KK (Recognition elsewhere as refugee) Democratic Republic of Congo [2005] UKIAT 00054

IMMIGRATION APPEAL TRIBUNAL

Date: 15 February 2005
Date Determination notified:
25th February 2005

Before:

The Honourable Mr Justice Ouseley (President)
Mr J Freeman (Vice President)
Mr P R Lane (Vice President)

Between:

SECRETARY OF STATE FOR THE HOME DEPARTMENT

APPELLANT

and

RESPONDENT

Appearances:
For the Appellant: Ms J Sigley, Home Office Presenting Officer
For the Respondent: Mr T Buley, instructed by Tennakoons

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State against the determination of an Adjudicator, Mr T Cockrill, promulgated on 28 January 2004. He allowed the Claimant's appeal in asylum and human rights grounds against the Secretary of State's decision of 15 November 2002 to refuse asylum and leave to enter. The case had an unusual history.

2. The Claimant is a citizen of the Democratic Republic of Congo, who left there in May 2001 for Zimbabwe where he was granted asylum under the 1969 OAU "*Convention Governing the Specific Aspects of Refugee Problems in Africa*". In August 2002, he left Zimbabwe because he feared persecution there and claimed asylum in the United Kingdom immediately on arrival.

3. The Secretary of State rejected his claim because he rejected completely the story of persecution in the Democratic Republic of Congo, of flight to Zimbabwe and of the grant there of refugee status. He was to be returned to the Democratic Republic of Congo. An appeal was made on the grounds that to send him either to the Democratic Republic of Congo or Zimbabwe would breach both Conventions. It was heard by an Adjudicator, Mrs S Clarke, and dealt with in a decision sent out on 20 November 2003, entitled "*Determination and Reasons on a Preliminary Issue*". There had been no directions given for the determination of a preliminary issue but the Adjudicator said that she had been told that there was a preliminary issue which if decided one way would decide the claim and remove the need for a full hearing.

4. The Claimant submitted that he did not need to prove his fear of persecution because he had already been granted asylum by Zimbabwe. The Secretary of State is recorded as saying that if the Claimant was credible then removal directions would be set for Zimbabwe because it was now accepted that he had been granted asylum status in relation to the Democratic Republic of Congo by Zimbabwe.

5. The Adjudicator then announced her decision before writing her determination but, as so often happens when that exceedingly unwise course is followed, she had to reconsider the decision in the light of her further consideration of the issue. While she adhered to her decision, she did so on the basis of a case which she was not referred to and which she did not invite submissions on. She then said:

> "15. However, I have taken on board the submissions by the Respondent's representative that the claim regarding the DRC is no longer relevant because the Appellant was granted refugee status.
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> 16. I allowed the appeal on the preliminary issue because the removal directions were set for the DRC. However, a consequence of this is that the Appellant still does not have leave to enter this country. Therefore, it remains for the Appellant to prove that he cannot go back to Zimbabwe.
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> 17. Accordingly, I make the following directions:
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> i) The Respondent do consider amending the removal directions to Zimbabwe
> ii) This case is listed at the first available date, standard directions and a time estimate of 2 hours."

6. The file shows that this was not sent out as a final determination with the notes on how to appeal, and there was no appeal or challenge by way of Judicial Review. The matter came on for hearing again as the directions envisaged. Mr Cockerill commented that the Adjudicator appeared to have been wrong to refer to the case which she relied on without allowing the parties to deal with it. The Home Office Presenting Officer said that the removal directions had been considered pursuant to the Adjudicator's direction, but the Secretary of State had decided not to amend them, and that was a considered position. It was acknowledged that the Claimant had been granted refugee status in Zimbabwe but maintained that he had no well-founded fear of persecution under the Geneva Convention in the Democratic Republic of Congo.

7. The Adjudicator considered that that grant precluded the Secretary of State from setting removal directions for the Democratic Republic of Congo, because it would necessarily be a breach of the Geneva Convention to remove him there. It followed that Article 3 would equally be breached. He found some assistance in the House of Lords decision in what he called Muisis. He allowed the appeal without any substantive consideration of whether there was a well-founded fear of persecution.

8. Ms Sigley for the Secretary of State accepted before the Tribunal that the Claimant had been recognised as a refugee in Zimbabwe and that return to Zimbabwe had not been raised before the Adjudicator. She argued that the removal directions had ceased to have effect once the appeal had been made. In particular, she submitted that it was wrong as a matter of law for the Adjudicator to have treated the grant by Zimbabwe as binding on this country: the terms of the OAU Convention were

broader than those of the Geneva Convention and it was unknown what the basis of the decision had been; even if the decision had been taken on one of the grounds which appear also in the Geneva Convention that did not bind the United Kingdom Courts.

9. Mr Buley argued that the grounds of appeal did not raise the issue which Ms Sigley sought to raise. If they did, the issue had been determined by the decision of the first Adjudicator which had not been appealed. He accepted however that the analysis in the Adjudicator's decision of the significance of the grant of asylum by Zimbabwe was wrong and had misunderstood the authority relied on. He also accepted that there were relevant issues as to the substantive merits of the claim for consideration by an Adjudicator, raised by the Secretary of State throughout and which had never been dealt with.

10. We regard the grounds of appeal as raising among other matters the issue which Ms Sigley puts before us. We had certainly so read them before we heard Mr Buley's contrary argument. Ground 2, and it can be seen as related to ground 1, specifically raises the question of whether the earlier grant of asylum should be seen as binding. It refers to the absence of any transfer of status and to the need for the Clamant to show a well founded fear of persecution. There would be no need for its binding nature to be considered if only return to Zimbabwe was being considered. Ground 3, which was abandoned, related to that point. The purpose of ground 1 was to say that the issue should not be decided simply by reference to removal directions but by reference to the substantive fear. If we are wrong, we would have granted leave to amend so that the real issue was raised as Mr Buley had realised that it was a potential issue; he just thought that the grounds did not raise it.

11. We grant a similar indulgence to Mr Buley in respect of the point that the second Adjudicator had no power to reach a decision on the issue as to the Democratic Republic of Congo, in the light of the first Adjudicator decision, and should have held that there was no appeal before him once the Secretary of State kept his removal directions unchanged. There was no Respondent's Notice which raised that point. But we do not accept it as a good one.

12. The first decision was not treated by the Adjudicator as determinative of the appeal; the relevant form for an appeal to the Tribunal did not accompany it. Whatever her intentions, the first Adjudicator did not require the Secretary of State to do more than reconsider his directions, which plainly conveys that he can say that he will maintain them and still deal with the substance of the appeal on different basis. Neither party considered that the decision was appealable or challengeable.

13. The Claimant did not submit to the second Adjudicator that he had no jurisdiction either to hear an appeal at all in the absence of a fresh immigration decision or to hear further argument about the effect of the earlier grant of refugee status on the appeal or to consider for the first time the risk of persecution which the Claimant might face on return to the Democratic Republic of Congo. Both parties assumed that he had jurisdiction in all three respects. He specifically drew attention to the deficiency in the way the matter had been handled by the first Adjudicator. Both parties argued their corner. Before the second Adjudicator, the Secretary of State did want to argue that the grant of refugee status was not binding and that there were substantive reasons for not believing that the Claimant had been persecuted in the Democratic Republic of Congo. No-one suggested that he could not do so if the grant were not binding. If the Adjudicator had reached a different, and as we say correct, conclusion about the non-binding nature of that grant, he would have heard

argument and evidence, without jurisdictional objection, about whether the Claimant had been or would be persecuted in the Democratic Republic of Congo.

14. Until the last minute here, there was no suggestion that these issues could not have been raised before him, or that there was no appeal available on all grounds from the second Adjudicator.

15. The first decision was not seen as disposing of the appeal. The Adjudicator refers to allowing the appeal, but then makes directions for its continuance; the appeal was not allowed in fact. It could not be appealed as that decision was not a "*determination*". It remained live before the second Adjudicator. He had the whole of it to deal with, and in so far as the second Adjudicator could have been confined by the preliminary ruling, there was no objection taken to him dealing with all the issues on the material before him, particularly in the light of the procedural unfairness which tainted the first decision. It is too late for objection now to be taken to that course and to his determination being the final determination, appealable on all the points to which it gives rise. The first decision should be seen as part of the whole process of determination of this appeal and that this is the first point, the final determination, at which the opportunity to appeal arises. Additionally, the possible procedural objections were clearly waived.

16. On the substance of the points, both Adjudicators were wrong to have treated the grant of asylum by Zimbabwe as determinative of refugee status vis a vis the Democratic Republic of Congo in this country. First, the terms of the OAU Convention are wider than the Geneva Convention in the definition of a refugee in a significant respect which would have been very relevant to someone from the Democratic Republic of Congo. There was no evidence at all as to the basis of the grant. It says in Article 1(2):

> "The term 'refugee' shall also apply to ever person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality."

17. Second, even if the grant had been on grounds which were found in the Geneva Convention, the grant would not be determinative of the position so far as the United Kingdom is concerned. It would still be necessary to consider the substantive merits of the case. This issue was considered in the case of Babela [2002] UKIAT 06214; it has been considered more recently in the case of LW (Ethiopia-Cancellation of refugee status) [2o05] UKIAT 00042. (We note that the reference to cancellation is a term which UNHCR employs where the cessation clause is applied following the judicial determination of refugee status.) Where the claimant can show, to a reasonable degree of likelihood, that there was a grant of asylum and that the grant of asylum was made on the same grounds as those which engage the Geneva Convention, the position is as follows.

18. The earlier grant of asylum is not binding, but it is the appropriate starting point for the consideration of the claim; the grant is a very significant matter. There should be some certainty and stability in the position of refugees. The Adjudicator must consider whether there are the most clear and substantial grounds for coming to a different conclusion. The Adjudicator must be satisfied that the decision was wrong. The language of Babela is that of the burden of proof: their status is prima facie made out but it can be rebutted; the burden of proof in so doing is on the Secretary of State. We do not think that that is entirely satisfactory as a way of expressing it

and it leaves uncertain to what standard the burden has to be discharged and what he has to disprove. The same effect without some of the legal difficulties is established by the language which we have used.

19. But the important point is that it does not prevent the United Kingdom from challenging the basis of the grant in the first place. It does not require only that there be a significant change in circumstances since the grant was made. Clear and substantial grounds may show that the grant should never have been made by the authorities; it may be relevant to show that the authorities in the country in question lacked relevant information or did not apply the Geneva Convention in the same way. Exclusionary provisions may be relevant. The procedures adopted for examination of the claim may also be relevant. Considerations of international comity may be rather different as between EU member states and those with less honest administrations or effective legal systems.

20. Where however the Adjudicator is not satisfied that the foreign grant was wrongly made, if the Claimant is to fail in his claim in the United Kingdom because of a change of circumstances, this is equivalent to the application of a cessation provision and should be considered in a like manner.

21. It is accepted that there is material which the Secretary of State wished to deploy and that it should be heard. It has never been examined at all as a matter of substance and it should be. Accordingly this appeal is allowed and remitted for hearing before another Adjudicator.

22. The case to which the Adjudicator referred is in fact R v SSHD ex parte Musisi [1987] Imm AR 250 HL, part of the quartet including Bugdaycay. Musisi concerned the question of whether someone could be returned to a country where he would not be persecuted but which would return him to a country where he would be. That has nothing to do with recognition of refugee status or return on the facts of this case to the Democratic Republic of Congo which was not said to be remotely likely to send him to Zimbabwe. The Adjudicator's citation from it refers to the Secretary of State's implicit acceptance that Musisi was a refugee and so would face persecution in his country of nationality, if removed there from a third country. It was not an acceptance of the binding value of foreign decisions by the Secretary of State because the case is silent about that and certainly not by the House of Lords.

23. We add that the determination of cases on the basis of a preliminary point of this sort, as opposed to eg the question of whether an appeal is out of time, is very unwise and can lead to real confusion as to the status of the decision, what points are thereafter arguable and as to whether it is appealable or challengeable by Judicial Review. It is a common experience that a preliminary point often leads to greater delay as the short cut turns out to be the longest route between two points, when it does not in fact dispose of the case. It must be made clear if a preliminary issue is decided what the effect of the decision is. If it leads to the allowing of the appeal, that is that. The decision has been dealt with. The appeal is not against removal directions but an immigration decision. It may be that another immigration decision can be taken on a different basis; it may be appealable.

24. There is no power to direct a reconsideration of removal directions in the way done here. Schedule 4, paragraph 21, to the 1999 Act did not (nor now does section 87 of the 2002 Act) permit a direction of that sort. Those statutory provisions are not concerned with general directions to the Secretary of State as to what he should do to reach a final conclusion in a claim; they are to enable the appellate authority to direct him to give effect to the outcome of final determinations such as by the grant of

entry clearance, where he has to take some action for the determination to be effective. Such a direction leaves uncertain what the position is if the reconsideration leads to no change in position. Reconsideration would follow from the allowing of the appeal, if the Secretary of State considered that another country could be specified and if he reached another decision, appealable or not.

25. This decision is reported for what we say about the grant of refugee status in another country, and the treatment of preliminary points. The appeal is allowed and remitted for hearing before an Adjudicator other than Mrs Clarke or Mr Cockrill.

MR JUSTICE OUSELEY
PRESIDENT