Asylum and Immigration Tribunal

MK (AB & DM confirmed) Democratic Republic of Congo CG [2006] UKAIT 00001

THE IMMIGRATION ACTS

Heard at Field House
On 29 November 2005

Determination Promulgated

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Before

DR H H STOREY (SENIOR IMMIGRATION JUDGE)
MR L V WAUMSLEY (SENIOR IMMIGRATION JUDGE)

Between

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr N Sekhon, Counsel, instructed by Switalski's Solicitors
For the Respondent: Mrs R Pettersen, Home Office Presenting Officer

*The June 2005 HJT report concerning suspension by the Netherlands of the return of asylum seekers to DRC does not afford a sufficient basis for modifying the conclusions on failed asylum seekers reached in **AB & DM**.*

DETERMINATION AND REASONS

1. The appellant is a national of Democratic Republic of Congo (DRC). By a determination notified on 16 August 2005, the Immigration Judge allowed on human rights grounds only the appellant's appeal against the decision to refuse to grant asylum and to refuse to grant leave to enter. The respondent seeks reconsideration of the determination.

2. The Immigration Judge did not find the appellant's account credible and he rejected it 'in its entirety...' (paragraph 57). Having rejected the asylum claim he went on to

consider the appellant's human rights claim. At paragraphs 59 to 60, with reference to the issue of risk on return to failed asylum seekers, he stated:

> 'I note the discrepancy between the evidence from the British Ambassador and the human rights activist. The letter from the British Ambassador post dates the information from the human rights worker. There is however evidence that this practice of detention assault and extortion of deportees continues as at 27 June 2005 if a person is unmasked as an asylum seeker (B60).
>
> Given the findings I have made and guidance case law which I believe is out of date and does not take account of the Dutch information I accept its is reasonably likely the appellant will be subjected to inhuman or degrading treatment if returned to DRC given paragraph 34 and 35 above.'

3. Essentially therefore the Immigration Judge decided to allow the appeal because he considered that the appellant, as a failed asylum seeker, would be at real risk on return of ill-treatment contrary to Article 3.

4. The grounds alleged that this decision manifested a failure to follow a country guidance determination, that of ***AB and DM (Risk categories reviewed – Tutsis added) [2005] CG DRC UKIAT 00188*** in particular.

5. At the reconsideration hearing Mr Sekhon submitted firstly, that the Immigration Judge could not be said to have materially erred in law in failing to follow ***AB and DM*** because neither of the parties had put the case before him and he plainly did not know about this decision, which was excusable because it had only been promulgated (on 21 July 2005) some four or five weeks prior to the hearing of this appeal on 12 August 2005. Secondly, in paragraphs 59-60 the Immigration Judge had effectively relied on compelling fresh evidence consisting in the evidence of the continuation as at 27 June 2005 of detention, assault and extortion of deportees if a person is unmasked as an asylum seeker. The reference he made was to an HJT Research News Reporting Service Item of 27 June 2005 which stated:

> 'Netherlands suspends returns of asylum seekers to DRC following reported leaks of official documents
> *HJT Research News Reporting Service*
> *27 June 2005*
>
> Dutch immigration minister Rita Verdonk announced a temporary halt of returns of failed asylum seekers to the Democratic Republic of Congo after official documents were reported to have been leaked to Congolese officials, BBC news reported on June 24th.
>
> According to BBC News, the announcement came at a special sitting of the Netherlands parliament following a report by the Dutch *Netwerk* current affairs programme last week. Congolese officials, BBC News reported, were said to have obtained

> confidential documents on several deported asylum seekers. The deportees were then "abused" by Congolese officials, BBC News said.
>
> An independent enquiry would be set up to investigate how the files were leaked, BBC News reported.
>
> BBC News added that Dutch media reports said human rights organisations had warned that deportees faced the "serious risk of imprisonment, extortion and assault if unmasked as asylum seekers".
>
> Expatica News (a news and information website for expats in Europe) reported on June 22 that minister Rita Verdonk had been called on to resign following the revelations. Expatica said that the *Netwerk* current affairs programme had reported that Congolese authorities had obtained official documents relating to Dutch asylum applications in at least three cases.
>
> According to Expatica, anonymous sources within the Congolese immigration service (DGM) and the country's security service (ANR) had told *Netwerk* that returnee asylum seekers "risk being held for detention for days, assaulted and receive a fine". Expatica reported that it was also alleged by some former asylum seekers that the Congolese authorities had been fully aware of the statements they had made in their asylum applications in the Netherlands.
>
> BBC News reported that minister Verdonk had previously reassured the Dutch parliament on several occasions that failed asylum seekers' files were kept secret.'

6. It is clear that that the Immigration Judge in this case was unaware of, or had overlooked, the ***AB and DM*** Country Guideline case notwithstanding that this had been posted on the AIT Country Guideline website list on 27 July 2005, over two weeks before he heard this appeal. In an earlier section of his determination, headed 'Guidance case Law', the only DRC case he referred to was ***[2004] UKIAT L DRC***. (This case is now cited as ***VL (Risk – Failed asylum seekers) Democratic Republic of Congo CG [2004] UKIAT 0007***). It can only have been this case that he had in mind in paragraph 60, when he referred to '... guidance case law which I believe is out of date'.

7. In fact the ***L (DRC)*** case was not the latest CG case, even leaving the ***AB and DM*** out of the equation for the moment. There were four others. These included ***RK (Obligation to investigate) DRC CG [2004] UKIAT 00129,*** added on 8 November 2004, which, inter alia, found that ***L (DRC***) continued to be applicable guidance.

8. Be that as it may, the case of ***AB and DM*** was published and was applicable country guidance at the date of hearing before this Immigration Judge. By virtue of AIT Practice Directions 18.2 made, inter alia, under section 107(3) of the

Nationality, Immigration and Asylum Act 2002, he was obliged to treat it as authoritative in any subsequent appeal, so far as that appeal:

> '(a) relates to the country guidance issue in question; and
> (b) depends upon the same or similar evidence'.

9. The fact that the Immigration Judge was unaware of the existence of applicable country guidance at the date of hearing does not make his failure to treat it as authoritative any less erroneous: see ***DK (Return – Ethnic Serb – Upheld SK – Accommodation) Croatia CG [2003] UKIAT 00153***.

10. However, whether this error amounted in this case to a material error of law comes down to the issue of whether or not the appeal before him depended upon the same or similar evidence as was before the panel in ***AB and DM.***

11. There is no specific reference in ***AB and DM*** to the 27 June 2005 document. There could not have been because the hearing of ***AB and DM*** took place on 25 February 2005 and no documents had been taken into account afterwards. Indeed, the panel hearing this case believed, on the basis of materials before it, that the Dutch government had not seen any evidence that failed asylum seekers were persecuted on arrival: see paragraph 34. However, in assessing the issue of risk to failed asylum seekers the panel in ***AB and DM*** considered a prodigious body of materials. Further it dealt specifically with the issue of risk arising from returnees from interrogation on arrival and being required to pay a fine. Comparing the materials which the panel in ***AB and DM*** had before it and those the Immigration Judge had before him in this case, we do not think that the fresh evidence he had was dissimilar.

12. In evaluating how the Immigration Judge approached the new evidence in this case it is important to take note of what issue it went to and how he approached that issue. The issue was a general one, indeed one of the most wide-ranging issues that can ever arise in respect of any country – failed asylum seekers. If the Immigration Judge was right in his assessment, then every national of the DRC who claimed asylum was potentially entitled to be recognised as at real risk of treatment contrary to Article 3 on return. We shall come back to the importance we attach to the scope of ***AB and DM'***s review of the evidence below.

13. In our view, when the risk category posited is a significant one it is also incumbent on an Immigration Judge to pay particular regard to paragraph 18.4 of the AIT Practice Directions:

> '18.4 Because of the principle that like cases should be treated in like manner, failure to follow a clear, apparently applicable county guidance case or to show why it does not apply to the case in question, is likely to be regarded as ground for review or appeal on a point of law.'

14. Very clear and cogent reasons have to be given for departing from country guidance on an issue which, by its very nature, requires consideration in the context of comprehensive evidence and argument.

15. With that in mind, we turn to consider what the Immigration Judge did in this case. He nowhere explained why he considered that the evidence before him was different or dissimilar to that considered in the Country Guideline cases of ***AB*** and ***DM*** because, as we have said, he was plainly unaware of that case. In any event, simply to say that '[t]here is however evidence that this practice of detention, assault and extortion of deportees continues as at 27 June 2005' was not enough. The mere existence of evidence proves nothing. What he was required to do was reach a decision as to why he considered that evidence weighty. Furthermore he was obliged by case law to reach a decision as to whether the evidence as evaluated was weighty enough to establish a *real risk* of treatment contrary to Article 3.

16. He was also required to consider that evidence in the context of the evidence as a whole. Plainly he failed to do that. In paragraph 59 he presented his decision as being based on resolution of a discrepancy between the evidence from the British Ambassador and the human rights activist; and the only reason he gave for preferring the latter was that that information post dated the British Ambassador's letter. The 27 June 2005 source, in turn, referred specifically to only a handful of cases, some specific to the Dutch government's alleged failure to adhere to the principle of confidentiality in respect of asylum claimant details; and it did not include the text of the sources relied on. If this Immigration Judge had read Tribunal country guidance on the issue of failed asylum seekers in the DRC, he would have seen that it has consistently not been accepted that untested reports of a small number of cases of asylum seekers said to have been ill-treated on return are sufficient on their own to demonstrate that failed asylum seekers generally are at real risk of serious harm of treatment contrary to Article 3. In the light of that previous finding, it was incumbent on the Immigration Judge to explain why he felt reliance could be placed on reports which appeared to be similarly untested, and why he felt, even if such reports were accepted, they demonstrated a real risk to returnees generally, in the light of the body of background evidence before him read as a whole.

17. The Immigration Judge's approach to the issue he sought to decide was legally flawed and he failed to show that the evidence on which he relied was dissimilar from the ongoing state of the evidence, considered in the round, relating to failed asylum seekers.

18. For an Immigration Judge to approach reversal of country guidance in so cavalier a fashion undermines the purpose and validity of country guidance as endorsed by the Court of Appeal in ***R (Iran) [2005] EWCA Civ 982***. The AIT Practice Directions make clear what an Immigration Judge needs to do if he is minded to depart from existing country guidance. The wider the risk category posited the greater the duty on an Immigration Judge to give careful reasons based on an adequate body of evidence.

19. Having decided that the Immigration Judge materially erred in law, we must now consider what decision we should substitute for that of the Immigration Judge

20. We do not consider that what the Immigration Judge referred to as the 'Dutch Information' substantiates the proposition that failed asylum seekers are generally at risk. We have no evidence in satisfactory form before us as to the circumstances of the individuals said to have been ill-treated. Some of this evidence refers to procedures which are clearly specific to those involved in Dutch asylum procedures and how their cases were handled by the Dutch authorities.

21. There is nothing in this evidence which relates to UK asylum procedures. It contains no suggestion that the DRC authorities have obtained documents relating to asylum claims made in the UK. In our view the sources referred to and the cases they refer to offer far too slender a basis for putting to one side the conclusions reached by the panel in ***AB and DM*****,** particularly given the very wide ranging consideration that panel gave to the state of the evidence on this issue and, having heard from a leading country expert, Dr Kennes, on procedures on return.

22. For the above reasons:

The Immigration Judge materially erred in law.

The decision we substitute for his is to dismiss the appeal on human rights grounds.

Signed Date

Dr H H Storey
Senior Immigration Judge

Asylum and Immigration Tribunal

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FUNDING DETERMINATION

1. The Tribunal is satisfied that, at the time the Appellant made the section 103A application and for the reasons indicated in the SIJ's order for reconsideration, there was a significant prospect that the appeal would be allowed upon reconsideration. Accordingly it orders that the Appellant's costs in respect of the application for reconsideration and in respect of the reconsideration are to be paid out of the relevant fund, as defined in Rule 33 of the Asylum and Immigration Tribunal (Procedure) Rules 2005

Signed Dated

Dr H H Storey

Immigration Judge