[2003] UKIAT 00012 B (DR Congo)

Heard at Field House on 24 February 2003

Date of Promulgation:12.06.03

IMMIGRATION APPEAL TRIBUNAL

Before

Mr K Drabu (Chairman)
Mr A G Jeevanjee

Between

APPELLANT

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

REPRESENTATION:

For the Appellant: Mr D O'Callaghan of Counsel instructed by Waran & Co, solicitors.
For the Respondent: Mr D Buckley, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a national of the Democratic Republic of Congo. He appeals to us with leave against the decision of an Adjudicator, Mr J R Devittie who dismissed his appeal against the respondent's decision not to allow him to remain in the United Kingdom under the Human Rights Act 1998. The appellant arrived in the United Kingdom on 11 December 195 and claimed asylum. The application was refused on 1 October 1996 and his appeals against the decision were finally determined and dismissed on 10 May 1999. On 28 July 1999 the appellant made a claim to remain under human rights. That claim was considered but refused by the respondent on 15 January 2002. The Adjudicator dismissed appeal against that decision on 15 October 2002.

2. The appellant had given oral evidence before the Adjudicator, stating that since his arrival in the United Kingdom he had been active in the activities of the RNS, which fights for human rights in the DRC. He told the Adjudicator that he had attended their meetings regularly and in June 2001 he had attended a demonstration when the Minister of Information had visited London. He produced a newspaper article he had written at the time and which he said had been published in Kinshasa. He said that he had not intended to publish the article. It

had fallen into the hands of a journalist who had published it in Kinshasa. He told the Adjudicator that because of this article and because of his activities in the United Kingdom, he would face torture and degrading treatment if he were returned to the DRC. The Adjudicator said, "I do not believe the appellant's evidence as to how the article came to be published. He was vague and hesitant. The ground upon which leave to appeal to the Tribunal was granted was that arguably the Adjudicator did need to consider the possible effect of the article, self serving though he found it: see **Danian [2000] Imm AR 96.**

3. Before us Mr O'Callaghan relied upon the article and argued that the Adjudicator had failed to consider the issue of risk on return properly in that he had disregarded the article on an improper basis. He argued that the Adjudicator ought to have considered in the light of the objective as well as subjective evidence whether the appellant would be safe from persecution in the DRC on his removal from the United Kingdom. He submitted that the Adjudicator's approach to the relevant evidence had been wrong. He asked that we give due weight to the objective evidence on DRC and also the decisions of the Tribunal in **Mozu [2002]UKIAT 05308**, and **Bashiya [2002]UKIAT 00186**. Mr O'Callaghan requested that the appeal be remitted for a fresh hearing before a different Adjudicator. When we asked whether there was any impediment as to why we could not deal with the appeal on its merits, Mr O'Callaghan said that as far as he was concerned, there was none. He submitted that the appellant would be at real risk of inhuman and degrading treatment on return because it would soon be discovered that he was a failed asylum seeker and that he had been active in dissident politics of the DRC in the UK.

4. Mr Buckley said he had "sympathy with the Counsel because it was not enough for the Adjudicator to find that the article was self-serving". He said that the determination of the Adjudicator in this case was "bad" as he should have considered whether the appellant would be regarded as anti-government. He drew our attention to paragraph 5.22 of the CIPU on DRC and submitted that there has been some improvement in the conditions in the DRC but "not a lot". He suggested that as the appellant has been away from the DRC for many years, his past activities, if any, would be of little interest or relevance to the authorities. He said that he would not oppose remittal of this appeal. When asked to address us on the merits, Mr Buckley simply said that the appellant would now be at less risk than before and that he would be likely to be arrested on arrival but investigations would not reveal anything adverse about him, He asked us to take account of the CIPU January 2003 Bulletin on DRC. And the decision of the Tribunal in **Madjidi [2002]UKIAT 02245**. Mr Buckley's attention was drawn by the Tribunal to Paragraphs 5.19, 5.20 and 5.21 and asked whether the contents of these paragraphs were contradictory to the contents of Paragraph 5.22, which he had asked us to bear in mind. He agreed that there is a contradiction but asked us to find that the return of the appellant to the DRC would not breach his rights under Article 3. In his final submission, Mr O'Callaghan drew our attention to the report of the expert and also Paragraph 5.33 of the CIPU. He asked us to bear in mind paragraphs 4.14 to 4.17 in the event the appellant is detained on arrival. He

also reminded us that according to Paragraph 5.38 use of torture is common in the DRC. He asked that the appeal be allowed.

5. The parties are agreed that the decision of the Adjudicator is unsustainable. In our view he not only erred in failing to address properly the risk on return due to the article that the appellant was relying upon and his activities in the United Kingdom in support of democratic rights of people in the DRC, he also appears to have misread or misconstrued the objective evidence in relation to the DRC. With regard to the conditions in the DRC the Adjudicator has stated in his determination, "The CIPU report indicates that political parties are allowed to exist in the DRC particularly in Kinshasa. There is nothing in this appellant's past, which makes him stand out for attention. There is no reason why his article which voices concerns shared by many in the DRC should have ruffled feathers in the DRC to the extent of placing him in dander (sic) of ill treatment." With great respect the Adjudicator understanding of the situation in the DRC is far removed from what is apparent from a full and not unduly selective reading of the CIPU. The government in the DRC is not a functioning democracy that the Adjudicator seems to have understood where "political parties are allowed to exist" and where the concerns raised by the appellant in his article "are shared by many". Our reading of Paragraphs 5.19 to 5.22 of the CIPU leads us to believe that freedom of assembly and political association is severely restricted. " The Government considers the right to assemble and associate subordinate to the maintenance of public order. The Government requires all organisers to apply for permits, which are granted at Government's discretion. Public activities generally are dispersed by the security forces. The Government requires political parties to apply for permits to hold press conferences but such permits are frequently denied." (Paragraph 5.19 of the CIPU). In our view the decree of 17 May 2001 which allows political parties to function legally and is therefore described as "liberalising political activities" is so full of conditions that political parties have to meet before their notification as a Party can be accepted that it makes the use of the phrase "liberalising political activities" a mockery. (Refer to Paragraph 5.20). According to Paragraph 5.22 the "political party offices by and large remain open and members of political parties can carry out internal administrative functions. In 2001, opposition parties were able to hold private meetings without government harassment which had not been the case in previous years." We note that offices remained open for "internal administrative functions" and that opposition parties could only hold private and not public meetings without government harassment. Of course we do not disregard the fact that in years prior to 2001 the government caused harassment even in the private meetings of political parties and that "government harassment of various political parties decreased in 2001 as compared with previous years." At the same time we note, "The Government, however, prevented most political gatherings and press conferences." (Paragraph 5.22). In view of the contents of the paragraphs referred to above and the contents of paragraphs 4.12 to 4.31 to which we will shortly make reference, we are left in no doubt that the Adjudicator's consideration of risk on return to the appellant was quite superficial and in serious error. In the circumstances we agree with the parties that the Adjudicator's determination is unsustainable. We do not agree with Mr O'Callaghan's initial submission and the submission of Mr Buckley that

the appeal should be remitted for a fresh hearing. We do not see how that can be of any assistance to either party. The evidence required to make a decision in this case is before us as it was before the Adjudicator. His decision is set aside for lack of proper consideration of the evidence that was before him. No new evidence is expected and therefore we do not see the point of a new hearing.

6. We have considered all the evidence and the submissions of the parties. We have taken due note of the cases that we were referred to. In this regard we should say that we did not find any of the cases to be of any great help as most of the cases, as one would expect, are very much bound by their own facts and do not purport to lay down any general principles of law. To the extent of taking note of consistency in decision making we note that in Mozu the Tribunal said, "The DRC is in a very unsettled condition and the evidence of the reception of returned asylum seekers, particularly from the UK is such that her return does indeed expose the appellant to a serious risk of imprisonment and with it rape. The conditions in prison are clearly inhuman and degrading anyway. This would be a breach therefore of Article 3." The decision in this case was promulgated on 20 November 2002. As against that we note that in its January 2003 CIPU Bulletin, the respondent states that "There has been no suspension of removals of failed asylum seekers to the DRC. There are currently administrative problems in obtaining travel documents from the DRC Embassy in London but the Home Office is fully co-operating with the DRC Embassy to resolve these administrative problems" It also goes on to say, "It is normally safe to return failed asylum seekers to Kinshasa in the DRC provided the returnees have valid identification and travel documentation." We do not know whether the appellant has valid identification and travel documents and we have no evidence before us of the likelihood of success in obtaining such documentation for him in the event that he does not have it. But that is not, for us, the determinative factor in this case.

7. We have considered the article that was published in Kinshasa. The Adjudicator did "not believe the appellant's evidence as to how the article came to be published." The Adjudicator did not dispute the publication of the article. Nor did he dispute its anti-government content. He disputed or disbelieved the genuineness of the motivation underlying the publication of the article. This he did because he thought that in his evidence before him the appellant "was vague and hesitant". The Adjudicator has given no indication about the areas in which he found the appellant to be vague. Given that the appellant appeared before him, if he had thought that the appellant needed to give more detail than he had, he should have sought such details and if the appellant had not provided the detail then the Adjudicator could properly have concluded that he had been evasive in his evidence. To describe a person's evidence as vague and use that as a ground for disbelief is, in our view, quite unsatisfactory unless of course the areas of lack of detail, which cause concern, are clearly spelt out. The Adjudicator also disbelieved the appellant's evidence about how the article came to be published because he was "hesitant". Again such a description is far from satisfactory without more. One can be hesitant for perfectly bona fide reasons and one can be perceived to be hesitant for a number of bad reasons. As hesitancy is so closely linked to demeanour and judging demeanour across cultural divides is fraught

with danger, the less it is used to disbelieve a person, the less likely is the chance of being criticised for unfair judgment. As is evident, we are not impressed by the Adjudicator's reasons for not believing how the article came to be published. He thought that the appellant had engineered the publication of the article. On the evidence that was before the Adjudicator and applying the correct standard of proof, we seriously doubt the basis for this conclusion. We do not draw that conclusion. Even assuming the conclusion to be correct, we are still required to consider whether the very fact of publication would put the appellant's Article 3 rights at serious or real risk on removal from the United Kingdom. In this context we bear in mind that the appeal before us is not about asylum but solely on human rights grounds. In addressing this aspect Lord Justice Brooke in **Danian (CA) [1999] INLR 533** , page 553 paragraphs D, E ,F and G referred to the relevant parts of the EctHR judgment in **Chahal v United Kingdom (1996) 23 EHHR 413**, 456-457 In Paragraph 79 the Court said, "Article 3 enshrines one of the most fundamental values of democratic society. The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment irrespective of the victim's conduct…" In paragraph 80 the Court said, "The prohibition provided by Article 3 against ill treatment is equally absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion. In these circumstances, the activities of the individual in question, however undesirable or dangerous cannot be a material consideration. The protection afforded by Article 3 is thus wider than that provided by Articles 32 and 33 of the United Nations 1951 Convention on the Status of Refugees." He rejected the contention made on behalf of the Secretary of State that protection afforded by Article 3 should be narrowed in cases where risk is created by acts of bad faith. Lord Justice Buxton agreed with this view in paragraphs E, F and G on page 566 of the judgment. The Tribunal decision in the case of **Madjidi** upon which Mr Buckley placed reliance is of no assistance. Besides being fact specific, it was a decision under the Refugee Convention and the dismissal of the appeal did not give the respondent the power to remove the appellant from the United Kingdom. The Tribunal specifically said, "If the Secretary of State as a result of this decision decides that he will remove the appellant, the appellant will then have a human rights appeal"

8. Mr Buckley conceded that the appellant was reasonably likely to be arrested on arrival and would be subjected to interrogation. However he argued that any investigation would reveal nothing of interest to the authorities and he would therefore be safe. We are sure that the appellant will be interrogated on arrival and he is most likely to be detained pending investigation. While in detention he will be held either in one of the Detention Centres or the Prisons. In this context we have given careful consideration to the relevant parts of the CIPU. Paragraph 4.12 says, "Despite legal provisions governing arrest and detention procedures, the security forces have reportedly been responsible for numerous cases of arbitrary

arrest and detention……Security forces, especially those carrying out orders of any official who could claim authority, use arbitrary arrest to intimidate outspoken opponents and journalists. Charges are rarely filed and the legal basis for such detentions are often obscure….” We believe that the appellant will be perceived to be an outspoken critic of the government. The investigation is bound to disclose, in our view the publication f the article. It is accepted by all that the article was critical of the government and was published in Kinshasa. There is no such thing as free press in the DRC. Once in detention, we find that there are substantial grounds for believing that he will be tortured and subjected to inhuman and degrading treatment. We are driven to this conclusion by a careful reading of the section on Prisons and Prison Conditions in paragraphs 4.14 to 4.31 of the CIPU. Paragraph 4.14 states, “The present regime operates 220 known prisons and other places of detention, and in all such facilities, conditions are harsh, unsanitary and life threatening. Overcrowding and corruption are widespread. Prisoners reportedly are beaten to death, tortured, deprived of food and water and die of starvation. Prisoners are wholly dependent on their families for their survival.” (emphasis added). In paragraph 4.16 it is states, “The Government allows some international humanitarian organisations to visit political prisoners on a regular basis but when the detainees are held in official prisons. The Government does not allow these organisations to visit the numerous unpublicised and unofficial detention sites throughout the country where mostly newly arrested detainees are held, questioned and sometimes subject to abuse.” Paragraph 4.31 states, “The situation in security service detention centres is reportedly worse than the main prisons. Detainees are held in communicado for long periods and are often subjected to torture and other forms of cruel, inhuman or degrading treatment. (emphasis added) The detainees also lack medical facilities for ordinary illnesses or the effects of torture. Detainees are often held in congested, dark and poorly ventilated cells. The cells lack toilets and inmates use either open containers, which are rarely emptied or plastic bags as toilets. Detainees spend days or even weeks without being allowed to wash themselves or change clothes. Beatings of detainees is a regular occurrence and some detainees have their hands and legs bound, often as a punishment.” We believe there is a real and serious risk that the appellant will be detained in one such detention centre pending investigation or post investigation..

9. We have reminded ourselves of the high threshold required for Article 3. At the same time we have borne in mind the absolute nature of protection afforded by Article 3. In our judgment the removal of the appellant to the DRC would infringe his rights under Article 3. We therefore allow this appeal.

K Drabu
Vice President