EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

Lord Osborne
Lord Johnston
Sir David Edward, Q.C.

[2007] CSIH 51
XA80/05

OPINION OF THE COURT

delivered by LORD OSBORNE

in

APPEAL

A M

Appellant;

against

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent:

_____

Act: Forrest; Drummond & Miller
Alt: Lindsay; The Office of the Solicitor to the Advocate General

20 June 2007

The background circumstances

[1] The appellant, having arrived illegally in the United Kingdom on 6 December 2001, claimed asylum on 19 December 2001. He contended that he had a well-founded fear of persecution in Burundi for the reason of membership of a particular social group. He also claimed that he had a right to remain in the United Kingdom under Articles 2, 3 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. His application was considered by the respondent,

but refused, for the reasons given in a letter dated 14 February 2002, to which we refer for its terms. The appellant was thereafter served with a notice of a decision to issue removal directions to an illegal entrant, dated 18 February 2002 stating that directions had been given for his removal to Burundi. There followed an appeal brought under the terms of the Immigration and Asylum Act 1999. The appeal was heard twice by different adjudicators, after which it was twice remitted for hearing *de novo*. Thereafter, following the coming into force of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, the appellant's case came before an immigration judge on 13 April 2005. On 29 April 2005, the appellant's appeal was dismissed for the reasons set forth in the determination of the Asylum and Immigration Tribunal annexed to the Appeal. Following upon that, the appellant made an application to the Asylum and Immigration Tribunal for leave to appeal to this court, which was itself refused on 4 July 2005. The reasons given for that refusal were as follows:

> "The appellant spoke of attacks upon his home by Tutsi soldiers in 1994, 1998 and 2001. The current situation between Tutsi and Hutu was considered in the determination. The appellant feared that he would be at risk because of his brother's activities with the Interahamwe. The Immigration Judge at paragraph 23 of his determination did not find the account of the search for the brother to be credible. The Hutu constitute the majority of the population of Burundi. A transitional Government was installed in November 2001 and has been working closely with the United Nations. The reasoning of the Immigration Judge was adequate. The appellant has himself no personal political profile and his brother now lives abroad in any event. Four years have elapsed from

the events described. The determination does not disclose any error of law in its approach to the issue of return or at all."

[2] Following upon that determination the appellant made an application for leave to appeal to this court under section 103B of the Nationality Immigration and Asylum Act 2002 in which grounds of appeal against the decision of the Asylum and Immigration Tribunal, dated 4 July 2005, were stated. Those grounds are in the following terms:

"3.1 The reasoning of the Immigration Judge ('the judge') was not adequate (see line 9 of the decision of the Tribunal). The judge correctly identifies whether the incident in 2001 took place as the first part of the important question (see last sentence in paragraph 22 of the decision by the judge dated 29 April 2005). He concludes (see final sentence in paragraph 23 of his decision) that it did not because the authorities would have known where to find the appellant's brother (see earlier in paragraph 23). This was not a finding that was open to him because there was no evidence that the authorities knew where his brother was. The reasoning of the judge was therefore based on speculation. It is accordingly flawed. In so far as the Tribunal state that his reasoning was adequate its decision is similarly flawed.

3.2 The reasoning of the Immigration Judge ('the judge') was not adequate (see line 9 of the decision of the Tribunal). The judge correctly identifies the effect of the incident in 2001 will have on the risk on return as the second part of the important question (see last sentence in paragraph 22 of the decision by the judge dated 29 April 2005). If the incident in November 2001 did take place the judge was not entitled to draw the conclusion that there was no credible reason to believe that the authorities would know or care about his

return (see third sentence in the judge's decision). Such a line of reasoning would be justified only if (a) the incident was not itself important; and (b) the improvement in the country situation to which the judge refers in the second last sentence in paragraph 24 was sufficiently marked as to render the effect of the incident in November 2001 irrelevant. There was no evidence that the incident was anything other than serious while the judge basis his conclusion that the country has improved on minimal evidence. His decision is therefore flawed. In so far as the Tribunal state that his reasoning was adequate its decision is similarly flawed.

3.3 The determination of the Immigration Judge disclosed an error of law (see line 12 of the Tribunal's decision). In finding that it would not be unduly harsh for the appellant to avoid his home area. It is assumed he has meant that it was open to the appellant to seek the option of internal flight relocation in Burundi. If so, he has erred by failing to properly consider the appropriate test and relevant issues, such as whether the appellant would be able to work in another part of Burundi, what effect this would have on his home/family life, what protection, if any, he would have, and what other consequences would result from such an important move. (*AE and FE* v *S.S.H.D.* (2003 INLR 475)."

[3] By an interlocutor, dated 4 May 2006, this court, on the unopposed motion of the appellant, no answers having been lodged, granted the application for leave to appeal to this court and held the application as the appeal in the case. At the outset of the hearing of the appeal before us, on 29 May 2007, counsel for the appellant sought leave to amend ground of appeal 3.2 by the insertion after the date "29 April 2005", occurring in line 5 of that ground the words "but fails to apply the correct standard of

proof." While this motion was originally opposed, the basis of opposition to it was resolved and the amendment was allowed.

Submissions of the appellant

[4] At the outset of his submissions, counsel for the appellant indicated that he sought to have the court remit the case to the Asylum and Immigration Tribunal, after allowance of the appeal. There ought then to be a reconsideration of specific parts of the evidence which had been misconstrued by the Immigration Judge. The powers of the court, in this regard, were now defined in section 103(B)(4) of the Nationality Immigration and Asylum Act 2002. It was a matter of agreement that the original appeal against the decision of the respondent, dated 14 February 2002, had been brought under the Immigration and Asylum Act 1999, in the first instance. The appeal continued to be regulated by that Act but, by virtue of transitional provisions, the disposal of the case by the court fell to be dealt with under section 103B of the 2002 Act.

[5] Thereafter counsel described the elaborate history of the case, which we have already summarised. The present appeal was focused upon the decision of the Immigration Judge, dated 29 April 2005. It was submitted that that decision involved certain errors of law.

[6] Dealing first with ground of appeal 3.1, counsel drew attention to paragraph 22 of the decision under consideration. In the last sentence of that paragraph the Immigration Judge stated that the important question was whether the incident of 2001 took place, and its relationship to the risk on return. The reference to the incident of 2001 was, of course, a reference to the incident described in the Immigration Judge's account of the appellant's evidence, narrated in paragraph 11(f)

of his decision. The appellant had claimed that on 20 November 2001, Tutsi soldiers came to the house of the appellant's family again. Five soldiers came to the house asking for the appellant's brother Youssouf. The family was badly beaten by the soldiers. They said that they believed that his brother was associated with the Interahamwe. By way of answering the important question which he had proposed in paragraph 22 of his decision, the Immigration Judge stated in paragraph 23:

> "It became clear in the course of evidence that the appellant's brother was a substantial business man. He was getting large shipments of garments from Thailand, which he was selling from their father's shop. His brother was also able to travel abroad. In these circumstances it must always have been obvious to the authorities where to find his brother. I do not believe his evidence as to the incident in which they are alleged to have been looking for his brother."

Counsel submitted that the conclusion reached by the Immigration Judge in paragraph 23 was not based on evidence. Rather it amounted to no more than speculation and was therefore flawed. To the extent that the conclusion of the Asylum and Immigration Tribunal stated that that reasoning was adequate, its decision was similarly flawed. In connection with this submission, counsel drew our attention to *Wani* v *Secretary of State for the Home Department* 2005 S.L.T. 875, particularly at page 884. In particular, the inference to be found in the second last sentence of paragraph 23 could not be drawn on the basis of the earlier parts of that paragraph. Thus the Immigration Judge was not entitled to disbelieve the evidence of the appellant on that basis.

[7] Counsel turned next to support ground of appeal 3.2. This ground was focused upon the reasoning of the Immigration Judge in paragraph 24 of his decision, which, it

was submitted, was bad. The context of paragraph 24 included what was narrated in paragraphs 4 and 5 of the decision. In paragraph 4 it was stated:

> "The basis of the claim to asylum, as summarised for the appellant in submissions, was as follows:
>
> > 'The appellant has a well-founded fear of persecution from the security forces and affiliated armed groups is returned to Burundi, by reason of his social group as the brother of a Hutu militia member suspected of involvement in the Interahamwe.'"

In paragraph 5 it was narrated that it had been specifically conceded on behalf of the appellant that he was not seeking asylum by reason of his Hutu ethnicity alone, or his perceived political opinion. Against that background it was accurate to say, as the Immigration Judge did in paragraph 24, that "in any event, the appellant has not claimed to have been personally targeted." In connection with this submission the standard of proof was crucial. It was contended that that standard amounted to "a reasonable degree of likelihood". There was, however, no mention of that standard of proof in the decision, particularly in paragraph 23 or 24. Paragraph 24 was couched upon the basis that the incident of November 2001 did in fact take place. However, the Immigration Judge was not entitled to draw the conclusion that he sought to draw in paragraph 24. In connection with this submission paragraphs 14 and 15 of the decision, which dealt with country information, derived from the United States Department of State document dated 28 February 2005 and the document compiled by the County Information Policy Unit. Paragraphs 14 and 15 were inconsistent with the document from the United States Department of State. At this point in the submissions counsel for the respondent produced the report compiled by the Country Information Policy Unit, of 2004. After consideration of this document counsel for the

appellant accepted that paragraphs 14 and 15 of the decision appeared to be consistent with that document. Nevertheless, he argued that that did not undermine this ground of appeal. The Immigration Judge had reached a conclusion based on a misunderstanding of the evidence, which gave rise to an issue of law. In any event, the Country Information Policy Unit report was unclear regarding the present risk which the appellant might face in Burundi. In all the circumstances the finding made in paragraph 24 was perverse.

[8] Counsel then proceeded to support ground of appeal 3.3 which was focused upon the contents of paragraph 25 of the decision in which it was stated:

> "If the appellant fears being asked about his brother, avoiding his home area in order not to run into anyone who might possibly pose such questions would not be unduly harsh."

If the grounds of appeal 3.1 and 3.2 were to fail, 3.3 would be immaterial. However, if the appellant succeeded on grounds 3.1 and 3.2 paragraph 25 of the decision should be reconsidered. The fact of the matter was that there was no material available to the Immigration Judge to entitle him to make the finding contained in paragraph 25.

Submissions of the respondent

[9] Counsel for the respondent moved the court to refuse the appeal and affirm the decision of the Asylum and Immigration Tribunal. At the outset, however, he indicated that two concessions were to be made on behalf of the respondent. First, the contention made in ground of appeal 3.1 was accepted. In particular, it was accepted that, in paragraph 23 of his decision, the Immigration Judge had stated a *non sequitur*. There was no basis for the conclusion stated in the sentence: "In these circumstances it must always have been obvious to the authorities where to find his brother." Thus

the basis for the Immigration Judge's rejection of the appellant's evidence concerning the incident of 20 November 2001 disappeared.

[10] Secondly, ground of appeal 3.3 was also accepted. There was no adequate reasoning concerning the conclusion that internal relocation would not be unduly harsh.

[11] However, despite these concessions, if the appellant were to succeed, he had to succeed in relation to ground of appeal 3.2, as amended. That ground was intimately connected with what was said by the Immigration Judge in paragraph 24 of his decision. In this connection, the respondent adhered to the position taken up in his Answers, relating to that ground. There was nothing that was open to criticism in paragraph 24 of the decision. The conclusion reached that there would be no real risk to the appellant if he were to be returned to Burundi was not in any way perverse.

[12] The amendment to this ground of appeal had raised the issue of whether the Immigration Judge had adopted the correct standard of proof. In relation to that, it was submitted that he had not erred in any way. In paragraph 24, he spoke of there being no "real risk" on return. Those words indicated an application of the test of a reasonable degree of likelihood of risk, the accepted standard of proof. In this connection counsel relied upon *R. (Bagdanavicius)* v *Secretary of State for the Home Department* [2005] 2 A.C. 668, particularly at page 676 in paragraph 22 of the judgment of Lord Brown of Eaton-under-Heywood. It was evident from paragraph 7 of the decision of the Immigration Judge that he had been fully aware of the appropriate standard of proof. Counsel also relied upon *Nalliah Karanakaran* v *Secretary of State for the Home Department* [2000] I.N.L.R. 122, in which reference was made to the earlier case of *R.* v *Secretary of State for the Home Department, ex parte Sivakumaran* [1988] A.C. 958. The test as regards standard of proof was clear.

It has been applied by the Immigration Judge. There was no merit in the argument related to the standard of proof.

[13] It appeared to be contended that the Immigration Judge's conclusion in paragraph 24 was perverse and that there was no proper basis for the statement that the situation in Burundi had much improved since the appellant left that country. In this connection reliance was placed upon the report of the Country Information Policy Unit, which had been before the Immigration Judge. Counsel referred particularly to paragraphs 4.52, 6.1, 6.76 and 6.79 of that report. The relevant contents of the report were closely reflected in the terms of paragraph 15 of the decision of the Immigration Judge, where it was said that the security situation had dramatically improved. That material was, in turn, reflected in paragraph 24 of the decision. Thus it could not be said that, in reaching the conclusion that he did in that latter paragraph, the Immigration Judge had proceeded on no evidence. In all these circumstances it was submitted that there was no merit in ground of appeal 3.2. If that ground of appeal were to be refused, the appeal itself must fail. If that ground were sustained, in the light of the concession made in relation to ground of appeal 3.3, it would be necessary for the case to be remitted to the Asylum and Immigration Tribunal. That disposal was competent within the powers of the court defined in section 103B(iv) of the 2004 Act. There would require to be a substantive hearing upon reconsideration, such as had previously occurred.

The decision

[14] In view of the concessions made by counsel for the respondent in relation to grounds of appeal 3.1 and 3.3, the issues for the court that continue to be live are, of course, only those arising out of ground 3.2, as amended. As regards the issue raised

concerning the Immigration Judge's alleged failure to apply the appropriate standard of proof, we have no hesitation in rejecting the appellant's submissions. Having regard to the authorities cited by counsel for the respondent, we are satisfied that that standard is to be seen as a reasonable degree of likelihood of risk. At several points in the course of his decision, particularly paragraph 7 and paragraph 24, the Immigration Judge uses the expression "real risk". We are satisfied that in doing so, he was applying the appropriate standard of proof.

[15] As regards the other matters raised in ground 3.2, it is necessary to focus attention on paragraph 24 of the decision. In the first sentence in the paragraph the Immigration Judge has said that, in any event, the appellant had not claimed to have been personally targeted. That is undoubtedly true as appears from what was said in paragraph 4 of the decision. The well-founded fear of persecution was said to arise by reason of the appellant's social group as the brother of a Hutu militia member suspected of involvement in the Interahamwe. As regards the second sentence of paragraph 24, we consider that what is there said is largely beside the point. As regards the remaining parts of the paragraph, having regard to the findings in paragraphs 14 and 15 of the decision, which were based upon the Country Information Policy Unit report, we consider that the Immigration Judge was entitled to reach the conclusion that he did. It is perhaps disappointing that his conclusions are stated with such telegraphic brevity, but, essentially his meaning is clear and the basis for his conclusion plainly appears to be evidence before him upon which he was entitled to rely. We should mention that counsel for the appellant conceded in the discussion before us that there was no positive evidence of a continuation of persecution of the Hutu militia members, or the Interahamwe movement. In that

situation, we consider that the Immigration Judge was entitled to reach the conclusion that he did in paragraph 24. In that situation, this appeal must fail.