APPEAL No. HX03344-2002
PK (Article 8-Return-Family) Democratic Republic of Congo CG [2002] UKIAT 05220

IMMIGRATION APPEAL TRIBUNAL

Date of hearing: 27 September 2002
Date Determination notified:

.....13 November 2002.....

Before:

Mr. P. R. Moulden (Chairman)
Mrs S. Hussain JP

Between

PLACIDE MUSA KILALA

Appellant

and

THE SECRETARY OF STATE FOR
THE HOME DEPARTMENT

Respondent

DETERMINATION AND REASONS

1. The Appellant is a citizen of the Democratic Republic of Congo (DRC). He has been given leave to appeal the determination of an Adjudicator (Mr K. St.J Wiseman) dismissing his appeal against the Respondent's decision to give directions for his removal from the United Kingdom and to refuse asylum.

2. Ms M. Canavan, of RLC, appeared for the Appellant. Mr G. Elks, a Home Office Presenting Officer, represented the Respondent.

3. The Appellant arrived in the United Kingdom on 12 September 2001 and applied for asylum. The notice containing the decision against which he appeals is dated 19 October 2001. The Adjudicator heard the appeal on 3 April 2002 and leave to appeal was granted on 20 June 2002.

4. The Appellant claimed to fear persecution from the authorities and the population at large because he was part Rwandan. Although his father was Zairean his mother was a Zairean of Rwandan origin. The Adjudicator did not find the Appellant's evidence credible. He had not established a well-founded fear of persecution or that his Article 2 and 3 human rights would be infringed. The Appellant also claimed that his Article 8 human rights would be infringed if he had to return. He had a family life in the United Kingdom with his wife and their infant child. The Adjudicator's Article 8 conclusion is brief, set out in paragraph 11.1 in the following terms, "whichever way one looks at his marriage, his immigration status was known to his wife at the time of their marriage and his removal would have to be regarded as proportionate in the context of immigration policy generally".

5. The main thrust of the grounds of appeal is that the Adjudicator made errors of law regarding the proper application of Article 8. The second ground of appeal argued that the Adjudicator had made an error in his assessment of future risk because of the Appellant mother's ethnic origin. Leave to appeal was granted because it was "arguable that the Adjudicator did not consider all the relevant evidence in relation to his Article 8 claim". Leave to appeal was not granted in respect of the other ground of appeal and Ms Canavan did not seek to reopen this.

6. We have the Appellant's bundle and skeleton argument. The Respondent submitted the April 2002 Country Assessment. Although the hearing was adjourned on a previous occasion because an interpreter had been requested but was not present, neither the Appellant nor his wife gave evidence. His representatives submitted additional witness statements and Mr Elks informed us that he did not wish to cross-examine.

7. Ms Canavan relied on her grounds of appeal and in particular the three bullet points outlined in paragraph 1.1. These are that there is a genuine and subsisting marriage, the Appellant's wife has been recognised as a refugee, and she is due to have a baby. In fact, since the grounds of appeal were prepared, the Appellant's wife has given birth to their child, Raymond Brian Kilala Dunia born on 24 May 2002. He accompanied his parents to the hearing.

8. Ms Canavan submitted that the Appellant and his wife had a six-year relationship in Zaire. We suggested to Ms Canavan that the witness statements of the Appellant and his wife and his evidence as recorded by the Adjudicator, did not bear this out. We asked her whether she wished to make any submissions on this point. She did not, but did not withdraw the submission. She submitted that the subsequent marriage in the United Kingdom legitimised an existing relationship. Removing the Appellant from the United Kingdom would interfere with his right to a private and family life. Our attention was drawn to the judgment of Lord Phillips MR in **Mahmood v SSHD [2001] INLR 1** at pages 76 and 77 of the Appellant's bundle and in particular the six general conclusions. The Appellant's wife could not accompany him to the DRC because she has a well-founded fear of

persecution in that country. We asked Ms Canavan whether there was any evidence that this was still the case, notwithstanding that the Appellant's wife was granted refugee status on 27 March 2001. Ms Canavan submitted there was a strong presumption that she was still a refugee. It would be too onerous to expect her to re-litigate her status. In any event there was no evidence that the situation in the DRC had changed and improved since March 2001. We were referred to the tribunal determination in **Soloot v SSHD (01/TH/01366)**.

9. In relation to the possibility of the Appellant returning and making a marriage application from the DRC, Ms Canavan referred us to paragraphs 12 to 14 of the skeleton argument and the tribunal determination in **SSHD v Sukhjit Gill (01/TH/2884)**. We should take into account not only the need for a firm and fair immigration policy but all aspects of the Respondent's policies, including discretionary policies.

10. Ms Canavan submitted that we should take into account relevant discretionary policies applied by the Respondent to those in a similar position to the Appellant in considering whether it would be proportionate to return him to the DRC. These were relevant to the questions of whether it would be proportionate to interfere with his right to family life and whether there was a pressing social need to return him. Our attention was directed to a printout from the IND website relating to dependency claims. Ms Canavan accepted that we could not interfere with the Respondent's discretionary policies but submitted that we should take them into account.

11. In relation to family reunion Ms Canavan submitted that, because the Appellant's wife was already in the United Kingdom, they would not need to meet the accommodation and maintenance requirements. The existence of these policies showed that the Respondent did not always require an individual to return to his own country and make a claim from there. His wife had a right to have her family join her and establish a family life in the United Kingdom. RLC had applied to the Respondent to grant the Appellant leave to remain in line with his wife, but he had declined to do so. If he had to go back to the DRC the only option would be to make a marriage application from there. If he was returned to Kinshasa he would be separated from his wife and child for a long time, if not permanently. His wife would be left to look after a young baby. Both of them were dependent on public funds. If he had leave it was likely that she would continue to be dependent on public funds for longer; he would not be able to work and earn in the United Kingdom. It was also likely that he would not qualify for entry clearance because they would not satisfy the maintenance and accommodation requirements of the Immigration Rules.

12. Ms Canavan submitted that, on balance, it would be unfair and inconsistent to return an individual who should qualify under the family reunion policy. It was not correct to describe his actions as "jumping the queue". The United Kingdom did not have quotas or a queue. All those who satisfied the Immigration Rules were entitled to entry clearance.

13. Ms Canavan asked us to take into account the effect on third parties, that is their baby. **Bequiri [2002] UKIAT 00725** made it clear that we were entitled to do this. The Appellant's wife had no other close relations in the United Kingdom. The evidence between pages 25 and 28 of the Appellant's bundle emphasised the benefits that a father could provide to a young child. If the Appellant had to return there would be a loss to the public purse. This would involve the cost of returning him, the fact that he would not be able to provide support for his wife, and the cost of administering his marriage application at the local Embassy.

14. All in all we were asked to find that the balance tipped in favour of allowing the Appellant to remain. It would be disproportionate to require him to leave the United Kingdom.

15. Mr Elks emphasised the provisions of Section 77 (4) of the Immigration and Asylum Act 1999. At the date of the Respondent's decision there was no family life. The Appellant and his wife had been together for less than a month. The Appellant arrived in the United Kingdom on 12 September 2001 and the removal directions were made on 19 October 2001. On the findings of the Adjudicator and his own witness statement they did not start living together until 19 September 2001. He had not lived with her in the DRC. Even though they said that the relationship started in 1994 the Appellant accepted that there had been problems and he had fathered two children by other women. He did not know when she left the DRC.

16. Furthermore, Mr Elks submitted that it was not foreseeable that they would continue to cohabit, marry, or have children.

17. However, if we were against him on this, and there was a private and family life, Mr Elks submitted that it would be proportionate to expect the Appellant to return and make a marriage application from abroad. If the application took some time this was a situation contemplated by Mahmood. In that case the Appellant had a wife and two children. There was no evidence to support the Appellant's contention that his wife and child could not return to the DRC with him. Mr Elks emphasised that the Respondent would not attempt to remove the Appellant's wife against her will. It was a matter of choice for her. She had to show insurmountable obstacles to her return now. She had not done so.

18. Mr Elks informed us that the Respondent had considered whether the Appellant was entitled to remain as a result of any discretionary policy, but had concluded that he was not. In order to be his wife's dependent for the purposes of family reunion he would have had to be a dependent under her Refugee Convention claim. He was not. In any event there was no family unity before he came to the United Kingdom. As to financial benefits to the state, costs had to be looked at in a wider context. It was not just the costs with regard to the Appellant, but the costs of many others.

19. In reply Ms Canavan relied on **Nhundu and Chiwera (01/TH/00613)** in

relation to the extent to which we could take into account post decision matters. It was not necessary for the Secretary of State to have considered the evidence. Giving the Appellant the benefit of the doubt, he had established that he had a family life at the date of the decision. It was not necessary for there to be a marriage or even cohabitation for a family life to exist. In circumstances where the Respondent had chosen not to cross-examine the Appellant or his wife we should accept their evidence as to the length of their relationship. In reply to our question, Ms Canavan accepted that we would need to follow the Adjudicator's undisputed findings of fact. She submitted that the Appellant was not likely to succeed on a marriage application brought from abroad. The grant of refugee status to the Appellant's wife brought with it a right to family reunion. This had not been considered in **Mahmood**. We were asked to allow the appeal.

20. None of the grounds of appeal seek to call into question the Adjudicator's findings of fact, which we follow with additional findings arising from the supplementary witness statements of the Appellant and his wife.

21. The Adjudicator found (paragraph 10.15) that within a week of his arrival in the United Kingdom on 12 September 2001 the Appellant was living with the woman who is now his wife and that she became pregnant almost immediately after his arrival. The Adjudicator did not state in terms that he accepted that the Appellant had established a family life in the United Kingdom but by implication he did so, because he went on to consider the question of proportionality, which would not otherwise have arisen. To clarify this, we find that the Appellant has established a family and private life in the United Kingdom at the date of the Respondent's decision on 19 October 2001. He and his wife to be were cohabiting at that date. They did not have been married or to have a child or children for there to be a family life.

22. We next consider the extent to which we are entitled to take into account subsequent events. Section 77 (4) provides that we may only take into account evidence, "(a) which was available to the Secretary of State at the time when the decision appealed against was taken; or (b) which relates to relevant facts as at that date." We follow **Nhundu and Chiwera.** The two subsections are not wholly interdependent. They are separated by "or" not "and". Relevant facts at the date of the decision include the fact that the Appellant and his wife were cohabiting and she is likely to have been pregnant. It was not necessary for these facts to have been known to the Respondent at the date of the decision. In these circumstances we can take into account, for example, the fact that they are now married, continue to live together, and have a child.

23. In his initial Asylum interview, recorded in paragraph 10.16 of the determination, the Appellant said, referring to the woman who is now his wife, that he "remembered" that he had a friend from Kinshasa in London. The Adjudicator found "that it has been his intention all along to join her in the United Kingdom and I believe that his Asylum claim has been constructed with that in mind". In his evidence to the Adjudicator the Appellant did not

say anything about a long-standing relationship with the woman who is now his wife. He referred to having two young children by different women, and that he had never married. Ms Canavan submitted that the Appellant and the woman who is now his wife had a long-standing relationship in the DRC. This is not born out by the evidence in their supplementary witness statements. We accept that they are likely to have met in Kinshasa in 1994 when she was a student. She said that she continued to see him for a long time, but has not said how long that was. She said that he saw him perhaps twice a week. She said that she was in love with him and he loved her, but he makes no similar claim. There is no suggestion that they cohabited, married, or that she became pregnant. Instead, she admits that there were problems with the relationship, because the Appellant had children by other women. Both of them are very vague about the nature of the relationship, how long it lasted and when it came to an end. We find that there is likely to have been a relatively short-term relationship in around 1994, without cohabitation, and they lost touch some time before she left the DRC in June 2000. It is clear from the Appellant's own evidence that when he came to the United Kingdom he did not know where to find her and had to trace her. We find that, when the Appellant arrived in the United Kingdom, there was no subsisting relationship and no family life. The Appellant knew little more than that she was likely to be in the United Kingdom.

24. They are now married, having decided to marry after she became pregnant. It was a difficult decision whether to keep the child. Both parties knew that his immigration status was not certain. They have a child, a continuing relationship and are cohabiting. Both are supported by public funds and neither is working. She cares for the child most of the time but the Appellant helps, particularly at night. They do not have any relatives to help them. This is her first child and, following the birth by caesarean section she is still recovering.

25. The letter in the Appellant's bundle shows that his wife was granted refugee status on 27 March 2002 and has permission to remain in this country permanently. We accept that this indicates that she had established a well-founded fear of persecution in the DRC in March 2001. However, absent any further evidence, it does not establish that she is still unable to return to that country. We are not suggesting, as Ms Canavan imagined, that the Secretary of State or anyone else could compel her to return to the DRC. It is for him to show, doubtless with her help, that there are still good reasons why she should not make a voluntary return, with her husband and child. An individual who has been granted refugee status does not, on that basis alone, establish that he or she can never be expected to return to the country of origin. In a changing world circumstances which gave rise to a well founded fear of persecution change, sometimes for the better and to an extent that such a fear no longer obtains. Recent examples are Kosovo and Afghanistan. We are not suggesting that an individual's claim has to be re-litigated. Refugee status has been granted and consideration of current circumstances does nothing to jeopardise this. Here we have hardly any information about her Asylum

claim. We do not have, for example, her witness statement or the determination of an Adjudicator. Whilst we have current country information, particularly in the Respondent's Country Assessment, we do not know on what basis she made out her claim. Although she was granted refugee status as recently as March 2001 there is no presumption that the circumstances at that date still hold good. It would not have been too onerous a task for her and the Appellant to provide the necessary information. We are in no position to judge whether she can now return. In the circumstances she has not established that she would not be able to return with the Appellant and their child.

26. We can find no merit in the submission that the Respondent should have considered the Appellant as the dependent of the woman who is now his wife for the purpose of a possible discretionary grant of exceptional leave to remain. The Appellant has never been her dependent within the terms of the policy, and set out in the guidelines which Ms Canavan has put before us. He was never included in her Asylum application. She was never included in his Asylum application. There is no basis on which it could be said that either was the dependent of the other. There was no pre-existing family unit abroad. The Appellant is not and has never been dependent on the woman who is now his wife. The discretionary policy for family reunion only applies to a spouse and minor children who formed part of the family unit prior to the time the sponsor fled to seek asylum. There was no family unit comprising the Appellant and the woman who is now his wife when she left the DRC.

27. The tribunal in **SSHD v Sukhjit Gill** said, "In considering the firm and fair immigration policy all aspects of that policy must be taken into account. So there is no policy of necessarily removing a person in the Respondent's position. Mr Gill is right to point out that there are policies which permit persons in the Respondent's position to remain in this country. Not only is the immigration policy which is such a strong factor based on executive discretion, but that discretion insofar as it is expressed in a policy is reviewable at least to some extent by the Appellate Authorities and the courts".

28. In **Bequiri** the tribunal said, "However it does not seem to us that these types of variation take matters very far, particularly when, as here, the claimant in question does not even fall under the terms of some item of concessionary policy. Such variations may qualify to some extent, but do not gainsay the interests of the state and the wider community in the maintenance of effective immigration control. Thus in our view it is not open to an Adjudicator to treat the interests of the state and wider community in the maintenance of effective immigration control as easily overridden ".

29. This is a case where the Appellant cannot bring himself within the terms of any of the Respondent’s concessionary policies. They do not assist him.

30. Having concluded that the Appellant has established a private and family life

in the United Kingdom it is clear that there would be interference with this if he had to return to the DRC. There is no dispute that the Respondents decision was in accordance with the law and pursued a legitimate aim.

31. In relation to proportionality we take into account the matters already set out. On the one hand the Appellant and his wife are married. They are living together in a continuing relationship, which benefits both of them and their infant child. It hardly requires the documentary evidence submitted by the Appellant to establish the benefits of the presence of a caring father to a child of whatever age. They do not have relatives to help them in the United Kingdom or in the DRC. She is recovering from the birth and he helps her both generally and with their child. We place little weight on the possibility of additional or continuing public expense if he returns to the DRC, she cannot work and the British government has to meet the cost of dealing with a marriage application from abroad. In any event these have to be set against what the Respondent may legitimately regard as the broader issues and the far greater costs of not maintaining an effective immigration policy.

32. It is not for us to prejudge the prospects of success of any marriage application made by the Appellant from the DRC. The likely success or failure should not enter into our assessment. Likely failure should not entitle the Appellant to remain. Likely success should not weigh in favour of return. The situation might be different if there was any evidence to show that it would be excessively difficult or even impossible for the Appellant to make an application from the DRC. There is no such suggestion. The length of time that an application is likely to take and the fact that the Appellant would be separated from his family in the meantime are factors which we take into account.

33. On the other hand what we cannot escape are the Adjudicator's conclusions, with which we agree, that it was "his intention all along to join her in United Kingdom and I believe that his Asylum claim has been constructing with that in mind" and "I have to be blunt and say that I believe the Appellant has effectively sought to "jump to queue" by claiming asylum but effectively seeking to remain here on the basis of his marriage. That is an application that should be made afresh from his home country". The Appellant and his wife have known throughout, as they admit, that his Asylum status and right to remain in the United Kingdom is precarious.

34. We have taken into account all the **Mahmood** factors. The Respondent has the right to control the entry of non-nationals into the United Kingdom. Article 8 does not impose on the state a general obligation to respect the choice of residence of a married couple. Removal or exclusion of one family member from a state where other members of the family are lawfully resident will not necessarily infringe Article 8 providing that there are no insurmountable obstacles to the family living together in the country of origin of the family member excluded, even where this involves a degree of hardship for some or all members of the family. We have found that, for lack of current

evidence, the Appellant has not established that there are insurmountable obstacles to his wife returning to the DRC. They have not been long established in the United Kingdom. Both of them come from the DRC and it would not be unreasonable to expect her and their child to return with him. Throughout their relationship in the United Kingdom both of them have known that his right to remain was precarious.

35. We find that there were reasonable grounds for the conclusion that removal of the Appellant is necessary in the interests of an orderly and fair control of immigration and that his right to respect for his family life has not been violated.

36. We dismiss this appeal.

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P. R. Moulden
Vice President