

IMMIGRATION APPEAL TRIBUNAL

Date of Hearing : 26 September 2003

Date Determination notified:

...29/10/2003....

Before:

Mr G Warr (Chairman)
Mr J A O'Brien Quinn, QC

Secretary of State for the Home Department

APPELLANT

and

RESPONDENT

DETERMINATION AND REASONS

1. The Secretary of State appeals the determination of an Adjudicator (Mr D.G. Zucker) who allowed the appeal of a DRC national (hereinafter referred to for convenience as the appellant) from the decision of the Secretary of State to refuse his application for asylum. The appeal was allowed on human rights grounds of appeal only, under Article 3.
2. Miss C. Hough appeared for the Secretary of State. Mrs P. Maudsley represented the appellant.
3. The appellant claimed to be a supporter of the MPR and he used to work as a singer accompanying the late President Mbutu and sign songs in his praise between 1990 and 1991. He worked in a bakery and in 1996 set up his own bakery. At a meeting which the appellant had called with his customers on 14 April 2000 to discuss the rising price of flour and bread, six soldiers came and arrested the appellant on suspicion of supporting rebels. The appellant declined to sign a paper incriminating him in this activity and was detained until an explosion near the place where he was held enabled him to escape.

4. The Adjudicator found a number of significant inconsistencies in the appellant's account which undermined it in its entirety. The Adjudicator made it clear that he was not accepting the appellant's credibility and had not satisfied him that he had been a singer in support of President Mbutu. He approached the case purely on the basis of a person who in fact had no reason to be concerned about being returned to the DRC. He then considered the evidence about returning failed asylum seekers to the DRC and found that the appellant would be returned on documentation obtained by the Secretary of State which would put the authorities in the DRC on notice that the appellant had sought asylum in the United Kingdom. In the light of the UNCHR letters - to which we will make reference below - there was a strong likelihood that the appellant would be interrogated and that ill-treatment would follow. He allowed the appeal on that basis.
5. Mrs Maudsley applied for an adjournment on the footing that the Tribunal was to consider the issue in what she described as a test case. She was aware that other appeals had been adjourned the previous week.
6. We carefully considered the application. We noted that this appeal had been listed for hearing on 21 July 2003 and there had been no application for an adjournment in advance of the hearing. Miss Hough had lodged two comparatively recently Tribunal decisions dealing with the relevant issues and we saw no reason why the case should be adjourned. We refused the application.
7. Miss Hough relied on the grounds of appeal and the cases of M [2003] UKIAT 00071 and N [2003] UKIAT 00050. These cases had been heard on 9 July 2003 and 9 May 2003 respectively. Both cases had two legally qualified chairmen as well as a lay member.
8. It was clear that the Tribunal in the case of N was concerned with the issue of risk on return as a failed asylum seeker - see paragraph 5 of the determination. At paragraph 43 the Tribunal had concluded as follows:
 - (a) On the information available to it, as at 9 July 2003, it is not the fact that a person returned to the DRC is, by reason only of being a failed asylum seeker, at real risk of persecution or Article 3 ill-treatment;
 - (b) In order to run a real risk of being taken into detention, following the screening of a returnee at Kinshasa Airport, there must

be something further in the returnee's background, such as past political or military activities or nationality of a state regarded as hostile to the DRC.

(c) There is nothing in the circumstances of the appellant in this case to suggest that he would of any adverse interest to the DRC authorities.'

9. In N the first issue identified at paragraph 8 was whether the appellant would be at risk as a failed asylum seeker. The Tribunal considered at paragraph 10.8 that it would be inconceivable if there were a real risk of persecution in the DRC for returning failed asylum seekers that the letter from the UNHCR would not have made this clear. At paragraph 10.16 the Tribunal concluded that failed asylum seekers were not at real risk of ill-treatment in breach of Article 3 simply because they were failed asylum seekers.
10. Mrs Maudsley relied on the UNHCR letters and reminded us that the Adjudicator found that the appellant would be returned on a Home Office travel document. Mrs Maudsley referred us to the April 2002 UNHCR letter which indicated that agents of the security forces frequently interrogated Congolese returning to Kinshasa from abroad, particularly those who were known to have sought asylum. The UNHCR was aware of instances where interrogation at the airport had been followed by arbitrary detention and serious ill-treatment. If the returnee was not already known to the DRC authorities that there was a strong likelihood that were he to be returned to Kinshasa his background would be revealed in the course of interrogation upon arrival.
11. There had been a Home Office Bulletin dated 30 January 2003 which confirmed there were currently administrative problems in obtaining travel documents from the DRC Embassy in London. However, the Home Office was cooperating with the embassy to resolve the problems. Removals of DRC nationals with valid national passports was not affected. The administrative problems were not related to the question of the safety of returning failed asylum seekers. It was normally safe to return failed asylum seeker to Kinshasa provided the returnees had valid identification and travel documentation. However, the British Embassy letter dated 22 November 2002, which was also in the respondent's bundle, gave rise to concern as the ambassador was not in a position to offer assurances that returnees would not face prosecution if it were established that they had left the DRC without the mandatory travel documents, or if they had been

the subject of criminal arrest warrants or of legal investigation prior to their original departure. The UNHCR had changed its position. Reference should now be made to the letter from the UNHCR dated 15 September 2003. The appellant would be identified because of UK travel documents and he would need to go through immigration control and he would be questioned and ill-treated because of his perceived political opinion.

12. Miss Hough submitted that the latest UNHCR letter was not different to the previous ones and the Tribunal had had the information before it. The Tribunal in the case of M had been given assurances that the travel document issued to the returning failed asylum seeker would simply identify the individual as a DRC national but would not contain any other information as to why he or she had been present in the United Kingdom - see paragraph 11(e).
13. At the conclusion of the submissions we reserved our determination. We have carefully considered all the material before us.
14. Reliance is placed on the UNHCR letters, the latest of which is dated 15 September 2003. Large sections of this letter appear identical to the letter considered by the Tribunal in M dated 5 June 2003, reproduced at paragraph 34 of the determination.
15. In the September letter, having referred to the position of the UNHCR as recently as March 2003, that it was UNHCR's view that it was generally possible to return failed asylum seekers, the following paragraph appears :

‘This view was subject to two important caveats. Firstly, some areas remained unsafe and return to those areas was not yet advisable. Secondly, individuals with certain profiles (e.g. those with real or perceived political or military associations) were likely to be at risk and therefore deserved to receive particular and careful consideration. The need to bear these considerations in mind has been further fortified by the recent events in the DRC, as the security situation still remains a matter of concern in certain parts of the country. Thus, UNHCR is in a position to reassert its March 2003 recommendation to the effect that states need to carefully ascertain the nationality of rejected asylum seekers as well as their areas of origin and

profile, before they are considered for return to the DRC.'

16. We do not consider that the material placed before us alters the position that the Tribunal had to consider in July 2003. Indeed, the paragraph we have just quoted indicates the type of individuals who might still be at risk. They have, as the UNHCR put it, to have a certain profile. On the Adjudicator's findings this appellant has no profile at all.
17. The Tribunal decisions of M and N to which we were referred appear to us to reach clear conclusions on the issue which we have to determine today. The material before us has not materially altered since those decisions. We have been referred to the up-to-date UNHCR letters and we have highlighted the most recent of all. We have no reason to doubt that the appellant will be returned on proper documentation which will not reveal the fact that he has been an unsuccessful asylum applicant. We do not believe that it is demonstrated to the required standard that he will be at risk because he will be perceived to have some profile or opinion. There is nothing to distinguish this individual from the failed asylum seeker considered by the Tribunal in M on 9 July 2003. We see no basis for distinguishing the instant appeal from the cases to which reference was made. We agree with the reasoning of the Tribunal on the question of the return of failed asylum seekers to the DRC. We adopt that reasoning in our determination. We appreciate that the Adjudicator was determining this appeal in March 2003 and he did not have the benefit of this jurisprudence or indeed the more up-to-date UNHCR letters.
18. For the reasons we have given, the Secretary of State's appeal is allowed.

**G. WARR
VICE PRESIDENT**