

THE HIGH COURT

2006 1277 JR

BETWEEN

P. I. E.

APPLICANT

AND

RORY MCCABE, ACTING AS THE REFUGEE APPEALS TRIBUNAL

RESPONDENT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, IRELAND AND THE ATTORNEY GENERAL

NOTICE PARTIES

Judgment of Mr. Justice Hedigan, delivered on the 30th day of October, 2008

1. The applicant is seeking leave to apply for judicial review of the decision of the Refugee Appeals Tribunal (RAT) to affirm the earlier recommendation of the Office of the Refugee Applications Commissioner (ORAC) that he should not be declared a refugee.

Factual Background

2. The applicant is a national of the Democratic Republic of the Congo (DRC). In October, 2001, he was attending University when his brother, a student leader, took part in a protest march. Thereafter, the applicant's brother fled to England, where he was granted refugee status. Government forces came to the family home to arrest the applicant's brother but when they found that he had fled, they arrested the applicant and members of his family. They were detained in very poor conditions, beaten and interrogated, and soldiers threatened to kill them if they did not disclose the whereabouts of the applicant's brother. They were released in April, 2002, on condition they did not join a political party or leave the country, and that they report periodically to the police. The applicant was thereafter treated in hospital for a week.

3. In 2003, following the signing of a peace agreement between rival factions in the DRC and the installation of a transitional government, the applicant joined the *Movement for the Liberation of the Congo* (MLC), a political party that had joined the government in December, 2002. He was chosen to join the Secret Service (SSMLC) and, after receiving military training, he was given the task of gathering information. A few months later, the SSMLC started to send him on missions to commit crimes, including murder. In January, 2004, two of his SSMLC colleagues who were unsuccessful in their task to kill an opposition politician were killed by the MLC.

4. Fearing that their lives could also be in danger, the applicant and a colleague wrote a letter of resignation on 29th March, 2004. That night, while the applicant was at his church, his mother, brother, fiancée and son were arrested and detained. The colleague who had resigned with the applicant was also arrested. The applicant went to stay with his uncle in Bandal and on 3rd April, 2004, he travelled to England, where he stayed for over a year. He has since heard that the MLC has confiscated his house.

Procedural Background

5. The applicant made an unsuccessful application for asylum in England; he says that his lawyer in England failed to lodge his appeal on time and his claim was 'withdrawn'. Fearing deportation, he travelled to Ireland and on 29th September, 2005 again applied for asylum, using an assumed name. He did not disclose the fact that he had already applied for asylum in the U.K. but the matter soon came to the attention of the authorities. He attended for two interviews with an authorised ORAC officer.

6. In the ORAC section 13 report, dated 24th March, 2006, negative credibility findings were drawn. In addition, the ORAC officer found that the applicant's alleged fears had no Convention nexus. From that decision the applicant appealed to the RAT. An oral hearing was held at which the applicant was represented by counsel and assisted by an interpreter. A report compiled by SPIRASI (a humanitarian organisation that works with asylum seekers and refugees, with special concern for survivors of torture) thereafter became available and was submitted to the RAT.

The RAT Decision

7. The decision to reject the applicant's appeal, dated 28th August, 2006, was primarily based on internal inconsistencies that the Tribunal Member identified in the applicant's account of events, relating to the following (among others):-

- a. The number of siblings (if any) who are in the U.K.;
- b. His state of knowledge as to the implications of SSMLC membership;
- c. The scenario leading to his decision to leave the DRC;
- d. That he considered the MLC to be an opposition party; and
- e. The implications of his resignation from the MLC for his family.

8. The Tribunal Member found these inconsistencies to be "both material and significant to his application" and he drew negative credibility findings from them.

Extension of Time

9. Although it is not clear when the RAT decision was communicated to the applicant, it is accepted that the applicant commenced the within proceedings outside the 14-day period allowed by section 5(2)(a) of the *Illegal Immigrants (Trafficking) Act 2000* for the making of a leave application.

10. The applicant seeks to explain the delay on the basis that he was, at first, represented by the RLS. The RLS notified him that they would not be pursuing an application for leave to seek judicial review of the RAT decision. He then sought private representation and consulted his present solicitor on 13th October, 2006. In my view, the applicant's solicitor acted with all due expedition thereafter and in the circumstances, I am satisfied that good and sufficient reason exists for extending time.

THE APPLICANT'S SUBMISSIONS

11. The primary complaints advanced by the applicant in respect of the Tribunal Member's decision are as follows:-

- a. Error of law as to the burden of proof;

- b. Flawed treatment of credibility; and
- c. Error of fact as to country of origin information.

(a) The Burden of Proof

12. In the section of his decision entitled "The Law", the Tribunal Member states:-

"In accordance with general legal principles, the burden of proof lies on the person who makes the assertion. An applicant for refugee status must establish the truth of the assertions made and the accuracy of the facts on which the application is based. This burden will be discharged if the applicant renders a truthful account of facts relating to the claim. This burden, because of the peculiarities of a refugee's situation, is shared with the determining authority, which must ascertain and evaluate all of the relevant facts."

13. He goes on to state that the standard of proof is less stringent than the civil 'balance of probabilities' test. The applicant complains that there is no reference in the decision to paragraph 196 of the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status*, and that it is unreasonable for the Tribunal Member to state that an applicant must establish the truth of the claim advanced.

14. The respondent refers to section 11A of the *Refugee Act 1996*, as inserted by section 7(f) of the *Immigration Act 2003*, which institutes a presumption that an applicant is not a refugee, in circumstances where the applicant has lodged a prior application for asylum in another state party to the Geneva Convention, unless he or she shows reasonable grounds for the contention that he or she is a refugee. The respondent also notes that section 16(16A) of the *Refugee Act 1996*, as inserted by section 7(i)(viii) of the *Immigration Act 2003*, states that the RAT "shall" affirm an ORAC recommendation unless it is satisfied that the applicant is a refugee, having regard to certain specified matters including *inter alia* the section 13 report, evidence adduced and representations made at the oral hearing, and documents or other information furnished to ORAC under section 11 of the *Refugee Act 1996*.

(b) Treatment of Credibility

15. The applicant submits that the Tribunal Member acted unreasonably and irrationally in drawing the negative credibility findings that he did. In this regard, reliance is placed on the judgments of *Da Silveira v The Refugee Appeals Tribunal* [2004] IEHC 426, *Zhuchkova v The Minister for Justice, Equality and Law Reform* [2004] IEHC 414, and *Simo v The Minister for Justice, Equality and Law Reform* [2004] IEHC 305, with which this Court is very familiar.

16. The respondent contends that this complaint is in the nature of an appeal, as opposed to a matter suitable for judicial review, and it is pointed out that it is not for this Court to substitute its views on credibility for that of the decision-maker.

(c) Country of Origin Information

17. In his decision, the Tribunal Member noted that the applicant claims that there is a risk to his life because he attempted to leave the MLC. He then stated thus:-

"There is not a single piece of credible or reliable evidence, subjective or objective, to support the applicant's express fear."

18. The applicant submits that this statement constitutes a basic and fundamental error of fact. It is said that there was ample objective evidence before the RAT in the form of country of origin information to support the applicant's fear, and it is submitted that the Tribunal Member failed to assess his credibility in the light of available country of origin information. Reliance is placed on *Kramarenko v The Refugee Appeals Tribunal & Others* [2004] IEHC 101, wherein a similar complaint was made. Finlay Geoghegan J. cited with approval the following principle set out by Pearl J. in *Horvath v Secretary of State for the Home Department (UNHCR Intervening)* [1999] INLR 7, a decision of the U.K. Immigration Appeal Tribunal:-

"It is our view that credibility findings can only really be made on the basis of a complete understanding of the entire picture. It is our view that one cannot assess a claim without placing that claim into the context of the background information of the country of origin. In other words, the probative value of the evidence must be evaluated in the light of what is known about the conditions in the claimant's country of origin."

19. The respondent submits that where – as in the present case – an applicant's account is contradictory from one place to another and where negative credibility findings are drawn from such inconsistencies, there is no obligation on a Tribunal Member to go on to assess whether or not the applicant's story would fit with country of origin information. Reliance is placed on the decisions of Pearl J. in *Imafu v The Minister for Justice, Equality and Law Reform & Another* [2005] IEHC 416 and *B.F. v The Minister for Justice, Equality and Law Reform & Another* [2008] IEHC 126.

THE COURT'S ASSESSMENT

20. This being a leave application, the applicant must establish substantial grounds for the contention that the Tribunal Member's decision should be quashed. As is now well established, this means that grounds must be shown that are reasonable, weighty and arguable, as opposed to trivial or tenuous.

(a) The Burden of Proof

21. It is clear to me, upon reading the "law" section of the RAT decision as a whole, that the Tribunal Member made no error when setting out the burden of proof. The Tribunal Member's statement of the law is, in my view, on all fours with the UNHCR Handbook, which states (at para. 196):-

"It is a general legal principle that the burden of proof lies on the person submitting a claim. [...] [W]hile the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examined."

22. As this Court held – following an analysis of the decision of the Supreme Court in *Z v The Minister for Justice, Equality and Law Reform* [2002] 2 IR 135 – in *K.O.O. v The Minister for Justice, Equality and Law Reform & Another* (unreported, High Court, Hedigan J., 15th October, 2008), at paragraph 19, "the primary burden of proof rests with the applicant to make out his case and there is what might only be described as a subsidiary burden on the decision-maker."

(b) Treatment of Credibility

23. There is no doubt whatsoever in my mind, having read the relevant documents (including the applicant's ASY-1 form, his ORAC

interviews, the section 13 report and the RAT decision), that there were, indeed, inconsistencies in the applicant's account of events. In the light of the applicant's failure to disclose that he had previously applied for asylum in the UK and also bearing in mind – as noted by Peart J. in *Da Silveira v The Refugee Appeals Tribunal* [2004] IEHC 426 – that “the Tribunal Member is uniquely placed to assess credibility and that this Court in judicial review proceedings cannot second guess a negative credibility finding, simply because the Court might on the same correct facts come to a different conclusion”, it is my view that there was ample information before the Tribunal Member upon which he could make the credibility findings that he did.

(c) Country of Origin Information

24. In my judgment, the Tribunal Member did err by stating that there was no objective evidence to support the applicant's claim. Although it was open to the Tribunal Member to conclude that there was no subjective evidence, it seems clear to me that there was before him ample objective evidence in the form of country of origin information to support the applicant's account of events, including a UK Home Office report on the DRC (October, 2005) and an excerpt from a lecture given to ORAC and the RLS on the *Current Situation in Kinshasa* by the UNHCR Assistant Representative (Protection) (June, 2004), both of which was appended to the section 13 report, and a Human Rights Watch Country Summary on the DRC (January 2006). Moreover, the situation in the DRC is a matter of general and common knowledge and such knowledge must be imputed to the Tribunal Member: he could not have been unaware that objective evidence exists as to the ongoing conflict in the DRC. All of this evidence did, in fact, support the applicant's story of civil strife in the DRC.

25. In the circumstances, the question that must be asked is whether, as a result of this error, there are substantial grounds for the contention that the RAT decision is irrational and unreasonable, and ought to be quashed. In my view, when the decision is viewed holistically, this question must be answered in the negative. In the great majority of cases, it is incumbent on a decision-maker to adhere to the *Horvath* principles and to assess credibility in the light of country of origin information. Exceptional cases do arise, however, and it is my view that this is one such case: the circumstances of the present case compare to those of *Imafu* [2005] IEHC 416 and *B.F.* [2008] IEHC 126, rather than those of *Kramarenko* [2004] IEHC 101 and such cases. This is because such doubts were cast on the applicant's personal credibility by the inconsistencies in his account of events that no matter how much objective evidence the Tribunal Member could have considered, it was open to him to disbelieve the subjective impact upon the applicant. There would be “no possible benefit to be derived” - to use the words of Peart J. in *Imafu* - from seeing whether the applicant's story fitted into a factual context in his country of origin.

Conclusion

26. In the circumstances, I am not satisfied that substantial grounds are established for the contention that the Tribunal Member's decision should be quashed and accordingly, I must refuse to grant leave.