FIRST DIVISION, INNER HOUSE, COURT OF SESSION

Lord President
Lord Nimmo Smith
Lord Clarke

[2007] CSIH 55
XA96/05

OPINION OF THE COURT

delivered by THE LORD PRESIDENT

in

APPEAL

by

Y.K.M.

Appellant;

against

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent:

_____

Act: Bovey, Q.C., Caskie; Drummond Miller
Alt: Lindsay; The Office of the Solicitor to the Advocate General

22 June 2007

The appellant's family history

[1] The appellant has a tragic family history. He was the third of seven children of Hutu parents who had their home at Rwamagana in the eastern province of Kibungo, Rwanda. Many of his parents' neighbours and friends were Tutsis. Following the death of the Rwandan President in 1994 massacres took place, principally of Tutsis. One of the worst of these occurred in Rwamagana where 5,000 Tutsis, having fled

from their homes and gathered at the Catholic church, were attacked by Interahamwe militia; only 200 escaped with their lives.

[2] On the evening of 15 April 1994 the appellant, who was then 8 years of age, was at home with the other members of his family. Men arrived there looking for the family's Tutsi neighbours. They believed that the Tutsis were hiding in that home. When they arrived the appellant's parents, his two elder brothers and a cousin were in the living room. The appellant and his younger brothers and sisters were sleeping in a room at the back of the house. They were wakened by the cousin who told them that they should leave the house without making any noise. They did so and hid in bushes from where they could see the front of the house. The appellant saw two men standing there. He later learned that four men in all had come to the house. The appellant was able to identify both men outside the house, although he was more confident of his identification of one than of the other. The brother of the man whom he could identify with greater certainty was, the appellant thought, a *conseiller* of the local commune. The appellant heard voices from inside the house and then screams, including screams from his mother. After a while there was silence and the men came out. They talked for a few minutes, then set the house on fire and left. The appellant and his siblings, together with their cousin, crossed the road and hid in the plantation and small bushes. Later they went to the Catholic church.

[3] The appellant's loss of family did not end there. After a number of moves, to which it will be necessary to return, the appellant and his siblings lived for a time in Kigali, the national capital, with a friend of their uncle. Events having occurred which caused apprehension for their safety, a decision was taken to flee abroad. The uncle's friend's wife set off by car with the appellant's younger siblings for Kenya, arrangements having been made for the appellant to travel separately and to meet

them there. The appellant reached Kenya but despite extensive efforts was unable to trace his siblings or his uncle's friend's wife. The appellant took a flight to London where he arrived on 13 November 2002. He immediately claimed asylum. He subsequently learned that his cousin had been found dead on a road in Tanzania.

Earlier procedure

[4] The appellant's claim for asylum was refused by the respondent in terms of a letter dated 6 January 2003. He appealed against that decision. The appeal was heard by an adjudicator on 5 February 2004 and refused. Leave to appeal to the Immigration Appeal Tribunal was granted and that appeal allowed by it on 1 February 2005, the case being then remitted to the Asylum and Immigration Tribunal for a fresh hearing. That hearing took place on 29 June 2005, the decision (to refuse the appeal both on asylum grounds and on human rights grounds) being promulgated on 21 July 2005. The appellant has further appealed to this court. The hearing of that appeal has been delayed by a change of legal representation on the appellant's part.

[5] The Asylum and Immigration Tribunal was constituted by Mr. M.E. Deans (Senior Immigration Judge) and Mr. J.G. Macdonald (Immigration Judge). Mr. Deans is a particularly experienced judge in immigration and asylum matters. That Tribunal was impressed by the appellant. It formed a very favourable view of him when he gave evidence before them. He was, it found, honest truthful and articulate. All challenges to his credibility as a witness were rejected by the Tribunal. His academic record, both in Rwanda and in the United Kingdom, where as at June 2005 he had completed the second year of an Honours economics degree course at the University of Aberdeen, showed that he was clever, intelligent and resourceful. We were informed that at the time of the hearing before us he was not in attendance in court

because he was sitting his final examinations in that course. He has, we were told, been offered a post-graduate place in London, conditional on his obtaining a particular class in the Honours degree. He is clearly an able and impressive young man.

Further aspects of the appellant's history

[6] In order to set in context the discussion before us it is necessary to return to the appellant's history. Once the situation at Rwamagana had calmed down, the appellant, his cousin and his younger siblings made their way to the home of the appellant's uncle in Kigali. There the appellant resumed school and he and his siblings lived a normal life for the next seven years. Some income for the family was derived from the operation by the cousin, with the help of the uncle, of a shop in Kigali which the appellant's parents had previously operated. In 2001 the Government of Rwanda began to set up what are known as "Gacaca" courts to try certain of the perpetrators of the 1994 genocide. These courts are local non-professional tribunals. At that time the appellant was a boarder at the Lycée de Kigali. It was known in the school that the appellant was a genocide survivor and that his parents and brothers had been killed. The headmaster of the Lycée encouraged him to consider testifying to the circumstances of his relatives' deaths. The appellant was initially reluctant to do so but in January 2002, again at the encouragement of the headmaster, went back on a visit to Rwamangana. There he found that a new house had been built where his family's home had stood. Although he only vaguely recognised those still living in Rwamagana, they remembered him well. He explained to those whom he met that he wanted to see the town before going back there for the trials. He stayed there overnight before returning to school in Kigali.

[7] Some months later the appellant began to receive threats or warnings. He regularly found plastic bags full of water, urine or blood under his bed sheets in the dormitory. Knives and crosses were drawn on his desk. Written messages were received saying "Don't do it", "You are dead" or "[J] is dead". ([J] was the name of one of the appellant's sisters.) Warnings and threats of those kinds continued until the appellant left school and went home in June 2002. Shortly thereafter his youngest sister met two men who slapped her face and told her to give to the appellant a piece of paper. On it was a drawing of a young girl with a line across her chest in red ink. On the forehead of the image was written "[J]" and the words "Don't do it". A similar threatening incident involving one of the appellant's younger brothers occurred shortly thereafter.

[8] A week later the appellant's uncle and his uncle's son were arrested by the army, apparently on political grounds. After their detention threatening messages began to arrive at the house. Blood was also found on the shop windows and doors. Arrangements were made for the appellant and his siblings to stay with a friend of the uncle. A few days later those who had arrested the appellant's uncle ordered that the shop be shut. In July 2002 the uncle's friend was also detained, apparently for the same political reasons as the uncle. Thereafter arrangements were made, as earlier narrated, for the departure of the appellant and his siblings from Rwanda.

The grounds of appeal

[9] In his grounds of appeal the appellant maintains that the Tribunal erred in law in holding that he did not have a well-founded fear of persecution, if returned to Rwanda, in terms of the 1951 Refugee Convention and was not at real risk of being subject to serious ill-treatment contrary to Article 3 of the European Human Rights

Convention. (Although, on one view, the real risk might be claimed to be to life, no issue has been raised under Article 2 of the latter Convention; but it was not suggested that anything turned on that). Although both Conventions were founded on, no distinction was sought to be drawn between the relevant tests under them. Before us, as before the Tribunal, reference was made to *Horvath* v *Home Secretary* [2001] 1 AC 489 (where the Refugee Convention was under discussion) and *R (Bagdanavicius)* v *Home Secretary* [2005] 2 AC 668 (where the European Convention was under discussion).

The appellant's submissions

[10] Mr. Bovey for the appellant did not maintain that the Tribunal had erred in any of the general legal considerations applicable to cases of this kind. It was accepted that under the Refugee Convention it was for the appellant to satisfy the Tribunal that he faced a real and substantial risk (or a real and substantial danger) of serious harm were he to be returned to Rwanda. That involved consideration of two elements, namely, (1) whether there was not only a genuine fear but an objective basis for fear of such harm and (2) whether the Government of Rwanda was unwilling or unable to provide a sufficient (in the sense of a reasonable level of) protection against such harm. Where, as here, the apprehended danger was from non-state actors, a broadly similar approach was required under the European Convention (*Bagdanavicius*, per Lord Brown of Eaton-under-Heywood at para. 30).

[11] Mr. Bovey's criticism of the Tribunal's decision was directed to its treatment of certain of the evidential materials which it had considered. Among other materials placed before it on behalf of the appellant was a report by Professor Fairhead, an acknowledged expert on Central African affairs. At paragraph 6 of his report

Professor Fairhead quoted from certain materials which had not already been supplied to the Tribunal. The first quotation was in the following terms:

> "(a) U.S. Department of State: Country Reports on Human Rights Practices - 2004 (Released by the Bureau of Democracy, Human Rights, and Labor February 28, 2005)
>
> 'According to several human rights organizations and government officials, hundreds of witnesses to the Genocide were killed throughout the country, reportedly to prevent testimonies and undermine the rural justice system (Gacaca).'".

Having referred to three other quotations, he stated:

> "(e) Rwandan government's recognition of this problem:
>
> '14 May 2004 (IRIN) - Rwandan President Paul Kagame has dissolved a district executive committee in the southwestern province of Gikongoro where several killings of genocide survivors has [*sic*] occurred, the Rwandan News Agency reported on Thursday. Kagame's action followed his two-day visit to Gikongoro that ended on Tuesday, the agency reported. Cabinet approved his decision on Wednesday, at a meeting during which replacements for the dismissed officials were named. Killings of genocide survivors in Kaduha District occurred in 2003. Four genocide survivors were reportedly killed in Gikongoro in late 2003 by a group of genocide suspects in order to prevent them from testifying in the Gacaca justice system, introduced in the country in 2001. Similar killings were also reported in the central province of Gitarama. In early March [2004], nine people were sentenced to death and another one to life imprisonment over the killing of a genocide survivor who was due to testify under the Gacaca justice system. The Court of First Instance ruled then

that the nine were guilty of jointly killing Emile Ntahimana in November 2003 in Gikongoro. The March convictions brought to 14 the number of people sentenced to death and three to life imprisonment for killing genocide survivors. In February, the court had sentenced five people to death and two to life imprisonment for killing Charles Rutinduka, another potential witness in the Gacaca trials. Gacaca, based on a traditional communal justice where elders at the village level judge offenders, was introduced to speed up trials for an estimated 85,000 suspects held in Rwanda's prisons, in connection with the genocide that claimed the lives of at least 800,000 people.'"

[12] Among other sources of information before the Tribunal was a report from "News from Africa", the relevant parts of which the Tribunal records at paragraph 60 of its decision as follows:

"[That report] referred to a Senatorial Commission of enquiry having been set up in Rwanda to examine recent killings of genocide survivors. The focus of these killings was again in the southern province of Gikongoro, referred to in the other reports above. The Prime Minister responded to the Commission by saying that his government had reserved no effort in preventing these murders. He claimed that the incidents had been acted on immediately. A number of suspects, about 25, had been arrested and the first of them would come to trial in June 2005. Reference was made by a Senate vice-president to the harassment of survivors in Cyangugu province [another southwestern province] in recent years but he added that little had been done in response. He claimed that similar cases were spreading to neighbouring districts of Karambo and Kabajari in Gitarama province [a central province]".

The Tribunal described that report as "of 10 June 2005", although on examination it appears that, although reissued then, it was originally issued in January 2004.

[13] The Tribunal also noted that the Home Office Country Report for Rwanda (dated April 2004) referred at paragraph 6.109 to fourteen people having been sentenced to death and three to life imprisonment for killing genocide survivors. It was added that several genocide survivors had fled from Gikongoro where killings were "rampant" for fear of being targets. In the same paragraph of this Country Report reference was made to a report in Mail and Guardian Online of December 2003 that one or two genocide survivors were killed every month; a BBC report of the same month was to the same effect.

[14] At paragraph 57 of its decision the Tribunal observed that, while the expert report by Professor Fairhead was highly informative, it was for the Tribunal to assess whether on the basis of the report, and other evidence before it, the appellant had established a real risk of serious harm and of failure of state protection. The Tribunal accepted that the appellant had a genuine fear that he would be harmed if he returned to Rwanda - as had many other people who had fled Rwanda in recent months. Those fleeing included persons apprehensive for another reason, namely, fear of a false allegation being made against them at a Gacaca trial. The Tribunal continued:

> "These are, in our view, largely subjective fears. The U.S. State Department Report, quoted by Professor Fairhead, refers to several human rights organisations and government officials reporting that hundreds of witnesses to the genocide were killed throughout the country in 2004 reportedly to prevent testimonies and undermine the rural justice system. However, when the evidence for this is examined closely, as it is by Professor Fairhead at 6(e) of his report, it appears that concern has focused, in particular, from the Rwandan

President on the southwestern province of Gikongoro, where it is said that 'several killings of genocide survivors' have occurred. Reference is then made to four genocide survivors having been reportedly killed in this province in late 2003."

[15] Mr. Bovey submitted that the Tribunal had misunderstood Professor Fairhead's report. At paragraph 6(e) he had not "examined closely" the evidence for the quotation at paragraph 6(a). He had been producing two distinct pieces of information. The information at paragraph 6(a) related to the calendar year 2004, while paragraph 6(e) was a report dated 14 May 2004. The former came from a number of sources, while the latter was from a single source. There had accordingly been no basis on the other materials considered by the Tribunal to justify its rejection of the U.S. Department of State report to the effect that hundreds of witnesses had been killed throughout the country in the year 2004 to prevent their testifying. The Tribunal's assessment of the extent of the risk was accordingly flawed. It had in any event failed to give adequate or comprehensible reasons for rejecting the U.S. State Department report. If the Tribunal had misanalysed the risk, its analysis of the state protection provided was consequentially flawed. It was unreasonable to label the appellant's fear as "largely subjective". The fact that it was shared by many people pointed to its having an objective basis and to the state protection not being sufficient. In so far as the protective element fell to be considered independently of the risk presented, the Tribunal had made no analysis of how the state was able to provide reasonable protection for the appellant as an individual faced, as he was, with danger from those against whom he could testify or their associates. There was no witness protection scheme in place in relation to Gacaca trials. The Tribunal had made no finding that in some other way the state provided sufficient protection for the appellant. Such judicial

and law enforcement arrangements as existed on the evidence (where officials had to be urged to do their duty) were different from those considered in *Horvath*. The inability of the authorities in Rwanda to provide sufficient protection had to be seen against the total collapse there of law and order in 1994, the problem in 2002-4 occasioned by the setting up of an increasing number of Gacaca tribunals (with consequential flight on a large scale) and the inability of the ordinary courts to cope with the number of cases to be tried. No tribunal acting reasonably could have reached the conclusion that the protection afforded by the state to the appellant was reasonable. In any event, the Tribunal had failed to give adequate or comprehensible reasons for finding that it was. In relation to the appeal under the European Convention, Mr. Bovey referred to *Mayeka* v *Belgium* (European Court of Human Rights - Application No. 13178/03, 12 October 2006, unreported) at paras. 41-2 and 48-53 and to *Osman* v *United Kingdom* (1998) 29 EHRR 245 at paras. 101 and 111-6. There was a positive obligation on the national authorities to take preventive operational measures to protect an individual whose life was at risk from the criminal acts of other individuals. Mr. Bovey invited the court, if it were in favour of the appellant's argument, to put the case out By Order, with a view to parties placing before it evidence as to the current position; the court could then make a judgment on that material and dispose of the appeal without the necessity for a remit to the Tribunal. In that regard he referred to section 103B(4)(b) of the Nationality, Immigration and Asylum Act 2002. Alternatively, he moved the court to remit the case for reconsideration, in light of its opinion, to the Tribunal as originally constituted.

Discussion

[16] The Tribunal correctly recognised that it was for it, on the whole evidence before it, to assess whether the appellant had established a real risk of serious harm and a failure of state protection. As regards risk, the frequency with which potential witnesses were killed was clearly a relevant consideration - as were the places in the country where such killings occurred. The Tribunal had before it specific information from specific sources. In December 2003 the BBC had reported Ibuka (an organisation representing survivors of the genocide) as stating that a number of people had been killed that year. One or two, Ibuka had said, were killed every month but three had recently been killed in Gikongoro. That report, together with one to the same effect in Mail and Guardian Online, had been noted in the C.I.P.U. Rwanda Country Report published in April 2004, which had also reported that the killings in Gikongoro were "rampant". In the IRNR report published in May 2004 it was stated that killings of genocide survivors had occurred in 2003 in Kaduha District (in Gikongoro province) and that four genocide survivors were reportedly killed in that province in late 2003 in order to prevent them from testifying in the Gacaca justice system. Similar killings were also reported in the adjacent central province of Gitarama. "News for Africa" initially published in January 2004 (but updated to June 2005) had also reported murders aimed at genocide survivors in Kaduha District. These various sources were the "more specific evidence" which the Tribunal at paragraph 72 preferred to the more general evidence contained in the U.S. State Department report. It was, in our view, entitled to make that judgment. Although, as the Tribunal clearly recognised, the latter report covered the whole calendar year 2004, there was no other evidence to support a substantial escalation of killings in the latter part of that year. It would be pure speculation to suppose that the increasing

operation of the Gacaca trial system had led to a multifold increase in killings of potential witnesses to incidents of genocide. We are not persuaded that the Tribunal's conclusion that the established incidence of killings of such witnesses was of the lower rather than the higher order was one which no tribunal acting reasonably could have reached. The reasoning, which leads to that conclusion at paragraph 72 is, in our view, adequate and comprehensible.

[17] As to paragraph 57, the Tribunal there asked itself the question whether the general statement in the U.S. State Department report was borne out by specific evidence. It concluded, as it was to restate at paragraph 72 after a full examination of the material before it, that the specific evidence did not support the generalisation (which itself did not have its origin in any named source). The parenthetical reference to Professor Fairhead's report simply points to the fact that paragraph 6(e) does not tend to support killings of the order indicated in the U.S. report. As to the reference in that paragraph to fears of potential witnesses being "largely subjective", that was a view which the Tribunal was entitled to reach on its analysis of the extent of the danger presented to such witnesses.

[18] In all these circumstances we are not satisfied that any error of law has been demonstrated in the Tribunal's evaluation of the risk presented in Rwanda as at 2005 to potential witnesses at Gacaca trials. Having reached its general conclusion, the Tribunal then addressed the particular situation of the appellant. It found that the measures taken against him appeared to have been directed towards frightening him rather than harming him. It considered the possibility that those people might, if their attempts to frighten him failed, resort to actual violence but were not satisfied that the appellant had shown a real risk of violence towards him. No criticism was in the end made of this part of the Tribunal's reasoning.

[19] Mr. Bovey having failed to persuade us that the Tribunal erred in law in its approach to the evaluation of risk, the foundation for his challenge to its decision on state protection is largely removed. We should, however, say something about this second aspect of the case. The sufficiency of state protection has to be measured against the nature and extent of the risk presented to the appellant as an individual and as a member of the class of persons for whom harm is apprehended. Mr. Bovey did not suggest that the Rwandan State was unwilling to protect its citizens of that class from harm. He maintained, however, that on the evidence it was unable to do so. While law and order broke down in 1994 with horrifying consequences, it is evident from the material before the Tribunal that a system of criminal justice has been re-established since. Although the ordinary courts are unable to cope with the number of cases which require to be tried, the Gacaca system has been established to try those charged with less serious involvement in the genocide. That establishment has had its problems - both with regard to threats or worse to potential witnesses and to the apprehension of false allegations - and no guarantee can be afforded that harm will not be done to individual citizens. Neither Convention, however, demands a guarantee of safety (*Horvath*, per Lord Hope of Craighead at page 500G-H; *Bagdanavicius*, per Lord Browne at para. 19; *Osman*, para. 116). The Tribunal discusses the steps which have been taken by the Rwandan authorities to address the problem. These include the apprehension, trial and punishment of offenders, the establishment of a Senatorial Commission and the Cabinet's denunciation of the murders and intimidation, with security and judicial officials being called upon to act in accordance with the law to ensure that those responsible are punished. The Tribunal also addressed the particular circumstances of the appellant - including the fact that after he and his siblings had moved to his uncle's friend's house no threats were received there, even though that

house was only a kilometre from where the appellant had previously lived. In all the circumstances the Tribunal was, in our view, entitled to conclude that the Rwandan State was providing a reasonable level of protection for a citizen such as the appellant. Its reasoning leading to that conclusion is adequate and sufficiently clear.

Disposal

[20] In all these circumstances we are satisfied that this appeal must be refused.

Coda

[21] We would add one word in relation to the procedure suggested by Mr. Bovey in the event of the appellant being successful on the substance of his appeal. We do not regard section 103B(4)(b) (which empowers the court on an appeal to "make any decision which the Tribunal could have made") as intended to confer on this court any fact-finding jurisdiction. An appeal lies to it only on a point of law (section 103B(1)). While further agreed facts might no doubt be taken into account by this court, any adjudication on disputed or potentially disputed matters of fact is for the Tribunal.