MM (DRC – plausibility) Democratic Republic of Congo [2005] UKIAT 00019

IMMIGRATION APPEAL TRIBUNAL

Date: 18 November 2004
Date Determination notified:
27th January 2005

Before:

The Honourable Mr Justice Ouseley (President)
Professor D B Casson
Mr R A McKee

Between:

APPELLANT

and

Secretary of State for the Home Department

RESPONDENT

Appearances:
For the Appellant: Mr R Toal, instructed by Wilson & Co
For the Respondent: Mr P Deller, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal against the determination of Adjudicator, Miss S Jhirad, promulgated on 7 October 2003. She dismissed the Appellant's appeal against the decision of the Secretary of State in May 2003 to refuse asylum to the Appellant, who had arrived in the United Kingdom in February 2000 and had claimed asylum immediately. He is a citizen of the Democratic Republic of Congo, born in 1978.

2. The Appellant has claimed that this father had been a Colonel in Mobutu's forces, who had defected to Laurent Kabila in 1997. In 1998, he had been ordered to Kisangani to confront rebels, but had been persuaded to switch sides. In 1999, Kabila soldiers had raided the family home and assaulted the family. He had escaped from them, fled to Brazzaville and ultimately to Paris where he was advised that it was safe to apply for asylum in the United Kingdom. After he came to the United Kingdom, he had married another Democratic Republic of Congo asylum seeker.

3. The Adjudicator noted that the Appellant had never claimed any personal involvement with any political party or rebel group. She explained why she regarded his account of his escape from the twelve soldiers who had come to the house as implausible. She referred to another significant inaccuracy, and to the absence of any support for any part of his claim that his father had been a soldier, let alone a Colonel, or had been sent to suppress rebels or had changed sides.

4. The Adjudicator said that his entire account was a work of fiction and that he had not experienced persecution. He could return, as someone who came from Kinshasa, without any real risk. It was not unreasonable to expect his wife and her child to accompany him.

5. Those grounds of appeal which were given permission related to various criticisms of the credibility findings and they were the only matters pursued before us. In particular, Mr Toal said that he was pursuing them in relation to plausibility.

6. We shall take the points in turn. They arise out of paragraph 10 of the determination:

> "Against this background I assess the appellant's appeal. The appellant has never personally had any involvement with any Party or rebel group in the DRC. At the interview the appellant claimed that 12-armed soldiers raided the family home yet at the hearing and in his current statement this is reduced to six raiders whilst six remained outside at the gate. That the appellant could manage to evade six armed soldiers is less than plausible. Having apparently sexually violated his sister (even supposing this happened which I do not accept) thus demonstrating that they were prepared to stop at nothing to achieve the arrest of the family) it is not likely that they would not also have attempted to stop the appellant in his tracks by aiming fire at him. There is no evidence this occurred. It is possible that the six soldiers who were holding family members might not have been entirely free to give chase but there were apparently six other soldiers in attendance outside and it is implausible that these militarily trained and armed men did not succeed in apprehending the appellant. That he managed to elude 12 soldiers who did not shoot at him and let him vault a 2 metre boundary wall when some, if not all of them, could readily have frustrated the escape route is far fetched. Furthermore, the appellant named the rebel leaded in the area as Benjamin Ngbemba, whereas he is actually called Jean-Pierre Bemba and this inaccuracy undermines the veracity of the claim. There is nothing to support the claim that the appellant's father was a Colonel or for that matter was a serving soldier or that he was sent to suppress rebels or that he defected to the rebels. I find the appellant's entire account to be a work of fiction and that he has not experienced persecution. The appellant is from Kinshasa and I find that provided he is supplied with proper travel documentation, obtainable, no doubt, from the DRC Embassy in London, he will be able to return to Kinshasa and will not face any real risk to his safety on arrival or thereafter."

7. The first point was that the third sentence inaccurately recounted the interview and was the cause of an inconsistency being attributed to the Appellant which did not in fact exist. The interview, at question 17, referred to twelve men, six of whom entered the house and six of whom stayed outside. As one soldier had held the Appellant by his clothes, he had managed to get away leaving his clothes in the soldier's hand.

8. It is right that there was no inconsistency, contrary to what the Adjudicator implies; but she draws no conclusion from what she appears to have thought. It is not the basis of her adverse credibility findings. That arises from her disbelief of the Appellant's case based on its inherent improbability. His statement had said that it was when he was taken outside that he was able to escape from the soldiers. It is evasion of the six soldiers outside which she finds implausible, and later that none of the twelve who were there shot at him. Her assessment is based on the disposition of the soldiers contended for by the Appellant. There is nothing in this first point.

9. On another lesser point, Mr Toal said that the Adjudicator had made too much of the differences in the name given of the leader of the rebels. It had been spelt as "*Benjamin Ngbemba*" in the SEF form; in the interview what he had said was written as "*Bemba*", but in his earlier appeal statement it was "*Jean Pierre Gbemba*". The actual name according to the Adjudicator was Jean-Pierre Bemba.

10. In our view, there is a real danger in putting any weight on differences in the written version of names which may have no official or conventional orthography or one known to a scribe transliterating non-European phonetics. "*Ngbemba*", "G*bemba*" and "*Bemba*" represent just such a problem. "*Jean Pierre*" and "*Be(n)jamin*" present no such problem. It is difficult to know precisely which aspects of the names caused the Adjudicator to comment as she did. Nor is it clear that she appreciated that the Appellant had effectively got it right on the earlier version. It illustrates the danger of giving weight to minor discrepancies. Whether or not her comments can be characterised as showing an error of law, we do not regard it as material to the outcome of the appeal. There was an inconsistency in the first name, which cannot be attributed to anyone other than the Appellant. It was used by the Adjudicator as an additional point, not as the main basis for the credibility conclusions.

11. Mr Toal then took issue with the subsequent comments of the Adjudicator; she had ignored other possible explanations for what had happened and so had come to her conclusions without a proper assessment of credibility. The soldiers might have been under instructions to take the family alive as the relatives of a soldier who had changed sides; that would account for the lack of shooting. The rape of the sister could not show that the soldiers were prepared to stop at nothing; that was pure speculation. There was no evidence that the six soldiers outside could see the Appellant after he had scaled the wall to escape. There was no evidence that those outside had shouted to those inside that the Appellant had escaped. There were seven adults and a child to be guarded by the six inside and the family had not been handcuffed or restrained on leaving the house. It was wrong to say that this story was beyond the realm of possibility.

12. Mr Toal referred us to a passage from the Judgment of Lee J in 'W148/00A' v Minister for Immigration and Multicultural Affairs [2001] FCA 679, in the Western Australia District Registry of the Federal Court of Australia. He urged us to apply what was said about plausibility as a basis for findings on credibility: *"A circumstance is 'implausible' if it is beyond human experience of possible occurrences, that is to say, inherently unlikely*". It was critical of

findings on credibility, based on the lower Tribunal's views as to what it thought was implausible on the facts of that case.

13. Mr Toal also submitted that the Adjudicator had failed to test her analysis of the Appellant's story against the background evidence, which showed that the Democratic Republic of Congo soldiery often raped women and would want to arrest traitors to Laurent Kabila.

14. The Adjudicator had also failed to assess the Appellant as a witness. It was as if she had assessed the case wholly on paper. There was no reference to oral evidence as such or to cross-examination. There was nothing about the way in which he had given his evidence, such as whether he had been detailed and elaborate, whether he had been evasive or forthcoming when answering challenging questions, hesitant when he should have been ready and confident. This was all necessary for the making of proper credibility findings.

15. We turn to our conclusions. First, Mr Toal is right to say that the assessment of credibility may involve an assessment of the plausibility, or apparent reasonableness or truthfulness, of what has been said. This assessment can involve a judgement as to the likelihood of something having happened based on evidence and or inferences. The particular role of background evidence here is that it can assist either way with that process, revealing the likelihood of part or the whole of what was said to have happened actually having happened. It can be of especial help in showing that adverse inferences can be apparently reasonable when based on an understanding of life in this country and yet are less reasonable when the circumstances of life in the country of origin are exposed. This is a problem of which Adjudicators are well aware, and it can exist even where no background material is available to assist. The assessment of plausibility is not however a separate stage in the assessment of credibility but is an aspect which may vary in its importance, from case to case. A story may be implausible and yet may properly be taken as credible; it may be plausible and yet properly not believed. There is a danger in erecting too many stages of reasoning with different tests, as opposed to recognising different aspects of reasoning. This is especially so as credibility, while often decisive, is however not the true or ultimate focus of decision in an asylum or human rights case.

16. But there is a danger of "*plausibility*" becoming a term of art, yet with no clear definition or consistent usage. It is simply that the inherent likelihood or apparent reasonableness of a claim, is an aspect of its credibility, and an aspect which may well be related to background material, which assists in judging it. This danger is reflected in the comment of Lee J which, with respect, we do not find helpful to us. We do not regard "*implausible*" or "*inherently unlikely*" as meaning "*beyond human experience or possible occurrence*", nor do we regard that latter phrase as the relevant benchmark for an adverse conclusion as to plausibility or credibility.

17. Mr Toal is also right to say that an assessment of the oral evidence including cross-examination of a witness, however brief, would often be of value, even necessary at times, to explain why particular findings were made. For example, an absence of evasion or a sequence of changing answers, and the

converse, can be usefully and explicitly referred to. This is an element in the assessment of credibility.

18. Where there are aspects of the way in which evidence was given which form part of an Adjudicator's reasoning, is for that Adjudicator to say how and why it did, as part of the reasons for the decision. But it is an area for real caution. Mr Toal disavowed any suggestion that demeanour be used or referred to as a tool in this context. He was right to do so.

19. It is the total content of the evidence, including consistency on essentials or major inconsistencies, omissions and details, improbabilities or reasonableness, which does and should found the decision. The way in which the evidence is given, so far as significant at all in this type of case, would normally be reflected in the quality of the content of the evidence. It may confirm a conclusion well founded in the content of the evidence. It would, we think, be very rare that it would properly justify a conclusion which was not sustained by the content of the evidence or its quality. Even evasiveness or the ability to answer questions would be reflected in the quality or content of the evidence – issues would be dealt with satisfactorily or not.

20. We also need to say something about the submission that there were alternative possibilities which could explain away satisfactorily what the Adjudicator found to be wholly improbable. This is a not uncommon approach on appeal, even where that appeal is only on a point of law. First, it is for the Appellant to put forward all the evidence which he can as to what happened. If there are inconsistencies and improbabilities, it is for the Appellant to recognise them and deal with them so far as he can. Usually, and as here, the Appellant will know that his credibility is in issue, even though not all the points relied on by the Adjudicator may feature in the refusal letter. Such points may arise from an Appellant's evidence to the Adjudicator. We have explained the Adjudicator's role in JK (Cote d'Ivoire) [2004] UKIAT 00061 and in WN (DRC) [2004] UKIAT 0213.

21. Second, if it is said that there was an alternative explanation unfairly overlooked by an Adjudicator because the relevant point was unfairly not raised, it is for the Appellant to provide evidence as to what it was. There is a world of difference between an Appellant's evidence and the speculations of an advocate.

22. Third, it is a fallacy to suppose that where an Adjudicator has concluded that a story is too improbable to satisfy the lower standard of proof, the conclusion can be shown to be legally erroneous by pointing to alternative inferences even if they may be possible, even reasonable. A conclusion is not legally erroneous because it may fail to contemplate or traverse possibilities not raised for the Adjudicator's consideration. It would need to be a point so obvious that any Adjudicator would reasonably have had it in mind as a reasonable alternative which needed to be dealt with, even though not proffered by the Appellant, in order for the contention even to be arguable.

23. Turning now to the specifics of this case, there is nothing in the background evidence relating to the motives or rapacious actions of Democratic Republic

of Congo soldiery which advances the Appellant's case. The Adjudicator was entitled to focus in particular on what the Appellant said about his arrest and escape. The coincidence of part of what he says with background evidence adds nothing here.

24. The absence of specific reference to the Appellant's oral evidence is of no significance here. The Adjudicator has concentrated on the substance or content of what he had to say.

25. Her conclusions as to its implausibility relate to inferences and her judgment as to what was likely or possible, in the circumstances of the alleged escape where no background material was of assistance and where it was for the Appellant to provide evidence as to why and how matters happened in the way in which he said they did in the light of the challenge to his credibility.

26. It is not sufficient to try to unpick individual stages in the conclusions by proffering a sequence of possibilities. It was the sheer improbability of one individual wresting himself from a guard, leaving his clothes in the guard's hand, then evading another five of them, vaulting a two-metre wall, with no one shooting at him, even to wound him, or shouting for others to come, which caused the Adjudicator to reject the story. She was fully entitled to do so, and to reach in consequence the overall credibility conclusion which she did.

27. The explanations proffered by Mr Toal are not persuasive alternatives. There was no evidence that this or any family was to be taken alive so pressingly that no chance was to be taken that a shot fired to prevent escape might kill rather than wound. The story was that the government wanted to capture them. It takes time to wrest oneself away from a guard so vigorously that clothes are left in his hand and to scale a two-metre wall – yet none of the six soldiers outside intervened to prevent it or to shout for assistance even just from those already outside the house. It was for the Appellant to give such evidence of the disposition of the soldiers, and of the layout of the house, exterior grounds, wall and entrance that might explain how it all might have happened. The more improbable a story, the more cogent the evidence necessary to support it, even to the lower standard of proof. In that light, the Adjudicator's comment about the absence of support for the claim about the Appellant's father, is not an impermissible requirement for corroboration, but a reflection of the fact that taken at face value the story was untrue and there was nothing else to shift that conclusion.

28. Accordingly, this appeal is dismissed. The decision is reported for our comments on credibility, plausibility and oral testimony.

MR JUSTICE OUSELEY
PRESIDENT