Case No: C5/2007/1291

Neutral Citation Number: [2008] EWCA Civ 320
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM & IMMIGRATION TRIBUNAL
[AIT No: AS/09729/2004]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday,12th March 2008

Before:

LORD JUSTICE TUCKEY
LORD JUSTICE RIX
and
SIR ROBIN AULD

- -

Between:

JN (DEMOCRATIC REPUBLIC OF CONGO) **Appellant**

- and -

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

- -

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Mr J Collins (instructed by Sheikh & Co) appeared on behalf of the **Appellant**.

Mr N Sheldon (instructed by Treasury Solicitors) appeared on behalf of the **Respondent**.

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Judgment

(As Approved by the Court)

Lord Justice Tuckey:

1. This is an appeal by JN from a decision of the AIT, which on a reconsideration dismissed his appeals from the Secretary of State's refusal to grant him asylum and humanitarian protection. The grounds of appeal for which Keene LJ gave permission complained of procedural irregularity.

2. The appellant, a 45-year-old citizen of the Democratic Republic of Congo entered the United Kingdom on a false passport in February 2004 and claimed asylum several days later. The basis of his claim was that he was an active member of the BDK (Bundu Dia Kongo) a banned ethnically-based spiritual and political separatist movement. As such he said he had organised demonstrations and marches and collected contributions. He had been arrested, detained, beaten and tortured over a period of three months after a meeting he had held at his home in February 2002. He was similarly treated after being arrested for attending a BDK meeting in July 2002 but he became ill during his ten-month detention and managed to escape from the hospital to which he had been taken for treatment. He then made an unsuccessful attempt to flee the country by plane but managed to escape over land in February 2004.

3. The appellant's appeal against the Secretary of State's decision was first heard by an adjudicator on 6 June 2004. The Adjudicator found that the appellant was a member of the BDK but because he did not accept his account of his escape from the second detention he found that the appellant had not been imprisoned on account of his activities on behalf of or support for the BDK. In other words he did not accept the appellant's account of either of his detentions. At paragraph 34 of his decision he concluded:

> "Nevertheless from the general consideration of his evidence I have found that he was a member of the BDK. I have to consider whether that alone is sufficient to put him at a reasonable chance of persecution on return. It was submitted for him that in August 2003 BDK members were still in prison… I find that the members of the BDK detained in July 2002 have been released. There was no other evidence to which I was directed to show continuing arrest and detention from members of the BDK. I find that the government is not likely to arrest people simply because of their membership of the BDK."

4. The appellant appealed to what had by then become the AIT. A first-stage reconsideration hearing took place before Senior Immigration Judge Nichols and two other members on 7 August 2006. The delay was attributable to the fact that the appellant was first refused permission to appeal by the IAT, a decision which he successfully challenged in the Administrative Court. On

the first-stage reconsideration the AIT found that there had been a material error of law in the Adjudicator's decision, saying at paragraph 10:

> "We conclude the Adjudicator has failed to give adequate and proper reasons for rejecting the entire account. We do not consider it was sufficient, having found that the escape from the hospital was not credible, to use that as a reason for rejecting the account in its entirety. We have taken into account the fact that the Adjudicator found that the Appellant was politically active with the BDK and in these circumstances in our view it was necessary to make clear findings on both detentions… Even if it could be said that he was entitled to his view that the escape was not credible it does not follow that the remainder of the account was not reasonably likely to be true, given that the adjudicator had accepted the Appellant's membership of this party. For these reasons we find that he has failed to make any findings on a material issue in the case namely at the first detention; he has failed to give adequate and proper reasons for rejecting the account and as a consequence has failed to make sufficiently reasoned findings as to the risk on return as a result of adverse political activity.
>
> 11 Accordingly we have decided to adjourn this hearing for a reconsideration of the evidence on all issues. In the light of our findings we make it clear that none of the findings of the Adjudicator should stand and the matter should be considered afresh on all issues."

5. These reasons were set out in the document headed "For the attention of the Tribunal at the adjourned hearing" and were accompanied by another document which was headed "Directions" said:

> "All issues are to be reconsidered. None of the findings in the determination of [the adjudicator] should stand.

The relevant rules at the time obliged the AIT at the second stage of the reconsideration to have regard to this direction.

6. Now none of this could have been clearer. All issues and in particular the appellant's credibility were to be reconsidered at the second-stage hearing. What in fact happened however is not entirely clear and is the subject of this appeal. Some of the history is recorded in the reasons of the Immigration Judge who heard the second-stage reconsideration, Immigration Judge Mark Davies. At paragraph 13 he says that:

> "The hearing of this appeal took place over three separate hearing dates. The matter first came before me on 1st December when it had to be adjourned due to lack of hearing time. A discussion took place between me and the representatives as to the basis of the reconsideration. Mr Collins [that is Mr Collins of counsel who has appeared for the appellant throughout these proceedings] thought that it should only be reconsidered on the narrow issue as to whether the Appellant's second escape from custody was credible, whilst Miss Hinsley for the Home Office suggested that all issues should be reconsidered as was indicated in the error of law finding of 7 August 2006. The hearing on that date was adjourned and I sought clarification from Senior Immigration Judge Nichols as to the basis upon which the hearing should be reconsidered. She informed me that the matter should be reconsidered on the basis that all issues were to be reconsidered. The matter next came before me on 22 January 2007 when preliminary discussions took place as to the effect on the reconsideration hearing of the matter of DK (Serbia)"

Now DK (Serbia) v SSHD [2006] EWCA Civ 1747 was a decision of this court. The judgment was handed down on 20 December 2006. The Immigration Judge goes on:

> "A copy of that decision was passed to the parties to consider."

And then he records at paragraph 18 of his decision:

> "Prior to the appellant giving evidence Mr Collins submitted that I should not readdress those matters not 'infected' by the error of law. [That is in substance what DK (Serbia) says.] Miss Hinsley suggested that all matters should be reconsidered but then accepted that I should only look at those areas affected by the error of law finding."

And it is those last words that have caused some of the difficulties in this case. Mr Collins contends that it was at this point that the Immigration Judge ruled in favour of his submissions. He ruled that the Adjudicator's positive findings should stand, the most important of which was the finding that the appellant was a member or had been a member of the BDK.

7. We have the Immigration Judge's record of the proceedings for that day where at the point which is referred to in paragraph 18 of the judge's decision he has recorded the following exchanges:

> "[Judge]
> If I ignore DK and I clearly cannot do so and reconsider all issues am I not committing a material error of law? How should I proceed?
> Mr Collins
> Should not revisit those matters not "infected" by the error of law
> Ms Hinsley
> Troubled by what Senior Immigration Judge Nichols has to say --
> [Judge]
> I am not troubled by what [Senior Immigration Judge Nichols] says as I am rehearing the case and not her.
>
> [Then unattributed]
> Accept could only look at those areas affected by the error of law makes a concession on that point."

8. When this matter was first before the court the Immigration Judge was asked to clarify this last passage if he could. He was asked to do this nine months after the event and was only able to say:

> "I am not able to offer any further clarification except to say that the highlighted part of my Record [that is the last sentence of the record] appears to refer to a concession that could only have been made by the Home Office Presenting Officer".

9. Well, that is how it reads to me. There is nothing in the note to support the contention that at this or any other time the judge made a ruling that Mr Collins's submissions about the scope of the hearing to follow had been upheld. If he had done so at this or any other point, or at any point, one would have expected him to have said so in the reasons he gave for his decision, which were prepared on 12 February 2007. The sentence upon which Mr Collins first relied in support of this submission which the judge was asked to clarify refers to a concession, but judges do not make concessions. I think this sentence in context clearly refers to what the Home Office Presenting Officer said.

10. Now we have had some debate about what concession was actually being made by her at this time. It is clearly not being made as to any particular finding made by the Adjudicator. There is no acceptance that the appellant was a member of the BDK. I think it was simply a concession that DK (Serbia) applied to the reconsideration and no more than that. To what

extent if at all it impacted upon the exercise upon which the Immigration Judge was about to embark was not spelt out.

11. After the exchanges to which I have referred the appellant gave evidence. He was asked a number of questions by Mr Collins in examination-in-chief about his activities on behalf of the BDK and, of course, about his detentions. He was then cross-examined at length on that day and 9 February by the Home Office Presenting Officer, in the course of which she asked him, without objection from Mr Collins or the Immigration Judge, a series of questions about his activities for the BDK designed to show that he knew little or nothing about this organisation or its activities and that, in any event, he had not been an active member of that organisation if indeed he had been a member at all. He was again asked questions about those activities in re-examination by Mr Collins. In the course of all this evidence it is apparent from the Immigration Judge's notes and reasons, that the appellant was frequently evasive and failed and refused to answer questions which were put to him even when they were asked by Mr Collins. As the AIT when refusing permission in this case were later to say, it is clear that his evidence "fell apart".

12. After this evidence had been given both representatives made submissions to the Immigration Judge. The Home Office Presenting Officer relied on the refusal letter which had been sent to the appellant by the Secretary of State. That letter had rejected the credibility of the appellant's account in its entirety, including the fact of his membership of the BDK. In her submissions the Home Office Presenting Officer is recorded as challenging the appellant's credibility and inviting the Immigration Judge to make an adverse finding about it.

13. Having rehearsed the evidence and the way in which it was given the Immigration Judge said:

> "66 I have proceeded in this matter on the basis, as indicated in the decision of Senior Immigration Judge Nichols of 24th August 2006, that 'reconsideration of the evidence on all issues' should take place. In deciding to proceed with the reconsideration hearing on that basis I have taken into account the decision of the Court of Appeal in DK (Serbia)."

He summarised his findings by saying:

> "74. I conclude, taking into account all the evidence, that the appellant's account of his political activity in the DRC to be a complete fabrication. I do not accept that he was ever a member of the BDK; that his evidence by his total inability to give consistent evidence as to what he actually did for that organisation. I therefore do not

> accept that he was ever arrested, detained, and ill-treated on the basis of his BDK activity nor do I accept that the appellant escaped from a second period of detention as he claims."

14. Mr Collins's main complaint of procedural irregularity was based, as I have indicated, on the premise that the Immigration Judge had ruled that the reconsideration would be limited in the way for which he had contended. But, as I have already said, I do not accept that the Immigration Judge made any such ruling. There is absolutely no contemporaneous indication that he did so. The Home Office Presenting Officer made some concession based on DK (Serbia), which was not in any way clarified.

15. As the evidence proceeded it is clear that the appellant's credibility as a whole was being put in issue. Mr Collins has maintained that at least the mere fact of the appellant's membership of the BDK remained uncontentious but I cannot read the whole of the record of the proceedings in this way. As the appellant's evidence fell apart, everything was in issue.

16. It follows that I do not think that there was anything unfair about the Immigration Judge reaching the decision which he did. It is clear from the first sentence of paragraph 74 which I have quoted that he reached this decision because he rejected the whole of the appellant's evidence of his political activity in the DRC. This conclusion was not premised on his finding that he was never a member of the BDK. As paragraph 74 of the decision which I have quoted makes clear.

17. Mr Collins submits, nevertheless, that the decision in DK (Serbia) did compel, the Immigration Judge to accept that the appellant was a member of the BDK, as the adjudicator had done. He submits that it was possible to isolate that as an issue which was not infected by the error of law which had been identified at the first-stage reconsideration. I do not accept this submission. It is clear for the reasons given at the first-stage reconsideration that the Tribunal considered that the Adjudicator's error of law (attaching too much weight to his finding that the appellant had not escaped from prison) infected the whole of his assessment of the appellant's credibility. That is why they said that none of the Adjudicator's findings should stand and directed that the matter should be considered afresh on all issues. I do not think this approach can be faulted. It in fact follows what was said in DK. It would be impractical and artificial to attempt to separate out individual elements of the credibility assessment in the way contended for by Mr Collins. That approach to a reconsideration on a credibility issue is supported by the decision of this court in the case of PM (Jamaica) v Secretary of State [2007] EWCA Civ 937. But even if I am wrong in concluding that the proceedings should have continued on the basis that membership of the BDK was not in issue (either because that had been conceded by the Home Office Presenting Officer or the evidence had proceeded in such a way that it had not been in contention), it seems to me that it would not have been wrong or unfair for the Immigration Judge to proceed in the way he did because it followed the approach in DK (Serbia) and because

it was the consequence of the way in which the hearing developed, with the appellant demonstrating, as each minute went by, less and less credibility.

18. There is a further reason for supporting the IJ's decision relied upon by the respondent in her Respondent's Notice, which is simply this: if he had proceeded on the basis that membership (and by that I mean mere membership) of the BDK, was accepted there was nothing in the objective evidence before him to show that such a person was at risk. TN & Ors (DRC) v SSHD [2005] UKAIT 00152, which had been decided in November 2005, indicated that there might be a risk to active members of the BDK but gave no support whatsoever to the idea that a mere member was at risk. That was the adjudicator's conclusion in 2004 and it seems to me that it would inevitably have been the same if the IJ in this case had gone on to consider in February 2007.

19. For those reasons I would dismiss this appeal.

Lord Justice Rix:

20. I agree, for all the reasons given by my Lord, Tuckey LJ. I would merely add this. In the immediate aftermath of the passage my Lord has cited from the record of the second day of the hearing (that is to say, 22 January 2007) Mr Collins, on behalf of today's appellant, listed before the judge various paragraphs and passages of the first adjudication where he had put before Immigration Judge Davies matters of fact on which the appellant's evidence had been accepted by the first adjudicator. There are lists of these. There is only one item amongst this list that mentions that the appellant had been found to be a member of the BDK. After that Mr Collins called the appellant as witness.

21. The position was, as I understand it, that all that had happened in this original discussion as to the effect of DK (Serbia) was that, against the background of the direction that all matters should be revisited on the reconsideration, Miss Hinsley, the Home Office Presenting Officer, accepted the principle of DK (Serbia), which is that you only look at those areas infected by the error, but that left open what the application of that principle meant on the facts of that case.

22. Mr Collins immediately took his stand on a whole list of matters which had been accepted by the first adjudicator. But as the matters developed it is quite plain, as my Lord has shown, that the appellant's total credibility was put in issue. At the end of the day it is only the membership of the BDK which Mr Collins seeks to save from the wreckage of the appellant's credibility but, for all the reasons which my Lord has given, that attempt fails.

Sir Robin Auld:

23. For the reasons given by my Lords I also agree that the appeal should be dismissed.

Order: Appeal dismissed.