 6th march 2008

Before:

LORD JUSTICE PILL
LORD JUSTICE KEENE
and
LORD JUSTICE MAURICE KAY

- -

Between:

FB (DEMOCRATIC REPUBLIC OF CONGO)	**Appellant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -

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Mr Henderson (instructed by Refugee legal Centre) appeared on behalf of the **Appellant**.

Mr Patel (instructed by the Treasury Solicitors) appeared on behalf of the **Respondent**.

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Judgment

(As Approved by the Court)

Lord Justice Pill:

1. This is an appeal against a decision of the Asylum and Immigration Tribunal dated 19 June 2007. It is made by FB and he is seeking refugee status in the United Kingdom having left the Democratic Republic of Congo ("DRC").

2. The appellant is Congolese by nationality; his mother was Congolese and his father Rwandan. He has four siblings. His father was killed in 1988. The appellant left DRC in 2005. He had worked there as a teacher in mathematics and physics.

3. It is common ground that the appeal must succeed at least to the extent of the case being remitted to the tribunal. Mr Henderson, on behalf of the appellant, submits that because of the error of law identified and accepted by the Secretary of State to exist, there is now only one possible finding and this court should allow the appeal and grant asylum. I refer to the decision which was carefully prepared and followed an order for reconsideration. The original determination had been on 8 February 2006. The appeal is brought with leave of the tribunal.

4. The appellant gave evidence to the tribunal. Under the heading "Findings of Fact" the tribunal state: "There are number of matters that throw doubt on the credibility of the story" (that is, the story of detention and threats):

> "None on its own might prove fatal to the appellant's case but the cumulative effect of them taken together is powerful."

5. In making their comments they state at paragraph 56:

> "The story of the appellant's escape is problematic in a number of ways."

6. Particulars of those difficulties are set out in the following paragraph. They found that the appellant did not have links with the UDPS, which was an anti-government organisation. At paragraph 63 the appellant's evidence with regard to his journey (that is, following the events which lead him to flee) was "at best vague and at worst implausible". Reference was made to the findings of fact of the first Immigration Judge:

> "We conclude that there is something more significant here and that the appellant travelled in a more open way than he was prepared to admit. That in turn suggests that he was not at risk from the authorities as claimed."

7. Paragraph 66:

> "When all allowances are made, the appellant has to come over as someone who is telling the truth. The appellant did not do so and this was not simply a question of inconsistencies."

8. Paragraph 67:

> "Taking all these matters into consideration we conclude therefore that there is not a reasonable degree of likelihood that any part of the appellant's story is true with the exception of two matters; that is that the appellant is a citizen of the DRC and has a Tutsi father. As we have said, these are findings of the previous Tribunal which binds us with regard to these matters and in the light of the evidence we are happy to accept them."

9. Reference is then made by the tribunal, under the heading "The Asylum Appeal", to the guideline case AB and DM (Risk Categories Reviewed -- Tutsis added) DRC CG [2005] UKIAT 00118. In several places the tribunal expressed doubts as to whether they ought to follow what was then guidance two years old, but they decided to do so.

10. Before referring in a little more detail to the determination I turn to the submission made by Mr Henderson on behalf of the appellant, which can be put succinctly. The error of law is in a failure to recognise that, on a return to the DRC, information would be available to the immigration authorities. The information is that they would know -- by reason of British information supplied to them -- the father's place of birth and nationality. They would thus know that the father was Rwandan by nationality and had been born in Rwanda. Further, I am prepared to assume for present purposes that they would know that the father was Tutsi. As the name of the guideline case indicates, there has in the past been difficulty about assessing the relative risks of Rwandans as such and Tutsis. I am prepared to follow the guidance in the guideline case that one should make that assumption in the present case.

11. Mr Henderson relies on the first category of people at risk stated at paragraph 51(i) of the guideline case. It summarised the current risk categories as follows:

> "(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."

12. For this purpose, I assume that Rwanda does come within that category of state but that is not the important point because reliance is placed on the expression "those who have or presumed to have Rwandan connections or are

of Rwandan origins". Mr Henderson submits that the appellant plainly comes within that category by virtue of his father's place of birth and nationality. It follows from those facts alone that the appellant comes within the category and the tribunal -- had they understood, had they been told that the DRC authorities would have had that information -- must have granted the appellant asylum. We have not been referred to any case since the guideline decision (which was on 21 July 2005) in which the provision has been applied in that automatic way.

13. For the respondent Mr Patel submits that a remittal is necessary because, in each case, it is for the fact-finding tribunal to assess the particular circumstances. It is not enough for an applicant for asylum to say "I have Rwandan connections, my father was Rwandan" to entitle that person to asylum. He refers to other passages in the decision in AB and DM which require, he submits, a closer analysis of the position of the particular applicant.

14. Two other categories are set out in paragraph 51 of AB and DM and they extend, it seems, to Tutsis, a risk which had formally been limited, or more limited, to Rwandans. The explanatory paragraphs -- 53 and 54 -- are, Mr Henderson submits, concerned solely with the extensions in category 2 and do not bear upon the very general and comprehensive finding about category 1.

15. I am not prepared to accept entirely the submission of Mr Henderson. I understand the force of it; decisions, however, are not to be construed like statutes and I understand the difficulties so that a tribunal, attempting to give guidance in a complex situation, cannot cover every possibility. However, if one looks at paragraph 40 of the decision, in which the background is set out, the tribunal stated:

> "If a person claims to be of mixed Tutsi ethnicity it will be relevant to examine to what extent he or she will be seen to have taken the ethnic identity of their father or mother."

16. And at paragraph 54, which purports to refer only to a different category, it is stated in terms:

> "It is not sufficient for an appellant simply to state that he is Rwandan or Tutsi or would be perceived as such."

17. That finding must (if any force is to be given to it) relate to category 1 as well as to category 2. The point is confirmed by the last sentence of that paragraph. "*The assessment*," it stated:

> *"…must be made on the basis of a careful analysis of an appellant's ethnicity, background and profile."*

Mr Henderson submits that that is merely an assessment of whether the person is a Tutsi but in my judgment, in context, a broader approach must be given to it.

18. That takes one back to the findings of the tribunal who did, in my judgment, consider the particular case, albeit missing what was a significant piece of evidence that on arrival the immigration authorities would know that the appellant's father was Tutsi and a Rwandan. His late father, who died seven years previous to the appellant's departure, was Tutsi and a Rwandan -- so that considerations of his appearance would not prevent the immigration authorities from being aware of his father's status in circumstances where clearly there is a considerable amount of anti-Rwandan and, I would assume for present purposes, anti-Tutsi feeling prevailing in the DRC.

19. At paragraph 39 of their determination the tribunal refer to the oral evidence of the appellant. As to his work he said:

> "…that they looked at his competence and he was well-known in his commune and he was a teacher well-known by his pupils. They knew him as a good guy and he had no problems. He accepted that in his area he was known as the son of a Tutsi. He agreed that that did not stop him being put on the management committee. He took his mother's nationality; he is Congolese."

20. At paragraph 67 they make their assessment of risk and they do so on the basis that the appellant is a citizen of the DRC and has a Tutsi father. At paragraph 71, still dealing with risk and risk once he was within the country:

> "We can see no reason to suppose that he would be recognised as a Tutsi on his return. He had no problems as a Tutsi before, even though, as he accepted, the government knew of his descent through his application forms as a teacher. Just as previous persecution is evidence that a person is likely to be persecuted in the future, a lack of persecution in the past is some evidence that there will be no persecution in the future."

21. In my judgment this is a case where the tribunal must be given the opportunity to reassess the facts and, in the light of the facts, to consider the risk involved if the appellant were to be returned. In my judgment, as in every other asylum case, the evidence must be looked at as a whole. It is a relevant consideration that the appellant has lived the life he has, as found by the tribunal, until 2005. And on their findings of fact he has lived it without the harassment, to put it no higher, his evidence having been disbelieved by the tribunal.

22. I cannot accept that this is a case where one can by rote read paragraph 51(i) of AB and DM, and the category thereby specified, and state that the

inevitable conclusion -- had they known of the Rwandan and Tutsi connection -- that the tribunal must have granted asylum. The tribunal must take a broader view: the word "connections" and the word "origins" themselves require analysis and it is for the tribunal, of course having full regard for the guidance present, to consider the case of the particular applicant for asylum.

23. For those reasons I would allow the appeal but allow it only to the extent of ordering a remittal to the tribunal. If my Lords agree with me, we would then hear any further submissions there may be as to the terms of that remittal. I would only add that there has been discussion in the course of the hearing as to the doubts expressed by the tribunal about the currency of the guidance in the case to which I have referred. To some extent Mr Henderson is helped by the fact that, in a case in September 2007 -- BK (Failed asylum seekers) DRC CG [2007] UKAIT 00098 -- the tribunal still applied the guidance in AB and DM. They set out a summary of the effect of that decision, which Mr Henderson accepts is a fair summary, at paragraph 154 of the decision. It is not, of course, for this court to indicate whether or not up-to-date guidance would appropriately be given. I would order accordingly.

Lord Justice Keene:

24. I agree.

Lord Justice Maurice Kay:

25. I also agree.

Order: Appeal allowed

Lord Justice Pill:

26. This case has been remitted to the Asylum and Immigration Tribunal for reconsideration. Throughout the hearing, when the issue was whether there should be a remittal at all, the appellant claiming that this court could make the decision, only Ground 1 was considered. The three grounds were set out by the Senior Immigration Judge who granted permission to appeal, and they appear at page 13 of the court bundle.

27. This is a case in which, with the best of intentions, efforts were made to resolve the matter without a court hearing. These proved impossible because the appellant was insisting on a decision from this court as to whether it would itself decide the case on Ground 1. If the appeal were to be allowed on Ground 1, Grounds 2 and 3 would not require consideration. The court was not prepared to accede to that submission.

28. The court is therefore left in the position whereby there are three grounds of appeal to it. That is a very common situation and the court will normally deal with all three grounds of appeal and will then decide on which of them the

case should be remitted; and the court would ordinarily have decided whether Grounds 2 and 3 or either of them required a remittal to the tribunal for further consideration.

29. However, in the course of the efforts, to which I have referred, to resolve the matter, the Secretary of State did in this case accept that she would agree to the case being remitted on all three grounds of appeal. Mr Patel does not seek to resile from that. Notwithstanding the procedural inconveniences involved, this court is not prepared to dissent from that approach, even if it wished to do so because it would be unfair on the appellant, who has been under the impression that Grounds 2 and 3 were alive and were not for consideration today. Mr Henderson has not prepared submissions on Grounds 2 and 3, and, having seen the proposed statement of reasons which were in the event aborted, he could not have been expected to do so.

30. Accordingly we do remit on all three grounds. I understand that a Vice President does have particular responsibilities for remittals from this court, and that judge will no doubt give directions as to the manner in which the hearing before the tribunal is to proceed.

31. I thought it right to set the matter out in a little detail. This is a case where there has already been one order for reconsideration, and the determination we have been considering today was itself a hearing following such an order. The position now is that there will be a third assessment by the tribunal and that assessment will take place not merely on Ground 1, but will cover the scope of Grounds 2 and 3 as well. If the tribunal were found to have erred in law in those respects, then a decision would have to be taken as to what further course should be followed by it. We regard those matters as appropriately for the tribunal itself to decide, and accordingly we make no order beyond the remittal of all three grounds on which permission to appeal to this court has been granted for reconsideration by the tribunal.

Order: Appeal allowed on all three grounds.