EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

Lord Clarke
Lord Hardie
Lord Bonomy

[2010] CSIH 88
XA130/08

OPINION OF THE COURT
delivered by LORD HARDIE
in APPLICATION
by
MD
for leave to appeal against a decision of
the Asylum and Immigration Tribunal
Applicant;
against
THE SECRETARY OF STATE FOR THE
HOME DEPARTMENT
Respondent:

_____

Act: Murray; McGill & Co
Alt: Haldane, Q.C; C Mullin, Solicitor to the Advocate General

10 November 2010

Introduction

[1] The applicant is a national of Guinea, who arrived in the United Kingdom in March 2007 and claimed asylum. His claim was refused by the respondent and he appealed against that decision. By determination dated 7 July 2007 an immigration judge dismissed the appeal. Thereafter an order for reconsideration was made on the basis that the immigration judge's reasoning in support of his making adverse credibility findings relating to the applicant, may have been flawed. On 16 April 2008 a reconsideration hearing was held before a senior immigration judge and a designated immigration judge ("the Tribunal"). By decision prepared on 3 June 2008, they concluded that the reasoning on which the immigration judge had based his adverse credibility finding was flawed. However, they also determined that the adverse credibility finding made no material difference to the outcome of the appeal because the applicant had failed to show that he would face a real risk of persecution or serious harm were he to have returned to Guinea at any time after March 2007 and accordingly his fear of returning to Guinea was not well founded.

[2] The applicant sought leave to appeal against that decision to the Court of Session. The grounds of appeal were in the following terms:

> "It is respectfully submitted that the Tribunal have erred in law
> (i) by failing to reconcile the findings that there was no real risk with the passage cited at para. 16 of the decision that none of the officials met committed

themselves to prosecuting the perpetrators of such acts and until that happens, torture will remain the norm in Guinea. It is respectfully submitted that as the appellant has a perceived political profile he would still be at risk on return and the Tribunal have failed to reconcile the findings with the passage cited of torture ongoing and the appellant being at real risk;

(ii) by failing to construe the letter from the UFR at para. 17 in broader terms and finding that the letter was supportive of the appellant being at real risk on return;

(iii) by failing to make clear any findings at para. 18 as to what impact the arrest and torture of the appellant's wife has on the appellant's case and that this is supportive of the fact that the authorities are still interested in finding the appellant;

(iv) by failing to properly consider the country information demonstrating that torture was perpetrated on opposition activists and this was supportive of a real risk to the appellant on return."

On 4 July 2008, the Asylum and Immigration Tribunal ("AIT")refused that application for leave to appeal to the Court of Session. The applicant now seeks leave to appeal against that decision.

Submissions on behalf of the Applicant

[3] In support of the application, counsel for the applicant relied upon the acceptance by the Tribunal that the applicant faced a real risk of persecution in the early part of 2007. Mistreatment of the applicant in the past was a good guide to the risk of further mistreatment (*Salim* v *Secretary of State for the Home Department* 1999-0993C; *Demirkaya* v *Secretary of State for the Home Department* [1999] INLR 441;*Hathaway: "The Law of Refugee Status"* page 88). Properly understood, there was no evidence to show that there had been a material change of circumstances resulting in the removal of risk to the applicant. The second alleged error was that the Tribunal was not entitled to interpret the letter from UFR dated 8 March 2007 as having the meaning that the applicant was only at risk at the time that the letter was written. The third submission was to the effect that the Tribunal failed to comment on the relevance and significance of the applicant's evidence that his wife had been arrested because the authorities had been unable to find the applicant and that, following her arrest, she had been tortured while in detention.

Submissions on behalf of the Respondent

[4] Counsel for the respondent invited the court to refuse the application because it had no reasonable prospects of success (*Hoseini* v *SSHD* 2005 SLT 550). It was accepted by the Tribunal that the applicant faced a real risk of persecution as at February 2007 but thereafter there had been a significant change with the appointment of a new Government on 28 March 2007. The Tribunal had considered all the material available to it and had reached a conclusion that was reasonably open to it. In relation to the UFR letter, the Tribunal was entitled to take the view that it did because the letter related to the situation in Guineabefore the change of Government. Similarly the applicant's evidence about the detention and torture of his wife predated the change of Government. In all the circumstances there was no evidence to suggest that the applicant would be persecuted on his return and, for that reason, counsel invited the court to refuse the application.

Decision

[5] The applicant gave evidence to the effect that he was a well known member and activist in a political party (UFR). He was arrested and detained in December 2003 because of his political activities and the authorities sought to arrest him on 18 February 2007 but he escaped, arriving in the United Kingdom on 2 March 2007. The events giving rise to the interest by the police in the applicant in February 2007 arose out of anti-Government demonstrations and strikes in January/February 2007 during a period of political unrest. Although the immigration judge rejected the applicant's account as incredible, his conclusions in that regard were found to be flawed by the Tribunal. Nevertheless, we consider that the immigration judge's findings in respect of human rights abuses are significant. At paragraph 25 of his decision, the immigration judge observed:

> "The human rights abuses committed by the authorities during the demonstrations and strikes in January and February 2007 is (*sic*) well documented. The Amnesty International Fact Finding Report of 27 June 2007 refers to a wave of peaceful demonstrations sweeping through Guinea during those months. The accompanying use of excessive force by the security forces left 130 people dead and more than 1,500 injured. The report goes on to observe:
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> > *This violence is the latest example to date of a series of cases of excessive use of force ordered and supported by the highest authorities of the state over a period of almost 10 years. Whenever political opponents or citizens exasperated at difficult living conditions or a lack of political transparency, have demonstrated their discontent, notably during elections, the Guinean*

security forces have not hesitated to fire into crowds of demonstrators causing heavy loss of life."

In the letter refusing the applicant's claim for asylum, the respondent accepted that the applicant may have been a member of UFR and he may have taken part in strikes during January and February 2007. The respondent accepted as valid, a membership card for UFR submitted by the applicant. However, that party was lawful and membership did not contravene the law. Moreover, the Tribunal accepted that the applicant faced a real risk of persecution in the early part of 2007 during the strikes and state of siege in Guinea. In that situation, we consider that the applicant's genuine fear of persecution immediately before his flight from Guinea is relevant and it was for the Tribunal to explain, by reference to a significant change in circumstances, why they consider that the applicant is no longer at risk. We are supported in our view by the observations of Stuart-Smith LJ in *Demirkaya* v *SSHD op. cit.* at pages 448/9:

"*Tribunal's failure to have regard to previous persecution*

Mr Nicol submits that the treatment which the appellant received in the months before he escaped from Turkey was life-threatening and of a particularly horrifying kind. This is very relevant to the question whether the appellant has a well-founded fear of persecution on his return, yet the Tribunal do not advert to this aspect of the case at all. In MacDonald's *Immigration Law and Practice* (Butterworths, 4th edn), para. 12.8, the editors state:

'Past persecution substantially supports the well-foundedness of the fear in the absence of a significant change of circumstances.'

In his book *The Law of Refugee Status*, at p.88, Professor Hathaway states:

'Where evidence of past maltreatment exists, however, it is unquestionably an excellent indicator of the fate that may await an applicant upon return to her home. Unless there has been a major change of circumstances within that country that makes prospective persecution unlikely, past experience under a particular regime should be considered probative of future risk ...

In sum, evidence of individualised past persecution is generally a sufficient, though not a mandatory, means of establishing prospective risk.' "

Although the House of Lords in *Adan's* case held that historic fear was not sufficient and an applicant for asylum had to show a current well-founded fear, Lord Lloyd of Berwick said at [1999] 1 AC 293, 308C ...:

"This is not to say that historic fear may not be relevant. It may well provide evidence to establish present fear.

> This seems to me no more than common sense. ...
> In my judgement, if it is the opinion of the Tribunal that there has been such a significant change that the appellant is no longer at risk, it is incumbent upon them to explain why this is so."

[6] In the context of what appears to us to have been a systemic abuse of human rights over a period of almost 10 years prior to the escape of the applicant from Guinea, we respectfully agree with these observations to the effect that it is incumbent upon the Tribunal to justify their conclusion that the applicant would no longer be at risk of persecution because of a significant change in the regime in that country. We emphasise that what is required is evidence of a significant or major change that is sufficient to persuade the Tribunal that the long-standing systemic pattern of human rights abuses of UFR activists such as the applicant will not persist. We are not satisfied that a sufficient basis for such a conclusion is contained within the decision of the Tribunal. Although we note that on 28 March 2007 a new Government was appointed, President Conté remained as Head of State. We doubt whether the aspirations or the "wave of hope" occasioned by the formation of the new Government are of themselves sufficient to merit the conclusion that the necessary significant change has been effected for the inference to be drawn that the applicant is no longer at risk of persecution were he to return to Guinea. We are reinforced in that view by the contents of paragraph 16 of the decision of the Tribunal to the following effect:

> "We have considered a report dated June 2007 by Amnesty International entitled 'Systematic Use of Torture in Guinea' ... This refers to a recent visit by Amnesty International to Guinea which revealed that torture and abuse were widespread in pre-trial detention. The report appears to be concerned, however, with those who were detained around the time of the anti-government demonstrations in January and February 2007. It is not disputed that the authorities arrested and ill-treated opponents during this period. The final paragraph of the report reads as follows:
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> > 'AI raised the issue of torture with the new Minister of Justice. She acknowledged that torture was a real problem, saying that her priority was to ensure that lawyers be present during the first hours following arrest. According to the Minister of Security, enquiries had been opened into some allegations of torture. However, none of the officials AI met committed themselves to prosecuting the perpetrators of such acts. Until that happens, torture will remain the norm in Guinea.' "

Although the Tribunal concluded that this passage related to detentions in January and February 2007, the reference to the new Minister of Justice clearly relates to her appointment after the creation of the new Government and the tenor of the passage is to the effect that torture is the norm in Guinea. In these circumstances we are not satisfied that the Tribunal has adequately explained its reasons for concluding that the applicant is no longer at risk of persecution should he return to Guinea. That is sufficient reason for us to allow the application for leave to appeal, to allow the appeal and to remit the case to the Upper Tribunal to proceed as accords.

[7] However, it is appropriate that we should deal with the other issues raised on behalf of the applicant. The first related to the allegation that the Tribunal had erred in construing the letter from the UFR as indicating that any risk to the applicant pre-dated the formation of the new Government. We reject that submission. Although the letter was written following the departure of the applicant from Guinea and refers to his still being at risk, nevertheless it pre-dates the formation of the new Government and the Tribunal was entitled to draw the conclusion which it did. The second issue related to the failure of the Tribunal to comment on the relevance or significance of the applicant's evidence concerning the detention and torture of his wife. While it is correct that, at paragraph 18, the Tribunal simply record the applicant's evidence to that effect without comment, we consider that the only significance of this evidence is to reinforce the applicant's claim that, at the time of his escape from Guinea, he was at real risk of persecution. As this has been accepted by the respondent and by the Tribunal, the failure of the Tribunal to comment on this aspect of the applicant's evidence does not amount to an error of law. If these two submissions had been the only matters raised before us, we would not have allowed the application for leave to appeal.

[8] For the reason given above, we shall allow the application for leave to appeal, allow the appeal and remit the case to the Upper Tribunal to proceed as accords.