

**THE HIGH COURT
JUDICIAL REVIEW**

[2005/868 JR]

**IN THE MATTER OF THE REFUGEE ACT, 1996 (AS AMENDED), IN THE MATTER OF THE IMMIGRATION ACT, 1999 AND IN THE
MATTER OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT, 2000 AND IN THE MATTER OF THE EUROPEAN CONVENTION ON
HUMAN RIGHTS ACT, 2003 SECTION 3(1)**

BETWEEN

"X"

APPLICANT

AND
**REFUGEE APPEALS TRIBUNAL
THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM
ATTORNEY-GENERAL IRELAND**

RESPONDENTS

AND
HUMAN RIGHTS COMMISSION

NOTICE PARTY

Judgment of Mr. Justice Herbert delivered on the 11th day of December, 2007

1. The Applicant in this matter, having been arrested when seeking Unemployment Assistance, then sought asylum in this State.

2. The Initial Application form was completed by the Applicant himself on the 17th April 2003. The Applicant gave a family name and two forenames. He gave his date of birth as 23rd June 1967. He stated that he was a Togolese national and, he furnished an address in that country. He gave the name and year of birth of his father and the name and year of birth of his mother. He stated that he did not have a spouse or partner or children. He gave the following reason for leaving his alleged country of origin:-

"Due to tribal and political crisis, leading to my family death, so as the first child, I was needed for execution as well, and I come to Ireland therefore for refuge and safety."

3. On 17th April 2003 an Information Questionnaire for Refugee Status Application was completed by the applicant. The Applicant gave his family name, his given names and his date of birth, all of which were the same as in the Initial Application form. He stated that his country of birth was Togo and his nationality was Togolese. He stated that his citizenship at birth and his present citizenship was Togolese. He stated that he belonged to the Youroba Tribe and that he was a Christian. He said that his first language was French but he also spoke English and Youroba. He gave particulars of having received six years primary education and seven years second level education in his native village of "Y". He gave the family name, given name, year of birth, nationality and occupation of his father and mother. He stated that his father was deceased and he did not know if his mother was living or deceased. He gave the family name, given name, and year of birth of a sister, but did not know whether she was living or deceased.

4. He stated that he had misplaced his passport and his national identity card, both of which had been issued by the Immigration Office at Lome, Togo and were valid until 30th December 2001. He said that his home was broken into in the middle of the night on 5th December, 2001 about 01.00 hours and he had to flee as he feared for his life, leaving his mother and sister and these documents behind.

5. At Part 2 of q. 26 of the Questionnaire, in response to the question "why do you fear persecution?" the Applicant replied as follows: -

"Because my father was killed and my uncle was also killed in the tribal problems in Togo, and as the first son of my father they want to persecute me also."

6. In response to qs. 27 and 28 as to what type of persecution he feared and from whom he feared it, the Applicant responded as follows: -

"I want [sic] to be executed while my village "Y" is against the present Government, for that they attack and kill our village and family members ... from the President village members called the "Z" village in Togo Republic".

7. At q. 29 of the Questionnaire he was asked if he had reported his fears to the authorities, and if so, when and to whom and what response he had received. His reply was that he had reported his fears to the authorities, "from the beginning of the present Government", that the "Government knows about it" and that he had received no response because the persecution was by members of the President's tribe. He then added that, "even if I report that will put me to more problems". In response to the question as to whether he was a member or had previously belonged to any political, military, ethnic or social organisation or grouping in Togo he answered "am a member of "Y" village the President village is against the tribe I come from".

8. The responses to further questions indicated that the Applicant claimed to have been mistreated or threatened by the authorities in Togo and by a group or groups controlled by the Government of that country. These further responses indicated that the mistreatment and threats were by groups loyal to the President who harass anyone that talks against the Government. They were the President's thugs, he said. President, General Gnassingbé Eyadéma was, he stated, the one who organises the thugs secretly, they are from his village of "Z".

9. In response to a question asking him to describe his activities and responsibilities in any organisation or group, for example, political parties, the following was the response given:-

"I have no responsibilities in any organisation. In 1991 in Lome, Togo we demonstrated for change of government to democratic government".

10. In response to a question as to whether he had moved to a different town or village or to another part of the country to avoid the persecution which he claimed to fear, he responded that the President owns the Country and that members of his tribe (that is the applicant's) were not safe with the present government. In response to a question as to whether any other member of his family had been mistreated or threatened, he stated that his father had died on 1st September 1975 and his uncle had died on 1st December 1990 for [sic] the same process. He stated that his father was among the tribe members who wanted to change the

government, that the government of Togo was a military government and that they want nobody to do or to say anything against the Government. He stated that in 1990 group called the "Secret Killers" blocked the road from Lome to northern Togo, checked the cars and took out any person from his tribe for torture and beating. He stated that members of his family had been mistreated and threatened by thugs who were members of the President's village of "Z" in Togo. He said that his uncle had been arrested in 1990 and detained in "Y" Police Station. He said that his uncle was now "on the run".

11. In response to a question as to whether any members of his family had been accused, charged or convicted and sentenced in Togo he responded that, "they prefer harassing and killing the village members". He said that military service was compulsory in Togo but that his tribe members were not given the chance to be in the military.

12. In response to a question asking what he feared would happen if he returned to Togo he responded as follows:-

"My reasons are:-

(1) In 1975 my father was attacked and killed by the Government.

(2) My uncle was also killed on 1st December 1990 at "Y" for the same problem.

(3) On 5th December 2001 my father's house was attacked at midnight to 0100 am. That led to my running away from the village and for that I don't know where my mother and my sister are. There has not been peace for my village members in "Y" Togo. On January 30th 1994 it was the same, the military killed 12 people in Lome. The same ---- 25th January 1994 the military killed also 19 people."

13. The Applicant stated that he had left Togo on 5th December 2001 unaccompanied. He made his way to Burkina Faso where he remained for six months then he went to Mali where he remained for two months. From there he travelled to Mauritania where he remained for four months and from there went to Morocco where he remained four months. From Morocco he said he travelled to Spain and Portugal. He stated that he had not applied for refugee status in any of these countries. Finally he stated that since the beginning of the regime of President Gnassingbé Eyadéma many Togolese people had fled the country for their lives.

14. It has been necessary to set out these answers given in response to questions in the Information Questionnaire for Refugee Status Application at length, because they are central to the principle issue raised at the hearing of this application for judicial review.

15. The Applicant was interviewed by an Authorised Officer of the Refugee Applications Commissioner with the assistance of an Interpreter. The Interpreter signed the appropriate Interview-Interpreter Form acknowledging that he had read and agreed to comply with each of the requirements set out in that form.

16. At q. 7 of the interview, the Applicant was asked the formal question of whether the information contained in the Application Questionnaire was correct. His response was, "yes, I did not understand all the questions".

17. The Applicant was then asked whether he belonged to a particular ethnic group and he replied that he belonged to the Kabé ethnic group. He was asked whether he was a member of any political party in Togo and he said that he belonged to the Convention Démocratique des Peuples Africains Party (CDPA).

18. The Applicant was then asked a series of questions about Togo including, the international telephone code for that country, the names of the largest towns and cities, the main wildlife reserves, the public holidays, the name of some of the newspapers, the names of the main radio stations, the name of the main streets in his native village of "Y", the population of that village, the names of the neighbouring towns and cities, the distance between "Y" and some named towns and cities, the main languages spoken in Togo and the annual festivals that take place in his native village of "Y".

19. The Applicant was asked to name some of the opposition political parties in Togo and he named the UTD, the CAR, his own party and, the RPT which is the Government party. In response to a question whether he knew any other opposition parties he replied that there was the party of Olympio, the son of the first President, but he didn't remember the name of that party. He was only able to name one public holiday in Togo, and that was Independence Day, 27th April. He was only able to name two newspapers. He replied that he had forgotten the name of the main radio stations in Togo. He said that the Minister of the Interior was Mr. Kofi Sama. In response to the question as to what annual festivals took place in his own village of "Y", he replied that he was a Christian and was therefore not interested festivals.

20. He said that he did not have any problems in Togo before September 2001 except that in 1991 he was involved in a demonstration. The police wanted to arrest the participants but they ran away. He said that two of his uncles were involved in the opposition party of Mr. Olympio. He said that his father was also in the opposition when he was young and was a member of Mr. Olympio's party. He said that he joined the CDPA on 2nd December 2000. He did so because he did not like the present government in power and wished for the change of Government. He said that the CDPA was legalised in 2000 and was not involved with any other Group. When asked about his role in the CDPA, he explained that the party had an office in the south of Togo only and, if something needed to be organised in the north of Togo he would organise whatever was to be done. He said he was a member of the "Y" village branch of the party which branch had over 40 members. He said that in 2000 he was involved in organising a small demonstration in the village of "Y". The police came and they fled. He said that the reason for the demonstration was that an election was pending and they wanted to change the government. His part in the organisation of the demonstration was that he was the person to tell people in the CDPA how and where they were going to carry out the demonstration. He was asked if the CDPA had brought about any changes for the Togolese people and whether the party operated from any other country. He said that the CDPA operated also from Ghana. He said it was a new party and if they got into government they would, "make the country quiet and assemble the country for the youths".

21. He was asked who had attacked him in September 2001 and he said it was the President's bodyguards, who were wearing civilian clothing. When asked why he thought he was attacked he said that it was because he was the person who organised the demonstration and the President's people they did not think that he would fight for the downfall of the Government, as he, like them was from the North of Togo and therefore he would support the President. He was asked to give the exact date when the demonstration was held and he said that it was on 25th or 26th October 2000 in the village of "Y". He said that over 20 persons attended the demonstration. When the police came they fled and no one was injured. He was asked how he knew that it was the President's bodyguards who had attacked him and he said he knew because it was those people that do those things in Togo. He said that nothing else happened between September 2001 and December 2001.

22. He was asked did he see the men who were breaking into his home in December 2001. He said that it was at night and he did not see them. He was asked why he thought they were the same people who had attacked him in September 2001 and he said he knew they were the same people because that is what they do, that is how they kill many people in Togo. He said that he feared the President of Togo and that if he returned they would kill him and his life was in danger. He said that if Togo was quiet he would not have left it but because of his problems he had to leave. He was asked did he try to contact his mother from Burkina Faso and he said that he did not because they did not have a telephone in their house and he didn't want anyone to know where he was.

23. He explained that when he went to Burkina Faso in December 2001 he was thinking of staying there. However, in 2002 the security forces there started killing people so he left. In June 2002 he went to Mali and he stayed there for two months friendless and in hiding. He then went to Mauritania. He stayed there for four months but was unable to remain because, he said, it was a Muslim country and people would insult you once they knew you were a Christian. In December 2002 he went to Morocco where he stayed for four months but again he found that this was a Muslim country with a lot of fanatics. He said he met a Portuguese man in Morocco who got him a Portuguese passport and took him by car to Malaga and from there by train to France from where they took a ferry to Ireland.

24. He said he met a Togolese man in Cork who was being sent a package from Togo and he asked him if he could arrange to have party documents for him sent in that parcel. He said that the office of the CDPA party put the documents - which he produced to the interview - into an envelope and then put it to in the man's package.

25. The interviewer put to the Applicant that at q. 9 of the Information Questionnaire for Refugee Status Application he had said that he belonged to the Youroba tribe, (at the start of the interview he said he belonged to the Kabé ethnic group). The Applicant replied that he thought the question being asked was where his mother came from, (at qs. 8(D) and 8(E) of the Questionnaire he said that his mother was born in a city in a neighbouring country, which he named and was a national of that country). It was put to him by the interviewer that at q. 4 of the Questionnaire it was asked on what grounds he claimed to have a fear of persecution and he was given a choice of placing a mark in five boxes entitled, "race", "religion", "nationality", "membership of a particular social group", and "political opinion", and he had marked "race" and "political opinion". In reply he said that there were some questions that he did not understand when answering them.

26. The Report, (11th June 2004) and Recommendation (14th June 2004) made pursuant to the provisions of s. 13(1) of the Refugee Act, 1996 (as amended), concluded and confirmed that the Applicant had failed to establish a well-founded fear of persecution as defined by s. 2 of the Refugee Act, 1996 (as amended).

27. In section 3 of the Report under the heading "Persecution Claimed", the Authorised Officer stated as follows:-

"The Applicant claims that he was an active member of the opposition party, the Convention of African People (CDPA). He claims that he was attacked and injured by Eyadéma's bodyguards because of his support for the opposition".

"... If we accept the Applicant's statement as credible, it may lead to a conclusion that he has been persecuted. This, however, is dependant on a careful analysis of the well-founded element of his claim."

28. At section 4 of the Report, the Authorised Officer summarised the facts as follows:-

"The Applicant claims that he joined the CDPA in 2000 and was an active member. He claims that in September 2001 he was assaulted by Eyadéma's bodyguards because he organised an anti-government demonstration in October 2000. He also claims that in December 2001 some people broke in to his property during the night. He claims that they were the same people who had attacked him in September, and fearing for his life he fled to Burkina Faso ..."

29. The Authorised Officer then made the following findings:

"4.2. Country of origin information discloses that Togo has a poor human rights record. President General Gnassingbé Eyadéma and his RPT party (Rassemblement du Peuple Togolais) backed by the armed forces continue to dominate political power in Togo. There are consistent reports of violence against members of political parties, inhuman and cruel prison conditions and widespread impunity."

"4.3. Though the Applicant is a reasonably educated and mature adult he displayed a lack of knowledge of Togo. He could only name three out of the more than fifteen recognised political parties. He could not name the principle public holidays in Togo, (there are fourteen including Christmas, New Years Day, Easter Monday, Ascension Day, Whit Monday, the Feast of the Assumption, and All Saints Day). He said that Mr. Kofi Sama was the Minister for the Interior when in fact he is the current Prime Minister and had previously been a Minister for Education and Secretary General of the RPT. It is highly unlikely that an alleged political activist would not know about other political parties, about opposition newspapers and radio stations."

"4.4. He said that the CDPA was a new party legalised in 2000. In fact, the party was legalised in 1991 (following violent protests in October 1990)"

"4.5 If one accepted that the CDPA membership card which the Applicant produced is genuine and that he is a member of that party he was involved at a politically low level in the organisation and unlikely to attract the attention of the authorities. There is no evidence to suggest that people involved at such a level are at risk from the Togolese Authorities."

"4.6. The alleged attacks in September 2001 and December 2001 occurred long after the alleged demonstration in October 2000. On the basis of country of origin information and on the balance of probabilities, if the Applicant's participation in the demonstration in October 2000 had come to the attention of the authorities he would have been arrested and detained shortly thereafter."

"4.7. The Applicant did not seek asylum in Burkina Faso or in Mali though both countries have provision for the granting of refugee status in accordance with the 1951 Convention."

"4.8 Because the Applicant has produced no evidence of nationality and given that he showed a poor knowledge of Togo at interview, I seriously doubt his nationality."

30. By a Notice of Appeal dated 9th July 2004, the Applicant appealed from this decision of the Refugee Applications Commissioner to the Refugee Appeals Tribunal. Accompanying this notice of appeal was a formal submission made on his behalf by Sean Mulvihill and Company, Solicitors, in which the following points were made on behalf of the Applicant:-

"1. The Applicant completed the application form and Questionnaire and, attended the interview without legal advice. This is a denial of fair procedures and renders the decision of the Refugee Applications Commissioner null and void."

"2. The Applicant's claim is based on his political activities. He joined the CDPA in 2000 and was an active member. In September 2001 he was assaulted by Eyadéma's bodyguards for organising a demonstration in October 2000. In December 2001 the same people broke in to his house at night and he had to flee in fear of his life."

"3. The Applicant fears persecution if he returns to Togo: as a political activist his life would be in grave danger. Contrary to the provisions of paras. 53 and 201 of the United Nations High Commissioner for Refugees Handbook all the materials relating to the Applicant were not considered which would make his fear well-founded."

"4. The Applicant considers that the interpreter at the interview was completely biased."

"5. The Applicant has the same knowledge about the CDPA as an ordinary member of one of the main political parties in this State would have about those parties."

"6. The Applicant was not a low level member of the CDPA party as he was involved in organising an anti-government demonstration."

"7. Paragraph 196 of the UNHCR Handbook provides that the duty to ascertain and evaluate all the relevant facts is shared between the Applicant and the Examiner. In this instance the joint responsibility for fact finding was not discharged at the interview stage."

"8. The future position was not considered. What would happen if the Applicant should be return to Togo was neither considered nor evaluated."

An issue was raised as to whether a medical report concerning the Applicant from a general medical practitioner in this State dated 21st September 2004 was before the Refugee Appeals Tribunal. In his affidavit sworn on 24th February 2006, John English, Higher Executive Officer of the Refugee Appeals Tribunal swore that this medical report was before the Refugee Appeals Tribunal in advance of the hearing, contrary to what is stated at para. 10 of the affidavit sworn by the Applicant on 9th August 2005."

31. In this medical report the physician noted that the Applicant had a number of healed striae of indeterminate origin which had been present for some time, on the right side of his thoracic spine. Approximately 10-20cm. in length, they were consistent with an old injury. There were two smaller lesions of approximately 4cm each on the upper right thoracic spine.

32. The Applicant claimed that he was beaten on one occasion and suffered injury to his back as a result of being struck by a number of implements (including knives) wielded by members of the President's tribe.

33. The Member of the Refugee Appeals Tribunal made his Decision on 4th July 2005. This decision followed an oral hearing which took place on 14th September 2004, at which the Applicant was represented by Sean Mulvihill, Solicitor, instructed by the Refugee Legal Service. Mr. Paul McHenry, a Presenting Officer, represented the Refugee Applications Commissioner.

34. The factual background as stated by the member of the Refugee Appeals Tribunal was as follows:-

"The Applicant's problems started in September 2001 when a number of people attacked him because they identified him as a member of the CDPA opposition party. The Applicant stated that he organised demonstrations for the CDPA and was heavily involved with this party. The Applicant stated that a number of people from the bodyguards of President Eyadéma attacked the Applicant because this is normal in Togo. The Applicant was severely beaten at this time. The Applicant went to a pharmacy where he got some medicine and then went into hiding in a neighbouring town."

"In October 2001 the Applicant organised another demonstration and was attacked by the police. Subsequently the Applicant ran away and stayed with friends. In December 2001 a number of people broke in to the Applicant's home. The Applicant felt compelled to leave his country and went to Burkina Faso. The Applicant stated that his life was not easy there as he had no means of making a living and he was unhappy. The Applicant left Burkina Faso in June 2002 and went to Mali where he stayed for two months. The Applicant did not want to stay there as a number of people had previously been sent back to Togo at the time."

"The Applicant then travelled to Mauritania in August 2002 and stayed until November. The Applicant stated that he was unhappy there as it was a Muslim country. The Applicant travelled to Morocco where he stayed for three or four months and in or about March 2003 left there with the help of a Portuguese man who arranged to take him out of Africa. This man gave him a passport and from there the Applicant travelled to Portugal, then to Malaga in Spain and on to France. The Applicant travelled by ferry from France to Cork and arrived on 7th April 2003. The Applicant was subsequently arrested for being illegal in Ireland after he came to the attention of the authorities sometime later."

35. The Member of the Refugee Appeals Tribunal in his Decision noted the following matters:-

"1. The Presenting Officer asked the Applicant why he did not know fundamental matters concerning the CDPA. The Applicant replied that he was not happy with the interview and had told this to his Solicitor.

2. The Presenting Officer put to the Applicant that he had signed the interview notes. The Applicant replied that he did but he was not happy.

3. The Presenting Officer asked the Applicant why no complaint was made in this regard in the Notice of Appeal. The Applicant accepted that none had.

4. The Presenting Officer asked the Applicant why no mention was made of CDPA in his answers in the Questionnaire. The

Applicant stated that this was because he completed the form after he was released from prison and, as he did not speak good English he obtained the assistance of another person help him fill in the Questionnaire. (At q. 51 of the Questionnaire the following questions were asked and the following answers given: Did you complete the questionnaire yourself? - yes; Are you satisfied that all the information given in the questionnaire is true and accurate? - yes; Did you receive legal assistance completing the questionnaire? - no; Who completed the questionnaire? - the Applicant signed his own name and gave his address). The Presenting Officer asked the Applicant why he would make a statement that was not true and the Applicant stated that, that was what had happened.

6. The Presenting Officer put to the Applicant that he had stated at interview that the CDPA was legalised in 2000 when in fact it was legalised in 1991.

7. The Presenting Officer put to the Applicant that at interview he said that the CDPA was not in any other group when in fact it was a member of the Pan-African Social Democrats. The Applicant made no answer.

8. The Presenting Officer asked the Applicant why he had not complained that he was not satisfied with the Interview. The Applicant said that he felt the interviewer was against him.

9. The Presenting Officer put to the Applicant that he stated at interview that Mr. Kofi Sama was Minister for the Interior when he never held that office. The Applicant said that he made a mistake.

10. The Presenting Officer asked the Applicant why he was only able to name three political parties in Togo. The Applicant stated that he didn't get time to name any more.

11. The Presenting Officer asked the Applicant about the documents which he had alleged he had received from the CDPA. The Applicant stated that he could not get his original ID Membership Card in Togo, so he had applied through a friend and that the CDPA party in Togo issued him with a duplicate."

36. Having dealt extensively with the law, with the burden of proof, with the standard of proof and with the meaning of the term "persecution", the Member of the Refugee Appeals Tribunal then gave his decision and the reasons for that decision. Because of the issues which arose at the hearing of this application for judicial review I consider it necessary to cite rather than summarise considerable portions of this decision.

37. The Member of the Refugee Appeals Tribunal held as follows:-

"It has been conceded that the human rights record in Togo remains poor presently. I have noted the country of origin information supplied by the Applicant's solicitor."

"The Applicant is making a claim of being persecuted on grounds of political opinion in that he claims to be a member of the CDPA in Togo and is being persecuted as a result. The Applicant stated that his father was a member of the opposition and had been killed in 1975. His uncle was killed in 1991. (In the Questionnaire the Applicant said 1990). The Applicant said that he had been attacked by some of Eyadéma's bodyguards in September of 2001 because he had been engaged in organising demonstrations as a result of which he was forced to flee. He presented to the Tribunal some documents to include a CDPA, ID Card and other documentation concerning his alleged membership of the CDPA in Togo. I have examined the originals on file. On being asked where he got these documents he said that when in Ireland he arranged for them through a friend in Togo as his original CDPA ID Card could not be found. He confirmed to the Tribunal that the ID document was a duplicate which was issued through the CDPA authorities in Togo. It is the case with all documentation that they are secondary evidence used to support the claim that the Applicant is making. I will therefore weigh such evidence in line with my general evaluations of the Applicant's testimony. (The Member of the Refugee Appeals Tribunal then recounted the inconsistencies as put to the Applicant by the Presenting Officer)."

"The Applicant presented as a mature and articulate person. He claimed to be an active member of the CDPA. After taking all the evidence into account I find it implausible that a person who claims to have been politically active in Togo would not know such basic facts or indeed mention the fact that he was a CDPA member in his Questionnaire. This, to my mind, undermines the Applicant's claim with regard to being persecuted for political opinion in Togo."

"According to the Applicant's evidence he claims to have been attacked eleven months after his alleged involvement in a demonstration. Considering the number of arbitrary arrests and detentions in Togo it does not seem plausible that if the Applicant's involvement in the demonstration had come to the attention of the authorities, he would not have been detained until some eleven months after this alleged demonstration had taken place."

"Regrettably, having listened carefully to the Applicant and having considered all the matters in this case I do not find him to be credible with regard to his claim to have been persecuted by virtue of his political opinion in Togo."

"Accordingly, pursuant to s. 16(2) of the Refugee Act, 1996, I affirm the recommendation made by the Refugee Applications Commissioner and I dismiss the appeal."

38. By Order of this Court made on 5th December 2005, the Applicant was granted leave to seek orders of certiorari, mandamus and declarations by way of application for judicial review on twenty-two different grounds. A statement of opposition was delivered on behalf of the Respondents on 27th February 2006.

39. It is not necessary for me to set out these grounds or, the Respondent's responses thereto, because at the hearing before me, Mr. O'Halloran, Counsel for the Applicant, with commendable and admirable courage and judgement, relied on one ground only - that is ground number 15 which claims as follows:-

"The first named Respondent erred in law and acted *ultra vires* in failing to properly consider and give weight to all elements of the Applicant's account of events and in failing to consider the real possibility of persecution should he be refouled, in failing to properly consider country of origin information available, and in accepting certain country of origin information to the exclusion of other country of origin information."

40. Counsel for the Applicant submitted to this court that the Member of the Refugee Appeals Tribunal had wrongfully and erroneously considered and decided the Applicant's claim for asylum in this State, as if it had been based on a fear of persecution because of his

actual membership and activities on behalf of the CDPA political party in the period October 2000 to December 2001. This, said Counsel, was altogether incorrect. As was abundantly and manifestly clear from the Initial Application Form and from the Information Questionnaire completed by the Applicant himself, his fear of persecution was based on the fact that he, his family, and even the people in his village of "Y", were perceived by the Togolese Authorities and, particularly by the bodyguards of President General Gnassingbé Eyadéma, and by his supports in the village of, "Z" to be non-supporters of the President's regime and opponents of the Government even though they were from the north of Togo. This had resulted in the killing of his father and of one of his uncles, the detention by the police of another uncle who had then to "go on the run" and, in himself being attacked and beaten in September 2001 and his home being broken into in the middle of the night on 5th December 2001. It did not matter counsel submitted, whether or not he was an opponent of the regime or a CDPA activist, once the police and the army in Togo believed he was. Once that was so it was clear from country of origin information, that he was in danger of arrest, detention in appalling conditions, torture and even death if he returned to Togo.

41. Counsel for the Applicant submitted that the true basis for the Applicant's fear of persecution was unmistakably set out by him in his replies to Questions 27, 29, 33 through to 39, and 50 of the Information Questionnaire for Refugee Status Application. Counsel submitted that it was the Authorised Officer of the Refugee Applications Commissioner who conducted the interview, who had erroneously narrowed and reduced the basis of the Applicant's claim and who had turned the entire focus onto the question of party membership and political activism.

42. This error, Counsel submitted, was adopted and obviously followed by the Member of the Refugee Appeals Tribunal, which resulted in a concentration by him on events in a single year in the Applicant's life and, left the true basis for his subjective fear of persecution uninvestigated.

43. Counsel for the Applicant submitted that the decision of the member of Refugee Appeals Tribunal was logical and intra vires, only in relation to a narrow, and not even fundamentally important aspect of the entire story. Counsel submitted that merely because the Member of the Refugee Appeals Tribunal did not find the Applicant credible with regard to his claim to have been persecuted by virtue of his political opinion, that did not justify the Member of the Refugee Appeals Tribunal in disregarding the Applicant's principal claim. Just because the Member of the Refugee Appeals Tribunal did not find part and, Counsel submitted, a relatively minor part of the evidence credible, (though over emphasised and afforded disproportionate importance by the Member of the Refugee Appeals Tribunal echoing the approach of the Authorised Officer of the Refugee Applications Commissioner), this did not permit the Member of the Refugee Appeals Tribunal to disregard the remainder of the Applicant's evidence. This was particularly so as the only reasonable inference to be drawn from the decision of the Refugee Appeals Tribunal was that the Tribunal accepted that the Applicant was indeed a Togolese national and a member of the CDPA Party. Counsel for the Applicant submitted that the Member of the Refugee Appeals Tribunal had consequently disqualified himself without reason or discussion from considering the principal evidence for subjective fear offered by the Applicant. While the conclusion of the Member of the Refugee Appeals Tribunal with regard to political opinion was something to be placed in the balance in reaching a proper conclusion on the entire of the evidence, the decision of the Member of the Refugee Appeals Tribunal was entirely unreasonable and was vitiated by the application of unfair procedures.

44. Mr. Barron, S.C. representing the Respondents submitted that it was entirely reasonable for the Refugee Applications Commissioner and the Refugee Appeals Tribunal to have concluded that the applicant's claim for asylum was based upon a fear of persecution because of his membership of the CDPA and his party activity. The Notice of Appeal to the Refugee Appeals Tribunal from the decision of the Refugee Applications Commissioner, did not allege that the authorised officer of the Refugee Applications Commissioner misdirected herself in considering that the applicant's case was based on party membership and party activity, and not on background, family and tribal connection and, the perception that he was not a supporter of the Government by the Authorities in Togo and, particularly by the Presidential bodyguard and by the supporters of the regime in the village of "Z".

45. Counsel for the Respondents submitted that the Applicant's initial claim as found in his answers in the Information Questionnaire was very vague. At q. 30(A) the applicant was expressly asked, "Are you a member of, or have you previously belonged to any political, religious, military, ethnic or social organisation or grouping in the country you fear persecution?" The answer written by the applicant was "am a Member of ["Y"] village. The president village is against the tribe I come from". Counsel for the Respondents submitted that it was not until his Interview, thirteen months later, in answer to the question from the Authorised Officer, "Are you a member of any political party in Togo?", that he claimed he was a member of the CDPA. In answer to a question as to his role in the CDPA, he explained that the CDPA had an office in the South of Togo only and if something needed to be organised in the North of Togo he would organise whatever was to be done. This said counsel for the Respondents was a new, different and opposed case for asylum. It was reasonable and rational, counsel said, for the Refugee Applications Commissioner and for the Refugee Appeals Tribunal to believe that the applicant's claim for asylum was based on party membership and party activity.

46. Even if the Refugee Appeals Tribunal accepted what was stated by the applicant regarding the killing of his father and his uncle, these events said counsel, had occurred in 1975 and 1990 respectively and, his other uncle was allegedly forced to go on the run, but in 1990 also. Therefore, counsel for the Respondents submitted, these matters could not have caused the applicant to leave Togo on 5th December, 2001. Even if one assumed that the applicant was a member of the CDPA, the Refugee Applications Commissioner found that there was, "no evidence that people involved at a politically low level are at risk from the Authorities in Togo", and this finding was intra vires and not irrational or unreasonable.

47. In the submission made on behalf of the Applicant by Sean Mulvihill and Company, Solicitors, by their letter of 9th July 2004, issue is taken with the conclusion reached by the Refugee Applications Commissioner that if the applicant was a member of CDPA, he was involved at a politically low level. Counsel for the Respondents submitted that this clearly and conclusively demonstrated that the applicant's claim for asylum in this State was based on party membership and political activities. Counsel for the Respondents referred to the following aspects of the solicitor's submission of 9th July 2004. At para. 2 of this submission it is bluntly asserted that, "the applicant's claim is based on his political activities". This paragraph then proceeds to connect the alleged assault on the applicant in 2001 and the alleged break-in at his house in December 2001, with his having organised the alleged demonstration in October 2000. At para. 3 of this submission it is stated that the Applicant does not see himself as a low-level member of the Party, as he was the one who was involved in organising the anti-government demonstration. At para. 5 of this submission it is stated that the Applicant requires and needs asylum in this country because his life is under threat, as he is a political activist and could be in grave danger in Togo according to an Amnesty International Report, 2004 p. 85 which describes continuing arbitrary detentions and torture of critics and opponents of the regime including of the supporters of opposition candidates before and after the election.

48. Counsel for the Respondent argued that the Refugee Appeals Tribunal reasonably and correctly understood this submission and the accompanying Notice of Appeal as indicating that the Applicant's claim for asylum in this State was on the basis of a fear of persecution arising from his party membership and activities and, not on any broader claim.

49. There were some exchanges between counsel with regard to a number of matters such as, the number of political parties in Togo

named by the Applicant at Interview, his not knowing of the coalition between the CDPA and the PASD, and his claiming that Mr. Sama was Minister for the Interior. However, in the circumstances of this application for judicial review, all these matters were taken into account by the Refugee Appeals Tribunal and by the Refugee Applications Commissioner in concluding that if the Applicant was a member of the CDPA, it was at a very low level. They are therefore merely subsidiary to the main issue in debate.

50. Counsel for the Respondents accepted that the decision of the Member of the Refugee Appeals Tribunal makes no reference whatever to the medical report of 21st September 2004. This, it will be recalled, was offered by the Applicant in support of his claim that he had been beaten with implements, including knives, by members of the President's tribe. Counsel for the Respondents submitted that as the examining doctor had described the striae on the right side of the Applicant's thoracic spine as consistent with an old injury of indeterminate origin. Therefore, said counsel, this oversight on the part of the Member of Refugee Appeals Tribunal was irrelevant as the medical report was not proof of anything.

51. Finally, counsel for the Respondents submitted that once the Member of the Refugee Appeals Tribunal found that the Applicant was not credible on a central issue, there was no need for him to consider anything more of the Applicant's story, or whether or not it received objective support from the country of origin information.

52. In my judgment, if this had been an ordinary inter partes issue, the arguments advanced on behalf of the Respondents would have carried very great weight. The review of administrative decisions by this Court would rapidly founder in chaos if the case presented by lawyers representing litigants, could not be accepted by the Court as the case which their instructing clients intended to make to the court, or to the body whose decision it was sought to review.

53. The Notice of Appeal, signed by Mr. "X" and by his legal representative on 9th July 2004, gave as the grounds on which the Applicant was seeking to appeal the Recommendation of the Refugee Applications Commissioner, only that the Refugee Applications Commissioner had erred in fact and in law as the Applicant had established a case such as to qualify him for refugee status as defined by s. 2 of the Refugee Act, 1996 (as amended). In the section of the Notice of Appeal which requires the Applicant to provide a brief note setting out the main submissions to be made at the oral hearing of the appeal, these are stated to be:-

"Submission 1. - discriminated and persecuted on grounds of politics.

Submission 2. - genuine well-founded fear of persecution if returned to country of origin"

54. These submissions were stated to be supported by the appended solicitor's submission, Amnesty International Report 2003, p. 243 - 250 and, Amnesty International Report 2004, p 85 - 86.

55. On the basis of this notice of appeal and that submission exclusively, the Member of the Refugee Appeals Tribunal might possibly be misled into thinking that the Applicant's claim to a well founded fear of persecution in Togo was based entirely on the reaction of the regime to known political activity on his part. The other grounds of appeal, (which were not argued before the Court during this application for judicial review), were, that the interpreter at the Interview was biased and, that as the Applicant had completed the Application Form and had attended the interview without legal advice, the decision of the Refugee Applications Commissioner was null, void and of no legal effect.

56. However, it is quite obvious from those parts of the Initial Application Form and the Information Questionnaire completed by the Applicant himself, to which I have already averted and, which were before the Member of the Refugee Appeals Tribunal, that the reasons which the Applicant himself advanced for fearing persecution in Togo were much more general and were based on alleged family, village and tribal connections and considerations and, the alleged perception of persons loyal to President Edyadémas that the applicant was carrying on a family history of opposition and disloyalty to the President's regime. The applicant in these documents did not rely on actual CDPA membership or party activity as the basis for his alleged fear of persecution in Togo.

57. I find that counsel for the Applicant in correct in his submission that it was the Authorised Officer of the Refugee Applications Commissioner who first elicited this information from the applicant and who then, unfortunately, concentrated on it to the entire exclusion of the other aspects of the Applicant's story submitted by himself. Perhaps the serious doubt expressed by the Authorised Officer in her decision, as to whether the Applicant was a Togolese national at all, caused her to conclude that an inquiry into these matters was irrelevant. Significantly however, the Member of the Refugee Appeals Tribunal expressed no such doubt as to the Applicant's country of origin. Neither did he hold that the Applicant's claim to be a member of the CDPA was not credible. In fact, it is significant in this context, that the Member of the Refugee Appeals Tribunal averted to the fact that the Applicant made no mention of his alleged membership of the CDPA in the answers which he gave to the questions in the Information Questionnaire.

58. In my judgment, if on a careful consideration of all aspects of an application for asylum, the Court is left with a real concern that a decision recommending that an Applicant should not be granted asylum in this State, was reached without fully and properly investigating all, or some very material aspects, of the claim made by the Applicant, then, regardless of the reason for that failure, unless referable to some indicated, intra vires and lawful determination on the part of the decision-maker, the court should remit the matter for a re-hearing before the appropriate decision-maker. Such cases will of course be exceptional and the reasons for the Court to interfere must be clear and compelling. It will not at all suffice for an applicant or his or her advisers, merely to assert, even on affidavit, that his or her claim for refugee status was misunderstood or misrepresented either by his or her own representatives or by the decision-maker. The Court must be able to satisfy itself from an independent examination and consideration of the documents and records in the application, which were before the decision-maker and, from the decision and the reasons given for it, that the true nature and terms of the Applicant's claim was so disregarded or so materially misunderstood by the decision-maker that the Court could not be satisfied that the Applicant's story was ever fully and properly considered and assessed by the decision-maker prior to arriving at his or her decision. To permit a form of estoppel by pleading to prevail in such exceptional circumstances would in my judgment be incompatible with the whole concept of refugee recognition and contrary to the intent and purpose of the recommendations and guidelines issued by the Office of the United Nations High Commissioner for Refugees and contained in the Handbook on Procedures and Criteria for Determining Refugee Status.

59. Article 29 of the Handbook identifies the first stage in the determination of refugee status as being the ascertainment of the relevant facts of the case. Article 37 of the Handbook states that the determination of refugee status will primarily require an evaluation of the Applicant's statements rather than a judgment on the situation prevailing in his or her country of origin. Article 41 of the Handbook emphasises, that where the Applicant's case is not sufficiently clear from facts on record, it is necessary for the decision-maker to take into account,

"The personal and family background of the Applicant, his membership of a particular racial, religious, national, social or political group, his own interpretation of the situation and his personal experiences - in other words everything that may

serve to indicate that the predominant motive for his application is fear.”

60. Article 43 of the Handbook notes, *inter alia*, that what happened to the Applicant’s friends and relatives and other members of the same racial or social group, may well show that his fear, that sooner or later he also will become a victim of persecution is well founded. The situation of each person must be assessed on its own merits. Article 52 of the Handbook points out that the subjective character of fear of persecution requires an evaluation of the opinions and feelings of the person concerned and that it is in the light of these that any actual, or anticipated measures against him must necessarily be viewed. Article 53 of the Handbook cautions, that it may be “cumulative grounds” in a general atmosphere of insecurity in the country of origin, which taken together produce an effect on the mind of the Applicant that can reasonably justify a claim to a well founded fear of persecution. Article 67 of the Handbook contains the reminder that it is for the examiner when investigating the facts of the case (the emphasis is mine) to ascertain the reason or reasons for the persecution feared.

61. Article 80 of the Handbook notes that an Applicant’s political opinions must be such as are not tolerated by the Authorities in his country of origin and must have come to their attention or be attributed by them to the Applicant. Article 196 of the Handbook provides that the duty to ascertain and evaluate all (the emphasis is mine) the relevant facts, is shared between the Applicant and the examiner, these will include the relevant facts which must be furnished in the first instance by the Applicant as indicated in Article 195. The inter-relationship of these duties was comprehensively considered and determined by the Supreme Court in *“Z” v. Minister for Justice, Equality and Law Reform* [2002] I.E.S.C. 14 at para. 62, 63 and 64 per McGuinness J. Article 201 of the Handbook warns that the cumulative effect of an Applicant’s experience must be taken into account and that taking isolated incidents out of context can be misleading.

62. G.S. Goodwin-Gill in his work *“The Refugee in International Law”*, (2nd Ed.) Oxford University Press, p. 349-350 warns that unless counsel and examiners play a proper role in the process of presenting an Applicant’s claim the ultimate objective of recognising and protecting refugees may otherwise get lost in the process.

63. In the instant case, I am satisfied that the basis for this Applicant’s claim for a subjective fear of persecution in Togo, became distorted and unduly restricted during the Interview of the applicant by the Authorised Officer of the Refugee Applications Commissioner. Despite the unavoidable conclusion that the Applicant’s Notice of Appeal and his solicitor’s appended submissions undoubtedly perpetuated and reinforced this unfortunate circumstance, it seems to me that the court must still conclude that the Applicant has been deprived of fair procedures. Given the nature of his claim and the country of origin information, that was before the Member of the Refugee Appeals Tribunal, in relating to Togo, this could be a matter of the greatest moment for him. From the very outset, the Applicant stated that his fear of persecution was based on race and political opinion. It is therefore hardly surprising that it was not until thirteen months later at interview, in answer to a direct question from the Authorised Officer, that he stated that he was a member of the CDPA. Again, it was in answer to a specific question as to his role in the CDPA that the Applicant explained that as the CDPA had an office in the South of Togo only, and that if something needed to be organised in the North he would organise whatever was to be done. In the circumstance, it is difficult to understand how counsel for the Respondents could describe this as, “a new, different and opposed case for asylum.”

64. It was submitted by counsel for the Respondents, that even if the Member of the Refugee Appeals Tribunal had accepted what the Applicant had stated regarding the alleged killing of his father and his uncle, these events had occurred in 1975 and in 1990 respectively: and if he accepted that the Applicant’s other uncle had been forced to go on the run, this was in 1990 also. Therefore said counsel, these events could reasonably be regarded as having caused the Applicant to leave Togo on 5th December 2001. Perhaps this is indeed a conclusion which it would be open to the Member of the Refugee Appeals Tribunal to draw if he had considered these matters, but the fact is that he did not. The Legislature vested in the Member of the Refugee Appeals Tribunal and not in this Court the function of finding such facts and arriving at such conclusions. Also, it seems to me, that it was a material part of the Applicant’s case, which was not considered by the Member of the Refugee Appeals Tribunal, that he connected the attacks on himself and his home in 2001 with these previous events and he feared that he would be next to be executed because of the perception on the part of supporters of President Edyadémas that he, like his father and uncles was hostile to the regime.

65. Counsel for the Respondents argued that even if one were to assume that the Applicant was a member of CDPA, the Authorised Officer of the Refugee Applications Commissioner had found that there was, “no evidence that people involved at a politically low level are at risk from the Togan Authorities”. Counsel for the Applicant submitted that this conclusion could only be reached as a result of a very selective reading of the country of origin information which was before the Member of the Refugee Appeals Tribunal and this, he said, in itself amounted to an unfair procedure. Having read the country of origin information which was before the Authorised Officer and which was before the Member of the Refugee Appeals Tribunal, I am satisfied that there is a strong arguable case that the Refugee Applications Commissioner was unduly selective in the passages on which she chose to rely and failed to maintain a proper balance and to give the benefit of any doubt to the applicant. However, no similar finding appears to have been made by the Member of the Refugee Appeals Tribunal whose decision is the subject matter of this application for judicial review.

66. Counsel for the Respondents accepted that the decision of a Member of the Refugee Appeals Tribunal made no reference whatever to the medical report of 21st September 2004. However, counsel submitted, that as the physician had stated that the cause of the striae could not be determined, this oversight on the part of the Member of the Refugee Appeals Tribunal was irrelevant. Counsel may indeed be correct in this, but this is a conclusion which only the Member of the Refugee Appeals Tribunal was qualified to reach. I do not consider that this error by the Member of the Refugee Appeals Tribunal would be sufficiently material in itself to constitute a sufficient reason to remit the matter to that body for re-hearing.

67. Counsel for the Respondents submitted that once the Member of the Refugee Appeals Tribunal found an absence of credibility on a central issue, there was no need for him to consider anything more of the Applicant’s story or whether it was or was not given objective support by the country of origin information. I am satisfied that this issue of party membership and political activity was not a feature, much less a central feature of the Applicant’s own story. It was elevated into a feature as a result of the interview and the decision of the Authorised Officer of the Refugee Applications Commissioner. Unfortunately and undoubtedly the error was perpetuated thereafter by the Notice of Appeal and the submissions filed on behalf of the Applicant. However, the Member of the Refugee Appeals Tribunal in my judgment made a simple negative finding on that issue which, on its face, did not amount to a finding that the Applicant was totally lacking in credibility. The negative finding on this issue, having regard to its history, might or might not be something to be weighed in the balance in considering the other aspects of the Applicant’s story. However, the fact is that those other issues were not considered at all by the Member of the Refugee Appeals Tribunal. Very importantly, the Member of the Refugee Appeals Tribunal did not find that the Applicant was not a credible witness generally. Not alone was this not a pivotal point in the claim made by the Applicant himself in the Initial Application form and in the Information Questionnaire, it was not made at all by him. I am satisfied that this finding by the Member of the Refugee Appeals Tribunal does not render any further investigation of the Applicant’s story in the context of the country of origin information unnecessary or irrelevant.

68. Finally, counsel for the Respondents submitted that as the summary of evidence contained in the decision of the Member of the Refugee Appeals Tribunal was not contested by the Applicant in his affidavit sworn on 9th August 2005, this Court must accept that summary as correct. While I accept this submission by counsel it does little to resolve the problem which has arisen in this case. The Member of the Refugee Appeals Tribunal is obliged by Statute to consider and to have regard to all documents furnished to him which, in the instant case, would have included the Initial Application Form and the Information Questionnaire and all the country of origin information. Given the manner in which the appeal was presented the Member of the Refugee Appeals Tribunal may well have concluded that the initial basis for the Applicant's claim had been abandoned. However, this is mere surmise, on my part as the decision is silent as to this. While referring to the Information Questionnaire with regard to the absence of any reference to the CDPA, the decision makes no reference at all to the many answers in that document in which the Applicant set out his reasons for leaving Togo and for his fear of persecution should he return to Togo.

69. The Court is satisfied that there was a failure in this instance to observe fair procedures in arriving at the decision. The Court will direct that the decision of the Member of the Refugee Appeals Tribunal made on 4th July, 2005 be delivered up for the purpose of being quashed, and that the matter be referred back to the Refugee Appeals Tribunal to be reheard before a different Member.