C4/2004/2067

Neutral Citation Number: [2005] EWCA Civ 367
IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE IMMIGRATION APPEAL TRIBUNAL

Royal Courts of Justice
Strand
London, WC2

Thursday, 17th March 2005

B E F O R E:

LORD JUSTICE WARD
LORD JUSTICE BUXTON
MR JUSTICE WILSON

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FRANCOIS MIBANGA

Claimant/Appellant

-v-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant/Respondent

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(Computer-Aided Transcript of the Palantype Notes of
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MISS N BRAGANZA (instructed by Messrs Douglas & Partners, Bristol BS2 8YA) appeared on behalf of the Appellant
MR ROBIN TAM (instructed by Treasury Solicitor, London SW1H 9JS) appeared on behalf of the Respondent

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J U D G M E N T

1. LORD JUSTICE WARD: I will ask Mr Justice Wilson to give the first judgment.

2. MR JUSTICE WILSON: The appellant, a citizen of the Democratic Republic of Congo (DRC), appeals from a decision of the Immigration Appeal Tribunal dated 10 August 2004. He had appealed to the tribunal, which, by virtue of section 101(1) of the Nationality, Immigration and Asylum Act 2002 could be only on a point of law, against the determination of an adjudicator, dated 1 September 2003, by which his appeal against the refusal of the Secretary of State for the Home Department to grant him asylum or leave to remain in the United Kingdom on human rights grounds had been dismissed. The Secretary of State appears as the respondent to the appeal.

3. The essential nature of the appellant's complaint to the tribunal was that the adjudicator had erred in law in the way in which she had conducted the requisite fact-finding exercise. That point found no favour with the tribunal but now the appellant brings it to this court.

4. Most of the background facts are in issue. It is however agreed that the appellant, who is now aged 38, came to the United Kingdom from the DRC on about 4 June 2002 and at once claimed asylum. It is also agreed that, by that time, his wife and their three children had already come to the United Kingdom; and that the family is now living together in Bristol. The wife and two of the children, including one who was recited at some stage as having been born on 18 January 2001 but whom the appellant alleges was born on 28 June 2001, had arrived in the United Kingdom in November 2001; and in about February 2002 they had been granted exceptional leave to remain for four years, i.e. until about February 2006. The third child, a girl now aged seven, had come unaccompanied to the United Kingdom in April 2002 and thus was not able to be included in the grant of exceptional leave. In his asylum and human rights claims the appellant therefore presented her as his dependant.

5. It was the case of the appellant, both in the presentation of his claim to the Secretary of State and in evidence to the adjudicator, that:

   (a) he had been born and brought up in the area of Kisangani in the north-east of the DRC;
   (b) upon his marriage, his father-in-law, who was a leader of one of the Mai-Mai militias, persuaded him to join it even though, by ethnicity, he was not a natural member of it;
   (c) between 1999 and 2002, and indeed since then, the Mai-Mai had been in fierce conflict with the Rwanda-backed rebel forces known as RCD-Goma;
   (d) in about 1999 his father-in-law had been killed by RCD-Goma;
   (e) at that time he had himself been detained by RCD-Goma and, subject to two interruptions to which I will refer at (g) and (h), had been kept by them in subhuman prison conditions until May 2002;
   (f) during the period of his captivity he had been cruelly tortured in an effort on the part of RCD-Goma to extract intelligence from him relevant to their conflict with the Mai-Mai; he had even suffered the passage of an electrical current through his penis and testicles;

(g) he had developed malaria with the result that between August and October 2000 his captors had allowed him to stay in hospital; both while in hospital, and indeed until 2001 while in prison, his wife had been permitted to visit him; and it was while in hospital that the child born in June 2001 had been conceived;

(h) in November 2001 he had managed to escape from the prison: in the course of carrying a bucket of the prisoners' faeces to a dump he had been able to escape through a crumbling wall but after about two days he had been recaptured; he ascribed to witchcraft his good fortune in being able to escape, although he accepted that in Western eyes such would be likely to be an unacceptable explanation for it;

(i) in May 2002 he had finally escaped, or been released, from prison; he had been enabled to do so because his guards had been distracted by riots outside the prison and because, in particular, one guard, being a member of his own tribe and surprised that he had subscribed to the Mai-Mai, had taken pity on him and helped him to flee; and

(j) thereupon an uncle had enabled him to escape upon forged papers from the DRC.

6. In his letter of refusal dated 15 January 2003 the Secretary of State expressed comprehensive disbelief of the history given to him by the appellant. He expressed disbelief that the appellant had been detained by rebel forces; disbelief that he had suffered beatings and the passage of an electrical current through his testicles; disbelief at his father-in-law's death; and indeed disbelief that the appellant had ever been a member of a Mai-Mai militia. He also pointed out that, even though RCD-Goma rebels were in control of much of the north and east of the DRC, the government of Joseph Kabele was firmly in control of the west and that in any event there was no reason for the appellant to fear persecution or human rights abuses if returned to Kinshasa, which is in the extreme west of the country.

7. Apparently galvanised by the rejection of his credibility, the appellant secured two expert reports for use before the adjudicator.

8. The first report was by Professor Pottier. He is a research fellow attached to the School of Oriental and African Studies at the University of London and has special responsibility for Central Africa; prior to joining the school in 1980 he lived and worked in Zambia and the DRC; and he has written extensively on the politics of the DRC. In his report he explained in detail the conflict since 1996 between the established government of the DRC, led first by Laurent Kabila and, since his murder, by Joseph Kabila, and the Rwanda-backed RCD-Goma rebels. He also sought to address the ambiguous political sympathies of the various autochthonous Mai-Mai groups and in particular to explain why, even though they have for long been generally at loggerheads with the RCD-Goma rebels, it does not follow that they have a close relationship with the Kabila government. He also referred to an agreement reached in Pretoria in December 2002 under which a transitional coalition government, headed by Laurent Kabila, was set up in the DRC. Within the government is a substantial constituency of members of RCD-Goma, which has thus expanded its power from its base near the eastern border with Rwanda across the DRC to the west and even to Kinshasa. He explained that, following the Pretoria agreement, some Mai-Mai groups

had reconciled themselves to the end of hostilities, while others continued to fight the former rebel factions, in particular RCD-Goma, in order to drive Rwandan influences out of the DRC. He explained that hostility on the part of Mai-Mai groups towards RCD-Goma goes particularly deep because of the brutality with which the latter has treated the former, particularly in 1999 when entire villages suspected of collaboration with the Mai-Mai had been eliminated by RCD-Goma.

9. The professor then addressed the evidence of conditions in the detention camps in which RCD-Goma rebels held members of the Mai-Mai. He said that it was well known that camp conditions were very harsh; but that, in order to ensure that detainees received some food, family members were allowed to visit them. He said that overcrowded cells, beatings with belts and torture by the application of electric shock to genitals were common. He said that the appellant's account of the conditions under which he was held, and of the torture which was inflicted upon him, conformed with what observers and human rights organisations had reported. He said that conditions in the camps had been described as subhuman; and that the appellant's description of the torture imposed upon him came over as genuine. He was also asked, if possible, to comment on the appellant's allegation that he had managed to escape, in particular on the second occasion. The professor reported that each of the reasons offered by the appellant for his ability to escape on that occasion was very plausible: first because his alleged escape was indeed at a time when riots were occurring which would have diverted the attention of his captors; and second because the allegation that his fellow tribesman was unable to understand his affiliation with a Mai-Mai group reflected the fact that the appellant comes from an area in central DRC in which there is no particular sympathy for the Mai-Mai.

10. Finally the professor considered the argument that in any event it was safe for the appellant to return to an area of the DRC under government control. In this regard he repeated that the relationship between RCD-Goma and the Mai-Mai remained unresolved; and he ended his report in these words:

> "Now that RCD-Goma have secured a strong position within the DRC's transitional government, we have every reason to believe that the RCD-Goma will intensify its efforts to quash the Mai-Mai movement. In all likelihood, this means that the anti-Mai-Mai campaign will move beyond eastern Congo to other parts of the country where Mai-Mai and their sympathisers may be residing. This more than likely scenario implies that no area of the DRC would be safe for [the appellant] to return to."

11. The second report procured on the appellant's behalf was that of Dr Norman, attached apparently to Bristol University and with special expertise in genito-urinary medicine and a part-time worker for the Medical Foundation for the Care of the Victims of Torture. The doctor examined the appellant on about 13 June 2003. After taking a history, she examined him naked. She found a mass of scars on his body. The appellant told her to ignore two such scars on his arm and chest because, according to him, they were the result of vaccination and of surgery. However, according to the doctor, there remained multiple circular scars on the fronts and backs of his legs and arms; multiple fine linear scars over the entire surface of his back; further scars on his

left shoulder, in his left loin area and along his right buttock; a cluster of scars over his right shin; and a scar below his left knee. In particular, however, she reported -- and demonstrated diagrammatically -- that on the underside of his penis were two scars, one at the tip which measured 1.5 centimetres in length and was irregularly shaped and with variable pigmentation; and one at the base, of the same length and shape and with irregular pigmentation.

12. The doctor reported that a number of the scars were consistent with beatings with a belt; that the multiple circular scars on his legs and arms were consistent with bites from leeches on an occasion when, according to his account to her, he had by way of punishment been thrown into a barrel of leeches; that the scars on his legs were consistent with being kicked with booted feet; and in particular that the scars underneath his penis were consistent with having been tortured by the application of electrodes to his genitals.

13. The doctor went on to say that, in her opinion, the veracity of the appellant's history was increased by his insisting that two of the scars had an innocent explanation; and that his emotional state when giving her his history, in the course of which he had at one point burst into tears and been unable to speak for several minutes, was also in her view consistent with the history of torture which he had given to her.

14. The appellant was represented by counsel before the adjudicator and gave oral evidence. In relation to conditions past and present in the DRC the adjudicator had before her not only the professor's report but other, albeit obviously less focussed, background material. She did not identify the other material but it seems that she had been provided with a quantity of material produced by Amnesty International and a Country Report by the US Department of State.

15. It is important to an understanding of the basis for the appeal that I should summarise the adjudicator's findings in the order in which she expressed them. She said that:

(a) in an obvious reference to the appellant's first alleged escape, she 'concluded' that his account of being able to escape through a broken wall was 'not credible';
(b) it was inherently implausible that someone who claimed to have regularly been tortured would have been able to make that escape;
(c) the above adverse finding, on an essential aspect of the appellant's claim, bore adversely on the rest of his account;
(d) in an obvious return to her analysis of the first escape, the background evidence did not support the suggestion that conditions of captivity by RCD-Goma were such that a prisoner could walk to freedom through gaps in the wall;
(e) in the light of the background evidence as to the brutal treatment of the Mai-Mai by RCD-Goma, the appellant's account of his second escape was 'wholly not credible';
(f) in an obvious reference to the same incident, it was 'not credible' that a guard would have had the inclination or the ability to release the appellant;

(g) in an apparent return to the circumstances of the first escape, it was 'wholly not credible' that a detention camp run by RCD-Goma would have had holes in the walls;
(h) in a further reference to the second alleged escape, it was 'not credible' that a guard would or could have assisted the appellant to escape;
(i) the appellant's claim to have been detained for as long as three years and regularly tortured with a view to obtaining information from him was 'wholly not credible' in that the background evidence suggested that RCD-Goma murdered members of the Mai-Mai, instead of detaining and torturing them over such a prolonged period;
(j) it was 'wholly not credible' that the appellant's alleged captors allowed his wife to visit him in prison and/or in hospital: although the background evidence suggested that the DRC government allowed prisoners to have such visits, there was nothing in the background material to support the professor's assertion that RCD-Goma allowed its prisoners to have such visits; and
(k) it was 'wholly not credible' that the appellant's alleged captors allowed him to go to hospital.

16. It was at this point, and only at this point, in her determination that the adjudicator turned to Dr Norman's report. She said as follows:

> "The medical evidence does not assist the appellant. The medical evidence, whilst noting the number and location [and] size of numerous scars on the appellant and his current, assessed to be fragile, mental state, does not consider or deal with whether the scars could be the result of anything else, for example, childhood illness or skin disease. I conclude that the medical evidence does not assist in establishing the appellant's case and the doubts I have expressed on the credibility of the fundamental aspects of his claim have not been resolved by the medical evidence in any sense."

In a later passage the adjudicator affirmatively asserted that the scars 'could well be' from childhood disease, adult skin disease or illness.

17. Following that interposition in relation to the doctor's report, the adjudicator continued her analysis. She found that, in that they were inextricably linked with his claim to have been detained and tortured, the appellant's claims to support the Mai-Mai were 'entirely not credible'. Indeed later she stated that she found no part of his account to be credible. She considered that the appellant could return to the DRC without any history of detention; that, in relation to his claim under Article 8 of the Human Rights Convention, his wife had not been established to be a refugee but had been granted only exceptional leave to remain and that she could, if she wished, return with him to the DRC; and that, were she not to do so, she would be the one to have interfered with respect for the appellant's family life.

18. Finally the adjudicator added:

> "Although rebel-controlled areas are not safe for returnees, the appellant,

with or without his family, can be returned to the DRC to Kinshasa."

19. In his grounds of appeal to the tribunal, drawn by counsel other than Miss Braganza who appears on his behalf today, the appellant made three points:

(a) The adjudicator had not at the hearing articulated her theory that the appellant's scars had been sustained as a result of illness or disease and that, had she done so, the appellant would have sought an adjournment in order to call Dr Norman to address the theory.
(b) The adjudicator had far too readily dismissed the professor's focussed and informed comments upon the likelihood of the appellant's account in the light of the former's knowledge, direct and indirect, of circumstances in the DRC. In this regard it was submitted that the adjudicator had failed to look at the case in the round.
(c) The adjudicator's despatch of the appellant's arguments under Article 8 of the Human Rights Convention had been flawed.

20. As I will explain, it is one of the central features of the argument before this court that the adjudicator fell into legal error in appraising parts of the evidence adduced on behalf of the appellant bit by bit and, in particular, in addressing the doctor's evidence only after she had conclusively rejected the central features of the appellant's case as incredible. In fairness to the tribunal, I would have preferred to see that argument more clearly articulated in the grounds of appeal put before the tribunal; nevertheless, it was there in summary form and I believe that it was reasonably clear that the whole fact-finding *modus operandi* adopted by the adjudicator was under challenge.

21. Much of the written determination of the tribunal, signed by Mr Andrew Jordan, Vice President, on behalf of himself and his two colleagues, relates to fresh points which it had permitted to be made with reference to the current medical condition of the appellant, being a matter which is not raised in today's appeal. In earlier passages, however, the tribunal rejected the complaint as to how the adjudicator had approached the report by Dr Norman. It held that it was sustainable for the adjudicator to have concluded that, while consistent with the appellant's account, the doctor's evidence of the scars was not determinative of it in that circumstances other than torture might have caused them. It also held that the professor's report could establish only that the appellant's account was consistent with events in the DRC and not that it was truthful. But the overarching point made by the tribunal was that the proposed return of the appellant, with or without his family, would be to Kinshasa and that the issue was whether such was a place where he would be at risk. "There is nothing", said the tribunal, "in [the report of the professor] that suggests the appellant will be at risk in Kinshasa as a result of his involvement, such as it was, with the Mai-Mai".

22. In the grounds presented to the tribunal for permission to appeal to this court, the points now made on behalf of the appellant were fully made. In refusing permission the Vice President, perhaps understandably, did little more than to repeat the tribunal's essential conclusions. In particular he wrote:

"Credibility apart, the Tribunal considered the central issue was the risk faced by the applicant on return to Kinshasa. There was no evidence to

> suggest that the applicant will be at risk there, even if the applicant's account were true. ... That finding disposes of the grounds of appeal."

23. In the light of my view as to the proper despatch of this appeal, it would be wise for me to keep my own views about the effect of the evidence to a minimum. The basis of the appeal is not that the weight of the appellant's evidence, coupled with that of the two experts, should have driven every reasonable fact-finding body to accept his account and to uphold his appeal but that he has been the victim of a flawed fact-finding exercise on the part of the adjudicator and that the tribunal fell into legal error in failing to recognise it and to remit the appeal for redetermination. In this regard Miss Braganza relies heavily upon the way in which the adjudicator folded the doctor's report into her enquiry only at a point after she had reached her conclusions and upon the way in which she jettisoned the focussed comments of the professor.

24. It seems to me to be axiomatic that a fact-finder must not reach his or her conclusion before surveying all the evidence relevant thereto. Just as, if I may take a banal if alliterative example, one cannot make a cake with only one ingredient, so also frequently one cannot make a case, in the sense of establishing its truth, otherwise than by combination of a number of pieces of evidence. Mr Tam, on behalf of the Secretary of State, argues that decisions as to the credibility of an account are to be taken by the judicial fact-finder and that, in their reports, experts, whether in relation to medical matters or in relation to in-country circumstances, cannot usurp the fact-finder's function in assessing credibility. I agree. What, however, they can offer, is a factual context in which it may be necessary for the fact-finder to survey the allegations placed before him; and such context may prove a crucial aid to the decision whether or not to accept the truth of them. What the fact-finder does at his peril is to reach a conclusion by reference only to the appellant's evidence and then, if it be negative, to ask whether the conclusion should be shifted by the expert evidence. Mr Tam has drawn the court's attention to a decision of the tribunal dated 5 November 2004, namely HE (DRC - Credibility and Psychiatric Reports) [2004] UKIAT 00321 in which, in paragraph 22, it said:

> "Where the report is specifically relied on as a factor relevant to credibility, the Adjudicator should deal with it as an integral part of the findings on credibility rather than just as an add-on, which does not undermine the conclusions to which he would otherwise come."

25. In my view such was the first error of law into which the adjudicator fell. She addressed the medical evidence only after articulating conclusions that the central allegations made by the appellant were, in her extremely forceful if rather unusual phraseology, 'wholly not credible'. Furthermore she said that she considered that the evidence did not assist her because of her belief that the scars could well be reflective only of illness or disease. Although I accept that the fact that the appellant had identified only two of the scars as being thus reflective did not establish that the others were inflicted in the course of torture, it does -- and here I choose my words with care in the light of what I will be proposing to my Lords as the proper disposal of the appeal -- seem at first a little unlikely that, to take one example, the scars underneath the penis were the result of illness or disease rather than of the torture of the genitals, with which,

by reference to a book on the medical documentation of torture, the doctor had regarded them as consistent. Unusually the adjudicator's determination had not included the usual express reminder to herself of the requisite standard of proof. Had she had the standard even more in the forefront of her mind; had she in particular considered the scars on the penis and also, perhaps, the multiple linear scars on the back; and above all, had she conducted her reference to the doctor's evidence at the right forensic time; then it is at least possible that she would have come to a different conclusion.

26. By reference to that point alone, I am driven to conclude, with all due respect to the adjudicator and to the tribunal, that the former made an error of law which the latter should have recognised. But the errors do not end there. In my view certain of the adjudicator's findings have cumulatively to be surveyed and then contrasted with the views of the professor:

(a) The adjudicator found that the appellant's account of his second escape/release was wholly not credible. The professor, however, had offered a view that the reasons why he had been enabled to escape on this second occasion were very plausible. Although I have already accepted that issues of credibility were for the adjudicator, it was relevant for the professor to point out (as, notwithstanding the submissions of Mr Tam, I construe him to have done) that this second escape indeed occurred at the time of riots; and that the appellant and the alleged guard were members of a tribe which was not affiliated with the Mai-Mai and which had no particular sympathy with it. It was, to put it mildly, bold of the adjudicator to say that, notwithstanding the professor's view, the appellant's account of this incident was wholly not credible; and it seems to me that, although she had in principle the right so to do, she had to venture a reason not just for rejecting his view but indeed for placing it outside the spectrum of rational views.

(b) The adjudicator also found it wholly not credible that the appellant's wife would have been permitted to visit him in prison and in hospital. She did admittedly remind herself that her conclusion in this respect differed from that of the professor, who had, without qualification, stated that RCD-Goma allowed families to visit detainees. If he was thereby making a statement directly inconsistent with any of the other, objective material before her, the adjudicator has not identified it. Again in my view she owed the appellant a reason for finding that his expert's view was beyond the pale of credible views.

(c) The adjudicator's conclusion that the appellant's account of being detained and tortured for almost three years was incredible also ran wholly counter to the professor's view that his account of detention and torture was believable. I am yet again perplexed that the adjudicator, who of course did not need to express herself in such vivid terms, felt able to sideline the professor's view in this regard as worthless; and, as before, it seems to me that a proper fact-finding enquiry involves explanation as to the reason for which an expert view is rejected and indeed placed beyond the spectrum of views

which could reasonably be held.

27. The adjudicator mentioned the option of the appellant's internal relocation only in one sentence. The gist of her decision was that the appellant could safely return to any part of the DRC, but, almost by way of a postscript, she made reference to his facility in any event to return to Kinshasa. Notwithstanding that it found no flaw in the adjudicator's decision-making, the tribunal, by contrast, concluded that the central issue was such risk as the appellant faced if returned to Kinshasa. Without any express consideration of whether it would be unduly harsh to expect the appellant to relocate to Kinshasa, it asserted that there was "nothing in [the professor's] report" and "no evidence" to suggest that the appellant would be at risk there. Unfortunately, under the pressure of work which now notoriously besets it, the tribunal there forgot the concluding sentences of the professor's report. His suggestion had been that no area of the DRC would be safe for the appellant. Fortunately it is not for us to decide whether that perhaps controversial proposition is valid. It is clear, however, that, in its despatch of what it regarded as the central issue, the tribunal, which had failed to recognise the legal errors of the adjudicator, added another one.

28. I consider that this court has no option but to allow the appeal; to set aside the tribunal's dismissal of the appellant's appeal to it; and to make the only order which could reasonably have been made by the tribunal, namely to set aside the adjudicator's determination and to remit the appellant's appeal to another adjudicator for fresh determination. In view of the appellant's aspiration on this appeal to introduce into the evidence a quantity of recently published material about circumstances in the DRC, it is worthwhile to note that, by virtue of section 85(4) of the Act of 2002, the adjudicator will be able to consider all such material.

29. LORD JUSTICE BUXTON: In his careful submissions, Mr Tam urged that a broad and not a technical approach should be taken to an adjudicator's decision and to the reasons that he or she sets out. I respectfully agree. That restraint on the part of the appellate court is especially important when, as is now the case, an appeal to the Immigration Appeal Tribunal is on a point of law only. Where, as in this case, complaint is made of the reasoning of an adjudicator in respect of a question of fact (that is to say credibility), particular care is necessary to ensure that the criticism is as to the fundamental approach of the adjudicator, and does not merely reflect a feeling on the part of the appellate tribunal that it might itself have taken a different view of the matter from that that appealed to the adjudicator.

30. For the reasons given by my Lord, this case does meet that criterion. The adjudicator's failing was that she artificially separated the medical evidence from the rest of the evidence and reached conclusions as to credibility without reference to that medical evidence; and then, no doubt inevitably on that premise, found that the medical evidence was of no assistance to her. That was a structural failing, not just an error of appreciation, and demonstrated that the adjudicator's method of approaching the evidence diverted from the procedure advised in paragraph 22 of HE, set out by my Lord.

31. Further, though perhaps lest obviously, I agree that if an expert's view is to be rejected in the conclusive terms adopted by the adjudicator in this case, then proper procedure

requires that at least some explanation is given of the terms and reasons for that rejection.

32. These failings were errors of law or principle, and not just the basis for a criticism of the adjudicator's actual finding of fact. The Immigration Appeal Tribunal should have recognised that, and thus quashed the adjudicator's determination and remitted the case for rehearing: an order which, as proposed by my Lord, this court should now make.

33. LORD JUSTICE WARD: I agree with both judgments.

ORDER: Appeal allowed; the decision of the adjudicator quashed and the matter sent back to a different adjudicator for redetermination; the Respondent to pay the Appellant's costs, to be the subject of a Community Legal Service Funding detailed assessment.

(Order not part of approved judgment)