Case No: C4/2008/1707

Neutral Citation Number: [2009] EWCA Civ 302
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
QUEEN'S BENCH DIVISION, ADMINISTRATIVE COURT
(MR JUSTICE CRANSTON)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday, 17th March 2009

Before:

SIR ANTHONY CLARKE MR
LORD JUSTICE TOULSON
and
LORD JUSTICE SULLIVAN

- -

Between:

THE QUEEN ON THE APPLICATION OF KALOMBO — **Appellant**

- and -

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

- -

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Mr D Chirico (instructed by Messrs Wilson & Co) appeared on behalf of the **Appellant**.
Mr C Zwart (instructed by the Treasury Solicitors) appeared on behalf of the **Respondent**.

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Judgment

Lord Justice Toulson:

1. The appellant comes from the Democratic Republic of Congo (DRC) and seeks asylum for humanitarian protection in this country.

2. He appeals from a judgment of Cranston J dismissing an application for judicial review of a decision by the Secretary of State, who has refused to treat the appellant as a fresh asylum and human rights claim by representations advanced on his behalf following an earlier unsuccessful claim.

3. Paragraph 353 of the Immigration Rules HC 1112 as amended provides:

> "When a human rights or asylum claim has been refused and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered."

The term "significantly different" is defined in the same paragraph:

> "The submissions will only be significantly different if the content:
>
> (i) had not already been considered; and
>
> (ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection."

4. To see how the point arises in the present case it is necessary to set out the background. The appellant was born in Kinshasa on 9 September 1964. He came to the UK on 19 June 2002 at the age of 37 and claimed asylum on the following day. He was interviewed on 5 July 2002. His application for asylum and human rights protection was refused by letter dated 16 July 2002. He appealed and set out his case in a witness statement dated 7 January 2003. In that statement he said that his mother had been born in Kasai, Kinshasa, and his father had been born in Kigali in Rwanda. His father was a Hutu from Kivu and his mother was from the Kasai tribe. He said:

> "I myself was born in the DRC and therefore I am Congolese. However, I took my tribal origin from my mother's tribe, the Kasai people as I had never been to Rwanda and have no connection or knowledge of this country"

5. He lived with his parents at home until 1992. In 1995 he married a woman who was a Hutu from Rwanda. They lived in Kinshasa. He said that his problems began at the beginning of August 1998, when the Ministry of Internal Affairs announced that they wanted to eradicate the Rwandan people from the DRC. Pausing there, that would have coincided with the policy introduced by President Kabila in 1998 of requiring foreigners to return to their own countries. Previous decisions of the AIT have recognised that since that time Rwandans have been a particular target of hostility in the DRC. Levels of hostility have fluctuated, as recorded in reports from time to time by Amnesty International and other bodies. Again returning to the appellant's narrative, he said that shortly after the announcement of the new anti-Rwandan policy by the minister of internal

affairs, the appellant and his wife began to receive threats from their neighbours, threats that their house would be burnt down because they were ethnically Rwandan. There was an occasion when neighbours came to the house with sticks and knives and threatened to kill the entire family. His sister, who was at the University of Kinshasa, was the victim of a violent rape. As a result of these frightening developments, the appellant and his wife moved from Kinshasa to Kisangani at the end of August 1998. Kisangani was about 2,000 kilometres from Kinshasa, and, they hoped, well away from civil unrest.

6. However, they began to suffer problems in Kisangani in May 2002, when Congolese people began to attack ethnic Rwandans in the area. As before, the Congolese began burning the houses of Rwandans. He gave a description in his statement of how his own house was burned and he learned that his wife had been killed. As a result of those attempts, he fled to Kenya in June 2002 and flew from Nairobi to London, arriving on 19 June 2002.

7. His appeal was heard by an adjudicator on 17 January 2003 and was dismissed in a determination promulgated on 5 February 2003. The adjudicator disbelieved his account of events, and concluded his findings of fact by saying:

> "My conclusion is that the appellant never went to Kisingani and if he is indeed married then I believe his wife is alive and well in Kinshasa where neither nor his wife would have experienced any problems from either the security forces or the general population. By the appellant's own admission, he

> certainly had no problems in Kinshasa throughout his life despite the fact that he claims his father is Hutu and even during the first three years of his marriage. In summary I do not believe the appellant at all."

8. Subsequently solicitors acting for the appellant put forward various representations on his behalf. For present purposes we are concerned only with representations set out in a letter dated 23 December 2005. The letter summarised the key points in support of his new application for asylum as follows:

> "(1) Our client is half-Rwandan
>
> (2) His original asylum claim had been finally determined by March 2003
>
> (3) The two leading country guidance cases on risk on return to the DRC, VL (DRC) CG [2004] UKIAT 00007 and AB and DM (DRC) CG [2005] UKIAT 00118, and much of the evidence considered in them, post-date the final determination of our client's first appeal
>
> (4) In VL (DRC) (at 93(a)), the IAT identified as a specific risk category '*nationality or perceived nationality of a state regarded as hostile to the DRC (in particular those who have or are presumed to have Rwandan connections or are of Rwandan origin)*'. No distinction is made here between those of Rwandan Tutsi and those of Rwandan Hutu origin.
>
> (5) In AB and DM (DRC), the IAT reaffirmed its decision in VL (DRC), adding the extra category of actual and perceived Tutsis (see para. 51(ii)). The category of those with actual or presumed Rwandan connections or origins is left in place (51(i)). As AB and DM makes clear, one is ethnicity-based, the other nationality-based; the categories overlap in part, but are distinct.

> (6) In *AB and DM(DRC)*, the IAT also found that the position for perceived Rwandans had significantly deteriorated in 2004: 'The resentment against anything or anybody Rwandan or perceived to be Rwandan is very high and such that there is a real risk of generalised hostility from the local communities against which the authorities are currently unlikely to protect. The situation improved in 2003 but we are satisfied in the light of the evidence before us that there has been a **sharp deterioration** in 2004 [emphasis supplied in the letter]."

9. The Secretary of State's initial response to these representations was to give them short shrift and dismiss them by a letter dated 6 January 2006. That prompted the appellant to bring judicial review proceedings, which were compromised on terms that the Secretary of State's decision letter refusing to treat the claimant's having advanced a fresh claim for asylum should be quashed and the Secretary of State reconsider the submissions advanced in the letter of 23 December.

10. The Home Secretary did reconsider the matter and came to the same conclusion as before, rejecting the submissions as constituting a new claim by a letter dated 25 January 2007. It is that letter which forms the subject of the present judicial review proceedings.

11. In the letter, the authorities relied on by the appellant were considered, and a substantial quotation made from the decision of the AIT in AB and DM. The letter then continued with the following key paragraph:

> "The judgment [ie in AB and DM] does not imply that all individual claimants with Rwandan

> connections will automatically be at risk of persecution simply on the basis of their ethnicity, rather that ethnicity in addition to other factors such as political activity are likely to bring such individuals to the adverse attention to the authorities resulting in mistreatment which may amount to persecution. Your client was found not to be credible by the Adjudicator at his One-Stop appeal hearing. Your client has no political or military past. We therefore do not believe that your client will come to the adverse attention of the authorities purely as a result of his Rwandan connections. It is therefore considered that he is not availed by the findings of **AB and DM (DRC) CG [2005] UKIAT 00118.**"

The letter then went on to say:

> "In the light of all of the above, the points raised in your submissions, taken together with the material previously considered in the letter/determination, would not have created a realistic prospect of success … As we have decided not to reverse the decision on the earlier claim and have determined that your submissions do not amount to a fresh claim, your client has no further right of appeal."

12. The appellant applied for judicial review of that decision. It is submitted that the Secretary of State failed properly to follow the relevant country guidance. The application was refused by Cranston J. He said in his judgment as follows, after quoting the relevant parts of AB and DM and the decision letter:

> "1.8. In the cogent submissions made on behalf of the claimant, it is said that the Secretary of State simply got those provisions in that judgment wrong. The submission was that, in particular, the Secretary of State was wrong to say that the Tribunal had found that Rwandan connections alone do not create a risk. The submission is that the Tribunal's decision cannot sustain that interpretation. Nothing, it is said, in the Tribunal's

> decision suggests that perceived Rwandan ethnicity is merely one factor which can act cumulatively with other factors to create risk. In this submission Rwandan connections are a freestanding risk category. In the light of that it is said that the Secretary of State in her letter should have been focussing on the ethnicity of the claimant, that he is half Rwandan.
>
> …
>
> 1.11. In my judgment, the Secretary of State, applying anxious scrutiny, was entitled to take that view of the Tribunal decision. As with any judgment, the decision of the Tribunal cannot be read as a statute … The Secretary of State was entitled to read the Tribunal decision as saying that Rwandan connections alone are not determinative."

13. It is submitted that Cranston J effectively furthered the same error as the Secretary of State, or endorsed the error by the Secretary of State, and that he took a wrong approach in considering whether her view was a legitimate interpretation of the country guidance cases rather than, as he should have done, determining what was the true effect of the country guidance cases.

14. It is therefore necessary to look at the relevant decisions of the IAT. As in a number of cases before the IAT in which the core issue has been the risk to a failed asylum seeker on return to the DRC, in the course of those cases tribunals have considered in greater or lesser detail other factors which may affect that risk. I start with M (risk, failed asylum seekers) DRC [2003] UKAIT 00071. This was not a country guidance case but it is relevant because it provides the genesis of what followed in the later decisions. The appellant was a Congolese citizen who claimed to have run into difficulties in the DRC because he had rented rooms to Rwandans and because his former

wife, who had died, had the daughter of a Rwandan. He was disbelieved by the adjudicator but he was given leave to appeal because the adjudicator had made no judgment about the risk on return to him as a failed asylum seeker. The appeal was dismissed but in the course of its ruling the tribunal said at paragraph 43:

> "The tribunal's conclusions are, accordingly, as follows:
>
> a) On the information available to it, as at 9 July 2003, it is not the fact that a person returned to the DRC is, by reason only of being a failed asylum seeker, at real risk of persecution or Article 3 ill treatment;
>
> b) In order to run a real risk of being taken into detention, following the screening of a returnee at Kinshasa airport, there must be something further in the returnee's background, such as past political or military activities or nationality of a state regarded as hostile to the DRC.
>
> c) There is nothing in the circumstances of the appellant in this case to suggest that he would be of any adverse interest to the DRC authorities."

15. VL [2004] UKIAT 00007 was a country guidance case on the issue of whether failed asylum seekers per se faced a real risk of serious harm on return to the DRC. The IAT concluded that they did not. In the course of its determination the tribunal said at paragraph 93:

> "Our essential focus in this determination has been on the issue of failed asylum seekers. However, the adjudicator in allowing this appeal made reference to one further risk factor, namely, being a woman with a very young child … In view of the analysis set out in M and in preceding paragraphs of this determination, we also have to consider whether

> there was another possible risk category into which she would fall, with reference to identification by the Tribunal in M of two definite risk categories as follows;
>
> a) nationality or perceived nationality of a state regarded as hostile to the DRC (in particular those who have or are presumed to have Rwandan connections or are of random origin;
> b) having or being perceived to have a military or political profile or background."

16. It is to be noted that in that paragraph the tribunal rephrased the language used in M by the use of the phrase "definite risk categories" and by supplementing the reference to nationality of a state regarded as hostile to the DRC with the words in brackets "in particular those who have or are presumed to have Rwandan connections or are of Rwandan origin". Those additional words were not the subject of any recorded argument nor any analysis or explanation as to precisely what was meant. I would not take the tribunal, in referring to definite risk categories and the addition of those words in brackets, to have meant that anyone with any form of Rwandan connection or any degree of Rwandan origin must automatically be assessed as at real risk of persecution or Article 3 ill-treatment.

17. The expressions "Rwandan connections" and "Rwandan origin" are susceptible of different shades of meaning, and are too broad in my opinion for the AIT to have intended them to define a hard-edged category of persons at risk without having heard any argument on the point and without seeking to elaborate on what was precisely meant. A Rwandan connection may be strong, moderate or weak. In saying that, I do not wish to encourage the creation of a hierarchy of some classifications. The simple (inaudible) is that

the expression is perfectly understandable and should be understood as identifying a factor which may cause a person to be at risk, depending on a fuller consideration of the nature and strength of the connection. This is not something which can be done mechanistically. The critical question is whether the person would be perceived as hostile to the regime on account of his or her Rwandan-ness, if there is such a word. That is likely to necessitate looking at a person's whole profile.

18. In AB and DM the AIT explained in the opening paragraph its reasons for hearing those two appeals together, and this was because they raised common issues of fact, namely the situation in DRC as to the current risk categories, and raised common questions in particular as to whether and to what extent those of Tutsi ethnicity were at real risk of persecution, as well as more general questions about the current risks of failed asylum seekers.

19. AB himself was born in Kinshasa. His mother was from Kigali and was half-Rwandan. It was his case that he would be exposed to a real risk of persecution on return for a variety of reasons including his Rwandan connections, or, to put it another way, his semi Rwandan origins through his mother and her (inaudible). The adjudicator had accepted AB's credibility but considered that the political situation in the DRC was not such that he would be at risk on return. At paragraph 39 the AIT observed:

> "The evidence currently available satisfies us that the position has changed since the Tribunal considered the issue of the risk to Tutsis in *M* and *TC*. In the current situation in the DRC the

> Tribunal accept that, with the exception of high level officials of RCD/Goma, returnees of Tutsi ethnicity or believed to be of this ethnicity could be at real risk on return. The resentment against anything or anybody Rwandan or perceived to be Rwandan is very high and such that there is a real risk of generalised hostility from local communities against which the authorities are currently unlikely to protect. The situation improved in 2003 but we are satisfied in the light of the evidence before us there has been a sharp deterioration in 2004."

20. The Tribunal went on to emphasise in the next paragraph that if somebody claimed to have mixed Tutsi ethnicity it would be right to examine to what extent he or she would be seen to have taken the ethnic identity of their father or mother. Throughout the judgment there is an emphasis on how a particular person would be perceived both by the authorities in the DRC and by the community to which they would be returning.

21. At paragraph 51 the tribunal embarked summary of risk categories saying as follows:

> 51. Building on previous country guidance cases and in particular *M* and *VL*, the Tribunal would reformulate and summarise 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.
>
> We consider that in light of recent developments there is now a risk category consisting of those who are Tutsi (or Banyamulenge) or are perceived to be Tutsi (or Banyamulenge). [then it deals with a

> possible exceptions and continues] However, they are distinct categories, one nationality-based, the other ethnicity-based.
>
> (iii) We also confirm as an existing risk category those having or being perceived to have a military or political profile in opposition to the government. The risk fluctuates in accordance with the political situation."

It will be noted that the reformulation of the first category of those at risk follows entirely the language of VL except that the words which in VL appeared in brackets no longer are in brackets. Nobody suggests that the disappearance of the brackets carries any significance when it comes to understanding and applying the law.

22. At paragraph 54 the Tribunal emphasised that, as with the military or political category, much would depend on the perception of the authorities as to whether they could be viewed somehow adversely and that an assessment of risk must be based on careful analysis of the appellant's ethnicity, background and profile.

23. The Tribunal concluded that the adjudicator had materially erred in law and this made it right for the AIT to form its own view of risk. It proceeded to do so by looking at the entire profile of AB. It said, at paragraph 57:

> "In the light of this evidence dealing with the heightened risks to those suspected of Rwandan or Tutsi background and the fact that the first appellant has come to the attention of the authorities in the past, the Tribunal is satisfied that there is a real risk

> of persecution on return. We bear in mind that the Adjudicator accepted that in January 2000 the authorities were looking for him and there was a newspaper article indicating that he had encountered some difficulties because of his ethnicity.
>
> 58. The first appellant does not have the identifiable physical characteristics of a Tutsi, but the newspaper report indicates that his perceived ethnicity of Tutsi has been a significant factor in the adverse interest taken in him by the authorities previously. We consider that his perceived Tutsi ethnicity, together with his past political and musical involvements, would mean that he was likely to continue facing a real risk of adverse treatment either from the authorities or from local communities against which he would not receive effective protection.

24. It is to be noted that the Tribunal did not say that because his mother was part-Rwandan he was therefore automatically someone who would be at real risk of persecution or Article 3 ill-treatment on return by virtue of that connection or with or origin from Rwanda: rather that the Tribunal looked at his entire profile and concluded that for a combination of reasons he would be at risk

25. That brings me to the question whether the Secretary of State failed to follow the relevant country guidance in the crucial part of the decision letter to which I have referred. The first point to notice is that AB said nothing new in relation to a person in the position of the appellant save that hostility for anyone or anything Rwandan had intensified. It recognised that there was a high level of resentment against Rwandans but also emphasised the crucial question was whether the person concerned

had a profile which made it likely that they would be identified as an opponent to those in power or, put in other words, would excite an adverse interest in them.

26. I would reject the argument that the AIT found that such a risk would be present or would be presumed to be present in the absence of contrary evidence in the case of any person who had any formal connection with Rwanda. I reject it for two reasons. The first reason is that which I have already given when considering the meaning and effect of AB (?), namely that "Rwandan connection" is itself a vague expression which would cover a very wide range of possible cases. Nowhere in the authorities has there been any attempt to refine the expression. Rather the emphasis has been placed rightly on the need to carry out a careful analysis of the person's profile which will include examining the nature and extent of any connection with Rwanda, since the key question in relation to any Rwandan connection is whether it would lead the authorities or the local community to feel the same hostility as that which they would have towards a Rwandan national.

27. The second reason is that the argument that a hard-edged category was created giving anybody (inaudible) with any form of Rwandan connection or any linkage with Rwanda by way of ethnic origin is incompatible with the approach of the AIT to AB (inaudible).

28. What of the key passage in the Secretary of State's decision letter? I see no ground for criticising the opening words. The judgment does not imply that all individual claimants with Rwandan connections would automatically be at risk of persecution simply on the basis of their ethnicity. But Mr Chirico, on behalf of the appellant, had a separate criticism which emerged at a rather late stage of the oral argument. It was advanced in the written grounds for judicial review so was not a new point but, like the bridegroom and the wine at the wedding feast in Cana, Mr Chirico kept his best until last.

29. The argument was that in saying "rather that ethnicity, in addition to other factors, such as political activity, are likely to bring such individuals to the adverse attention of the authorities resulting in mistreatment, which may amount to persecution", the Secretary of State was interpreting AB as meaning that no form of Rwandan connection and no degree of linkage with Rwandan origin could be to expose a person to a real risk of persecution or Article 3 ill-treatment on return unless there was some additional factor. The appellant had, so to speak, to be able to tick two boxes, of which Rwandan-ness might be one. That is not right either on authority or in principle. AB does not say so. On the contrary it recognises Rwandan-ness for short as a risk category, without going more specifically into what it means.

30. Mr Zwart properly accepted that if the letter was read in the way that Mr Chirico submits was its plain meaning then it was wrong. But he

submitted that this was not how the letter should be read: he submitted that the letter had to be read fairly and as a whole. I agree with the latter part of this submission, but reading the letter fairly and as a whole, I am unable to accept Mr Zwart's submission as to its effect. I agree with the appellant's submission about the natural sense of the words used. Moreover that reading is reinforced by the words which followed:

> "Your client has no political or military past. We therefore do not believe that your client will come to the adverse attention of the authorities purely as a result of his Rwandan connections."

31. There was nothing else in any other paragraph of the letter which would place a different complexion on that paragraph. Indeed, as I read Cranston J's judgment, he read the letter in the same way, but thought that it was a permissible interpretation for the Secretary of State to have adopted. With respect to him, I consider the question is not whether the Secretary of State might without irrationality have interpreted the guidance in the way she did but whether her interpretation was correct.

32. Having reached the conclusion that the Secretary of State misdirected herself in her decision letter about the effect of AB, it follows, in my view, that the claim for judicial review of her decision must succeed and that the decision should be quashed. In his application for judicial review, the appellant seeks not merely an order that the decision of the Secretary of State be quashed but also a declaration that the letter from his solicitors dated 23 December 2005 constituted a new claim. Mr Chirico

made various submissions in support of that relief. Having considered the arguments on both sides, I have reached the conclusion that this would be a step too far at this stage and that the appropriate relief for this court to grant is the quashing of the decision which will then leave it for the Secretary of State to make a fresh decision. Having reached that conclusion, I do not wish to comment on the various arguments advanced on both sides in relation to that aspect of the matter in case any further decision of the Secretary of State becomes itself the subject of further review but I would add one thing. One of the criticisms made of the present decision letter is that it is not clear whether the Secretary of State asked herself the question whether she thought that the claim was a good one or whether there was a realistic prospect of an adjudicator, applying real anxious scrutiny, thinking that the appellant would be exposed to a real risk of persecution or Article 3 ill-treatment on return. The latter is the correct question see the judgment of Buxton LJ in WM (DRC) v SSHD [2006] EWCA Civ 1495; [2007] Imm AR 337 at paragraph 11. The Secretary of State should bear that in mind in making a fresh decision.

33. For those reasons I would allow the appeal, grant judicial review and order the quashing of the decision of the Secretary of State in her letter of 25 January 2007.

Lord Justice Sullivan:

34. I agree that the appeal should be allowed and the decision letter should be quashed for the reasons given by Toulson LJ. In the decision letter dated 25 January 2007 the Secretary of State concluded that the appellant would not come to the adverse attention of the authorities purely as a result of his Rwandan connections. With respect to the Secretary of State, the question was not simply whether the appellant would come to the adverse attention of the authorities in the DRC; the more pertinent question was whether the nature and extent of the appellant's Rwandan connections were such that in the DRC he would be perceived as a Rwandan, with the consequence that he would be at real risk of generalised hostility from local communities in the DRC against which the authorities would be unlikely to protect him.

Sir Anthony Clarke:

35. I agree with both judgments. So it follows that the appeal will be allowed, permission to apply for judicial review will be granted, the application for judicial review will be granted and the relief will be that indicated by Toulson LJ, namely that the decision of the Secretary of State contained in the letter dated 25 January 2007 will be quashed.

Order: Appeal allowed; permission to apply for judicial review granted; application for judicial review granted; the Secretary of State's decision of 25.1.07 quashed