

THE HIGH COURT**JUDICIAL REVIEW****Record No. 2009 / 574 J.R.****Between:/****A. M., E. M. AND T. M. (A MINOR, SUING BY HIS FATHER AND NEXT FRIEND A. M.)****APPLICANTS****-AND-****THE REFUGEE APPEALS TRIBUNAL (Michelle O’Gorman) AND THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM****RESPONDENTS****JUDGMENT OF MS JUSTICE M. CLARK, delivered on the 4th day of October 2012.**

1. The applicants in this case come from Zimbabwe, a country from which many have had to flee in search of asylum. The first applicant Mr. AM’s claim has been rejected as not credible by the Refugee Applications Commissioner and by four different Tribunal Members. In this application he and his second wife Ms. EM and their child TM seek leave to apply for judicial review of the decisions of Tribunal Member Ms. Michelle O’Gorman dated the 2nd March 2009 and notified to the applicants by letters dated the 8th April 2009. As the claims of the second and third applicants are dependent on the appeal of Mr. AM, the first applicant, the challenge proceeded on the basis of the lawfulness of the decision in respect of the first applicant’s claim.

Background

2. Mr. AM is a Zimbabwean national of considerable education having obtained a primary degree in Zimbabwe and an MSc in management from a British University. He claims that he was engaged in a PhD programme before leaving Zimbabwe to seek asylum in Ireland.

3. The claim for refugee status as outlined in his questionnaire, completed within days of his application, was that he was persecuted because he was a political activist and sympathiser of the MDC, then an opposition party. He played an advisory role to the MDC as an academic and was involved in organising rallies and “stay- away protests”. From the time of his return to Zimbabwe from the UK, he was employed in the Civil Service and then as the senior housing officer for a local authority. Zanu- PF youths known in his area as “the Green Bombers” were under instruction to hunt out persons opposed to President Mugabe. Because of his outspokenness and because he was an organiser of the stay-aways, he was a wanted man. He decided to flee because of numerous acts of persecution by the Green Bombers directed towards him and his family and because of that group’s threats to do worse. His flight from Harare was funded by commercial white farmers who also provided him with an Emergency Travel Document (ETD). He told the asylum authorities that he feared being taken to a camp, tortured, tried for treason and jailed for life or face a death sentence if returned to Zimbabwe. Alternatively he could become one of the “disappeared”.

4. He claims that he used a false South African passport to travel to Ireland on 1st June 2003. He did not apply for asylum at the airport. Instead, he applied at the Offices of the Refugee Applications Commissioner (ORAC) on the 3rd June 2003.

The ORAC interview and s. 13 report

5. There was an eight month delay between the delivery of his questionnaire to ORAC and the s. 11 interview. His claim was very much enlarged at his interview and differed significantly from that outlined in his questionnaire. This time he said he had left his local authority job in 1996 to start his own successful fibreglass company making bathroom items, canoes and boats. He minimised his role in the organisation of the stay-away protests and presented himself as an adviser to the MDC and not an organiser. No explanation was offered for those amendments which were volunteered at the commencement of the interview. This time the applicant claimed that his problems with the authorities dated from the publication in November 1998 of an article written about him in the Financial Gazette, one of two independent newspapers in Zimbabwe. The author of the article was Masipula Sithole, a well known critic of the Mugabe regime and Professor of Political Science at the University of Zimbabwe. He wrote a weekly column for the newspaper and knew the applicant since he was a student at the university. The applicant furnished the newspaper clipping for the first time at the s. 11 interview. The article involved a discussion between the author and some of his former political science students at a social event. One of the named students was described as AM, a former Marxist and budding businessman, who was quoted on his views on the need for a robust opposition party to Zanu-PF. The applicant stated at his s. 11 interview that he was the person named in the article. He explained that Professor Sithole had regular contact with him since he was a student and he was to have been his supervisor for his doctoral studies. However this was not to be as he died suddenly from what he believed was a stress-related heart attack.

6. The case made by the applicant at his interview was that the publication of the article brought him to the immediate adverse attention of the Mugabe régime and from that time forth he was harassed, followed by the CIO (Central Intelligence Office), the Green Bombers and the War Veterans and he was physically attacked on at least ten occasions over the years. Immediately after the publication of the article, he was apprehended and held overnight when he was tortured. In February 2002 he was again arrested and tortured when melted plastic was poured over his body causing scars which were still visible.

7. The final event which caused him to seek protection abroad was his arrest and detention in May 2003 when he was held and tortured by being suspended from a helicopter over a crocodile-infested lake in an attempt to obtain information from him. All of this information was new, giving the Commissioner’s officer no forward notice. When asked to explain what information was sought which gave rise to such torture, the applicant provided further new information. He explained that in May 2005, Professor Sithole had asked him to conduct research for the MDC on the causes of the failure of the “stay away” campaigns which had been organised in opposition to the Mugabe government. He described his suggestions and the ORAC officer recorded each one. He said that after researching the issue, he presented a paper on the results to Professor Sithole and others including the Dean of the Department of Political Science at Zimbabwe University, who was an adviser to MDC leader Mr. Morgan Tsvangirai and with whom he was friendly. A

week after the presentation, his computer and documents were seized by the authorities and it was in that context that he was detained and then tortured to obtain information on his research.

8. All these events were described as having occurred in May 2003 and were connected with the big “stay away” protests which he had organised and which were due to take place in early June. He decided to leave immediately as he felt his name would be linked to these MDC protests. He left Zimbabwe on 1st June 2003. This time he said he obtained his ETD himself by bribing officials in the passport office.

9. After the s. 11 interview the Commissioner’s officer conducted some research into Professor Masipula Sithole and established that he had not been living in Zimbabwe since at least late 2002 as he was a visiting professor at the US Institute of Peace in Virginia and further, that he had died in the United States on the 3rd April 2003. It was therefore impossible for Professor Sithole to have been in personal contact with the applicant up to mid May 2003 either to ask him to conduct the research or to receive the presentation of the report which the applicant said he had requested. The whole narrative of the seizure of his laptop a week later and the other events which followed were therefore cast into doubt and these matters were set out in the s. 13 report. The failure to mention the article and the perceived untruth relating to his contacts with Professor Sithole were major reasons for the rejecting of his credibility.

10. The s. 13 report made several other adverse credibility findings. Generally, his relationship with the MDC was doubted. The lack of a passport among when the applicant had furnished so many other identity documents was deemed unusual for a person from Zimbabwe. The negative recommendation included a s. 11B (f) finding relating to his claim, which strongly suggests that the Commissioner had grave doubts about the applicant’s identity and the authenticity of his documents. While it was accepted that he came from Harare, his account of events was found to be “*so littered with inconsistencies*” that the benefit of the doubt could not be applied in his favour.

The appeal to the Refugee Appeals Tribunal

11. The applicant addressed the issue of Professor Sithole’s death in his written notice of appeal and explained that he had made a simple mistake in the date of his conversations with Professor Sithole. He had meant to say March 2003 and not May. He reminded the Tribunal that he had volunteered that Mr. Sithole was dead at an earlier part of the interview with the ORAC officer when explaining that he could no longer act as supervisor of his PhD. He also complained that the discrepancy was never put to him and he was afforded no opportunity to correct his error. He addressed the doubts relating to his identity by referring to an extract from the Harare telephone directory showing his name and address and correspondence from Raynor, Rensch & Pfeiffer, his first wife N’s legal representatives in Nebraska, which related to her successful asylum claim and that of her dependent children, which was based on her husband’s persecution. Her attorneys also wrote to the Refugee Legal Service (RLS) notifying them of her successful claim.

12. The oral appeal which included that of the second applicant EM was conducted over three well spaced hearings in August and November 2008 and January 2009. It was his fourth such hearing due to three previous annulments of RAT decisions. At the hearing, he explained the discrepancies between his questionnaire and the answers given at his s. 11 interview by saying that he had not appreciated the importance of accuracy in his questionnaire believing that he could provide further details at his interview which he said he did. He had volunteered the correct information about his employment and other details at interview. No explanations were provided for correcting the information given in his questionnaire. He then outlined his relationship with Professor Sithole and other lecturers at the University of Zimbabwe and described that they lived in the same area and that would meet socially. He outlined his problems with the authorities after the publication of the article. When questioned as to why a friend should expose him to the risk of such danger he replied that when he had complained, Professor Sithole laughed and told him to “grow up.” He described three occasions of detention and torture by the authorities between the publication of the article and 2002 and said that in between, he received silent phone calls and warnings to the effect that it was known that he was an MDC sympathiser.

13. He then outlined the events which caused him to leave Zimbabwe. In 2003 there were serious discussions in the University about what to do about Mugabe. Professor Sithole phoned him from America in March 2003 and when the research he requested was completed, the applicant sent it to him by email and the work was then discussed with other members of the group in the University of Zimbabwe. All of these events were now said to have occurred to March 2003 but he maintained the claim that his computer was confiscated from his home in May 2003. Shortly after that, he was detained and held in two of Zimbabwe’s infamous interrogation centres and questioned about his relationship with the MDC.

14. He described that after his release from his final arrest and torture in the helicopter a friend who was privy to what was happening in the ZANU-PF party advised him that the recommendations contained within his reports constituted treason and that he should leave Zimbabwe. He was tortured due to the contents of his notes. He then applied to the passport office for an ETD and was facilitated by bribing officials there.

15. The second applicant EM – the applicant’s second spouse – gave evidence of her claim, of her awareness of her husband’s political involvement and of her frequent harassment by the authorities to reveal information on his whereabouts. She was aware that her husband had left Zimbabwe to seek asylum but did not know where he was going. She did not follow because her young baby did not have a passport. She worked for a white farmer after her husband left but was unable to explain why she chose such source for employment when that group of people was targeted for adverse attention. She registered the first applicant AM’s name as father of her baby even though the authorities were seeking him. She had a passport since 2001 and entered Ireland legally having obtained a visitor’s visa through her cousin who lived here. She then claimed asylum on the basis of her husband’s persecution. She had a child in Zimbabwe and a child born in Ireland since she came.

16. A witness from Zimbabwe now living in Ireland was called to identify the applicant. This witness stated that he knew him from when he worked for the housing authority. He was aware of his political involvement and relationship with his former lecturer. He knew of his fibreglass business and said that the applicant regularly crossed into South Africa to buy cars which he brought into Zimbabwe for re-sale as he used to visit him going and coming from South Africa. He believed that the fibreglass business was affected by the economic situation in Zimbabwe and was no longer doing well. There was some discussion about the origins of totem names in Zimbabwe but this discussion was not detailed in the Tribunal Member’s twelve pages of notes nor was it addressed by the applicant in his evidence or later in his affidavit and no party in the case before the Court was in a position to explain or elucidate on the role of totem names. The applicant himself explained that it was highly improbable that a second person named “AM” could exist in Zimbabwe or that he would have been at Zimbabwe University at the same time as himself. The applicant did not agree that he travelled frequently to South Africa to buy cars saying he only did this once or twice.

The Refugee Appeals Tribunal decision

17. The Tribunal Member’s report indicates that she had considerable difficulty in accepting the applicant’s credibility. She outlined her many reasons. She repeated the obvious discrepancies between the questionnaire and what the applicant subsequently said at interview. The differing reasons given for leaving Zimbabwe and the claim that he did not appreciate that he could claim asylum at

Dublin airport were outlined and similarly rejected. The Tribunal Member attached importance to the fact that Professor Sithole was simply not mentioned at any stage in the questionnaire and she did not accept that the date of Professor Sithole's death could be a simple mistake, as:-

"it would be reasonable to expect that he would be very familiar with the month on which Sithole died and who he had made the presentation at the University to. [sic] The research and presenting of this paper form a core element of the applicant's claim and it would be reasonable to expect that the applicant would be consistent when recounting same. The Applicant's statements that he was asked to research a paper by Sithole and that he actually presented the paper to Sithole, among others, in and around May, 2003 calls into question the credibility of the Applicant's account and his general credibility."

18. The description of his successful businesses was deemed inconsistent with the core claim of being harassed, persecuted and tortured by organisations associated with Zanu-PF because of an article identifying him with opposition politics. None of the supporting identity documents, the correspondence from the first wife's attorneys or the medical report furnished from a hospital in Zimbabwe was deemed sufficiently compelling to overturn the s. 13 report. The Tribunal Member accepted that the applicant may have been assaulted in the past. Finally, she accepted that the applicant may be named "AM" but she found that, given the credibility issues surrounding his claim, she could not accept that he was the "AM" mentioned in the newspaper extract.

The Submissions

19. The applicant argues that the Tribunal Member failed to conduct the appeal in a manner which accords with the requirements of natural and constitutional justice in that she engaged in conjecture in relation to her finding that the applicant was not the person named in the 1998 newspaper article; and that insufficient regard was placed on the article and on the medical report outlining the applicant's injuries in 2002 or on documents relating to the first wife's successful claim and the evidence of the witness called. The respondents argue that the applicant has parsed and dissected a comprehensive and detailed decision which upheld the s. 13 decision and rejected the claim on credibility grounds and has not established even at leave stage that the decision is legally unstable.

The Court's decision

20. The issue argued before this Court was the rationality and reasonableness of the assessment of the applicant's credibility. More than that, the applicant impugned those credibility findings by arguing that the keystone issue was the finding relating to the newspaper article published in 1998. It was postulated that if the Tribunal Member had examined the evidence in a rational manner, she would have accepted that the applicant was the "AM" named in that article and that all his other claims would thereafter have fallen into place.

21. That brave argument ignores the very many inconsistencies in the applicant's changing claims and in the Court's view overstates the role of the content of the article in the decision. The Tribunal Member took the view that this applicant was not the person named in the article because in her view such a person would be at high risk from government agents and could not be the successful businessman he was. In the opinion of the Court, her view as to whether the applicant was the "AM" in the article is of minor significance when set against her main credibility findings which derived from an overall view of the shifting nature of his core claim. It is her function and not that of the Court to assess the applicant's credibility from an analysis of his claim, from observation and from what her experience and common sense tells her while using the guidelines provided by s. 11B of the Refugee Act 1996, and s. 5 of the European Communities (Eligibility for Protection) Regulations 2006 as mandatory aides. It is not for this Court in judicial review proceedings to re-write the decision to express a substitution of the Court's evaluation for that of the Tribunal Member.

22. The Tribunal Member's obligation is to establish from the applicant's evidence whether his claim could be true on the basis of his own presented facts and measured against objective facts known about Zimbabwe. The claim before the Tribunal was that he was a businessman and an academic and an independent adviser to the MDC at a high level since its formation in 1999. He was never a member and did not find it to be a credible opposition party even though it had, according to him, the support of the majority in Zimbabwe. In late 1998, following the publication of an article suggesting the need for an opposition party, the authorities and the various militia groups associated with the ZANU-PF became aware of his association with the opposition. Because of the content of this article he has since then been targeted for arrest, significant torture, physical attack and harassment which extended to his family. Against this background and the known propensities of the ZANU-PF towards the businesses of those who are not openly their supporters and their attacks on those who are identified as opponents of the regime, the applicant had his own luxury goods company employing twenty five employees up to the time he left Harare. The company was involved in the manufacturing and sale, mainly to builders and "high profile people", of fibreglass bathroom items including jacuzzi baths. His first wife was employed there. He may also have had another business importing cars from South Africa though the frequency of such ventures is disputed. Leaving aside the inconsistencies between this claim and his previous claim, the Tribunal Member looked askance at this unusual profile for an asserted wanted man who claimed harassment to such an extent that he had to keep changing his addresses for safety. That can only be viewed as a reasonable approach in all the circumstances.

23. The applicant who is a well educated man from Harare thus told a story which the Tribunal Member found unlikely to be true in the political situation prevailing in the Zimbabwe of 2003 when non-Zanu-PF supporters did not thrive in business. She then went on to consider the other part of his claim and in her extensive determination she rejected the applicant's claim. There is no dispute that then and now, extra-legal militia and war veteran supporters of Zanu-PF kill, torture, beat and abuse persons believed to be sympathetic to the opposition. The negative assessment in this case does not derive from any dispute relating to the human rights situation on the ground in Zimbabwe or from any lack of identification but from the applicant's own actions in his presentation of materially and significantly inconsistent claims and claims which run counter to objectively known facts.

24. It is impossible to ignore that the core of the applicant's claim changed from one which derived from his role in advising on and organising the stay away protests in 2002 / 2003 to one where he was a wanted man since the publication of an article discussing his views in late 1998 and further to one where he was detained and tortured because of the contents of his computer in March / May 2003 when he was asked to advise Professor Sithole on a political issue. The Court's objective assessment of the applicant's entire file is that these major shifts are plain to see and the significant new facts are difficult to reconcile with earlier assertions as are the ancillary facts such as how the ETDs were obtained and when his notes/computer were taken. Objectively, it is very difficult to understand how an extensive questionnaire omits to mention an event as terrifying as being dangled from a helicopter over crocodile infested waters. Equally, it is difficult to ignore that a picture was painted of direct contact with Professor Sithole throughout May 2003 until the applicant was made aware of the date of his death in early April of that year. The contact then was explained as being electronic or telephonic. The Court cannot identify any error in any of the negative credibility assessments made on these issues.

25. The frailty of the applicant's challenge to the Tribunal decision was highlighted when the Court was invited to examine each document which was before the Tribunal Member. It became obvious that the first wife's claim for refugee status in the US as outlined in her attorney's correspondence differs in material respects from that put forward by her husband, the applicant. The first

wife's claim was based on her persecution because of husband's membership of the MDC while the applicant has consistently denied membership. The injuries inflicted on her husband as described by his wife's representatives differ significantly from those described in the medical report furnished by the applicant or as described by him. The letter from the first wife's attorneys states that her husband was forced to leave his position in a named local council in 1998 because of harassment by the Zanu-PF party which is inconsistent with the applicant's case that he left the position to start his fibreglass company and further he never made the claim of harassment which caused him to leave the housing authority. It is clear that this document could not corroborate or substantiate his core claim.

26. The medical report written in January 2004 which was furnished to the Tribunal Member outlines injuries consistent with an assault and burning in February 2002 and indicates that the applicant was further seen in May 2003. The injuries are similar to those described by the applicant but quite different to those described by his first wife in her US claim. The medical report contains an unusual request that "*all assistance should be given to the applicant*", thus to some extent impugning the contemporaneous nature and impartiality of the report.

27. It cannot be said, as was asserted, that the Tribunal Member failed to have regard to this report. She referred to the report and accepted that the applicant may have been assaulted but she did not find the contents sufficiently compelling to overturn the s. 13 report. She was obliged to have regard to the report and to attach whatever probative value she felt was due to the particular report in the context of the assessment of overall evidence. The Court adopts the reasoning of Cooke J. in *Pamba v. The Refugee Appeals Tribunal* (Unreported, High Court, 19th May 2009) and Birmingham J in *M.E. v. The Refugee Appeals Tribunal* (Unreported, High Court, 27th June 2008) that Tribunal Members are not obliged to explain how and why each item of evidence running counter to the decision has been discounted or rejected. The Court must be satisfied that the Tribunal Member had regard to the report but the Tribunal Member is not required to accept its contents as proof of the applicant's claim. In this case the description of the applicant's injuries was not discounted; rather, the assault was deemed insufficiently compelling to ground a positive recommendation for refugee status. The Court does not accept that the Tribunal Member failed to have regard to the medical report or to attach sufficient weight to it in the light of the entire story.

28. The challenged decision fully outlines the case made by the applicant at his oral appeal. The Tribunal Member then contrasted the claim made in his questionnaire and the claim made at his interview. She noted his reasons for not applying for asylum at Dublin Airport and found them unreasonable for a well educated and travelled person who left Zimbabwe and South Africa in search of refuge. She noted the discrepancy between what he said and what his witness said about his business. She noted his second wife's evidence and the documents presented. While this evidence clarified that the applicant was a person named "AM" from Harare, the Tribunal Member in effect found that establishing his identity did not advance his claim of persecution. The Tribunal Member then examined the extraordinary assertion that his friend and mentor Masipula Sithole would write an article causing his friend the applicant to be persecuted and then tell the victim of his irresponsibility to "grow up", and moreover that their relationship endured into the future. It cannot be surprising that any decision maker would find such a claim not credible.

29. As the decision is based on credibility the High Court's role is confined to ensuring that the decision is legally sound and is not invalidated by any material error whether of law, fact or principle of any breach of natural or constitutional justice. In the view of the Court the conclusions reached by the Tribunal Member are soundly based on the information put before the Tribunal. The applicant's core claim never moved beyond assertions. While frequently such information is simply not available because of conditions on the ground in an applicant's country of origin or for other valid reasons, the Court objectively observes that no evidence was called to support the sending by email of the notes to Professor Sithole. A missing laptop does not obliterate an electronic identity or address and a sent email can with passwords be retrieved from another computer. The reality is that in the five years since the negative ORAC recommendation, not a shred of additional evidence was called at this fourth appeal hearing notwithstanding three negative Tribunal decisions. No supporting statements were provided from the other named members of Professor Sithole's think tank in the University of Zimbabwe and nothing was put before the Tribunal to support his assertions of a close relationship with the intellectuals of the MDC party.

30. The one finding in the contested decision which did cause the Court to hesitate is that which relates to the Financial Gazette article which was alleged to have been printed on the 5th November 1998 where the Tribunal Member found: "There is nothing to suggest that the applicant is the [AM] named in that article. He may be an [AM]." *Although it does give rise to a moment's pause, the Court is satisfied that even if the Tribunal Member was wrong in her assessment of whether the "AM" in the article was in fact the applicant, that finding does not render the remaining findings made on the rest of the applicant's claim irrational or unreasonable.* Whether the article is viewed with suspicion as to its authenticity, whether it is accepted as genuine or whether it did or did not relate to the applicant, the version of the consequences to him as presented by the applicant was found not to be credible. In the final analysis, whether the article was indeed published and whether applicant was the "AM" mentioned in the article makes no effective difference to the validity of the decision. Accepting that he was the person named in the article and was therefore a marked man who was persecuted does not explain the objective implausibility of his claim to have been a successful businessman with 25 employees with free access to the high echelons of the opposition intelligentsia. Nor does it explain the many inconsistencies in his evolving account of his reasons for leaving Zimbabwe.

31. While the Tribunal decision differed from that of the ORAC in relation to identity, there was no difference in the finding that the applicant had not established, to any degree of satisfaction that he had any involvement with the MDC either as an advisor or otherwise, or that he was arrested, tortured and released before coming to Ireland. Taking the decision as a whole, set against the entire tableau of the applicant's changing narrative, omission, mistakes and explanations drives the Court to conclude that it was entirely reasonable for the Tribunal Member to find that the applicant's claim is so peppered with inconsistencies that his assertions lack any objective support. The entire determination ought not to be quashed because of one possibly objectionable finding which does not infect the remainder of the decision. Substantial grounds are not established and leave is refused.

32. As a postscript, the Court notes that a significant length of time has elapsed since the first applicant applied for asylum in 2003. The situation in Zimbabwe has evolved considerably since then and it is clear that any future protection application relating to this family ought properly to encompass consideration of the changed circumstances in Zimbabwe and the treatment of similarly situated Zimbabwean nationals who are returned to their country of origin having been refused political asylum abroad.