

THE HIGH COURT
JUDICIAL REVIEW

Record No. 2009 / 69 J.R.

Between:

M.B. (DRC)

APPLICANT

-AND-

**OLIVE BRENNAN, SITTING AS THE REFUGEE APPEALS TRIBUNAL, THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM,
IRELAND AND THE ATTORNEY GENERAL**

RESPONDENTS

JUDGMENT OF MS JUSTICE M. H. CLARK, delivered on the 28th day of January, 2014.

1. The assessment of credibility in asylum cases is a key issue in a very large number of applications for judicial review, notwithstanding the fact that since the 10th October, 2006, the procedures for determining the facts and circumstances of protection claims are determined and set out by the Qualification Directive, which was transposed into domestic law by S.I. 518 of 2006, the *ECs (Eligibility for Protection) Regulations 2006*. The process essentially involves eliciting the applicant's claim by statements and answers and assessing the information obtained by reference to relevant, current country of origin information (COI).
2. In this case, leave was granted to the applicant to challenge credibility findings made by the Tribunal Member who found that the applicant's story was "*simply not credible, coherent or believable*". She argues, in brief, that the Tribunal failed to assess her core claim, made two fundamental errors of fact, and engaged in impermissible speculation and conjecture when assessing her credibility.
3. Before considering those grounds the context of the claim must be examined. The applicant is a woman from the Democratic Republic of the Congo (DRC). She appears to have been detained at Dublin Airport on the 10th March, 2006, as she had no identity or travel documents. Three days later she applied for asylum and at her preliminary Section 8 interview she claimed her fears were based on the war between Burundi, Rwanda and the DRC.
4. Her written responses to the Refugee Applications Commissioner's Questionnaire described her reasons for leaving the DRC in more detail. Generally there was insecurity in her country arising from war, hunger and violence. The specifics of her claim centred on two incidents in very disparate and distant parts of the DRC – the first was in her aunt's village in Kivu Province in 2000 when she saw her pregnant aunt and uncle brutally killed by mercenaries or rebels and she herself was then raped by five men from Rwanda and Burundi. She became pregnant and gave birth to a son in the following year. The second incident occurred in Kinshasa in 2006 when she was visiting her father who had joined the Union for Democracy and Social Progress (UDPS) political party a year earlier. He was abducted in her presence because Theophile Mbemba, a politician with the ruling party, sought his elimination. Because she recognised one of the soldiers who had betrayed her father, he intended to have her killed too. She was warned of his intentions by a military agent who had been at school with her brother. She sought the assistance of a priest from her village who was in Kinshasa at the time and he arranged her to travel to Ireland.
5. She attended two interviews with the Commissioner where a more detailed account of the two separate and unconnected incidents was provided. The second interview focused on her claim of her father's UDPS membership and the details of his kidnapping. She said he was friendly with the head of the UDPS before he joined the party as they came from the same province. She had no contact with her mother and son since she left Lubumbashi for Kinshasa but had been in touch with her cousin who told her that her father's body had been found by a river in Kinshasa. She submitted a birth certificate in her name which carried an issue date post dating her arrival in Ireland and bore the inverse date and month of birth given to the Commissioner.
6. The Refugee Applications Commissioner recommended that the Minister should not grant her a declaration of refugee status in July, 2006, and that recommendation was affirmed by the Refugee Appeals Tribunal by decision dated the 3rd June, 2008. The applicant's oral appeal hearing had been delayed pending the judgment of the Supreme Court in *Atanasov v. Refugee Appeals Tribunal* [2006] IESC 53 (Unreported, Supreme Court, 26th July, 2006)¹ and finally took place on the 13th March, 2008.

The Appeal

7. The applicant was represented by the Refugee Legal Service (RLS) on appeal. They had asked the Refugee Documentation Centre (RDC) to conduct a search of COI to establish whether there was any no information available about the arrest of the applicant's father or about Theophile Mbemba. No information was found on the applicant's father or on the abduction of a UDPS member as described. It was established that Theophile Mbemba was the Interior Minister of the DRC government and that in May, 2006, he had announced the arrest of 32 foreigners who had plotted a coup against the Kabila Government, but that some in Kinshasa had expressed doubts about the veracity of the claim that the arrested foreign men were mercenaries. The RDC stated that no information could be found about complaints against Minister Mbemba.
8. A brief report from the applicant's GP dated July, 2007, was furnished which stated that she had "*witnessed the killing of her father and aunt by soldiers*" and was then sexually assaulted and raped by five "*soldiers*". The GP said she was suffering from post-traumatic stress disorder (PTSD), depression and gynaecological problems; she was on long-term anti-depressants and was attending psychiatric and counselling services; she had attempted suicide and had suffered severe physical and mental trauma and was still suffering as a result. Confirmation of her attendance at a Health Service Executive (HSE) clinic for psychiatric review and at the Rape Crisis Centre for counselling was also submitted. Also furnished was a letter from Consultant Psychiatrist Dr O'Sullivan, who confirmed the diagnosis of PTSD with associated mild to moderate depression. She stated that with medication there was no evidence of depression at her most recent interview and that the symptoms of PTSD did not seem to be so significant.

9. Additional COI furnished at the appeal stage related to the rape of thousands of women and girls in eastern Congo's conflict, and abuses which went unpunished in the southern province of Katanga.

10. The Court has the benefit of a handwritten note taken by her legal representative at the hearing. A summary of the evidence is also contained in the Tribunal decision, from which it seems she gave an account along the same lines as she gave the Commissioner.

The Contested Decision

11. The Tribunal Member identified as the applicant's "core claim" her fears arising from her father's involvement with the UDPS and her witnessing of his kidnapping. While the claim of rape in 2000 was noted this incident was not the reason why the applicant ultimately left the DRC. She found that the applicant's problems proper began in 2005 when her father became involved in the UDPS. The Tribunal Member did not accept the applicant's narrative as plausible for the following reasons:

(i) *"Given that the Applicant was still in the place where he[r] father was allegedly abducted with the door broken down and access and egress from easily made it seems highly improbable and impossible that if it was the intention of the soldiers to come looking for the Applicant they knew full well where she was"* [sic];

(ii) It did not seem unreasonable for the applicant to return to the safe house since her father had lodged her there, and it was highly implausible and improbable that she instead went to a priest.

(iii) If her father was a member of the UDPS it would have been reasonable for her to contact the UDPS about her father's situation and about her own.

(iv) It seemed unbelievable that she would not have made reference to the problems regarding her father at her Section 8 interview when she simply stated that there was a war in the DRC.

(v) She presented as being very intelligent but when she was asked if she had visited her father before his alleged abduction in 2006 she was seriously evasive and non co-operative. It was put to her that she was being asked a very simple question but she refused to co-operate.

(vi) It was not believable, given her education and intelligence, that she would not have noted the name on the passport and her account of what happened at Dublin airport is simply not capable of being believed.

(vii) Her birth certificate has no probative value in the overall assessment of her claim. She has no internal photographic ID, no passport and no driver's licence.

(viii) She answered fluently and comprehensively in relation to her story of that which allegedly befell her in the DRC but she was hesitant and evasive when answering simple straightforward questions relating to the substance of the story.

12. The Tribunal Member noted the letter from her GP dated July, 2007, the assessment that she is suffering from PTSD and depression and the letter from the HSE to the effect that she is attending for psychiatric reviews. The Tribunal Member concluded that her story was *"simply not credible, coherent or believable"* and that she was unwilling or unable to explain the many lacunas in her story, though she was given many opportunities.

Grounds on which Leave was Granted

13. Leave was granted by Mac Eochaidh J. on the following four grounds:

(i) *The Respondent erred in law and breached natural and constitutional justice requirements in failing to make any assessment of the Applicant's father's membership of the UDPS, his kidnapping and subsequent assassination, with the finding of his body in a river in Kinshasa, in making an assessment of the Applicant's own well-founded fears in accordance with the provisions of paragraph 43 of the UNHCR Handbook;*

(ii) *The Respondent made [a] basic and fundamental error of fact in stating that the Applicant "had made no mention of any problems regarding her father" in her Section 8 interview ... when she had given such particulars right through both her interviews as well as in the addendum to her Questionnaire, with regard to the problems of her father;*²

(iii) *The Respondent made a basic and fundamental error of fact in stating that the Applicant was "evasive and non-cooperative" in answering the question in relation as to whether she had visited her father before his abduction in February, 2006, when she had already given such information at Question 17, page 7 of her First Interview;*

(iv) *The Respondent erred in law in engaging in speculation and conjecture in stating that "it seems highly improbable and impossible that it was the intention of the soldiers to come looking for her that that they knew full well where she was" and in stating that "it is highly implausible and improbable" that the Applicant went to the Priest after being advised by her father that it was not safe to stay in his friend's house in Kinshasa.*

14. The applicant was also granted a lengthy extension of time to bring proceedings.

15. Leave was sought but was not granted to challenge the manner in which the Tribunal Member dealt with the incident in 2000 or her assessment of the medical evidence, the birth certificate and the COI furnished. Leave was also refused on grounds relating to her purported refusal to adjourn the oral hearing to allow the applicant to obtain a further medical report,³ or her omission to consider an additional medical report faxed to the Tribunal some weeks after the hearing, by which time it appears the decision had been made.⁴

16. The substantive hearing took place on the 25th July, 2013. Ms Sunniva McDonagh SC with Ms Aoife McMahon B.L. appeared for the applicant and Ms Fiona O'Sullivan B.L. appeared for the respondent Tribunal.

THE COURT'S ANALYSIS

17. Much of the applicant's argument centred on the failure to provide reasons and on the lack of clarity in the Tribunal Member's reasons for her decision. The leave decision of Mac Eochaidh J. quite correctly made adverse comments on the writing style of part of the Tribunal decision but he did not grant leave nor was he asked to grant leave on the failure to give reasons.

18. While the decision would have benefitted from basic proof reading and the insertion of some punctuation, it did not suffer from a failure to provide reasons for finding the narrative of the claim not credible. The Court is not satisfied that the Tribunal decision suffers from such flaws in clarity as would warrant the quashing of decision. The findings made by the Tribunal Member are robust and reasoned and based on the evidence put forward at the earlier stages of the claim and at the appeal hearing.

19. It is common case that at the core of the applicant's claim were the events surrounding her father's abduction and murder arising from his involvement in the UDPS. The Tribunal Member was aware that this was the core claim and this was recognised by Mac Eochaidh J, in his written judgment. The applicant also described horrific events relating to her aunt's village in eastern DRC, where as she stated there is a war going on. Those events are said to have occurred in 2000 while the event which motivated her flight from the DRC was in 2006. While the Court readily accepts that events such as those described in 2000 do indeed occur in the Kivu provinces, the applicant did not provide any specific evidence beyond assertion which would enable an assessor of fact to determine the truth of what she asserted. The Tribunal Member did not address that aspect of the claim in any detail, and the Court is not required to make any determination on the issue.

20. The issue before the Court is undoubtedly the adequacy and legality of the Tribunal Member's assessment of the credibility of the applicant's core claim in relation to the abduction of her father in Kinshasa in 2006 and her subsequent flight from the DRC. The Court must consider whether – as the respondents contend – the Tribunal Member's findings were soundly based on the evidence presented and current COI reports, or whether – as the applicant contends – they were founded on significant errors of law and based on subjective demeanour assessments that the applicant was 'evasive and seriously non-cooperative' and on impermissible speculation and conjecture unsupported by objective facts.

21. The principles which have evolved from the many decisions on the assessment of credibility were distilled with characteristic precision by Cooke J. in *I.R. v. Minister for Justice, Equality and Law Reform & Anor* [2009] IEHC 353, (Unreported, High Court, Cooke J., 24th July, 2009). Of particular relevance to this challenge are rules 4 and 8 at para 11:

"4) The assessment of credibility must be made by reference to the full picture that emerges from the available evidence and information taken as a whole, when rationally analysed and fairly weighed. It must not be based on a perceived, correct instinct or gut feeling as to whether the truth is or is not being told. [...]

8) When subjected to judicial review, a decision on credibility must be read as a whole and the Court should be wary of attempts to deconstruct an overall conclusion by subjecting its individual parts to isolated examination in disregard of the cumulative impression made upon the decision-maker especially where the conclusion takes particular account of the demeanour and reaction of an applicant when testifying in person."

22. The Court is satisfied that on the whole the decision under challenge could have been more elegantly stated but it still correctly identified the applicant's core claim which was accurately summarised and then properly considered and analysed. The story told relating to her visit to Kinshasa, the kidnapping of her father by reason of his UDPS membership and his guardianship of key UDPS documents, the threat to the applicant's own life because she recognised one of the abductors and the question of why, if he knew she recognised him, her father's friend would not have harmed her then or later that evening, were all part of the credibility assessment. The Tribunal Member also weighed in the balance her failure to contact the UDPS or even to return to the safe house and the coincidence of her brother's school-mate being a member of the Presidential Guard and the local priest from Lubumbashi⁵ being in Kinshasa. There was also the issue of the applicant's failure to even mention her father's abduction and her fear for her own life at her Section 8 interview which took place three days after she arrived in Ireland at the ORAC headquarters and not at the airport. There is also the inescapable fact that the Refugee Documentation Centre – a specialist organisation which is highly experienced in the research of country of origin information and which consults a wide range of sources before issuing a response to a request for information – could find no information in relation to the claimed specific incident. The applicant said her father had been charged with the care and custody of important UDPS documents. She said that the soldiers had specifically come to get those documents but was extremely vague at the appeal hearing about whether they had searched for or obtained the documents. It was open to the Tribunal Member to consider that it would not be unreasonable to expect some reference to an abduction and eventual killing in COI if it occurred, especially if the applicant's father who had previously been described as a farmer was highly placed and well connected in the UDPS. This absence must be considered against the fact that human rights abuses in the DRC are widely and systematically documented and that political opposition parties themselves are generally anxious to have abuses perpetrated against their members by the Government documented and the information disseminated widely.

23. Decision makers are not expected to make decisions which are devoid of common sense or to disregard obvious difficulties in an applicant's case. This is a woman who gave no rational explanation for her failure to contact her father's political party and employers after his politically-related kidnapping or even after she learned that his body had been discovered when she was in Ireland. It was never clear why she chose to flee to a stranger's house hundreds of miles away in Kivu and then to Ireland instead of returning to her mother's home in Lubumbashi where she had left her young son or why she had not been in contact with her mother since she left Kinshasa after her father's alleged abduction.

24. There were many parts of the story which, as a matter of common sense, did not hang together. The Court also notes that, if accurately recorded (and translation difficulties must be factored in), the GP's report suggests that she *witnessed* her father and aunt being killed and that she was raped by *soldiers*. The birth certificate which she produced post dates her arrival in Ireland by a number of days and she otherwise produced no identity documents. She was not an illiterate young girl when she arrived in Ireland without documents. She was in her mid-20s and the mother of a five year old child. She claimed that she had trained as a chef and worked in her family's restaurant and was in education from 1987 to 2002 and she also speaks several languages.

25. Against this background, the Court is satisfied that the Tribunal Member did address the applicant's core claim and that the decision as a whole, which recites many reasons for why the claim was lacking in credibility, is reasonable having regard to the applicant's claim, including the earlier background of the claim as a whole. The first ground on which leave was granted must therefore fail.

26. The second ground on which leave was granted relates to the failure to mention any problems relating to her father at her Section 8 interview. The Court finds no fault with any adverse comment being made when an applicant who claims she fled due to fear for her life because she witnessed and could identify one of her father's abductors, fails to mention this fact at all at the first available opportunity. Given that this was only one of many adverse findings made by the Tribunal Member in her assessment of the full picture and the applicant's evidence as a whole, there is no error of principle or fact. This was a logical finding which was open on the facts.

27. The third and fourth grounds on which leave was granted are similar in that they relate to reliance on demeanour, speculation and

conjecture. While it is well accepted that extra care must be exercised if relying on demeanour as an indicator of credibility given the social, linguistic and cultural differences between an assessor of fact and the protection applicant, it *cannot* be the case that specialised, experienced decision-makers such as Tribunal Members can *never* rely on an applicant's demeanour when sudden evasiveness or non-cooperation occurs in response to specific questioning when previously no problems have occurred. In this case, it was specifically put to the applicant at the appeal hearing that she was considered to be evasive in the manner in which she answered certain questions relating to her visits to her father and to the confidential documents he was said to be guarding or in relation to why they would be held by him at all. The episode is clearly described in the Tribunal decision, and inferences were drawn for what was considered evasiveness in providing answers. The third and fourth grounds are therefore untenable.

28. For these reasons, the Court is satisfied that the application seeks to deconstruct a decision in an attempt to emphasise and magnify a couple of minor clumsy phrases in order to provide evidence of a decision which lacked reasons for the finding of a lack of credibility. No fundamental errors were identified in the decision and no minor errors of fact or law were established. The challenge fails.

¹·Affidavit of David Keogh, Staff Officer at the respondent Tribunal, 30th April, 2009. Mr Keogh says that the *Atanasov* judgment was delivered on the 26th July, 2006, and thereafter the Tribunal set up a system which would provide access to asylum seekers to previous decisions requested by them. In a replying affidavit sworn by the applicant on the 4th July, 2009, she argued that no explanation has been given for the inordinate delay following the delivery of *Atanasov*. However, leave was not sought to argue that the delay was inordinate or inexcusable or invalidated the decision in any way.

²·The Applicant initially averred that she never had a Section 8 interview, but is clear from documents exhibited in replying affidavits that she did. It was submitted at the hearing that she was confused arising from the brevity of the Section 8 stage, and it is now common case that such an interview did take place.

³·The applicant says her counsel sought and was refused and adjournment of the hearing to obtain a further medical report. The fact that such an application was made and refused is disputed by the Tribunal.

⁴·This was a medical report prepared by a consultant Psychiatrist, following discussion with the applicant's treating Psychiatrist. Mac Eochaidh J. was satisfied at the leave stage that the earlier report was more favourable to the applicant and no prejudice arose from the Tribunal Member's omission to consider this report.

⁵·A very large distance from Kinshasa – perhaps 1000 kilometres as the crow flies