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THE HIGH COURT

JUDICIAL REVIEW

2008 238 JR

BETWEEN/

A.O. AND D.B. (A MINOR SUING BY HIS MOTHER

AND NEXT FRIEND A.O.)

APPLICANTS

AND

REFUGEE APPEALS TRIBUNAL AND MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENTS

JUDGMENT of Mr Justice Cooke delivered on the 25th day of November, 2009

1. The first named applicant is from the Democratic Republic of the Congo and is the mother of the second named applicant who is now five years old. They both arrived in Ireland in June, 2006 and claimed asylum. The mother was interviewed under Section 11 of the Refugee Act 1996 on 31st July, 2006 and the Commissioner's report under Section 13 of that Act issued on 7th September, 2006. It recommended that they be not declared to be refugees. Primarily, the authorised officer of the Commissioner found the personal history which the mother gave of having been persecuted for working as a secretary for a newspaper in Kinshasa to be lacking in credibility.

2. The report and recommendation were appealed to the Refugee Appeals Tribunal and a hearing before a Tribunal Member took place on 13th December, 2007. The report dated 27th January, 2008, rejected the appeal and affirmed the negative recommendation of the Commissioner. The applicants now seek leave to apply for judicial review of that decision with a view to having it quashed. The grounds proposed to be raised as to why the decision should be quashed focus on two specific aspects of it namely, first, the rejection as incredible of the history given by the applicant as the basis of her claim to a fear of persecution; and, secondly, the summary dismissal without examination of her fear of persecution as a returned asylum seeker because it was held to fall outside the jurisdiction of the Tribunal.

The Credibility Issue

3. The applicant's fear of persecution as originally expressed in her claim to be a refugee arose from her experience working as a secretary in Kinshasa for a newspaper called "La Manchette" and the treatment she claims to have received from the state security services as a result. She claimed that her partner, R.B.E., worked as a journalist for the same paper. He had been sent to the Kivu province to investigate what was happening there and when he returned she wrote up his report for publication. The next day, 13th December, 2005, her partner and her young son were kidnapped. She herself was allegedly kidnapped separately on the same day by the security service agents of the GSSP.

4. She was held in prison until 13th May, 2005 when she was released. In the period until 5th March, 2006, she had been repeatedly beaten and tortured. She did not know why she was eventually released but thought that the newspaper editor might have arranged it.

5. People she could not identify took her to a house where she was reunited with the second named applicant, her son, who had been kidnapped with her partner. The two stayed there for 29 days.

6. In the decision the Tribunal Member came to the conclusion that the applicant's claim could not be believed because of a series of discrepancies and implausibilities in her account of having worked for the newspaper and her description of her escape from kidnap.

7. As regards the first aspect, the Tribunal Member comments critically on the answers the applicant gave to questions at the hearing. As in the s. 11 interview, an issue arose as to how often the "La Manchette" newspaper was published. She had said it was published everyday and it was put to her that country of origin information indicated that in fact it was published only twice a week. At the appeal hearing she produced a copy of the newspaper which she had obtained from friends in Belgium and which purported to show that (as it is described in the decision) "there is a daily newspaper and there is a newspaper that comes out bi-weekly". The Tribunal Member's analysis of the claim at the sixth section of the decision does not refer to this ambivalent evidence but says:

> "She claims she worked for a newspaper called "La Manchette' and that it was published everyday. This was contradicted by country of origin information referred to in the section 13 report and when the contradiction was put to the applicant at her oral hearing, she was vague, unconvincing and left the Tribunal with the distinct impression that she had little, if any, dealings with this newspaper despite assertions that she worked for it for three years. This fundamentally undermines the applicant's claim because the rest of her evidence centred around this newspaper and her alleged involvement with the man called R.B.E. who was a journalist for the same newspaper. It is widely reported that the said R.B.E. was kidnapped in or around 13th December, 2005."

8. Although the Tribunal Member thus seems to attach some weight to this issue as to the publication frequency of the

newspaper, it is clear that it is not the sole basis for the rejection of the applicant's story as incredible. A number of other issues are identified as follows:-

> • She had been asked if anyone else from the paper had been arrested and she had said "no": country of origin information on the other hand indicated that the publisher and a director of the paper had been arrested in March, 2005.
>
> • It was doubted whether she had in fact been really involved with R.B.E. as it had been widely reported that this man had been kidnapped on 13th December, 2005;
>
> • Considerable disbelief was expressed about her claim to have been kidnapped and detained. She was repeatedly asked why she thought she had been released but could give no explanation:
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> • She was not believed when she described how people she did not know brought her to the house or how her child who had been kidnapped with her partner when arrested managed to arrive at the house. She was vague about the occupants of the house and did not know where her child had been for the preceding three months.
>
> • She said she left the DRC on 12th June, 2006 and had a birth certificate. This, she said, had been given to her by a woman living in the house but she did not know how the woman had obtained it. The birth certificate bore the date 12th June, 2006.
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> • She had described how, while in detention, she had been brought to a place of execution with two others who were shot in front of her. She could not explain why the soldiers would release her when she had witnessed the shooting of the two others.

9. The Tribunal Member concludes:

> "Regarding all of the evidence provided by the applicant – including documentation – and assessing the manner in which the evidence was delivered and her overall demeanour, the Tribunal is satisfied that the alleged connection with La Manchette is contrived, implausible and not credible. The Tribunal has considered the submission made in relation to failed asylum seekers and restates the function of the Tribunal as outlined in the 1996 Act, as amended. It is the responsibility of the appropriate Minister of Government to deal with the outcome of any decision from the Refugee Appeals Tribunal."

10. There is therefore a very clear and definitive finding by the Tribunal Member that the applicant's claim could not be believed. While there was some ambiguity about the evidence as to whether La Manchette was a daily or twice weekly paper or, perhaps, one that had been twice weekly but had become a daily paper, the Court does not consider that any discrepancy in the way in which the Tribunal Member appears to have dealt with that specific issue (he seems to have assumed the country of origin information was the more reliable,) is sufficient to vitiate the reliance placed on the overriding weight of the other aspects of the account which are found to be incredible. The points thus identified as implausible and incredible arise logically and obviously out of the account as given and do not appear to have involved any element of conjecture or speculation on the part of the Tribunal Member. This is not, therefore, a finding on credibility which could be upset by the court as being perverse, irrational or unreasonable given the implausibility of the various aspects of the account identified by the Tribunal Member.

11. An ancillary ground is raised in the Statement of Grounds to the effect that the Tribunal Member wrongly relied on country of origin information which was not disclosed to the applicant. No specific information or document is identified in this regard. Insofar as it appears to refer to the information relied on as to the publication frequency of the newspaper, it does not appear to be material to the validity of the decision for two reasons. First, the substantive issue was clearly discussed at the hearing and secondly, it is a matter which goes to credibility and that issue turned upon the wider aspects of the evidence as explained above.

The returned asylum seeker ground

12. The applicant also challenges the decision's refusal to entertain a claim to a fear of persecution as a returned asylum seeker. At the end of the decision the Tribunal Member dealt with this issue briefly as follows:

> "The Tribunal has considered the submission made in relation to failed asylum seekers and re-states the function of the Tribunal as outlined in the 1996 Act, as amended. It is the responsibility of the appropriate Minister of government to deal with the outcome of any decision from the Refugee Appeals Tribunal."

13. This matter was raised for the first time in the additional grounds of appeal lodged on 2nd October, 2007. In support of the argument, two particular documents were relied upon. Neither appears to come within the description of "country of origin information" in the sense in which that term is most frequently used namely, authoritative reports on political, social, administrative or economic conditions prevailing in a country from which refugees are in flight and issued by some government service or international agency.

14. The first is an article from the English "Observer" newspaper on a pending case before a U.K. court in which a challenge was to be raised to a decision of the U.K. Home Secretary to continue to deport failed asylum seekers to the DRC. The article reports the accusations made by the party pursuing that action, himself a former Congolese secret policeman, as to the alleged mistreatment, abuse, torture faced by "returning opponents of the Kinshasa regime".

15. The second is entitled "IRR News" and is an interview with "Congolese Human Rights Activists Rene Kabala Mushiya" who claims that returned asylum seekers face prison and death. The interviewee paints a grim picture of State security agencies acting arbitrarily and with violence and of failed asylum seekers being subjected to degrading treatment not only on arrival and in extra- judicial detention centres afterwards, but even at the hands of European authorities in detention centres prior to deportation and during transfer to the DRC.

16. The gravamen of his pertinent accusation is this:

> "As individuals who have claimed asylum in Europe, deportees are automatically regarded by the ANR as threats to national security in Congo. Simply because they have claimed asylum in the West, Congolese authorities consider them political dissidents."

17. It is not necessary on this application for leave to decide whether these accusations are well founded or whether the documents in question constitute reliable sources of information about the DRC as a country of origin or that they are representative of the contents of other more authoritative sources. If those matters fall to be decided, they must first be examined by the administrative decision maker and if necessary by recourse to appropriate enquiries carried out under s. 16 (6) of the 1996 Act.

18. For the moment the Court would merely observe that the IRR interview dates from December, 2004 and that the outcome of the case referred to in the Observer article was not available to the Court. Furthermore, the Court notes that another more extensive, detailed and later report of March, 2007, from a possibly more objective source, namely, the U.S. State Department in the form of a Country Report on Human Rights in the DRC, records that a new three year coalition transitional government had been formed there in June, 2003. A new constitution had been adopted by referendum in December, 2005 which had led to a democratic national assembly and presidential elections in the latter half of 2006. This report, while also indicating widespread arbitrary arrest, violence, killing and rape with impunity by security forces, makes no mention of the existence of any policy or practice directed at the mistreatment of returning refugees as a group. On the other hand, this report records that the transitional government had established a rudimentary system for the protection of refugees from other states and had cooperated with the UNHCR and other organisations in assisting refugees. Two Sudanese asylum seekers accused a border patrol of arbitrarily detaining them and they were released on the same day.

19. The immediate issue to be decided on this application for leave is whether a substantial ground has been made out to the effect that the Tribunal Member erred in law in declining to examine this ground as being, in effect, outside the competence of the Tribunal. The reference to re-stating the function of the Tribunal as outlined in the 1996 Act in the decision is, apparently, a reference to the practice of the Tribunal to treat alleged persecution of returning asylum seekers as a matter to be dealt with under the prohibition of refoulement in s. 5 of the Act rather than as a matter coming within the definition of "refugee" in section 2. It is, of course, undoubtedly the case that the prohibition on refoulement can apply to a situation in which a deportee faces persecution on return to a country of origin whether or not he or she has been unsuccessful in an asylum claim. That does not, however, appear to preclude persecution of returned asylum seekers also coming within the scope of the definition where the conditions of that definition are shown to be met.

20. It clear that cases can arise in which return as a failed asylum seeker is the occasion or pretext for the treatment of such persons as falling into some political or other category which attracts discrimination or persecution at the hands of a particular regime. An example of that is to be found in the unreported judgment of Clark J. of 26th February 2008 on a leave application in *Gidey v. RAT* [2005] where the asylum seeker had a fear of persecution if returned to Eritrea because returning asylum seekers who were young men of military age were treated as having evaded military service and were imprisoned on return for that reason. Thus, their classification as failed asylum seekers coincided with their being attributed the particular political opinion of refusing military service thereby providing the Convention nexus which brought that status within the definition of "refugee".

21. It follows, accordingly, that if the statement in the present decision to the effect that it is the responsibility of the Minister to deal with the outcome of any decision is to be understood as meaning that a fear of persecution as a returned asylum seeker can never come within the definition of "refugee" and thus within the jurisdiction of the Tribunal, the decision is clearly wrong in law.

22. Nevertheless, no purpose would be served by granting leave in this case if it was clear that the applicant's circumstances and claim were in any event incapable of falling within that definition. In other words, can it be said in this case that the documentation relied upon by the applicant was sufficient by way of cogent evidence of the systematic persecution of asylum seekers on return to the DRC to put the Tribunal Member on inquiry as to whether this was a case in which the necessary Convention nexus was established?

23. So far as concerns the possibility that the Convention nexus might lie in fear of persecution for imputed political opinion, the Court is satisfied that such a case could not be made here. The applicant herself never claimed to have been persecuted for her political opinions nor, indeed, ever to have uttered such opinions. If her personal history were to be believed, her mistreatment at the hands of the security authorities was not directed so much at her personally because of her own political activities or opinions, as at the journalist whom they are alleged to have pursued. According to her story, the security forces were attempting to find out what investigations the journalist had been conducting in Kivu province.

24. The central thrust of the allegations made in the Observer article appears to be that the treatment of returning asylum seekers was directed at identifying political opponents of the regime rather than at the systematic mistreatment of asylum seekers as such. The article refers to "secret service officials across Europe gathering information about Congolese nationals who are politically active against the government". The accusation is made that when returned asylum seekers arrive at the airport in Kinshasa they are interrogated and "forced to admit to any political activities they have been involved in". Although the article does refer to "people with no political history" being tortured in one of the detention centres in DRC, it is not clear that this is the result of their having claimed asylum abroad. There is no doubt, of course, that the matters described in the article may well constitute ample grounds for the application of the prohibition of refoulement in section 5 in due course but, taken by itself, it does not, in the Court's judgment, constitute cogent evidence of systematic treatment of asylum seekers as such.

25. The interview with the human rights activist Rene Kabala Mushiya does however, go further. Dealing with illegal detention in DRC of returning asylum seekers the interviewee says:

> "Of those who cannot bribe their way out, many will be handed over to the national security agency (ANR) which

> operates its own extra judicial prisons where people are detained illegally for long periods of time. As individuals who have claimed asylum in Europe, deportees are automatically regarded by the ANR as threats to national security in Congo. Simply because they have claimed asylum in the West, the Congolese authorities consider them political dissidents."

26. Notwithstanding, therefore, some possible reservations as to the lack of authoritative status and objectivity in the two documents relied upon, the Court considers that the contents, taken together, were sufficient to put the Tribunal Member on inquiry as to whether, if regard was had to more contemporaneous and authoritative source material, the applicant's claimed fear of persecution as a returned asylum seeker might come within the definition on the basis of imputed political opinion as the pretext for a systematic treatment of such persons in the DRC.

27. A far more difficult issue arises if it is necessary to consider whether the Convention nexus lies in the identification of returned asylum seekers as a "particular social group" for the purpose of the definition. The precise scope of the notion of "particular social group" in the Geneva Convention is an issue which has exercised the courts of many jurisdictions in the application of the Convention and its precise scope does not appear to have been considered in detail in any Irish judgment to date.

28. The issue has been considered by the courts of the United States in cases such as in *Re Toboso – Alfonso* (20 I & N Dec 819); in *Re Acosta* (19 I & N Dec. 211); and *Gatimi v. A.G.* (7th Cir. 20th August, 2009). It has been considered by the Canadian courts in *A.G. of Canada v. Ward* (1993) 103 DLR 1; and by the House of Lords in the United Kingdom in *R. v. Immigration Appeal Tribunal Exparte Shah* (1999) 2 AC 629; and *Fornah v. Secretary of State for Home Department* (2007) 1 AC 412.

29. What appears to emerge from such case law is a common thread to the effect that persecution coming within the heading of "particular social group" in the Convention is persecution directed at a person who is a member of a group of persons all of whom share a common characteristic. That common characteristic, which must be other than the risk of persecution itself, distinguishes the group from the rest of society or is perceived by society as being a distinct group. The common characteristic must be unchangeable or innate or so closely linked to identity, conscience or the exercise of a person's human rights that the person should not be required to change it or is incapable of changing it.

30. The UNHCR has published "Guidelines on International Protection: Membership of a Particular Social Group" with a view to encouraging a common approach to the issue in the application of the Convention. The Guidelines explain the innate or unchangeable nature of the common characteristic as follows:

> "This definition includes characteristics which are historical and therefore cannot be changed and those which, though it is possible to change them, ought not to be required to be changed because they are so closely linked to the identity of the person or are an expression of fundamental human rights. If a claimant alleges a social group that is based on a characteristic determined to be neither unalterable nor fundamental, further analysis should be undertaken to determine whether the group is nonetheless perceived as a cognisable group in that society. So, for example, if it were determined that owning a shop or participating in a certain occupation in a particular society is neither unchangeable nor a fundamental aspect of human identity, a shopkeeper or members of a particular profession might nonetheless constitute a particular social group if in the society they are recognised as a group which sets them apart."

31. It is therefore arguable that, independently of any element of imputed political opinion, a group comprised of young men of military age liable for military service could, on the basis of appropriate evidence, be demonstrated to be regarded in a particular society as a recognised social group which sets them apart. Similarly, there does not appear to be any reason of principle why, again on the basis of appropriate evidence, it might not be established that in a particular society, returning failed asylum seekers were regarded as a distinct group. Furthermore, having applied for asylum abroad and failed, that characteristic of their status would obviously be incapable of change in the sense that it is an historical fact of their lives just as a person could not undo the fact of having been married and divorced or having fought in a foreign war.

32. The Court would emphasise that this is, of course, only an application for leave. The issues thus raised require more extensive consideration upon the hearing of the substantive application. In particular, the applicant's claim to a fear of persecution as a returned asylum seeker can only succeed if it is grounded upon cogent, authoritative and contemporaneous evidence of the existence in the DRC of a specific policy and practice of the systematic targeting of returned asylum seekers for treatment amounting to persecution and that this is so either on the basis of their being imputed a particular political status or their being regarded as a distinct group which is targeted as such for mistreatment amounting to persecution.

33. The Court is, however, satisfied that a substantial ground has been raised in this case sufficient to require those issues to be examined on a substantive application and leave will therefore be granted.

34. Leave will be granted to seek the reliefs identified at s. 4 of the Statement of Grounds in paragraphs C, E, F and G. (The remaining reliefs are unnecessary).

35. Leave will be granted on the basis of a single ground to be stated as follows:

> " The decision of the Tribunal of 27th January, 2008 is wrong in law in refusing to examine and consider as outside its jurisdiction, the applicant's claim to be a refugee within the meaning of the definition of that term is s. 2 of the Refugee Act 1996 (as amended) on the basis of her claim to fear persecution if returned to the Democratic Republic of Congo on the ground of imputed political opinion or, alternatively, as a member of a particular social group comprised of returning failed asylum seekers."

36. The costs of the present application will be reserved.