

**Neutral Citation Number: [2005] EWCA Civ 61**  
**IN THE SUPREME COURT OF JUDICATURE**  
**COURT OF APPEAL (CIVIL APPEALS DIVISION)**  
**ON APPEAL FROM THE IMMIGRATION APPEAL TRIBUNAL**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Tuesday, 1 February 2005

Before :

**LORD PHILLIPS OF WORTH MATRAVERS, MR**  
**LORD JUSTICE BUXTON**  
and  
**LORD JUSTICE CARNWATH**

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Between :

**B**  
**- and -**  
**SECRETARY OF STATE FOR THE HOME**  
**DEPARTMENT**

**Appellant**

**Respondent**

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(Transcript of the Handed Down Judgment of  
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Official Shorthand Writers to the Court)  
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**Ms Amanda Weston** (instructed by **Messrs Taylor & Co**) for the Appellant  
**Mr Robin Tam** (instructed by **Treasury Solicitors**) for the Respondent

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**Judgment**

## **LORD PHILLIPS, MR :**

This is the judgment of the Court.

### **Introduction**

1. This is an appeal by B against a decision of the Immigration Appeal Tribunal dated 2 June 2004, brought with permission granted by Carnwath LJ on 22 October 2004. B is a citizen of the Democratic Republic of Congo ('DRC'). She was born on 19 May 1985. She entered the United Kingdom on 11 January 2003 and claimed asylum four days later. On 25 February 2003 she was refused leave to enter. She appealed to an Adjudicator, further contending that she should not be sent back to the DRC on the ground that this would infringe her rights under Articles 2, 3 and 8 of the 1950 European Convention on Human Rights ('the Human Rights Convention'). On 10 June 2003 the Adjudicator allowed her appeal, holding that she was entitled to asylum and that to return her to the DRC would infringe her Human Rights Convention rights. The Secretary of State appealed against this decision and, on 2 June 2004, the IAT allowed his appeal.

2. The Secretary of State's appeal to the IAT was brought pursuant to Section 101(1) of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act'), which applied to any appeal from a determination of an Adjudicator dated on or after 9 June 2003. That sub-section provides:

"A party to an appeal to an adjudicator under section 82 or 83 may, with the permission of the Immigration Appeal Tribunal, appeal to the Tribunal against the adjudicator's determination on a point of law"

Prior to 9 June 2003 an appeal lay against an Adjudicator's decision on grounds of fact or law. Neither the Secretary of State's grounds of appeal to the IAT nor the decision of the IAT adequately reflected the change in the law made by the sub-section. We have no evidence of the basis upon which the IAT gave the Secretary of State permission to appeal to the IAT.

3. Attempts were made by the parties at resolving this appeal by consent. The Secretary of State was prepared to concede that the decision of the IAT was flawed in that it did not clearly identify an error or errors of law on the part of the Adjudicator. He contended, however, that such errors could clearly be identified and that the matter should be remitted to the IAT for further consideration. Those acting for B conceded that, if the only basis for the Adjudicator's decision had been that B was entitled to asylum, the Secretary of State had at least an arguable case that the Adjudicator had erred in law that would justify reconsideration by the IAT. They contended, however, that no error of law could be demonstrated in relation to the Adjudicator's finding that to send B back to the DRC would infringe her rights under the Human Rights Convention. Accordingly, that part of the Adjudicator's decision should be 'ring

fenced' and remission to the IAT should be restricted to the question of whether B enjoys refugee status.

4. This appeal is brought pursuant to section 103 of the 2002 Act, which provides:

“(1) Where the Immigration Appeal Tribunal determines an appeal under section 101 a party to the appeal may bring a further appeal on a point of law”.

### **The facts**

5. No challenge has been made by the Secretary of State of the account given by B of her experiences before entering this country. On 4 August 1998 she was living at Commune de Gombe in the DRC with her stepfather, who was a Rwandan Tutsi, her mother and her two sisters aged 6 and 7. On that day a number of lorries carrying soldiers arrived. They took away her stepfather, her mother and her sister. She has since learned that her stepfather was almost certainly killed but that her mother and sisters probably survived and may have escaped to Europe. She, aged 13, was taken by a soldier called ‘Commandant Eddie’ to his house in Kinshasha, where she found five older girls. They were kept locked in the house. She explained that the soldier “would come in and take one of the girls each night. I was taken like the other girls. I was continuously raped. He said that we were for him. We were his girls”.
6. In November 1998 the soldier was in some form of personal trouble. It seems that he had formed a particular affection for B, for he put her on a plane for Abidjan, in the Ivory Coast, and arranged for her to be met there, when she arrived without papers, by a woman known as Mammy Flaure, who was also from the Congo. She looked after B for the next four years. The two then came under threat as a result of political troubles in the Ivory Coast and fled, making their way to this country, where Mammy Flaure said she could no longer look after B, and left her at a supermarket.
7. As a result of her experiences B suffered both from gynaecological problems and from significant and disabling post traumatic stress disorder (‘PTSD’). A psychiatric report that was before the Adjudicator commented:

“This is compounded by the increasing neurological vulnerability which means that each subsequent trauma is more damaging by virtue of the unresolved traumas of the past.”

The Report stated:

“PTSD can be treated and responds well to Eye Movement Desensitisation Reprogramming and similar approaches. These are highly specialised techniques which are unlikely to be available in her country of origin. [B] will require a period of

certainty and security within which to benefit from any therapeutic intervention.”

### **The Adjudicator’s decision**

8. In his Determination and Reasons, the Adjudicator summarised the facts that we have set out above. He then considered at some length the current situation in the DRC. He directed himself that the burden was on B to prove that there was a ‘real risk’ of persecution for one of the five grounds recognised by the 1951 Geneva Convention Relating to the Status of Refugees (‘the Refugee Convention), or of breach of protected human rights. The standard of proof, whether under the Refugee Convention or the Human Rights Convention, was ‘a reasonable degree of likelihood’, ‘a reasonable chance’ or a ‘serious possibility’.
9. He began his findings by stating:

“I have carefully examined the oral evidence, submissions, documentation and caselaw referred to. I find that in the past, the appellant has suffered a traumatic incident which would amount to persecution and severe ill-treatment. However, in my view the issue to be considered is whether or not there would be a real risk to the appellant if she were returned. On this issue, there are the points relating to her ethnicity, the situation in Kinshasa, her position as a woman, the return itself and the medical situation to be considered.”
10. He went on to find that, over the last five years, conditions in the DRC had improved, so that the risk of persecution that B had faced five years earlier no longer persisted. He observed, however, when dealing with the role of women that “the risk of rape remains for homeless girls”.
11. The most important findings appear in the following paragraphs:

“34. However, I have paid particular attention to the cases of Ngha and Ramazani and the issues relating to medical treatment, combined with the appellant’s particular situation. Firstly, she has no family or financial support in the DRC. The caselaw and background information indicates that medical assistance and medicines have to be paid for. The appellant has no means of livelihood and whilst there is a reference to the Salvation Army providing health assistance at low rates and the churches and nongovernmental organisations providing help, there is no guarantee that she would have their support. It is possible that she could be homeless and, in accordance with the background information, at great risk or danger of rape.

35. She has been diagnosed as severely depressed and suffering from PTSD. Further, because of the trauma suffered, a therapeutic approach is required. It is said that she needs a great deal of support and has an increasing neurological vulnerability. I conclude that to return the appellant would not lead to an improvement in her situation and more likely a deterioration. I am not certain that she could receive the appropriate treatment, particularly because of her situation as a young girl, no livelihood, no family support and her financial position.

36. Having regard to the caselaw and background information, I find that if she is returned there is a real risk that she would suffer ill-treatment or conditions such that would amount to persecution or inhuman or degrading ill-treatment sufficient for a Convention reason or likely to be a breach of Article 3 of the 1950 Convention.

#### ASYLUM AND THE 1951 CONVENTION

37. Article 1 of the 1951 Convention defines a refugee as someone who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events is unable or, owing to such fear, is unwilling to return to it.

38. Given my findings, I find that the appellant has discharged the burden of proof of having a well-founded fear of persecution for a Convention reason. I come to the conclusion that the appellant's removal would cause the United Kingdom to be in breach of its obligation under the 1951 Convention.

#### HUMAN RIGHTS AND THE 1950 CONVENTION

39. The appellant's representatives has submitted that the appellant's rights under Articles 3 and 8 of the 1950 Convention are engaged. Under Article 3 I have to decide whether there is a breach of the prohibition on Torture, or Inhuman or Degrading Treatment or Punishment. I have subsumed into my consideration of this Article my assessment under Article 2 on the Right to Life. Both rights are absolute. Under Article 8, the appellant's physical and moral integrity needs to be considered.

40. Given my findings, I find that if the appellant is now returned to the DRC, there is a real risk she will suffer a breach of her protected rights under these Articles. In the light of the above conclusions, I find that the Decision appealed against would cause the United Kingdom to be in breach of the law or its obligations under the 1950 Convention. ”

### **Commentary**

12. The reasoning in these paragraphs is seriously deficient. They proceed on the basis that the matters considered are equally relevant to B’s claim under the Refugee Convention and her claim under the Human Rights Convention. Manifestly they are not.
13. The Adjudicator considered two, largely distinct, types of risk to which B would be subject if returned to the DRC. The first was the risk of psychiatric injury as a consequence of the stresses inherent in being returned to the DRC where there was no certainty that she would receive appropriate treatment. The second was the risk that she would be subjected to rape.
14. So far as the Refugee Convention is concerned, we cannot see how the risk of psychiatric injury could give rise to ‘a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion’ (Article 1A(2) of the Convention). Nor will the risk of being raped give rise to such a fear, unless a State agency is implicated. The Adjudicator gives no explanation for his conclusion in relation to the engagement of the Refugee Convention. Miss Weston, who appeared for B, came close to conceding not merely that the Adjudicator had arguably erred in law on this issue, but that he plainly had done so. We are in no doubt that the latter is the position.
15. So far as the Human Rights Convention is concerned, the Adjudicator appears to have held that to return B to the DRC would infringe her rights under Articles 2, 3 and 8. It is quite unclear on what basis he found that her Article 2 rights would be infringed. So far as Article 3 is concerned, there is no discussion of the nature and severity of risk that must be established if this Article is to be engaged. This might not have been necessary if the relevant facts had been set out with a clarity which enabled them to speak for themselves. Unhappily this was not the case. The Adjudicator scrambled together facts relevant to the risk to B’s mental health and facts relevant to the risk that B would be subjected to rape and held, without explanation, that the amalgam engaged Article 3.
16. The same is true in respect of Article 8, though the shortcomings in the manner in which the Adjudicator dealt with this Article were compounded by the fact that he did not carry out the essential balancing exercise required by the provisions of Article 8(2).

### **The grounds of appeal to the IAT.**

17. It will be apparent from the commentary that we have set out above that there was ample scope for the Secretary of State to draft grounds of appeal to the IAT that demonstrated the arguable errors of law that had to be demonstrated if the IAT was to have jurisdiction under section 101 of the 2002 Act. Unhappily, the grounds of appeal were inaptly drawn. They did not properly identify the points of law on which it was alleged that the Adjudicator had erred, indeed they did not show an appreciation of the difference between law and fact. So far as the Refugee Convention was concerned the only point taken, as far as we can understand it, was that being persecuted because one is a woman will not satisfy the requirements of Article 1A of the Refugee Convention. So far as the Human Rights Convention is concerned, the grounds attempted to deal both with the risk of rape and with the risk to B's mental health. So far as concerns the risk of rape, reliance was placed on the decision of the IAT in *Sinanduku v Home Secretary* [2002] UKIAT 05060 as demonstrating that the risk was not sufficiently real. As far as concerns the risk to health, the grounds consisted largely of a challenge to the Adjudicator's appraisal of the facts.
18. Mr Tam, who appeared for the Secretary of State, accepted that there were shortcomings in the grounds of appeal, but submitted that the court should as a general rule not take too critical a view of grounds of appeal, since these were often drafted by persons with an inadequate understanding of the law. We cannot accept that submission. While a court will always wish to ensure that the substance of the case is not lost just because of poor drafting, the grounds form the agenda on which the IAT considers the grant of permission and, if granted, conducts the appeal. As this case shows, with the recent limitation of the jurisdiction of the IAT it is particularly important that the grounds should clearly establish that the appeal does at least in form fall within that jurisdiction. And in any event we would certainly not accept such a submission in respect of an appeal brought by the Secretary of State. Where the Secretary of State seeks to appeal against an adjudicator's decision it is important that the grounds of appeal should be settled by someone who is capable of identifying clearly the points of law on which it is alleged that the adjudicator has erred.
19. These considerations leave us in some doubt as to whether the basis upon which permission to appeal was granted was satisfactory but, as we have said, we have no evidence of this.

### **The decision of the IAT.**

20. Two recent decisions of this court, *Thulani Ndlovu v Secretary of State for the Home Department* [2004] EWCA Civ 1567 and *CA v Secretary of State for the Home Department* [2004] EWCA Civ 1165; [2004] INLR 453 indicate that, at the time of the IAT's decision in this case, members of the IAT were under the misapprehension that, once permission to appeal on a point of law had been given, it was open to the IAT to review the Adjudicator's conclusions of fact. We suspect that this misapprehension accounts for the form of the decision of the IAT. This consisted

largely of a review of the facts and of findings that these did not demonstrate that B had a case either under the Refugee Convention or under the Human Rights Convention. The failure on the part of the IAT to identify errors of law that undermined the Adjudicator's decision led the Secretary of State to concede, in negotiations before the hearing of this appeal, that the decision of the IAT could not stand.

21. By the time of the hearing before the IAT the decision of this court in *N v Home Secretary* [2003] EWCA Civ 1369; [2004] 1 WLR 1182 had been reported. In the light of this decision Miss Plimmer, who then appeared for B, accepted that the risk to B's mental health could not found a case under the Human Rights Convention. She nonetheless appears to have pursued the allegation that the Adjudicator's decision could be supported having regard to the risk of rape, though it is not clear whether she did so in respect both of the Refugee Convention and the Human Rights Convention.

22. As to the risk of rape, the IAT found as follows:

“Street children are subject to harassment including the rape of homeless girls. However we adopt the reasoning and conclusions set out in paragraph 9 of *Sinanduku* which reads as follows and applies equally to the DRC:

“The background evidence certainly shows that there is possibility and to that extent a risk of rape in the Congo but because the general risk exists for all, it does not follow that there was a real risk for each individual. In order to establish a real risk arising from the general risk faced by an entire category of people, it must be shown from the evidence that there is a consistent pattern of a gross flagrant or a mass occurrence of the conduct feared. The background evidence fails to reach this high threshold and in these circumstances the risk to women in general identified in the background evidence is not such that it can be properly be said that there is a real risk to the Respondent on return.”

The situation in the DRC is far from ideal and there is clearly violence, some lawlessness and difficulties within the infrastructure. However although there may be a general rule in the DRC this Respondent has not shown a real risk that it applies to her.”

### **Submissions before us**

23. Miss Weston realistically conceded, with some encouragement from the court, that the Adjudicator had erred in law in concluding that the facts found by him were capable of establishing that B had a well-founded fear of persecution if returned to the DRC. Had this been the only issue, we would have been minded to dismiss B's appeal



on the ground that the IAT had reached the correct decision even though their reasons were not satisfactory.

24. Miss Weston put at the forefront of her case the Adjudicator's finding in respect of the risk of rape. She submitted that *Sinanduku* was no answer to this. We agree with her contention that *Sinanduku* was addressing an argument that the claimant there could be said to be at risk, at the necessary level, of rape on return to the DRC simply because of the general threat to women that was found to exist in that country. The IAT held that the country situation was insufficient by itself to demonstrate a sufficient risk to an individual. But in the present case the Adjudicator, basing himself upon B's psychiatric vulnerability, youth and threatened homelessness, had made a specific finding as to the risk to her individually of being raped. Miss Weston argued that whether Article 3 is engaged depends critically on the facts of the individual case. The IAT should not interfere with a decision of an adjudicator who has heard the evidence in relation to such an issue unless the adjudicator's decision was plainly perverse. That was not the position in this case. The appeal against the IAT's decision should be allowed and the Adjudicator's decision in respect of the engagement of the Human Rights Convention should be allowed to stand.
25. Mr Tam advanced submissions on an alternative basis. He submitted that the risk that B would be raped if returned to the DRC was insufficient to reach the high level of severity of ill-treatment that *N v Home Secretary* demonstrated was necessary to engage Article 3. Accordingly the decision of the IAT was correct and should be upheld. Alternatively, he argued that the reasoning of the Adjudicator was insufficiently clear to support his conclusion in respect of the Human Rights Act and that issue should be remitted for further consideration.
26. We do not find it easy to apply the reasoning of this Court in *N v Home Secretary* to a case where the risk facing a young woman as vulnerable as B if returned to her country is that of being raped. We are not prepared to hold that B's case, based on the risk of being raped, is clearly bad in law. At the same time, we reject Miss Weston's submission that the Adjudicator's approach to Article 3 displays no error of law. We find that the Adjudicator has erred in law because the amalgamation of considerations relevant to the risk to B's mental health and the risk of rape makes it impossible to evaluate his decision. Furthermore, it seems to us that the degree of likelihood that B will find herself destitute and homeless if returned to the DRC has a vital bearing on the degree of risk of being raped that she will run if returned. The Adjudicator's finding in relation to this is not adequate.
27. In these circumstances we have concluded that the appropriate course is that this matter should be remitted so that B's claim under the Human Rights Convention can receive proper consideration. The question then is to whom the matter should be remitted. Mr Tam submitted that the IAT was the appropriate body to reconsider the matter. We do not agree. The powers of the IAT on an appeal under section 101 include remitting the appeal to an adjudicator – see section 102 (1)(c). We think that this is the appropriate course to follow in this case so that, after consideration of the relevant evidence, a properly reasoned decision can be given.

28. Accordingly, for the reasons that we have given this appeal is allowed to the extent that B's appeal under the Human Rights Convention must be remitted to another adjudicator.

ORDER:

1. The appeal is allowed
2. The Appellant's appeal to an adjudicator under sections 65 and 59 Immigration Act 1999 is remitted for hearing by an adjudicator other than Mr N E Sarsfield.
3. No order as to costs
4. Detailed assessment of the Appellant's publicly-funded costs in accordance with the Community Legal services (Costs) Regulations 2000 and Regulation 107 fo the Civil Legal Aid (General) Regulations 1989.

(Order does not form part of approved Judgment)