EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

Lord Reed
Lord Carloway
Lord Hardie

[2009] CSIH 52
XA29/08

OPINION OF THE COURT

delivered by LORD REED

in the Application for Leave to Appeal under Section 103B of the Nationality Immigration and Asylum Act 2002

by

MBK

Applicant:

against

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent:

_____

Appellant: Forrest; Drummond Miller
Respondent: Lindsay; Solicitor to the Advocate General for Scotland

9 June 2009

Introduction

[1] The applicant maintains that he is a national of the Democratic Republic of Congo ("DRC"). On 21 February 2007 he applied to the respondent for asylum under the 1951 Convention relating to the Status of Refugees (the Geneva Convention). On 23 March 2007 the application was refused. The applicant appealed against that decision

to the Asylum and Immigration Tribunal, under section 82 of the Nationality, Immigration and Asylum Act 2002 as amended. The appeal was heard by an immigration judge. On 4 May 2007 she refused the appeal. The applicant then applied under section 103A of the 2002 Act for an order requiring the Tribunal to reconsider its decision on the appeal. That application was decided by a senior immigration judge, in accordance with the procedure set out in Part 2 of Schedule 2 to the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 and Part 3 of the Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI 2005 No. 230), as amended. On 26 June 2007 the senior immigration judge ordered the Tribunal to reconsider its decision on the appeal, on the grounds set out in the applicant's application notice. The appeal was reconsidered by a senior immigration judge. On 2 November 2007 he decided that the original Tribunal (i.e. the immigration judge) had not made a material error of law, and dismissed the appeal. The applicant then applied for permission to appeal to this court under section 103B of the 2002 Act. Permission having been refused by the Tribunal, he applied to this court, which has heard his application for permission together with the appeal itself.

The background circumstances

[2] In support of his application for asylum, the applicant gave the immigration judge an account which can be summarised as follows. He lived in the DRC with his family, including a wife, five children, his mother, his brother and three sisters. He also had a brother living in the United Kingdom, and another brother living in the United States. He had never taken part in any political activities and had no political affiliations. He had not experienced any problems with the authorities. On 21 August 2006 he was fishing. There were other fishermen there. Suddenly all the fishermen were surrounded by soldiers of the Presidential Guard, who began to arrest all the men that

were there. Those who tried to swim to freedom were shot by the soldiers. The remaining fishermen, including the applicant, were taken to Camp Tshatsi, where the barracks of the Presidential Guard are located. They were detained there and tortured. There were about 50 of them. The applicant was placed in a dungeon and repeatedly tortured, without questioning or interrogation. On 20 September 2006 he collapsed as a result of a severe beating. He was told that day that he had been arrested because he was accused of having spoken out against the Government. He was said to have insulted the President, Mr Kabila, by stating that he was Rwandan. He was accused of involvement in a conspiracy to bring rebel soldiers from Congo Brazzaville to the DRC. After he collapsed he was taken to a hospital facility in the camp. He was unconscious for two days. Once he regained consciousness he was kept in hospital for a further month for observation. On 27 September 2006 he saw a senior lieutenant in the Presidential Guard, whom we shall refer to as X, whom he recognised as being a friend of one of his brothers. He saw this officer again on 30 September 2006. On 21 October 2006 the applicant was discharged from the hospital but remained a prisoner in the camp. On 16 November he escaped, dressed as a member of the Presidential Guard. He was taken by some soldiers from his cell to a car. There were four soldiers in the car, one of whom was X. The applicant was told that he had been due to be executed that day. The soldiers gave him the uniform of a member of the Presidential Guard, a loaded gun, and a code that he was to use if stopped at checkpoints. He was taken to X's house, where he returned the uniform. X told the applicant that he had contacted the applicant's in-laws to seek money in return for helping the applicant to escape. They suggested that he contact the applicant's brothers in the United Kingdom and the United States. He did so, and they provided the money requested. X then enlisted the help of a DRC diplomat, who acted as the applicant's agent. The applicant

remained at X's house until 18 February 2007, when he was told that he was to leave the DRC that day. He was put in the diplomat's car and taken to the airport, where the necessary arrangements were made by the diplomat. The applicant flew to the United Kingdom, via Ethiopia, using a false Canadian passport. He was accompanied by the diplomat. He was met at the airport in the United Kingdom by his brother, who had been notified before the applicant left the DRC. The diplomat took back the passport, and the applicant went to his brother's house. He claimed asylum two days later. He claimed to have scarring and continuing medical symptoms as a consequence of the torture. He maintained that the DRC authorities were still looking for him: his wife, in particular, had seen suspicious-looking people around the house. He would be at risk if he were returned.

[3] The documentation submitted by the applicant in support of his claim included reports of the incident on 21 August 2006, and a list of the people detained on that date. The names on the list include the applicant's first name. No medical evidence was produced.

The decision of the immigration judge

[4] The immigration judge disbelieved several aspects of the applicant's account. First, she noted that the incident on 21 August 206 when fishermen had been detained had been well publicised, and it was possible that the applicant had latched on to it. The applicant's first name was not uncommon, and the presence of that name on the list proved very little. It was necessary to look at the other evidence and consider the case in the round. The judge found that the documentary evidence relating to the people detained on 21 August 2006 indicated that they were detained at the camp for only a few days. That did not match the applicant's account. There was no satisfactory explanation of why the applicant should have been detained for a much longer period

than anybody else. The applicant's original account to the Home Office had been that he was accused of helping opposition party members to cross the river where he was fishing, whereas his later account was that he had been accused of speaking out against the Government, insulting the President and conspiring to bring rebel soldiers from Brazzaville to the DRC. He appeared to have embellished his story. The judge did not believe that the applicant, if he was one of the fishermen, was detained for three months at the camp.

[5] Secondly, the judge did not find it credible that a person who was to be executed would have been sent to hospital for medical treatment and kept there for a month.

[6] Thirdly, the judge noted that no medical evidence had been provided, although it had been suggested at an earlier hearing that a report should be obtained from the applicant's general practitioner. The absence of medical evidence, in circumstances where such evidence could have been obtained, detracted from the credibility of the applicant's claim to have suffered repeated torture with continuing medical consequences.

[7] Fourthly, the judge found the applicant's account of his escape implausible. In that regard, the judge commented:

> 'Why would a senior lieutenant in the Republican Guard contact the Appellant's in-laws even if he was friendly with the Appellant's brother? If he did, why did he not make contact with the brother that he was friendly with? Why would [X] put himself at such risk? This part of the Appellant's account is not credible.'

The judge also found it implausible that other military officers would have helped the applicant to escape, and that he would have been given a gun.

[8] Fifthly, the judge did not believe that the authorities in the DRC were looking for the applicant. The applicant was not political and had no political affiliations. There was no indication that anyone had looked for him during the three months he claimed

to have spent at X's house. It was difficult to believe that X would have kept a wanted man in his house for three months. The account of suspicious-looking people being seen more recently around the applicant's house did not make the judge believe that the applicant was being actively sought.

[9] In the circumstances, even if the applicant had been one of the fishermen detained on 21 August 2006 (as to which the judge found herself unable to reach a conclusion), the judge did not accept that he continued to be of any interest to the authorities. He would therefore not be at risk if he were returned to the DRC. He was therefore not entitled to protection under the Geneva Convention. Nor would his return to the DRC be incompatible with any Convention rights.

The decision of the senior immigration judge

[10] Reconsideration was ordered on the basis of a number of grounds put forward by the applicant. The first was that the judge had erred in law in stating that there seemed to be no reason why the applicant should have been detained longer than the other fishermen: the judge had ignored the possibility that a political opinion might have been imputed to the applicant. The senior judge rejected this contention, observing that the question would then arise why a political opinion should not have been imputed to all the fishermen, so that they were all kept longer in detention.

[11] Secondly, a number of criticisms were made of the adequacy of the judge's reasons for rejecting the applicant's account of his escape. The judge was also criticised for not putting to the applicant the questions which she posed in her decision in the passage which we have quoted. The senior judge rejected these criticisms, observing that the core element of the applicant's claim was that he, unlike the other fishermen arrested on 21 August 2006, had not been released after a few days but had been detained for several months. That core element of the claim had been rejected on

the basis that it was inconsistent with the documentary information and was further undermined by the conflicting accounts given by the applicant at different times as to the reasons for his arrest. Standing the rejection of the applicant's account of his detention, the criticism of the judge's rejection of his account of his escape from his supposed detention was otiose.

[12] Thirdly, it was said that the judge had failed to give adequate reasons for her conclusion that the applicant was of no further interest to the authorities. This criticism was rejected by the senior judge.

[13] Finally, in relation to this aspect of the case, it was said that the judge had not properly considered the risk to the applicant on his return by reason of his having left the DRC irregularly. This criticism also was rejected by the senior judge.

The present application

[14] In the present application, the applicant seeks leave to appeal on two grounds. The first is that the senior judge erred in law in holding that the decision of the immigration judge in regard to the length of time the applicant was held in the camp was open to her. In that regard, it is said that the immigration judge based her finding as to the credibility of the applicant's account of his detention solely on the documentary evidence that the fishermen were released after a few days, whereas other evidence to which she referred, of a more general character, demonstrated that torture and ill-treatment do take place, sometimes arbitrarily, while persons are being detained in the DRC. It is also said that, in any event, the immigration judge's approach assumes that the authorities would have acted rationally, and therefore would not have treated the applicant differently from other fishermen unless there had been some reason to do so. It could not however be assumed that the DRC authorities would act in a rational manner.

[15] There does not appear to us to be merit in this ground of appeal. A finding as to credibility is a finding of fact, which can only be challenged under section 103B if some error of law can be identified. It is plain from her decision that the immigration judge had regard to the evidence that detainees in the DRC may be subjected to torture and ill-treatment. That evidence did not detract from the evidence that the detained fishermen were released a few days after their arrest. It was, in part, the conflict between that evidence and the applicant's account that he had been detained for several months which led the judge to doubt the applicant's account. The credibility of the applicant's account was also undermined by the fact that that account changed materially from time to time. The judge was entitled to regard the difference between the applicant's account of his treatment and the evidence as to how other fishermen had been treated as undermining the credibility of his account, in the absence of any satisfactory explanation of why the applicant should have been treated differently from the other fishermen.

[16] The second proposed ground of appeal is that the senior immigration judge erred in law in holding that the decision of the immigration judge in regard to the involvement of X was open to her. In that regard, it is said that the judge's rejection of the applicant's account of his escape was based on unjustified assumptions and speculation. She assumed that people would not behave in the DRC in the way the applicant had claimed (and, in particular, that X would not put himself at such risk). She gave no reason for finding it incredible that other officers had assisted in the applicant's escape. She did not expressly accept or reject certain aspects of the applicant's account, such as that he had been given a uniform, or that X had been given money. She speculated that no-one had been looking for the applicant while he was in hiding.

[17] This ground of appeal also appears to us to be without merit. We observe, in the first place, that the immigration judge's rejection of the credibility of the applicant's account of the details of his escape was not critical to her decision. As the senior immigration judge noted, standing the immigration judge's conclusion that the applicant, if he was detained at all, was released after a few days, there was no question of her accepting his account of his escape from detention supposedly some three months or so later. What she regarded as the improbabilities of that account at most strengthened a conclusion which she had already reached on other grounds. In those circumstances, any error of law in her approach to the applicant's account of his escape could not be regarded as material.

[18] In any event, we can detect no such error of law. It is of course true that credibility is an issue to be handled with care and with sensitivity to cultural differences. We accept that there will be cases where actions which may appear implausible if judged by domestic standards may not merit rejection on that ground when considered within the context of the asylum-seeker's social and cultural background. But the credibility of the account given by an applicant for asylum has to be judged; and it is a question of fact which has been entrusted by Parliament to the immigration judge, specially appointed to hear asylum appeals and having the benefit of training and experience in dealing with asylum seekers from different societies and cultures. In coming to her conclusion the immigration judge is entitled to draw on her common sense and her ability, as a practical and informed person, to identify what is or is not plausible. In the present case, there were a number of aspects of the applicant's account which, particularly when considered cumulatively, the judge regarded as being unlikely to be true. In reaching that view, she used her common sense and experience, as she was entitled to do. She also had regard to aspects of the

case in relation to which her assessment has not been criticised, such as the absence of medical evidence and the extent to which the applicant's account had altered from time to time. So far as concerns the particular matters referred to in the proposed ground of appeal, we do not consider that the immigration judge can properly be said to have proceeded on the basis of assumptions and speculation. Her conclusions were based to some extent on inferences, but the inferences which she drew were rationally based on the evidence before her, and on an assessment of inherent probabilities which cannot in our view be characterised as unreasonable, or as being based on a disregard of the possibility of relevant cultural differences.

Conclusion

[19] In the circumstances we shall refuse the application.