

THE HIGH COURT
JUDICIAL REVIEW

2008 406 JR

BETWEEN**D. D.****APPLICANT****AND****THE REFUGEE APPEALS TRIBUNAL (BEN GARVEY)****RESPONDENT****AND****THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, IRELAND AND THE ATTORNEY GENERAL****NOTICE PARTIES****JUDGMENT OF MS. JUSTICE M. CLARK, delivered on the 28th day of April, 2010.**

1. The applicant, who is a native of the Ivory Coast, seeks leave to apply for judicial review of the decision of the Refugee Appeals Tribunal (RAT), dated the 10th January, 2009, which affirmed the negative recommendation of the Refugee Applications Commissioner. The hearing took place on the 24th March, 2010. Mr. Hugo Hynes, S.C. with Mr. James Healy, B.L. appeared for the applicant and Ms. Sinead McGrath, B.L. appeared for the respondent.

Background

2. Very briefly, the applicant applied for asylum on the 22nd January, 2007. His biographical details as presented are that he is a member of the Dioula ethnic group who are Muslims and a minority tribe from the north of the Ivory Coast where he was born and educated. He became a specialist car mechanic and moved to Abidjan where he practised his trade in a partnership, married and had two children who were born in 1994 and 1995.

3. Following the military coup in the Ivory Coast in 1999, the applicant joined the *Rassemblement des Republicains* (RDR), a predominantly Muslim opposition party. He outlined the political problems in the Ivory Coast where violence and xenophobia against Muslims and northern ethnic groups had become common. In October, 2000 he was arrested while attending at an RDR rally. He was detained in Yopougan prison for three months. There, he was beaten and tortured and was released with a number of RDR prisoners at the order of the President at the beginning of January, 2001.

4. He recounted no further difficulties until July, 2003 when uniformed men came to his house seeking out RDR members. He was out visiting friends so the men assaulted his wife saying that they would return when her husband was home. His neighbours telephoned him to warn him not to return to his house and they gave shelter to his wife and children. That night the applicant's friend Mahmoud, who is also an RDR member was killed. The next day the applicant collected his wife and children from the neighbour's house and went with them to his hometown of A. which is some 30 kilometres from Abidjan, where they stayed for a week before travelling on to Mali.

5. In Mali they were advised to leave as the people of the Ivory Coast were not welcome there. The family then made arrangements to go to Ireland but on the day that they were due to travel, the applicant was stopped at the airport and refused permission to travel as his documents were found not to be in order. His wife and children then came to Ireland without him and his wife gave birth to their third child in Ireland shortly afterwards. That child is a citizen of Ireland and the applicant's wife and two other children were granted permission to remain in Ireland on the basis of her parentage of an Irish citizen child.

6. The applicant who was left behind spent the next three years in Mali where he earned a living as a cloth trader in a market. He then moved to Togo where he lived for six months before coming to Ireland via France on the 21st January, 2007. He did not at any stage apply for asylum in either Mali or Togo. The applicant says that he paid a trafficker to travel to Ireland. He furnished a birth certificate, a nationality certificate and an Ivorian nationality card bearing his photograph as proof of his identity but he says that he travelled on false documentation.

7. His application before the Refugee Applications Commissioner failed and a negative recommendation was made. Some credibility issues on details of the applicant's narrative were identified but the s. 13 report mainly relied on country of origin information from a U.K. Home Office Operational Guidance Note (OGN) on the Ivory Coast dated the 14th November, 2006 which stated that for lower ranking RDR members, internal relocation within the Ivory Coast would be a viable option.

The appeal

8. The Refugee Legal Service (RLS) lodged a notice of appeal to the Refugee Appeals Tribunal (RAT) against the Commissioner's recommendation. The applicant furnished two medical reports together with two previous RAT decisions and three country of origin information (COI) reports in support of his appeal. The first medical report had been prepared by a G.P. in Galway and became a feature of the challenge. This medico-legal report records that the applicant claims to have been beaten and tortured both mentally and physically while in detention in the Ivory Coast and says that after he was released he was hospitalised and treated after suffering a severe injury to his left ear. The report notes that he had multiple scars on the upper and lower limbs and scalp, that he suffered from insomnia and anxiety and that he suffered a loss of hearing in his left ear as well as having recurrent ear infections in that ear. He was referred to an ENT specialist who also provided a medico-legal report. That report noted that the applicant claimed to have been assaulted with an iron bar and to have received a significant temporal parietal injury and at a later date had major surgery to the left ear. The report records that he had "*fairly significant*" surgery to the left ear although "*it is difficult to know exactly what was done and that there was evidence of auricular excision and a meatoplasty*". The hearing loss in his left ear was

permanent and he would require ongoing care. The ENT specialist made no reference to the reason for the "radical mastoid surgery".

9. An attendance note of the oral appeal hearing which took place in November, 2007 was available to the Court. The applicant's affidavit includes an averment that he was not satisfied with the standard of his interpreter at his hearing and also that he had shown the Tribunal Member his scars on his body. The applicant's wife gave evidence at the hearing and confirmed that her husband was an RDR member and had been in custody for three months in 2000. Her evidence that she never discussed with her husband the events of the fateful day when the soldiers came to her house and attacked her, was found simply not credible. The Presenting Officer questioned the applicant on the contents of an up to date U.K. Home OGN on the Ivory Coast which stated that low level members of the RDR were not persecuted, but the applicant disagreed with the content of the OGN.

10. A negative decision issued on the 10th January, 2008. The Tribunal Member found the applicant to have been articulate, confident and well able to communicate through the interpreter. The main reasons why the applicant failed in the appeal were, first, that the Tribunal Member found that three years had passed without trouble since his arrest and detention and if the armed forces had really been looking for him, they would have gone to his place of business rather than his home. Secondly, he had been in Mali for a considerable time and also in Togo without claiming asylum in either country. Finally, it was noted that country of origin information indicated that persons of low level involvement in the RDR were not likely to be ill treated and that the grant of asylum in such cases was unlikely to be appropriate. It was specifically noted that the applicant disagreed with this analysis. The medical reports were said to have been considered in the light of the Istanbul Protocol and ultimately the applicant's account of events was found to lack credibility. These negative findings included the applicant's account of his travel to Ireland and his failure to provide a reasonable explanation to substantiate his claim that Ireland was the first safe country in which he arrived after leaving the Ivory Coast. The three year stay in Mali and Togo before coming to Ireland and applying for asylum were deemed inconsistent with a desire to seek a safe haven from persecution.

Extension of time

11. These proceedings issued more than 13 weeks outside the 14 day time limit allowed by s. 5 of the Illegal Immigrants (Trafficking) Act 2000. The applicant explains the delay in his affidavit by saying that originally, he was waiting for advice from the RLS who were seeking an opinion with regard to judicial review proceedings. As he had not heard from them, he consulted Ms. Sarah Ryan, a private solicitor familiar with asylum law who agreed to take his case on a *pro bono* basis. Since he consulted Ms. Ryan he arranged for a consultation, has kept in touch with his claim and attends at all consultations and appointments as arranged.

12. Ms. Ryan also swore an affidavit but unfortunately left blank spaces for the key dates. The affidavit indicates that the applicant first contacted her on the - January 2008, that she received papers from the RLS on the - day of February, 2008 and forwarded them to counsel. She says she received draft proceedings from counsel on the - day of February, 2008 but furnishes no explanation as to why the proceedings were not then issued until the 8th April, 2008 and then filed on the 10th April 2008. At the hearing of the leave application, Mr. Hynes, S.C., provided the relevant dates to the Court, which were the 23rd January, 19th February and the 25th February. No explanation was provided for the delay between the 25th February and the 10th April.

13. The respondent opposed any extension of time arguing that the Court can exercise its discretion to extend time only on the basis of facts put before it on affidavit and no such facts are before the Court in this case. Time expired at the end of January, 2008. The respondents relied on *Abus v. The Refugee Appeals Tribunal* [2009] I.E.H.C. 281 (30th June, 2009) where Irvine J. held that:

"In assessing whether there are good and sufficient reasons to extend time in the present case, I will have regard to the following factors: the period of delay, any prejudice to the respondent, the reasons given for the delay, whether the applicant had an intention to appeal within the stated time limit, whether the matters relied upon for the extension of time are on affidavit, and the strength of the applicant's case on the merits."

14. The applicant responded that if there were faults for the delay, they did not lie with the applicant and that the justice of the case required an extension of time. The Court therefore determined to hear the arguments in the case before determining whether the merits were such that the justice of the case would require that an extension of time be granted.

The issues in the case

15. The applicant argues that the Tribunal Member erred in his analysis of the situation that would be faced by the applicant as an RDR member if he were to be returned to the Ivory Coast. In particular, he argued that the Tribunal Member:

- (1) Acted in breach of s. 16(8) of the Refugee Act 1996 in failing to give the applicant notice of country of origin information on which he relied in his decision;
- (2) Engaged in selective reliance on country of origin information;
- (3) Acted unlawfully in his treatment of the two previous redacted RAT decisions which were furnished in support of his claim, in failing to be influenced by their content; and
- (4) Failed to adequately consider the medical reports furnished.

(1) Breach of s. 16(8) of the Refugee Act 1996

16. Although the applicant argued that he had no prior notice of the U.K. Home Office OGN and that its production at the hearing was in breach of s. 16(8), it was admitted at the hearing that parts of the OGN had in fact been put to the applicant and that he had been given every opportunity to respond to the contents of the OGN. The Court is satisfied that it was quite clear from the RLS note of the hearing - which coincides with the Tribunal Member's record of the evidence in the appeal decision - that the particular OGN was put to the applicant at the hearing and that he was given an opportunity to comment on its findings. While he may have disagreed with the findings, there is no question that he was either taken by surprise or not given an opportunity to respond. He was represented by counsel at the hearing who could if surprised have requested a short adjournment to allow him to deal with any new information of which he had no prior notice. Alternatively, he could have sought the leave of the Tribunal to put in fresh submissions on the subject. Neither of these alternatives were availed of and the Court cannot identify a substantial ground here.

(2) Selective Use of COI

17. The next ground was expressed to rely on the judgment of Edwards J. in *Simo (D.V.T.S.) v. The Refugee Appeals Tribunal* [2008] 3 I.R. 476. The applicant argues that the Tribunal Member preferred one particular part of the U.K. Home Office OGN and ignored "overwhelming contradicting views" in preceding paragraphs of that OGN and in other COI reports before him, without providing

reasons for this preference. It was asserted that a far less sanguine state of affairs relating to RDR members was described in the information ignored. In examining that challenge it is apparent that the Commissioner's negative recommendation was based on an OGN of 2006 while in his appeal documents, the applicant relied on reports which were dated 2004 and 2005. The Tribunal Member relied on a 2007 version of the OGN. In his analysis of the applicant's claim, he stated that COI put to the applicant {i.e. the U.K. Home Office O.G.N. on Ivory Coast (2007)} shows that:

- *The RDR is an illegal organisation which is currently a part of the new administration and affiliates are not considered to be at risk of treatment amounting to persecution on the basis of their membership or association with that party.*
- *Membership of, involvement in or perceived involvement in the RDR at a low or medium level is not likely to lead to a level of ill treatment that would amount to persecution.*
- *The grant of asylum in such cases is therefore not likely to be appropriate.*
- *The claim of persecution owing to his religion is not well founded; and*
- *It is unlikely that claimants of non-Ivorian background and / or who are Muslims from the North will be able to establish a real risk of ill treatment amounting to persecution either by the state authorities or non-state agents based solely on their immigrant status and / or religious affiliation.*

16. It is clear from that analysis of the OGN that this information is taken from paragraph 3.6.9.

17. When this summary is compared to the information contained in the preceding paragraphs from the same report which, in the applicant's view, presents a less sanguine picture, it becomes apparent that any distinction identified is not a real one and that there is no conflict in the reports. The applicant particularly relied on paragraph 3.6.4 of the 2007 OGN which states:

"In 2006, pro-government militias and groups, sometimes working together with state security forces, intimidated and at times attacked opposition party members. During 2006, security forces continued to arrest and usually release RDR party members and officials and persons of northern origins thought to be close to the rebellion. RDR members occasionally had difficulties associating freely in 2006, and there were reports that security forces harassed and detained RDR members who tried to meet. In July 2006, the RDR also reported that its militants were attacked in clashes over the United Nations-backed identification programme which proposes to issue identification cards to over 3 million unregistered people to enable them to vote." (emphasis added)

18. The 2007 OGN further stated at paragraph 3.6.6 that *"As this category of applicants' fear is of ill treatment/persecution by the State authorities, they cannot apply to the authorities for protection."*

19. The applicant never claimed to be a militant. While he claimed to belong to a northern Ivory Coast ethnic Muslim group perceived by the government to be in opposition to them, he had no involvement with the rebellion or the war. He lived in peace in the predominantly Christian Abidjan during the worst of the war years without harm. He clearly did not belong to the category of applicants referred to in paragraphs 3.6.4 and 3.6.6 of the 2007 OGN.

20. As all parties accepted that the situation in the Ivory Coast was for a period of years extremely fluid, it was essential for the Tribunal Member to act on current relevant information. There is, in fact, no internal conflict in the paragraphs of the 2007 OGN relied on by the applicant. The Tribunal Member did not suggest that the situation in the Ivory Coast was rosy. The crucial point taken by the Tribunal Member from the COI was that the grant of asylum is unlikely to be necessary for low level RDR members. The Commissioner took the same view when he relied on an earlier 2006 OGN appended to the s. 13 report. The up-to-date information in the 2007 OGN relied on by the Tribunal Member is almost identical in terms. No substantial ground has been identified in this challenge.

(3) Treatment of previous RAT decisions

21. This ground was very much associated with the previous ground in that the applicant argued that the Tribunal Member failed to explain why he did not consider the two previous RAT decisions furnished with the appeal to be relevant. The relevance of those decisions was – according to the applicant – that they analysed fully the political position in the Ivory Coast insofar as it related to RDR opposition party supporters. It was argued that if the Tribunal Member had considered the reasoning in those decisions, he may have come to a different conclusion as to persecution of RDR members in the position of the applicant.

22. In the previous RAT decisions relied on, the situation prevailing in the Ivory Coast at the relevant time was fully set out. It first appeared to the Court that there could indeed be some substance in the applicant's arguments. However, this would be to compartmentalise each individual challenge to the decision and to ignore the decision as a whole and the real and crucial difference between the applicant's situation and that prevailing in the two previous decisions, which concerned applicants who fled the Ivory Coast and came to Ireland. The applicant in this case cannot avoid the fact that in contrast to those successful applicants, his recital of events is that he spent three and a half years in countries where he suffered no persecution, before joining his wife and children in Ireland. It is very difficult for the applicant to overcome those asserted facts. The Tribunal Member was entitled to have regard to the applicant's long stay in Mali, a predominantly Muslim and Francophone country, followed by a six month period in Togo which shares the same traits. In those circumstances, the previous Tribunal Members' assessments of the situation in the Ivory Coast as it impacted on those applicants is not really of great relevance.

23. The Tribunal Member was, in this decision, entitled to have regard to the implausibility of the applicant's travel arrangements and his failure to give any reasonable explanation for failing to apply for asylum in either Mali or Togo. Those factors are at the heart of the failed appeal and of the Commissioner's negative recommendation. It is those facts which distinguish this applicant's appeal from the two previous RAT decisions on applicants from the Ivory Coast. While some criticism of the Tribunal Member's assessment of the COI might arguably have been sustained if the applicant's history was of a person coming directly from the Ivory Coast in 2005, the reality is that the history presented to the Tribunal Member was of a man who had exited his country in 2003, but only came to Ireland in pursuit of asylum three and a half years later, when a less dangerous situation for northern Ivorians prevailed. The ground relating to the previous RAT decisions fails.

(4) Failure to consider Medical Reports

24. The applicant's final argument was that the Tribunal Member failed to take account of the medical reports submitted which, he argues, confirm his account of being tortured while in custody in 2000. The specialist medical report on the applicant's ear condition refers to extensive operations on the ear but does not make any comment as to whether the condition that led to the operations is attributable to trauma. The G.P.'s report refers to scars *"which might be explained by his claim to have been tortured"* but makes no

comment on whether he accepts that they might be consistent with or diagnostic of torture. While such reports should in the normal way be subject to some assessment by the Tribunal Member and reasons given for why their content was not relied upon, the Court cannot criticise the Tribunal Member in this case as the medical reports have to be seen in the context of the application of a forward-looking test. The events which the applicant says are corroborated by the medical reports were said to have occurred in the year 2000. As previously outlined, on the applicant's own evidence he lived in Abidjan without disturbance between 2000 and 2003. Following an incident where his wife was assaulted by uniformed men in search of RDR supporters he went to Mali and remained there for in excess of three years while his family found refuge in Ireland. He worked openly as a trader buying and selling cloth and fabric in the market but he did not apply for asylum during his three years in Mali. His reasons for not seeking asylum were found not to be credible. He had also spent six months in Togo where he did not apply for asylum nor did he seek asylum in France, a country through which he passed. Country of origin information indicates that affiliates of the RDR are not currently considered to be at risk of persecution and that membership of the RDR at a low level is not likely to give rise to a risk of persecution. These issues, and the fact that the applicant failed to give a reasonable explanation to substantiate his claim that Ireland was the first safe country in which he arrived, were matters which the Tribunal Member was entitled to take into account and are the reason for his affirmation of the Commissioner's recommendation that refugee status be refused.

25. The fact, if it is a fact, that the applicant was detained and tortured in 2000 is not determinative of his eligibility for refugee status. The Tribunal Member quite correctly addressed his mind to the question of whether the applicant's account is consistent with a well-founded fear of persecution if returned to the Ivory Coast *in the future*. The Tribunal Member specifically stated that he had regard to the Istanbul principles when considering the medical reports. In the circumstances, the Tribunal Member cannot be criticised for not referring specifically to their content or stating why his view on credibility was not affected by their conclusions. The very fact that he said he had regard to the Istanbul Protocol is indicative that he considered the medical reports in the context of the applicant's account and the application of a forward-looking fear.

26. The Court is satisfied that none of the grounds outlined by the applicant are such that could be described as substantial. In those circumstances, the Court finds no good and sufficient reason for the extension of time which will therefore be refused. It follows that leave will not be granted.